JUDICIAL SYSTEM AND REFORMS[†]

*Justice Arun Madan**

I. Introduction

The judicial system cannot survive onslaught of rust and dust, in view of the transitional nature of society in the absence of progressive attitude and needs appropriate reforms. The reforms are aimed at parting with obsolete and outdated laws with a view to introduce reformative laws which take into account the feelings and sentiments of the people at large since their welfare cannot be overlooked or ignored. It is in this context that we have to appreciate the status of judiciary, scope of its functions and judicial review.

The growing needs of the society always call for review and updating of laws to keep pace with advancement and change. The effective judicial reforms not only relate to amendments in procedural and substantive laws but also include reformative and corrective endeavours aimed at strengthening and systematizing the law and order mechanism operating in the country.

II. Status of Judiciary

The scope of judicial review in its true sense determines the status of our judiciary as essential organ of the State. In the persent day democratic system, one can better understand the structure of state as being conglomerate of three major organs viz. Legislature, Executive and Judiciary. Our constitutional set up is based on giving independent status to the judiciary according to the doctrine of seperation of powers. The interrelationship of the judiciary with each of the other two organs viz. Legislature and Executive is very significant. It is well known concept that in order to have strong and independent judiciary, we equally need to have strong and independent bar. The judiciary can be strong and independent only if the bar also plays a positive role in strengthening judicial system by exercising its role in a very objective manner so as to harmonise relations

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* Judge, Rajasthan High Court.

between the two. Primarily no institution can survive without strong and independent judiciary.

The Constitutional Bench of the Apex Court while recognising independence of the Judiciary in *Indira Nehru Gandhi* v. *Raj Narain*[1] observed :

> In federal system which distributes powers between three coordinate branches of Government, though not rigidly, disputes regarding the limits of constitutional power have to be resolved by courts and therefore as observed by Paton, distinction between judicial and other powers may be vital to the maintenance of the Constitution itself.
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> No Constitution can survive without a conscious adherence to its fine checks and balances. Just as Courts ought not to enter into problems entwined in the 'political thicket', Parliament must also respect the preserve of the courts. The principle of separation of powers is a principle of restraint which has in it the precept, innate in the prudence of self preservation that discretion is better part of valorous. Courts have by and large, come to check their valorous propensities.

In *Minerva Mills* v. *Union of India*[2] the Constitutional Bench of the Apex Court held sections 4 and 55 of the Constitution of India (42nd Amendment) Act, 1976 as void and thereby struck down the same for the reason that it was beyond amending power of the Parliament.

Section 55 of the 42nd Amendment Act introduced two new clauses in Article 368, namely, clauses (4) and (5). Clause (5) was to confer upon the Parliament a vast and undefined power to amend the Constitution even so as to distort it out of recognition. The Apex Court held that the amendment under 42nd Amendment Act if introduced would have damaged basic and essential structure of the Constitution, itself , by total exclusion of the challenge to any law on the ground that it is inconsistent with or takes away or abridges any of the rights under Article 14 or 19 of the Constitution. The Apex Court also held that the very object of the legislation is to give effect to the policy of the state towards securing for all directive principles of the State as enshrined in parts III and IV of the Constitution. The Apex Court then held that the amendments under sections 4 and 55 of the 42nd Amendment Act were beyond the amending power of the Parliament and were void in as much as these remove all limitations on the power of the

1. AIR 1975 SC 2299.
2. AIR 1980 SC 1789.

Parliament to amend the Constitution. The Apex Court was dealing with the constitutional amendments which had been brought into operation and which permitted violation of certain freedoms through laws passed for certain purposes. Following the dictum of law laid down in *Keshavanand Bharati* v. *State of Kerala*[3] the Apex Court held that Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. In other words, Parliament cannot by having resort to Article 368 expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. It is well known that the donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one. Since clause (5) of Article 368 transgresses the limitations on the amending power, it was held to be unconstitutional with a view to maintain a balance of powers among three pillars of the State. It is the function of the Judges nay their duty to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled.

This is significant contribution to uphold independence of the judiciary and also to maintain balance of power between three wings of the State. It is not open to the Parliament to bring forth any amendment by way of introduction of new legislation under the garb of its amending power so as to nullify the basic structure of the Constitution. Viewed from this prospective, judicial reforms would not simply encompass amendments in procedural and substantive laws but would also include reformative and corrective endeavours to strengthen judicial system. Thus, an exercise for review of the Constitution of India under the garb of reforms, should be in strict conformity and adherence to the basic structure theory as propounded in *Keshavand Bharati's* case.[4]

In *S.P. Sampath Kumar* v. *Union of India*[5] the Constitutional Bench of Apex Court observed thus —

> It is also a basic principle of the Rule of Law which permeates every provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance

3. AIR 1973 SC 1461.
4. *Ibid.*
5. AIR 1987 SC 386.

> with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the Rule of Law.

