12

PATNA : MY SECOND INNINGS

(The Fodder Scam)

These are peoples that have lost the power of astonishment at their own actions. When they give birth to a fantastic fashion or a foolish law, they do not start or stare at the monster they have brought forth. They have grown used to their own unreason; chaos is their cosmos; and the whirlwind is the breath of their nostrils. These nations are really in danger of going off their heads en masse; of becoming one vast vision of imbecility…..

G. K. Chesterton, 'The Mad Official'

(i) Introduction to this Chapter

I received on 13th September 1996 a marching order transferring me from the post of the Director General of Income-Tax (Exemptions), Calcutta, to Patna as the Chief Commissioner of Income-tax for Bihar, Orissa, Assam, and the North-East. I handed over the charge at Calcutta on 26th September 1996. On reaching Patna I came to know that, on a public interest litigation, the Hon'ble Patna High Court was monitoring investigations into Bihar's Fodder Scam (also called the Animal Husbandry Department Scam). Various agencies were involved in the task. The CBI was supposed to play an effective role in the conduct of investigation. The Patna High Court had impleaded the Income-tax Department requiring it to submit reports on the status of investigation, as done by the Income-tax Department, every time the matter came up for hearing. The High Court had adopted an activist approach. The Chief Commissioner was supposed to supervise the Department's work in this key area, and to ensure the submission of reports on the status of investigation to the High Court. When I reached Patna, I was told that the High Court had expressed displeasure at the performance of the Income-tax Department. I realised that my task was arduous and challenging. I decided to respond to the challenge. I was sure that the Department was capable of giving a good account of itself.

I have painfully noticed that after India became independent, frequent scandals and continuing corruptions have been endemic. Mahatma Gandhi had this apprehension, so he stressed on the building of character, and faith in the values for which we had waged the long Struggle for Independence. Whilst the total abolition of these evils must await higher levels of human evolution, it is surely worrisome when regression and decline in values come to be tolerated,

even appreciated. It was my misfortune to closely watch (i) the Bhopal Gas-leak disaster and our government's response to it; (ii) the imposition of the infamous Emergency; and (iii) Bihar's Fodder Scam. In this Chapter, I intend to write, in brief, about Bihar's Fodder Scam. It is good for us to draw lessons from the Fodder Scam.

(ii). An Overview of the Fodder Scam, and the response of the Government of Bihar

The story of the Fodder Scam deserves to be read with care as it illustrates the degradation of the institutions of our democratic polity. We adopted under our Constitution the Westminster model of the system of governance. Under this system the political institutions are structured on the principles of solidarity and interdependence, checks and balances, and broad functional divisions of powers and functions. Their operations and synergic effects required a general commitment to discharge public duties with honesty, good faith and verve to achieve the constitutional objectives. The story of the Fodder Scam is a morbid account of the abdications of public duties, and the distortions in the system of governance. It also illustrates the syndrome of the indifference of the citizenry of the State to the ills growing apace under the public gaze. I have always felt that the students of democratic polity, wherever they are, should study the factors which had led to this pass in order to derive effective lessons.

The officers of the Animal Husbandry Department, both at the district and the Secretariat levels, colluded with the Treasury Officers, the officers of the Finance Department at the Secretariat level, and drew systematically huge sums of money in excess of the grant against fake allotment orders, vouchers etc. This was done by them with the blessings and support of the high political functionaries. Because of their involvement, it was not possible to investigate into the Scam. The Report No. 2 for the year ended 31 March, 1996, prepared by the CAG (the Comptroller and Auditor General of India) and presented to the State Legislature on March 6, 1997, presented the picture of the excess and fraudulent withdrawals in the Animal Husbandry Department. It highlighted that the excess expenditure of Animal Husbandry Department increased from 21 per cent of its total budget provisions in 1987-88 to 229 per cent in 1994-95. The CAG claimed in its *Report* that his officers had pointed out to the Government of Bihar a lot of serious irregularities and improprieties in (i) the personnel management in Animal Husbandry Department, (ii) the purchase of feed, fodder, medicines and artificial insemination materials; (iii) the sanction of allotment orders; (iv) the scrutiny and maintenance of vouchers; and (v) the supervision of actions to detect systemic aberrations. The Press also widely reported what went wrong over a long period of time highlighting the State's financial mismanagement.

As the Government of Bihar had paid no heed to the reports by the CAG and the reports in the Press, a 'public interest litigation' (PIL) was initiated before the Patna High Court. The State of Bihar admitted before the Patna High Court, in the case reported as *Sushil Kumar Modi & Ors* [1996 (1) PLJR 561 decided by Justice S.N. Jha & Justice S.J.Mukhopadhaya], that there had been excess drawals of money beyond the sanctioned grants. The Government of Bihar did not deny that the drawals were fraudulent in nature. It admitted, in its Counter-Affidavit, a gross dereliction of public duty but stated that "as a matter of fact, it is a case of

fraud and forgery and the money fraudulently drawn from the consolidated fund of the State." According to the State, while it was aware of the excess drawals which was usual in the State Financing, it had no knowledge that the drawals were fraudulent in nature. The Court examined provisions contained in Articles 202 to 206, 266 and 267 of the Constitution of India, and concluded that our "Constitution contemplates expenditure either from the consolidated fund or the contingency fund of the State. The ordinary and the usual procedure is to spend from the consolidated fund. The expenditure from contingency fund is supposed to be a temporary measure to meet unforeseen expenditure. The amount so spent, by way of advance, is to be replenished by supplementary or additional grants…". The point for consideration before the Court was: whether the procedure prescribed, or contemplated by the Constitution, had been followed: if not, what were the consequences? Whether the consequences were purely fiscal or administrative in nature, or whether they partook a criminal character as well? The factual position was summarized in the judgment: it is worthwhile to mention some of the salient features:

(i) Huge sums of money, far in excess of the legislative sanction for the services, had been spent in the Animal Husbandry Department over the last so many years. These expenditures, systematically effected by making drawals from the concerned Treasuries, were fraudulent in nature.

(ii) No legislative sanction in the shape of additional or supplementary grants / appropriations had been accorded to these excess drawals.

(iii) The State Government was admittedly in know of the excess drawals, yet, no remedial action whatsoever was taken. The Government had failed to show its *bona fide* by taking steps to stop the ongoing drawals and expenditures.

(iv) The stand of the State Government that excess drawals were usual phenomena, in the circumstances of those cases, could not be accepted. Its plea that it was not aware of the fraudulent nature of the drawals / expenditure until January, 1996 was also not believable.

(v) Excess drawals and expenditures could not have been made year after year without the tacit support and 'blessings' of the high-ups at the Secretariat / Government level.

(vi) The State Government gave patronage to the officers of the Animal Husbandry Department who were already under 'cloud', and were now made accused. The possibility of the Government influencing the course of investigation by State Police could not be ruled out.

(vii) Administrative actions taken against the officers were mere eyewash.

(viii) Investigation done so far appeared to be slipshod and perfunctory.

(ix) The State police was not well-equipped to make full and proper investigation of the case of the present nature.

(x) The State Government's recalcitrance in agreeing to probe by any outside agency, *prima facie,* showed that it wanted to hide facts and shield guilty persons. Earlier in 1990 also, despite the Minister-in-charge suggesting CBI enquiry, the proposal was scuttled on misrepresentation of facts that CBI had declined to take up investigation.

