

# INDIA'S CONSTITUTIONAL ODYSSEY

*75 Years of Evolution and Global Reach*



*Foreword*

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The Chief Justice of India

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# CONTRIBUTION OF THE PARSİ COMMUNITY IN FRAMING AND DEFENDING THE CONSTITUTION OF INDIA

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and the Supreme Court of India*

## **Introduction**

The legend which perfectly describes the Parsi community in India is the one with their first interaction with King Jadi Rana of Gujarat somewhere in the 8th Century. The Parsi community fled Persia by sea around 1200 years ago to escape persecution following the Islamic conquest of Persia. They reached the coast of Gujarat to seek refuge and docked at Sanjan. King Jadi Rana of Gujarat, unable to understand the language of the Parsis sent out a glass of milk filled to the brim which was to indicate that there was no place for them to seek asylum in his kingdom. To this, the Parsi priest added sugar to the milk symbolizing that not only will the Parsis coalesce with the people of his kingdom but also sweeten the local community. This immediately convinced King Jadi Rana and he granted asylum to the Parsis.

Ever since then, the Parsi community has indeed been sugar in milk in our society. The only motto with which they have worked is to keep our nation first and always worked towards making our country a better place and truly adding sweetness to it.

Parsis have produced luminaries and greats in all fields. In the field of science – Dr. Homi Bhabha, Dr. Homi Sethna, in medicine – the likes of Dr. Farokh Udawadia, Dr. N.H. Wadia, Dr. Sir Temulji Bhicaji Nariman, Dr. Dinshaw Pardiwala, Dr. Keiki R. Mehta, in the field of business – Jamsetji Tata, JRD Tata, Pallonji Mistry, Areez Khambatta, Adi Godrej, Nusli Wadia, Dr. Cyrus Poonawalla and the Wadia family. In the defense forces – highly decorated officers with the most prominent being Field Marshall Sam Manekshaw apart from Admiral Jal Cursetji and Air Marshal Aspy Engineer.

The list of legal luminaries is endless with the likes of Sir Jamshedji Kanga, Nani Palkhivala, Fali Nariman, Justice Rohinton Nariman, Soli Sorabjee, T.R. Andhyarujina, Justice Sam Piroj Bharucha (*30th Chief Justice of the Supreme Court of India*), Justice Sarosh Homi Kapadia (*38th Chief Justice of the Supreme Court of India*), Justice Jamshed Burjor Pardiwala (elevated to the Supreme Court in May 2022, he is expected to serve as the Chief Justice of India from May 3, 2028, to August 11, 2030), and many more.

## **Contribution of the Parsis in Framing of the Constitution of India**

The Parsis played a predominant role in the Indian freedom struggle and contributed in their own way to make India an independent nation. In the era of Early Constitutionalism (1885-1905), three stalwart Parsis played a major role – Dadabhai Naoroji, Pherozechah Mehta and Dinshaw Wacha.

Constitutional agitation post the 19th century was with great efforts from Dadabhai Naoroji. In 1865, he spearheaded the passing of the Parsi Marriage and Divorce Act, 1865 and the Parsi Intestate Succession Act, 1865. Nowrojee Furdoonjee and Manockjee Cursetjee were major lobbyist who pushed for personal laws for Parsis. They were also strong defenders of the Rule of Law.

In 1892, Dadabhai Naoroji became the first Member of Parliament of the House of Commons from South Asia and the first Parsi ever to do so. He put in great effort in the House of Commons to put the idea to the British Crown that India was ready to be an independent country with its own constitution governing its citizens.

Cowasjee Jehangir and Phiroze Sethna were part of the Liberal Party in India that was founded in 1919. The main focus of the party was to infuse the idea of parliamentary democracy. The two regularly participated in local and national level meetings to spread awareness on parliamentary democracy and the need for independence from the British Crown.