In *C.Ravichandran Iyer* v. *Justice A.M. Bhattacharjee*[6] the Apex Court observed that independence of judiciary is an essential attribute of rule of law which is a basic feature of the Constitution and so the judiciary must be free from not only executive pressure but also from other pressures.It is the sentinel on the *qui vive* to protect the fundamental rights and to poise even scales of justice between the citizens and the State or the States inter-se. Rule of law and judicial review are basic features of the Constitution. As its integral constitutional structure, independence of the judiciary is an essential attribute of rule of law. Relying on the decision in *S. P. Gupta* v. *Union of India*[7], the Apex Court observed that it is therefore absolutely essential that the judiciary must be free from executive pressure or influence which has been secured by making elaborate provisions in the Constitution with details. The independence of judiciary is not limited only to the independence from the executive pressure or influence; it is wider concept which takes within its sweep independence from any other pressure and prejudices.

The Apex Court then observed that independence of judiciary is most essential when liberty of citizen is in danger. It then becomes the duty of the judiciary to poise the scales of justice unmoved by the powers (actual or perceived), undisturbed by the clamour of the multitude. The heart of judicial independence is judicial individualism. The judiciary is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own .

III. Delays in Disposal of Cases and Remedial Measures

During last 50 years of our independence, litigation has increased manifold not only on account of population growth but also in view of new laws, legal awareness, industrial and commercial growth besides urbanization but proportionately there is not increase in the strength of judges and judicial infrastructure. No scientific study is undertaken to assess growing need being experienced as regards strength of Judges at all ladders of the Judiciary. In its 20th report, the Law Commission found that India had 10.5 judges per million of population, the corresponding figure in England was

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6. 1995(5) SCC 457.
7. 1981 (Supp) SCC 87.

50.9, Australia 57.7, Canada 75.2 and the USA 107. The Law Commission in 1987 had recommended 50 judges per million of population instead of only 10.5. The recommendation has remained buried in the Report with no follow up action. The inadequate strength of judges is a major cause for the delay in disposal of cases.

One of the causes for the delay in disposal of cases is request for adjournments. The adjournments are very often granted at the drop of hat. The only remedy is to avoid uncalled for adjournments and this malady can only be resolved if the Bar and the Bench make sincere efforts together. Experience shows that it is always the helpless litigant who has to pay the price and to suffer for uncalled for adjournment at the behest of the Bar. Apart from that, strike-call also adds to the problem, which should be strictly avoided. The Members of the Bar are not trade unionists and they should avoid participation in strikes since they not only reflect on the system badly but also cause undue hindrances in the effectiveness of the justice delivery system.

IV. Procedural Delays

Yet another cause for delay is procedural mechanism of legislation such as provided in the Indian Evidence Act, Indian Penal Code, Criminal Procedure Code and Civil Procedure Code. Appropriate legislation by way of procedural reform is the immediate need. Both the Houses of Parliament upon the recommendations of the Law Commission have made significant changes by approving amendments proposed in the Code of Civil Procedure, 1908. The Parliament has passed the Code of Civil Procedure (Amendment) Act, 1999, which aims at amending the Code of Civil Procedure, 1908 and the Limitation Act, 1963 and the Court Fees Act, 1870. Of course it would come into force on such date as the Central Government by notification in official Gazettee notify which is still awaited.

V. Role of Investigating Agencies

Proper administration of justice is not in the hands of the judiciary alone. Proper implementation of laws and maintenance of justice depends upon the character of the personnel of the police, prisons department, political and social leaders and lawyers. In a degenerated society, even thousands of laws cannot ensure proper social justice. Earlier, by punishing the criminals properly and in time, law and order in the society was maintained. As a majority of officials in various departments, leaders of various political parties, religions and castes were conscious of maintaining justice in the society, laws were successful. In those days, these leaders did not try to protect criminals belonging to their party, religion and caste. The interest in maintaining justice, paved the way for early disposal of cases, conviction of

criminals, prevention of crime and reformation of offenders. Today, when people in various walks of life are sheltering criminals on the basis of caste, religion and political affinity, there is growing apprehension that justice may not only be delayed but even denied.

During his address on the Golden Jubilee Celebrations of the Supreme Court, Prime Minister Shri Atal Behari Vajpayee spoke thus :

> There is an urgent need to curb the strong appetite of our departments and the lawyers representing them for casual litigation and for wasting government money. They routinely file cases or defend cases they know are indefensible and do so only because they do not want to take responsibility.