(xi) The notification dated 19 Feb. 1996, and the appointment of 'Judicial" Commission, were attempts, *prima facie,* to pre-empt the CBI from taking

up investigations, and the Court from making positive orders in that regard.

The High Court indicted the State Government in extremely strong words as in its view all those facts, *prima facie*, constituted "gross financial indiscipline verging on fraud on the Constitution and the people". The Court referred to the famous quote, "Nero fiddled while Rome burnt". It felt that "it is the legitimate right of the public to know, and feel assured about, that the investigation is done in correct perspectives and that no guilty person will be spared". The High Court granted the writ under Article 226 of our Constitution making a scathingly caustic comment:

> "The people of this State, in different walks of life, have been made to suffer on the specious plea of paucity of funds. The limited funds of the State which could be utilised for the welfare of the people were allowed to be systematically plundered, assuming unparalleled proportions. In such a situation, people naturally have a 'legitimate expectation' that the guilty be punished. It is the duty of this Court in writ jurisdiction to see that these legitimate expectations are fulfilled."

(iii). The Drama of the Absurd: where the Buffalos travelled on the bike.

H. Jane Lehman is said to have used the word 'buffalo' in the sense suggesting 'deception' or 'hoodwinking' when he wrote: "Too often... job seekers have buffaloed lenders as to their competency and training". In Bihar, the persons in power could believe that buffalos could be carried on bike! The High Court gives a graphic account of the grotesque drama of the absurd enacted in Bihar:

> "The Deputy Accountant General, Bihar vide his letter No.12 dated 5.4.90 after test-check found that the vehicles which were shown in the payment vouchers as having been used for transportation of bulls, heifers, cattle feed etc. were actually car, station wagon, oil tankers, jeep, scooter, which could not have been used for the purpose, suggesting that the payment vouchers were fake and bogus and payments made were fraudulent in nature. The Regional Director, Animal Husbandry, Ranchi, vide his letter No. 4690 dated 31.5.1990 submitted his report to the Secretary of the Department certifying that the livestock had actually been transported to the destination."

Not even with a cockroach's brain anybody could believe the buffaloes could move on the backseat of the bikes enjoying the jerks of Bihar roads. Justice Hansaria aptly said in *Shivsagar Tiwary vs Union of India* (1997) that the scams are the products of moribund mind and low moral character. Systematically over years the dishonest knaves, wielding public power, allowed the strategy and stratagem of the fraudsters and tricksters to rule in the Animal Husbandry Department at its various units in the State. This drama of the absurd was enjoyed by the wielders of political power, and the intelligent people of the State tolerated it by maintaining silence, thus becoming *particeps criminis*

(iv). Fraud on our Constitution: "Nero fiddled while Rome burnt"

The Patna High Court in Modi's Case examined the Fodder Scam at length, and pointed out that it was a terrible fraud on our Constitution: it said—

> "All these facts, *prima facie*, constitute gross financial indiscipline verging on a fraud on the Constitution and the people. It is an irony of situation that while employees are not getting their salary on time in this State, writ petitions have been filed for payment of pensions, contractors, bills, lawyers, fee bills, for construction and repairs of roads and bridges, hundreds of crores of rupees were allowed to be swindled. The usual plea of the State in all such matters is paucity of fund. Where all this money in the Animal Husbandry Department came from? That reminds me of the famous quote, "Nero fiddled while Rome burnt".

The High Court examined the Constitutional provision pertaining to the State Finance, and considered the plea of the State of Government based on Article 205 of the Constitution which contemplates and permits expending the money in excess of the grant. The Court pointed out what went wrong in the system thus:

> "There cannot be any doubt, as I have observed above, that the Constitution contemplated and permitted only *bona fide* excess expenditure so as to meet *bona fide* exigencies of situation but what appears from the Appropriation Accounts referred to above is that there were systematic excess drawals of huge sums of money every year, the amount of excess rising every year in yawning proportions. The plea of the State that the excess drawals / expenditure is a usual phenomenon in the State financing in the above mentioned background sounds too hollow and unconvincing."

It is not that the Government was not knowing the rot that had set in the financial administration of the State. They knew, yet pretended not to know that. The words of T.S. Eliot come to mind:

> After such knowledge, what forgiveness? Think now
> History has many cunning passages, contrived corridors
> And issues, deceives with whispering ambitions,
> Guides us by vanities.

Our Constitution erects a structure of power setting forth the ladders enabling some to become the masters of the machine of power we call the State. But it contains a structure of duties also for pursuing the mission that our Constitution prescribes. Whilst the second cannot survive the first, the first can well survive even if the second goes to dust. The Fodder Scam showed the breakdown in the constitutional structure of public duties.

(v) The monitoring of the Cases by the Patna High Court

Never till this day had any High Court monitored an investigation in a case with so much thoroughness and judicial detachment as was done by the Patna High Court in *Modi's Case* popularly known as the Fodder Scam Case. Frivolous objections to the High Court's jurisdiction to monitor the said investigation by the CBI were raised by the State of Bihar. It pleaded that the directions prayed for in the writ petition could be given only by the Supreme Court in exercise of its power under Article 142 of the Constitution (the power of doing complete justice) which

power the High Court did not possess. The High Court dismissed this plea by requiring the Counsel for the State to answer a question:

> "We put a pointed question to Mr. P.P. Rao as to whether and what kind of justice is to be done by the High Court in appropriate cases; surely the High Court is not supposed to do incomplete justice or no justice at all."

This threshold objection by the state was dismissed outright. But the very fact that such a frivolous plea was raised by the Government revealed the rot that had set in our polity. It also indicated the guilty mind at work somewhere not to allow facts to come to light.

It was unique in the history of the income-tax administration that the process, which would culminate in statutory orders, was itself under the judicial supervision. The crux of the judicial monitoring was that we must do our duty as required under the law. It was the traditional function of the court to see that the public authorities exercised their public powers in accordance with law. This had been said so by our Supreme Court in *Union of India* vs. *Sushil Kumar Modi* [1997(1) PLJR 53 at 56. The nature of the procedure of monitoring the investigation by the High Court could be described as the 'continuing mandamus' to require performance of the public duty by the Central Bureau of Investigation and the Income-tax Department. Our Supreme Court reiterated this felicitously and crisply in *Vineet Narain & Ors.* Vs. *Union of India* [1996 (2) 199]. I told my officers that the judicial directions operated on us too: and we were duty bound to carry them out with verve and candour. I told my officers: the police and the income-tax authorities possessed one thing in common. When they function under the law, they are the creatures of the statute under duty to implement the provisions of law in good faith.

But during the High Court's monitoring of the cases, certain features emerged which tarnished, in my view, the image both of the State Government and the Central Government. Many instances came into public domain to show how the watchers of public cause had not given a good account of themselves. The problem that the Roman poet Juvenal had posed came to our mind: *Quis custodiet ipsos custodes?* (Who will guard the guards themselves?)