Naval Bhathena was initially Dr. B.R. Ambedkar's roommate at Columbia University who later went on to become his friend for life. It is also said that Naval Bhathena financially supported a large part of Dr. Ambedkar's education. Dr. Ambedkar did not have money to obtain his Sanad (Advocate's license to practice). Naval Bhathena stepped in and

gave Dr. Ambedkar the money to get his Sanad<sup>1</sup>. With this, Dr. Ambedkar could commence his life as a Barrister.

The shadow of a Parsi always stayed with Dr. Ambedkar in his work and in his personal life. A legend goes by that Dr. Ambedkar was once thrown out of a Parsi boys hostel in Baroda because he sought lodging there on the pretext of being a Parsi<sup>2</sup>.

Homi Mody was mentored by the legendary Pherozeshah Mehta. Homi Mody attended the Roundtable Conferences in London in 1930 and pushed for a constitution for independent India. He was a part of the Indian Legislative Assembly from 1929-1943. He was a part of the Viceroy's Executive Council from 1941-1943. Homi Mody was also a member of the Constituent Assembly of India. He was a founding member of the Swatantra Party along with C. Rajagopalachari. The party eventually merged in 1974 with Charan Singh's party.

Homi Mody was a great supporter of the Government of India Act, 1935, the drafting of which was deeply discussed in the Roundtable Conferences he attended in London in 1930. This act later went on to be bedrock of the framing of the Constitution of India.

Rustom K. Sidhwa was another prominent Parsi in the Constituent Assembly of India. He was elected to the Constituent Assembly of India from a Congress ticket from Central Provinces and Berar. He defended the rights of Parsis and brought forward their issues in the Constituent Assembly of India. He actively believed in minority rights for the Parsis and worked towards making it a reality<sup>3</sup>.

Rustom K. Sidhwa along with his colleague Dr. Tarachand Lalwani authored the 1932 Report of the 45th Indian National Congress. He was a staunch Congressman who lived and died a Congressman. In the Constituent Assembly of India debate of 13th October 1949, Rustom K. Sidhwa proposed the merger of the armed forces for all states under a Commander in Chief. He believed that each state had their own police force and hence the armed forces needed to be combined as one under a Commander in Chief.

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1. Dr. Ambedkar Life and Mission by Dhananjay Keer – published in May 1954 at p. 44.
  2. Dr. Ambedkar Life and Mission by Dhananjay Keer – published in May 1954 at p. 26.
  3. Mitra Sharafi (2023) Indian Constitutionalism, the Rule of Law, and Parsi Legal Culture, *Indian Law Review*, 7:3, 259-280, DOI: 10.1080/24730580.2023.2197317.

He was also a fierce advocate for formation of municipalities at a local level. He believed that governance starts from the grassroot levels.

*“I desire that ... a full-fledged local body should be immediately formed, ... so that people may know really what is an administration, what are the franchise, what are the powers, what are the rights and what are the privileges in a small sphere, in their own town, in their own villages.”*

— Rustom K. Sidhwa,  
Member, Constituent Assembly

*(during the Constituent Assembly Debates, 13 October 1949)*

Rustom K. Sidhwa had also proposed the merger of border states with adjoining territories for better administrative control. He cited the example of Rajasthan stating that it is a scattered Rajputana state but the Centre needed to keep a hold on it. The administration there was not very good and the people of Bharatpur and Dholpur were not very happy with the administration.

## **Defenders of the Constitution of India**

While the Parsi community contributed significantly in making of Constitution of India and the freedom movement, they continue to have a lasting influence in defending the Constitution.

### **Sir Jamshedji Kanga**

Sir Jamshedji Kanga was undoubtedly the greatest lawyer produced by the Bombay Bar. Even today, no chamber has produced the juniors that he produced in his chamber. Stalwarts like Nani Palkhivala, Soli Sorabjee, Fali Nariman, H.M. Seervai were all part of his chamber on the ground floor of the Bombay High Court building. His chamber also produced Sir H.J. Kania, the first Chief Justice of India.

