

The Judiciary in India

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Mamta Kachwaha



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Determinants of its Independence
and Impartiality

Mamta Kachwaha

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For the sake of convenience throughout the report masculine genre has been used and the same should be taken to include the feminine and neutral genders, wherever applicable.

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Preface

The Indian judiciary has been widely praised for its independence. The firm stance India's courts have taken in upholding the values enshrined in its detailed and eloquent Constitution is universally recognised. The manner in which the Supreme Court of India stood up to the Executive during the political corruption cases that engulfed India during the last few years, is simply exemplary. It is also exemplary how it seriously took up the concerns of the underprivileged. Operating in one of the world's most populous nations, it made serious efforts to turn access to justice into a reality and provide individuals with the tools to exercise their rights more effectively. Early on, judges in India understood that they should not take a textual approach to law; rather they should think of its impact on individuals.

These virtues have not been absolute however. The political conflicts in certain regions, notably Kashmir and Punjab, have placed the judiciary in these states in a controversial position. Many doubt that the structures of justice created for such territories can achieve justice. The popularity of the courts in the stable regions has also been affected by problems in delay and backlog. The work conditions of judges are not always adequate. These problems have had an impact on how the public perceives the judiciary and relate to it.

The Centre for the Independence of Judges and Lawyers (CIIL) is pleased to co-publish with PIOOM this study on the independence of the judiciary in India. Careful and well-researched, the study outlines not only the positive angles, but also highlights the areas where attention and improvement are needed. The CIIL is pleased to cooperate with PIOOM on this project. The project, entitled *Determinants of the Independence and Impartiality of the Judiciary*, involved country research on four countries: Burkina Faso, the Philippines, Sri Lanka and India. The reports on the Philippines and Burkina Faso were already published and we are pleased that the report on India is now released.

The role of the Geneva-based CIIL has been in providing advice and guidance on the international legal aspects of the study. The CIIL also submitted the work to the scrutiny of a highly qualified legal expert in India. We are pleased that it was endorsed.

The CIIL defines questions of judicial independence and the role of lawyers in legal terms. It looks at these values through the prism of the 1985 UN Basic Principles on the Independence of the Judiciary and the 1990 UN Basic Principles on the Role of Lawyers. PIOOM insisted on adding an anthropological and sociological approach. We hope the reader will agree that this interdisciplinary approach adds value to the understanding of this topic.

Mona Rishmawi
CIIL Director
June 1998

Foreword

The relation of the judiciary to human rights is fundamental. The respect for the various human rights and fundamental freedoms that are specified in authoritative international texts, depends to a significant degree on the quality of the judiciary and the judicial process. The Universal Declaration of Human Rights emphasizes that every human being has the right to 'equality before the law', 'presumption of innocence' and 'the right to a fair and public hearing by a competent, independent and impartial tribunal established by law'.¹ These rights and freedoms are also guaranteed and further specified by the International Covenant on Civil and Political Rights (ICCPR), in particular through the Covenant's important additional underlining of the right of everyone 'to be tried without undue delay'.² In other words, according to authoritative instructive instruments from United Nations bodies, the protection of human rights is closely linked to the functioning of a fair, legitimate and effective justice system. A competent, independent and impartial judiciary forms a central aspect of such a fair and effective legal system.

The relevance of an independent, impartial and competent judiciary, however, is not restricted to the specific rights mentioned above. The role of the judiciary is important in relation to all human rights, since the judiciary is ultimately the instrument from which human rights victims can seek redress for injustices they have suffered, particularly if other channels of seeking such redress have failed. This importance is indicated by Article 8 of the Universal Declaration and Article 2.3 of the ICCPR. Both of these imply that factors influencing the fairness and effectiveness of the justice system — and particularly the independence, impartiality and competence of judges — also significantly influence respect for, and promotion of, human rights in a country.

The importance of an independent, impartial and competent judiciary has been underlined by various authoritative texts from UN bodies. The most important of these are the United Nations Basic Principles on the Independence of the Judiciary, which were endorsed by the UN General Assembly in 1985, and the Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, which were endorsed by the General Assembly in 1989.³

¹ Articles 7, 10 and 11, of the Universal Declaration of Human Rights are particularly important in this respect.

² Article 14 of the International Covenant on Civil and Political Rights is particularly relevant.

³ The Basic Principles were adopted by the Seventh UN Congress on the Prevention of Crime and Torture in Milan, Italy, held from 26 August to 6 September 1985, and endorsed by the General Assembly on 29 November 1985 (A/RES/40/32, 29 November 1985). Later these principles were specifically 'welcomed' by the General Assembly, which invited governments 'to respect them and to take them into account within the framework of their national legislation and practice' (A/RES/40/146, 13 December 1985). The Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary were adopted by the UN Economic and Social Council in Resolution 1989/60 and endorsed by the General Assembly in Resolution 44/162 of 15 December 1989.

Though an independent and impartial functioning of the judiciary forms a central aspect of any fair and effective justice system, other actors are nevertheless also important in determining the quality of the system as a whole. The importance of lawyers has been explicitly recognized in the United Nations Basic Principles on the Role of Lawyers, which were 'welcomed' by the General Assembly in 1990.⁴ Another important text concerning the role of both judges and lawyers is the Draft Universal Declaration on the Independence of Justice, which is also referred to as the Singhvi Declaration.⁵ Nevertheless, since the Indian Constitution expresses most of the basic values that are part of these authoritative international texts, the Indian Constitution will serve as the dominant explicit evaluative standard of this study.

Though the independence and impartiality of judges and the independence of lawyers form central aspects of this study, it is not restricted to these issues. The scope of this study also includes important issues of social justice, such as backlogs and court delay; access to justice and the courts; human rights and the role of the judiciary in giving redress to victims.

The objective of the present study is to analyze the factors that influenced the quality of the justice system in India and respect for human rights during the last two decades. This study on India has been written within the framework of the project *Determinants of the Independence and Impartiality of the Judiciary*, which also involved the conduct of similar research in India, Sri Lanka and Burkina Faso (West Africa). The overall objective of this wider project has been to generate sound scientific knowledge concerning the factors that affect the functioning of judicial systems and to articulate recommendations for their improvement. The present study is particularly directed at policy makers in the legal system in the Philippines, and at academic institutions, legal scholars and practitioners of law in general. The project uses the authoritative international texts on human rights and on the independence of judges and lawyers mentioned earlier in this preface as the standard against which situations in the countries being researched are

⁴ The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which was held in Havana, Cuba, from 27 August to 7 September 1990, adopted these principles by consensus. In its resolution 45/121 of 14 December 1990, the General Assembly 'welcomed' the instruments adopted by the Congress and invited 'Governments to be guided by them in the formulation of appropriate legislation and policy directives and to make efforts to implement the principles contained therein ... in accordance with the economic, social, legal, cultural and political circumstances of each country'. In resolution 45/166 of December 1990, the General Assembly welcomed the Basic Principles in particular, inviting Governments 'to respect them and to take them into account within the framework of their national legislation and practice'.

⁵ Through its Decision 1980/124, the UN Economic and Social Council authorised the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to entrust Dr. L.M. Singhvi (India) with the preparation of a report on the independence and impartiality of the judiciary, jurors, assessors, and the independence of lawyers. By Resolution 1989/32 the UN Commission on Human Rights, invited governments to take into account the principles set forth in Dr. Singhvi's final Draft Declaration in implementing the UN Basic Principles on the Independence of the Judiciary.

measured.⁶ The project *Determinants of the Independence and Impartiality of the Judiciary* is coordinated by the Interdisciplinary Research Program on Root Causes of Human Rights Violations (PIOOM, an independent organization that conducts and coordinates research into the root causes of human rights violations). PIOOM is presently connected to the Faculty of Social Science of the national university of Leiden, The Netherlands. The project is solely funded by the Directorate-General for Development Cooperation of the Dutch Foreign Ministry. Ms. Mona Rishmawi, Director of the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists in Geneva, has acted as special consultant to the project.

The study has been written by Atty. Ms. Mamta Kachwaha.

Leiden (The Netherlands), 15 May 1998

Dr. Jan Willem A. Bakker

Project Coordinator 'Determinants of the Independence and Impartiality of the Judiciary'

⁶ In this context I have relied significantly on the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists Bulletin No 25-26, a special issue devoted to *The Independence of Judges and Lawyers: A Compilation of International Standards* (Geneva, April-October 1990).

Chapter 1

The Indian Polity and Historical Perspective

India is so large and diverse that it is often said to be a continent, and not a country. It is the second largest country in the world in terms of population. About one out of every six people in the world live in India. India is a land of enormous diversities. The diversities are in race, customs, language and religion. The country includes a desert, jungles and one of the world's rainiest areas. India has broad plains, mighty rivers, tropical low lands, and some of the tallest mountains of the world. In order to appreciate India's Constitution and judicial system, a brief survey of India — its land, geography, people, history and society is relevant.

Geographical Context

India occupies a strategic position in Asia looking in the west across the sea to Arabia and Africa and in the East to Burma, Malaysia and the Indonesia Archipelago. Geographically the Himalayan ranges keep India apart from the rest of Asia. To the south lies the Indian Ocean. India shares its political borders with Pakistan, Afghanistan on the west and Bangladesh and Burma on the east. The northern boundary is made up of Sun-Kyann provinces of China, Tibet, Nepal and Bhutan. India has 7 major physiological regions. There are about sixty socio-cultural sub-regions marked for their distinct internal homogeneity and sub-national identity.

The Republic of India encompasses 25 states and 7 union territories including the Capital Delhi. There are 439 administrative districts. Almost half, i.e. 12 of the states in India, are larger in population and larger in territory compared to about 100 nations of the world. For instance, the state of Uttar Pradesh has a population of 112 million; United Germany (the most populous state in Western Europe) has a population of around 77.5 million.

People

About 72% of India's population lives in rural areas (580,000 villages) and 28% of the population lives in urban areas. India has about 4000 cities and towns. Only about 225 cities have a population of over 100,000. More than 20 cities have a population of more than one million.¹

As per the 1990-91 census, India has a population of 846.3 million² (439.2 million males and 407.1 million females). Since early 18th century India's population has grown by several million a year. During the 1980s and 1990s the population increased by as much as 18 million per year. This has led to increased poverty and has affected the overall development of the country.

Languages

The people of India speak 15 major languages and more than 1000 minor languages and dialects, although the number of officially recognised languages is 18. The major languages of India belong to two language families; Indo-European and Dravidian. Indo-European languages are spoken by about 73% of the people, mainly in the northern and central region. These include Hindi, India's most widely spoken language and also the principal official language, which is closely related to Urdu. These languages are offshoots from Sanskrit; an ancient Indian language and one of the oldest languages of the world.

Dravidian languages are spoken by about 24% of the population, mainly in the Southern part of the country. These include Kannad, Malayalam, Tamil and Telugu.

Economy

Poverty is fairly widespread in India but a few Indians, however, have great wealth. India has a large economy in terms of Gross National Product (GNP), but because of its large population, India has one of the lowest per capita GNP. India is considered a developing nation because of its low per capita GNP. Agriculture provides about a third of India's national income. India ranks 5th among the world's nations in total farming areas. About 60% of India's workers earn a living by farming.³

Religion

About 83% of the Indian people are Hindus and about 11% are Muslims. The next largest religious groups in order of size are Christians, Sikhs, Buddhists, Jains and Parsis. Religion plays a vital role in the Indian way of life. Religious dicta governs the people's clothing, food, marriage and property rights.

India – a Classical Plural Society

Thus the mosaic of Indian federalism is composed of segments constituting language and dialect groups, religious communities, denomination sects, caste and sub-castes, regional and sub-regional configuration, ethnic formations and cultural patterns. While recognising the fact that India is a historically evolved unified civilisation, it is necessary to remember that in the making of such a civilisation many strands of races, languages, cultures and religious communities have mingled to render it the hallmark of an authentic and classic plural society.

India's Constitution has been drafted within its social, economic, political and religious contexts, referred to above.

Further, India's Constitution was born out its freedom struggle. It is hence essentially linked to leaders of the freedom movement and their social economic philosophy. The following paragraphs set out in brief India's recent history, including the national freedom movement, culminating in India's Constitution.

Historical Perspective

India is the home of one of the world's oldest and richest civilisations going back around 5000 years. For much of its history, India was not one nation politically but was divided into big and small empires with altered boundaries and dynasties from time to time. The last of these empires was the British Empire which ended in 1947. Free India emerged when it achieved independence from the British and also from the scores of Indian rulers ostensibly ruling various parts of India (but in reality were basically puppets of the British Crown).

British India

Historians regard the year 1757 as the starting point of the British empire in India. However, till 1857, the rule over India was through the East India Company. The said Company, though primarily a trading company, established towns, maintained armies, conquered huge territories, entered into alliance with Indian rulers, established courts, and to all intents and purposes was a sovereign power. After 1857, following a failed war of independence between Indian rulers and the East India Company, the rule over India was taken over by the British Crown. The period from 1858 to 1914 was the high tide of British rule in India. This period marked the introduction of railways, postal services, modern education, and many other institutions beneficial to the general public.

National Movement

The national movement or the movement for independence in the early 20th century was a part of a larger spectrum of national resurgence which covered almost all aspects of national life — religious, social, professional, cultural and economic. The leaders of the freedom movement were highly educated and aware individuals. They were exposed to the liberal democratic tradition of the western world. They sought freedom not only from British rule, but also sought to free India from a host of social evils which for centuries had oppressed its citizens and denied to them equality or other human rights.

Indian National Congress

The rise of the Indian National Movement started in the early 1880s. At first it was a moderate constitutional movement. The National Congress was founded in 1885. The birth of the Indian National Congress was an unprecedented phenomenon in the political history of India. It marked the entry of the new educated middle class into national politics.

In its early days the Congress confined itself to debates, during which political issues were discussed. It asked the government to remedy the complaints but had no constitutional role. However, some Congress members were also members of the Legislative Assembly which advised the Viceroy and the Executive Committee on the drafting of new laws. In the 1890s, chiefly due to Bal Gangadhar Tilak, a radical politician and theocrat, the political momentum gained impetus. The demand by the Indians for power sharing convinced the British that urgent changes were needed. In 1915, Mohandas Karamchand Gandhi returned from South Africa and joined the Indian National Congress.

Gandhi's political philosophy was revolutionary. It was based on the idea of non-violence and mass non-cooperation against the British rule. Between 1920-21, Gandhi launched *Satyagraha*, the peaceful demonstration and non-cooperation movement. This turned the independence movement into a popular campaign, with the involvement of the common man. In the words of Chief Justice (Retd) P.N. Bhagwati:⁴

With the advent of Mahatma Gandhi on the political scene in India in the second decade of the twentieth century a new Chapter began in the history of India. No one understood more deeply than him the mute and dumb agony of the people of this country. He alone understood the value realities of Indian life. He had always the little Indian in mind and constantly strove to upbring him from the quagmires of ignorance, social taboo and economic stagnation.

The Government of India Act

In 1935, the British Parliament passed the Government of India Act. This law created a new Constitution in which Indians were to be elected to local assemblies but the central government remained under the control of the Viceroy and the Executive Council which could veto any legislation. During World War II Britain tried to reach an agreement with the Indian leaders on independence. All Indian political groups however, rejected the plan. When negotiations began between the British and the Indian leaders, they were complicated by a demand by some Muslims for a separate Muslim state in India.

The last British Viceroy, Lord Mountbatten and the Indian leaders realised that there was no way out from the Hindu-Muslim deadlock. Mahatma Gandhi finally and most reluctantly relented. India achieved independence but was divided into two nations — India and Pakistan.

India's Independence and Its New Constitution

On 15th August 1947, India achieved independence from British rule. In a famous speech before the Constituent Assembly, India's first Prime Minister, Jawaharlal Nehru, addressed the nation as follows:

Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially...

The vision of the leaders of India could not be realised until India achieved its social revolution as well. For this the vehicle was the Constitution of India.

Soon after India achieved independence, the Constituent Assembly (elected prior to independence) began work in earnest on the drafting of India's new Constitution. The effort required can be well gauged from the fact that India's Constitution was finally adopted on 26th January 1950. The Indian Constitution enshrines the rule of law, and socio-economic justice for all its people; not only by granting and safeguarding for them civil and political liberties, but by mandating the state to strive, to promote the welfare of the people and secure for them a social order in which justice, social, economic and political shall inform all institutions of the national life (Part IV — Directive Principles). In the words of Granville Austin, 'The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement... The core of the commitment to the social revolution lies in parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution.'

The Fundamental Rights are set out in Part III of the Constitution under seven sub-headings as follows:

- 1) the right of equality;
- 2) the right of freedom;
- 3) the right against exploitation;
- 4) the right of freedom of religion;
- 5) cultural and educational rights;
- 6) the right to property; and
- 7) the right to Constitutional remedies.

Part IV contains the Directive Principles of State Policy. Some of these provisions by their very nature cannot be enforced by any court — but it is stated in Article 37 that the principles laid down (in part IV) ‘are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws’. The Directive Principles set out more clearly the social revolution which the Constitution aims at bringing about, including that the state shall strive to promote the welfare of the people by securing and protecting as effectively as possible a social order in which justice, social, economic and political shall inform all institutions of the national life (Article 38).

The judiciary occupies a central position in the Constitution. It is viewed not only as an institution for resolving disputes between parties but as the guardian angel of the Constitution and as a vehicle which would help bring about the social revolution which the leaders of India strived for. Hence, the extraordinary jurisdiction of the Supreme Court to issue any appropriate writ for the enforcement of any of the rights guaranteed in the chapter on fundamental rights is itself a fundamental right (Article 32 — ‘The Right To Constitutional Remedy’) — ‘indeed, the judiciary was seen as an extension of the Rights, for it was the Courts that would give the Rights force, the Judiciary was to be an arm of the social revolution upholding the equality that Indians had longed for during colonial days, but had not gained...’.⁵

The Constitution empowers the High Courts as well as the Supreme Court to review legislative as well as executive action. The Constitution enshrines provisions for safeguarding the independence and impartiality of the judiciary which shall be dealt with in detail in the chapters which follow.

At this stage, it would be relevant to briefly review India’s judicial system prior to the Constitution. This is set out in the following section.

Historical Perspective of the Indian Judicial System

The development of the judicial system during British rule took place separately in the towns of Bombay, Madras and Calcutta. In the course of time with the formation of a common central government and a central legislative council, a uniform and well organised judicial system was established. Independent India inherited this judicial system.

Beginning with its application in the 17th Century to British subjects in small areas in certain parts of India, the common law of England with its statutory modifications and the doctrines of English Courts of Equity became part of Indian law.

The judicial system as it existed during the early British days, however, had to undergo a lot of changes. At various points the need was felt to reform the judicial system and make it better organised. A case study illustrative of the era is as follows:

In 1684 an Admiralty Court was set up in Bombay. Dr. St. John was appointed as a Judge Advocate. Dr. John once recorded evidence against the Surat Governor. The Governor asked him to desist from taking such evidence. Dr. John refused stating that he was bound by his oath of office and he could not fail to discharge his duty. The Governor apparently did not see eye-to-eye with the judge. He divested the Admiralty Court of its ordinary Civil and Criminal jurisdiction and confined it to Maritime and Mercantile Law. Ultimately, it was the executive which prevailed.

Between 1690 to 1718 the judicial administration of the East India Company in Bombay was interrupted owing to a Mughal invasion and occupation of Bombay. After an interlude of about 29 years, a new court was constituted consisting of a Chief Justice and 9 other judges out of whom 4 were to be Indians and 5 English. The Chief Justice and the other judges were members of the Bombay Council.

There was no bar for a judge interested in a case discharging his judicial functions. Judges were mainly members of the Governors Council and, therefore, involved in executive responsibilities. Some of the judges participated in the trial and also heard cases sitting in the Council. On two occasions Chief Justices were dismissed for having dissented with the views of the Governor and the Council. The system was capricious.

The Charter of 1726 and subsequently the Charter of 1753 issued by the British Crown were an important step in establishing a proper judicial system in the towns of Madras, Bombay and Calcutta (the earlier courts were set up by the East India Company). The charters made no mention, however, as to the laws to be followed. It was only stated that the court had to render decisions according to 'justice and right'. The separation of the judiciary from the executive was to a very limited extent. The system did not function smoothly because of continuous governmental interference with the independence of the court. The provision for the appointment of judges by the Governor and the Council, even from amongst the servants of the East India Company, resulted in the judiciary being subservient to the Council and therefore unable to render justice impartially, particularly in cases where the East India Company was involved. The judges did not also have adequate knowledge of laws, which they were expected to administer.

The British Parliament enacted a Regulating Act of 1773 to improve the state of affairs of the East India Company including the field of the administration of justice. The Company was made subject to the control of the British Government and Parliament. This marked the commencement of Parliamentary laws for regulating affairs of the Company which were hitherto regulated by Royal Charters. Provision was made for the establishment of a Supreme Court in Calcutta. The Supreme Court was authorised to frame rules for regulating its procedure to carry out all acts necessary to ensure the proper exercise of the powers vested in it. The Court was to consist of a Chief Justice and three Puisne Judges. The appointment was required to be made by the Crown. Judges

were to hold office at the pleasure of the Crown and the qualification required for fixed appointment was that of a barrister with at least five years standing.

The establishment of a Supreme Court in Calcutta, and subsequently in Madras and Bombay, marked an important step in the field of administration of justice. For the first time qualified judges were appointed and were to administer justice in accordance with law and the court had jurisdiction over the servants of the Company.

However, within a few years of its functioning the Supreme Court came to be disliked by various sections, though for varying reasons. The executive did not relish the interference of the Supreme Court. Though the Indians were given full protection against the acts of the Company and its servants, they also disliked it on account of oppressive powers conferred like arresting on mesne process etc.

In 1774, Warren Hastings, the Governor General of India, headed a Committee which prepared a plan for the administration of justice. This marked the beginning of a well organised judicial system with the object of ensuring a fair trial. The separation of the judiciary and executive functions was one of the important and desired reforms brought about under the plan of 1774. The revenue and civil functions were also separated. This system continued with minor modifications for the next few years.

An interesting case of the era, illustrative of the state of the judiciary, arose in connection with a Habeas Corpus writ petition for the release of a 14 year old boy, named Moro Ranganath, who was detained by his grandfather at Poona (near Bombay). The petition was opposed on the ground that the detainer and detainee were both natives residing outside the jurisdiction of the court. The Supreme Court issued the writ returnable immediately. A penalty of Rs.10,000 was fixed for failure to comply with the order. As there was no response, the court issued orders of attachment against the accused and directed the government to execute it. The government refused to execute the order on the ground that the order of the court was without jurisdiction. Justice Grant who issued the order, and who was the only judge of the court at that time, stated that the court had ceased to function and that he would perform none of the functions of a judge until the court had received an assurance that its authority would be respected and its process would be obeyed and rendered effectual by the government. The issue was referred to the Privy Council which reversed the view of the Supreme Court with regard to its jurisdiction; nonetheless, it was made clear that the government of Bombay was bound to obey the Supreme Court's order.

The system of law prevailing in India at about the beginning of the 19th century was not free from confusion. Difficulties in the way of ascertaining the procedural and substantive law not only for the uninitiated but even for the lawyers and the judges resulted in expensive and dilatory litigation. In many cases the parties went up to the Privy Council in England. In an attempt to gain clarity in the law, the Charter Act of 1833 made provisions for the establishment of an All India Legislature having legislative authority throughout the country and for the appointment of the Law Commission.

The efforts to codify the laws, however, did not achieve substantial progress as there was no sense of urgency. In 1858, the control of the East India Company was dissolved and the Government of India was taken over by the British Crown directly. In the field of codification, immediate action was taken by way of enacting the pending drafts of

three significant codes. The Code of Civil Procedure was enacted by the Indian Legislature in 1857. In 1860 came the Indian Penal Code. In 1861 the Code of Criminal Procedure was enacted. The Limitation Act of 1859 was passed immediately after the Code of Civil Procedure. The Transfer of Property Act and the Negotiable Instruments Act were some other important enactments of this period.

From 1836 onwards the earliest Reports of the Privy Council Judgements on appeal from India were published under the name of 'Moore's Indian Appeals'. The Reports of the Judgements of the High Courts were published in the Indian Reports from 1862 onwards. An indication of the sophistication and deep roots of the Indian legal culture and tradition can be gathered from a perusal of the said reports. Commenting on the Judgements, Mr. Whitley Stokes (Law Member of the Governor General's Council) wrote in his classic works on the Anglo Indian Codes:

Of these judgements none can be read with more pleasure, and few with more profit, than those of the Hindu Muttusami Ayyar and Muhammadan Sayyid Muhmud. For the subtle races that produce such lawyers, no legal doctrine can be too refined, no legal machinery can be too elaborate.

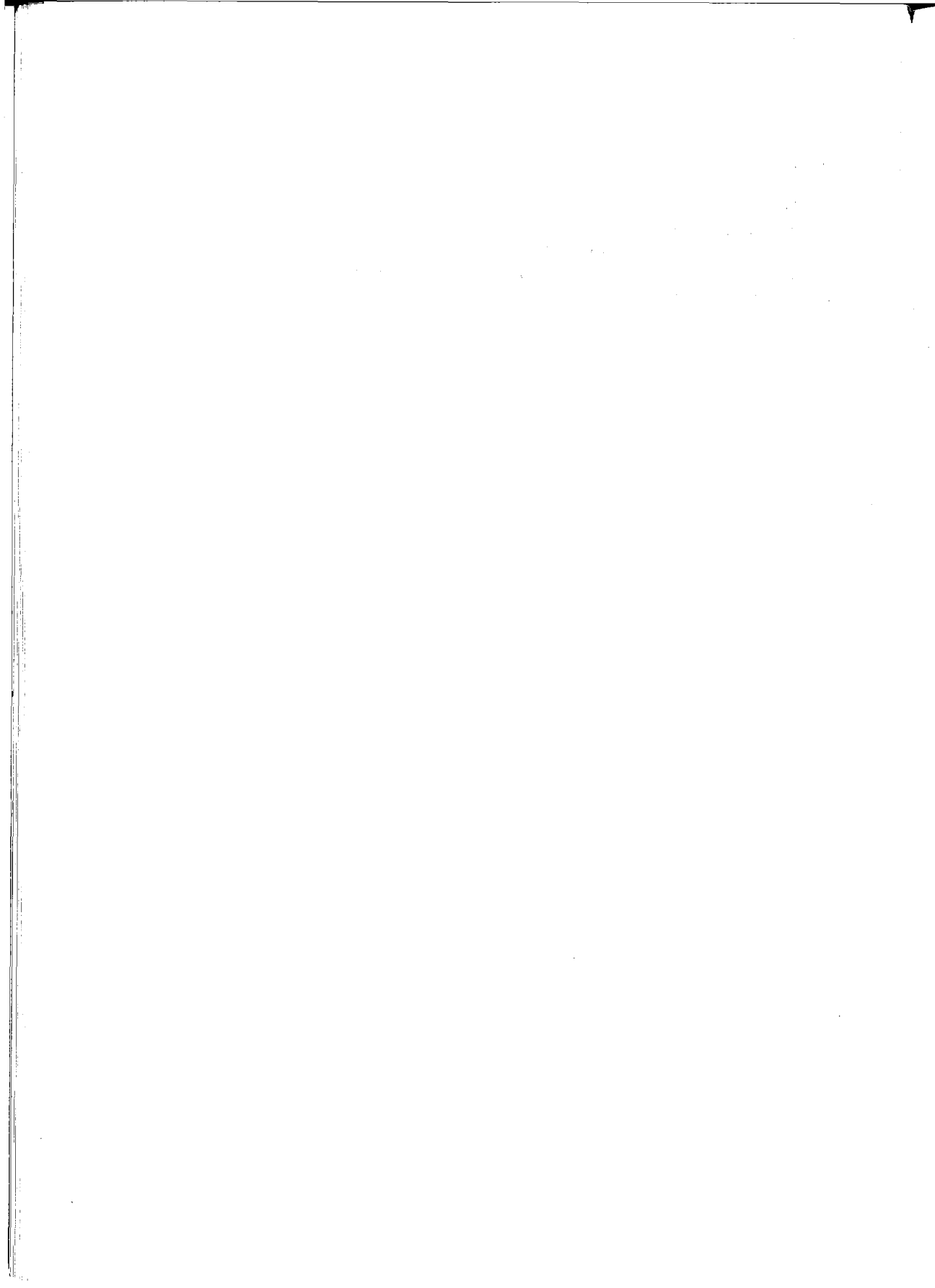
The Government of India Act, 1935 was one very significant constitutional measure passed by the British Parliament. It marked a change in India from a unitary to a federal system of government. It also set up autonomous administration and made provisions for introduction of partial responsibility in central government. The federal part of the Constitution, however, could not be inaugurated due to lack of consensus in the chief political parties. The Government of India Act, 1935, provided a security of tenure to the judges. It provided that a judge could be removed only for misbehaviour or for infirmity of mind or body, and even then only on the recommendation of the Judicial Committee of the Privy Council. Section 200 of the said Act provided for the setting up of a Federal Court to decide on cases between the provincial and central legislature. The Act also conferred the Court with advisory jurisdiction concerning important constitutional questions. The Federal Court was abolished on the 26th January 1950, when independent India adopted its present Constitution.

Conclusion

To conclude, India comprises of a pluralistic society. Such a country, being large and diverse must have a system where the local initiative and a strong centre are blended. India has thus created a federal structure with a strong central government. India's Constitution is born out of its freedom struggle which aimed for not only political independence, but also for social justice and sought to bring about a socio-economic revolution with rule of law. In the constitutional scheme, the judiciary occupies a pivotal position. The judiciary is the guardian angel of the Constitution and the vehicle which would help bring about the social revolution which the Constitution strive for.

Notes

1. World Book India Chapter P.
2. Manorama1996 Ed.
3. World Book.... India Chapter P-74.
4. Speech delivered at Law Day function on 26th November 1986.
5. Granville Austin - The Indian Constitution.



Chapter 2

The Constitution and the Judiciary — An Overview

In this chapter an overview is given of the provisions in the Constitution dealing with the judiciary. Further, a description is given of the various organs of the state such as the executive, and the union and state legislatures.

Provisions Regarding Judiciary in the Constitution

The Constitution incorporates several provisions regarding the judiciary, which provide for:

1. the establishment of the Supreme Court of India, its constitution, organisation, constitutional jurisdiction and powers, qualifications for the appointment of judges, method of appointment, their conditions of service and security of tenure.¹
2. the establishment of a High Court for each state or for two or more states, its constitution, organisation, constitutional jurisdiction and powers, qualifications for appointment of judges, method of appointment, their conditions of service and security of tenure;² and
3. the vesting of effective administrative control in the High Court, over the subordinate judiciary, and in the matter of recruitment of personnel to the judicial services.³

Legislative power in relation to Judiciary

The law giving power Parliament and the Legislative Assemblies is provided for in Article 245 of the Constitution and, in so far as is relevant, is as follows:

245(1) subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State.

The matters on which the legislative bodies can legislate in relation to the judiciary are set out in List I, List II or List III of the VII Schedule to the Constitution. Parliament alone is competent to pass laws in relation to matters listed in List I. List II sets out the matters on which the legislature of the state is competent to pass laws. List III sets out the matters on which both Parliament and the State Legislatures can pass laws.

Entries 77, 78, 79 and 95 of List I relate to the judiciary. These are set out below:

77 — Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court) and the fees taken therein; persons entitled to practice before the Supreme Court.

78 — Constitution and organisation (including vacations) of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practice before the High Courts.

79 — Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of the High Court from, any Union Territory.

95 — Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this list; admiralty jurisdiction.

In List II (the State List) entry 65 pertains to the judiciary and is as follows:

65 – Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this list.

List III is the Concurrent List (on which both Parliament and the State Legislatures are competent to enact Laws). Entry 11(A) of the said List (inserted vide a Constitutional Amendment in 1976) pertains to the judiciary and is as follows:

11-A – Administration of justice, constitution and organisation of all courts, except the Supreme Court and the High Courts.

Besides these powers, Parliament has a residuary power vide entry 97 to pass any laws in relation to any matters which are not enumerated in List II (State List) or List III (the Concurrent List).

Supreme Court: The Constitutional Scheme

The Supreme Court as the highest court of the country came into existence on the 26th January 1950, i.e. the date of commencement of the Constitution. Under the Constitution, the Supreme Court is the highest court of civil and criminal appeal and is also vested with original and advisory jurisdiction. In view of its importance to the working of constitutional system, the Constitution itself has specified the jurisdiction and powers of the Supreme Court. Parliament is given the power to enlarge its jurisdiction or confer special jurisdiction. The salient features of its jurisdiction and powers are:

1. Original jurisdiction for enforcement of fundamental rights under Article 32. Under this Article any person (even non-citizens) can directly approach the highest court, to seek enforcement of any of the fundamental rights guaranteed under the Constitution. Art. 32 finds its place in the Chapter on Fundamental Rights – and is hence itself a fundamental right.
2. Exclusive jurisdiction to decide Centre-State and inter-State disputes.⁴
3. Appellate jurisdiction against judgements of High Courts on certificate by the High Court in any case involving substantial question of law relating to interpretation of the provisions of the Constitution⁵ and in any matter involving a substantial question of law.⁶
4. Appellate jurisdiction against judgement in any criminal matter in which the High Court has reversed an order of acquittal into one of conviction and has imposed death sentence, or the High Court has withdrawn a case for trial and imposed death sentence or certified that the case is a fit one to appeal to the Supreme Court.⁷
5. Appeal against any judgement, decree, determination, sentence or order of any court or tribunal (final or interlocutory).⁸
6. Power to transfer cases pending in one High Court to another or to withdraw cases involving similar questions and pending in more than one High Court and decide on such cases itself.⁹
7. Advisory jurisdiction to furnish opinion on important questions of law or fact on a reference by the President.¹⁰

Articles 138 and 139 empower Parliament to make laws enlarging the jurisdiction of the Supreme Court. Art. 141 provides that the law declared by the Supreme Court shall be

binding on all courts within the territory of India. Art. 144 provides that all the civil and judicial authorities in India shall act in support of the Supreme Court.