With very high hope, the Fodder Scam Cases had been assigned to the CBI, but it emerged that the high-ups in the CBI did all that they could do to delay or subvert the process of the investigation. I had close interactions with the CBI unit at Patna. Whilst Dr. U.N. Biswas, heading the unit, worked with dedication, many others at the higher echelons adopted ways to delay, and thereby frustrate, the process of judicial monitoring of the investigation. I had come in close contact with the CBI in 1960s when it was investigating into matters of the 6 ex-ministers who had been subjected to the Aiyar Commission of Inquiry. Mr. Hingorani, the DIG, and Mr. Rattan Singh did wonderful job then. Now things had changed for worse. I closely observed how the CBI was going ahead with the investigation into the Fodder Scam Cases. The officers of the CBI were never seen to put their heart and soul into the cause of great public importance.

For sometime I had functioned in Calcutta as the Director of Investigation, and then as the Secretary of the Settlement Commission. I knew that many of the scamsters, who had authored the Fodder Scam, had filed Petitions for settlement of their liabilities, and exoneration from possible criminal and civil liabilities for

their legal infractions. It was essential to subject the Commission to the High Court's monitoring jurisdiction. I got a prayer made before the High Court for impleading the Settlement Commission also. The High Court agreed with this submission, and the Court restrained the Settlement Commission from proceeding with any settlement of tax issues in the cases having close nexus with the scam in the Animal Husbandry Department of the Government of Bihar. And on 19 December 1996, the High Court reiterated its said direction. But the outcome of all these endeavours was almost zero. It is well said: 'You can lead a horse to water, but you can't make it drink'!

And the role of the Income-tax Department! The High Court had required the Department to submit reports on the investigation done by the Department whenever the Fodder Scam Case came up before the Court. The officers of the Assessment Wing and the Investigation Wing worked hard with total commitment despite heavy odds. There was a shortage of officers who could be deployed on the work. We tried to persuade the Central Board of Direct Taxes for posting more officers, but nothing was done. Even the High Court expressed anguish over the ways the government functioned, but that comment had no effect. The High Court suggested that the newly created post of the Director of Investigation be filled up immediately. When nothing was done for some time, I went to New Delhi to tell the Revenue Secretary Shri N. K. Singh I.A.S. that if it was not done immediately, he and the Chairman of the Central Board of Direct Taxes would have to answer to the Court by entering their appearance there. Within 10 minutes Shri Jagdish Jha was posted as the Director of Investigation, and I flew to Patna to break this news to the Court. This was the result of personal pleading. The 11 months, which I devoted mainly to exploring the Fodder Scam cases, were most satisfying and frustrating at the same time.

While at Patna, I was advised to obtain security for my protection which I refused. I felt that as I worked without animus, and with due respect for all, I had no reasons to fear. And I was not wrong. But my activism had become too much for those in Delhi who always strove to please Lalooji. I think I must not blame Lalooji. I never heard that he spoke ill of me. He had talked to me on phone. I found him remarkably courteous, soft-spoken, precise and impressive. I wondered how different he seemed from the Laloo about whom we read in the press. I felt he was an artist of excellence: he knew what role was appropriate in which context. But to please him, I may be wrong, certain politicians and civil servants in New Delhi worked. They saw to it that I was shifted from Patna when I had less than half a year to retire. One fine morning in September 1997, I received my transfer order posting me as the Chief Commissioner at New Delhi. Many speculated on the reasons for my exit from Patna, but I remained happy with all that had come to me. How things moved thereafter at Patna would be clear from the exasperation of the High Court with the performance of the Income-tax Department thereafter. After a few months of my transfer to New Delhi from Patna, I was distressed to read that on 20 March 1998 the Department suffered a judicial censure by the Patna High Court (coram: S.N. Jha & S.J. Mukhopadhaya, JJ.) in words expressing the Court's deep annoyance:

> "We record our displeasure with the manner in which the matters are being dealt with by the Income Tax Department. Mr. Rastogi has promised to show better results in the next month. We may observe

> that if tangible progress is not made within next month, we will be constrained to make observations against the Department and / or its officials. List these cases for further directions on 24-4-1998. The CBI and the Income Tax Department shall file their respective progress reports as usual." [1998 (2) PLJR 327].

I superannuated in March 1998, and what happened to the Fodder Scam Cases thereafter ceased to be the matter of my concern. I could know about the unfolding of things thereafter from the media. I heard that the investigation was slowed down for political reasons. So the same game, the same strategy, which the politicians are accustomed to play. It was the conjoint Strategy of Stealth and Delay. Delay always works for the benefit of the accused: memory becomes stale, the prosecutor's verve gets diminished or lost, witnesses die, records of criminality get eaten by rats or white ants, and new political friends emerge to save the birds of their own feathers from distress.

What has happened to the cases of the protagonists and the minions of the Fodder Scam is now in the public domain. The Cases are crumbling like the house of cards; and those yet not crumbled are struggling for life at the precipice. Much illicit benefit is being derived from the proverbial fact that the human memory is short. What we keep hearing from time to time makes us laugh and weep: we laugh at ourselves; we shed tears at our destiny. The way litigations in the matter of the Fodder Scam moved, or are moving, illustrates best this Kaliyugi justice about which the *Srimad Bhagavad Purana* tells us (See Chapter 19 of this Memoir).

I do not intend to draw up an account of the morbid state of litigations in the cases against numerous persons charged at various places for criminal or / and civil wrongs. In this Chapter, I have written what troubled me most: the breakdown in the system of constitutional governance in Bihar. It is hoped that the story of the Fodder Scam does not get consigned to oblivion. Jean Anouilh said: "God is on everyone's side and in the last analysis, he is on the side with plenty of money and large armies." [For 'armies' we can read 'power']

All that happened in the Fodder Scam brings to my mind a situation in Beckett's play *Godot* in which nothing happens. Its last lines and stage direction are very suggestive:

'Vladimir: Well? Shall we go?
Estragon: Yes, let's go.

They do not move.

(vi) The concept of Judicial Monitoring: a critique of the concept

> *What experience and history teach is this— that people and governments never have learnt anything from history, or acted on principles deduced from it.*
>
> *—Georg Wilhelm Hegel quoted by G.B. Shaw in* The Revolutionist's Handbook

I had an opportunity to see the way Patna High Court monitored the Fodder Scam Cases. As the Chief Commissioner of Income-tax for Bihar, Orissa, Assam and the North-East, I was duty-bound to assist the Court. I had to oversee the

performance of the Income-tax Department in that region to ensure that the Fodder Scam Cases were properly investigated, and also to approve the status reports. I had good occasions to reflect on various legal and constitutional issues which cropped up in course of the judicial proceedings before the Court. I closely observed what was being said about it in the media, and in the gathering of well-informed people. As I had good occasion to reflect on the issues pertaining to the Fodder Scam monitoring, I consider it proper to state, with utmost brevity, some of the points which are of great public importance, and may come up for consideration in future.

(a) The objections to the judicial monitoring of the Fodder Scam Cases.

I recall the criticism of the judicial monitoring of the Fodder Scam Cases by the Patna High Court. The politicians in power were all against the activist approach of the High Court as they considered that a veritable trespass on the domain of the Executive. The bureaucrats encored the views of their political masters. A lot of them, especially belonging to the Animal Husbandry Department, were participants and accomplices in the sordid Scam. But the maximum benefits had been reaped by some businessmen without whose complicity the Axis of Evil could not exist, and operate. How such a morbid Triple Alliance worked to plague our polity remained an abiding concern of several Commissions (referred in the Notes & References to Chapter 12) appointed by our Government from time to time. I have quoted in Chapter 12, the deep anguish expressed by Justice Shah: he said:

> ".One cannot but be struck by the near-unanimity in the observations of the several Commissions on the unhealthy factors governing the relationship between the ministers and the Civil Servants. Yet nothing seems to have been done, at any rate effectively, to set right such of the aspects of these relationships which, prior to the emergency, had contributed to the several developments which came in for indictments by the Commissions."