### **Nani Palkhivala**

Nani Palkhivala stands out as the finest lawyer ever produced by India. He believed that the Constitution was the binding force for India to stay a united country. He did not believe in amendments being made to

the Constitution for political gains of the party in power. He was a firm believer of Constitutional morality and placed emphasis on the fact that the Constitution needed to be defended in letter and spirit. He greatly believed in the freedom of expression and an independent press being one of the biggest pillars of a democratic India. Palkhivala also strongly advocated for constitutional protection for minority institutions.

Palkhivala in *Golak Nath v. State of Punjab*<sup>4</sup>, argued on the issue of whether an Amendment is a “law” under the meaning of Article 13(3)(a) and if Fundamental Rights could be amended. The Supreme Court of India held that Fundamental Rights could not be taken away by amending the Constitution under Article 368 of the Constitution.

Nani Palkhivala was the lead counsel in the landmark case of *Kesavananda Bharati v. State of Kerala*<sup>5</sup>, in which by a wafer-thin majority of 7-6 judges, the bench ruled that there were certain provisions of the Constitution that form the basic structure of the Constitution and under no circumstances could these provisions be amended by the Parliament of India. The country deeply owes it to him to convince the bench of the importance of the Basic Structure Doctrine and for establishing it as the most crucial safeguard against constitutional amendments detrimental to the rights of Indian citizens.

In *Minerva Mills v. Union of India*<sup>6</sup>, Palkhivala was assisted by Rohinton Nariman who was in his early days at the Bar. This judgement added on to what was ruled in *Kesavananda Bharati* case stating that the power of Parliament to amend the Constitution was limited. Rohinton Nariman went on to become another stalwart of the Bar and later of the Bench. Palkhivala was awarded the Padma Vibhushan in 1998 for his contribution to public service.

## **H.M. Seervai**

H.M. Seervai was a pillar of Constitutional law in India. He appeared for the State in the *Kesavananda Bharati* case against Nani Palkhivala. H.M. Seervai was courageous enough to later on accept the Basic Structure Doctrine as

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4. *Golak Nath v. State of Punjab* 1967) 2 SCR 762.

5. *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

6. *Minerva Mills v. Union of India* (1980) 3 SCC 625.

being an integral part of the Constitution of India<sup>7</sup>. His three-volume book titled *Constitutional Law of India* is the most referred book on the Constitution even today. It is a must read for young and senior lawyers to understand the tenets of our Constitution. That the authorship of this book meant so much to him that he expressly recorded in his Will that it should never be edited. He even declined the office of Attorney General for India on the ground that he wished to complete the work, and that assuming such a constitutional post would compromise the academic independence required to write an objective treatise on the Constitution. Remarkably, despite having last been edited in 1996, the book continues to be relied upon and cited by the Supreme Court of India—such was the depth and enduring authority of his scholarship.

He was the Advocate General of Bombay from 1957 to 1960 and of Maharashtra from 1960 until his resignation in 1974. Seervai appeared in *K.M. Nanavati v. State of Bombay*<sup>8</sup> as Advocate General which was the last jury trial in India. The matter was later overturned by the Supreme Court of India. Seervai also appeared in the *S.P. Gupta v. Union of India*<sup>9</sup> which was the First Judges' case regarding transfer of judges to High Courts. Seervai was conferred with the Padma Vibhushan in 1972.

### **Soli J. Sorabjee**

Soli Sorabjee was another doyen of Sir Jamshedji Kanga's chamber. He holds the unique distinction of being Attorney General for India twice, once from 9th December 1989 to 2nd December 1990 and his second stint from 7th April 1998 to 4th June 2004. He also holds the unique distinction of being Attorney General for India to three different governments (Under Prime Ministers V.P. Singh, Chandra Shekhar and Atal Bihari Vajpayee). He assisted Nani Palkhivala in the landmark Kesavananda Bharati case. In *Maneka Gandhi v. Union of India*<sup>10</sup>, the landmark case which broadened the scope of Article 21, Soli Sorabjee appeared as Solicitor General of India. In *S.R. Bommai v. Union of India*<sup>11</sup>, Soli Sorabjee vehemently opposed the misuse of Article 356 with regard to imposing President's Rule in a

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7. The Basic Structure Doctrine – Protector of Constitutional Integrity by Rohinton Nariman.