An analysis of the provisions referred to above indicates that under the scheme of Constitution the Supreme Court is constituted to function:

1. As the protector of the fundamental rights and liberties of the individuals in exercise of its original as well as appellate jurisdiction.
2. As the ultimate authority to interpret and enforce the provisions of the Constitution and the laws.
3. Final court of appeal in all matters constitutional, civil, criminal, revenue, etc., against decisions and orders of all courts and tribunals in the country.
4. The sole tribunal to decide Centre-State and inter-State disputes;
5. To give opinions in an advisory capacity on important questions of law or fact on reference by the President.

Thus the Supreme Court occupies a most vital and exalted position under the constitutional set-up, entrusted with the power to interpret and finally decide on all matters and disputes pertaining to the state, its various organs and the people of India. Further, its decision is binding on all courts throughout India.

High Courts: The Constitutional Scheme

The High Court established for each state or groups of states, in relation to that territory, constitutes the highest Court of Civil and Criminal Appeal, review and revision. The Court is also invested with original jurisdiction to issue prerogative writs for enforcement of rights given to individuals under the Constitution and the laws.

Under the Government of India Act 1935, the Constitution and organisation of the High Courts was vested in the provincial legislature. However, a change was brought about in the Constitution of India. The framers of the Constitution felt that the constitution and organisation of the High Court ought not to be allotted to the State Assemblies in the interest of uniformity. Hence, not only the legislative subject of the Constitution and organisation was included in the Union List, the provision for appointment of the judges of the High Court, and their conditions of service were also laid down in the Constitution itself. Under Art. 216, the President of India is the authority for appointing the Chief Justice and judges of all High Courts. As regards jurisdiction and powers, certain jurisdiction and powers considered vital for rule of law were conferred on the High Courts by the Constitutional itself. These are, powers to punish for contempt,¹¹ the writ jurisdiction,¹² supervisory jurisdiction over subordinate courts and tribunal of the concerned State,¹³ power to withdraw cases from the subordinate courts involving interpretation of the constitution,¹⁴ administrative control over the staff of the High Court¹⁵ and subordinate judiciary.¹⁶

Lower Judiciary: The Constitutional Scheme

The State Legislatures are invested with the powers to make laws governing the constitution, organisation, jurisdiction and powers, both general and special of all lower courts with regard to the requirements of each state. However, a few special provisions have been made in the Constitution itself. These are: (i) Appointment to the Cadre of District

Judges, whether by direct recruitment or promotion shall be made by the Governor as recommended by the High Court,¹⁷ (ii) Recruitment to the other subordinate judicial positions shall be made only in accordance with the rules made and in consultation with the High Court,¹⁸ (iii) once a person is appointed to a judicial post either under Art. 233 or 234 he comes fully under the administrative control of the High Court as provided for in Art 235. The object of the special provisions made in this regard is to ensure the independence of the judiciary down to the lowest level. Independence of the judiciary at the lower levels is just as important as its independence at the higher levels. In order to ensure the independence of judges appointed to subordinate courts, security of tenure, including security in the matter of their postings, transfer and the like are absolutely necessary. This is sought to be achieved by these special provisions, particularly by Art. 235 which vests the entire administrative control over the subordinate courts and judges to the High Court.

Indian Federation and the Judicial System

Framers of the Indian Constitution in deciding upon the political structure of India, had to make a difficult decision. On the one hand was the history of a centralised Government of India for over a hundred years under British rule. On the other hand, were the partly autonomous provincial units and the Indian states ruled by Indian rulers, which had to find a place in the Indian polity. The members of the Assembly drew upon the experience of great federations like the United States, Canada, Switzerland and Australia, and evolved suitable modifications of existing ideas. A new kind of federalism answering to India's peculiar needs came into existence. A striking feature was the relative absence of conflicts between the centralists and the provincialists. A new phase of co-operative federalism which had emerged since World War II, characterised by increasing interdependence of federal and regional governments while retaining the federal principle, was found to be most acceptable for India. A country as large and diverse as India had to have a system where local initiative and a strong centre were blended. While a strong centre was required for better administration of a large and diverse structure to avoid disintegration, a very strong unified administration could not have worked in the face of such diversified polity. Therefore, the exigencies of the present as well as a pattern of the past compelled the founding fathers to create a strong central government. Only a strong government could survive the communal frenzy of the partition of the country and deal with the problems of the quasi-independent Indian states ruled by Indian rulers. The goals of social revolution and the imperative to improve industrial and agricultural productivity also provided a compelling reason for strong central authority.

In its day to day working the federal structure of the Constitution is centralised by the powers of the union government to interfere in the affairs of the states which have been used infrequently, however. In the case of an emergency the Union Government may take over the operation of a State Government for a brief initial period. Besides, the Centre can dissolve a State Assembly and declare President's Rule in a state on the ground that the Government of the State cannot be carried out in accordance with the

provisions of the Constitution (Art. 356). This decision has to be laid before the Parliament. The Union Parliament can legislate on matters included in the State List only with the approval of a two third majority in the Council of States or during a proclaimed emergency. The Water and Air Pollution Control Laws are an example where the states granted the requisite approval to the Union to enact a central All India Legislation in an area which was otherwise a state matter.

In Dr. Ambedkar's well known description — the Constitution is, 'a federal Constitution in as much as it establishes what may be called a dual polity, consisting of the union at the centre and the states at the periphery, each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution'. Yet the Constitution, said Ambedkar 'avoids the tight mould of federalism in which the American Constitution was caught and can be both unitary as well as federal according to requirements of the time and circumstances'.

Although the Indian and the American Constitutions are both federal in nature, the Indian judicial system differs from that of the United States in one very significant aspect. Whereas America has a dual system of courts — a federal judiciary with the Supreme Court at the top along with a separate and parallel judicial system in each state — India has a unified system of courts. The Supreme Court, the High Courts and other lower courts constitute a single judiciary having jurisdiction and providing remedies in all cases arising under any law whether enacted by Parliament or a State Legislature. The centralisation of the Indian judicial system is made clear not only by the single hierarchy of courts, but also by the uniformity of law provided by the Legislative Lists.¹⁹ Criminal Law and procedural laws dealing with marriage, divorce, succession and the transfer of property (other than agricultural land), contracts 'actionable wrongs', civil procedure and many other such categories, are in the 'Concurrent Legislative List' and therefore subject to legislation by either Parliament or a State Legislature. Although the 'administration of justice', the constitution of subordinate courts, and, within limits the jurisdiction of High Courts, are in the State List, the constitution and organisation of the High Courts, in addition to the Supreme Court, lie within the province of Parliament. The extension of a High Court's jurisdiction beyond the state in which it has its seat is also a Union subject.

Executive

The executive power of the Indian Union is vested in an elected head, the President of India.²⁰ The President holds office for a term of five years and may be removed from office by impeachment for violation of the Constitution. The executive functions of the Union extend, as in the Canadian Constitution, to all matters with respect to which the Union Parliament may make laws. The President is obliged to exercise his powers in accordance with the 'aid and advice' of his Council of Ministers of which the Prime Minister is the head.²¹ The Prime Minister is appointed by the President and the members of the Council of Ministers are also appointed by him on the advice of the Prime Minister. The Ministers hold their office at the pleasure of the President.

The designation of the President as the executive head and his being elected creates an impression that the President of India would have the powers of Chief Executive as in the American Constitution. The resemblance however ends with the name. The Constitution, undoubtedly, assigns numerous functions to the President. Not only is he to perform functions of the Chief Executive of the union government, but he is also a limb of the Union Legislature. Bills passed by the Houses of Parliament have to be presented to the President for his assent before they can become law. He may also return certain Bills to the Houses requesting their reconsideration. The Supreme Command of the defence forces of the Union is vested in the President. He has, in that capacity, powers with regard to the appointment, discipline, disposition and the use of the armed forces. The Constitution also vests in him the powers to create various statutory authorities in which the performance of different functions are vested. However, the Constitution requires the President to act in accordance with the 'aid and advice' of his Council of Ministers. This phraseology has been borrowed from the Government of India Act, 1935 and its true meaning is to be found in the British Constitutional Practice and Conventions where the King acts solely on the advice of his Ministers. The Constitution seems to apply this very principle to the President whereby the Indian Constitution has opted for a constitutional head in whose name the power of the Government is to be exercised. It follows therefore, that the executive powers in India really vest with the cabinet. The cabinet enjoying the majority in the legislature concentrates in itself the control of both the legislative as well as executive functions.

In *Ramjavaya Kapoor Vs., State of Punjab*²² the Supreme Court dealt with an important question relating to the nature of executive power and the manner in which it is to be exercised under the Constitution. The Court held, 'Our Constitution though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State... In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature? Under Article 53(1)..., the executive power of the union is vested in the President but under Article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the cabinet. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England ... The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.'

Union and State Legislatures

For the Union, the Constitution has adopted a bicameral legislature based on the Westminster Model. In the legislature of states there are some states which have only one House while others have two Houses following the pattern of the Union Legislature.

The Union Parliament comprises of the President, the Council of States and the Houses of the People.²³ The Council of States consists of no more than 238 representatives of the states and of the union territories and 12 members nominated by the President from persons with special knowledge or practical experience concerning matters such as, literature, science, art and the social services. The House of the People (Lower House) consists of no more than 525 members chosen directly in territorial constituencies in the states and no more than 20 members representing the Union territories chosen in the manner prescribed by Parliament through law. The seats are to be allocated to each State of the Assembly and by a majority of no less than two thirds of the members of the Assembly present and voting. A person is not qualified to take a seat in Parliament if he is less than 30 years of age, if the seat is in the Council of States, and if he is less than 25 years of age, if the seat is the House of the People, and possess such other qualifications as may be prescribed by or under any law made by Parliament.²⁴

Unless dissolved earlier, the House of the People continues for 5 years from the date of its first meeting. The expiration of five years occurs with the dissolution of the House except when in the case of a proclamation of emergency, the period of five years may be extended for a period not exceeding one year at a time and not exceeding in any case beyond 6 months after such a proclamation has ceased to operate. The Council of States is not subject to dissolution but nearly one third of its members retire on the expiry of every second year in accordance with the law made by Parliament.²⁵ The seats are allocated to each state so that the ratio between their number and the population of the state is as far as practicable the same for all states. Each state is divided into territorial constituencies so that the ratio between the population of each constituency and the number of seats allotted to it is, as far as practicable, the same throughout the state.

As regards State Legislatures, every legislature consists of the Governor and the two Houses of the Legislature, or one as the case may be. The two Houses are called the Legislative Council and the Legislative Assembly.²⁶ However, Parliament is empowered to abolish by law, the Legislative Council of a state following a resolution being passed by the Legislative Assembly of the state by a majority of the total membership of the Assembly, and by a majority of no less than two thirds of the members of the Assembly present and voting. The Legislative Assembly consists of no more than 500 and no less than 60 members chosen directly, with provision being made for preserving the ratio between the population of each constituency and the number of seats allotted to it. The Legislative Council is composed of members partly through indirect elections, partly through special constituencies and partly by nomination. The provisions of the duration of the legislatures are the same as those for the duration of the House of the People. In England, the Queen and the two Houses of Parliament constitute the legislature and the Queen is an integral part of the legislature. India has adopted this model and the

President and the two Houses constitute the Parliament, and the Governor and one or two Houses (as the case may be) constitute the State Legislatures.

Article 105 and 194 deal with the powers, privileges and immunities of Parliament and its members, and all legislatures and their members. The powers, privileges and immunities of legislatures are conferred on Parliament by Art. 105, and State Legislatures by Art. 194, which are identical in terms. Art. 194 is in so far as is relevant, set out below:

- (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.
- (2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.
- (3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law...

Conflict between the Legislature and Judiciary: A Case Study

The powers, privileges and immunities of the Legislature (though usual in Parliamentary democracies) have occasionally brought the legislature into grave collision with the law courts. One such classic case took place between the High Court of Allahabad and the Uttar Pradesh State Legislative Assembly. The Assembly had passed a resolution that a reprimand be administered to one Keshav Singh for having committed contempt of the Assembly. The said Mr. Keshav Singh had published pamphlets and written letters to the Speaker which were considered disrespectful by the House. He was thereupon brought into custody of the marshal of the Assembly on March 14, 1964. In the Assembly he further declined to answer questions put to him and even turned his back to the Speaker. Thereupon the Assembly found him guilty of contempt of the Assembly and he was sentenced to imprisonment for seven days. The warrant did not state the facts constituting the contempt and Keshav Singh was taken to jail the same day and kept imprisoned there.

On March 19, 1964 a Mr. B. Solomon, an Advocate, presented a petition to the Bench of the High Court of Uttar Pradesh, then constituted by Beg and Sehgal JJ, for a writ of habeas corpus for the release of Keshav Singh, alleging that he had been deprived of his personal liberty without any authority of law and that this detention was mala fide. On the same date, the court made an order that Keshav Singh be released on bail and the petition be admitted and notice issued to the respondents named in it. Keshav Singh was promptly released on bail. This order interfered with the sentence of imprisonment passed by the House. On March 21, 1964 the Assembly passed a resolution that Beg J, Sehgal J, B Solomon and Keshav Singh be committed for contempt of the House and that Keshav Singh be immediately taken into custody and kept confined in the District Jail for the remaining term of his imprisonment and that Beg J, Sehgal J, B Solomon be brought in custody before the House. Warrants were issued on March 23, 1964 to the marshal of the House and the Commissioner of Lucknow for carrying out the terms of the resolution. On the same day, Sehgal J moved a petition under Article 226 of the Constitution in the High Court of Uttar Pradesh at Allahabad for a writ of certiorari quashing the resolution of the Assembly of March 21, 1964 and for other necessary writs

restricting the speaker and the marshal of the Assembly and the State Government from implementing the resolution. A full Bench of the High Court of Allahabad admitted the petition and ordered stay of the execution of the Assembly's resolution against them. The State Assembly, to clarify thereupon passed a resolution modifying its earlier stand. Instead of being produced in custody, the judges and the advocates were asked to appear before the House to offer their explanation.

At this stage, the President of India deemed it fit to intervene by way of making a reference under Art. 143(1) of the Constitution (advisory jurisdiction of the Supreme Court) in which the whole dispute as to the Constitutional relationship between the High Court and the State Legislature, including the question whether on the facts of the case, Keshav Singh, his advocate and the judges, were guilty of contempt of the State Legislature. The matter was referred to the Supreme Court for its opinion and report. The matter was heard by a bench comprising of seven honourable judges. Gajendragadkar, the then Chief Justice, wrote in his opinion for the majority holding that the judiciary, the legislature as well as the executive, must function not in antimony nor in a spirit of hostility but rationally, harmoniously and in a spirit of understanding within their respective spheres. The majority opinion held that the power to commit for contempt by a general warrant 'was not a privilege of the House, but courts have not scrutinised such general warrants on the ground of comity, presumption or agreement'. In short, the majority held that it was competent for the High Court to entertain the petition of Keshav Singh and pass appropriate orders thereon and hence the Legislative Assembly was not competent to direct the production of the honourable judges or of Mr. Keshav Singh, or his Advocates, or to call for their explanation.

The matter however, did not end there. There is a post-script to the controversy. The opinion of the Supreme Court under Art. 143 of the Constitution is a mere opinion — and not a binding law declared by the Court. After the opinion of the Supreme Court was delivered the Assembly went into the question and held that the majority opinion was wrong in law. However, in view of the importance of the harmonious functioning of the two important organs of the state, i.e., the legislature and judiciary, the Assembly felt that the end of justice would be met and the dignity of the House vindicated if the House 'expressed its displeasure' — thereby putting the vexed question to an uneasy rest.

Notes

1. Articles 32, 136, 132, 133, 139A, 141, 143, 124-127.
2. Article 214-231.
3. Article 233-237.
4. Article 131.
5. Article 132.
6. Article 133.
7. Article 134.
8. Article 136.
9. Article 139A.
10. Article 143.

11. Article 215.
12. Article 226.
13. Article 227.
14. Article 228.
15. Article 229.
16. Article 223 to 225.
17. Article 233.
18. Article 234.
19. Dr. M.C. Sharma, Working Paper for Leiden Workshop.
20. Indian Constitution, Art. 52, 53 and 54.
21. Article 74.
22. 1955 (2) SCR 225.
23. Article 79.
24. Article 84.
25. Article 83.
26. Article 168.

Chapter 3

Selection, Appointment and Transfer of Judges

The Indian judicial system is pyramidal and unified in character, in contradiction to the American and Australian models. The judicial system is vertically structured with the Supreme Court of India at the apex, High Courts at the state level and subordinate judiciary at the grass roots level.

The Constitution incorporates specific provisions for manpower, planning, selection and induction in the different levels of judicial service. Briefly stated, the power to appoint the Chief Justice of India and a Judge of the Supreme Court of India is vested in the President of India, to be exercised in consultation with those Judges of Supreme Court and High Courts as the President may deem necessary for the purpose (Article 124). Similarly, the power to appoint the Chief Justice of a High Court and Judge of the High Court is vested in the President to be exercised in consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court (i.e. where the appointment is of a Judge other than the Chief Justice Article 217). The power to appoint or promote a person to the post of District Judge is vested in the Governor of the State to be exercised in consultation with the Chief Justice of the High Court exercising jurisdiction in relation to such state (Article 233). Similarly, the power to recruit and appoint persons other than District Judges to the judicial service of a state is vested in the Governor, to be exercised in accordance with rules made by him after consultation with the State Public Service Commission and with the High Court, exercising jurisdiction in relation to such state (Article 234). (The aforesaid provisions are dealt with later in greater detail).

Historical Evolution of the Method of Appointment of Judges to the Superior Judiciary in India

The ground norms for the Indian judiciary were laid down in the Government of India Act, 1915 and 1919. Provisions with regard to Indian High Courts were set out in Part IX of the Act. The power to appoint a Judge of the High Court is vested in His Majesty (Section 101). The power to fix salaries, allowances, furloughs and retiring pensions of a judge was conferred on the Secretary of the State in Council. The qualifications necessary for being appointed a Judge of the High Court were set out in sub-section (3) of Section 101.

A few features of the colonial approach to the appointment of High Court judges, were that the executive branch had a quota in the High Court. The tenure was at His Majesty's pleasure and the salaries and perks were determined by the executive.

The Government of India Act, 1935 provided for the setting up of the Federal Court and the High Courts (Sections 200 and 220). The High Court judges were to be drawn from four groups, namely (i) barristers of England and Northern Ireland or advocates of

Scotland, (ii) members of the Indian Civil Service, (iii) holders of judicial office in British India, and (iv) pleaders practising in High Courts. The power to appoint a High Court Judge was vested in His Majesty, as provided for in Section 220(2). One notable change was that the tenure provision was changed, from 'His Majesty's pleasure' to attaining a certain age; that of sixty years. The power to determine salaries, allowances and such other perks as well as other rights in respect of leave and pension was conferred upon His Majesty in Council. Similarly, the power to appoint Judges of the Federal Court was vested in His Majesty and such judges could hold office till the age of sixty-five. The power to determine salaries, allowances, perks, rights in respect of leave and pension was vested in His Majesty in Council. These provisions show that the power to appoint judges of the superior judiciary was unreservedly vested in the executive (without even consulting any person from the Judiciary). Such were the provisions in existence when the Constituent Assembly was convened and proceeded to determine the shape of superior judiciary as well as the procedure for selecting judges to man the superior judiciary of free and independent India.

The Constituent Assembly set up an Expert Committee consisting of Mr. S Varadachariar, a former Judge of the Federal Court, Sir Alladi Krishnaswami Ayyar, Mr. B L Mitter, Mr. K M Munshi and Mr. B N Rao, the Constitutional Adviser, for drafting provisions relating to the judiciary. The Committee submitted its report on May 21, 1947. The approach of the Committee was largely influenced by the provisions of the Government of India Act, 1935.¹ Long before the advent of independence, a view had gained ground that there must be a Supreme Court at the apex of the judiciary with each state having a High Court of its own. A federal structure with division of powers among the federation and the federating units and a written Constitution with fundamental rights, all combined to make a compelling necessity for a judicial body having powers to regulate and determine the inter se spheres and relationships of the federating units. This necessitated conferment of power of judicial review on the Supreme Court. Such a body must also be protected from executive and political interference.

The Expert Committee proceeded to give shape to the various provisions under which the Supreme Court of India would be set up, as well as how the High Court in each state would be set up. The draft Constitution was forwarded to the Judges of the Federal Court for their comments. The Chief Justice of the Federal Court convened a Conference of the Judges of the Federal Court and the Chief Justices of the High Courts in India. The conference authorised the Chief Justice of the Federal Court to submit a memorandum expressing its views. Amongst the various views expressed therein, one which needs mentioning, is that the Chief Justice of the Federal Court and the Chief Justices of High Courts considered the importance of securing the fearless functioning of an independent and efficient judiciary paramount.²

Provision relating to Appointment and Removal of Judges in Higher Judiciary

The system of independent judges was inherited from the British administration of justice. Up to 1 April 1947 (when the Government of India Act 1935 was brought into force), the judges of the High Court held office following the British Colonial pattern, at the pleasure of the Crown. However, after the Government of India Act and in the establishment of a Federal Court in India, judges were protected and were irremovable except in cases of misconduct to be determined by a report from seven judges of the Federal Court. Only then could the King in Council remove a High Court judge. The only instance of a High Court judge removed on the grounds of misconduct was Justice Sinha of the Allahabad High Court. This occurred following a unanimous report by the Federal Court.

After 1950 the independence of the judges of the superior Court was secured by the Constitution.

The Constitution deals with the higher judiciary in Parts V and VI. Article 124 provides for the establishment and constitution of a Supreme Court. Article 214 provides for the establishment and constitution of the High Courts. These Articles and the other provisions for appointment and transfer of judges to the higher judiciary have been the subject matter of judicial pronouncements in two significant judgements of the Supreme Court. These judgements are dealt with in detail in another section in this chapter (the constitutional provisions are dealt with in this present section).

The procedure of the appointment of Judges of the Supreme Court is set out in sub-clause (2) of Article 124 of the Constitution which provides that the President, while appointing a judge, shall consult such of the Judges of the Supreme Court and High Court as he may deem necessary for the purpose. It is further provided that a judge shall hold office until he attains the age of sixty five years. Hence prior consultation with the judges is a mandatory provision of the Constitution.

The qualifications for appointment are set out in sub-clause (3) of Art. 124 which states that a person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and has been a Judge of a High Court for at least five years or has been an advocate of a High Court for at least ten years or is in the opinion of the President, a distinguished jurist.

Sub-clause (4) of Article 124 protects a judge against removal. It empowers the President to remove a Judge of the Supreme Court only on the basis of proved misbehaviour or incapacity; provided a resolution to that effect is passed in the same session by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the Members of that House present and voting.

Parliament has enacted an Act titled 'The Judges (Inquiry) Act 1968', with a view to regulating the procedure for the investigation and proof of misbehaviour or incapacity of a Judge of the Supreme Court or of a High Court and for matters related thereto.

The said Act, vide Section 3 provides that if a hundred members of the Lok Sabha (Lower House) request the Speaker, or if fifty members of the Rajya Sabha (Upper

House) request its Chairman, then the said Speaker or Chairman (as the case may be) shall thereafter consider the material placed before him and appoint a Committee of three members consisting of:

1. One of the Judges of the Supreme Court;
2. One of the Chief Justices of the High Court; and,
3. One eminent jurist.

The Committee shall inform the judge concerned of the charges against him and will give him an opportunity to defend himself. If, after hearing him, the Committee comes to the conclusion that the judge is not guilty of misbehaviour or does not suffer from any incapacity, then no further steps shall be taken in either House of Parliament. If, on the other hand, the report of the Committee contains a finding that the judge is guilty of any misbehaviour or suffers from any incapacity, then the motion shall, together with the Committee's Report, be placed before Parliament. If it passes the resolution by a requisite majority, then the President shall pass the order for the removal of the judge vide Section 6. Thus, the procedure laid down for removal fully safeguards the judiciary from motivated or vindictive action in order that judges can act in a fearless manner.

The Constitution deals with High Courts of the states in Part VI. Article 214 provides that there shall be a High Court for each state. Every such High Court shall consist of a Chief Justice and such judges as the President may from time to time deem necessary to appoint. Article 217 provides that 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 qualifications for being appointed a High Court Judge are set out in Sub-clause (2) of Art. 217. The President is obliged before making an appointment to consult the Chief Justice of India, the Governor of the state and the Chief Justice of the High Court to which the selected person is to be appointed.

The consultation with the Governor of the State would imply intervention of the state executive represented by the Council of Ministers as ordained in Article 163. Thus, it is clear that the Chief Justice of the High Court, the Council of Ministers of the state concerned, the Governor of the state and the Chief Justice of India and the Council of Ministers at the centre would all be involved in the process of making and finalising the appointment of a High Court Judge.

A Judge of the High Court would hold office until reaching the age of retirement (62 years) and can be removed by the President only on the ground of proved misbehaviour or incapacity (as discussed above in the context of Supreme Court Judges).

Articles 124(2) and 217 of the Constitution thus confer power on the President to appoint a Judge of the Supreme Court and a Judge of the High Court respectively. These judges are assured a fixed tenure and can be removed only for proved misconduct or incapacity by a process analogous to impeachment. The tenures, pay, pension, privileges and other conditions of service of the Judges of the Supreme Court as well as of the High Court are guaranteed and cannot be altered to their disadvantage during their tenure.

Law declared by the Supreme Court on appointment and transfer of Judges

The appointment and transfer of judges of the higher judiciary has been the subject matter of two significant judgements of the Supreme Court which are dealt with hereafter. The first is the case of *S P Gupta Vs Union of India*, a decision of 7 honourable judges (1981 Supple SCC - 87). S P Gupta's case has been partly overruled in the subsequent judgement of the Supreme Court in the matter of *Supreme Court Advocates-on-Record Association Vs Union of India 1993(4) SC 441*, by a bench comprising of 9 honourable judges. In S P Gupta's case, the Supreme Court held as follows:

1. The power of appointment of judges under Article 217 of the Constitution rests solely and exclusively with the executive.
2. The 'Consultation' required under the Constitution means full and effective consultation after placing full and identical material before the Constitutional functionaries. It, however, does not mean that appointment has to be made with the concurrence of either the Chief Justice of India or Chief Justice of the High Court.
3. The opinion of the Chief Justice of India does not have primacy over the opinion of the Governor of the state, or of the opinion of the Chief Justice of the High Court. In the event of difference of opinion, it is for the central government to decide whose opinion should be accepted or whether the appointment should be made or not.
4. The Supreme Court was also required to pronounce upon the validity of a circular issued by the Law Ministry dated 18th March 1981. This circular required all judges to give their prior consent for transfer from one High Court to another based upon a policy of the government that one third of the Judges of the High Court, would as far as possible, be from outside the state in which the High Court is situated. The Supreme Court in S P Gupta's case held by a majority that the circular is not unconstitutional but at the same time does not have any legal force and is not binding on the judges concerned.
5. As regards the power of the government, to extend or not to extend the term of Additional Judges, it was held that an Additional Judge once appointed has a right to be considered for appointment for a further term on the expiry of his initial term. The government must initiate the procedure required for extension (including consultation) sufficiently in advance in order that the initial period of appointment does not expire. The Court also held that in view of the arrears, short-term extensions of Additional Judges are not justified.
6. Another aspect which the Court considered was whether the court could pass a mandamus directing the government to increase the number of Judges of the High Court. The majority held that the Court could not issue such a mandamus.
7. As regards the transfer of judges from one High Court to another, the Court held that the consent of the judge concerned was not required to be taken before his transfer under Article 222(1) of the Constitution. It was, however, held that the power to transfer a judge must be exercised in public interest only. A judge could not be transferred by way of punishment. Further, the government must consider the personal difficulties of Judges before issuance of transfer orders.

Hence, in SP Gupta's case, the Supreme Court whilst bringing in some safeguards in the matter of transfer of judges etc., made it clear that the executive has the sole discretion in the matter of appointment of judges so long as there is full and effective consultation amongst the constitutional functionaries. The aforesaid judgement of the Supreme Court has been partly overruled in the case of Supreme Court Advocates on Record Association as stated above. The decision of the Supreme Court in the later case has been summarised by the majority and is quoted below:

A brief summary of the conclusions stated earlier in detail is given for convenience, as under:

1) The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and the most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.

2) Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a High Court by the Chief Justice of that High Court; and for transfer of a Judge/Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the Supreme Court and the High Courts as well as for the transfer of Judges/ Chief Justices of the High Courts must invariably be made.

3) In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated, has primacy.

4) No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.

5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.

6) Appointment to the office of the Chief Justice of India should be of the seniormost Judge of the Supreme Court considered fit to hold the office.

7) The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court Judges/Chief Justices.

8) Consent of the transferred Judge/Chief Justice is not required for either the first or any subsequent transfer from one High Court to another.

9) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.

...

13) Fixation of Judge-strength in the High Courts is justiciable, but only to the extent and in the manner indicated.

In the aforesaid decision, the Supreme Court also laid down detailed norms or guidelines which it said ought to be observed by the functionaries to regulate the exercise of their discretionary power in the matters of appointments and transfers. The said norms are summarised inter-alia as follows:

1. In matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice of India has to be formed taking into account the views of the two senior most Judges of the Supreme Court. The opinion of the Chief Justice of India is not merely his individual opinion; but an opinion formed collectively by a body of persons at the apex level in the judiciary. Similarly, the opinion of the Chief

Justice of the High Court must be formed after ascertaining the views of at least two senior most Judges of the High Court. It was further held by the Supreme Court that in the matter of appointment of Judges of the High Court to the Supreme Court, the inter se seniority of the judges amongst all High Courts is of significance. Due weight must be given to this aspect unless there are strong cogent reasons to justify otherwise.

2. It was reiterated that the opinion of the Chief Justice of India for the purpose of Articles 124(2) and 217(1) has primacy in the matter of all appointments; and no appointment can be made by the President under these provisions to the Supreme Court or the High Courts unless it is in agreement with the final opinion of the Chief Justice of India formed in the manner stated in the judgement. The Court also held that whilst no appointments could be made unless they are in agreement with the opinion of the Chief Justice of India, a person recommended by the Chief Justice of India must be appointed. In the event the other functionaries feel that the person recommended by the Chief Justice of India is unsuitable, they may place material before the said Chief Justice asking him to reconsider his decision. If, after reconsideration, the Chief Justice reiterates his recommendation, the appointment of the recommendee must be made.
3. It was further stated that appointments to the Chief Justice of India should be of the most senior Judge of the Supreme Court considered fit to hold the office.
4. The Court held that the practice of having acting Chief Justices for long periods; transferring permanent Chief Justices and replacing them with out-of-turn Acting Chief Justices for long periods; appointing more than one Chief Justice from the same High Court resulting in frustration of the legitimate expectation of Judges of some other High Courts commensurate with their seniority before appointment as Chief Justice in their turn; must all be depreciated and avoided.

Thus, it can be concluded that the Supreme Court has virtually protected the judiciary from interference by the executive in matters of appointments, promotions and transfer of judges and has created a mechanism which ensures primacy to the judiciary in a manner which is transparent and where several senior constitutional functionaries are consulted.

Significance of the aforesaid Judgements in light of past experience

The importance of the judgements of the Supreme Court can be well appreciated on examination of the motivated interference by the executive in judicial independence in the past. This is dealt with in this section in order to demonstrate how the independence of the judiciary would have suffered and ultimately withered away had it not been for the pronouncement by the Supreme Court.

1. *Supersession of Judges:* The practice of superseding judges started when Mrs. Indira Gandhi became Prime Minister. Mrs. Gandhi nationalised the banks and abolished the privy purses of the erstwhile rulers of India in the year 1970. Both these measures were

declared null and void by the Supreme Court. Mrs. Gandhi was rather displeased and as a punitive measure moved to impeach Justice J C Shah, the then Chief Justice and two other Supreme Court Judges. As many as 152 members of the Lok Sabha (Upper House) signed the petition but the speaker somehow managed to stall it.³ When Justice J C Shah retired in 1970, the government considered superseding Justice Sikri, the most senior Judge of the Supreme Court and by tradition next in line for Chief Justiceship. This move was, however, also dropped due to objections from all quarters. However, a major blow was dealt to the independence of the judiciary when three Judges of the Supreme Court — Justice Shelat, Hegde and Grover were superseded by Justice A N Ray for the post of Chief Justice of the Supreme Court. The facts leading to the case are as follows. The Supreme Court in the Keshavand Bharti's case, popularly known as the Fundamental Right case, declared a part of the 25th Constitution Amendment Act invalid, and also held that Parliament cannot amend 'the basic structure' of the Constitution. The ruling party in Parliament retaliated by superseding the three Judges mentioned above and appointing Justice A N Ray as Chief Justice (Justice Ray's judgement was in favour of the government). The supersession was done against the explicit recommendations of the outgoing Chief Justice Sikri. Immediately thereafter the three superseded Judges of the Supreme Court submitted their resignations which were accepted by the government.⁴ This was a major blow demoralising the judiciary. (If the Supreme Court Judges could be punished for not towing the government line — what would be the fate of others!) It is believed that when these three judges were superseded neither the retiring Chief Justice, nor the cabinet⁵ was consulted and even the President was not very happy about it. A storm of controversy raged for some time. Two spokesmen of the government; Kumarmangalam and Gokhale, went public and defended the supersession arguing that a judge's 'Social Philosophy' could not be ignored when the government was deciding who the Chief Justice would be; and that 'forward looking' judges would be preferred to 'backward looking' ones (Kumaramangalam 1973). The political, social or economic attitudes of judges were never discussed before, and the government's virtual declaration of a policy that attitudinal and ideological credentials of potential judges were a relevant consideration caused much alarm to the believers of independence of the judiciary.

