

INDIAN JUDICIARY TOWARDS 21ST CENTURY

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“True administration of justice is the finest pillar of good Government.”

— George Washington

Indian Constitution is the best humanist and political document that India has. It is the product of a few best legal brains, eminent diplomats, true patriots and experienced politicians of India. It is a growing document and its provisions can never remain static. The court's endeavour should be to interpret its phraseology broadly so that it may be able to meet the requirements of an everchanging society. It may be permissible to give an enlarged or expanded meaning to the phraseology used by the Constitution-makers to mould the provisions to serve the needs of the society. It may even be permissible in certain extreme situations to stretch the meaning and, if necessary, to break it or, in the guise of interpretation, to replace the provisions or to re-write them.

I. JUDICIARY

The judiciary is one of the three basic organs of the State — the other two being the legislature and the executive. It has a vital role in the functioning of the State, particularly in a democracy based on rule of law. Since times immemorial, law and judiciary have played a vital role in Indian polity. The Constitution accords a place of pride to the judiciary by conferring the power of judicial review of legislative and administrative action and entrusting it with the task of enforcement of the fundamental rights guaranteed under the Constitution.

In a democratic polity, the supreme power of the State is shared among the three principal organs *i.e.* constitutional functionaries, namely the legislature, the executive and the judiciary. Each of the functionaries is independent and supreme within its allotted sphere and none is superior to the other. Justice has to be administered through the courts and such administration would relate to social, economic and political aspects of justice

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as stipulated in the Preamble of the Constitution. The judiciary, therefore, becomes the most prominent and outstanding wing of the constitutional system for fulfilling the mandate of the Constitution. The judiciary has to take up a positive and creative function in securing socio-economic justice to the people.

The constitutional task assigned to the judiciary is in no way less than that of other functionaries i.e. legislature and executive. Indeed, it is the role of the judiciary in carrying out the constitutional message, and it is its responsibility to keep a vigilant watch over the functioning of democracy in accordance with the dictates, directives and imperative commands of the Constitution by checking excessive authority of other constitutional functionaries beyond the ken of the Constitution. In that sense, the judiciary has to act as a sentinel on the *qui vive*.

The Constitution has generally provided for a single integrated system of courts to administer both union and state laws. At the apex of the entire judicial system exists Supreme Court of India with a High Court of each state or group of states, and under High Courts, there is a hierarchy of subordinate courts. There is generally separation of judiciary from executive. Panchayat courts also function in some states under various names like *Nyaya Panchayat*, *Panchayat Adalat*, *Gram Kachheri*, etc. to decide civil and criminal disputes of petty and local nature. Different state laws provide for different kinds of jurisdiction courts.

Each state is divided into judicial districts presided over by a District and Sessions Judge. The District and Sessions Court is the principal civil court of original jurisdiction. All offences including those punishable with death are tried in such a court. Below District and Session Courts, there are courts of civil jurisdiction, known in different states as munsifs, sub-judges, civil judges, and the like. Similarly, criminal judiciary comprises of chief judicial magistrate and judicial magistrates of first and second class.

II. JUDICIAL INDEPENDENCE

The concept of justice is based on the judicial independence. Unless the judges are independent and impartial, people will have no faith in the administration of justice. In the context of Indian judiciary, the independence means and is confined to post-appointment i.e. in service — independence only. It does not include pre-appointment or post-retirement independence.

Thus, Judicial independence implies only partial independence, not full independence, 'practical' independence not ideal independence, created, crippled or legal independence, not complete or natural independence, make-believe or assured independence, not real independence, in true sense.

1. Establishment of Courts

The Constitution provides that the Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may with the approval of the President from time to time, appoint. Since the commencement of the Constitution, the Supreme Court sits in Delhi only.

As regard High Courts' seats, the Constitution is silent. But, mostly they sit in the capitals of their States, with a bench(s) at other place. Every District in every State has a District and Sessions Court headed by District and Sessions Judge.

The Supreme Court and High Courts are Courts of record. They have all the powers of a court of record, including the power to punish for contempt of the Supreme Court and respective High Court, as the case may be.

2. Composition

The Supreme Court and every High Court consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint. Similarly, in the subordinate judiciary, every District Court in every State consists of a District & Sessions Judge and such other Additional District & Sessions Judges, and subordinate judges as the Governor of the concerned State may from time to time deem it necessary to appoint. Since the year 1986, the Supreme Court consists of 25 judges, besides Chief Justice of India. Initially, in 1950, the Court consisted of seven judges, which number was raised to ten in 1956, 13 in 1960 and 17 in 1981. Excepting three advocates, only judges of High Court have been appointed as judges of the Supreme Court.