Justice Shah found how the "Root of All Evil" during the infamous Emergency was wrought by some top politicians and bureaucrats. But the "Root of All Evil" became more sinisterly prolific when the traders, manufacturers and corporations became most aggressive and dexterous participants to perpetrate grave public wrong. This Triple Entente flourished under an opaque system, and was greatly helped by the professionals of many brands who were always ready to rationalize and justify their acts.

It was most unfortunate that a nexus had developed between the law maker, the law keeper, and the law breaker. The PIL had the effect of bringing to the High Court's notice the gross remissness on the part of the Government of Bihar, and its administrative agencies as they had failed to provide good governance to the people. The scam not only subverted our Constitution's provisions, it bred massive corruption that led the authorities to abdicate their legal and constitutional functions. The state of affairs in Bihar revealed the failure of the government to provide good governance, and had the effect of depleting the State's resources. The circumstances wrought conditions in which people's fundamental rights under Articles 14

and 21, even 19, had been imperiled, nay, breached. In effect, there was a breakdown in the constitutional government in the State of Bihar.

(b) <u>The PIL and the reasons which led the High Court to subject the Fodder Scam matters to Judicial Monitoring.</u>

The judgment of High Court adopted a very prudent and pragmatic approach in the monitoring of the Fodder Scam Cases. It noticed an extraordinary situation posing an extraordinary challenge demanding an extraordinary response. This approach is evident from the High Court's observations in *Sushil Kumar Modi & ors. vs The State of Bihar & ors.* [1996 (1) PLJR 561]

> "The moot question, in my opinion, is not whether the High Court under Article 226 of the Constitution can give direction and / or entrust the investigation of a pending case to the C.B.I., but as to whether in these cases such an order / direction is required to be made." [para 34]
>
> "'There, thus, cannot be any doubt that in appropriate cases the Courts can issue *mandamus* of that nature. It is true that in most of the cases referred to above, orders were passed by the Supreme Court but that, in my opinion, cannot be a stumbling block before the High Court in exercise of its writ jurisdiction. As already stated above, the moot question is whether these are the appropriate cases in which direction should be issued. In *Sampatlal's Case* also it has been observed that such an order can be made on being *prima facie* satisfied that the investigation had either not been proper or adequate'."[para 35]
>
> "One of the first and foremost considerations which should carry weight not only with the public functionaries but also the courts is that the Government and its functionaries must not only act but also appear to act in public interest. In my opinion, it is the legitimate right of the public to know, and feel assured about, that the investigation is done in correct perspectives and that no guilty person will be spared." [para 44]
>
> "In such a situation, people naturally have a 'legitimate expectation' that the guilty be punished. It is the duty of this Court in writ jurisdiction to see that these legitimate expectations are fulfilled. It is a fit case, therefore, in which direction should be issued for enquiry and investigation of the entire episode by the Central Bureau of Investigation for the period in question." [para 53]

Often we heard that the judicial monitoring of the Fodder Scam Cases was going counter to the well-known constitutional doctrine of the Separation of powers. It was said that as the wrongs pertained to the realm of administration, and as the Government had itself set up its SIT (Special Investigation Team) to investigate the Scam, the adoption of the procedure of the judicial monitoring of the investigation was unwarranted. But the High Court found that this SIT was a mere melodrama of pretended acts. The High Court castigated this SIT for several reasons. The High Court,

found that one of the members of the SIT was himself "under cloud" Another member was close to "a ruling Janta Dal M.L.A." The High Court could have itself appointed the worthy members of the SIT, but it chose to monitor the activities, and the pace of investigation being done by various agencies. It was the process of commanding them to do their constitutionally and legally mandated duties.

The High Court by an order dated 11.3.1996 [reported in 1996 (1) PLJR 561] directed the investigation to be entrusted to the Central Bureau of Investigation (CBI) giving it instructions as to what required to be done. The Court directed "the Income-tax Department through the Chief Commissioner of Income-tax, Bihar, to initiate such action as may be considered fit, necessary and expedient under the Income-tax Act, Wealth-tax Act etc. against persons who he reasonably thinks to be involved in the 'scam' and possess unaccountable wealth and property, and take the proceedings to their logical conclusions." The High Court directed that the "State Government would provide all necessary facilities to both the CBI and the Income-tax Department in discharge of their duties pursuant to this order". The High Court considered the proceeding before the monitoring Court analogous to the proceedings in Writ Petition (Cr.) Nos. 340-343 of 1993 (*Vineet Narain & ors. vs. Union of India & ors.* (AIR 1998 SC 889) and Writ Petition (Civil) Nos. 640 of 1995 (*Anukul Chandra Pradhan vs. Union of India & ors*.)

The High Court rejected the plea of the State that the writ petitions were premature. But it made it clear that the judicial observations " should not be construed as Court's opinion on the merits of the case in any way, nor they shall be construed as reflection on any individual. The directions as given … should also not be understood as 'indictment' of any individual or individuals; they are intended merely to serve public interest and keep the people's faith in the system intact."
In *Union of India & Ors. vs Sushil Kumar Modi & Ors.* [1996] (2) PLJR 218] (SC), the Supreme Court (J.S. Verma, K. Ramaswamy & S.P.Bharucha, JJ.) clarified that the judicial monitoring could continue till the chargesheets were filed in the competent courts, as held in *Vineet Narain* v. *Union of India*.

(c) <u>The nature and the ambit of mandamus that determine the reach of the High Court (or of the Supreme Court) in granting the mandamus, or continuing mandamus</u>.

The *raison d'etre* for the judicial intervention to monitor a Case was succinctly set forth by the Supreme Court in *Vineet Narain & Others vs Union Of India & Another* (18 December, 1997). The remedy of "continuing mandamus" was forged to respond effectively to the problems on the judicial anvil. The Supreme Court observed:

> 'Merely issuance of a mandamus directing the agencies to perform their task would be futile and, therefore, it was decided to issue directions from time to time and keep the matter pending requiring the agencies to report the progress of investigation so that monitoring by the court could ensure continuance of the investigation.'

While I was at Patna assisting the High Court in carrying out its monitoring of the Fodder Scam Cases, I had occasions to reflect on the propriety of judicial intervention, and the grant of 'continuing Mandamus' directing the government agencies to discharge their public duties as they had not given good account of themselves in discharging their duties. I was of the view that the Court rightly issued the Mandamus to monitor the Fodder Scam matters as even on the conventional view the High Court (and the Supreme Court) possessed the inherent jurisdiction to issue the writ of Mandamus. I considered the issues from two observation-posts:

(i) the *locus standi* of a public-spirited person to bring to the notice of the court matters of administrative remissness prejudicial to constitutionally protected public interests of great importance; and

(ii) the constitutional jurisdiction to issue Mandamus to monitor Cases, like the Fodder Scam.