The supersession was also sought to be justified on the basis of the recommendation of the Administrative Reforms Commission. This commission has recommended that the appointment of the Chief Justice should not be regulated by seniority alone. The commission stated that he should have the following three main qualities amongst others:⁶

1. He should be a man of sturdy independence;
2. He should have the capacity to act as a watch dog of the independence of the judiciary.
3. He should be a competent administrator.

In addition, the commission recommended that the tenure of the Chief Justice should be 5-7 years.

The attempts by the government to justify the supersession however did not convince anyone. The supersession was criticised amongst others by S M Sikri, the outgoing Chief Justice; J C Shah, the former Chief Justice of India; the Chairman of All India Bar

Council; and the President of the Supreme Court Bar Association. The Bar Councils of almost all the High Courts and Supreme Court observed May 1, 1973 as 'Solidarity Day' by boycotting the courts.

Another supersession took place in the High Courts of Punjab and Haryana, when Chief Justice Daya Kishan Mahajan, retired, Justice P C Pandit, the senior most judge was superseded by Justice R S Narula on May 11, 1974.

Subsequently, in January 1977 another controversy took place when Justice H R Khanna was superseded by Justice M H Beg. Justice Khanna was the lone dissenter in the case of illegal deletion of political opponents during the emergency imposed by Mrs Indira Gandhi. Justice Beg, however, towed the government line and upheld the detentions by the government. Justice Khanna was made to pay the price for his independence. The supersession of Justice Khanna was justified by the then Law Minister H R Gokhale on the plea that Justice Khanna was in any case to have a very brief term and appointment to the highest office of Chief Justice should not be for such a short duration. Justice Beg had a longer term of about 13 months. Few, however, gave the government the benefit of doubt.

It is important to note in this connection that the plea of longer term was not advanced in 1970 because Justice Grover was senior to Justice A N Ray and would have retired a month after the retirement of Justice Ray. Moreover Justice J C Shah was in office for about five weeks and Justice A K Sarkar for three months only. Their terms of office were shorter than the term of office of Justice H R Khanna.⁷ Hence Justice Khanna's supersession was clearly on the mala fide ground that he had not bowed to government pressure.

Fortunately, however, ignoring the 'seniority principle' for the appointment of Chief Justice did not last for long. In 1978 a new government led by Mr. Moraji Desai took control of the country. Soon thereafter Chief Justice Beg retired. Justice Chandrachud and Justice Bhagwati were next in line for appointment for the post of Chief Justice. However, both these judges had rendered judgements against the citizens during the emergency. This led to a move by the politicians to supersede these judges on the same logic adopted by the previous government. To the credit of the new government, it stood firmly on the convention of seniority and Justice Chandrachud who was next in seniority was appointed Chief Justice. Since then the principle of seniority has been firmly followed (even where the appointment of Justice K N Singh as Chief Justice was for 18 days). The decision of the Supreme Court in the case of 'Advocate-on-Records Association' has converted this policy into law. This has removed a major fear that was created by earlier supersessions.

2. *Indirect Supersession of the High Court Judges:* Supersession of the High Court Judges to the Supreme Court had been going on for many years without any significant protest. Out of 59 Judges of the Supreme Court appointed from the High Court, in 29 cases those appointed were not the most senior in their respective High Courts.⁸

This supersession continued even after the Moraji Desai government came to power. In September 1977, Justice D A Desai of Gujarat High Court was appointed as a Judge of the Supreme Court ignoring the claims of three of his senior colleagues in that Court.

Justice J B Mehta of Gujarat High Court resigned in protest. There were, in fact, as many as sixty judges in various High Courts who were senior to Justice Desai.⁹

Mr. Shanti Bhushan, the then Law Minister, defended this appointment by saying that the decision was in accordance with the report of the Law Commission which states that 'in making selection from the benches of the High Court prompt and unhesitating recognition should be given to merit and ability regardless of consideration of seniority and experience'.

3. *Non-confirmation of Additional Judges:* Another method of demoralising the High Court judges, particularly those who were working as additional judges, was by not extending their term for a further period when the normal term of two years expired. The then Prime Minister overruled the recommendation of the then Law Minister and the Chief Minister and the Chief Justice by not extending the term of Justice H R Lalit as an additional judge of the Bombay High Court.

Ordinarily, additional judges are appointed for two years and as soon as this period expires a further extension of two years is given and this process is repeated until a regular vacancy occurs on the Bench against which he can be confirmed. But this was not done in the case of Justice H R Lalit which was quite unusual. In fact, it was the first case of its type in the post-independence judicial history of the Indian High Courts where the appointment of an additional judge was treated as an appointment on probation.

Subsequently in 1981, the terms of Justice O N Vohra and Justice S N Kumar, the then additional Judges of Delhi High Court were also not extended though the extension of the term of Justice S N Kumar was recommended by Justice Chandrachud, the then Chief Justice of India, for two years. However, the term of Justice S B Wad also from Delhi High Court was extended. At that time there were three permanent vacancies in the Delhi High Court. The non-extension of the term of Mr S N Kumar was challenged in the Supreme Court in the case of S P Gupta referred to above. The Court however, held that the government has the sole power to extend or to not extend the term of additional judges.¹⁰ This, however, now stands overruled by the later decision of the Supreme Court, as stated above.

4. *Transfer of Judges:* Article 222 of the Constitution confers powers on the President to transfer a judge from one High Court to any other High Court after consultation with the Chief Justice of India. For the first time in the history of India, in the year 1976, sixteen judges from various High Courts were transferred to other High Courts.

A judge of the Gujarat High Court, Justice S H Sheth challenged the constitutionality of the order transferring him from Gujarat High Court to Andhra Pradesh High Court without his consent. A full Bench of the Gujarat High Court struck down the order of transfer.

The contention that was put in front of the Supreme Court was that a non-consensual transfer is destructive to the independence of the judiciary which is the basic feature of the Constitution and, therefore, the Court should read a limitation, that the consent of the judge was mandatory in Article 222(1). The majority declined to read Art. 222 in a restrictive fashion and upheld the transfers.

The very question was reopened in *S P Gupta Vs Union of India* (Supra). In this case the transfer of Chief Justice K.N Singh from Patna High Court to the Madras High Court was made by the President of India under Article 222 after consultation with the Chief Justice of India. The only question was whether the order transferring Chief Justice Singh was valid and constitutional. The majority took the view that the transfer was clearly right since it had been effected in the public interest and without any oblique motive.

Hence, a survey of the position prior to the case of *Advocates-on-Records Association* demonstrates its significance. The Supreme Court has indeed made one of its most significant contributions in laying the foundation for an independent and fearless judiciary.

Description of Courts Comprising Lower Judiciary and Appointment and Selection of Judges thereto

Before dealing with the appointment and selection procedure of the lower judiciary, it would be relevant to describe briefly the class of courts falling within the description of 'lower judiciary'.

At the base level there are courts variously described as Munsif Magistrate or Civil Judge/Judicial Magistrate First Class. This is what is called the court of initial jurisdiction. Most of the disputes subject to a ceiling on pecuniary limit are brought to these courts for their resolution.

Moving upwards, the next set of courts are described as Courts of District and Sessions Judge which also include the Courts of Additional Judge, Joint Judge or Assistant Judge. In some states, there is a court called Court of Civil and Sessions Judge. These courts have in most cases unlimited pecuniary jurisdiction and depending upon the power conferred on the incumbent officer in charge of the court, can handle criminal cases where maximum punishment would not exceed seven years. In some states, these courts with unlimited pecuniary jurisdiction are called Courts of Civil Judge (Senior Division) and in some states, they are described as Courts of Subordinate Judge.

Courts have also been set up under two statutes called the Provincial Small Causes Court Act, applicable to places other than Presidency Town and the Presidency Town Small Causes Court Act applicable to Presidency Towns (Presidency Towns mean the Towns of Calcutta, Bombay and Madras). The first mentioned is subordinate to District and the last to the High Court. The judges in charge of these courts are designated as Small Causes Court Judge. The Court of the District and Sessions Judge at the district level is the principal court of original jurisdiction and is presided over by an officer called the District and Sessions Judge. The designation District Court is derived from the Code of Civil Procedure and Sessions Court from the Code of Criminal Procedure. As a rule, the same officer invested with power under both the statutes presides over the court known as District and Sessions Court.

The subordinate courts deal with all disputes of a civil or criminal nature as per the powers conferred on the incumbent presiding over the court.

The nomenclature of the courts, as well as the designations of the incumbents in charge of courts specify their functions referable to the various provisions of the statutes prescribing civil and criminal procedure providing for setting up of courts. To illustrate, section 6 of the Criminal Procedure Code, 1973 provides that besides the High Courts and the courts constituted under any law other than the Code of the Criminal Procedure, there shall be in every state the criminal courts of the following classes:

1. courts of sessions;
2. Judicial Magistrate of the First Class and in any metropolitan area, Metropolitan Magistrates;
3. Judicial Magistrates of the second class; and
4. Executive Magistrates.

Similarly, Section 3 of the Civil Procedure Code, 1908, envisages the setting up of a District Court as the principal court of original jurisdiction subordinate to the High Court. Every state has enacted its own law for setting up courts subordinate to the District Court and variously described as indicated previously. Ordinarily, the District Court has jurisdiction over a district demarcated as a unit of administration in every state also known as revenue district. In fact, every state is divided into districts as units of administration and each district is divided into taluks/tehsils and each of these comprises certain villages contiguously situated. There are at present 439 administrative districts. The court structure more or less corresponds with these administrative units except in urban areas. Ordinarily, a court described as a court of Munsif/District Munsif-cum Magistrate or Civil Judge (JD/Judicial Magistrate) is set up at taluk/tehsil level, but given the quantum of institution of causes and cases such a court may have jurisdiction over more than one taluk/tehsil. Similarly, a district court may have jurisdiction over more than one district. Small causes courts are set up under either the Provincial Small Causes Courts Act at district level or under the Presidency/Metropolitan Towns Act.

Part VI and Chapter VI of the Constitution deal with subordinate courts. Article 233 provides that, 'appointment of persons to be, and the posting and promotion, of district Judges in any state shall be made by the governor of the state in consultation with the High Court exercising jurisdiction in relation to such states'. Article 234 provides for recruitment of persons other than district judges to the judicial service. Appointment of persons other than district judges to the judicial service of a state shall be made by the governor of a state in accordance with rules made by him concerning this after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such state. Article 235 provides that control over District Courts and courts subordinate thereto including the posting and promotion of, and the granting of leave to persons belonging to the judicial service of a state and holding any post inferior to the post of a district judge shall be vested in the High Court. Recruitment to the cadre of district judge can be made from two sources, viz.: promotion from the subordinate judiciary and direct recruitment from the Bar. In the matter of promotion from the subordinate judiciary, power is conferred on the governor to make a promotion in consultation with the High Court exercising jurisdiction in relation to it. In the matter of recruitment from the Bar, the appointment can be made on the recommendation of

the High Court. The conditions of service of members belonging to the lower judiciary vary from state to state.

Conclusion

To conclude, the Constitution has created a mechanism which contains the fundamental requirements for independence of the judiciary. The Constitution guarantees consultation in the matter of appointment of judges. Besides, their tenure, privileges and other aspects of service are also protected. The Supreme Court has held that the appointments are to be made by the Chief Justice of India in consultation with senior judges of the Supreme Court. Hence, the Supreme Court has made the provisions further fail-proof in the interest of the independence of the judiciary and in order that competent qualified judges are appointed and can function in a fearless manner.

Notes

1. B Shiva Rao, *The Framing of India's Constitution. A Study*, Page 483.
2. B Shiva Rao, *The Framing of India's Constitution, Select Documents*, Vol. IV Page 194.
3. Kuldip Nayyar ed. *Supersession of Judges*, New Delhi, Indian Book Company, 1973, Page 38.
4. *Id* at page 32.
5. *Id* at pp 16-17.
6. N A Palkhiwala, 'A Judiciary Made to Measures'. In: Kuldip Nayyar, ed; *Supersession of Judges* New Delhi, 1973, Page 22.
7. *The Statesman*, February 3, 1977, Page 4.
8. *The Times of India*, November 16, 1977, Page 9.
9. *The Hindustan Times*, December 29, 1978, Page 8.
10. *The Times of India*, December 31, 1981, Page 7.



Chapter 4

Arrears in the Courts

In India every single court is totally engulfed by a backlog of pending cases and this backlog swells in size every year. The problem of delay has shattered the confidence of the public in the capacity of the courts to redress their grievances and to grant adequate and timely relief. The problem is not new nor is it peculiar to India alone. The problem has raised its head in most countries where Anglo-Saxon jurisprudence is in vogue. In England, as early as in 1934, a Royal Commission was appointed to examine the problem and recommend effective measures to ensure speedy disposal of cases of common law. In England in 1919 a case remained pending for a whole century¹ — but that was an exception. In the USA, the Institute of Judicial Administration maintains a chart to watch and study the congestion of personal injury cases in the trial courts and in many American Courts. Years go by before any final decision is given.

Addressing the issue in India, Union Law Minister Mr. Shanthi Bhushan (back in 1978) informed the chairman of the Seventh Finance Commission, J.J.M. Shelat, of the alarming increase in the number of criminal and civil cases pending in subordinate courts, and the need to revamp the judicial administration if people were not to lose faith in the efficacy of the system. The commission was also informed that apart from the arrears of 44 hundred thousand criminal and 22 hundred thousand civil cases in district and lower courts, an equal number of cases were pending in the High Courts and the Supreme Court.²

In fact, arrears in court pose perhaps the single most significant challenge to the credibility of the judiciary. The arrears and backlog of old cases in various courts have been a cause of anxiety for those connected with the administration of justice and various steps have been initiated as remedial measures. However, these have all proved to be half measures. An attempt is made in this chapter to state the magnitude of the problem, analyse the causes and suggest remedies.

Extent of the Problem

Pending cases in lower courts

The problem of delay is more acute in the subordinate courts. A perusal of statistics of the total number of cases instituted every year in these courts and the cases decided will reveal that the number of judges and courts are wholly inadequate to deal with the pending litigation. This may be illustrated by taking the figure for 1981 in the subordinate courts for the state of Andhra Pradesh (including district courts). It is seen that the total institutions in higher courts are 69,272, while disposals are 66,784. In the lower courts the cases instituted are 919,021 whilst the cases decided are 896,106. The total number of courts were only 458. The number of subordinate judicial officers, while is just sufficient to keep disposals abreast of institutions, is totally inadequate to deal with the

huge backlog of 3,52,850 cases.³ Some of them have been pending for a number of years.

Table 1⁴ will explain the rising of institutions, disposal and pendency in the lower courts.

Table 1: Year Wise Position in District and Subordinate Courts.

1. Session Court			
Year	Institution	Disposal	Pendency
1982	231992	210971	199829
1983	296192	273976	222045
1984	296678	269878	248845
2. Magisterial Courts			
1982	8077950	7676075	6749813
1983	8595527	4896129	7439211
1984	7940978	7638730	7741459
1989	--	--	15936826
Civil Courts			
3. Original Side			
1982	2712309	2613670	2625399
1983	2056298	1888959	2792738
1984	2143599	2016044	2911193
Civil Courts			
4. Appellate Side			
1982	232364	206736	945727
1983	881088**	778763	1048053
1984	1030054**	986347	1091760

Current latest figures of the above are not available.

** Does not include figures pertaining to the State of Sikkim.

Pending Cases in Higher Courts

If the problem of pendency and delay in the lower courts is gigantic, the problem is no less acute when one looks at the higher judiciary. The following tables (one⁵ dealing with the High Court and the other⁶ dealing with the Supreme Court) demonstrates the enormity of institutions, disposal and pendency in the higher judiciary.

Table 2: Year Wise Position in the High Courts

Year	Institution	Disposal	Pendency
1983	671,195	540,357	1119,484
1984	707,912	575,451	1251,945
1985	731,543	605,698	1377,790
1986	786,308	665,881	1495,864
1987	819,542	700,407	1614,999
1988	860,939	714,928	1761,010
1989	914,655	802,866	1872,799
1990	909,020	748,793	2033,553
1991	1004,244	837,861	2199,936
1992	1073,467	845,206	2427,197
1993	1162,685	911,221	2650,516*
1994	1143,030	917,688	2875,855
1995**	1007,647	957,223	2920,730

Information supplied by the Registry of Various Courts. Government of India - Annual Reports 1988-89 and 1994-95. Ministry of Law and Justice.

* Figures of pendency changed by the Registry of Rajasthan High Court, after physical verification.

** This includes the figure of Calcutta and Madhya Pradesh for 12/94, Gujarat for 3/95, Allahabad and Delhi 6/95. Annual Reports 1996-97, Ministry of Law, Justice, Page 31.

Table 3: Year Wise Position in the Supreme Court

Year	Institution	Disposal	Pendency
1983	104,345	8,336	136,313
1984	98,683	86,105	166,319
1985	109,665	92,237	152,969
1986	69,479	82,829	175,748
1987	68,911	46,132	
1988	67,642	44,252	199,138
1989	52,138	48,118	203,158
1990	38,293	56,343	185,108
1991	42,215	93102	134,221
1992	-----	Not available	-----
1993	38335	-----	97,170* *As on 30.6.93 Not available for the full year
1994 as on 1st Aug.	Not available	-----	55,280
1995 as on 1 st Dec.	21357 pendency	37168 (Regular matters only)	
*1996 as on 1 st July	Not available	Not available	9932 Admission matter 18639 Regular matters

• Information furnished by the Registrar of the Supreme Court. Also reported in Annual Reports 1988-89 (page 29), 1995-96 (page 30) Ministry of Law, Justice and Company Affairs.

It is important to note that when the Supreme Court was set up in 1950, only 3000 cases were pending before it.⁷ Year after year the arrears in the Supreme Court have risen relentlessly. It may be stated that at the end of 1989 1,872,799 matters were pending in the Supreme Court which grew to 2,650,516 by the end of 1993, meaning that in a span of five years the arrears rose by approximately 777,735 cases. Apart from the continuous rise in the quantum of rise of arrears year to year, the most disturbing fact is that the cases after having been brought to the Supreme Court are not disposed of for over a decade. Table 4⁸ hereunder is relevant to this:

Table 4: Regular hearing matters pending over

3 years	5 years	10 years
27,014	16,852	3,811

(Pendency position as on 1.1.1988)

It is distressing to note that a case has been pending for over 10 years in the Supreme Court (recalling the fact that the High Court and Lower Courts also take such a long time to dispose the case).

The Law Commission, in its 14th Report on the 'Reform of Judicial Administration' (1958), noticed that cases had been pending for many years. The Commission noted that four fundamental rights cases were pending from 1952, and 162 from 1955, 18 civil constitutional appeals were pending from 1954 and 118 such appeals from 1955, 143 ordinary civil appeals were pending from 1955, 197 civil appeals from 1956 and 533 such appeals from 1957. Seventeen special civil appeals were pending from 1953, twelve constitutional (criminal) from 1954, 10 from 1955 and 22 from 1956.⁹ In the Commission's view, this was quite a docket of cases to accumulate in such a short time.

A statement supplied by the Registry of the Supreme Court shows that in 1960 at least 3 civil appeals had been pending since 1950, 3 fundamental rights petitions since 1953, 3 constitutional appeals since 1954, 13 since 1956, 26 since 1957, 100 since 1958 respectively. In 1970 — there was 1 writ petition pending from 1964, 158 civil cases pending from 1967, 38 service matters and 64 labour cases from 1967. This was only a small fragment of the total pending cases. In 1978, at least one election case had been pending for 11 years, 639 civil cases were pending from 1969, 133 tax cases were pending from 1972 and 172 criminal appeals were pending from 1973.

Causes of Delay

Some amount of delay cannot be ruled out in any system. The adversarial system that India follows is time consuming. The judges sit through the proceedings impartially. The burden of proving or not proving facts at issue lies with the parties and the parties fulfil this task by adducing evidence. Hence, consumption of time becomes inevitable. Apart from the delays inherent in the system there are other causes of delay. Increase in population, greater awareness among the people of their rights, enactments of new laws

specially regarding tenancy and matrimonial rights. Rapid industrialisation coupled with new labour laws all contribute to the increase in the number of cases being instituted in the courts year after year.

There is the sprawling extraordinary jurisdiction of the High Courts under Articles 226, 227 and 228 enabling them to issue prerogative writs for enforcement of the fundamental rights or for any other purpose. The High Courts are responsible for the overseeing of all inferior courts within their jurisdiction (Article 235). Over and above this, the High Courts of Bombay, Calcutta, Delhi, Himachal Pradesh, Jammu and Kashmir and Madras also exercise ordinary original civil jurisdiction. The vastness of area of jurisdiction can be appreciated by reference to first appeals, appeals under letters patent second appeals, revision petitions, criminal appeals, criminal revisions, writ appeals etc. The varied and unmanageable jurisdiction has been responsible to some extent for a very heavy institution of matters in the High Courts. Supreme Court in India also enjoys the widest jurisdiction, including original jurisdiction. Various statutes provide for a first appeal directly to the Supreme Court. The Supreme Court has, according to the constitution, original jurisdiction in all 'federal' disputes between the states and between the states and union government. It also has a broad appellate jurisdiction. Any civil or criminal case may be appealed to if an interpretation of the constitution is involved and if the High Court certifies that the case is a fit one for appeal or if the Supreme Court grants 'special leave' to appeal. Two more important aspects of the jurisdiction are 'advisory jurisdiction' and 'original jurisdiction' for enforcement of Fundamental Rights under Article 32. This jurisdiction has been expanded by the Supreme Court by conferring upon itself the episolatory jurisdiction that is entertaining numerous letter petitions as well as social action litigation for rendering justice to aggrieved persons. A detailed discussion of the nature, scope and consequence of exercise of episolatory jurisdiction by the court is given in Chapter 6 of this work.

Delay in Trial Courts

In dealing with the question of delays in the disposal of civil suits in the trial courts, we must direct our attention to the points of bottlenecks or stages of the suit where delays actually take place. After a plaint is filed in court the same is scrutinised by a court official with a view to seeing as to whether the proper court fee has been paid and whether other formalities for filing the plaint have been complied with. Some time elapses between the filing of the plaint and the registering of the suit. The court then fixes a date for which summons are issued to the defendants. These summons are prepared by the court official on printed form but as the duties of the court official are manifold, it takes a number of days to prepare the summons.

Again in any system of adjudication which works on the basis of a written record, delay is inevitable. Paper work always takes time. The more untrained the staff and archaic the technology the more time will be taken to prepare the record. The delay increases and the various agencies dealing with the workload are unable to cope with the increased workload expeditiously.

Another important reason for delay in subordinate courts is the inadequate staff working in most courts. The number of staff in each court was fixed several decades ago and in spite of the fact that there has been a tremendous increase in litigation, there has been only a marginal increase in the number of staff.

Lack of proper physical facilities also add to the delays and miseries of the litigants and hampers the efficiency of lawyers as well as judges. At the subordinate rank of the judiciary the courts do not even have proper court rooms or a place to properly file the record. The courts do not have modern gadgets. Word processors have been a recent addition in some of the higher courts. Accounting is done by manual accounting process. Teleprinters with a court circuit is still unknown. All this again contributes to a slow motion approach in the hearing of cases. The financial constraints in affecting such a far reaching reform of bringing down the pendency have received the governments attention and the Finance Commission was approached a while ago to allocate Rs. 98 crore to enlarge the judiciary at all levels¹⁰.

Delay in High Courts/Supreme Court

The causes of delay in the higher courts are to some extent different from that of the subordinate courts. Two of the main causes for the accumulation of arrears in the High Courts/Supreme Courts is the inadequate number of judges commensurate with the work load and delay in filling vacancies.

In 1971-72 the number of vacancies which remained unfilled in different High Courts was 41. This increased to 52 in 1973,¹¹ 59 in 1976¹² and 60 in 1977.¹³ This amounted to a deficit of nearly 15 per cent. By July 1979, the situation improved and the number of vacancies was only twenty five.¹⁴ However, by July 1, 1982 these vacancies had again risen to 89.¹⁵

Justice D C Tewatia, a judge of Punjab and Haryana High Court has illustrated, by way of a table¹⁶, man days lost in the said High Court, on account of non-filling of vacancies from 1950-1984:

Table 5:

Year	Average Institution of main case	Average Disposal of main cases	Disposal per day	Average disposal per judge per day	Judges days lost on account of vacancies	Conversion of Judges days lost into possible disposal
1950-59	6812.3	6216.4	705.4	3.35	3682	12334.70
1960-69	12734.7	10765.7	689.08	3.00	4728	14184.00
1970-79	17789.7	16596.6	937.95	4.46	8076	36018.96
1980	11802.8	11807.4	1205.8	5.75	3249	18681.75
Total					19735	78940

He further stated that at the end of 1983 a total number of 33,703 cases were pending in Punjab and Haryana High Court. If there had been no vacancy the High Court would have cleared as many as 78,940 cases and there would have been no pending cases in the courts. The position in other High Courts is not much different.

There has been a failure to periodically revise the numbers of judges in each High Court commensurate with the vacancies and work load. The number of judges in all High Courts was increased from 426 judges (393 permanent judges and 31 additional judges) to 450 judges¹⁷ (420 permanent and 30 additional judges), during the last few years from 1984-88. The total sanctioned number of judges and additional judges of all the 18 High Courts was 443 as on 1.1.1988. In March 1987, the number of judges of the High Court was increased sanctioning 81 posts comprising 25 of permanent judges and 56 of additional.¹⁸ The total number of judges and additional judges in various High Courts was 443 in 1988 leaving 85 vacancies to be filled.

On 31.3.1989, the total number of judges and additional judges in position was 287, against the sanctioned strength of 451, leaving 64 vacancies to be filled.

On 1.12.1994, the total sanctioned number of judges and additional judges of various High Courts was 529. In addition, it has been agreed to create the posts of 12 permanent judges and 34 additional judges in different High Courts and on 1.4.1994, 51 fresh appointments of judges and additional judges were made. In addition to this, additional judges were appointed as permanent judges.¹⁹

On 17.12.1996, the position in various High Courts was 502, against the sanctioned strength of the total number of judges and additional judges leaving 66 vacancies to be filled.

The High Court Arrears Committee, 1972, chaired by C.F. Shah, former Chief Justice of India submitted its report making detailed recommendations for tackling the problem of backlogs. The Committee highlighted the known fact, namely, the inability of the High Court to cope with the inflow and disposal of a rising number of cases instituted, which is largely attributable to the denial of the necessary judge strength to the High Courts at the appropriate time, and strongly advocated that vacancies must be filled as expeditiously as possible. The statistical table incorporated in the report shows that the delay in filling the vacancies which attracted the attention of the Committee varied between 8 months and 7 days to 1 month and 18 days. Today, on average, vacancies are not filled for one year. The Shah Committee Report further reveals that due to the delays in the appointment of judges, 799 days were lost in Punjab and Haryana High Court, 455 days in Bombay, 450 days in Delhi and 391 days in Calcutta High Courts respectively.²⁰ Some of the vacancies have remained unfilled for several years.

Amongst the other causes responsible for the backlog of cases, the Shah Committee noticed population explosion; extra-ordinary resort to writ jurisdiction of the High Court; investment of special jurisdiction in the High Court etc. The Shah Committee reviewed the number of judges in each High Court and recommended an upward revision, simultaneously pointing out the pitfalls, in unsatisfactory appointments in the High Courts on political, regional, communal or other grounds. The Shah Committee suggested certain procedural changes for reducing arrears. The Committee also seriously considered curtailment of jurisdiction of the High Courts.

Similarly, the workload has been increasing in the Supreme Court year after year and barring very few exceptions, the pendency has hardly decreased. The Supreme Court was set up on January 26, 1950 when the Constitution became operational and only 3,000 cases were pending in it. The sanctioned strength up to the year 1956 was Chief Justices and seven other judges. Parliament on four different occasions sanctioned upward revision of the judge strength of the Supreme Court. In 1956 the strength was revised from 7 to 10; in 1960 from 10 to 13; in 1977 from 13 to 17; and in 1986 from 17 to 26.²¹ The institution, disposal and the mounting arrears showed no decrease despite the increase in the judge strength from 17 to 26 in the year 1987. The arrears took a quantum jump in particular in 1967. That was the year in which the cases of *L C Golaknath Vs State of Punjab*²² and *R C Cooper Vs Union of India*²³ were heard by a bench of 11 judges, in each case leaving few judges to deal with other work. Then came the famous *Keshvananda Bharti's Case*²⁴ which was heard by a bench of 13 judges for a continuous period of six months, leaving practically none to attend to other cases. Again the challenge to *National Security Act 1980*²⁵ occupied the court's time and in the *Judges' case*²⁶ a bench of seven judges heard the case from August 4, 1981 till the end of the year. A high number of judges being occupied in the hearing of only one case has the inbuilt tendency to push up the arrears. All these factors were responsible for the rise in arrears in the Supreme Court.

Merely passing legislation for the upward revision of judges strength is by itself hardly of any consequence. Even when the judge strength is augmented there is delay in filling in the vacancies in time and arrears keep mounting up. An attempt was made by the Law Commission²⁷ to establish that there is inordinate delay in filling vacancies. Information has been collected for the years 1981-86 in a tabulated form as follows:

Table 6: Statement showing the strength of the Judges of the Supreme Court (excluding the Honourable Chief Justice of India) from the year 1981 to 1986

no	year	sanctioned strength of the judges of the court	no of judges actually elevated to the bench	period		vacancies remaining unfilled	period during which vacancies remain unfilled		
				from	to		Y	M	D
1	1981	17	13	01.01.81	14.01.81	4	0	0	14
		17	12	15.01.81	27.01.81	4	0	0	13
		17	13	28.01.81	29.01.81	4	0	0	2
		17	15	30.01.81	31.12.81	2	0	11	2
2	1982	17	14	01.01.82	06.03.82	3	0	3	6
		17	13	07.03.82	31.12.82	4	0	9	2
3	1983	17	13	01.01.83	01.01.83	4	0	0	12
		17	12	13.01.83	14.03.83	5	0	2	2
		17	16	15.03.83	31.12.83	1	0	9	17
4	1984	17	16	01.01.84	24.06.84	1	0	5	2
		17	17	25.06.84	31.12.84	NIL	0	6	7
5	1985	17	17	01.01.85	08.05.85	NIL	0	4	8
		17	16	09.05.85	11.07.85	1	0	2	3
		17	15	12.07.85	16.06.85	2	0	1	5
		17	14	17.06.85	20.06.85	3	0	0	4
		17	13	21.06.85	30.09.85	4	0	1	10
		17	12	01.10.85	28.10.85	5	0	0	2
6	1986	17	14	29.10.85	31.12.85	3	0	2	3
		17	14	01.01.86	08.03.86	3	0	2	8
		17	13	09.03.86	09.03.86	4	0	0	1
		17	16	10.03.86	06.04.86	1	0	0	2
		17	15	07.04.86	14.06.86	2	0	2	3
		17	14	15.06.86	01.10.86	3	0	3	7

Source: Material supplied by Additional Registrar, Supreme Court of India.

Whenever upward revision of strength is sanctioned, therefore, steps must be taken to fill those newly created posts immediately. If the increase is worked out scientifically in the manner of disposal of cases by a judge per year and a certain figure is arrived at, then leaving the vacancies unfilled would unquestionably lead to the inadequate strength continuing to be inadequate even though there is an upward revision of the strength. The authorised strength of the Supreme Court judges (including the Chief Justice of India) is 26. However, there were only 23 judges in October 1995, leaving 3 vacancies to be filled.

It must be conceded that judges of the Supreme Court are overworked and that by not filling the vacancies overburden those who are in position. Monday and Friday are reserved as 'admission days' and, on an average 100 SLP/Writ petitions are listed for admission before each bench comprising of mostly two judges. On the regular hearing days, on average, 10 to 15 matters are listed for admission and also for a regular hearing. When these matters are heard, the judgements have to be pronounced. Ordinarily,

judgements are prepared at home outside office hours. This method entails a heavy workload on Saturday and Sunday and judges are hardly left with energy and stamina to read and investigate on their own. They may not have the time to reflect on the merits of each case thoroughly. In addition, judges do not have research assistants assigned to them. Therefore they may have to rely on the arguments advanced by the lawyers.