8. *K.M. Nanavati v. State of Bombay* (1961) 1 SCR 497.

9. *S.P. Gupta v. Union of India* 1981 Supp SCC 87.

10. *Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

11. *S.R. Bommai v. Union of India* (1994) 3 SCC 1.

state. The Article was misused by the then government and this landmark judgement brought limitations to the use of Article 356 strengthening centre-state relationships.

The Ninth Schedule of the Constitution continued to be misused by the party in power. It was made with the initial purpose to shield acts from being challenged in the Supreme Court of India but was later thoroughly misused by successive governments to place acts which violate provisions of the Constitution in the guise of shielding it from judicial review. Soli Sorabjee in *I.R. Coelho v. State of Tamil Nadu*<sup>12</sup> argued that the laws under the Ninth Schedule were not immune from judicial review. Soli Sorabjee was awarded the Padma Vibhushan in 2002.

### **Tehmtan R. Andhyarujina**

Tehmtan R. Andhyarujina was a leading constitutional law, public law and commercial law expert. He came from the illustrious chamber of H.M. Seervai. He assisted H.M. Seervai in the famous Kesavananda Bharati case. He also appeared in the S.R. Bommai case and I.R. Coelho case. He had authored a book *The Kesavananda Bharati Case: The untold story of struggle for supremacy by Supreme Court and Parliament* which is a brilliant book on the landmark case and how it truly shaped the basic structure doctrine. He used to write regularly in prominent newspapers in India and his views were deeply revered and respected. He served as the Advocate General of Maharashtra from 1993 to 1995 and the Solicitor General of India from 1996 to 1998.

T.R. Andhyarujina's son Zal Andhyarujina is a prominent Senior Advocate practicing in the Bombay High Court and Supreme Court of India. He is also a Door Tenant at Fountain Court, London. Zal appeared in *Property Owners Association v. State of Maharashtra*<sup>13</sup> with respect to Article 31C as upheld in Kesavananda Bharati remains in the Constitution after the decision in Minerva Mills. The 9-judge bench also held that not all privately owned property is a "material resource of the community". I assisted Zal Andhyarujina in this matter along with many other prominent advocates. I had the great fortune of being Zal's junior who gave me the foundation and knowledge to get into independent practice.

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12. *I.R. Coelho v. State of Tamil Nadu* (2007) 2 SCC 1.

13. *Property Owners Association v. State of Maharashtra* (2024) 18 SCC 1.

## **Fali S. Nariman**

One cannot forget the contribution of the Nariman family – Fali Nariman and Rohinton Nariman (Later Justice Rohinton Nariman) in defending our Constitution. Fali Nariman was another gem from Sir Jamshedji Kanga's chamber. He served as Additional Solicitor General of India from May 1972 to June 1975 when he resigned on the declaration of the national emergency by Indira Gandhi. He did not believe it was right to serve as a law officer of a government going against basic democratic principles and against Fundamental Rights of its citizens. He also appeared in the Golak Nath case along with Nani Palkivala. He argued the famous *Supreme Court Advocates on Record v. Union of India*<sup>14</sup> matter, popularly known as the Second Judges Case which brought about the collegium system of appointment of judges replacing the earlier system of appointment of judges. He argued the landmark *TMA Pai Foundation v. State of Karnataka*<sup>15</sup> case which was a 11-judge bench matter deciding the scope and right of minorities to establish educational institutions under Article 30.

Fali Nariman was nominated to the Rajya Sabha by the President of India from 1999 to 2005 as an eminent member of the Bar for his eminence in the field of law. He believed those were the best years of his life and he thoroughly enjoyed his stint in the Rajya Sabha. He regularly addressed Members of Parliament on Rule of Law and also on the law-making process. He was awarded the Padma Bhushan in 1991 and the Padma Vibhushan in 2007.