Every High Court has sanctioned judges strength. It has been increased from time to time. As on 20th June, 1998 the total sanctioned judges' strength of various High Courts was 581. As on 1.5.1997, in 18 High Courts, there were as many as 503 judges, including Chief Justices. Among these judges the representation of Bar judges (directly recruited from the Bar) and Service judges (promoted from service) was thus : Chief Justices 18, Bar judges 16, Services judges 2; Bar judges 313 (62.33%), Service judges 190 (37.67%); senior most (two) puine judges - Bar judges 32, Service judges 4. Of the 190 service judges in various High Courts, direct recruits to Higher Judicial Service and promotees from civil judges numbered 66 and 124, respectively.

When office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the

other judge of the court as the President may appoint for the purpose.¹ Also, there are provisions for appointment of retired judges, and attendance of retired judges at sittings of the Supreme Court.²

3. *Appointment of Judges*

The Constitution does not lay down qualifications or procedure for appointment of Chief Justice of India or Chief Justice of High Court, but it does lay down qualifications for appointment of a judge of the Supreme Court and High Court. Thus for Supreme Court, he should be a citizen of India and should have experience of (a) five years as a judge of a High Court or of two or more such courts in succession; or (b) should have practiced as an advocate for ten years in a High Court or in two or more such courts in succession; or (c) he is in the opinion of the President, a distinguished jurist. For High Court, he should be a citizen of India and should have experience of holding judicial office in territory of India for at least ten years, practising law as an advocate of High Court. For Higher Judicial Service, the eligibility criteria is Indian citizenship and seven years' standing at Bar. For subordinate judiciary, the eligibility criteria is Indian citizenship and three year's standing at Bar.

An advocate of High Court has been defined under the Advocates Act, 1969. According to it, an 'advocate of High Court' is a person enrolled with the Bar Council of India as an advocate of a High Court itself or in courts subordinate to it or both, irrespective of type, place or standing of practice. Appointment as judge of Supreme Court or High Court is made by the President on the recommendation of the Chief Justice of India and advice of the Union Cabinet. Appointment as member of subordinate judiciary is made by the head of the respective State Government on the recommendation of the High Court or State Public Service Commission.

In the case of appointment of a judge other than the Chief Justice, the Chief Justice of India is always consulted.

4. *Jurisdiction*

Jurisdiction of the Supreme Court the High Courts are described in the Constitution, and those of subordinate judiciary in the Code of Civil Procedure and Code of Criminal Procedure in general and in specific statute in particular. Indian Supreme Court has widest possible jurisdiction of not less than seven kinds, each having seasky scope. These may broadly be classified thus : (1) Original jurisdiction, (2) Exclusive jurisdiction, (3) Appellate jurisdiction —

1. Article 126 of the CONSTITUTION OF INDIA.

2. Articles 127 and 128 of the CONSTITUTION OF INDIA.

(a) Civil (b) Criminal (c) Certificate jurisdiction, (4) Special Leave jurisdiction, (5) Writ jurisdiction, (6) Transfer of case jurisdiction, (7) Review jurisdiction and (8) Advisory jurisdiction. Besides, the Supreme Court has created or carved for itself and High Courts one more jurisdiction in the name of public interest or public welfare. It is named as public interest jurisdiction. It may be utilized by (1) public spirited persons and (2) Supreme Court or High Court at its own i.e. *suo moto*. Public spirited persons may be any member of the public or professional. The jurisdiction of every High Court has pattern almost similar to that of the Supreme Court, except in one respect i.e. it is confined to the concerned state.

5. *Transfer of Judges*

The President may transfer a judge from one High Court to any other High Court. Before doing so, his consultation with the Chief Justice of India is necessary. High Court has power to transfer any member of subordinate judiciary within the state.

A joint conference of Chief Justices and Chief Ministers endorsed the policy of having one-third of the judges from outside in each court in December, 1993.

Transfer is effected on two grounds — administrative ground and as a matter of policy. As on 1.5.1997, transferee judges in various High Courts totalled 127, on administrative grounds - 39 (Bar judges 32, and Service judges 7) and as a matter of policy 88 (Bar judges 40, and Service judges 48).

6. *Resignation/Retirement/Removal*

A judge of the Supreme Court, (as also Chief Justice of India) may resign from his office. He may do so by writing under his hand addressing to the President. So is the case with a judge of High Court, including Chief Justice, and any member of subordinate judiciary in any State.

Different ages have been fixed in the Constitution for the retirement of judges of the Supreme Court and High Courts. Thus, in case of a Supreme Court judge the retirement age is 65 whereas in case of a High Court judge, it is 62 years.