It is trite law that for delay in examining witnesses and deciding cases certainly results in defeat of Dharma that is "miscarriage of justice". In our system, such a situation has become a rule rather than an exception and this delay can be attributed to ineffective investigation by the police and lack of motivation among public prosecutors who are burdened with a large number of cases. Even in some cases the investigating officer is reported to have submitted the chargesheet without completing investigations. This weakens the cases which ultimately results in acquittal of the accused. Only about 15 Public prosecutors and 45 Assistant Public Prosecutors are handling nearly 78,000 (66,720 as on 31/12/1998) criminal cases pending in the lower courts situated in Judgeship of Jaipur City itself excluding Jaipur District Judgeship.

It is brought to the notice of the Judges that in case the role of investigating agency is tainted, the matter should be referred to some impartial agency like C.B.I. which too is blamed for taking long time and undue delay in investigation. Very often real culprits go unpunished on account of either evidence not forthcoming or the prosecution witnesses being threatened by the accused, with the result that the Judges express helplessness in the matter with no option except to order large scale acquittals. The sensational case is of "Priyadarshan Mattoo' rape cum murder case which is a glaring example of tainted investigation resulting in acquittal of accused by Additional Sessions Judge, New Delhi who in his judgment of 449 pages said, *"Accused is a criminal but I cannot convict him for lack of evidence"*.The Trial Judge also said, *"the manner in which the CBI investigated puts question mark on its credibility as a premier investigating agency"*. However, the onus was on the State to negate probability of defence which the Trial Judge observed, the State failed to discharge. There was no medical evidence adduced by the investigating agency to suggest that she was raped. Notwithstanding the autopsy report of the deceased regarding the injuries on her person, the

accused was let off because of procedural lacunas created by investigating agency. That being so such cases result in people's losing faith in justice delivery system which requires judicial reforms in view of trained role being played by the investigating agencies, which should be held accountable for their lapses.

Though there is specific provision under section 309 CrPC that adjournment should be granted sparingly that too on valid grounds when it is necessary but it is followed more in the breach than in observance. In order to overcome difficulties and uncalled for delay in the trials, the proceedings should be conducted expeditiously as soon as the charge is framed. The Courts as a matter of course or routine should not interfere in each matter unless there are sparing and justifiable reasons which would necessitate the same. The under-trials remain in detention without trial being expedited resulting in violation of their right to speedy trial. Once the examination of witnesses has begun, the same should be continued on day to day basis until all the witnesses in attendance have been examined and the trial reaches its logical conclusion and the adjournments should be only subject to justifiable reasons to be recorded.

VI. Criminalisation During Elections

Most serious problem which is being faced today by democratic polity in our country is holding of free and fair elections due to increasing criminalisation of politics. Time and again, serious apprehensions have been expressed from different quarters about this obnoxious development of Indian politics. Though free elections, being the representative of collective will of the people, are the backbone of Indian democracy, yet electoral malpractice have the capacity to subvert the whole electoral process. Hence there is dire need to reform the system to purge it from further deterioration. There is no need to highlight increase of criminal elements and their role in elections. According to the Election Commission, almost forty members facing criminal charges were members of the Eleventh Lok Sabha and almost 700 members of similar background were in the state legislatures.

Conceptually, it is the function of the Sovereign to represent national interests but, in democracy this function is performed by Parliament, which mainly consists of persons belonging to different political parties. In view of the attraction of enormous political power, the political parties tacitly support or expressly do not object to the use of unfair means and corrupt practices by their candidates. The result of this development is increasing criminalisation of politics against which a deep concern is being shown or expressed in the society. Needless to say the real life of the Constitution under which all legal and political institution function depends upon free and

fair elections. It has rightly been said that "display of money and muscle power spreads corruption which is detrimental to the electoral process". Booth capturing deserves to be checked effectively but very few cases have been decided by the courts. The use of money or muscle power and the totally unacceptable practices of intimidation of voters and booth capturing offend, the very foundation of our socio-political order. Experience shows that since no effective action has yet been taken to check the corruption, criminality and casteism. The problem has become more serious and aggravated with every ensuing election. Despite the fact that there is anti-defection law yet floor crossing is very often indulged by the legislators to serve their vested interest at the cost of the voters which very often goes scot free since no action is taken to prevent such candidates from participating in electoral process. The number of election offences have gone up in recent years and elections have been criminalised because of entry of criminals and casteism. It is truism that States like Bihar, Uttar Pradesh and Andhra Pradesh have become notorious for electoral malpractices like rigging and booth capturing. The Apex Court has also expressed its serious concern for electoral reforms in catena of decisions like *Sasanagouda* v. *S.B. Amarkhed*[8] by observing thus—

> It is common knowledge that in the recent past, there have been various complaints regarding booth capturing. The tendency to overawe the weaker section of the society and to physically take over the polling booths meant for them is on the increase. Booth capturing wholly negates the election process and subverts the democratic set up which is the basic feature of our Constitution. During the post independent era, ten parliamentary elections have entrenched democratic polity in this country which cannot be permitted to be eroded by showing laxity in the matter of booth capturing".

