Reforming The Judiciary

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The basic structure of the Constitution of India divides the State into three equal but separate constituents which, nevertheless, have a degree of convergence and interaction because each is incomplete without the others. These three constituents are, in the order that they are mentioned in the Constitution, the Executive which is provided for by Part V, Chapter 1 of the Constitution for the Union and Part VI, Chapter 2 for the States; the Legislature as provided for by Part V, Chapter 2 for the Union and Part VI, Chapter 3 for the States; and the Judiciary as provided for by Part V, Chapter 4 for the Union and Part VI, Chapter 5 for the States. It is noteworthy that though the Constitution is federal in character the Judiciary forms a single hierarchy from the court of first instance right upto the Supreme Court. Under Article 141 the law declared by the Supreme Court is binding on every court in India, thus making them subordinate to the Supreme Court in all judicial matters. In the States the High Court is the court of records and is also the court which exercises superintendence under Article 227 over all courts and tribunals functioning within the territorial jurisdiction of the High Court. All courts in India can try cases under all laws, whether enacted by Parliament or by a State Legislature and in this our Constitution differs from that of the United States of America where State courts have jurisdiction in matters within the purview of the State Legislature and Federal Courts have jurisdiction in matters which lie within the purview of the U.S. Congress.

The Judiciary in India is completely independent of the Executive and the Legislature. In the appointment of Judges of the Supreme Court of India and the High Courts of States the Executive has no direct say because under Articles 124 (2) and 217 of the Constitution Judges of the Supreme Court and the State High Courts are appointed by the President as per the procedure prescribed by the Constitution. In fact it is a matter of some doubt whether in the appointment of Supreme Court and High Court Judges the President is required to consult the Prime Minister and the Council of Ministers at all. In the case of the Supreme Court the President shall appoint Judges after consultation with such of the Judges of the Supreme Court and High Courts as he deems necessary, as also the Chief Justice of India, consultation with whom is mandatory under the Constitution. Here the advisor to the President is the Chief Justice of India and not necessarily the Prime Minister. In the case of High Courts the President is required to consult the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court concerned. One interpretation could be that in these matters the Constitution gives discretion to the President. This is an issue on which we need an authoritative pronouncement because at present the view is that the President has to consult the Council of Ministers. Why, then does the Constitution provide for consultation with the Chief Justice of India, Supreme Court and High Court Judges and the Governor and the Chief Justice of the State concerned?

The question of appointment of Judges has been laboured because this is an issue to which this essay will revert at a later stage, but it is of importance in determining whether the present practice is valid or calls for change. Meanwhile, we shall discuss the issue of judicial reforms. Why has this discussion become necessary? There is a growing public perception that corruption amongst judicial officers has increased substantially and will continue to grow unless suitable remedial action is taken. The complaints against corruption are no longer confined to the lower Judiciary and have reached as high as some former Chief Justices of India. There are also complaints about irresponsible behaviour of Judges over whom there is no control. It is also alleged that the Judiciary is overreaching itself and intervening in the realm of the Executive and the Legislature also. The major complaint is that there is inadequate judicial accountability and that this has to be set right.

Taking the nature of the complaints we can break up our response into the following parts:

(1) The judicial procedure and delays caused by it. (2) Appointment and removal of Judge. (3) Accountability, judicial discipline and administrative control over courts by the Judiciary itself. The easiest part is the first one which looks at procedures. The principal complaint is that the courts are overloaded with judicial work and that cases are inordinately delayed. This is tantamount to denial of justice. Let us take the criminal courts. In all criminal trials there is the prosecution, which represents the State and then there is the accused. In a case of which cognisance is taken on private complaint the trial court is still required to hear the prosecution, record the prosecution evidence and then proceed to try the case according to law. In both cases the State or the private complainant is required to prove the case against the accused beyond a shadow of doubt and the burden of proving the case rests with the prosecution. The accused person is not required to establish his innocence, though he may be required to defend himself and rebut the prosecution evidence if the prosecution is able to establish the guilt of the accused. The proceedings in a criminal court are relatively simple and straightforward because both the prosecution and the accused are required to produce their witnesses or request the court to issue process for summoning the witnesses. In the matter of heinous crimes in a Sessions Court every trial is conducted by a Public Prosecutor, which means that every sessions case becomes one of the State vs. an accused person. Under section 309 Cr.P.C the Court of Session is required to continue the case from day-to-day till all the evidence is recorded and an adjournment would be an exception for which necessary reasons have to be recorded. The entire tenor of Cr.P.C is that the trial must be conducted expeditiously so that an accused may not remain under a cloud or even in custody for an excessively long period and the deterrent value of penalty is enhanced by the fact that trial and conviction or acquittal both follow as quickly as possible from the date of commission of an offence. Delay is the biggest enemy of deterence.