Judges in the USA have law clerks as assistants who are generally highly accomplished law graduates from Universities like Harvard or Yale. These clerks study the whole brief and render assistance to the judges on various aspects of fact and law in each case.²⁸ The judges in the United States Supreme Court sit in open court for not more than 8 or 10 days a month; the rest of the days are spent in studying briefs and preparing judgements. Their court is in session from the first Monday in October until the end of June the following year. Generally, the first two weeks of each month are set apart for hearing cases argued orally and the last two weeks are spent discussing the cases and writing opinions.²⁹ This tolerable burden of work provoked a former Chief Justice, P N Bhagwathi³⁰, to say that the failure on the part of the government to fill the vacancies has operated as an act of cruelty to the existing judges forcing them to carry such an intolerable burden.

Though the last judge strength of the Supreme Court was effective from 9th May 1986, for a period of nearly two years, not a single post from the additional strength was filled. Upward revision of judge strength is founded on a certain assumption that the present judge strength would not be able to cope with the inflow of work and to effectively deal with arrears. Therefore, one way of solving the problem is to increase the number of judges. If the increase is worked out scientifically in the manner of disposal of cases by a judge per year and a certain figure is arrived at, not filling those vacancies would mean that the inadequate strength continues to be inadequate even though there is an upward revision of strength. Therefore, merely passing legislation for upward revision of strength on its own is hardly of any consequence. The moment upward revision of strength is sanctioned, steps must be taken to fill those newly created posts as early as possible.

Other causes of delay

Some of the commonly accepted factors contributing to delay are:

1. Court caused delays;
2. Bar caused delays;
3. Litigant caused delays;³¹
4. Government caused delays.

Court caused delays: These arise from administrative matters, i.e., delay in complying with administration formalities for issuance of summons, notices, carrying out execution of decrees etc.

It has been suggested that court caused delays, may be reduced by drawing up a manual of court management for all levels of judiciary and that there should be a more intensive training programme for the judicial officers and administrative staff. Another

eminent authority³² on constitutional law, reveals various cases which contribute to increasing arrears. Briefly stated that judges intervene too easily in the cases. Another states that unless judges have a clear head, sound knowledge of the law, the gift of clear speech and avoiding wrangles with the counsel and the gift of attentive silence, the delay in the disposal of cases is inevitable. Another reason is that some judges have a bias for certain causes such as labour law cases. According to him, the judges must be value free, value neutral because the Constitution of India has no fixed 'philosophy' or no fixed 'values'.³³

Lengthy oral arguments consume a great deal of time in the High Courts and in the Supreme Court. In the Indian judicial system, the practice of presenting written arguments well in advance of the date of hearing is not enforced by the courts or the Bar. This adds to the time judges devote to hearing arguments. In the USA the oral arguments are limited in duration usually not extending beyond half an hour or a few days. But in India as stated above in the *Keshavanda Bharti's Case*³⁴ comprising 13 judges, when the relevant judge strength of the court was 14 the hearing lasted for about six months. Similarly, in *R C Cooper's case*³⁵ bench comprising of 11 judges, when the judge strength of the Supreme Court was 12, the hearing lasted for 37 working days. Looking at the judge strength during that period when the aforementioned two cases were heard no other work apart from routine admissions could be processed by the court.

Bar caused delays: In an adversarial system, the legal profession has a vital role to play in the administration of justice. However a disadvantaged side, or a side with a weak case opts for all sort of delaying tactics to prevent the court from deciding the issues. Lawyers going on strike is another attempt at delaying justice. Strikes by lawyers has become a recurring phenomenon paralysing the court work. A section of the legal profession is politicised and uses its elected office to demonstrate their powers. Striking is a convenient means for this. For those who believe that law is a noble profession to be pursued in the spirit of public service and wish to maintain that ideal, a prolonged strike with the tremendous inconvenience it undoubtedly inflicts, is the very antithesis of that ideal and of professional ethics.³⁶

A brief look at some of the occasions when the Bar resorted to striking reveals an interesting picture. On some occasions, the Bar was upholding the independence of the judiciary and legal profession. On other occasions, however, the reasons were partisan. The Gujarat High Court Bar went on a long strike on the grounds that the acting Chief Justice of the court was not being confirmed by the government. Further they also protested on the grounds that some of the persons recommended for appointment to the judiciary by the Chief Justice of the High Court were not appointed by the government. The Allahabad High Court Bar Association resorted to striking for a period of about 13 days as a protest against the style of functioning of the Chief Justice. On certain occasions however, issues raised by the Bar are very narrow-minded. Hence, an Income Tax raid at the premises of a lawyer led to a strike; the cane charge resorted to by the police to dispel rioting advocates resulted in a prolonged strike in the Lower Courts of Delhi. In 1987, the Delhi High Court went on a long strike protesting against a decision of the government to raise the pecuniary jurisdiction of the said court to Rs.500,000. Interesting-

ly, the Lower Court which would have benefited from this decision (since it would have resulted in the transfer of case files of below Rs.500,000 to the Lower Courts), went on an even longer strike protesting about delays on the part of the government in implementing the decision to raise the pecuniary jurisdiction to Rs.500,000. Hence, cases of advocates striking vary from the profound to the mundane — but it was always at the cost of the litigants.

A rough estimate suggests that during the last three years the three lower courts in India observed a total of 30 strikes, paralysing the work for over 500 working days. A day strike at these courts affects at least 1200 to 1500 cases.³⁷ Low quality of input from the Bar further compounds the problem of delays and backlogs.

Government caused delays: Another important reason for delay and inefficiency in courts is the inadequate staff working in High Courts and the Supreme Court. The Supreme Court's work has grown steadily. Today, the court has to deal with all sorts of cases and work has grown substantially. Inevitably, the court faced with an increasing workload and increasing volume of arrears, required more staff. Over the years the staff of the court has been increasing, but whether there has been an adequate increase is a moot question. The increase in staff has continued on a relatively ad hoc rather than a sanctioned basis. No criteria is available as to why staff has increased in the way in which it has. Each time a judge is appointed, the total strength of gazetted officers increase. A closer examination of employment levels in the Supreme Court will show considerable increases in junior clerical staff and peons. The ministerial staff are the backbone of the court's administrative work. Of the 264 ministerial staff, 45.36% of the total 115 are junior clerks (i.e. 19.75%).

Recommendations

- (i) As stated earlier that every adjournment granted freely causes delay in the disposal of the proceedings, it is suggested that whenever an adjournment is sought in a case the Presiding Officer should earnestly examine the reasons for the adjournment and grant adjournments only after due and effective consideration of the grounds for adjournments. The legal profession should also act with a sense of responsibility in this regard.
- (ii) Although in India we have adopted the adversarial system, the trial judge should not play altogether a passive role, but must take a greater interest and elicit such information as may be helpful in finding the truth. There are certain categories of cases under special statutes which by their very nature have an element of urgency about them and call for speedy disposal. For instance matrimonial cases, motor accident cases, tenancy cases, etc. Priority should be given in disposal of these cases. There is also a need for speedy adjudication of disputes relating to labour cases.
- (iii) It cannot be denied that the bulk of people receive justice through the subordinate judiciary. It is the trial court which is the first resort for these seekers of justice and the confidence of the common man in the system of judicial administration depends largely on the image produced by the trial judge. A trial judge indeed is the linchpin of the entire

judicial system.³⁸ His ability, efficiency and tact or lack of these can make all the difference regarding the fate of cases handled by him. A proper and fair trial requires not only professional competence of a trial judge, it also needs mental firmness and a cool temperament as in the course of proceedings he has to give a number of rulings on the spur of the moment. Therefore, even if the procedural laws were perfect the country would need adequately trained and capable judicial officers to apply and administer the law properly. There is thus a need to reinforce the importance of the selection of the right type of judges who have experience, competence, integrity and an appreciation of the values for which the judiciary stands for. The suggestion to have an All India Judicial Service of same rank and same pay scales as the Indian Administrative Service should receive serious consideration. A comprehensive training programme for a period of six months to one year comprising of not only judicial training but also revenue training, policy and administrative training, has been recommended by the Law Commission.³⁹

As the judicial system is to reflect the functional values of a constitutional democracy in operation, it is imperative to have continuous education for judges from the lowest to the highest levels. The judges should, through such training be acquainted with procedural requirements for dealing with different stages of cases, including the writing of judgements and interlocutory orders and dealing with administrative matters.

(iv) Recalling that the delay in filling vacancies, both existing and those created by the upward revision of the strength, is largely responsible for the piling up of arrears; one specific suggestion was made by the Law Commission in its report.⁴⁰ If a vacancy occurs in a High Court on the elevation of the High Court judge to the Supreme Court or on retirement or death of a judge in position, the process of filling the vacancy must be taken in advance, at least three to six months before the occurrence of a vacancy, during which time the proposal will be processed. On average, a period ranging from one to three years is spent in filling the vacancies. During this period, the judge strength is reduced, average disposal suffers and arrears increase.

(v) Another significant recommendation made by the Law Commission in the same report pertains to utilising the services of retired judges. Retired judges are experienced people having spent a major part of their life in adjudication work. The rich experience of these senior citizens should be used. The judges retiring from the High Court generally settle down where the principal seat of the High Court is located or where the Benches are set up. The Chief Justice under Article 224-A should enlist the services of retired judges for setting up Benches composed of two judges to do civil, criminal and miscellaneous work in the morning. Art. 224A of the Constitution provides that the Chief Justice of a High Court for any state may at any time, without the previous consent of the President, request any person who has held the office of judge of that court or of any other High Court to sit and act as a judge of the High Court for that state. Every such person so requested shall, while sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a judge of that High Court. The existing judge strength would be able to deal effectively with the current incoming work and the retired judges would deal exclusively with the arrears and no other administrative or admission work. The Benches of retired judges may start functioning in the morning at

about 8.30 am and work till 12 noon. The High Court judges can assemble from 12 noon and work till 5.30. This will have a double advantage. Firstly, utilising the unutilized capacity of the buildings, centralised offices and facilities, including library and also utilising the rich talent pool represented by retired judges. The second advantage would be that they would be quick in the disposal of the work on account of their rich experience and expertise in judicial process. The only thing required to be done would be to increase the staff strength of stenographers, court masters, etc., in proportion to the number of judges who would work as ad hoc judges.

Similarly, the services of the judges retiring from the Supreme Court can be called upon by the Supreme Court. This can be done under Article 128 of the Constitution which provides that when retired judges are requested to attend the sittings of the Supreme Court, they would be entitled to such allowances as the president may by order determine.

(vi) Lengthy oral arguments consume a great deal of time in the courts. The Law Commission has recommended⁴¹ that a systematic concise note of arguments be presented by the parties in advance, before the commencement of oral arguments. The cost of litigation also mounts in direct proportion to the length of oral arguments. It is necessary to control and curb the length of oral argument. Therefore, written submission including the case law to be relied upon, must be submitted to the court within four weeks from the date of the service effected on the respondent and when he has entered appearance. The respondent shall submit his written submissions within four weeks from the date of the receipt of the submissions of the appellant. The written brief must be circulated to the members constituting the Bench. The Bench specify the time allocated to each side in advance. This will effectively reduce the length of oral arguments and save the time of the court.

(vii) With regard to the frequent strikes by the Bar, it is noted that the institution of courts is neither for the judges, nor for the legal profession, but for the litigating public who seek resolution of their disputes through the court system. Judges and members of the legal profession are to assist in resolution of disputes for the orderly development of society. There should be a forum for joint deliberations for tackling problems arising in the administration of the court system where a dialogue may help in resolving the problems which would smoothen the working of the court. In New Zealand, a courts consultative committee has been established, chaired by the Chief Justice and comprising judges, law secretary nominees, officers of the Justice Department, the Solicitor General and lay representation. India should also set up such a committee accordingly in every High Court chaired by the Chief Justice of the High Court, comprising three senior most Judges, Advocate General, the Minister of Justice, the President and the Secretary of the High Court Bar Association, a nominee of the Bar Council of the state from amongst the members of the state Bar Council and three representatives of the litigating public to be nominated by the Chief Justice of the High Court.⁴² Problems arising in the administration of the court system may be brought before this committee which would try to resolve the same. Such a committee should also be appointed at the Supreme Court level. This partnership principle of sharing joint responsibility would have the in built

potential of avoiding friction and confrontation and the court work and the litigating public would suffer less from recurrent strikes.

(viii) The High Court is at the apex of the state judicial apparatus. Each High Court is invested with control over all subordinate courts in the state. The system of both civil and criminal justice provides for either an appeal or a revision to the High Court depending upon the nature of civil disputes, the jurisdiction of the trial courts as well as the level of the court at which the criminal case is tried. This needs to be either controlled or curtailed without impairing the quality of justice. The Law Commission has recommended the restructuring of the judiciary at grass root level, and has recommended only one revision petition to the District Court and no appeal to the High Court.⁴³ This, when implemented, would make a deep dent in the institution of second appeals and civil and criminal revision petitions in the High Courts. The jurisdiction of the High Court as well as the Supreme Court can be curtailed by excluding from their jurisdiction subjects which deserve specialist treatment by specialist courts/tribunals, like tax, consumer forum matters, etc. This will again reduce the inflow of workload to a considerable extent.

One highly innovative method of relieving the courts of the backlog of cases in the recent past has been the holding of *Lok Adalat* — literally Peoples Court. The object of *Lok Adalats* is to render instant justice to litigants where cases follow typical factual situations like motor accident cases, family settlement, etc. In such cases facts are similar and hence the outcome also generally known to parties. Such cases are bundled together and posted on a particular date from time to time. Lawyers are not allowed and even the parties are given very little choice to discuss their case at length. The aim is to cajole a party into accepting a compromise. Since many persons situated in the same boat are accepting such offers of compromise — when the *Lok Adalat* is over by the end of the day, it turns out that a majority of the cases have been settled. Often, the Chief Justice of the High Court and other Senior Judges are also present to goad both parties into a reasonable settlement.

(ix) Another method is to provide for compulsory arbitration in certain types of disputes, where questions of law are not involved. For this however, it is necessary to arm High Courts and Supreme Court with power to compel parties to go for mediation or arbitration.⁴⁴

(x) In order to attract men of ability and character as judicial officers, the terms and conditions of service must be made more attractive. Attempts have also been made to improve the conditions of service of judges of the High Courts and the Supreme Court. Parliament enacted the High Courts and the Supreme Court Judges (Conditions of Service) Amendment Act, 1986. It also amended, by the Constitution (54th Amendment) Act, 1986 Part D of the second schedule to the constitution. By the constitutional amendment, the salaries of the Chief Justice of India, judges of the Supreme Court and the Chief Justices and judges of the High Court were revised and more than doubled. It is necessary to keep revising the salary structure in order that the best talent from the Bar is attracted to the judiciary.

(xi) The staffing and management of the court is in the hands of the Chief Justices. What is needed is a very realistic estimate of what staff requirements for each section of the

judiciary ought to be. Some thought was given to this in 1971. Since 1975, there has been a system whereby the Registrar of Administration reviews staff allocation on a six-monthly basis. The Supreme Court's work is highly specialised work. It is work that requires training, yet no training programmes exists. The details of such a programme must be urgently worked out. What is needed is trained staff able to deal with the work allocated.

(xii) In the age of computers and high technology, our legal processes are still antiquated. Modern technological advances must be made if the judicial process is to be expedited. Computerisation of the registry of all the courts is a necessity. Similarly, computerisation of a library is also needed as a lot of time is wasted in conducting research.

Extracts from Report of Chief Justice Meetings and Law Ministers Meetings

Since the delay in the disposal of cases is the common feature of the judicial system, there have from time to time been innumerable conferences and seminars where the subject has been discussed at length by lawyers, jurists and others connected with the administration of justice. A number of committees has been constituted from time to time to suggest ways and means to tackle the problem. As early as 1924, a civil justice committee known as the Rankes Committee was appointed in order to find a solution to the problem. Again in 1969 the High Court Arrears Committee headed by Justice J C Shah was appointed which submitted its report in 1972. In the recent past, several concrete suggestions have been made at the hands of the committees of Chief Ministers and Chief Justices Meeting, as well as the Law Ministers Meeting, 1992, extracts from which are produced below:

Report of the Three Chief Justices Committee, 1984

A committee of three Chief Justices of High Courts was constituted by the Government in 1984 to study the problem of arrears in High Courts and suggest reforms. The Committee under the Chairmanship of Justice Satish Chandra, the then Chief Justice, Calcutta High Court, suggested numerous procedural reforms. Some of the suggestions required amendment of legislation and High Court Rules and Orders, whereas others required issue of administrative instructions on the part of the High Courts. The suggestions of the Committee, as accepted by the government, were sent during the year to the state governments/union territory administrations and High Courts for adoption on 5th October 1988. Some of the reforms suggested by the Committee were as follows:

- a. Pecuniary appellate jurisdiction of District Courts be raised to Rs.500.000 so that cases of lesser value go to junior judges.
- b. Revisional jurisdiction of High Courts should be exercised within the limitation of Section 115 of the Code of Civil Procedure, 1908 and not under Article 227 of the Constitution (which is far wider in scope).
- c. Legislation be enacted to abolish second appeal against the judgement of a single judge in a writ petition directed against an appellate or revisional forum below.
- d. Ordinary original jurisdiction of High Courts be abolished.

- e. To speed up the disposal of cases in High Courts, the following categories of cases be disposed of in chambers (i.e. without hearing).
1. Revision applications or writ petitions for admission arising from:
 - a) interlocutory orders;
 - b) concurrent decisions of the 2 courts, authorities or tribunals immediately below.
 2. Applications for substitution where abatement is involved.
 3. Application for exemption from paying court fees.
 4. Application for fixation of time in paying court fees.
 5. Application for extension of time for furnishing bank guarantees, securities, etc.
 6. Application for transfer.
- f. All administrative work by the judges of High Courts should be done after court hours.
- g. First appeals, second appeals, civil revision and writ petitions be heard by a single judge at the time of final hearing. Only criminal appeals involving sentence of death or life imprisonment be heard by a Division Bench of two judges.
- h. Cases for hearing be assigned to judges with experience in a particular branch of law.
- i. Commissioners duly empowered for recording evidence be attached to the High Courts.

The recommendations of the Committee as accepted by the government of India were sent to High Courts and state governments for implementation on 5th October, 1988.

Law Ministers Meeting, 1992

In the year 1992, the Government of India constituted a Committee, popularly known as Malimath Committee, with a view to identifying the causes for the accumulation of arrears in courts and suggesting appropriate remedial measures. The implementation of the recommendations of the Committee calls for concerted action on the part of the Centre and State Governments. Therefore, with a view to enable the Law Ministers and Law Secretaries of various states/union territory administrations to discuss the recommendations made by the Malimath Committee, and to formulate an appropriate action plan, a meeting was organised in Bangalore during 16-18 October 1992.

There was general agreement on the following points at this meeting of the Law Ministers:

1. Unless the problem of growing accumulation of arrears is dealt with in time, extra-constitutional centres for dispute resolution by use of criminal force, etc., may spring into existence and get strengthened. It is in the interest of the healthy growth of democracy to strengthen the judicial wing of the state.
2. There is a need to take immediate action to upgrade the infrastructure facilities of the judiciary.
3. Alternative forums for dispute resolution such as *Lok Adalats* (compromise forums) should be established.
4. Tribunals may be constituted to deal with litigation involving technical issues like tax, customs, excise, etc.
5. There should be institutions for the training of judicial officers.

6. Government litigation should be reduced by undertaking timely steps to screen grievances against the government.
7. Courts should be strict in the matter of admission of public interest litigation which is often misused.
8. The Supreme Court and the High Courts should exercise greater restraint in the exercise of their powers of entertaining writ petition and in the discharge of their functions.
9. Problems connected with frequent adjournments, strikes, etc., cannot be effectively handled, unless the judges and practising lawyers are brought together to discuss matters across the table.
10. The Malimath Committee recommendations constitute the right framework to proceed further in the matter.

Meeting of Law Ministers (Working Group III)

Pursuant to the decision taken at the meeting of the Law Ministers held in Bangalore from 17-18 October, 1992, the Law Minister's (Working Group III) meeting was held in Pondicherry from 5-7 February 1993.

The Law Secretaries met under the Chairmanship of Dr. P C Rao, Union Law Secretary, on 5th and 6th February 1993.

The Law Ministers considered that the recommendations made by the Malimath Committee on the subject of arrears of cases, as well as the Law Commission's 79th, 99th, 124th and 131st Reports offered a sound framework for the effective handling of various problems concerning the accumulation of arrears in the various courts.

The Law Ministers agreed that inordinate concentration of work in the hands of some members of the Bar had contributed to the accumulation of arrears, especially in the Supreme Court and the High Courts. They considered that this led, among other things, to the mounting cost of litigation.

The Law Ministers concluded that the granting of unnecessary adjournments had become a widespread phenomenon and that the Chief Justices' Conference should be requested to consider the question of evolving a convention that would discourage the granting of adjournments, except in exceptional circumstances, and require recording of reasons for granting adjournments.

The Law Ministers felt that unending oral arguments not only increased the costs of litigation but also contributed to the accumulation of arrears of cases. They further felt that, in the interest of expeditious disposal of cases, courts should discourage long arguments. They felt that, while it might not be desirable to dispense with oral arguments altogether, time-limits should be fixed, in consultation with the counsel, for the presentation of oral arguments. The Law Ministers also recommended that parties should be made to present a concise note of arguments, including the case law to be relied upon, in advance before the commencement of oral arguments.

The Law Ministers also felt that the Chief Justices' Conference should be requested to consider the need for avoiding the writing of long and elaborate judgements as a general rule.

The Law Ministers expressed their concern at the growing number of old cases. It was also felt that liberal grant of stay orders by the superior courts had contributed to the growth of old cases. The Ministers recommended that all courts should consider preparing lists of old cases and arranging their early disposal. It was also considered that the Chief Justices' Conference could consider evolving criteria for giving priority of consideration to cases requiring prompt attention.

The Law Ministers considered that urgent steps should be taken to furnish courts with modern equipment like photocopying machines, word-processors, etc.

The Law Ministers felt that grouping and classification of cases should be undertaken in all the courts on a priority basis, so that several cases could be disposed of together spending the minimum amount of court time.

The Law Ministers viewed with concern the recurrent phenomenon of lawyers going on strike which affected the administration of justice. They recommended that the Chief Justices' Conference, in consultation with the Bar Council of India, could consider constituting a committee consisting of lawyers and judges at the appropriate level for dealing with the underlying causes for lawyers' strikes and for evolving appropriate guidelines for preventing indiscriminate closure of courts.

Infrastructure Facilities for the Judiciary

It has been decided, in consultation with the Planning Commission, to include in the Eighth Five Year Plan, a central sponsored scheme on 'infrastructure facilities for the judiciary'. The expenditure on the scheme is estimated at Rs. 1,000 crores which is to be shared by the central and the state governments on 50:50 basis. The central assistance will be limited to capital expenditure only. The scheme includes:

1. Setting up of new courts with all modern facilities;
2. Construction of court buildings and residential quarters for judicial officers;
3. Amenities in courts;
4. Expansion of the existing High Courts;
5. Construction of accommodation for High Court judges.

Establishment of a National Judicial Academy for Training of Judicial Officers

It has been agreed, in principle, to set up a National Judicial Academy for recruitment and training of judicial officers. The proposed academy will be run by an autonomous body registered under the Societies Registration Act 21 of 1860.

Family Courts

29 Family courts have already been set up in different States — 2 in Karnataka, 3 in Kerala, 2 in Maharashtra, 2 in Orissa, 5 in Rajasthan, 10 in Uttar Pradesh and one each in Manipur, Tamil Nadu and Union Territory of Pondicherry. Besides, necessary notifications extending the jurisdiction of the Family Courts Act have also been issued by the union government in respect of Haryana, Sikkim, West Bengal and the Union territories of Andaman and Nicobar Islands and Delhi. Lawyers are not allowed in a family court. The parties appear in person and the judge acts as an agent of compromise, failing which the case is disposed of in a few hearings.

Chief Minister's and Chief Justices' meeting, 1993

The Chief Ministers of various states and Chief Justices met in New Delhi on 4th December, 1993, to consider the problem of arrears of cases in courts and to find out ways and means to deal with it as expeditiously as possible.

They expressed their appreciation of the recommendations of the Law Ministers who met in Bangalore (October 1992), Pondicherry (February 1993), Panaji (April 1993), Pachmarhi (May 1993) and of the recommendations of the Informal Consultation Committee which met in New Delhi (October-November 1993) under the chairmanship of the Chief Justice of India. They noted that these recommendations took into account the various reports of the Law Commission of India and also the report of the Arrears Committee, 1989-90, constituted by the government of India on the recommendation of the Chief Justices' Conference. They expressed their deep concern over the exploding number of court cases.

Appointment of Judges

The Chief Ministers and Chief Justices noted with concern the delays that occurred in the filling of vacancies in the Superior Courts and underlined the need to review the procedure for the appointment of judges. They considered that it was necessary to initiate action with regard to appointments at least four months in advance of the occurrence of a vacancy and to prescribe time-limits within which the proposals ought to be processed at different stages so as to ensure that judges were appointed as soon as vacancies arose. They recommended that the number of vacancies in each High Court to be filled from the judicial officers of subordinate judiciary should be enlarged; this number might go up to 40 per cent.

Judges Strength

The Chief Ministers and Chief Justices took note of the fact that the work load of the High Courts was steadily increasing. They expressed the opinion that, for efficiently dealing with arrears of pending cases, the government of India should undertake a periodic review of the optimum strength of the judges in each High Court, in consultation with the constitutional functionaries in the states concerned and the Chief Justice of India. The first such exercise should take place within a period of six months and thereafter once every three years. They emphasised, however, that there were several other factors which also contributed to the accumulation of arrears substantially and that the question of judges strength could not be viewed without considering those factors.

The Chief Ministers and Chief Justices noted that unsatisfactory appointment of judges could contribute to the accumulation of arrears and to the deterioration of the quality of justice administered by courts. They considered that the constitutional functionaries should exercise the greatest amount of care in the appointment of judges so as to ensure that only persons who have, among other things, requisite legal expertise, the ability to handle cases, proper personal conduct and ethical behaviour, firmness and fearlessness were appointed.

Alternative Dispute Resolution

The Chief Ministers and Chief Justices were of the opinion that courts were not in a position to bear the entire burden of the justice system and that a number of disputes lent themselves to resolution by alternative modes such as arbitration, mediation and negotiation. They emphasised the desirability of litigants taking advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial. They emphasised the urgent need to strengthen the movement of *Lok Adalats* throughout the country for resolution of disputes.⁴⁵ They further underlined the need for both the central government and the state government to set up effective grievance cells for resolving problems before they ended up as disputes in courts or tribunals.

Appeals and Original Jurisdiction

The Chief Ministers and Chief Justices Committee noted that Regular First Appeals arising under the Code of Civil Procedure and under certain special enactments had contributed substantially to arrears in the High Courts. They were of the opinion that there was a need for raising the pecuniary appellate jurisdiction of District Courts/City Civil Courts up to Rupees Hundred Thousand, wherever it was less.

The Committee recommended that the High Courts should make rules or orders specifying categories of cases which could be heard by a single judge, or as the case may be, by a Division Bench, regarding their complexities and importance.

Concentration of Work

The aforesaid Committee agreed that inordinate concentration of work in the hands of some members of the Bar had contributed to the accumulation of arrears, especially in the Supreme Court and the High Courts. They considered that this led, among other things, to the mounting cost of litigation. They were of the opinion that the Bar Council of India, in consultation with the Bar Councils of various states, should address itself to this problem and make appropriate recommendations. It was felt that the leaders of the bar should be invited by the Bar Council to participate in the discussions and make any recommendation with regard to this.

Handling of Judicial Work

The Committee noted with concern that the granting of unnecessary adjournments had become a widespread phenomenon. They considered that a convention should be evolved that would discourage the granting of adjournments except in exceptional circumstances, and also require recording of reasons by the judge for granting adjournments.

Conclusions

It is therefore clear that the problem of arrears if tackled with a determined will and if the recommendations as mentioned above are implemented, the courts can manage both

their arrears and their inflow of work and the problem of backlog should not be difficult to contain.

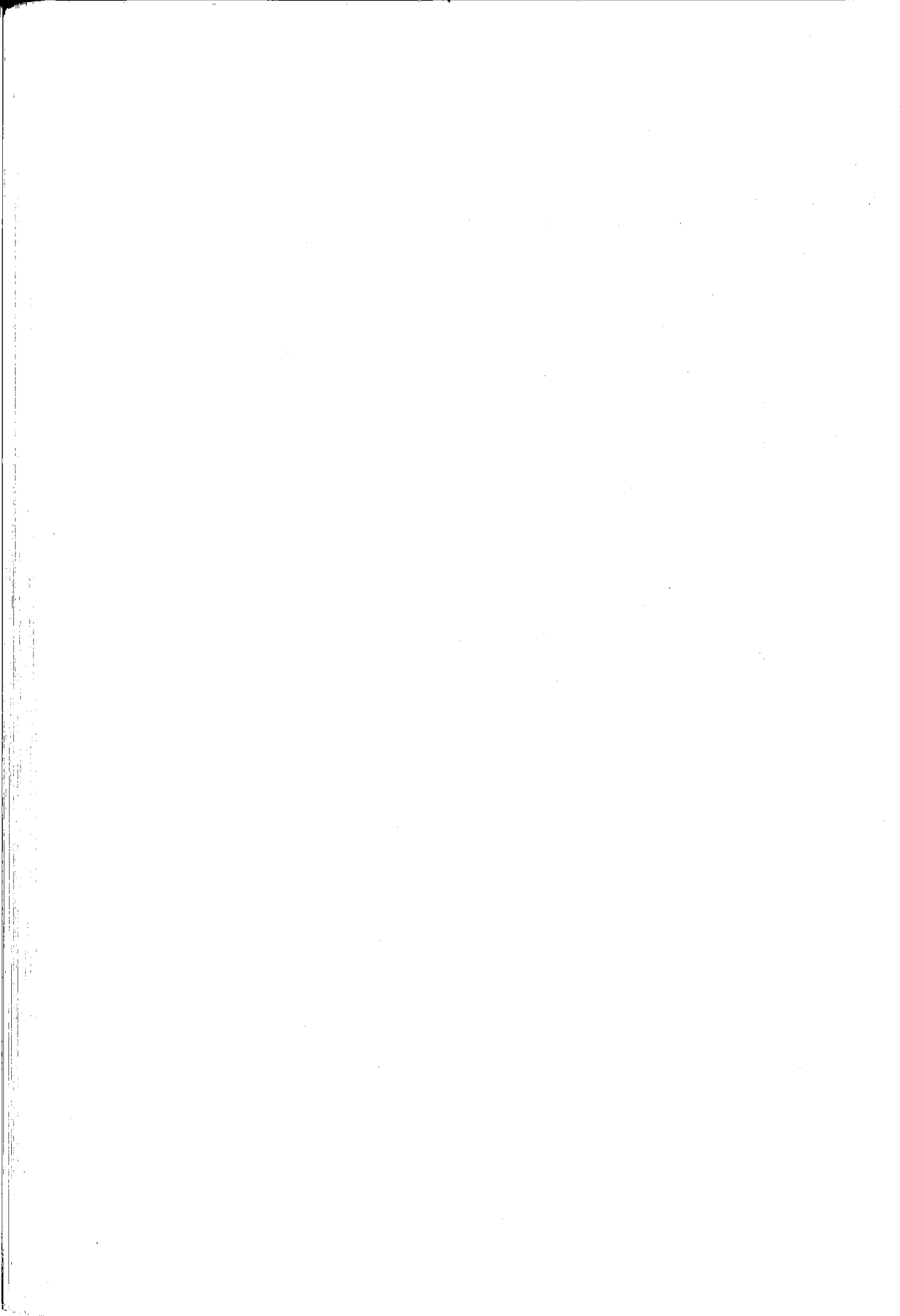
In fact, the judges have got on top of the arrears in the apex court though not in all High Courts and certainly not at the lower levels of the judiciary. The apex court has by simply changing certain procedures and introducing a system of quick and ready disposal of cases at the preliminary stage of grant of leave to appeal, has helped a lot in reducing the arrears. But in the lower courts, the reluctance and inability of Trial Judges and First Appellate Court Judges to push cases along continues to result in the backlog increasing.

Therefore, it is of utmost importance that to preserve the faith in the judiciary and to avoid its becoming marginalised and inaccessible to ordinary litigants, that the problem of arrears be tackled with determination. Important steps such as the creation of alternative forums for dispute resolution like specialised tribunals, arbitration forums, training of judicial officers, discipline in procedural matters like adjournment, etc.; filling of vacancies in the Supreme Court and in the various High Courts should be all taken up in earnest.

Notes

1. *Linolt V Footmer* as cited in *Indian Express* March 30, 1978.
2. Rajeev Dhawan, *Justice on Trial, The Supreme Court Today*, 1979, page 83.
3. Alladi Kuppaswami, 'Some thoughts on Judicial Reforms.' *Indian Bar Review* Vol. 70, 1983 Page 433.
4. *Government of India Report, 1987-88*, P32, Ministry of Law, Justice and Company Affairs.
5. *Govt of India, Annual Reports, 1988-89* page 29 and *1994-95*, page 25 Ministry of Law Justice, and Company affairs.
6. *Govt. Of India Annual Report 1988-89*, page 29, *1992-93*, page 23, *1993-94* page 27.
7. *Times of India*, May 16, 1985, page 9.
8. Information supplied by Minister of State for Law and Justice in Parliament in reply to unstarred question No.1646 on 10th March 1988.
9. *LCJ, 14th Report on Reform of Judicial Administration*, 1958.
10. *The Tribune* January 16, 1979 page 4.
11. *The Statesman*, May 1, 1973, page 1.
12. *The Hindustan Times*, April 24, 1976, page 7.
13. *The Hindustan Times*, January 31, 1977, page 1.
14. *The Hindustan Times*, July 8, 1979 page 6.
15. *The Times of India* May 2, 1982 page 4.
16. *The Tribune*, March 27, 1985, page 4.
17. *Govt of India Annual Report 1988-89*, page 37, Ministry of Law, Justice and Company Affairs.
18. *Govt of India Annual Report 1994-95*, page 24.
19. *Ibid.*
20. Paras Dewan, 'Arrears of cases; the Impending Explosion.' *The Lawyers Collective*, 1993, page 9.
21. *LCI 125th Report on The Supreme Court — 'A fresh Look'*, 1988.
22. *AIR 1967 SC 1643*.