As to the *locus standi* of a citizen, Lord Diplock, in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd*[1] [quoted with approval by the Supreme Court of India in *S. P Gupta & Ors. vs. President of India & Ors.*[2]], had observed

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public- spirited taxpayer, were prevented by out-dated technical rules of *locus standi* from bringing matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

The Inland Revenue Commrs.' Case (which was a case of mandamus) put an end to the controversy when it overruled *R.* v. *Lewisham Union Guardians*[3] in which it was held that an applicant for a mandamus "must first of all show that he has a legal specific right to ask for the interference of the Court." Lord Scarman adopted Prof. Wade's observation in his *Administrative Law*, 4th ed. (1977) p. 610 that if *Lewisham Case* were correct, mandamus would lose its public law character by becoming no more than a remedy for a private wrong.[4]

As to the constitutional jurisdiction of the Court to issue Mandamus to monitor Cases, we must examine the jurisdiction of the superior courts under Articles 226 and 32 of our Constitution. Mukharjea J. said in *T.C. Basappa v. T. Nagappa*[5] that we should " keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law." H. M. Seervai aptly observes: "With his usual perceptiveness, Mukherjea J. realized that the common law in England was constantly adjusting itself to new situations, and at times rediscovering powers which has remained unused."[6] Hence, it is worthwhile to examine the reach and ambit of Mandamus under the common law jurisprudence. This is justified also because we have broadly adopted the British model of Parliamentary Government. In no uncertain terms, the Court of King's Bench pronounced, in 1616, the great constitutional mission of the court. It was when James I was ruling in England. The Court said :

> "to this court belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done, but that it shall be reformed or punished in due course of law.[7] "

Lord Mansfield's statement of law is still very relevant. Viscount Simonds has observed in *Shaw* v. *DPP*[8].

> "When LORD MANSFIELD, speaking long after the Star Chamber had been abolished, said (in *R* v. *Delaval* (1763) 3 Burr at p 1438.) that the Court of King's Bench was the *custos morum* of the people and had the superintendence of offences *contra bonos* mores, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society."

The reach of Mandamus has been examined with thoroughness, under historical perspective, by de Smith in his *Judicial Review of Administrative Actions*. The following propositions can be drawn from his exposition;

- Our superior courts have the jurisdiction not only to correct errors in judicial proceedings, but also other errors and misdemeanors of misgovernment.
- Our superior courts are under constitutional duty to provide a remedy against the wickedness of man, unseen by the legislature, having the effect of disrupting the order of society. Mandamus is at once of high governmental importance, and a valuable remedy of last resort for the subject.
- The ambit and reach of Mandamus (or by that matter of Articles 226 and 32) depend on the provisions of our Constitution, and the role of our courts under our Constitution, and polity.

The ambit of Mandamus stands graphically described in the definition of this term as given in the *Shorter Oxford English Dictionary*:

"Mandamus: any of a number of writs, mandates, etc., issued by the monarch, directing the performance of a certain act. Later, a judicial writ or order issued in the name of the Crown or the government directing an inferior court, a corporation, an officer, etc., to perform a public or statutory duty."

(d) <u>Nothing turns on the Doctrine of the Separation of Powers.</u>

In my view, the Government of Bihar was right in not invoking the doctrine of the Separation of Powers in support of its plea that the judicial monitoring was an encroachment on the executive domain. The right perspective to examine our Court's jurisdiction is to examine the provisions of our Constitution. I have discussed some of its assumptions in Chapter 21 ('Our

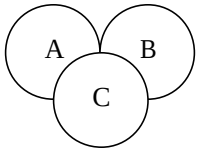
Constitution at Work'). Our Supreme Court aptly said in *Bengal Immunity's Case*[9], quoting Justice Frankfurter who had said so perceptively:

> "….the ultimate touchstone of constitutionality is the Constitution itself and not what we [court] have said about it".

'Sovereignty' inheres in our Constitution, and it is essentially, as Oppenheim says:[10] "a matter of internal constitutional power". Oppenheim, while analyzing what 'Sovereignty' means in the 20th century, observed:

> "Sovereignty was, in other words, primarily a matter of internal constitutional power and authority, conceived as the highest, underived power within the state with exclusive competence therein"

Sovereignty of the Republic of India is essentially a matter of constitutional arrangements. What is most important is to see the constitutional arrangements of the constitutionally prescribed duties (functions) of the different organs of the State.



'A' represents the domain of the legislative functions; 'B' of the executive functions; and 'C' of the judicial functions. As the interpretation of law and Constitution, the resolution of disputes, the maintenance of legality and constitutionality affecting the legally protected rights and legitimate interests of the people, and the non-transgressions of the constitutional discipline come within 'C', the superior courts posses the constitutionally granted authority to intersect on 'A' and 'B'. The areas not intersected are analytically wholly of policy formulations, law-making and administration. This diagram is not designed to portray the relationship *inter se* 'A' and 'B' as that depends on shifting political equations, and the emerging events in our nation's political sphere causing different protocols of interactions amongst the political organs (as is usual in the Parliamentary form of government). Under our Constitution, our polity is closely structured: the organs are created with granted powers for discharging prescribed functions. The organs of the State are bidden to act within the province of functions whose frontiers are constitutionally determined.

(e) <u>The irrelevance of invoking the bookish doctrine of the Separation of Powers.</u>

Nothing turns on the doctrine of the Separation of powers, which Locke and Montesquieu had propounded with insight and verve. This was one of the metaphysical notions of political science which was never wholly true in the past, and is nowhere at work in its technical and conceptual purity. They say that the U.S Constitution is founded on this theory. But now we see that this doctrine does not operate even there on Locke's lines. Analysing Locke's impact on the U.S. Constitution, Bertrand Russell perceptively observes:[11]

> "The country where Locke's principles of the division of powers has found its fullest application is the United States, where the

> President and Congress are wholly independent of each other, and the Supreme Court is independent of both. Inadvertently, the Constitution made the Supreme Court a branch of the legislature, since nothing is law if the Supreme Court says it is not. The fact that its powers are nominally only interpretative in reality increases those powers, since it makes it difficult to criticise what are supposed to be purely legal decisions. It says a very great deal for the political sagacity of Americans that this Constitution has only once led to armed conflict."

The U.S. Supreme Court held in *Reid v. Covert* [ILR 24 (1957) p. 549] ' the provisions of certain treaties unconstitutional'. In *Hamdan v. Rumsfeld, Secretary of Defense, et al* (decided by the U.S. Supreme Court on June 29, 2006), the Court's conclusion ultimately rested upon a single ground: Congress 'had not issued' the Executive a "blank check." Cf. *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion).In the U.K, the theory of the Separation of power is a functional doctrine rather than strictly compartmentalized division of the sovereign powers. The position in the U.K is thus summarized in *Att-Gen v. BBC* [1980] 3 All ER 161 by Lord Scarman who considered judicial power itself species of sovereign power [of the State]:

> "…. Though the United Kingdom has no written constitution comparable with that of Australia, both are common law countries, and in both judicial powers is an exercise of sovereign power. I would identify a court in (or 'of') law, *i.e.* a court of judicature, as a body established by law to exercise either generally or subject to defined limits, the judicial power of the state…".

We have reasons to think that now in the U.K., there is a trend towards concentration of powers between the two departments of the State: legislature and the executive. The Judiciary remains unaffected by this sinister phenomenon. We saw how in *Inland Revenue Comrs. v. National Federation of Self-Employed and Small Businesses Ltd.*[12] the Judiciary controlled the Executive even in matters of the income-tax administration.