Despite these legal provisions even criminal trials have a tendency to linger on for years. In a case in which my Deputy Secretary and I trapped a lady who was offering a bribe my evidence was recorded eleven years after the event and a conviction was obtained fifteen years after the offence. Here the slow pace of criminal justice had resulted in the accused virtually escaping punishment. In more serious cases where the witnesses themselves may be from a village, so many contradictions can creep in when they are being examined years after the event that the accused often goes scot free and the conviction rate remains low. The standard excuse given is that the accused absented himself, summons were not served on witnesses or that witnesses did not come forward for evidence. What is not explicitly stated but in fact underlies most delays in trials is that an accused with a weak case uses legal tricks to delay the case and members of the bar help accused persons to obtain adjournments without proper cause. Many Magistrates and Judges are scared that if they do not give adjournments the lawyers may make complaints against them to the High Court and they would be in the unhappy situation of explaining their conduct to the High Court. That is why many Magistrates and Judges take the easy way out and adjourn the case.

It is obvious that we need some procedural changes either by amendment of the Code of Criminal Procedure or by High Court Rules and Orders on the criminal side laying down the procedures for giving an adjournment and for ensuring service of process so that the Judges can work in an environment where they are not vulnerable to the virtual blackmail by advocates and can also take necessary steps to expedite the trial of cases. If the police is unable to serve process then we need to make greater use of alternative means, including extensive use of courier services in which payment would be made for every summons served and no payment would be made for summons not served. Because the courier is in the trade in order to earn money he would ensure that his subordinates do their

duty so that the fees for serving process would flow to the courier and at the same time processes would be served so that the excuse for nonattendance in the courts would disappear. Simultaneously if an accused person absents himself from a hearing the court should hold him in physical custody so that the question of an accused absenting himself does not arise.

In civil matters things are much worse and pendency is very high. Civil cases linger on for years and decades. Most civil cases require adjudication between two parties, the plaintiff and the defendant. There can be civil suits against government also, but these are easier to resolve because generally government does respond quickly to any process that might have been issued. That is not true of private disputes and because neither the liberty nor the life of a party is under threat, civil courts themselves take things very easy. Actually because the interests of two parties are involved and they are largely of a financial nature or relate to title, possession, fulfillment of contract, etc., both parties, should normally be eager to obtain an early decision. Unfortunately quite often courts do not even frame issues, leave alone proceed with the trial and are happy to grant adjournments. The party which has the weaker case will try to use every means to delay a decision and these could include moving frivolous applications and then filing revision petitions, etc., questioning the intermediate orders that a court may have passed on a petition. Injunctions can be misused by a court's order of an intermediary nature and the person enjoying illegal possession of a property who has obtained an injunction for stay of ouster would be only too happy to let the case linger because the longer it takes to decide the case the longer he can continue to enjoy benefit of his possession. I am aware of the fact that the Code of Civil Procedure has been amended from time to time to take care of such contingencies. What we need are clear-cut directions from the High Courts through Rules and Orders Civil which restrict interlocutory and intermediate orders and also restrict the filing of various types of petitions which can further delay the case. As far as possible temporary injunctions should be avoided and certainly the right of revision against intermediate orders should be severely restricted. A trial must be brought to a speedy conclusion, as far as possible intermediate orders should be avoided and it is only in appeal that the entire case should be heard. In every case when an intermediate order has been given, in order that a stay thus obtained may not lull the party concerned into a state of torpor, the case should be given a high priority in the cause list, witnesses should be examined speedily and a final decree should issue without delay. If we eliminate or substantially reduce temporary injunctions and stay orders in civil cases both the plaintiff and the defendant will have an interest in fast disposal of the case. It is about time that the Supreme Court and High Courts work out the best method of avoiding procedural delays in criminal and civil matters and emphasise that speed of disposal, without compromising justice, will be the criteria for judging the performance of judicial officers.

Our courts must become technology oriented and much greater use needs to be made of video recording of evidence long distance so that delays on account of witness absence can be avoided. If the electronically recorded evidence is automatically printed out and the hard copy is signed and certified by the trial court, then subsequent tampering with the digital record would be avoided because it is the certified print out that would be the authentic record. To the extent that IT and ICT become tools to serve the courts we can speed up our trials.