Likewise in *Ram Singh* v. *Col. Ram Singh*[9], the Apex Court observed, "The election process in our country has become an extremely complex and complicated system and indeed a very difficult and delicate affair."

The Apex Court expressed its anguish by observing that there have been various complaints regarding booth capturing which wholly negates the election process and subverts the democratic set up. Such a problem can possibly be combated only if some political remedies are invoked. Criminals and suspects should not be given tickets by political parties. Electoral reforms must receive the top priority of any Government for the survival of the Constitution and its institutions in our country.

8. AIR 1992 SC 1163.
9. AIR 1986 SC 3.

VII. Appointment and Transfer of Judges

With regard to appointment and transfer of Judges, Dr. Anand, Chief Justice of India, in his address on Golden Jubilee Celebrations of the Supreme Court of India recently on 28th January, 2000 said that the proposed constitution of National Judicial Commission is a lofty idea but it is too presumptuous to say that those who are outside judiciary and almost strangers to judicial fraternity would be in a better position to participate in the selection of the Judges. In Special Reference No. 1 of 1998 decided by the Constitutional Bench on 28th October, 1998,[10] Dr. Anand felt that there was no need for National Judicial Commission. The Apex Court observed that in such matters, merit should be the predominant consideration though inter-seniority amongst Judges in their High Court and their combined seniority on all India basis should be given due weight but cogent or good reasons should be recorded far recommending person of outstanding merit regardless of his lower seniority. Expressions "strong cogent reasons" and "legitimate expectation" used in *Second Judges* case[11] were also explained besides scope of judicial review of the appointment or recommended appointment was also stated and according to it, recommendations made by Chief Justice of India without complying with the norms and requirements of consultation process, were not binding on Government of India. The majority view in the *Second Judges* case is that in the matter of appointments to the Supreme Court and the High Courts, the opinion of the Chief Justice of India has primacy and the opinion of the Chief Justice of India is "reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation". It is to be formed "after taking into account the view of some other judges who are traditionally associated with this function".

This is indeed a commendable effort to ensure that outside interference muchless any pressure from any quarter should be strictly avoided and the independence of the judiciary is maintained. This proposition being an integral part of judicial reforms with a view to improve over all functioning of judicial system in the country that too within the framework of our Constitution without distorting its basic structure as propounded in *Keshavanand Bharati's* case.

VIII. Role of Legal Education

Even though the Constitution provides that every citizen should cultivate a scientific temper, the fact is that no effort is made by the law makers to educate the masses about the need for it. We attained freedom after a great

10. 1998 (7) SCC 739.
11. 1993(4) SCC 441.

struggle, but can India be said to be free when millions of her people are groping in the darkness of ignorance? The basic infrastructure of legal education in Rajasthan being imparted by the Universities deserves to be given utmost priority for the upliftment and in-order to maintain good academic standard of the Bar, the State must ensure adequate funds for such facilities. With proper coordination between Bar Council of Rajasthan with State Government and Bar Council of India as well of the Universities imparting legal education in the State, it can ameliorate cause of legal education so that better talented persons are produced in making judicial system more meaningful and effective.

IX. Public Interest Litigation

Role of public interest litigation is also of great significance towards judicial reforms. Proceedings initiated by way of PIL by public spirited citizens are intended to vindicate and effectuate interest of public at large by prevention of violation and rights constitutional or statutory for the benefit of sizeable segments of the society which owing to poverty, ignorance, social and economic disadvantages cannot themselves assert and quite often not even aware of those rights. The technique of PIL serves to provide an effective remedy to enforce these group rights and interests, as rightly said in *Sheela Barse* v. *Union of India*.[12]

In *Bandhua Mukti Morcha* v. *Union of India*[13] the Apex Court observed thus :

> It is quite obvious, therefore, that in a public interest litigation the petitioner and the State are not supposed to be pitted against each other, there is no question of one party claiming or asking for relief against the other and the Court deciding between them. Public interest litigation is a co-operative litigation in which the petitioner, the State or public authority and the Court are to be co-operative with one another in ensuring that the constitutional obligation towards those who cannot resort to the Courts to protect their constitutional or legal rights is fulfilled. In such a situation the concept of cause of action evolved in the background of private law and adversary procedure is out of place. The only question that can arise is whether the prayers in the petition, if granted, will ensure such constitutional or legal rights.