It would be futile to criticize the judicial monitoring of the executive actions and inactions by invoking the doctrine the Basic features of our Constitution. Though *Kesavananda v. State of Kerala* (AIR 1973 SC 1461) mentions 'Separation of Powers' as one of the Basic features, it was not decided as a point of law in that Case as there was no occasion to consider and decide the issue. The right perspective for deciding which feature is a basic feature has been provided in the *Election Case* [*Indira Nehru Gandhi v. Raj Narain* (AIR 1975 SC 2299] : to quote Chandrachud J. —

> "(for) determining whether a particular feature of the Constitution is part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance."

This sort of exercise is yet to be done. But when we were considering the propriety of judicial monitoring of the Fodder Scam matters, it was more

> appropriate to consider the statutory and constitutional duties of the organs of the State, as structured under our Constitution, than to be preoccupied with the theory of Separation of Powers. In fact, under our Constitution, the concept of the 'Separation of Powers' is not at work in its strict conventional sense in which the political theorists of the West had used this concept. One is reminded of Chief Justice Marshall's seminal 1819 dictum that "the Court must never forget that it is a Constitution it is expounding."[13]

(vii) As I saw the show; and my suggestions

As we learn from experience, so does Judiciary. In the context of *Liversidge v. Anderson*[14], C. K. Allen said:

> "In *Liversidge* v. *Anderson* the majority of the Lords felt the same confidence in the wisdom and moderation of executive officials; there is, apparently, something in the tranquil atmosphere of the House of Lords which stimulates faith in human nature".[15]

I found that much of the Court's efforts stood frustrated by the Executive's studied efforts to protect the scamsters and fraudsters. The most effective device to frustrate the judicial endeavours was to resort to a technique I called the Technique of Creative Delay. I have already told you, in the segment (v) above, the benefits which accrue on account of the operation of the technique of Creative Delay. New situations can be created, and ambiguities can be noticed in words. In this context, I would tell you the story of Penelope's web. It illustrates the technique of delay that pays dividend. Penelope had never wished to accept the overtures of her suitor whilst her husband Odysseus was far away. She decided to keep her suitor await her love, but inside she wished to frustrate his overtures. She was waiting for the return of her husband. She adopted the device of melodramatic inaction illustrating what our modern scientists say, the Brownian motion. She promised her suitor to be with him when she completed weaving a winding-sheet for old Laertes. She adopted a strategy. She used " to weave away at her loom in the day-time ....., and then spend the night ..... in unpicking her last day's work"[16] Her device succeeded. Her husband came after a long time, and they were united. The suitor hoped, and hoped, till his hope stood dashed to ground.

But there are many other ways to keep the melodrama of seeming actions going on. One is not to provide adequate infrastructure on this ground or that so that nothing moves. The Patna High Court had told us in its different orders passed in course of the monitoring of the Fodder Scam how the high-up interfered in the working of proper investigation. Often good officers were embarrassed in many ways. Situations were created when working for public cause could become extremely frustrating and disgusting.

I often felt that the process of judicial monitoring should have continued even after charge-sheets were filed in the courts of competent jurisdiction. The High Courts could exercise its vigil, in exercise of powers under Article 227 of the Constitution, on how the matters went on in the subordinate courts. True, these courts could have themselves kept an effective control on their proceedings. But the history of the court cases relating to the Fodder Scam tells us sad stories. I wish, someday, our superior courts would devise ways to get over such problems. The superior courts have inherent common law jurisdiction to devise ways, and to

forge effective remedies. For protecting our Constitution, judicial creativity is a must. And 'judicial creativity' requires moral courage and vibrant imagination.

(viii). The Plight of the CAG: this glamourous 'Constitutional orphan'

The Accountant General conducted audit of certain Income tax assesses and came to a conclusion that the Income tax Department had failed to grasp the import of materials and information, which had come to its notice in the early nineties in course of searches conducted by the Department. The Income-tax Administration rightly pointed out that information about the Scam was available in the media, and could have been gathered by the agencies of the State Government from the reports available in the public domain. The CAG and the Government of Bihar indulged in the criticism of the Income-tax Department for non-communication of materials which could have helped detect the Fodder Scam much earlier. Much time and energy had been wasted in wordy warfare and exchange of allegations: all mere "words, words, words". They simply tried to pass the buck!

And the CAG and his organization! The Constitution of India prescribes for the CAG a most responsible role. He takes oath in the same form in which the judges of the Supreme Court take that. He is required to uphold the Constitution. Dr. B. R. Ambedkar considered his role no less vital than that of the Judges of the Supreme Court. He was conceived under the Constitution to function as an effective evaluator and critic of the ways the Executive handled finance. He ensures the legislative control on the income and expenditure of the government. While delivering a lecture at the Defense Service Staff College, Wellligdon Island on 14 November 1964, Sri A. K. Roy, the then Comptroller and Auditor-General of India, stated the functions of his office in these words:

> "He himself determines the extent and scope of audit in regard to various types of transactions.... He has absolute discretion in regard to the accounts to be included in his reports to Parliament and the State Legislature and the executive can in no way fetter his discretion in this matter. Unlike the U.S.A. he has no power to settle claims by or against Government, nor has he the power to impose a fine as done by the audit courts of Europe. His audit transcends the mere formal or legal aspects of audit and includes what may be called efficiency-cum-propriety audit."[17]

What happened in Bihar illustrates what ailed the institution of this great constitutional authority in whom, on good grounds, the framers of the Constitutions reposed great faith, and from whom they had great expectations. The Accountant General squarely placed the responsibility for the Scam on the Government of Bihar. But Shri Laloo Prasad Yadav, the then Chief Minister, held the Accountant General and his Organization wholly responsible for the Scam as they failed to show vigilance in discharge of their duties.

But it is amazing to see that the CAG possesses no statutory powers to enforce the constitutional obligations of the government functionaries. If the Government of a State non-cooperates, the CAG becomes helpless. A Class II Income tax Officer can exercise the wide powers conferred on the civil court for the purpose of production of evidence and the enforcement of the attendance of witnesses, but

this great Constitutional authority finds himself at his wit's end when some recalcitrant Government Department, or the Government of the State, evades its duty to supply to the officers of the CAG records and documents for discharging their constitutional functions. The Fodder Scam brought to public gaze this sinister situation. The CAG could not complete its audit for several years because of the studied indifference, deliberate defiance, and criminal negligence of the public functionaries of the State of Bihar. The officers of the Accountant General felt themselves driven to the wall.

As the Chief Commissioner of Income Tax, Bihar, I had the painful opportunity to see the constraints under which the officers under the CAG worked. The bureaucrats and the political executive had made them ineffective and effete. During the British days, the Auditor-General was accountable to the Secretary of State for India who, like other ministers, was responsible to the British Parliament. The Auditor-General, then, was responsible only to the Secretary of the State, who worked for the Crown. The writ of the Auditor-General ran effectively as every government authority feared the displeasure of the Secretary of State. Now ground realities have changed making the great office of the CAG a virtual constitutional orphan. This situation has been created by the nexus that exists between the superior bureaucrats and the wielders of political power. Justice J.C. Shah rightly called this nexus, in the famous *Shah Commission Report,* "the root of all evil". The CAG is a sentinel on the *qui vive*. As a watchdog, he watches and reports on the counts of illegality, procedural impropriety, irrationality, and lack of proportionality noticed within the sphere of its scrutiny. This institution is a watchdog, it was unfortunate that the Government of Bihar wanted to see this institution just as a lap-dog, not a hound. Once I asked the Accountant General why did he not propose to the President for the declaration of Emergency when he found the State Government deliberately flouting the constitutional obligations which clearly revealed the break-down in the constitutional system in the State. Under Art. 256(1) of the Constitution, the President could exercise his discretion to declare the emergency on "receipt of report from the Governor of a State or otherwise…..". The idea appealed to him. I heard later that he sent the proposal to this effect to New Delhi but all in vain.