This brings us to the next point, the appointment of Judges of the High Courts and Supreme Court and their removal where necessary. It is alleged that today the Supreme Court, through its collegium of Judges, is virtually the final arbiter of who will become a Judge. Before discussing this it is necessary to look at the quality of Judges that we are appointing. In the past it was considered an honour to be offered elevation to the Bench and some of our best legal brains came to the judicial profession. Justice Hiralal Kania, Justice Mehar Chand Mahajan, Justice M Hidayatullah, Justice M.C.

Chagla, Justice J.S. Verma, Justice Vivian Bose are some of the great names which come to mind. They were all people who could have continued to earn millions of rupees in the legal profession, but who chose the public service as Judges for a relatively paltry amount because to them service was always above self. Today the position is that the best lawyers prefer the fat fees they command and are reluctant to be elevated to the Bench. This means that mediocrities are the ones who come forward for appointment and because they know that they are not good lawyers, some of them are tempted to misuse their high office for illegal gain. As a people we would be very foolish if we did not take cognisance of this fact. In fact the Chief Justice of India should be really worried about the quality of the Judges who are being appointed because unless we get the best people into the judiciary we cannot expect to maintain its excellence. One suggestion is that we review the emoluments of the higher Judiciary and bring them to what I would call a comfort level. This would not make the Judges rich, but it would be sufficient to enable them to lead a life of comfort and free the family of financial worries. The amount can be left open to discussion, but if we want Judges of unimpeachable integrity and intellectual quality then we should be prepared to pay for their services.

Together with this we should also consider the age of retirement. This age for the Supreme Court is sixty-five years and for the High Courts sixty-two years. One anomaly in this is that quite often by the time a person becomes Chief Justice of India he may have already attained an age where he has a very short tenure of service left. We have had a Chief Justice who enjoyed only fourteen days of office. In order to ensure an adequate term it is suggested that the age of retirement of High Court Judges be raised to sixty-five years and of the Chief Justice to sixty-eight years. This means that if by sixty-five years a person has not been appointed Chief Justice of a High Court he will stand retired. As Chief Justice, however, he will enjoy at least three years in office. Similarly, the age of retirement of a Supreme Court Judge should be made sixty-eight years and that of the Chief Justice of India seventy years. He will thus remain in office for at least two years. A codicil to this is that like a Member of the Public Service Commission a retired Judge would be disqualified for any further appointment under government, including to a Commission of Enquiry, on superannuating from the court. This would insulate Judges from any inducement offered of post retirement appointment by government, which could be the lollipop which could influence Judges in the concluding years of service to rule in favour of government. All Commissions must be headed by serving Judges only.

Let us come to appointment proper. Article 124 (2) of the Constitution reads, " Every Judge of the Supreme Court shall be appointed by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose …. Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted". For the High Courts section 217 (1) reads, "Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court …." The Supreme Court has constituted a collegium of Judges which is to be consulted in the matter of appointment of a Judge. Article 124 makes no mention of a collegium and the President is free to consult any Judge in addition to the Chief Justice of India as he deems fit. If the Chief Justice wants to consult a collegium in rendering his advice to the President he is welcome to do so, but the President is free to consult any Judge, including one who is or is not a member of the so-called collegium. I think the procedure for consultation needs to be clarified and it should not be such that it ties the hands of the President of India in the matter of consultation. Incidentally, unless the Constitution is changed a National Judicial Commission cannot be constituted for advising the President on the issue of

appointment of Judges. If there are clear-cut procedures and practices regarding consultation, perhaps the present system needs no change.

However, what we need to look at is the procedure for removal of Judges. As per Article 124 (4), which covers Judges of High Courts also when read with Article 217, there is a procedure laid down for impeaching a Judge. There are three parts to this procedure. The first is a demand by Members of Parliament or otherwise for holding an enquiry against misbehaviour or incapacity of a Judge. This can be regulated by a law enacted by Parliament under Article 124 (5). It is here that a National Judicial Commission can be appointed either to investigate the case against the Judge or to create a mechanism for such investigation. At present a tribunal is constituted by the Chief Justice of India. The second part of the process is that after the investigating tribunal or body presents its report, then each House of Parliament has to address the President on the basis of a majority of the total membership of that House and a majority of not less than two-third of the Members of that House present and voting. The address would recommend the removal of the Judge on ground of proved misbehaviour or incapacity. The third part is the order of the President removing the Judge. It may be recalled that in the Justice Ramaswamy case the errant Judge was found guilty on thirteen counts by the tribunal, but because the Congress Party abstained the requisite majority could not be mustered in Parliament and the corrupt Judge was thus virtually let off scot-free.