23. AIR 1970 SC 564.
24. AIR 1973 SC 1716.
25. AIR 1982 SC 710.
26. S.K. Gupta Vs. Union of India, AIR 1982 SC 179.
27. Supra, n.21, page 32.
28. For the first time in 1986, the practice of having a position of law clerk to at least the Chief Justice of India was introduced and a senior member from Faculty of Law was invited. The law clerk would assist the Chief Justice on various aspects of law in almost all cases. The practice continued for 5 years successfully but later it was abandoned.
29. Lewis & Others, Introduction to the Courts and Judicial Process 1978 page 9.
30. Law Day Speech, 26th November 1986 — Justice P.N. Bhagwati.
31. U. Baxi, The Crisis in the Indian Legal System, 1983, P. 64.
32. Mool Chand Sharma, 'Should Lawyers Strike?' The Times of India June 20, 1990.
33. Indian Express, April 30, 1996, p. 3.
34. Supra, n. 31.
35. HM Seervai, Constitution Law of India, 3rd Vol. II, page 2454.
36. Supra n. 24.
37. Supra n. 34.
38. AIR 1970 SC 564.
39. LCI, S, 77th Report on Delay and Arrears in Trial Court, 1978, P. 31.
40. LCI, 117th Report on Training of Judicial Officers 1986.
41. Supra n. 21.
42. LCI, see generally 77, 79, 124, 125th reports.
43. Supra, n. 41 at page 23.
44. LCI, 114th Report on Gram Nyayalaya, 1986.
45. Supra, n.39 page 26.



Chapter 5

Judicial Credibility, Judicial Discipline and the Media

The subject of judicial credibility and discipline is wide and has numerous facets. Some of these have been dealt with at various places in this paper. This chapter concentrates on the aspect of judicial corruption, which is central to judicial credibility. It also deals with the allied topic of the media and judiciary, including the rights of the media and affected citizens to bring the judicial process to public knowledge by means of a free and robust publication of all aspects relating to the judiciary.

Judicial Corruption

Broadly stated, the judiciary enjoys a higher credibility and prestige than any other branch or institution of the state. However, recent years have seen a threat to the credibility of the judiciary. One major factor contributing to this decline is the allegations of corruption in the judiciary.

Even the severest critics of the judicial system who found fault with the tardiness of the legal process, the costs and the uncertainty would not accuse the judges of corruption except in very rare cases. Earlier, there was a general perception in the minds of the public that corruption, if any in the judiciary, was more or less confined to the lower judiciary. But the past few years have seen a rise in the allegations of corruption at almost all levels of the judiciary and a belief in the veracity of these allegations.

A judge of the Bombay High Court, Mr. P B Sawant, who was later elevated to the Supreme Court dealt with the internal working of the judiciary in a series of lectures delivered in Pune in 1987. Justice Sawant's lectures were very candid and are an insiders view of the hallowed institution and highlight the urgent need for judicial reforms. According to Justice Sawant, the judiciary is surrounded by an aura of mysticism, sophistry, awe and fear. A deliberate atmosphere of reverence and respect is maintained around the judges. This coupled with the law of contempt with which the court proceedings are armed make the court look like a divine institution and the judge a sort of a demigod. The phenomenon has crept up partly due to a human tendency to mystify individuals and institutions which they do not understand. But, this silence maintained about the judiciary in its workings which makes it look larger than life is fatal to the democratic way of life, where all institutions should be intelligible and accountable to the people.

Adverting to corruption in the judiciary, the judge listed a whole number of subtle and not so subtle forms of corruption in the judiciary.¹ Bribery, gifts, hospitalities of various kinds including dinners and entertainment, provisions for transport, birth and wedding anniversary presents for the judge or the persons of his family are the known forms of corruption. But corruption also works in more insidious ways. Favouring the firm of lawyers, which sends briefs to the judges relatives, if they are practising in the same or

other courts; favouring the juniors or other associates of judges, kith and kin; trying to favour lawyers and law firms with a view to earning briefs or opinion work after retirement are some of the other damaging modes of corruption. Expectations of promotion or that of political or other offices or of lucrative practice after retirement may induce even an otherwise upright judge to compromise with his intellectual honesty. Then there is the well known phenomenon of some litigants and lawyers trying to get their matters fixed for hearing before a particularly 'helpful' judge. Someone has aptly put it that it is 'face law' and not 'case law', which prevails in some courts.

Judicial Corruption and the Role of the Bar

In India a very vigilant bar and an lively press have in the past focused on the issue of judicial corruption. Although there have been allegations against both for being overzealous at times, it would not be an exaggeration to say that both the Bar and the media have fulfilled the much needed task of bringing the question of judicial integrity to the notice of the nation. To illustrate the point some of these instances are mentioned below.

The advocates of the Bombay High Court Bar Association went on strike for a considerable number of days demanding the resignation of at least half a dozen judges on various occasions as the Bar doubted their integrity. The Bar also boycotted some of the judges of the High Court as they seriously doubted their integrity.

Around May 1990, the then President of the Country, Shri R Venkataraman, had forwarded to the Attorney General of India a Memorandum of complaints received by him from several members of the Bombay High Court bar against Justice S K Desai.² The Bar was, however, divided between those who wanted action to be taken against Justice Desai straightaway, and those who held that the charges of corruption should be first substantiated. Ultimately, the judge tendered his resignation amidst controversy. However, his resignation definitely left a lot of unresolved issues. Firstly, the details about the judges' alleged misdemeanours were made public by another judge. Further, a letter written by the Attorney General of India to the Governor of Maharashtra, was leaked to the press.³

The case of Chief Justice Bhattacharjee of the High Court of Bombay is also quite peculiar. On 19th February 1995, the news broke that Chief Justice A N Bhattacharjee had received a sum equivalent to US\$ 80,000 from an overseas publisher for the publishing rights of a proposed book, to be titled 'Muslim Law and the Constitution'. The payment was certainly disproportionate — considering that the type of topic selected could hardly merit any large sales. The publisher was also virtually unknown. In the wake of the controversy the judge at some stage even offered to return the money. However, the essential facts of the transaction remain unanswered to this day.⁴

Around the same time Justice V Bahugana resigned from the Bombay High Court amongst rumours that he was found in possession of large sums of money offered as bribes and was threatened with prosecution upon which he offered to resign. In the wake of the resignation of Justice V Bahugana and the scandal surrounding Chief Justice A N Bhattacharjee's book proceeds, the Supreme Court Bar Association held a series of

meetings calling for the transfer of judges who have relatives practising in their courts and also underlining the need for a uniform code of conduct for judges.

Justice K N Singh, who was appointed the Chief Justice of India on November 25, 1991 was scheduled to retire on December 12, of the same year. In his very short tenure of 18 days as the Chief Justice, the judge exposed himself to rather open criticism by the press on the ground of favouring certain business houses. In January 1992, a sub-committee was set up by the Supreme Court Bar Association to look into the allegations against the former Chief Justice of India, Mr. Justice K N Singh. It was for the first time that the Supreme Court Bar Association constituted a sub-committee to look into the allegations of corruption against a former Chief Justice.⁵

The case of Kerala High Court was, however, different and illustrates how transparency of action can rebut an ill-conceived or mischievous move to malign a judge. In reaction to an anonymous statement, then in circulation throughout Kerala casting aspersions on the Chief Justice, the Kerala High Court decided to take steps to stop the rumours.⁶ A full court meeting held in the chambers of the Chief Justice, unanimously resolved to keep the Chief Justice of India and the Chief Justices of the other High Courts informed of the matter. The High Court issued a press release immediately after the meeting — the first in the 34 year history of the court. The following is the text of the resolution:

The High Court of Kerala views with grave concern the growing trend of maligning and denigrating the judiciary and of tarnishing the image of the Judges by indiscriminate utterances, communications and publications calculated to prevent the Judges from discharging their functions without fear or favour thereby shaking the confidence of the public in the judiciary.

The High Court hopes and trusts that all sections of the people will not spare any effort to check this trend. The High Court considers it a paramount duty to take all reasonable steps to arrest this unfortunate trend.

The High Court Advocates Association also condemned the publication of the slanderous notice and urged the Government to identify and punish the culprits. Hence, transparency of action promoted judicial credibility and protected innocent judges.

The V Ramaswamy Case

The case of Justice V Ramaswamy of the Supreme Court is of landmark significance and hence deserves in-depth exposition. This case reflects the various ramifications related to the subject of corruption in the judiciary, judicial accountability and the preservation of judicial credibility. Justice Ramaswamy's case was a single case wherein judicial propriety in the conduct of judges was made a major issue before the polity. The media was seized with this volatile issue for a duration of more than 2 years. The case was given a lot of attention in scholarly research circles, the Bar, the political circles and from common citizens of the country. Various demonstrations and protests were held on the issue and seminars were organised to discuss the legalities and the constitutional issues surrounding this case.

The Ramaswamy affair, started with an article by a journalist Kuldip Nayyar⁷ on January 29, 1990, which disclosed that as per an audit report sent to the Chandigarh administration many financial norms were violated by Justice V Ramaswamy when he

was the Chief Justice of Punjab and Haryana High Court. The judge had allegedly incurred an abnormal expense of Rs. 1361 hundred thousand on telephone charges and Rs. 1341 hundred thousand on furniture. For many days this matter lay simmering. 'The Lawyer' (published by the Lawyers Collective) published an article regarding the audit report against Ramaswamy and various newspapers started writing about the financial irregularities committed by the judge. A writ petition was filed in the Madras High Court but the court refused to intervene holding that the matter was for Parliament to decide. Newspapers, lawyers magazines and Members of Parliament demanded some action from the then Chief Justice of India (Sabyasachi Mukharji) on the disclosures against the judge. Several lawyers had filed petitions in the Supreme Court urging action against the judge. On July 18, 1990, after a full court meeting, Chief Justice Sabyasachi Mukharji took the unprecedented step of writing an open letter to Justice Ramaswamy advising him not to discharge judicial functions till his name was cleared following investigation by the concerned authorities. Justice Ramaswamy was advised to go on leave which he did. The Chief Justice of India made history by writing this letter which he read out to a full court.⁸

In the said letter, the Chief Justice conceded that 'legally and constitutionally' the Chief Justice had no right or authority to inquire into the conduct of a sitting judge of the Supreme Court. However, being the 'head of the judicial family', he was duty bound and responsible for maintaining judicial propriety, adding that it was also the duty of the Chief Justice to secure the confidence of the public in the working of the judicial process.⁹

The Chief Justice said 'it was an unprecedented and an embarrassing situation' calling for caution and establishment of a 'salutary convention'. The Ramaswamy issue, which the Chief Justice said was brought to his notice by some senior advocates of the court, involved five questions.

1. Whether Mr. Ramaswamy was entitled to the telephone expenses incurred at Madras because Chandigarh was declared a 'disturbed area' (the judge was posted to Chandigarh though his home-town was Madras).
2. Whether Mr. Ramaswamy was obliged to obtain leave to avail the facility of leave travel concession (LTC).
3. Whether Mr. Ramaswamy was entitled to direct the official cars to be taken to Madras (more than 3000 Kms away) when he was on vacation from Chandigarh for the reasons mentioned by him (the reasons were not listed in the Chief Justice's note).
4. Whether the silver maces ordered by the high court were made at the same rate as that supplied to the Madras High Court.
5. Whether, even though the judges of the Punjab and Haryana High Court did not approve of the idea of having maces for each individual judge, the Chief Justice (Mr. Ramaswamy) was entitled to purchase these maces.

The Chief Justice said that though no final decision could be arrived at until the investigations and inquiries were completed, there was no doubt that those who aspire to uphold the rule of law must 'strive to live according to law and they necessarily expose themselves to the danger of perishing by law'. Chief Justice Sabyasachi Muk-

herji also examined the reports by the internal audit cell of the High Court, the fact-finding report submitted by the District and Sessions Judge (vigilance) and the report by the Accountant General's office of the High Court.

The action of the Chief Justice of India in asking Justice Ramaswamy to proceed on leave during the pendency of an inquiry into the charges against him, was perceived by the legal circles as the establishment of a healthy convention whereby the Chief Justice had filled in a gap in the Judges Enquiry Act which lays down in detail the method for the removal of a High Court or a Supreme Court judge on the constitutional grounds of 'proved misbehaviour or incapacity'. But, at the same time various questions cropped up during this controversy. The first question was what would happen if a judge chose not to follow the advice and chose to challenge the administrative authority of the Chief Justice of India to take away the constitutional function of judging from the judge concerned. Apart from this, there could be situations where allegations against a judge were undocumented by any official authority (as was the case in the Bombay High Court where the Chief Justice of that court was being asked to act on the resolutions of the Bar Associations). A significant issue was whether the Chief Justice of India could formulate a convention in each case as the head of the judicial family, or that there was an urgent need for a law to be formulated to deal with these issues.

There was another school of thought which firmly believed that the question of corruption or other lapses by the members of the higher judiciary had to be dealt with in a non-legal, non-legislative way.¹⁰ A law dealing with corruption among judges could be far from comprehensive, especially as the allegations are difficult to prove. Corruption in judges could assume innumerable forms from open bribery to trying to please those in political power. How could any law deal with all these aspects? It would be much preferable, therefore, to have a Code of Conduct for judges.

Thereafter in September 1990, a meeting was held which was attended by the Chief Justices of all the 18 High Courts, the 24 judges of the Supreme Court and the Chief Justice of India.¹¹ The members of this meeting arrived at a broad consensus to set up an informal machinery within the judiciary for handling such complaints. This machinery would give the entire power over such complaints to the Chief Justices of the High Courts and the Chief Justice of India, without providing for any time limit for a decision on the complaint. It was decided that the media would have no justification to publicly discuss the conduct of judges of High Courts or the Supreme Court or the complaints against them by citizens, lawyers or others. Similarly, the Bar would have no justification to publicly discuss the conduct of the judges. The Chief Justice of India gave the details about this informal machinery in a press conference of legal correspondents and mentioned that the Chief Justice of each High Court would receive the complaints from any citizen, after which he would decide upon the way the complaint should be looked into. If he came to a positive conclusion, he would have the facts ascertained in a manner he considered appropriate keeping the nature of the allegations in view. After this, if he was of the opinion that the matter should be reported to the Chief Justice of India, then he would do so. The Chief Justice of India would act in a similar manner concerning the complaints related to the conduct of the judges of the Supreme Court and in regard to the conduct of the Chief Justices of the High Courts. On the basis of the facts ascer-

tained, the Chief Justice of the Supreme Court or the High Court, as the case may be, shall take such appropriate action as may be considered proper keeping the interest of the judiciary as the paramount consideration. The entire procedure of looking into the complaints would be confidential. A warning was given against reckless uninformed public criticism by the media and Bar and it was stated that the judiciary would not tolerate uninformed reckless allegations which could undermine the independence of the judiciary and effect the credibility of the institution making it difficult for the judiciary to function.

Reverting to the Justice Ramaswamy case, the whole controversy came alive again. On 19th December, 1990, the next Chief Justice of India (Ranganath Mishra) decided to ask Justice Ramaswamy to return to work following a finding of the 3 judge panel of the Supreme Court set up by the Chief Justice Sabyasachi Mukharji, that the allegations made against Justice Ramaswamy did not relate to any lapses of propriety in his judicial conduct. Sharply reacting to this, on 1st February 1991, the Supreme Court Bar Association voted to boycott Justice Ramaswamy unless he resigned.¹² The Bar also called upon the Chief Justice of India not to assign any work to Justice Ramaswamy, and by a signature campaign, called upon the Members of Parliament to initiate impeachment proceedings against the judge. However, soon thereafter the Bar itself got divided on the issue. There was tension between the Bar and the judiciary. Coupled with this there was tension in the Bar itself since one section of the Bar gave the whole affair a political colour and North India versus South India colour. The fact that the signature campaign was initiated by members of a political party did not help matters. Unfortunately the real issue got blurred and the bar could not take a united and principled stand. The Advocate on Record Association of the Supreme Court resolved that the boycott decision of the Bar association would not apply to them.¹³ They declared that this was in the interest of their clients, in order that the cases are not decided ex-parte. Meanwhile, some lawyers staged a protest outside the Supreme Court demanding the resignation of the controversial judge. The resolution of the Supreme Court Bar for the boycott call was violated by several advocates including some senior lawyers leaving the Bar totally divided. Ultimately, on March 12, the bar 'lifted' the boycott of Mr. Ramaswamy's court but after expressing 'distress' over his continuance in office.¹⁴ The issue was not free from difficulty, since the only constitutional procedure for removing the Supreme Court judge is through impeachment proceedings in Parliament. At the same time, the Bar could not be expected to ignore all allegations until they were conclusively established. Impeachment is an extremely cumbersome procedure. A dire need was felt for some machinery that lies somewhere between the ineffectiveness of Bar resolutions and the rigours of impeachment. The Supreme Court judges refused to change their stand and thereby rejected the request made by the Supreme Court Bar Association that the Chief Justice of India, Justice Ranganath Mishra should not allocate any judicial work to Justice Ramaswamy. Justice Ramaswamy made it clear to all his colleagues that the only constitutional method of removing a Supreme Court judge is impeachment and that he would not recognise any other extra constitutional procedure like a Bar resolution.

In March 1991, 108 Members of the Parliament put up a notice of motion before the Lok Sabha (Upper House) Speaker seeking the removal of Justice Ramaswamy from office.

Thereafter, the Supreme Court on April 30, 1991 created history when its five-judge constitution bench issued a notice to its own judge, Mr. Justice V Ramaswamy, on a public interest petition seeking a direction to the Chief Justice of India not to allot judicial work to the judge since a motion for impeachment against him had been admitted by the Lok Sabha Speaker, and also since the Speaker had constituted a three-member committee under the Judges (Inquiry) Act to investigate the charges.¹⁵

The rare decision of the Supreme Court issuing notice to its own judge followed detailed arguments by the counsel for the 'Sub-Committee on Judicial Accountability', Mr. Shanti Bhushan (an eminent Senior Advocate) while arguing tried to touch judicial conscience by saying that the public confidence in the highest judicial institution would be completely eroded if a judge under question was allowed to adjudicate on matters when he himself was to answer charges levelled by 108 Members of Parliament in their notice of motion for impeachment. Mr. Shanti Bhushan, said the court's judgement in the Sampath Kumar case would be 'disturbed' if a judge, lacking integrity, was permitted to be a judge of the apex court. The Supreme Court in that case had observed that men of integrity needed to be appointed in the Central Administrative Tribunal.

The Constitution makers had never contemplated a situation in which a judge against whom impeachment proceedings had been initiated by a constitutional authority like the Speaker, would stick to his chair during the pendency of the investigations. It was also argued that the Chief Justice was constitutionally duty bound not to allocate any judicial work to the controversial judge in the larger interest of the administration of justice.¹⁶

However, Mr. Justice V. Ramaswamy, challenged the authority of the Constitution Bench to issue notice to him and asserted that he was answerable neither to a 'motivated' section of lawyers nor the press on his conduct as a judge. He declared that the court could not issue a writ against itself and that the court was not the appropriate forum before which he was required to defend himself. He said that the proceedings before the court were both ill-conceived and misconceived and that through an orchestrated campaign against him by certain members of the Bar, he had already been convicted by the media.

Mr. Justice Ramaswamy said the distortion of events as projected by the members of the Bar had obfuscated the real issues. 'I will not allow the institution (the Supreme Court) to be subjected to public ridicule,' he said, adding, 'I will not succumb to motivated pressure tactics in which the court is sought to be used as an instrument of achieving, that which is not permitted by law. ... Whereas they are free to make defamatory statements against me', the judge said, 'I do not enjoy the freedom to respond. The privilege of convicting me in the eyes of the public is theirs.'¹⁷

Ultimately the Supreme Court on October 29, 1991 passed an order and by a 4:1 verdict held that, although the court was not empowered to pass any judicial direction either to the judge concerned or the Chief Justice (to stop allotting him judicial work), it was for judge's 'sense of judicial propriety', to decide to abstain from discharging any judicial functions during the pendency of the inquiry by the three-member committee set up by the Speaker of the Lok Sabha.¹⁸

Declining to pass a categorical direction to the judge or the Chief Justice on allocation of judicial work to Mr. Justice Ramaswamy, the court held that it should be expected

that the learned judge would be guided in such a situation by the advice of the Chief Justice who had been called upon by the court to devise an arrangement to meet the situation. The court further observed that unlike the other constitutional functionaries the position of the judges of the Supreme Court was different as they could not be put under suspension pending an inquiry. According to the court, the framers of the Constitution had assumed that a desirable convention would be followed by a judge in such a situation without requiring an exercise of the power of suspension. The Chief Justice of India in such a situation would be expected to find a desirable solution to avoid embarrassment to the judge and to the Supreme Court in a manner which is conducive to the independence of the judicial system, and it would be desirable to assume that the judge concerned would ordinarily abide by the advice of the Chief Justice of India. Lastly, the court urged the Bar not to embarrass the judge until an inquiry was completed on him.

As stated above, the Speaker of the Lok Sabha (Upper House) constituted an Enquiry Commission under Section 3, sub-clause 2 of the Judges Enquiry Act comprising of Supreme Court Judges Mr. Justice P B Sawant, Chief Justice of the High Court at Bombay Mr. Justice P.D. Desai and Mr. Justice O. Chinnappa Reddy, a Former Supreme Court Judge. The Committee framed 14 specific charges against Justice Ramaswamy, some of which were (1) wilful abuse of power when he was Chief Justice of Punjab and Haryana High Court in purchasing items of furniture, furnishings and electric appliances far in excess of the sanctioned limit; (2) purchase of carpeting from favoured dealers after procuring quotations which were not genuine; (3) incurring wasteful expenditure involving over Rs. 3.5 lakhs without concurrence of other judges of the High Court while ordering and sanctioning purchase of 26 silver maces; (4) his telephone bill during the period when he was the Chief Justice of the High Court of Punjab and Haryana for about 2 years was Rs. 9.10 lakhs.

The Enquiry Commission concluded that Justice Ramaswamy's conduct disclosed wilful and gross misuse of office, moral turpitude for using public funds for private purposes, bringing disrepute to the higher judicial office and dishonour to the institution of the judiciary, undermining the faith and confidence which the public reposes in the administration of justice. Justice Ramaswamy on the other hand, alleged mala fide on the part of the auditor who discovered his abuse of office; the parliamentarians who scrutinised the charges; the Speaker who constituted the Inquiry Committee; the judges who conducted the enquiry and the press which published reports about his abuse of office. He refused to resign and Parliament was forced to issue summons to the judge on May 10, 1993, to explain why he should not be impeached for the corruption charges upheld by the Enquiry Commission of 3 judges. Justice Ramaswamy was represented in Parliament by an eminent Senior Advocate, Mr. Kapil Sibal. Unfortunately, the issues got blurred and Parliament became divided on political lines. The ruling party went to the extent of issuing an oral whip before the voting, directing the members to press the abstention button. Out of 400 members in the House, 196 voted for the motion and there were 205 abstentions. The impeachment thus failed for technical reasons. The decision of the ruling party to come to the rescue of the judge was strange indeed. The matter should have been at least left to the conscience of the individual members — there was no justification for issuing the whip. On May 13, 1993, Mr. Justice Ramaswamy

announced his decision to resign to the President of India claiming that his stand had been vindicated. The impeachment failed due to technical reasons. The Ramaswamy saga has demonstrated that political manoeuvring by a majority party in Parliament could make it very difficult to remove a judge even if he was guilty. It is generally felt now that some more effective steps should be taken to check judicial corruption. The number of pages devoted to this single case in this report may appear disproportionate in the context of this study. It needs, therefore, to be emphasised that this case highlights not only the question of judicial independence, judicial propriety, credibility, but also raises various jurisprudential questions concerning the moral, ethical and political issues concerning judicial accountability. This was a glaring case where a 3 Judge Enquiry Committee constituted under the Act found Justice Ramaswamy guilty and still, it became impossible to remove him from office because of the political backing given to him. This clearly shows the lacunae in our judicial system that if a judge and the political branch of the state connive together, it is impossible to remove a judge and this is the single largest factor which undermines not only the credibility, but also the independence, of the judiciary.

The Supreme Court has dealt with the increasing instances of various Bar agitations for removal of judges, against whom allegations of corruption or misbehaviour are levelled. This was in the case of *C. Ravichandran Vs. Justice A.M. Bhattacharjee* 1995 (5) SCC 457. In this case the petitioner, an advocate, filed a Public Interest Litigation seeking a restraint order against the Bombay Bar Association and the Advocates Association of Western India from coercing Justice A.M. Bhattacharjee, Chief Justice, Bombay High Court to resign from the office as a judge. The basis of action by the Bar Council and Bar Association were financial irregularities as stated above. The petitioner also sought an investigation by the Central Bureau of Investigation into the allegations made against the judge.

The Supreme Court observed that bad conduct or bad behaviour of a judge needs correction to prevent erosion of public confidence in the efficacy of the judicial process or the dignity of the institution. When the judge cannot be removed by impeachment process for such conduct, but generates wide spread feeling of dissatisfaction among the general public, the question would be who would stamp out the rot and judge the judge? The court went on to state the proper course in such matters. It stated that the Bar Association should first gather, 'specific, authentic and acceptable material' which would show the conduct on the part of the judge which creates a feeling in the mind of a reasonable person about the honesty and integrity of the judge. The Bar Association Officers should thereafter approach the Chief Justice of the High Court and appraise him of the situation with material they have in their possession. The Chief Justice of that High Court, after verification, should satisfy himself about the truth of the imputation, and consult the Chief Justice of India where deemed necessary. The court went on to state that when the Chief Justice of India is presented with the matter, 'to avoid embarrassment to him and to allow fairness in the procedure to be adopted', the bar should suspend all further actions to enable the Chief Justice of India to appropriately deal with the matter. The court observed that this is necessary since any action by the Chief Justice must not even appear to have been taken under pressure from any quarter. The court felt that such

procedure would facilitate 'nipping in the bud the conduct of the judge', and also avoid needless embarrassment of contempt proceedings against the office-bearers of the concerned Bar Association. In case the allegations are against the Chief Justice of a High Court, the Bar should bring them directly to the notice of the Chief Justice of India.

The Court thus attempted to deal with the ticklish issues of 'who would judge the judge' (in a case where the judge is not removed by impeachment).

The approach of the Supreme Court has found support as well as condemnation from different sections of the Bar and the public. Some members of the Bar feel that the lawyers can from their daily practice discern more easily if a particular judge is above suspicion, in his day to day dispensation of justice and that they should be allowed to discuss or criticise the conduct of such judges. Moreover, the judges have consistently refused to formulate and accept a Code of Conduct for themselves. It is felt that any step to gag the Bar may lead to extremely authoritarian trends and a total absence of checks on judicial misconduct by the judges.

Checks on the Lower Judiciary

As far as the lower judiciary is concerned, the powers exercised by it are subject to necessary checks and supervision by the High Courts and the Supreme Court. *In Sham Sher Singh's Case*, AIR 1974 SC 2192, a Seven Member Bench of the Supreme Court unanimously held that the High Court under Article 235 is vested with the power to control the subordinate judiciary. The members of the subordinate judiciary are not only under the control of the High Court but also under the care and custody of the High Court. When the High Court exercising disciplinary control over the subordinate judiciary finds, after a proper enquiry, that a certain officer is guilty of gross misconduct and is not worthy to be retained in the judicial service and therefore recommends to the Governor the recommendation of removal of such a judicial officer, such recommendation should always be accepted and the Governor has no power to consult the Public Service Commission under Article 320 sub-clause 3(c).

As an illustration of such powers of the High Court an interesting case had come up recently before the Lucknow Bench of the Allahabad High Court. In this case, Smt. Garima Singh, the wife of the former union minister Sanjay Singh had applied for the setting aside of a divorce decree granted by the Civil Judge (Senior Division, Seethapur on March 27, 1995.¹⁹ Justice Shobha Diskshit of the High Court, while passing orders in the case observed that the judicial officer V K Srivatsava, the then Civil Judge, Seethapur had granted a decree of divorce in an irresponsible manner and that he had not discharged his duties in a fair manner. The bench directed the registrar to place the judgement before the Chief Justice of the Allahabad High Court for issuing necessary directions for ordering an enquiry into the matter by a judicial officer not below the rank of a District Judge. The judge observed 'if judicial decisions of this kind are allowed to be sustained, it is bound to shake the confidence and faith of the people in impartial dispensation of justice by subordinate judiciary and dilute the sanctity of judicial pronouncement'.

In September, 1991, the Bombay High Court took stringent action against a large number of judicial officers in Maharashtra following widespread allegation of corruption in the judiciary. Two District Judges resigned in the wake of speculation that their conduct might be investigated by the High Court. Seven were suspended and departmental enquiries were initiated against them. The High Court carried out the investigations by a special investigation department which the court had set up under its powers under Article 235 of the Constitution. Besides this, warrants were issued to many judges.

In May 1996 the Delhi High Court ordered an enquiry on the alleged misconduct and infliction of corporal punishment on a CISF constable Mr Jha by a Metropolitan Magistrate.

The Phenomena of the Relative – Judge Nexus

According to estimates, some 20% of the judges in about 25 High Courts have either their son, son-in-law or daughter practising in the same court. By convention they do not appear before them. However, the situation is clearly one where justice is not 'seen to be done'. At a social and inter-personal level these relatives have a greater inter-action, access and rapport with the judicial fraternity. Hence exercising, judicial discretion in favour of such relatives is viewed with suspicion by the common man.

The implication of relatives living in the official residences of judges and using the address for their practice has been also raised by the Supreme Court Bar. Some judges who have relatives practising, have been transferred in pursuance of the transfer policy of 1994. However, some have not. Clearly a pick and choose policy has been adopted. There exists no objective criteria on the basis of which the Chief Justice of India can decide whether a particular judge is misusing his position and that another is not. There is no statistical survey of the assets of the judges or of their practising relatives, hence, no basis to decide the quantum of abuse of office. The only rational way of dealing with the problem therefore is to implement the policy uniformly.

On 28th August, 1993, a meeting of the Bar Association of the Punjab and Haryana High Court was held in honour of the visiting Chief Justice of India, Mr Justice M N Venkatachaliah. A lawyer, named Anupam Gupta, had in his speech lamented upon the privatisation of the judicial process. The lawyer had alleged that about 14 out of 28 sitting judges of the Punjab and Haryana High Court at that time had their close relatives practising in the High Court. Some of them had more than one relative practising in the court. The lawyer claimed that he had authentic information about certain judges, who were actively involved in the professional lives of their relatives and that the judges were charging astronomical fees and obtaining over generous judicial orders, especially, interim orders. However, the Chief Justice of India along with 4 other judges of the Supreme Court, the Chief Justice of Rajasthan, Gujarat, Himachal Pradesh and Jammu and Kashmir and the Chief Justice and all the judges of the Punjab and Haryana High Court walked out in protest against the speech delivered.

However, Mr. Anupam Gupta could not have been totally off the mark. This became clear a few years later. In 1995, Justice Challapathi of the Punjab and Haryana High

Court filed a complaint with the Chief Justice of the Supreme Court for necessary action concerning a lawyer named Shri Sudhir Mehra, who was practising in the Punjab and Haryana High Court, while his father Justice A S Mehra was a sitting judge of the same court. Mr. Sudhir Mehra had filed a bail application which had been rejected already, without disclosing the fact of rejection. His second application for bail came up for hearing before Justice Challapathi, who had been transferred from Andhra Pradesh to the Punjab and Haryana High Court. When the judge after going through the papers in the file came to note of this suppression of facts, he reported the conduct of the advocate and also complained that he found judges in Chandigarh with close relatives practising in the same court were not being transferred and their progeny were indulging in unethical practice.²⁰

The transfer policy has been welcomed by the Bar Association as a step in preventing the nexus between influential lawyers and judges in the same Bar. The likely revision of the much-lauded transfer of judges policy has raked up a debate over its necessity and its modalities. The erstwhile Chief Justice of India, A M Ahmadi, has sought the High Court Chief Justices' comments, in consultation with their colleagues, on taking a fresh view on the transfer policy introduced over a year ago by his predecessor, Justice M N Venkatachaliah.

Many lawyers have reacted strongly to a likely change in the transfer policy. Some lawyers feel that since the judges transfer policy will have a bearing on the independence of the judiciary, views of only the High Court judges would not suffice. The views of the Supreme Court Bar Association, all the High Court Bar Associations, the Bar Council of India, state Bar councils besides independent organisations, striving for cleansing the administration of justice, ought to be sought on this vital issue.