The hiatus between our Constitution's expectations from the Comptroller and Auditor-General and his performance is abysmal. The Third Schedule of our Constitution prescribes an oath to be taken by the CAG to 'uphold the Constitution and the laws'. None should consider that taking the constitutional oath is a mere formality. He is duty-bound to uphold the Constitution. In *Marbury* v. *Madison*[18], the Chief Justice Marshall refers to the effect of the judge's oath in words which time can never make stale:

> "Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If such were the real state of things, this is worse than solemn mockery. To prescribe, or to take oath, becomes equally a crime."

(ix) The Legislature that betrayed trust

It was a tragedy that the people's representatives remained indifferent to the ills brewing unashamedly in Bihar. On close observation, it is evident that the

Public Accounts Committee of the Bihar legislature failed in discharging its public duties in the matter of the scrutiny and evaluation of the excess drawals made by the Officers of the Animal Husbandry Department. These serious financial derelictions were in the full knowledge of the Public Accounts Committee; yet it evaded the problems.

The Public Accounts Committee plays a very important constitutional role in the examination of all appropriation accounts. Explaining its role Erskine May observes:

> 'The main function of this Committee is to make sure that the Parliamentary grants for each financial year, including supplementary grants, have been applied to the object which Parliament prescribed, and to consider the matter brought to the notice of Parliament in the reports made by the "Comptroller and Auditor-General" as a result of his audit. For this purpose they have the assistance of the Comptroller and Auditor-General. The Committee also scrutinizes the causes which have led to any excesses over parliamentary grants….'.[19]

In England, the committee of public accounts "has identified fraud and corruption in the Property Services Agency (the body responsible for building and maintaining government property); the need for economies in the cost of H.N.S. supplies; and the grave misuse of public resources in the De Lorean car project."[20] One of the most crucial function of the Public Account Committee is to discover and report the unwarranted excesses "where a department has spent more upon a service in the financial year than the amount granted to it by Parliament."[21]

During the period the so called Fodder Scam was being fostered for illicit gains, The Bihar's Public Accounts Committee had as its Chairman an important MLA of the Bhartiya Janata Party. There could not be a worse commentary on the Public Accounts Committee than the fact that it's Chairman (that too a member of the BJP) had himself become an accused. What a comedown for the great institution! In the Preface to the Report No. 315, drawn up by the Public Account Committee of the Bihar Legislative Assembly and presented to the House in November 2000, Shri Ramdev Verma made some insightful comment. An extract from the Report's introduction runs as under (I translate his comments from Hindi to English):

> "The framers of India's Constitution have cast an independent responsibility on the Public Accounts Committee to supervise, scrutinize and control the implementation of the budgetary provisions by the executive, judiciary and legislature.. But the history of the last fifty three years shows that the Public Accounts Committee has adopted a negative approach in discharge of the above responsibility. And this has become a matter of concern for us in the matter of the maintenance of the democratic structure."

In unearthing a Fodder Scam, the Newspapers of Bihar, specially the *Times of India*, did very good work. Sri Sachchidanand Jha kept on writing well-informed articles and reports. I was greatly impressed by the performance of the Press.

(x) The Root of All Evil grew apace

It is seen that the public services in India have registered an abysmal decline after independence. The politicians and the bureaucrats virtually forged an alliance to promote their greed. The Shah Commission considered this to be the very root of all evil. I had occasions to see how deep and morbid this nexus had gone. I was working in close interactions with Shri Venketrama Aiyar Commission of Inquiry about which I have already written something. After referring to the reports of Commissions headed by the Sri S. R Das, Sri Rajgopal Iyengar, Sri Venketrama Aiyar, Sri Madholkar, Sri A. N. Mulla, Sri G.K Mitter, the Shah Commission of Inquiry aptly observed in its *Report*:

> "The Commission is not aware of the action taken, if any, in response to these Reports submitted from time to time in regard to the Minister - Civil Servant relationship. The fact, however, remains that the refrain in all these Reports in so far as this concerns the relationship of the Ministers with the civil Servants, is the same. One cannot but be struck by the near-unanimity in the observations of the several Commissions on the unhealthy factors governing the relationship between the ministers and the Civil Servants. Yet nothing seems to have been done, at any rate effectively, to set right such of the aspects of these relationships which, prior to the emergency, had contributed to the several developments which came in for indictments by the Commissions. In the light of this, it may be easy to conclude that what happened during the emergency is merely a tragic culmination of the particular trend that had been identified and condemned from time to time by the Commissions of the past. The Commission owes it to the citizen of India to emphasize that appointments of Commissions by themselves are not enough if the Governments concerned do not follow up and implement at least such of the recommendations as are avowedly accepted by the Government. Unless the Government is prepared to apply the corrective principles in the Minister-Civil Servant relationship effectively and with a determination to produce the desired results at different levels and within the several components of the Government, the agonizing impact of this unfortunate malaise would be felt by the common man in the streets, in the villages, in the factories and in the far distant corners of this vast country."[22]

It is an irony of history that the leaders, who were shaped during the JP Movement, became involved in the infamous Fodder Scam. The J.P Movement, which worked for the alleviation of the fate of the suffering millions, failed to have an impact on the character of the politicians, and the system of governance in the State. It also illustrates the point that it is easy to bring down a government but it is difficult to run a clean and good government.

(xi) My Dismay & the Lessons to be drawn from Bihar's Fodder Scam

So where have we come? The story that I have narrated in this Chapter of my Memoir is the tale of evasion and abdication of duties by the government and its organs and agencies. The Patna High Court bewailed that the "values of public

life are fast declining". In fact the 'decline in moral values', which is the core cause of all scams, is, over the recent decades, the burden of song in various decisions of our courts, including the Supreme Court of India. We read the events of the past with an iron in our soul. Fali Nariman said about the Emergency:

> "One of the lessons of the Internal Emergency (of June 1975) was not to rely on constitutional functionaries. These functionaries failed us — ministers of government, members of Parliament, judges of the Supreme Court, even the president of India."[23]

The Fodder Scam, and the response of the authorities to it and towards its protagonists, deserve the same pungent but saddening comment.

(xii) It is time to frame a new law to prevent the nation's loot.

The Fodder Scam of Bihar, and all other horrendous scams, which we all know, stress the need for a new penal law to respond effectively to the present-day challenges. H. M. Seervai has aptly stated what we all feel at the heart of our heart:

> "Ordinary people find it difficult to understand that an assault by Ministers should be made punishable as an offence under the Penal Code but more grievous injuries inflicted by Ministers by abuse of power should escape punishment."