Public interest litigation should be used very sparingly in specially deserving cases and should be strictly confined to promoting public interest

12. AIR 1988 SC 2211.
13. AIR 1984 SC 802.

which mandates that violation of legal or constitutional rights involving large number of persons, poor, downtrodden ignorant, socially or economically disadvantaged citizen should not go unredressed. The Court should not hesitate in taking cognizance of PIL matters when there are complaints from any segment of the society which is shocking to the judicial conscience. We must remember that "the PIL is *pro bono publico*" and should not smack of any ulterior motive and no person has right to achieve any ulterior purpose through such litigation.

In *S.P. Gupta* v. *Union of India*[14], the Apex Court has cautioned citizens by observing that the Courts must be careful that the members of the public who approach the Court are acting bonafide and not in personal garb of private profit or political motivation or other oblique consideration and must not allow its process to be abused. Similar view has been echoed in the case of *Kazi Landup Dorji* v. *Central Bureau of Investigation*.[15] Thus, the rule of law requires to observe certain safeguards which are very vital in the context of PIL with a view to ensure that genuine grievances do not go unredressed while no individual should be permitted to make PIL as a private tool to vindicate his own vested interests.

X. Constitutional Reforms

The proper functioning of democracy to which this country is committed depends on the rule of law which forms the basis of the institutions and depends upon the position accorded to the Supreme Court and the High Courts in the constitutional structure and their relations with other organs of Government. It is well said that a nation that does not know how to respect the rule of law and the judiciary as its final interpreter is a nation that is not fit for the democratic way of life. As was said by Viscount Sankey, "Amid the cross currents and shifting of sands of public life, the Law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice".[16]

Recently there has been talk in higher echelons of the Government regarding setting up a panel to review the Constitution. The decision to set up a panel under the Chairmanship of Mr. Justice M.N. Venkatachaliah has been taken by the Government. His Excellency the President of India Shri K.R. Narayanan has expressed as to review of the Constitution in his speech at the function in the central hall of Parliament on January 27, 2000, to commemorate the Golden Jubilee of the republic that "the Constitution has not failed us, we failed the Constitution".

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14. AIR 1982 SC 149.
15. 1994 Supp (2) SCC 116.
16. Fourteenth Report Vol. II. Law Commission of India at 671.

Apprehension has been expressed by certain segments of the society that the pronouncements made by the Government are full of ambivalence and, therefore, rouse a lot of suspicion. It is more so in case of proposal to set up a commitee for the experts to review the entire Constitution. Shri K.R. Narayanan, the President of India, has made distinction between "amending Constitution" and subjecting it to comprehensive review. In order to allay the doubts and fears in the minds of critics, the Prime Minister in his speech on January 27, 2000, gave an assurance that the basic structure of the Constitution would not be altered, while thrust of the President of India was that the structure of parliamentary democracy has stood the test of time because it accepted the primacy of collective accountability to Parliament over stability, whereas in a presidential system, the stress is on stability with accountability or responsibility taking a backseat.

XI. Conclusions

Be that as it may, if any step is envisaged to transform system of parliamentary democracy to presidential system, we should not forget historical experience of other countries across the continent particularly Africa, Latin America and the Asia where installation of the presidential system had led to some form of authoritarian or dictatorial rule, as has been rightly said by Shri Madhu Dandavate.[17]

Recently, a Commission has been set up headed by Mr. Justice M.N. Venkatachalliah, former Chief Justice of India and Chairman of Human Rights Commission. The Commission shall examine in the light of the exeprience of the past 50 years, as to how far the existing provisions of the Constitution are capable of responding to the needs of efficient, smooth and effective system of goverance and socio-economic development of modern India and to recommend changes, if any, that are required to be made in the Constitution within the framework of parliamentary democracy without interfering with the basic structrue or basic features of the Constitution.

Eminent jurist Shri Nani A. Palkhivala, in his treatise, "We, the Nation — the Lost Decades", has expressed very significantly that in the past 50 years, under the garb of constitutional reforms, the Constitution has been defaced and defiled. This fact should not be overlooked in the proposed exercise by the panel on Constitution review. Doubtless, the law is imperfect, and it would be imperfect even if it were made by a committee of archangels. The Court is no longer looked upon as a cathedral but as a casino.

17. The Times of India, February 11, 2000.