It has been felt that instances of 'rising sons' in the judicial profession are growing and that separation of 'parent' judges from their practising sons or daughters is a must. With no intent to cast aspersions on judicial freedom, legal professionals feel that the presence of a parent judge on the bench does weigh heavily on the minds of the litigants when selecting a lawyer to argue their case.²¹

Judicial Discipline

Besides corruption, judicial credibility also suffers due to certain amount of lapses of judicial discipline on the part of the judiciary. A case in point is that of Chief Justice S K Jha of the Madhya Pradesh High Court. Chief Justice Jha, who was originally from Patna, was transferred as Chief Justice of the High Court of Madhya Pradesh. In August, 1993, the Madhya Pradesh High Court Bar Association expressed a total loss of confidence in the Chief Justice and boycotted the High Court and all other courts for a week. It was further decided that the Bar would completely boycott the court of the Chief Justice and abstain from appearing in his court, till he was transferred from Madhya Pradesh or relieved from the office of the Chief Justice. The petitions before the Supreme Court in this regard stated that Chief Justice Jha had failed to discharge his duties leading to a total disruption of judicial work as well as the administrative affairs of the High

Court of Madhya Pradesh. A shocking account of his absences in the office showed that the Chief Justice had remained absent from work from time to time and that during a period of 10 months from October 1992 to July, 1993, the Chief Justice had worked only for about 30 days. Throughout the period when the judge abstained from work, he continued to draw his salary as if on duty, even though he was not on any sanctioned leave. Faced with an unprecedented situation on 23rd August, 1993, the Supreme Court directed the constitution of a 7 Judge Administrative Committee to take charge of the administration of the subordinate judiciary in the state.

Conduct that contravenes a well settled judicial tradition, may sometimes be fatal as far as judicial credibility is concerned.²² In 1990, Justice Sharad Manohar of the Bombay High Court came under severe criticism for holding a press conference on a matter pending before him. Arguments were still being heard in a case in Mr. Justice Manohar's court on a volatile and contentious issue, namely, the future of Bombay's slum dwellers when the judge chose to seek the platform of the press to comment on the ongoing litigation. His action was against the well known tradition built up by the judiciary over decades.

It is perceived by a significant section of the society that in recent years, the courts, specially the Lower Courts, while granting bail or interim orders, are liberal in favour of the rich and people with political connections. This perception arises partly because of the media building up such cases. However, the charge of bias cannot be totally ruled out. In certain cases, the higher judiciary has even gone to the extent of passing strictures against the judges in the Lower Courts for not adhering to conventional judicial norms while granting or withholding bails and other interim assistance.

While deciding a case concerning a construction company²³ the Supreme Court warned the judges to use their powers with regard to interim orders with more responsibility and observed that what was happening in that case was illustrative of a fairly widespread trend in the country whereby some rich and influential persons had started believing that they were above the law and had developed an utter disregard for the law. The court expressed its displeasure at the mechanical manner in which some of the courts had been granting interim orders, injunctions and stay orders.

The main reason for such lapses seems to be a lack of training in the judicial traditions. In certain states, academies for judicial training have been established for the training of the lower judiciary. It is hoped that these training schools will have a positive impact on the style and functioning of the judicial process at least in the lower ranks. As far as the higher judiciary is concerned, it is generally felt that the answer lies in the implementation of a Code of Conduct. However, in the absence of a proper machinery, having the sanction of the Constitution to enforce such a Code of Conduct would not solve the issue.

Media and Judiciary

Introduction

As stated at the beginning of this chapter, the topic of judicial credibility is linked with the topic of media and the judiciary. A free and responsible media ensures judicial credibility. In the words of Mr. F S Nariman (eminent Senior Advocate of the Supreme Court and Chairman of the Executive Committee of the International Commission on Jurists): 'A responsible press is the handmaiden of effective judicial administration. The press does not simply publish information about cases and trials but subjects the entire hierarchy of the administration of justice (police, prosecutors, lawyers, judges, courts), as well as the judicial processes, to public scrutiny. Free and robust reporting, criticism and debate contribute to public understanding of the rule of law, and to a better comprehension of the entire justice system. It also helps improve the quality of that system by subjecting it to the cleansing effect of exposure and public accountability.'²⁴ Conversely, however, an irresponsible or malicious press can do enormous damage to the judicial institution: 'The press is not always responsible, nor always innocent of the charge of misreporting or scandalising. At times, it simply doesn't care about "fair hearing" or "fair trial" ... The need is great that courts be criticised, but there is just as great a need that courts be allowed to do their duty fearlessly.' This sub-topic deals with the subject of restraints on the media in the matter of reporting on the judiciary and the limits of such restraint.

Statutory framework

The most significant statute restraining the media is the Law of Contempt of Court. The Supreme Court under Article 129 and the High Courts under Article 215, of the Constitution have been vested with the power to punish a person for contempt of the Supreme Court or the High Courts, as the case may be. Entry 77 of List I of the Seventh Schedule of the Constitution, authorises Parliament to make a law with respect to contempt of the Supreme Court. Entry 14 of List III (Concurrent List) empowers both Parliament and the State Legislatures to make laws with respect to contempt of courts, other than of the Supreme Court. Article 19(2) permits the state, by law, to impose reasonable restrictions on the freedom of speech and expression in relation to contempt of court.

After the Constitution came into force an Act entitled The Contempt (of Courts) Act 1952 was brought into force. It was, however, felt that the enactment was somewhat uncertain and unsatisfactory. Accordingly, a Committee was constituted to make appropriate recommendations regarding the revision of the law relating to contempt of courts since it affected two important fundamental rights, viz.: freedom of speech and expression and personal liberty. Based on the recommendations of the Committee, the Contempt (of Courts) Act 1971 was enacted and the 1952 Act was repealed. Under the Act of 1971, Contempts of Court are classified into two categories; civil contempt and criminal contempt. Civil contempt means wilful disobedience of any judgement decree, direction or order writ or other process of a court or wilful breach of a undertaking given to a court. Criminal contempt means the publication, whether by words, spoken or written, sign, visible representations or otherwise, of any matter or the doing of any act whatso-

ever, which scandalises or tends to scandalise, lowers or tends to lower the authority of any court or prejudices or tends to interfere with the due course of any judicial proceeding or interferes or tends to interfere with, obstructs or tends to obstruct the administration of justice in any other manner.

In India although the matter has so far been dealt with under the Contempt of Court Act there is also a constitutional dimension to it. The concept of 'procedure established by law' (in Art. 21) as evolved in the judgements of the Supreme Court in recent years, lays emphasis on a number of components of a fair trial. Prejudicial publicity if indulged in extensively or intensively before the trial might be regarded as violative of the principle of fair trial or of procedure established by law.²⁵

Reference may also be made to a recent amendment to the Indian Penal Code. The Criminal Law Amendment Act 1983 has inserted Section 228(a) in the Indian Penal Code. The Section runs as follows:

(1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under Section 376, Section 376A, Section 376B, Section 376C or Section 376D is alleged or found to have been committed (hereinafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is:

(a) by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

(b) by, or with the authorisation in writing of, the victim; or

(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim; provided that no such authorisation shall be given by the next of kin to anybody other than the Chairman or the Secretary, by whatever name called, of any recognised welfare institution or organisation. Explanation — For the purposes of this sub-section, 'recognised welfare institution or organisation' means a social welfare institution or organisation recognised in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a Court with respect to an offence referred to in sub-section (1) without the previous permission of such court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Explanation — The printing or publication of the judgement of any High Court or the Supreme Court does not amount to an offence within the meaning of this Section.

Approach of the Court: Some illustrative cases

It may be relevant here to mention a few cases of the Supreme Court and the High Court which show the approach of the judiciary while deciding matters relating to contempt of court.

In EMS Namboodiripad's case,²⁶ the appellant, who was the Chief Minister of Kerala at that time, had in a press conference made various critical remarks relating to the judiciary referring to the judiciary as an 'instrument of oppression' and stating that the judges were guided and dominated by 'class hatred', 'class interests' and 'class prejudices'. These remarks were reported in the newspapers and the Chief Minister was charged for contempt of court by the Kerala High Court. On appeal, the Supreme Court observed that the law punished not only acts which had in fact interfered with the courts

and the administration of justice, but also those which had a tendency to do so. The conviction was confirmed.

In *C K Daphtary vs OP Gupta*,²⁷ the defendant had printed, published and circulated a pamphlet containing criticism of a senior judge of the Supreme Court using the words 'dishonest judgement', 'open dishonesty', 'deliberately and dishonestly', 'utter dishonesty' etc. The Court convicted him.

In the matter of *S Mulgaokar*,²⁸ the Supreme Court has laid down certain norms regarding publications in newspapers. They may be summarised as follows:

1. National interest requires that all criticisms of the judiciary must be strictly rational and sober and proceed from the highest motives without being coloured by partisan spirit or tactics.
2. The judiciary cannot be immune from criticism but when that criticism is based on obvious distortion, or gross misstatement and made in a manner which aims to lower the respect of the judiciary and destroy public confidence in it, it cannot be ignored. The courts must harmonise constitutional values of free criticism and the need for a fearless judicial process.
3. To criticise a judge fairly is no crime, but a necessary right. But, if the court considers the attack on the judge or the judges offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must strike a blow on him who challenges the supremacy of the rule of the law.

In the *National Textile Workers Union's case*,²⁹ the Supreme Court observed that while commenting on matters pending in the courts, the press should bear in mind that the parties to a case have as much right to get redress at the hands of court uninfluenced by external pressure as the press has its right to publish news and comments.

In the *Ram Dayal Vs State of U P case*³⁰ the Supreme Court laid down certain norms and principles regarding the limits of criticism and the nature of fair comment. In this case, certain judges were alleged to be unsuitable for appointment to that office because they made a pre-government decision in certain preventive detention cases during the emergency. The sitting Chief Justice was also criticised for 'bowing to executive pressure' in framing a code of ethics for High Court Judges. To have continued with these cases would have itself generated more controversy. The cases were dropped but Justice Krishna Iyer laid down certain guidelines asking (1) for a policy of restraint; (2) for a balance between free criticism and protecting the supremacy of the law; (3) for an avoidance of the use of the jurisdiction for the personal protection of a judge; (4) for giving the press free play to make the criticisms within responsible limits; (5) to avoid judicial hypersensitivity even where the limits are crossed; (6) to use the jurisdiction of contempt of court only in extreme cases where the public interest requires it.

The courts have been reluctant to pass an order preventing the press from publishing details of a sub-judice case, where public interest is involved. In the *supersession of Judges Case*,³¹ the Delhi High Court ruled that matters of public importance such as the appointment of the Chief Justice of India must be fully canvassed publicly. In the *Daily Deccan Chronicle Case*,³² the Andhra Pradesh High Court permitted a discussion of the law of curfew while it was an issue before the courts and relied on the English

Sunday Times case (Attorney General Vs Times Newspapers Limited 1973 2 WLR 452) to ask for a greater accommodation of the freedom of press.

In the last 2 years media and media disputes have figured more prominently in the Supreme Court. The court has declared that the government did not have monopoly over airwaves and that the media should be freed from governmental control. However, in the courts in certain cases, the freedom of the press was curbed and more and more hearings were held in camera. A review petition in Sarla Mudgal's case in which the Supreme Court recommended to the Prime Minister bringing into force the uniform civil code, was heard in camera. Anamika Chawla's case (an estranged wife who had made strong allegations against her husband) was also heard in camera and she was reprimanded for giving an interview to the press. The court reprimanded the Narmada Bachao Andolan (the petitioners in an environment protection case) for giving interviews to television during the hearing of the case.

Recently, in a significant judgement the Punjab and Haryana High Court convicted a reporter of the Indian Express for contempt of court and sentenced him to one month's imprisonment and a fine of Rs. 2000.³³ The Indian Express story from Patiala of February 13, 1996 was purported to be based on a judgement of the High Court on a Public Interest Petition that had not even been delivered. The petitioner had demanded delivery of a mark sheet in a competitive examination. In these proceedings, the court observed that it seemed as though the reporter had written the judgement. In the very same case, the court accepted the apology tendered by managing director Vivek Goenka, editor Shekhar Gupta and resident editor and the printer and publisher Sushil Goenka of the Indian Express and observed 'we feel satisfied that there was no intention on their part to either publish an inaccurate report or to impede the course of justice'.

A Division Bench of the Delhi High Court in March 1996 headed by Chief Justice M J Rao hauled up the publishers of Times of India under contempt proceedings for an article on the film 'Bandit Queen'. This famous award winning film faced problems for screening in India on the grounds of obscenity. The court expressed its dissatisfaction with the press coverage of the case and indicated that the publications were hampering their course of decision making. The court refused to accept an oral apology tendered by the newspaper, and insisted directed the publishers to file an affidavit.³⁴

There is some difference of opinion regarding judges expressing their views through the media. So far the judges have been sceptical about talking to the press. Those belonging to the old school of thought would still say despite stressing the need for transparency that the judiciary should keep a safe distance from the media. At a time when the judiciary has assumed the role of a guide for better administration, people expect to be informed about the judicial philosophy. Recently, Justice J S Verma, judge of the Supreme Court observed that once in a while, it was the duty of the judges to answer questions regarding constitutional policy and functioning of the court on certain issues. The judge also expressed his displeasure and anguish at the way the media was covering the 'Hawala Case', wherein graft transactions involving senior bureaucrats, ministers, political members were being investigated by the CBI. While requesting the media covering the proceedings to report his observations for the benefit of those not present in the court, the judge said that it was in fact expected of the media to do so.

It was undoubtedly a right of the media to gather and convey information to the public about the case without violating the presumption of innocence. It should also desist from spreading misinformation as that would be detrimental to the public interest. Referring to the covering of the Hawala proceedings, he minced no words saying: 'You don't know the agony the media has caused to me in the last few days.'

It is quite clear that the discretion to issue or not to issue notice of contempt of court proceedings is being used very selectively by the judges. The court does not seem to have any definite policy of publications in the press. While some outrageous reports go unpunished others are objected to. Unless the Supreme Court evolves some criteria on press reports which are critical of judges, the impression will gain ground that some are victimised while others are not. Recently, Justice Kuldip Singh of the Supreme Court against whom some defamatory remarks were made suggested to the applicant that he withdraw his application for contempt of court as the judges had 'broad shoulders' and can take criticism in their stride, thereby demonstrating as to how subjective a judges approach can be to the subject.

Pre-Trial Publicity

The subject of pre-trial publicity and the limits of the press in relation to this has several aspects depending on the stage, the subject and the manner in which publication is resorted to. The law on the subject is both statutory and non-statutory. Furthermore, some constitutional provisions could possibly be invoked in India in view of the expanding dimensions of the concept of 'procedure established by law' in Article 21 of the Constitution (this has already been done in the USA under the 'due process clause'). In the context of pre-trial publicity, civil contempt has limited relevance; for instance, where the publisher has given an undertaking not to publish the proceedings in court and that undertaking is violated. Criminal contempt is of comparatively greater importance. To scandalise a judge or court is an offence being a criminal contempt of court as defined under the Contempt of Court Act. Criticising an order passed by a judge or casting doubt on him would also be contempt. Criminal contempt under this category may take a variety of forms. For example, it is contempt to deter a person from coming forward as a witness, or to make a threat to a party for discontinuing the proceedings, or to publish an abuse against a party, or to discuss the merits of a case pending in the court. The policy of the law being that it is for the courts to decide the merits and the judicial process should not be hampered in any way. In the *A K Gopalan's case*,³⁵ the Supreme Court quoted with approval the following principles from its earlier unreported decision of 1961 in the case of *Surendra Mohanty Vs the State of Orissa*.

... It must be shown that it was probable that the publication would substantially interfere with the due course of justice. Commitment for contempt is not a matter of course, but within the discretion of the court which must be exercised with caution. To constitute contempt it is not necessary to show that as a matter of fact a Judge or a jury will be prejudiced by the offending publication but the essence of the offence is conduct calculated to produce an atmosphere of prejudice in the midst of which the proceedings will have to go on and a tendency to interfere with the due course of justice or to prejudice mankind against persons who are on trial or who may be brought to trial... As to when the proceedings begin or when they are imminent for the purposes of the offence of contempt of court must depend upon the circumstances of each case and it is unnecessary in this case to define the exact boundaries within which they are to be confined.

In some cases, no doubt, especially in cases of public scandal regarding companies, it is the duty of a free press to comment on such topics so as to bring them to the attention of the public... Indeed it is sometimes largely because of facts discovered and brought to light by the press that criminals are brought to justice.

While deciding the case on hand, the Supreme Court went on to observe that it would be an undue restriction on the liberty of free speech to lay down that even before any arrest has been made there should be no comments on the facts of a particular case.

Criticism to the Law of Contempt of Court

The restraint on the media through the law of contempt of court has been subjected to two major types of criticisms. The first is that the law as it stands is vague and is implemented without any guidelines and ultimately rests on the subjective sensitiveness of the presiding judge. The second criticism is that truth is no defence to a charge of contempt of court. These aspects are discussed hereunder:

1. Absence of sufficient guidance in the law:

In the ultimate analysis, the restraint on the media operates in an ad hoc fashion according to the whims and idiosyncrasies of the judges. In the words of Mr. F S Nariman — ‘that the law of contempt of court ... does not define (often, even when embodied in a statute) what precisely will be regarded as “contempt of court” and what will not. It gives little guidance to the editor and broadcaster; it serves only as a standing threat to free expression. It leaves too much to the discretion of the particular judge...’³⁶

2. Truth is no defence:

It has been regarded as a settled law in India that neither truth nor bonafide conduct is a defence to a charge of scandalising the court. This is in accordance with the law in the UK. Hence, it is not open to the media to impute dishonesty, partiality or bias to a judge, even if it is in a position to prove the charge to the hilt. Indeed, the very attempt to justify the charge would itself constitute a new offence of contempt. This is a serious encroachment on the rights of the society and is indeed in violation of human rights. Chief Justice P N Bhagwathi (Retired) in an article titled ‘Media Criticism of Judges and Judicial Decisions’,³⁷ made a strong plea that truth ought to be accepted as adequate defence to a charge of contempt of court. Justice Bhagwathi has relied upon the law in America and Australia, where truth is accepted as an adequate defence to a charge of scandalising the court. Another powerful plea in this direction was made by Mr. Soli J Sorabjee (Senior Advocate of the Supreme Court) before the Conference of the International Bar Association in Vienna in September 1984.

On the other hand, it may be pointed out that even in the recent enactment in England, i.e. Contempt of Court Act 1981, truth has not been accepted as a valid and good defence. The English Act has devised a strict liability rule which has been circumscribed by imposing a limitation that the rule implies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. In the views of (Retired) Justice A N Grover,³⁸ if truth can be pleaded as a good defence in proceedings for contempt of court it would be open to any contemner to introduce that plea (whether ultimately it may succeed or not), and thereby

further malign and caste scurrilous aspersions on courts (Justice Grover was the Chairman of the Press Council of India).

Mr. Nani Palkivala (eminent Jurist and Senior Advocate) has strongly cautioned against truth being permitted to be pleaded as a defence. In his book, 'We the Nation', he said as follows:

It would be foolish as well as dangerous to relax the rigour of the Contempt of Courts Act, 1971 and permit truth to be pleaded as a defence when an allegation of corruption is made against a judge. Character assassination is the national sport of India, and some dissatisfied litigants and lawyers will have no hesitation in making allegations which would scandalise the court and then inviting the judge to face a public inquiry.

Whilst there may be something to be said in favour of the cautionary approach of Justice Grover and Mr. Palkiwala, it may be pointed out that the law can well take care of a plea of truth which does not have any adequate foundation or which is found to be motivated by providing exemplary punishment in such cases. Furthermore, as suggested by Mr. Rajiv Dhawan (Senior Advocate of Supreme Court), allegations of judicial corruption can be examined in camera by the High Courts before they are permitted to be published.

In conclusion, it may be stated that to suppress, or worse, to punish truth is an anomalous situation which no free society resting on the Rule of Law should tolerate. Hence, truth ought to be recognised as an adequate defence. This would be in consonance with human rights and fundamental rights and would be in the larger public interest. Further suggestions in this direction are summarised at the end of this chapter.

Recommendations for enhancing judicial credibility and judicial discipline

I. Recommendations regarding judicial credibility and discipline:

1. The basic aim is to make the judiciary more accountable without impairing its capacity to administer justice without fear or favour. Hence, the regulation of the judiciary must be internal, i.e. through a regulated Code of Conduct. At the same time, the said Code of Conduct must be binding on the judges so as to not to be flaunted with impunity. Accordingly, it would be necessary to clothe a body of judges and jurists headed by the Chief Justice of India with powers to enforce the Code of Conduct. This body or judicial commission must have a statutory basis.
2. According to Mr. Nani A Palkiwala perhaps the best way of dealing with the problem is to have a law or even an unwritten convention regarding the procedure to be followed when there are allegations of corruption against a judge. The matter should be placed confidentially before the Chief Justice of the court concerned with investigating the case. If, in his view, there is no substance to the allegations, the matter should be regarded as closed. If he thinks otherwise, the case, if pertaining to a High Court, should be referred to the Chief Justice of India and 2 Supreme Court judges, who could be members of the National Judicial Commission. If the decision of the National Judicial Commission (which would be final) is also adverse, the errant judge should not continue on the bench.
3. Some suggestions made by eminent jurists are as follows:
According to Sr. Advocate, F S Nariman, the lawyers themselves have to look within for sources of corruption since judges come from amongst lawyers. According to him,

there should be an informal cell in each court of 2 to 3 judges to enquire into the allegations of corruption. This would avoid people going to the press with their complaints.

According to Sr. Advocate and former Union Law Minister, Shri Shanti Bhushan, the Judges Enquiry Act should be amended so that judges could investigate alleged corruption before impeachment. This could give an opportunity to the judge against whom there are allegations to resign if need be, failing which the Chief Justice could recommend his impeachment. Former Chief Justice of India, Shri P N Bhagwathi also prefers an internal judicial mechanism to make discrete enquiries on allegations of corruption. According to him, the Chief Justice of India could set up a Small Committee of 2 to 3 judges for going to various High Courts and enquiring discretely about judges who are suspected of corruption. According to Sr. Advocate, and ex-President of the Supreme Court Bar Association, Mr. K.K. Venugopal, there should be a binding Code of Conduct for the judges. According to Justice Krishna Iyer (Retired), elaborate measures to correct judicial misbehaviour should be adopted in an atmosphere of a growing number of allegations of corruption against the judicial ranks. While delivering the Justice Meherchand Mahajan Centenary Lecture on 10th December 1991, he observed that no democratic institution including the judiciary could remain above the rule of accountability. A high level of scrutiny was mandatory in the appointment of judges. According to the judge, there should be a Code of Conduct for the judges and the Bar has to play a real role in ensuring good behaviour within the judiciary.³⁹

II: Recommendations regarding media and the judiciary:

(A) Mr. F S Nariman has made the following recommendations in his article⁴⁰ 'Are Impediments to Free Expression in the Interest of Justice?':

(i) Any interference with the freedom of expression must be detailed in enacted law or prescribed by rules. This would ensure adequate accessibility to law, and foreseeability of the law, and thus enable individuals (including the press) to regulate their conduct in conformity with it. Consequences of reports and comments by the press on pending court proceedings must be clearly foreseeable, so as not to instil lurking doubts and fears about the freedom to exercise the most important right of free expression.

(ii) Interference with free expression may be limited by law only to pre-trial, pending trial and trial publicity. After judgement in the cause of matter, there should be no legal restraints on publications of temperate comments and criticisms, even if an appeal from such judgement is provided for by law. No such restraint should be countenanced or penalty prescribed for reporting or bonafide commenting, on pending appellate court proceedings, on the score that such reports or comments interfere with or prejudice the hearing or decision in the appeal. Under a multi-tier system of justice, impediments to free expression, i.e. reporting and commenting on pending cases, can only be tolerated at the trial stage and not after the judgement is rendered by the trial court.

(iii) Prior restraints on publication/broadcasting are not normally acceptable and are certainly not when there is no enacted law. Any law which authorises prior restraint of publication 'in the interest of fair administration of justice' should be very narrowly framed, and must specify with precision, the criteria for determining the pressing necessity of such prior restraint. The law must prescribe the period of such prior restraint, and provide for prompt time-bound decisions determining challenges to prior restraint orders. Prior restraint of publications without limit as to time and prior restraints without extremely speedy redress being also provided for, is totally inimical to the freedom of expression and of the corresponding right of the public to 'know' more especially in this age of instant global mass communication.

(iv) Normally the bonafide reporting of events and proceedings, civil or criminal, in courts, including pending proceedings, ought not to be prevented either by law, or by court order, (the word

'normally' has been used deliberately, because in a pluralistic society, it is possible that even fair and accurate reporting of court proceedings may have a tendency to incite violence amongst a section of the community). Hence, regulation may be necessary, not in the interest of a fair administration of justice, but only to accommodate another public interest viz. 'public order'.

(v) The courts of law should themselves assist in the dissemination of information concerning cases and causes, especially those which are important and controversial. The public has a right to know what judges decide and why; and when judges say so (e.g. in the form of a press release) it is one sure way of counter-acting or pre-empting the adverse effect of coloured, garbled or exaggerated reports by the press.

(vi) In a case where it is alleged before the court either that a legally permissible prior restraint order is absolutely necessary in the interest of justice, or that a publication has prejudiced or has a tendency inevitable to prejudice the fair trial of a case, opportunity should be given to representative bodies of the press, radio and television to make their submissions, and their responses should be considered by the court before passing final orders.

(B) Chief Justice P.N. Bhagwati (Retired) made the following recommendations in his article 'Media Criticism of Judges and Judicial Decisions' (CIJL Vol. IV 1995):

(i) Truth should be accepted as a defence, as in America and Australia;

(ii) Judiciary must be accountable to the people. The people have a right to know how the institutions of the State, including the judiciary, work. There is no reason why the public should be kept in the dark about the true state of the judiciary. Why should the people not be entitled to know how many cases are pending in the courts and for what periods those judgements have been pending; how many letter petitions the courts entertain every year and with what results, and how many days the judges were absent although the courts were open? These are matters which the public is entitled to know in order to enforce the accountability of the judiciary. Unfortunately, the judiciary keeps such information from the public. The press is often afraid of ferreting out this information and publishing it, lest it may invite punishment for contempt of court.

(C) The Press Commission made certain recommendations to the Central Government for amendment of the Contempt of Courts Act, 1971.⁴¹ Some of these are summarised below:

(i) Publication of any statement which is true or which the maker in good faith believes to be true shall not constitute criminal contempt provided the making of the statement is not accompanied by publicity which is excessive in the circumstances of the case.

(ii) The discussion of affairs or other matters of general public interest in good faith will not constitute contempt of court if the prejudice to particular legal proceedings is merely incidental to the discussion.

(iii) Publication of a fair and accurate report of a pending judicial proceeding should be protected (subject to statutory restraint or an order of the Court on certain grounds, such as security of the State, public order and the like).

(iv) Crime must be reported as matter of public interest. However, proper care is to be taken that the report should not be such that it may prejudice the trial or offend against the law.

(v) Publication of comments on or criticism of public utterances of the Judge should not be contempt because when a judge enters the arena of debate, he sheds the mantle of a Judge.

Conclusion

To conclude, judicial credibility is enhanced (and not eroded) by transparency and accountability.

The judiciary has to accept the reality that in a modern world governed by the Rule of Law, where all institutions are subjected to scrutiny, the judges cannot remain in a cocoon — virtually unaccountable to the Republic they serve.

Impeachment is not an effective deterrent or answer to the various situations which are more in the realm of judicial impropriety (as distinct from misconduct justifying impeachment). Hence the need for a binding code of conduct designed to check judicial impropriety and ensure judicial discipline.

The media should be protected so long as the reporting is responsible. Further, 'truth' should be a defence and a complete answer to a charge of contempt of court. To suppress, or worse, to punish truth is an anomalous situation which no free society resting on Rule of Law should tolerate. Truth, therefore, ought to be recognised as an adequate defence. This would be in consonance with human rights and fundamental rights and would be in the larger public interest.

Notes

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3. The Hindu, 1st July, 1990.
4. Lawyers Collective, 1995 — Article by Indira Jai Singh.
5. The Hindustan Times Report - 7th January 1992.
6. The Hindu, 1st July, 1990.
7. The Pioneer, 30th January 1990.
8. The Times of India, 21st July 1990.
9. Supra.
10. The Hindustan Times, 26th July 1990 — S Sahay.
11. The Times of India, 3rd September, 1990.
12. The Times of India Report, 2nd February 1991.
13. The Hindu, 9th February 1991.
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25. Justice E S Venkataramiah — 'Freedom of Press-Some Recent Trends' — Page 109.
26. EMS Namboodiripad Vs T N Nambiar AIR 1970 Supreme Court 2015.
27. C K Daphtary Vs O P Gupta AIR 1971 SC 1132.
28. AIR 1978 SC 727.
29. National Textile Workers Union Vs P R Ramakrishnan, AIR 1983 Supreme Court 759.
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32. Y V Hanumantha Vs K R Pattabhiram, AIR 1975 A P 30.
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37. CIJL Year Book Vol.IV 1995 – Page 43.
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41. The Law of Press – A N Grover.

Chapter 6

Judicial Power and Judicialisation of Political Issues

In chapter 1, the wide jurisdiction of the Indian judiciary was dealt with. The extent of jurisdiction however, derives its meaning from the power of judicial review. Broadly stated this power is contained in three Articles of the Constitution, viz. — Art. 32 — Original jurisdiction of the Supreme Court to enforce the fundamental rights; Art. 226 — Original jurisdiction of the High Courts to issue any writ, order or direction (including the enforcement of fundamental rights); and Art. 136 — the appellate jurisdiction of the Supreme Court to hear an appeal from any judicial order of any court or tribunal in India.

Historically, this power is pre-constitution. A limited power to issue writs of *certiorari* prohibition and *quo-warranto* had been conferred on the High Courts of Calcutta, Madras, Bombay by their Charters.¹ Directions in the nature of *habeas corpus* and *mandamus* have long been part of the judicial power of India. The concept of judicial review in the sense of declaring a law void for lack of legislative power or for violating constitutional limitations was also well known and the High Courts had exercised such powers. Although the power of judicial review existed, the occasions for its exercise were infrequent. This was chiefly due to the fact that under the English tradition, the judges were conservative and did not concern themselves with the wisdom or the policy of the legislature. They were not free to test the validity of legislation according to their individual philosophies and their predictions.²

The Constitutional Perspective

The framers of the Constitution provided for the fearless functioning of an independent, incorruptible and efficient judiciary.³ The framers of the Constitution however, contemplated a separation of powers between the judiciary, legislative and the executive. Accordingly, the famous 'due process clause' of the American Constitution was dropped from the Indian Constitution and was replaced by the following: 'No person shall be deprived of his life or personal liberty except according to procedure established by law' and that is how Article 21 now stands. This was done specifically to limit the powers of the judicial review. Further the restrictions and limitations permissible to the legislature whilst legislating and affecting fundamental rights were inserted in the Constitution itself, instead of being left to judicial interpretation. With these precautions, the framers of the Constitution hoped that they had laid the foundation of judicial review.

In fact, Article 32 and 226 were hailed as securing for the citizens speedy and effective remedy for the protection of their fundamental and other rights. The framers of the Constitution had faith in the sagacity and competence of the High Courts and of the Supreme Court to be the ultimate authority on the interpretation of the Constitution and as protector of the fundamental rights of the citizens. Consequently, the High Courts and the Supreme Court have the authority to declare invalid and unconstitutional acts of the

legislature and executive. Moreover, the courts have also claimed and exercised this power to strike down not only the legislations and ordinances but, since the Golak Nath decision (1961)⁴ and Keshavanand Bharthi's decision (1973),⁵ have gone further than any other constitutional court in the world in exercising the power of judicial review to invalidate amendments to the Constitution on the ground that the same were in violation of the 'basic structure' of the Constitution.

Approach of the Indian Courts in the Exercise of Judicial Review

On the eve of the Constitution, the Indian judiciary, steeped in the British tradition adopted a cautious and a pro-legislative stance. This approach of the Court is reflected in some of its earlier decisions such as the AK Gopalan Case.⁶ The Court in this case construed the phrase 'procedure established by law' in Art.21 in a restricted manner. Briefly stated, Article 21 states that no person shall be deprived of his life or personal liberty except according to procedure. The Court referred to the debates of the Constituent Assembly which disclosed that the Constitution draftsmen shied away from the Court sitting in judgement on the wisdom of the Legislature and deliberately did not borrow the 'due process' concept of the American Constitution. The Supreme Court accordingly held that once a procedure is laid down by law, the Courts could not strike it down on the grounds of unreasonableness or harshness.

However, soon after Gopalan, the Supreme Court adopted a more bold approach and started enforcing the fundamental rights of the individuals. The court started exercising its powers of judicial review more creatively in order to give effect to the spirit of the Constitution.⁷

In 1967 in the Golaknath's case, the Court held that the provisions of the Constitution other than the fundamental rights were subject to the amending process of Parliament and thereby held that the fundamental rights could neither be abridged nor abrogated by Parliament through an amendment of the Constitution.⁸

In the Keshavanand Bharthi case,⁹ the Supreme Court held by a process of judicial interpretation that though there are no express words in Article 368 of the Indian Constitution limiting the powers conferred on Parliament to amend the Constitution, that power is not an unlimited or unrestricted power and it does not entitle Parliament to amend the Constitution in such a way as to alter or affect the 'basic structure' of the Constitution. The court, however, did not define what would be the content of the 'basic structure' of the Constitution and this is something the Courts would have to define from time to time. This decision put a limitation on the power of Parliament to amend the Constitution and is undoubtedly a remarkable instance of judicial activism ensuring that future Parliaments by brute majority do not alter any basic feature of the Constitution (e.g. Judicial Review). This decision of the Court has been termed by many as the supreme example of exercise of judicial review anywhere in the world and has been termed as an act of Constitution making.