## **Justice Rohinton Nariman (Retd.)**

It is rare to find a father-son duo contribute so much to the same field yet Justice Rohinton Nariman played a prominent role as a member of the Bar and later on the Bench to defend the tenets of our Constitution in letter and spirit. He was the youngest member of the Bar to be designated a Senior Advocate at the age of 37 when the then Chief Justice of India Chief Justice Venkatachaliah amended the rules to designate him as a Senior Advocate from 45 to 37. He is a walking encyclopedia on Constitutional

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14. *Supreme Court Advocates on Record v. Union of India* (1993) 4 SCC 441.

15. *TMA Pai Foundation v. State of Karnataka* (2002) 8 SCC 481.

and Civil Law. At a very young age, he assisted Nani Palkhivala in the Minerva Mills case where his talent was truly identified. He served as the Solicitor General of India for 18 months from 27th July 2011 until 4th February 2013.

He was elevated as a judge of the Supreme Court of India on 7th July 2014 being only the fifth judge to be directly elevated from the Bar. During his tenure as a judge, one cannot recall any other judge who contributed so much to defend the freedoms of citizens of India. In *Shreya Singhal v. Union of India*<sup>16</sup>, he struck down the draconian Section 66A of the Information Technology Act, 2000 which gave the state police power to arrest any individual accused of posting emails or any electronic message which “causes annoyance or inconvenience” to anyone.

In a landmark ruling of Muslim personal law in *Shayara Bano v. Union of India*<sup>17</sup>, Justice Nariman struck down triple talaq making it illegal and unconstitutional calling it a disapproved form of divorce. This brought a huge sigh of relief to the Muslim women of India who continued to suffer under this draconian form of divorce.

In *Indian Young Lawyers Association v. The State of Kerala*<sup>18</sup> popularly known as the Sabarimala temple case which was regarding entry of women into the Sabarimala temple in Kerala, he delivered a dissent in which he stated that women aged between 10 and 50 years shall not be denied entry to the Sabarimala temple.

In another landmark ruling of *Navtej Singh Johar v. Union of India*<sup>19</sup>, Justice Nariman decriminalized all consensual sex among adults, including homosexual sex under Section 377 of the Indian Penal Code.

I was a Judicial Clerk cum Research Assistant to Justice Rohinton Nariman during his last year as a Judge of the Supreme Court of India. I have seen his determination and passion to defend the Constitution. I also shared a warm relationship with Fali Nariman who I would meet a number of times on a personal and well and professional basis.

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16. *Shreya Singhal v. Union of India* (2015) 5 SCC 1.

17. *Shayara Bano v. Union of India* (2017) 9 SCC 1.

18. *Indian Young Lawyers Association v. The State of Kerala* (2019) 11 SCC 1.

19. *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

## **Parsi Judges in the Bombay High Court and the Supreme Court of India**

Justice S.J. Kathawalla during his tenure as a judge of the Bombay High Court was known as a workaholic judge and a judge who burned the midnight oil in order to dispense justice to the people of India. Even post his retirement, his is one of the most respected judges in India.

At present the Bombay High Court has three Parsi judges – Justice B.P. Colabawalla, Justice Firdosh Pooniwalla and Justice Farhan Dubash. The Supreme Court of India currently has one Parsi judge in Justice J.B. Pardiwala. Justice Pardiwala is in line to become the Chief Justice of India in the year 2028 and will have a long tenure of over 27 months. Each of the current lot of Parsi judges are deeply meritorious and command great respect from the Bar and the Bench.

### **Conclusion**

The intention of this article was to not only highlight the past contribution of the micro minority Parsi community in not only framing of the Constitution but also on how they have produced stalwarts to always defend the Constitution in the best interests of the citizenry of India.

Each and every one mentioned in this article is a maverick in his own right and his contribution has held an everlasting impact on how Indians perceive their rights and duties today. There are many more Parsis who have contributed a lot towards keeping our Constitution a secure document for generations to come.

One can only hope and pray that many more Parsis as well as non-Parsis follow the footsteps of these legends continue to defend the freedoms of our country.