A judge of the Supreme Court or High Court cannot be removed from his office except by (1) an order of the President, passed (2) after an address by each House of the Parliament, (3) supported by a majority of the total membership of that House and (4) by a majority of not less than two-third of the members of that House present and (5) voting has been presented to the president in the same session for such removal on the ground of

proved misbehaviour or incapacity. Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a judge. Since establishment of the Supreme Court and High Courts, not even a single judge has been 'impeached'. Only one unsuccessful attempt has been made in the case of a judge of the Supreme Court.

7. Post Retirement/Resignation

No person who has held office as a judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India. Similarly, no person who has held office as a permanent judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts. Thus, the restriction is applicable to judges who have retired, resigned or even removed. However, different persons after holding office as a judge of the Supreme Court or High Court have engaged themselves in different occupations in conformity with the restrictions imposed on them.

8. Code of Conduct

All the judges of the Supreme Court and High Courts have unanimously decided on May 7, 1997 to evolve mechanism to ensure proper conduct by the higher judiciary. The then Union Minister of Law and Justice, Mr. Ram Jethmalani had stressed the need to 'legalise' the code of conduct. However, there seems to be strong opposition to the legalisation since.

III. LAW AND JUSTICE

Are 'law and justice' two words have the same meaning - two bodies and one soul? Or, are these two world with two meanings - two bodies with two souls? Or, they are only one word with only one meaning? Answers to these questions may vary from person to person, time to time and context to context.

In India, law and justice are usually understood to be two words with one meaning, one coin with two sides. Indian Constitution is what the judges say it is. In it if 'law' is used little less than five hundred and fifty times, (538 times to be exact) in more than one forms and contexts, mainly 'law' (450 times) and 'law' (50 times), 'justice' is used rarely, hardly eight times, including one in the Preamble 'justice, social, economic and political'. 'Justice' has been used six times, and 'civil and criminal justice' two times. Even in the provisions pertaining to union judiciary and state judiciary, the use of 'law' is preferred as against 'justice'.

The Union Ministry of Law, Justice and Company Affairs (Department of Legal Affairs, Legislative Department and Department of Justice) has been assigned a role in assisting the process of orderly change directed towards realisation of the objectives set out in the Constitution. For the purpose, it has various Departments, namely : (1) Department of Legal Affairs, (2) Legislative Department and (3) Department of Justice. The Department of Legal Affairs advises the Government on legal issues, examines legislative proposals, conducts the government litigation work, regulates the legal profession, organises legal aid to the poor etc. The Legislative Department mainly deals with the work of drafting government bills and subordinate legislation sponsored by the various Central Ministers. The duties of the Department of Justice include the administration of justice and the processing of appointment of Judges to the Supreme Court and High Courts. Thus, the Union Government does draw a line of distinction between 'law' and 'Justice', but it is very thin and dim. It is motivated by convenience only.

Initially, the Departments of Legal Affairs and Justice were administered by the Ministry of Law and Justice. Subsequently, another department — Company Affairs — was added under the Ministry of Law and Justice. Accordingly, its name was changed as Ministry of Law, Justice and Company Affairs. Justice Department was transferred to Home Ministry without making any change in the name of Ministry of Law and Justice or Law, Justice and Company Affairs by making the Home Secretary as ex-officio Secretary of the Department of Justice. In 1996, the Department of Company Affairs was transferred to Ministry of Finance. Thus, there are three Departments of Legal Affairs, Justice and Company Affairs under three different Ministries of 'Law and Justice', 'Home Affairs' and 'Finance and Company Affairs'.

Placement of words too seems to make to difference for the Union Government. In its yearly publication 'India — 1994' 'Justice and Law' has been preferred as against 'Law and Justice', while naming the concerned ministry, 'Law and Justice' has been preferred as against 'Justice and Law'. Similarly, in the list of Chief Justices of India, there is no mention of 'Justice' before the names of Chief Justices of India, including the Chief Justice of India in chair. Mohammad Hidayatullah does provide an exception. Before his name 'Justice' is used, even after he ceased to be Chief Justice of India and became Vice President of India (1979-1984) as also while he was President of India (20 July, 1969 to 21 August, 1969 Acting).