When the Indian Penal Code came into force in 1862, none thought that India would ever be a free country with its own Constitution establishing a democratic polity. Not even our Constitution-framers could ever think that the great Indian Republic would someday become the Republic of Scams! These morbid realities demand our creative response. Article 20(1) of our Constitution prescribes that no person can be convicted of any offence except for the violation of the law in force at the time of the commission of the act charged as an offence. H. M Seervai rightly suggested:

> "It is therefore necessary to make an abuse of power by persons holding public office a substantive offence punishable under the Indian Penal Code..... it would not be unreasonable to provide that if a public officer departed from the rules, procedures or settled practice, resulting in injury to some or an unfair advantage to himself or other persons, a rebuttable presumption should be raised that there was abuse of power."

After my close observation of the Fodder Scam, the study of the Reports of the various Commissions of Inquiry, and all the Scam Cases we keep on hearing, I consider that Seervai's suggestions must be immediately accepted in our country. In fact, the IPC requires to be re-written responding to the new realities of times.

(xiii) My visits to Orissa: I touched the Sun's Chariot, I visited the land where God Vishnu is to appear as Kalki

During my short term as the Chief Commissioner of Income-tax for Bihar, Orissa, Assam and the North-East, I got opportunities to visit Orissa and the North-East to observe their rich cultural traditions and scenic beauty. I am grateful to their people for the cordial warmth they showed towards me and my wife. Constraints of the space of this Memoir do not permit me to give a graphic

account of the things of beauty and joy which we experienced there in abundance. But I must write a few words about my Orissa visit to commemorate my those moments. Hence, the following cryptic comments by way of disjointed assortments;

(i) My visit to Orissa fulfilled my desire to have a *darshan* of the area which, during the times of Ashoka the Great, had witnessed the great Battle of Kalinga which transformed the imperialist Ashoka into a great pacifist who gave up war, and began working for peace and the promotion of *dhamma* (*dharma*) that the Buddha had preached for the weal of mankind.

(ii) My visit provided me an opportunity to observe the Sun temple at Konark, one of our world's great wonders, which enabled me to touch the wheel of the Sun's chariot whose wheels (the *chakras*) symbolise and illustrate the Buddha's *dharmachakra*, and Krishna's *sudarshanchakra*. I would reflect on these symbols in Chapters 19 and 20 of this Memoir. I stood near the wheel touching one of its ornate spokes of concentrated beams. I felt how lucky I was that I could touch the Sun's chariot with joy, when in trying even to go near the Sun the wings of Icarus had melted away making that ambitious creature fall!

(iii) My visit convinced me that Orissa had economically developed as one region with two systems: one of the affluent coastal areas, the other of the interior and western-southern Orissa with its alarming poverty.

I spent a few days at Sambalpur and Berhampur. I interacted with a lot of people. One fine morning a group of people came to my guest house to request me to perform a *yagya* and *pooja*. I felt thrilled that in that holy region I could get an opportunity to play the role which many Mahamahopadhyas and Pandits of my family had played earlier. I performed the ritual in the Vedic tradition, and laid the foundation of the Income-tax Building at Sambalpur. A day after, I laid the foundation stone of the Income-tax Building at Berhampur also.

At Sambalpur, I heard a very interesting story. *The Bhagavat Mahapurana* tells us that the Hindus believe that God Vishnu would come to the world as God Kalki to deliver people from their misery and exploitation. I would tell you something about the heartlessness of the powerful in Chapter 22 of this Memoir by recalling Fyodor Dostoyevsky's *The Brothers Karamazov*. A story goes in the *Mahapurana* that time would surely come when God would come as Kalki, the 10th avatar of Vishnu. The *Mahapurana* tells us that He would appear in the family of a poor Brahmin in 'Shambhala' (the *Srimad-Bhagavatam*.12.2.18). The suffering people believes, as most of us do, in the oft-quoted assurance given by Krishna in the *Bhagavad-Gita* that whenever *dharma* decreases, or is wrecked, and *adharma* becomes triumphant then, Lord Krishna manifests Himself to set the aberrations and injustice right (the *Bhagavad-Gita* IV.7). The people felt sure that that day would certainly come. The words of Faiz Ahmed Faiz came to my mind. He says precisely what Krishna had said in the *Bhagavad-Gita* in the *shloka* just quoted.

The western-southern Orissa, richly populated by the down-trodden tribals and the poor, is most neglected region, and illustrates the greed of the capitalists, and the degradation that has set in our politics. I would revisit this point in Chapter 22 of my Memoir. But here it would be enough to point out what our Supreme Court said, in January 2011, in *Kailas* v. *State of Maharashtra* (2011) 1 S,C,C, 793 at 802:

> "The injustice done to the tribal people of India is shameful chapter in our country's history. The tribals were called *'rakshas*" (demons), *"asuras"*, and what not. They were slaughtered in large numbers, and the survivors and their descendants were degraded, humiliated, and all kinds of atrocities inflicted on them for centuries. They were deprived of their lands, and pushed into forests and hills where they eke out a miserable existence of poverty, illiteracy, disease, etc. And now efforts are being made by some people to deprive them even of their forest and hill land where they are living, and the forest produce on which they survive."

The *'rakshas'* are those who exploit human beings. Lord Krishna would call such persons 'demonic'. He describes the traits of the demonic persons in chapter XV1 of the *Bhagavad-Gita*. I quote two *shlokas*, as rendered into English, by Dr. S. Radhakrishnan:

> 'This today has been gained by me; this desire I shall attain, this is mine and this wealth also shall be mine (in future)". (Ch. XVI.13)
>
> "Bewildered by many thoughts, entangled in the meshes of delusion and addicted to the gratification of desires, they fall into a foul hell." (Ch. XVI.16)

NOTES AND REFERENCES

1 (1981) 2 ALL ER 93 at 107 (H L)
2 AIR 1982 SC 149 P. 190
3 (1897) 1 Q.B. 498, 500
4 H.M. Seervai, *Constitutional Law of India* Vol. III, p. 1823
6 AIR 1954 SC 440
6 H.M. Seervai, *Constitutional Law of India* Vol. III, p. 1451. (italics supplied by me)
7 *Bagg* (1616), 11 Co. Rep. At 98a, [quoted by W. Friedmann, *Law in a Changing Society*, p. 77]
8 [1062] AC 220
9 AIR 1955 SC 661, 671 para 13
10 Oppenheim's *International Law* 9th Ed Vol I Peace p. 125
11 Bertrand Russell, *History of Western Philosophy* p. 616
12 (1981) 2 ALL ER 93 at 107 (H L)
13 Quoted in Pollack, *Earl Warren: The Judge Who Changed America* 209 (1979)
14 (1942) A.C. 206.
15 Allen, *Law and Orders* 3rd ed. p. 297
16 Toynbee, *A Study of History* Chap. XXII, p. 631
17 Quoted by H.M. Seervai, *Constitutional Law of India* p. 2154 (4th ed.)
18 *2 L Ed 60 (1803)*
19 May, *Treatise on the Law Privileges Proceedings and Usage of Parliament,* page 653
20 O Hood Phillips' *Constitutional and Administrative Law,* Seventh Edition. at- 227
21 O Hood Phillips' *Constitutional and Administrative Law,* Seventh Edition. p. 228
22 *Shah Commission of Inquiry Report XXIV. 18*
23 Fali S. Nariman, *Before Memory Fades* p. 171