Emergency and Judiciary

In 1975, a state of 'emergency' was imposed in India. This era had a very drastic effect on the credibility of the judiciary in India, for the judiciary explicitly rendered itself powerless against all acts of the state during this period of 21 months. It may thus be relevant to treat the effect of declaration of an emergency on judicial review and the judicial powers of the judiciary in a somewhat detailed manner.

The 'emergency provisions' comprise of nine Articles of Part XVIII of the Constitution. According to the first of these; Article 352, the President may proclaim that a state of emergency exists if he is satisfied that national security is threatened by external aggression or internal disturbances. Such a proclamation must be laid before the House of Parliament and expires automatically after two months unless extended by Parliament. If the President is satisfied that the financial stability or credit of India or any part of it is threatened, he may issue, under the authority of Art.360, a similar proclamation.

During the state of emergency, the Union Executive may issue directions to the states concerning exercise of their executive power and Parliament may legislate on any matter whether or not it is on the Union Legislative List. Parliament can pass orders curtailing individual freedoms which are otherwise protected by the Constitution. The right to move the courts for enforcement of any of the fundamental rights may be suspended by the President under Art.355. He may, by proclamation assume the functions of the State Executive and declare that the powers of the State Legislature shall be exercisable under the authority of Parliament. Such a proclamation expires after two months unless approved by both Houses of Parliament; but, if approved, it may be renewed at six months intervals for a period not exceeding three years.

The Government has in the past resorted to declaring a state of emergency. An emergency was declared when India was faced with external aggression from Pakistan in 1965 and 1971 and again in 1980 to counter terrorism in Punjab. However, certain events happened in the year 1975 which need to be discussed more extensively. These events show how power can be misused to derail even the best of the Constitutions.

The events leading to the emergency of 1975 are briefly as follows: The election of Mrs. Indira Gandhi, the then Prime Minister, was held to be invalid in an election petition filed in the Allahabad High Court. Mrs. Gandhi, faced with the prospect of resigning the Prime Ministership, decided to declare an emergency on 25th June 1975 on the pretext of an 'internal threat' to the country. Vast sections of the people, or rather any person considered to be a political threat, or any person who could politically voice his opinion was detained without trial under the Preventive Detention Laws. The press was silenced. The political opposition was silenced. The common man was terrorised. Against this background, various detainees moved various High Courts by way of writs of Habeas Corpus, which was a pre-Constitution remedy and which was still open to the citizens vide Art 226 of the Constitution of India. The High Courts of Allahabad, Andhra Pradesh, Bombay, Delhi, Karnataka, Madras, Madhya Pradesh, Punjab and Haryana and Rajasthan rose to the occasion and sought to protect the helpless citizens of India. These High Courts rejected the contention of the government and held that detainees despite suspension of their fundamental rights could demonstrate that their detention was not in

compliance with the law (under which they were sought to be detained), or that in any event the state action was mala fide. The government appealed against these decisions to the Supreme Court. A Constitution Bench of the Supreme Court in the case of *A.D.M. Jabalpur Vs Shivkant Shukla*¹⁰ showed by a 4:1 majority that it did not have the courage which was expected from it. The Supreme Court held that no person had a locus-standi to move a writ petition before a High Court for Habeas Corpus or for any other writ in view of the declaration of emergency. It even rendered the Courts helpless if a detainee could show that there was a mistake on the part of an authority in detaining 'A' instead of 'B' or in the event the detainee could show mala fide on the part of the detaining officer or indeed on any ground. The judges of the Supreme Court clothed their judgments in noble sentiments and platitudes. Justice Chandrachud (who later became the Chief Justice of India for a 7 year term) expressed his sentiments as follows:

Counsel after Counsel expressed the fear that during emergency, the executive may whip and strip and starve the detenu and if this be our judgement, even shoot him down. Such misdeed have not tarnished the record of Free India and I have a diamond-bright, diamond-hard hope that such things will never come to pass.

Justice Beg (who was also elevated as Chief Justice of India) had the following to say:

Furthermore, we understand that the care and concern bestowed by the State authorities upon the welfare of detenus who are well housed, well fed and well treated, is almost maternal.

The 'emergency' lasted for 21 months. It is estimated that 166,000 persons were arrested without trial during this period.¹¹ It was indeed the darkest period of the Supreme Court.

The judges of the High Court were the unsung heroes of a bold judiciary. They were the only silver lining in this sorry chapter.

Supreme Court and Judiciary in General — in the Post Emergency Era

The Supreme Court, after the emergency sensitised by the perpetration of large scale atrocities during the period and chastised by public criticism, donned an activist mantel. Starting with the case of *Maneka Gandhi*,¹² the Court started taking a whole new look at citizens rights and began to construe the provisions of the Constitution and scrutinise administrative action in a manner which gave meaning to fundamental rights. The Court also started examining the executive actions of the state on the touchstone of reasonableness and arbitrariness. It vastly widened the jurisdiction of the court by construing that any state action which is arbitrary is also discriminatory and hence in violation of the equality clause of the Constitution. The fresh approach of the Supreme Court was also in conformity with the global trends in human rights jurisprudence. In the *Maneka Gandhi* case, the Court ruled that the term 'procedure established by law' appearing in Article 21 of the Constitution (which states that no person can be deprived of his life or personal liberty except in accordance with the procedure established by law) is controlled by the provisions of Article 14 (equality clause) and thus procedure contemplated under Article 21 cannot be unfair or arbitrary lest, it should be overruled by the provisions of Article 14. The court held that a citizen has a right to travel abroad, and that an arbitrary administrative order impounding the petitioners passport would amount

to violating his 'personal liberty' guaranteed under Article 21 of the Constitution. The court thus effectively departed from Gopalan's case. It laid the foundation for the new approach to follow and stated:

The principle of reasonableness which legally as well as philosophically, is an essential element of equality or non arbitrariness pervades Art.14 like a brooding omnipresence and the procedure contemplated by Art. 21 must answer the test of reasonableness in order to be in conformity with Art. 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it should be no procedure at all and the requirement of Art. 21 would not be satisfied.

Thereafter, in the case of *Motilal Padampat*¹³ the court re-enunciated, re-expounded and gave new vigour to the doctrine of promissory estoppel. Briefly stated, the doctrine stipulates that the state cannot go back on its administrative decisions on which the citizen may have acted to its detriment in the meanwhile. In this case, the state had declared a sales-tax holiday for a few years in a certain backward area in order to attract industry. Later, the government sought to reinforce sales-tax. The Supreme Court prevented this on the doctrine of promissory estoppel. This judgement opened the doors for justice between government and citizens. In the *International Airport Authority Case*¹⁴ the Supreme Court made a dent in the area of administrative law which had earlier been regarded as purely discretionary. This judgement sought to regulate government discretion in the areas of conferment of government largesse and benefits on individuals by holding that the government is not free like individuals to select the recipients for its largesse and where an administrative authority has laid down norms or principles on which it would act in its dealings with third parties, the administrative authority cannot be permitted to depart from such principles or norms. This case laid down the foundation for challenging any arbitrary award of license or contract by the government and ensured transparency in governmental conduct. In another series of decisions, the Court made a bold stride in the discretion of defining the various authorities of the state which would be subject to the discipline of fundamental rights. Fundamental rights are available only against the 'state'. The question whether 'state' would include autonomous societies, corporations and companies incorporated by the state under the Companies Act was settled in the *Ajay Hasia case*.¹⁵ The court held that the correct approach is to determine whether the agency (through purportedly independent of governmental control) is an 'instrumentality or agency of the Government' and if it was in essence so, it would be 'state' for the purposes of the enforcement of fundamental rights. This case thus ensured that government controlled independent societies, companies etc., do not escape the discipline and mandate of fundamental rights. The court once again held in very clear language that government action must not be arbitrary or unreasonable. It held as follows:

Wherever therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 21, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness, pervades the entire constitutional scheme, and is a golden thread which runs through the whole of the fabric of the Constitution.

The Phenomenon of Social Action Litigation or Public Interest Litigation in the Indian Courts

In the previous section we had adverted to how the Supreme Court in the post-emergency era had sought to give meaning and content to the fundamental rights and had extended its jurisdiction over not only arbitrary but also unreasonable actions of the state. The question, however, remained whether the benefits of the fundamental rights could ever filter through to the poor and weak sections of society. Was the judiciary being used only by persons with deep pockets and for commercial interests or could it be approached by the vast majority of the Indian population who were poor and backward. These were some of the questions which the court began to ask itself. In a series of decisions beginning in the late seventies, the Court nurtured a new jurisprudence unique in India and known popularly under the name of Public Interest Litigation (PIL). Under this PIL jurisdiction the Court has now virtually conferred on itself not only judicial review as is popularly known in democratic countries, but has gone far beyond that into the realm of policy making, legislation and indeed administrative supervision. Hence, it is important to deal with the PIL jurisdiction of the Court in some detail.

The seed of the concept of public interest litigation were initially sown in India by Krishna Iyer J in 1976, in *Mumbai Kamgar Sabha Vs Abdul Bhai Faizal Bhai*.¹⁶ In this case, while disposing an industrial dispute with regard to the payment of bonus, Justice Iyer observed that for the weaker and backward sections of the society, it is important for the courts to exercise a certain amount of latitude in the procedural technicalities where foul play is absent and fairness is not faulted. He also observed that Article 226, in its wider perspective, could be amenable in the case of collective or common grievances as public interest is promoted by a 'spacious construction' of locus standi in our socio-economic circumstances.

A significant decision was taken by the Court in 1980, in the *Sunil Batra Case*.¹⁷ In this case, the Court accepted a letter written to the Supreme Court by one Mr. Sunil Batra, a prisoner in Tihar Jail, New Delhi, complaining that the jail authorities were subjecting prisoners to inhuman conditions and torture. The Supreme Court treated the letter as a writ petition, allowed the same and issued certain directions for taking suitable action against the erring official. The Court enlarged the scope of habeas corpus by making it available to a prisoner not only for seeking his liberty, but for the enforcement of constitutional rights and human rights to which they are entitled to even while in confinement. Similarly, in the case of *Dr. Upendra Baxi Vs State of Uttar Pradesh*,¹⁸ the Court entertained a letter sent by two professors of the Delhi University seeking enforcement of the constitutional right of alleged prostitutes who were confined in a 'protective home' at Agra, and who were living in inhuman and degrading conditions in violation of Article 21 of the Constitution. The court gave directions to the authorities to ameliorate their living conditions and on other connected matters.

Another important case was the case of the *Bhagalpur Under Trial Blinding Case*.¹⁹ In this case, some prisoners were deliberately blinded in police custody by police officials in order to terrorise other criminals. The Supreme Court expanded the notion of State Law for its officials and stated that the state cannot shy away from its responsibility by

putting its agents and servants at the front. The Court directed that the best medical treatment be given to the victims and further directed that they should be given vocational training in an institute for the blind and compensation should be paid to them for rehabilitation. The Court also directed criminal trial proceedings against the guilty police officers.

This trend was sought to be formalised in a legal principle which would govern such cases, in the case of *S P Gupta Vs Union of India*²⁰ (judgement of seven judges of the Supreme Court). In this case the Supreme Court was moved by some advocates who were aggrieved by certain administrative actions of the government which according to them eroded the independence of the judiciary. In particular the issues raised concerned the transfer of judges from one High Court to another; and of the appointment of additional judges and their ad hoc extension of term at the whim of the administration. The court dealt with the rationale of public interest litigation and also the category of persons to whom it would be extended. The relevant portion is best quoted from the judgement itself as follows:

Today a vast revolution is taking place in the judicial process, the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public-spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the court for relief.

The court was careful and spelt out the limitations inherent in such a jurisdiction as follows:

1. The courts must see that the member of public should approach the court in such cases as acting bonafide and not for personal gain or private profit or political motivation or other oblique considerations.
2. Court must not allow its process to be abused.
3. Court must not overstep the limits of its judicial functions and trespass into areas reserved for the executive and legislature by constitution.

In an early case on PIL, the Court sounded a note of caution. This was in the case of *Sudipt Majumdar Vs State of Madhya Pradesh*.²¹ In this case a journalist addressed a letter to the court enclosing newspaper cuttings. The petitioner contended that certain tribes were entering areas where the army was conducting military drills for the purpose of collecting waste ammunition material and selling the same as scrap. This often resulted in casualties and injuries to the tribes. The journalist petitioner sought directions from the court to protect the tribes. This matter came up before another court and not before the then Chief Justice Bhagwathi, who had given the PIL movement its shape and content initially. This bench felt that the petition raised matters which should be addressed before a Constitution Bench (i.e. bench comprising of at least 5 judges) and that essential parameters of PIL should be laid down for guidance of courts. The Court order formulated 10 questions to be addressed by the Constitution Bench relating to the mode, manner and extent to which the court should entertain PIL. The judges raised questions of jurisprudence as to whether the court would or should become a party to the cause of action by

reason of informality of procedure adopted by it in such cases, and such other issues. Chief Justice Bhagwathi however did not constitute any Constitution Bench to hear the matter thereby missing out on an opportunity to lay down the parameters of PIL. Instead PIL has been developed on an ad hoc basis as will be demonstrated in subsequent paragraphs.

A significant case in which the Court defined the content and limits of PIL was the *Bandhu Mukthi Morcha Case*.²² The Court in this case treated a letter from an NGO as a writ petition. By this letter the organisation had asked for release of 'bonded labourers' in the State of Haryana (bonded labour which forces persons to work as labourers to repay debts incurred to the contractor has been banned by legislation — but the practice continues illegally in parts of India). The court directed a professor in the university to conduct a socio-legal inquiry into the prevailing conditions in the stone quarries in Haryana and to put forward a scheme for improving the living conditions of the workers. After hearing the parties, the court evolved a finance scheme with the assistance of the state government for the purpose of economic rehabilitation of the workers. The Supreme Court reiterated that any member of the public acting bonafide can move the court for the enforcement of fundamental rights of deprived and disadvantaged persons of the society and that in such cases the court would waive the technical requirements of procedural law. Such proceedings would not be adversarial proceedings. At the same time, one of the judges (Justice Pathak) sounded a note of caution. He pointed out that public interest litigation generally affects the rights of persons not before the Court (and who are not heard). Accordingly the court should take into account the various interests which are not represented. Further, it was pointed out that exercise of this kind of jurisdiction requires:

Judicial statesmanship and a close understanding of constitutional and legal values in the context of contemporary social forces and judicious mix of restraint and activism determined by dictates of existing realities...

Importantly at the same time the court must never forget that its jurisdiction extends no farther than the legitimate limits of its constitutional powers and avoid trespassing into the political territory which under the constitution has been appropriated to other organs of the State...

In public interest litigation, the role held by the Court is more assertive than in traditional actions; it is creative rather than passive, and it assumes a more positive attitude in determining facts...

Though in public interest litigation courts enjoy a degree of flexibility unknown to the trial of traditional private law litigations, whatever the procedure adopted by the Court it must be procedure known to judicial tenets and characteristic of a judicial proceeding; i.e. the fundamental principles which form the essential constituents of judicial procedure employed in every judicial proceedings, and constitute the basic infrastructure along whose channels flows the power of the court in the process of adjudication...

If there is a statute prescribing a judicial procedure governing the particular case, the court must follow such procedure. It is not open to the courts to by pass the statute and evolve a different procedure at variance with it. Where, however, the procedure, prescribed by statute is incomplete or insufficient, it will be open to the court to supplement it by evolving its own rules. Nonetheless, the supplement procedure must conform at all stages to the principles of natural justice, and other accepted procedural norms characteristic of a judicial proceeding... (per separate concurring judgement of Justice Pathak).

S P Gupta's case and *Bandhi Mukthi Morcha's* case provided the foundation for public interest litigation. Jurists and lawyers and other concerned citizens hailed the new jurisdiction of the court.²³ Perhaps enthused by public applause the court went a step

further in the case of *Laxmi Kant Pandey Vs Union of India* (adoption case).²⁴ In this case an advocate wrote a letter, based on an article in a magazine complaining that some Indian children were being sent abroad for adoption and ended up as beggars or prostitutes for lack of proper foster care. The petitioners requested a ban on private agencies taking Indian children abroad for the purpose of adoption. To determine the veracity of the allegations the court did not appoint a Commission or make any other effort. Rather, the court, presided by Justice Bhagwathi, immediately acted to issue notice to the Union of India and the two major national child welfare agencies to 'assist the court in laying down principles and norms which should be followed in determining whether a child be allowed to be adopted by foreign parents, and if so, what procedure should be followed for that purpose, with the object of ensuring welfare of the child'. The Court also considered various studies and policy statements on adoption and allowed the intervention of a number of private adoption agencies before issuing a scheme with extraordinary details as to the maximum permissible daily rate for child care by an agency while adoption proceedings are pending.

The Court went far beyond the 'relief' requested for in the petition which was limited to only banning the private agencies from arranging the adoption of Indian children by foreign parents. This case is a clear demonstration of the court overstepping the limits of its jurisdiction.

Another interesting case relating to the PIL and which illustrates some of the problems which are likely to arise in the PIL is the *Olga Tellis Case*.²⁵ In the city of Bombay many poor people set up small shelters on pavements for lack of any other alternatives. Hence the slums exist not only on government or private lands but also occupy pavements. The city government, on the directions of the Chief Minister, started forcibly evicting persons from the pavements. The timing was, however, totally inappropriate as the monsoon season was about to break and eviction would have caused untold miseries to the pavement dwellers. Being moved by the plight of the pavement dwellers, a citizen group approached the High Court of Bombay represented by eminent Senior Advocate Mr. Ashok Desai (presently Attorney General of India). In the High Court it was 'candidly conceded' by the petitioners that they were not claiming any fundamental right on the part of the pavement dwellers to stay on the pavements — rather they were merely seeking an indulgence on humanitarian grounds that they be allowed to stay till the monsoons were over. The court considered this request favourably and halted the process of eviction of pavement dwellers till the monsoons were over. As expected, once the monsoons were over, the pavement dwellers continued to stay put. At this point of time, other organisations have filed a writ petition in the Supreme Court now contending that they have a fundamental right to stay on the pavements linked to their right to livelihood, which according to them was guaranteed under Art. 21 of the Constitution. The question naturally arose as to what would happen to the undertaking given by 'their counsel' in the High Court. It was contended before the Supreme Court by the new organisations that they had nothing to do with the undertaking, if any, given in the High Court. This was precisely the situation that Justice Pathak had taken pains to point out in the *Bandhu Mukthi Morcha Case*.²⁶ The judge had the foresight to point out that public interest litigation affects the rights of the persons not before the court and who are not heard and

accordingly the court should take into account interests which are not represented. The Bombay High Court had accepted the oral undertaking of an advocate (which in normal course is accepted unhesitatingly) and on that basis passed an order — which now turned out to be a piece of paper. The High Court ought to have realised that such an undertaking could have been given only if the matter was declared to be a representative action for which proper notice was given, in accordance with the procedure prescribed for representative suits and actions to effected persons. The High Court did not do so. Even the Supreme Court chose to side step this ticklish issue rather than deal with it head on. The Supreme Court merely stated that there could not be an estoppel of fundamental rights and hence the ‘concession’ made in the proceedings below whether under mistake of law or otherwise would not affect the fundamental rights of the pavement dwellers who approached the Supreme Court.

The Supreme Court held that the pavement dwellers had a fundamental right by further expanding the interpretation of Art. 21 to include not only ‘life’ but ‘livelihood’. The Supreme Court held that eviction of the petitioners from their dwellings would result in deprivation of livelihood and such deprivation can only be by reasonable procedure established by law and hence the petition is maintainable under Art. 21 of the Constitution. Having said that, the court held that the procedure under which the Bombay Municipal Corporation was seeking to evict the persons from the pavements was not unreasonable. Hence the court ultimately came to the conclusion that the petitioners were not being deprived of their right to livelihood by any unreasonable procedure. The Supreme Court, however, held that the state government must give the pavement dwellers alternate sites and the concerned persons must be resettled. This the Court held was on the basis of ‘assurances’ given by the government from time to time that the pavement dwellers would be rehabilitated.

In the case of *State of Himachal Pradesh Vs Umed Ram Sharma*,²⁷ the court presided by Justice S Mukherjee, adopted a restrained approach. In this case, the petitioner moved the High Court seeking a direction to the state government to construct certain roads which are necessary in the mountainous part of the country to which the petitioner belonged. The High Court directed the concerned officers to proceed with the construction work and complete the same within a bound time frame. The High Court also directed the state government to ‘favourably consider the demand for additional funds’ which would be required for the work. It further directed the matter to be placed before it on the next date to review the progress. In appeal, filed by the state government the Supreme Court upheld the basic contention of the petitioners that the matter was a public interest litigation and that for a hillman access to roads was an essential attribute of life guaranteed within the meaning of Article 21 of the Constitution. The Supreme Court, however, held that the state government could not have been directed to obtain funds since allocation of funds is within the realm of legislation for which there are provisions in the Constitution. The court, inter alia observed as follows:

In the instant case, administrative action or administrative inaction is being sought to be reviewed. Read in the background of the directive principles as contained in Art. 38 (2) of the Constitution access to life should be for the hillman an obligation of the State but it is primarily within the domain of the legislature and the executive to decide the priority as well as to determine the

urgency. Judicial review of the administrative action or inaction where there is an obligation for action should be with caution and not in haste.

The court further observed:

The court must know its limitations in these fields. The court should bring about an urgency in executive lethargy if any, in any particular case but it must remember the warning of Benjamin N Cardozo in the *Nature of Judicial Process* at page 141 of the book:

'The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "The primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains.'

With the aforesaid observations, the Supreme Court upheld the substantive portion of the judgement of the High Court but not the portion which impinged on the powers of the legislation regarding allocation of funds.

Despite the cautionary approach adopted by the judges in some cases, the Supreme Court continued to pick and choose favourite topics and adopt an ad hoc approach. One typical illustration of the lack of consistency in approach, was Chief Justice Venkataramiah giving top priority to a 'Public Interest Litigation' filed by an advocate against the Board of Cricket Control in India.²⁸ In this case, the petitioner felt that certain fines imposed on cricket players by the board were disproportionate and illegal. The Court headed by the Chief Justice immediately made way for such a petition and issued notice to all respondents and heard the matter on a day to day basis and gave directions thereafter. The court gave liberty to the cricket players to intervene if they so desired. Surely the jurisdiction of PIL had been overstretched in favour of cricket players who comprised the elite and glamorous section of society and a personal penalty imposed on them was taken up at the behest of a person who had no visible interest in the matter (*Vineet Kumar vs Board of Control for Cricket 1989 (2) scale 764*).

Another case which illustrates certain types of problems relating to PIL is the case of *Janata Dal Vs M S Chowdhary 1992*.²⁹ The factual background leading to this case is as follows. The Government of India had placed an order with a company known as M/s. AB Bofors of Sweden for the supply of a certain number of Howitzer Gun Systems for a total amount of Rs. 1437.27 crores. Allegations were made subsequently that certain senior Indian politicians and key defence personnel had been paid bribe money to secure the contract. This led to a storm of controversy which quietened temporarily when a Joint Parliamentary Committee gave a clean bill to the scandal. However, after the change of government, the Central Bureau of Investigation (CBI), on the basis of certain new information unearthed by some journalists lodged an FIR under a certain section of the Indian Penal Code against certain persons. Whilst an application filed by the Government of India before the Court of Geneva regarding some further information was pending, an advocate claiming to be a General Secretary of an organisation devoted to 'upholding the rule of the law' filed an application before the Special Court set up to hear the matter for a request that no letter rogatory be issued on the request of the CBI unless the allegations against those accused in the FIR were established to the satisfaction of the Court. The Special Court dismissed the petition of Mr. Chowdhary who thereupon approached the High Court of Delhi raising a number of questions including the validity of the FIR

registered. A single judge of the High Court held that the petitioner had no locus standi and that his petition was not maintainable. The judge, however, observed that the Court can take judicial notice of 'any illegality being done by any court, with a view to prevent injury being caused to known or unknown aggrieved party'. Accordingly, the learned judge of the High Court took suo moto cognisance of the matter and directed the Registrar of the High Court to register a case under the title 'Court on its own motion Vs The State and CBI'. Thereupon, the single judge called upon the CBI and the state to show why the proceedings initiated on FIR not be quashed. Being aggrieved by this, the state government filed special leave petition to the Supreme Court. The Supreme Court held that the suo moto action of the single judge of the High Court could not be sustained. The Supreme Court came to this conclusion on an interpretation of the inherent powers of the High Court under Sect. 482 of the Code of Criminal Procedure and not on the basis of the scope of PIL. The Supreme Court observed that though it had recognised a departure from the strict rules of locus standi in PIL cases, no precise or working definition had been evolved in respect of locus standi of an individual seeking judicial remedy. The court observed — 'probably some reservation and diversity of approach to the philosophy of PIL among some of the judges of this Court as reflected from the various decisions of this court, is one of the reasons for this court finding it difficult to evolve a consistent jurisprudence in the field of PIL. True in defining the rules of locus standi no "rigid litmus test" can be applied since the broad contours of PIL are still developing space seemingly with divergent views on several aspects of the concept of this newly developed law and discovered jurisdiction leading to a rapid transformation of judicial activism with a far reaching change both in the nature and form of the judicial process'.

The Supreme Court nearing conclusion of the judgement commented that it was 'depressing' to note that on account of such proceedings innumerable days are wasted which could otherwise have been spent on the disposal of cases of genuine litigants. The Court observed:

We cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters, Government or private persons awaiting the disposal of tax cases wherein huge amounts of public revenue or unauthorised collection of tax amounts are locked up, detenus expecting their release from the detention orders etc. — are all standing in a long serpentine queue for years with the fond hope of getting into the courts and having their grievances redressed; the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either for themselves or as proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffling their faces by wearing the mask of public interest litigation, and get into the courts by filling vexatious and frivolous petitions and thus criminally waste the invaluable time of the courts and as a result of which the queue standing outside the doors of the court never moves which piquant situation creates a frustration in the minds of the genuine litigants and resultantly they lose faith in the administration of our judicial system.

The court recalled the words of Justice Bhagwati that the courts must always be careful *in entertaining public interest litigations* and at the same time made it clear that there is no question of retreating from the philosophy of public interest litigation which according to the court had led to many outstanding judgements.

PIL and Environment Cases

Perhaps, the greatest contribution of PIL is in the field of the protection of environment and ecology. Though in India the Prevention of Water Pollution Act was enacted in the year 1974, and the Prevention of Air Pollution Act was enacted in 1981, the enforcement machinery continues to be hopelessly inadequate. Hence industries continue to flout the norms with impunity — sometimes hand in glove with the lone inspector and sometimes by hoodwinking the authorities. In remote areas as well as in the cities the law continued to be on paper till very recently. The Supreme Court awoke to the threat and in a series of judgements beginning from 1985 clamped down heavily on illegal stone quarrying and mining cases.³⁰ The court effectively prevented illegal mining, degradation of forests in sensitive ecological areas by entertaining PIL and called for reports from competent technical persons. It issued directions to the enforcement agencies and thereafter satisfied itself that its directions had been followed. Similarly, in relation to the Water Pollution Cases the Court accomplished what would have been an otherwise impossible task for the administration by tackling thousands of errant industries and forcing them to comply with the relevant rules and regulations by installing proper pollution control devices. This task could never have been accomplished by the administration alone. The political will which was required would have balked when faced with the consequences. However, the court led initially by Justice Bhagwathi and thereafter by Justice Kuldeep Singhy stepped in and ensured that the pollutants come to heel.³¹

Recently, continuing with its drive against pollution, the Supreme Court imposed a pollution fine on a large number of tanneries in Tamil Nadu and stressed the need for the setting up of 'green benches' in various High Courts to deal with the environmental issues. It also directed the Union Government to constitute, within a month, an authority headed by a High Court judge empowered to order the closure of polluting industries, impose fines on them and order compensation. The Court also directed the district authorities to close down the polluting units in case the owners refused to pay the compensation imposed by the proposed authority. In another significant directive, the judges said that even in the case where an industry is found to have set up pollution control devices it would still be liable to pay compensation for polluting the environment, in the past and causing its degradation.³²

However, in very recent times the court have begun to act in a certain manner, especially in environmental cases where questions have been raised as to whether the court is dispensing justice in accordance with the law and whether the approach of the court falls short of natural justice to the respondents. It seems that the enthusiasm of the court is leading it to overstep its limit which can only have dangerous consequences for the judiciary and the citizens in the years to come. A typical case which illustrates this is the case of *MC Mehta Vs Union of India*.³³ The facts leading to this case are as follows. In the statutory Master Plan for New Delhi provision has been made that industries classified as 'hazardous' must close down their activities within a period of 3 years beginning from August 1990. It is further provided in the Master Plan that these industries would be given all assistance by the government and that the closure would be in a planned manner for which purpose the industries were required to submit schemes

within a year from the date of the Master Plan. The industries forwarded their schemes but the government could not take a decision essentially because of the consequences the closure of thousands of industries would have on the vast population of the city and the economy of the city. The Supreme Court took cognisance of the matter and directed a list to be prepared of all industries which would fall within the description of 'hazardous industries'. Many persons protested that their names were wrongly included in the list but they were not heard and they were told that they could at best forward their case to the government. Thereafter, the Court heard a few industries who approached it only on the question of incentives which they wished to have if they were to be closed down and relocated. The Court also directed the authorities to plan a scheme for closure of all the industries. After hearing only a few industries on the question of incentive desired by them, and despite the fact that the workers of the industries were not heard and that there was no proper categorisation of industries which would fall within the description of hazardous industries, the Court directed that all the 168 industries mentioned in the controversial list prepared by the authorities, must close down by 30th November 1996. A further 762 industries would have to follow suit since their names were under preparation. As regards the workmen the Court directed that they would get compensation in addition to what they are entitled to by law and they would be entitled to one year salary over and above their statutory dues in the event of retrenchment. In the event the concerned industries did not close down and instead relocate themselves outside Delhi, the workmen got full benefit of continuity of service including one year extra salary as a bonus. The question naturally arises as to where the Court derived its power to pass such a direction and if there is some inherent power, where it is to be found. The workers naturally ask why not more than one year compensation for themselves; and the industries similarly ask what the basis is for one year compensation. There are, indeed, no answers on either side. The answer is that this is the figure which has appealed to the conscience of the court but has no basis in law.

As regards the benefits to the industries in the shape of utilisation of land on which they were situated, the court held that for industries occupying large areas i.e. over 10 hectares of land, they would be entitled to redevelop only 32% of their land and the balance 68% must be surrendered by them to the government which would be develop the land as a green belt. The development of a green belt indeed is a laudable object but the question again arises under what provision the private citizens can be deprived of 68% of their land without any compensation. Furthermore, how can the court devise the use to which vacated land is to be put. Surely, this is the function of the administration. These questions would, undoubtedly, be agitated in the Courts after 30th November 1996 (the closure date) and it would certainly be stated in courts that the judges concerned did not hear the concerned persons including workmen and factory owners, on certain vital issues before passing the orders and also that the orders of the honourable Supreme Court are not in accordance with law. This is only one typical example of judicial over-enthusiasm, in recent times.

Judicial Activism - Some Viewpoints

Therefore, it is clear that over the years the judiciary has increasingly assumed a more and more significant role. A large variety of issues have been brought to the Supreme Court for adjudication ranging from issues involving social action programmes for the backward classes; examination systems, admissions in educational institutions, religious political issues, election disputes, to name but a few. The judges have exercised jurisdiction over aspects of social, political and religious life of the people of the country. These developments have resulted in making the Courts and particularly, the apex Court and its judges highly visible, sometimes inviting strong criticism and other times highest applause from its observers.³⁴ According to the perception of some people, the Supreme Court has on occasions, while taking an activist stand ignored the line of distinction between legislation and adjudication on the one hand and adjudication and administration on the other.³⁵ There have been critics who have perceived this new role of the Supreme Court as a threat to a public policy of separation of powers. The role of the Court is quite often seen as a transgression of the court into the domain of the executive and the legislature.

It is true that the Courts in India have been very dynamic and have successfully dealt with the contingencies which were unforeseen and unprecedented. Yet, in the recent past, the judiciary has also attracted a fair amount of controversy. In fact, it may not be an exaggeration to state that at present, the Indian polity is quite seized with the issue of the role of Indian judiciary. There is a constant debate going on as to whether such an over active court was envisaged by the Constitution.

Recently, Justice K Ramaswamy of the Supreme Court, while talking to the press denied that the judiciary was involved in any kind of activism. The judge said that some people when they do not find the courts verdict favourable start branding the judiciary as activist. The judiciary becomes a topic of discussion whenever the other organisations of the society are found wanting in their task.

The Chief Justice of India, Justice Ahmedi, recently observed that it is important to appreciate that there is a basic distinction between litigation in the realm of private law and public law and that the old and mechanical notions of judicial process are properly applicable to the realm of private law litigation, but are entirely inappropriate in public law litigation. This is more so, in the case of a nation having a written constitution that seeks to attain socio-economic equality amongst its citizens. When dereliction's of constitutional obligations and gross violations of human rights are brought to the notice of the Supreme Court, the Court has to act in a positive manner to provide relief which is real and not illusory.³⁶ Sometimes, to be bogged down by the spirits of the delicate balance of power between the wings of the government could cause grave injustice to the individuals making the Supreme Court guilty of not furthering its constitutional obligations. This debate is discussed in the latter sections of the chapter.