Hon'ble members of the Union Judiciary, particularly State Judiciary, it appears, are very serious about the usage of 'Justice' with their names, some of them even after retirement, some until (and, may be, a few even

after) death. Unlike the usage of ranks by defence personnel, in service and after retirement, for which there are written rules, there are neither rules nor norms guiding the usage of justice during service or post-retirement period. Consequently, 'Justice' has been and is still under use in more than one form — (in service) — Hon'ble Mr. Justice', 'Hon'ble Ms. Justice', 'Hon'ble Mrs. Justice', 'Hon'ble Mr. Chief Justice', 'Hon'ble Dr. Justice'; (after retirement) — 'Hon'ble Mr. Justice', 'Justice', 'Mr. Justice'. After retirement, some judges have preferred to affix 'Retd.' 'Former' or 'Ex.' In Telephone Directory (1994) of the capital of the country, before the names of three former Chief Justices of India, 'Justice' has been added in different forms - 'Justice', 'Mr. Justice' and 'Chief Justice'.

'Shah' of Justice, J.C. Shah, former Chief Justice of India, was an exception; he had totally discarded the use of 'Justice' with his name immediately after his retirement as Chief Justice of India. Not only he himself discarded 'Justice' from his name, he disallowed and discouraged others also to use it with his name. So much so, he instructed the telephone department in Bombay not to use 'Justice' with his name in the telephone directory. His contention in support of his thinking could well be found in his own short and simple answer : "I was Justice, now I am no more. When I have ceased to hold the chair of Justice, I have no right to make use of it."

In the judicial pronouncements too, there are instances of 'Justice' winning over law, or former getting sacrificed at the alter of the latter and vice versa although their number may not be more than very many. Likewise, in judicial appointments, as against 'Justice' 'Law' seems to be main guide, if not only guide. There appears to be a big chasm between the 'best' choice of the Bench from the Bar and the 'best' choice of the Bar and Society at large. Lately, average 'best' choice by the concerned constitutional authorities from the Bar for appointment as judge of High Court or trial court is whispered to be 'worst' choice by the Bar and the society at large in general, and quite a few in particular. Service of 'self' alias 'individual' rather the 'system' or society alias 'institution' or India seems to be primary requisite qualification for the high judicial appointments.

Broadly speaking, there are only two types of law — man made law and nature-tailored-embroidered law. The former is known as law and the latter justice. There is sea-sky difference between the two. Law is the earth and justice is the sky; law is private secret and justice is open secret; law is truth contained in books and justice is truth scattered in open. Law is concerned with man made legislations, rules sub rules, books, reports, judicial and executive decisions, justice is related to the rule of nature; law is road or footpath and justice is goal; law may be dependent on nature but the nature is not dependant on law; law is slave chained by so many visible and

invisible considerations but the nature is absolutely independent and impartial; law is man's bicycle, bullock cart, bus, motor car or rail but justice is nature's aeroplane, helicopter or rocket.

The parameter of law is distinct from justice. Our society has learnt to remain within the parameter of law. In a way, the daily adherence to law is being done since time immemorial but to follow justice has always remained a casualty. A man remains in the parameter of law but sees injustice and tolerates injustice. He does not become impatient even on the death of justice whereas he should have become intolerant at the very sight of injustice.

Law is a negative side. The positive side is justice which demands a will power. Only justice should be done and injustice should not be manifested. Till we are not determined to this tenet, there is no justice, no balance and no religion in the society. Only law is there, only organisation is there to bind us.

In any democracy a question should be echoed within each citizen, but this question should emerge from the polity of that society as well. The question to be asked can be addressed plainly as to what is the difference between law and justice? Law should be a crutch to achieve individual and social justice. The justification of a government rests on bestowing justice to individual as well as to whole society.

In policy who perceive that law and justice are interlinked and those who believe that ends and means should co-exist have become rare. The people will smell the fragrance of 19th century's liberation thoughts when one speaks of law and justice. Now-a-days the burden of law is increasing but the justice is decreasing proportionately. Nineteenth century's maxim that Justice delayed is justice denied if extended today it will become clear that the governments and politicians are against it.

Media is replete with the views of bureaucrats, politicians and legal pundits that they are worried about the delay in justice in the courts. This anxiety is not for justice but for quick decisions. The question that why justice is not administered fast has not been addressed to. It was rephrased that why decisions are being delayed. The early decision no doubt solves some problems.

According to late Sachidanand Vatsayan 'Agegy', today, the Government and judicial concern is devoid of law and justice. Law has merged with establishment. Law and justice was the twin of nineteenth century's liberal relations. Law and order is twentieth century's ruling concern. Today's lawyer forgets in interpreting the niceties of law that in legislating it was thought that individual and society will get justice from it. It is not sufficient

that order will be maintained or work will be eased. Individualised society may not be based on justice.

Now only 'Mr. Justice' is brought before the courts again and again. If justice itself is the accused then how can one hope for justice? Our people should be taught that we have not got free society by winning freedom. For free society we need the bed-rock of social justice. We have to change the rotten social system. And this change, the polity will not initiate. The people's will power has to be ignited failing which the justice will be a pipe-dream.