Let us take the argument further, in fact to a stage which our founding fathers could not even have dreamt of as a possibility. Supposing a Judge of a High Court or the Supreme Court commits a heinous offence, is convicted and sentenced to a long term in prison. A government servant convicted of an offence is removed from service automatically. A convicted Judge, however, would still have to be impeached and if the political equations in Parliament are such that the Judge can muster adequate support, then the requisite majority will not be available and like Justice Ramaswamy the Judge would continue to be a Judge. He would be in jail serving a prison sentence but he would have all the privileges of a Judge. How does one deal with such a contingency? It is here that we need a fundamental reform which would enable an errant Judge to be eased out without affecting the independence of the Judiciary. I think the Supreme Court should devise a procedure for this and necessary amendments in the Constitution should be made for dealing with such a Judge. This should not be treated by the Supreme Court as a violation of its order in the Keshvanand Bharti Case.

The third issue is one of accountability. Today judges are judicially accountable to their superiors through the medium of revision, review and appeal. The Supreme Court, of course, is accountable only to itself. One is acutely aware of the fact that if any accountability machinery other than the courts is misused to browbeat Judges this could seriously affect the Judiciary's independence and thus subvert the cause of justice. This has to be avoided at all cost. At the same time the number of errant judges, especially in the subordinate Judiciary, is increasing by leaps and bounds. There are many kinds of judicial misbehaviour. Recently a Judicial Magistrate in Gwalior who was moving around in a car with an orange beacon was checked by the DIG Police of Gwalior. The vehicle was a private one belonging to a friend of the Magistrate and neither the Magistrate nor that friend had permission under the Motor Vehicles Act to sport or flash a beacon. The Magistrate misbehaved with the police officer and was taken to a police station, from where he was subsequently released. The Judiciary made this a point of prestige and a weak and pusillanimous government, instead of backing up the police officer for doing his duty, ordered his transfer. In such a case with the High Court backing up the errant Magistrate who is clearly in the wrong to whom does a citizen go for redressal? This is where we need a strong National Judicial Commission which would be empowered to investigate such cases and recommend suitable action. The Supreme Court also has to devise a mechanism whereby the behaviour of High

Court and Supreme Court Judges can also be called to account. There is the notorious case of a High Court Judge from the Allahabad High Court who, a few years ago, took umbrage at the New Delhi Railway Station for not being given train accommodation of his choice. He treated this as a contempt of court and at the Railway Station platform he hauled up the Station Superintendent of New Delhi Railway Station and his staff. How does one call such a Judge to account? There has to be self-discipline within the High Courts and the Supreme Court.

One perception is that Public Interest Litigation, which really consists of writ petitions filed on issues of public interests which are of a high profile nature and can gain publicity, are given priority because some judges at least like to see their names highlighted in the media. Is it not time that the Supreme Court and High Courts systematically review all the cases pending before them, arrange them in order of priority and dispose of them quickly, while being very careful in the matter of admission of writ petitions? The writ jurisdiction of the Supreme Court under Article 139 and of High Courts under Article 226 is a power vested in these courts to deal with extraordinary situations where all other remedy has failed. Unfortunately our courts admit writs on almost any subject under the sun. In service matters, on trivial matters, on matters of interpretation of rules and laws writ cannot be a remedy for aggrieved parties. There are administrative remedies available and there are normal judicial procedures available. It is high time that our courts of records accept only those writs which call for urgent intervention by the courts, while firmly rejecting all trivia. In fact the courts could probably reduce their writ case work by about ninety percent if they are careful in accepting only those writs which are of urgent public importance. For the rest let people seek remedy before the appropriate courts having jurisdiction or the appropriate administrative authority. This will greatly reduce the total workload of the superior courts.

Our Judiciary is at a crossroads today. If it decides to cleanse itself judicial independence would remain undisturbed. We need a fiercely independent Judiciary and I strongly oppose any effort by the Legislature or the Executive to intervene in this behalf. However, without performing an Adi Sankara on itself the Judiciary would find it very difficult to resist outside intervention in matters in which the public perception of the Judiciary has taken a nosedive. For the sake of the Constitution and for the good of the country as a whole I would beg the Chief Justice of India and the entire judicial establishment to apply self-correction to the Judiciary so that the high regard in which it has always been held by the people is restored.

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