One aspect which needs to be kept in consideration is that the judges are not answerable to anyone for an allegedly wrong decision. Further, a decision (however incorrect) would continue to remain binding on the organs of the state (in the case of High Courts) and on the country (in the case of the Supreme Court) till such time as it is overruled

by a subsequent decision. Further, harm or damages caused to a party by an erroneous judgement is incapable of correction. The question arises as to how this would apply in Public Interest Litigation. Litigation in India is conducted by the adversarial system, i.e., proceedings where parties argue their respective positions as adversaries and the judge does not enter into the arena of controversy. In Public Interest Litigation, however, the Courts abandon the adversarial method and directly take sides. Indeed there may sometimes be no two sides at all; the only side being the state and the court. Sometimes, courts suo motu go into the matter; or, as it happened in the Adoption Cases (*supra*), the Court suo motu laid the law for adoption by foreigners, going far beyond the assistance claimed in the petition by the petitioner. Such judgements became final without the framing of issues, arguments, evidence or material (except for such as the judge may deem fit to call). The question may well arise as to how the public interest should be safeguarded against incorrect judgements; or to put it in other words — what is the protection of the public against the whim of a judge. This becomes more relevant especially since the judges are not answerable to any authority for incorrect decisions. The judges have now become clothed with enormous powers to suo motu lay down the law of the land and affect vast sections of persons. Public interest demands that there must be some check and balance on the judges, in the light of the new powers being clothed upon them in the form of activists jurisprudence and Public Interest Litigation. Perhaps the time has come for the judiciary to lay down the limits and constrains of Public Interest Litigation.

Judicialisation of Politics

One of the major challenges faced by the judiciary is the tendency in recent years in some Asian-African countries to use the judicial process to settle political issues.³⁷ This tendency lies in an increasing attempt on the part of the people in power as well as the political parties in opposition, to judicialize issues that belong to the political arena. These kinds of stresses and strains seriously cause a threat to the independence of the judiciary. According to an eminent jurist, the test of the independence of the judiciary arises when times are abnormal, when the administration is surcharged with passion and when there is a brooding sense of fear, when important personalities get involved and when the judicial process is used by those in power to persecute political opponents under the garb of prosecution. Such happenings damage the confidence of the people in the judiciary as an institution above political wrangling. Recently, there has also been a trend to pass on purely executive decision making functions to the judiciary, thereby exposing the judiciary to risks of being politicised and scandalised.

It is a convenient method to refer all political controversial issues which normally the executive should be deciding on to the Supreme Court under Article 143 of the Constitution (Advisory jurisdiction of the Supreme Court). Recently, the nation got engrossed in the 'Babri Masjid' controversy. Vast sections of Hindus believe that the Babri Masjid (mosque) was built by a Muslim conqueror after demolishing a temple which marked the birth place of Lord Ram and which existed from pre-historic times. Right wing

politicians, politicised the issue and illegally demolished the 400 year old mosque. The government was plainly ineffectual in taking a decision which would settle the controversy. It wanted the Supreme Court to 'bell the cat'. Accordingly, it moved the Supreme Court to give its opinion under Article 143 of the Constitution as to whether a temple existed centuries ago on the site where the Babri Masjid stood before its demolition. Questions of the following nature were placed for decision before the Supreme Court in this case.

1. whether the Hindu devotees should be allowed to conduct prayer at the make-shift temple on the disputed site at Ayodhya;
2. whether the government should rebuild the mosque which was dismantled;
3. whether a mosque and a temple should both co-exist at Ayodhya.

Questions on fact incapable of clear determination and where there could be a divergence of opinion even amongst historians and archaeologists were to be decided on by the Supreme Court. Against this background, a resolution was passed by the Bombay Bar Association on 16th December 1992.³⁸ The resolution condemned this trend as follows:

We the members of the Bombay Bar Association:

... deplore the violations of solemn undertakings given to the Supreme Court and call upon all political parties and the Central and State Governments to refrain from using the Supreme Court to further political objectives. We call upon all lawyers to protect the independence of the courts as sacrosanct forums strictly for the dispensation of justice and adjudication and resolution of legal and constitutional issues.

Even the present Chief Justice of the Supreme Court Mr. Justice A H Ahmedi observed recently that in the last decade, the Supreme Court of India has had to tackle, deliberate upon and pronounce judgements on some of the gravest politico, legal and socio-economic issues. The extended role of the court has been much commented upon by journalists, legal experts and academicians. Some allege that Parliament has abdicated its primary responsibility of legislation in favour of judiciary, while others accuse the Supreme Court of transgressing into the spheres of Parliament and the executive.

In this regard the Bar in India is quite vibrant and has always played an active role in the affairs of the courts. Its role in bringing out the case of corruption in the judiciary to the forefront has been discussed at length in chapter 3 of this report. The legal experts recently reacted very sharply when cases of politicians came up before the Court. This brings to light the fact that when judicial activism steps into the political arena the judgement is immediately viewed as being motivated. The courts immediately get dragged into the controversy and are branded depending on which way their order goes. An order of the Court transferring a corruption case against the Former Prime Minister, Mr. Rao, from one court to another is one such case.

The entire furore arose out of the former Prime Minister Mr. Rao's petition to transfer the Lakhubhai Pathak case out of the court of Delhi's Chief Metropolitan Magistrate, Prem Kumar. A non-resident Indian businessman, Mr. Lakhubhai Pathak had levelled charges of cheating and criminal conspiracy against one Chandraswamy and had included Congress President Mr. Rao as co-accused in the said case. The Supreme Court granted relief to the former Prime Minister, Mr. Rao, by agreeing to his plea for transfer of the case to another competent Magistrate, thereby allowing him to gain more time at the cost

of judicial time. The Court declared that the Chief Metropolitan Magistrate, Mr. Prem Kumar had acted fairly and impartially in summoning Mr. Rao as co-accused in the 100,000 US\$ corruption case. The Attorney General described Mr Kumar as an outstanding and upright judicial officer. Mr. Rao's counsels never alleged that Mr. Kumar's order smacked of any bias against their clients. Despite this the Court chose to transfer the matter to any other competent judge.

Many eyebrows were raised by the Court order. According to the former Union Law Minister and Senior Advocate, Mr. Shanti Bhushan, the Supreme Court had so far been appreciated for applying the law equally to all, no matter how high the person might be. This order, however, had done the opposite. Sr. Advocate, Ms. Indra Jaisingh, described the Supreme Court order as a great setback to everything the judiciary had been trying to do for the last year in the recent cases concerning top politicians. These controversies (howsoever genuine or flimsy) are bound to arise every time the Court dons an activist mantle in cases of politicians.

Enforcement of Judicial Decisions (Monitoring)

The development of judicial activism raises the allied issue of the enforcement of judicial decisions. The judicial enforcement machinery in existence is designed to deal with inter-party disputes. It does not envisage an activist court seeking to bring about a socio-economic revolution by mandating policy decisions and even legislative measures. The question is how these decisions are to be enforced? This is dealt with in the following topic.

According to former Chief Justice A M Ahmadi, although it is difficult, the court must take precautions to ensure that it passes orders which are capable of being enforced, lest the courts appear to be speaking only for effect and publicity. This tends to erode the image of the judiciary.

This trend can encourage the view that the court orders can be disobeyed. The judiciary should never lose its power to command respect and expectations from the public. Although some of the judges of the apex Court have become cautious and conscience of this fact the court should take utmost care to issue directions only after assessing the basic realities and analysing the prospects of the order being properly implemented. The court should consider whether the enforcing authority has the financial and other material resources requisite to carry out its directions.

Some judges of the Supreme Court have evolved a peculiar method of monitoring the implementation of their judgements by calling for periodic reports of compliance from named officials. Sometimes the court appoints counsels who are given the job of presenting a report to the court as to whether or not the court orders are being implemented. There have also been an increasing number of convictions for contempt of court. Builders, IAS officers, police officers and even lawyers have been hauled up for contempt of court.

A much publicised case in this regard was that of 'Vasudevan'. In this case it was alleged that the state government had not implemented an order of the Supreme Court

directing a particular officer to be promoted. After taking legal advice the State decided not to promote the officer as it felt that the officer was not eligible for promotion to a selection post. But the Supreme Court took the view that Vasudevan (a senior IAS officer) was guilty of contempt of court and passed a sentence of one month's imprisonment.

Recently, in May 1996, the Supreme Court hauled up the MCD Commissioner and four joint directors as well as the Director General of Doordarshan (Government controlled television company) by issuing contempt notices to them. By its orders, the Court had ordered that night soil garbage and domestic refuse should be regularly cleared and dumped in landfills earmarked for the purpose. The Doordarshan had been directed to screen programmes aimed at making people aware of hygiene. The court felt that despite the order the city of New Delhi continued to remain dirty and unhygienic. The court felt that its orders had been flouted. The Court observed that contempt proceedings was the only way to deal with disobedient officials. It further observed that if the contempt were proved against these officers, they 'will regret' having disobeyed the orders of the Court.

The Sarla Mudgal case, however, is a classic example where the time tested method of contempt powers failed the Court.³⁹ In this case, the court issued a direction in the nature of a 'request' to the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. The Court felt that different laws of different communities in areas like marriage, divorce, maintenance etc., could lead to inequitable situations. Sometimes, persons would abuse the personal laws of a community to get an advantage. For example, a Hindu converting to the Mohammedan religion to divorce the first wife or to marry another wife without divorcing the first wife. This led the court to call for a 'Uniform Civil Code' for all citizens of India. Though worded as a 'request', the court had virtually issued a direction to the government to bring about legislation in this field. This became clear when the court further directed the government of India through the Secretary, Ministry of Law and Justice to file an affidavit of a responsible officer in the Supreme Court indicating therein the steps taken and efforts made by the government of India towards securing a Uniform Civil Code. Certain measures which could be undertaken in this regard were also suggested to the government of India.

These directions by the Supreme Court opened a debate in the legal and political circles on if the Court can direct the government to implement any of the directive principles of the Constitution and can a direction be issued to the legislature to bring about a legislation. The order passed by the Court was perceived as a populist move and initiated criticism. The position in the Constitution being clear that the enforcement of the Directive Principles of state policy is clearly within the realms of government's discretionary power. Strangely enough the judges later backtracked in an interesting manner by an oral observation. A division bench comprising Justice Kuldeep Singh and Justice Sagir Ahmed on August 11, 1995, indicated that the observations made by them in Sarla Mudgal's case were in the nature of 'obiter observations' and therefore not binding on the government.⁴⁰ Taking the clue, the government filed an affidavit in court clearly stating that it would not be bringing about a Uniform Civil Code as it would affect the minorities rights. The facts of the case clearly indicate that the Court had passed a misconceived order in a hurried manner and when it realised its mistake, it itself

backed out. The government was bold enough to tell the Court that it would not follow the order.

Another method evolved by the Courts to enforce its direction or intention is to monitor the implementation of its direction. In this context, it is relevant to give in detail what has come to be known as the Hawala Case, which is one of India's gravest corruption scandals. The investigations led to the indictment of senior politicians from across the political spectrum. Firstly, the court removed the case from the Prime Minister's supervision to eliminate any impression of bias and avoid erosion of credibility of the investigation. A special panel of 3 Supreme Court judges was set up to oversee the Central Bureau of Investigation's (CBI) probe into the so called Hawala Scandal.

The courts' intervention arose from a petitioners request that the CBI be permanently separated from the Prime Ministers' Office. While declining to realign branches of government so radically, the judges held that in the present case, the CBI needed to be independent and also have its full protection. According to the editor of an Indian periodical, this was the first extraordinary intervention of the Supreme Court whereby immunity attached to powerful politicians had been broken.

The scandal revolves around cash payments made to politicians, bureaucrats and well connected businessmen by an industrialist. On interrogation by the CBI, the businessman gave a testimony that he had also funnelled moneys to the then Prime Minister Mr. Narasimha Rao in 1991. The CBI's investigation went into a two year slumber, still unexplained, until the Supreme Court prodded by a Public Interest Petition from two journalists and two lawyers began demanding results. The Supreme Court was not cowed down by the big names that kept propping up in the case. According to a Supreme Court advocate, the Court 'has given a new and powerful dimension to activism and in the process enhanced the prestige of the Supreme Court'. According to the administrative rules, no agency can investigate public servants at the level of Joint Secretary and above, without government consent. The Supreme Court viewed this as a procedural formality that was clogging up the process and discarded it. In fact it directed all the concerned authorities to render full assistance to the CBI and declared that the CBI could function entirely independently to investigate the case. The Supreme Court issued a mandamus to the CBI that it shall within a stipulated time complete its enquiry. For the Supreme Court of the land, to virtually dictate terms to the CBI, in other words telling the executive how to do its job, was perceived by many people as a reflection of the breakdown of the other branches of government. At the same time, the orders passed by the Court in this case have raised concern in some quarters about whether the judiciary is overstepping its authority.

The 'fodder scam case' is another illustration of the Court taking over the role of the executive and monitoring, supervising and controlling the investigation of the case. Almost simultaneously, the Delhi High Court passed similar orders in the Member of Parliament Bribery Case (in which it was alleged that certain members of Parliament had taken bribes) — popularly known as the Jharkhand MPs Case.⁴¹ In October 1996, the Patna High Court and the Delhi High Court passed orders with regard to the CBI in the Jharkhand MPs bribery case and the Animal Husbandry scam case respectively. The Delhi High Court gave special directions to the two key officers of the team present

before them to consider themselves as 'officers of the court' and stated that no one would interfere in the working of their investigation and that they would be at liberty to approach the court for any order if the need arose. The Patna High Court passed strictures against CBI director, Joginder Singh, stating that he would interfere and also scuttle the investigation into the Animal Husbandry Scam. The court also directed that he was henceforth not to deal with the case. The Court observed that there was a prima facie evidence of the contempt of the court against the CBI director. The CBI filed a special leave petition to the Supreme Court against this order of the Patna High Court, holding that the order of the Patna High Court was interfering with the executive functioning of the CBI. But the Supreme Court rejected the CBI's plea for stay of the High Court order divesting the CBI of its supervisory powers in the case. Such orders of the court have been found by many as usurpation of powers by the Court. But since the maximum noise on this front is mainly from the political circles, it does not have any effect on the common man. In fact, recently, a section of the Members of Parliament were contemplating to convene a special session of Parliament on judicial activism. Apparently, this move was later abandoned since the opposition made it clear that it would not like to embarrass the judiciary at this stage (most of the cases with which the judiciary is currently dealing relate to corruption of the ruling party and its supporters). All the same a symposium was organised comprising of presiding officers of State Legislatures and Councils to discuss whether the judges were lately showing a 'disturbing tendency' to encroach on the executive prerogative. It was observed in the symposium that the trend of the judiciary in identifying the investigating official who will report to it and bringing the police investigation in its own jurisdiction, thus playing the role of the prosecutor as well as the judge, should stop. The official note on the symposium while commending the constitutional role played by the court observed that the present direction was disturbing.⁴²

The Supreme Court's decision in October 1996 to shed its self-imposed responsibility to monitor investigations in the St. Kitts⁴³ and Pathak Cases⁴⁴ is a landmark in itself. The Court has stopped its monitoring because the CBI has finally filed charge sheets in both those cases involving the erstwhile Prime Minister, Mr. Narasimha Rao.⁴⁵ Thus the bench headed by Justice Verma has demonstrated that monitoring of these cases were not to usurp the powers of the executive, but to make the executive perform its duty. The criticism made by the politicians that judicial monitoring of investigations undermines the separation of powers and principles has been refuted by a former Supreme Court Justice, O. Chinnappa Reddy. According to him, the law does not anyway contemplate the executive to supervise the functioning of the investigation officers and the courts had to resort to monitoring in the light of the executives poor track record of complying with their orders. Nevertheless, there is still apprehension in the minds of some that courts supervision of investigations could compromise the principle of impartiality of the judicial process.

While taking a stand on this controversy, one cannot overlook the fact that some day after investigation is complete the case would proceed to trial. Can it be expected that the trial of these cases (blessed or may be even initiated by the Supreme Court) would be fair to the accused? This apprehension was voiced by Justice Tulzapurkar of the

Supreme Court more than a decade back speaking extra-judicially, when judicial activism was in its infancy.

Conclusion

In conclusion, it may be stated that the Supreme Court has demonstrated considerable creativity and imagination in exercising its wide powers of judicial review. In leading cases like *Keshavanand Bharti*, *Maneka Gandhi* and *Ajay Hasia's* the Court has ensured the foundation of good government in accordance with law and ensured that Parliament would not be able to tamper with the Constitution or erode its basic foundation. The Court has taken the fundamental rights to the doorsteps of the masses who would otherwise never have been able to avail of the same. The Court has forged new tools and created a new jurisprudence of 'public interest litigation'. However, the court has failed in not being able to evolve public interest litigation on a sound jurisprudential footing so that it often degenerates to become a peg for the judge to hang his whims and fancies on or entertain matters which should never have become the subject matter of PIL.

The fact remains that judges cannot fit the shoes of policy makers. They do not have a concept of the resources and limitations of the state and the consequences their orders may have on the limited resources of the state. The judges cannot take an over all view and they cannot become inspectors, policy makers, law enforcement agencies and law makers all rolled into one. Further, the courts do not have any hierarchy by which they would become accountable to their seniors. The only consequence of wrong judgements is an appeal and when the judgement is by the apex Court the only hope in the event of wrong judgement is that one day it would be over ruled.

The judges must be careful when they not only enter into the arena of controversy but become a part of the controversy. In such event they are bound to be soiled by the dust of controversy. Often judges take up cases and causes suo moto without any pleadings or sometimes suo moto they exceed the pleadings. The Courts do not proceed by any known method and all this goes in the name of PIL. The Courts can well be the watch dog of citizens' rights or public causes, but if they become the blood hounds, the credibility of the judgement which is pronounced is obviously going to be open to a very fundamental question, namely, whether it is a judgement by a judge or a judgement by the prosecutor?

It is, indeed, important if PIL is to grow and be sustained and become a part of the Indian jurisprudence and if judicial activism is not to get a set back, the courts must evolve a sound platform and basis for Public Interest Litigation. Judicial discipline must be ensured. The wise words of Justice Cardozo adopted in the case of *State of Himachal Pradesh Vs U.R. Sharma* and the restraint adopted by Justice Pathak in the case of *Bandhu Mukthi Morcha Case* must be heeded by judges. Otherwise there is a clear danger of PIL going out of control, losing its credibility and the judiciary being tarnished in the process. There is real danger that in future years the judiciary may have to be 'held back' and become passive as in its initial years.

But, by and large it is generally perceived that the Indian judiciary is playing a commendable role. In fact, Lord Woolf Master of Rolls (one of the most prestigious posts of the British judiciary) recently expressed (in London) his 'gasping admiration' for the work done in the immediate past by the Indian higher courts. He is reported to have said that attempts of the British judiciary to exercise judicial control over government 'are nothing compared to the kind of work, the courts in India have done'.⁴⁶

Above all, the common man perceives the judiciary as the only hope which can salvage the rights of the citizens, protect the environment and safeguard public interest.

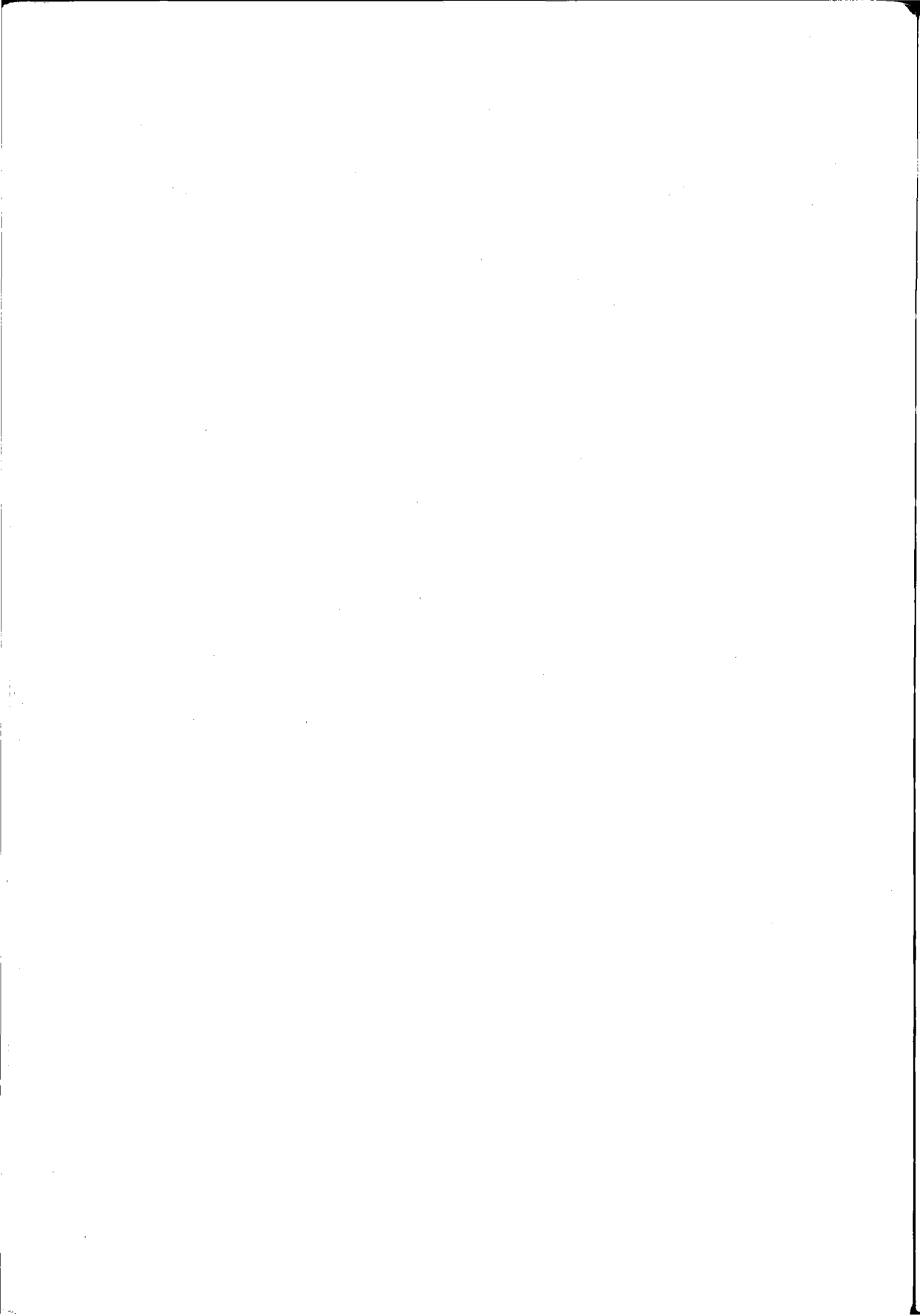
Notes

1. Seervai H.M. - The position of the Judiciary under the Constitution of India. P55.
2. Supra.
3. See discussion in Chapter 1.
4. Golak Nath Vs. State of Punjab AIR 1967 SC 1643.
5. Keshavanand Bharthi Vs. State of Kerala AIR 1973 SC 1461.
6. A.K. Gopalan Vs. State of Madras AIR 1950 SC 27.
7. See Upendra Baxi 'Supremed Politics' and Rajeev Dhawan 'Indian Supreme Court: Socio Legal Critique'
8. Supra F.N.4.
9. Supra F.N.5.
10. AIR 1976 SC 1325.
11. Dr. Janak Raj Jai 'Emergency Excesses A Daylight Robbery of Human Rights' - page 158.
12. Maneka Gandhi Vs. Union of India AIR 1978 SC 597.
13. Motilal Padampat Sugar Mills Limited Vs. State of Uttar Pradesh, AIR 1980 SC 1285.
14. Ramanna Dayaram Shetty V IAAI. AIR 1979 SC 1628.
15. AIR 1981 SC 487.
16. 1976 (3) SCC 832 - In this case the dispute concerning the bonus issue resulted in the appointment of a Board of Arbitrators under Section 10 A of the Industrial Disputes Act to arbitrate upon the demands put forth by the Mumbai Kamgar Sabha, Bombay (A Union representing the bulk of workers). The arbitral Board rejected the demand for the bonus. The dispute then went up to the Tribunal whose decision refusing the bonus demand was challenged by the Kamgar Sabha before the Supreme Court. One of the pleas taken by the respondents before the Court was that the Union which figured as the appellant before the Court being no party to the dispute had no locus standi. The Court observed that a bare reading of the petition left no doubt that the battle was between the workers and employers and the Union represented the numerous workmen whose presence was in no doubt though they were formally invisible. The Judges further observed that the procedural prescriptions were the handmaids, and not the mistresses, of the justice and failure of fair play is the spirit in which the Courts must view the procedural deviances. Most sensitively the Court observed - "Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural poor, the urban lay and the weaker societal segments for whom law will be an added terror if technical wrong descriptions and deficiencies in drafting pleadings and setting out the cause title create a secret weapon to non-suit a party. Where foul play is absent, and fairness is not faulted, latitude is a grace of procedural justice. Test litigations, representative actions, pro bono publico and like broadened forms of legal proceedings are in keeping with

the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral, procedural shortcomings.”

17. *Sunil Batra Vs. Delhi Administration* 1980 (3) SCC 488 - This writ petition originated from a letter written to a Supreme Court Judge by Sunil Batra, a prisoner in Tihar Jail, Delhi, complaining that a Jail Warden had pierced a baton into the anus of another prisoner serving life term in the same jail as a means to extract money from the victim through his visiting relations. The Court initiated proceedings in the nature of a Habeas corpus and issued notices to the state and the concerned official. The Court further held in this case whether inside prison or outside a prisoner shall not be deprived of his guaranteed freedom save by methods right, just and fair. It further held that the technical and legal niceties are not impediments to the Court to entertain even an informal communication as a proceeding for habeas corpus if the basic facts are found.
18. 1983 (2) SCC 308 - During hearing of this petition, the court gave various directions to ensure that the inmates of the Protective Home at Agra do not continue to live in inhuman and degrading conditions and that the right to live with dignity enshrined in Article 21 of the Constitution is made real and meaningful to them. The state government was directed to appoint a District Judge as a permanent invitee to the Boards of Visitors of the Protective Home to ensure that the various facilities which were (on the court's direction) provided to the Home continue to be made available to the inmates and further directed the state government to take necessary steps for the purpose of rehabilitation of the inmates.
19. *Khetri Vs. State of Bihar* AIR 1981 SC 928 - In this case, the Court directed that the branded prisoners should be given proper vocational training to rehabilitate the prisoners and the prisoners were directed to be kept in an institution at the cost of the state government.
20. 1981 Supp SCC 87.
21. 1983 2 SCC 258.
22. AIR 1984 SCC 802.
23. See e.g. *Upendra Baxi: Court, Craft and Contention*.
24. AIR 1984 SC 469.
25. *Olga Tellis Vs. Bombay Municipal Corporation* 1985(3) SCC 545.
26. *Supra*.
27. 1986(3)SCC 68.
28. *Vineet Kumar Vs. Board of Control for Cricket* 1989(2) Scale 764.
29. 1992(4) SCC 305.
30. 1985 2SCC 431; 1985 3 SCC 641; 1985 Suppl. SCC 517 etc.
31. *Ganga Pollution of Water Cases* 1987 4 SCC 463; AIR 1988 SC 1115; *Vehicular Pollution cases* 1991 2SCC 137.
32. *Times of India* - August 28, 1996.
33. Judgement dated May 10, 1996 and July 8, 1996 in WP No. 4677/1985.
34. *Sharma M.C. Justice PN Bhagwati 'Constitution and Human Rights'*.
35. *Sharma M.C. - 'Has the Judiciary gone too fast?'* Indian Bar Review 1984.
36. C.J. Ahmadi while delivering Dr. Zakir Hussain Memorial Lecture on February 15, 1996 at New Delhi.
37. Justice H.R. Khanna - *Human Rights in changing world*.
38. *The Lawyers collective* - January - February 1993. Page 5. Article by Anand Grover.
39. *Sarla Mudgal Vs. Union of India* 1995 3 SCC 635.
40. *Hindustan Times* - August 12, 1995.

41. In this case, the CBI had conducted an enquiry into the allegations of the Petitioner, the Rashtra Mukhti Morcha President Ravindra Kumar that Mr. Suraj Mandal a Member of Parliament had received RS.30 lakhs to vote against the non-confidence motion and in favor of the Rao Government in July 1993. One Mr. S.K. Jain (the Hawala King pin) had also made a statement that he had paid RS.3 crore to the Prime Minister and his associates for engineering defection from the opposite parties in view of the no confidence motion.
42. Times of India - October 13, 1996.
43. St.Kitts case. In this case the CBI charged former Prime Minister, Mr. P.V. Narasimha Rao, former Union Minister, Mr. K.K. Tiwari, Mr. Chandraswamy, his associates, Mr. K.N. Aggarwal and others for hatching a criminal conspiracy to fabricate and pass off as authentic certain back documents showing Mr. Singh as the beneficiary of a Bank Account St. Kitts Islands in which his son had ostensibly deposited 21 million dollars.
44. This is a case where a non-resident Indian Lakhubhai Pathak had made allegations of cheating and criminal conspiracy against Mr. Rao.
45. The Court declared that the purpose of its intervention had been served once the charge sheet had been filed in this case. Since the CBI and the other investigating Agencies had been dilly dallying in this matter, once the charge sheet had been filed under Section 173 of Cr.PC . In these cases it was for the concerned Lower Court now to deal with the case on merits and in accordance with the law. And the Courts concerned should proceed without the slightest impression that there was any parallel proceedings in the apex Court.
46. A lecture given at a reception to the Members of the Indo-British Legal Forum.



Chapter 7

Human Rights & Social Justice

Human Rights, Social Justice and Constitutional Setting

India's concern and commitment to the cause of human rights is unambiguously stated in the text and scheme of its Constitution. Representing the crystallisation of the values and concepts held dear in India's varied and rich cultural heritage and having its roots deep in motivational forces of the national struggle for independence, the formulation of a bill of rights was among the first task to which the Founding Fathers addressed themselves. Coming closely on the heels of the Universal Declaration of Human Rights, inclusion of the bill of rights in the Constitution of India accorded with the contemporary democratic humanitarian temper and constitutional practice in other nations of the world. Also, it reflected in no single measure the anxiety of the Founding Fathers to incorporate and implement the basic principles enunciated in the Universal Declaration. In fact, the Constituent Assembly (Fathers) incorporated in the Constitution most of the rights enumerated in the Universal Declaration in two parts — the Fundamental Rights and the Directive Principles of the Constitution of India between them covered almost the entire field of the Universal Declaration of Rights. The first set of rights enunciated in Article 2 to 21 of the Declaration are incorporated under the Fundamental Rights — Articles 12 to 35 of the Constitution and the second set of rights enunciated in Articles 22 to 28 of the Declaration are incorporated under Directive Principles — Article 36 to 51 of the Constitution. While the first set guarantees the rights and liberties of the individual against coercive or arbitrary state action, the second seeks to lay down certain economic and social goals for attainment through a non-violent social evolution which would fulfil the basic needs of the common man. The Indian constitutional format in respect of human rights is remarkable as a significant attempt at striking a balance between political and civil rights on the one hand and social and economic rights on the other. The makers of the Constitution believed in the equal importance of the two sets of rights as cardinal tenet of their philosophy. Human rights for them were invincible and civil and political as well as social and economic rights had to coexist for true human happiness.

The rights have been guaranteed under the following broad categories, namely, (a) the right to equality including, equality before law and equal protection of laws (article 14); prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (article 15); equality of opportunity in matters of public employment (article 16); and abolition of untouchability and the system of conferring titles (article 17 and 18); (b) the right to freedom including the right to protection of life or personal liberty (article 21), and the right to freedom of speech and expression, assembly association or movement, residence, and the right to practice any profession or occupation (article 19) — some of these rights are subject to the needs of the security of the state, friendly relations with foreign countries, public order, decency and morality; the right against exploitation, prohibiting all forms of forced labour, child labour and traffic in human beings (article

23 and 24); (c) the right to freedom of conscience and free profession, practice and propagation of religion (article 25 to 28); (d) the right of minorities to preserve their culture, language and script and to establish and administer educational institutions of their choice (article 29 and 30); (e) the right to constitutional remedies for the enforcement of any of these rights (article 32). It is a unique feature of the Indian Constitution that a citizen can directly reach the highest court in the land — the Supreme Court — for any violation of his guaranteed fundamental rights. Article 20 provides protection in respect of conviction for certain offences in certain cases, thus, (i) no person can be punished for any offence which was not an offence at the time it was committed nor subjected to a penalty higher than that prescribed in the law at the time of commission of the offence; (ii) no person can be punished for the same offence twice, and (iii) no person can be compelled to be a witness against himself. Similarly, article 22 provides for protection against arrest and detention in certain cases; every person has a right to a counsel of his choice; to be informed of the grounds of arrest; to presentation before a magistrate within 24 hours of arrest. The protection, however, does not apply to cases of preventive detention.

While seeking to protect the basic rights of the individual, the framers also wanted it to become an effective instrument of social revolution and thus incorporated a chapter on the more positive 'Directive Principles of State Policy' which, though not enforceable in courts of law, were declared to be 'fundamental in the governance of the country' and the legislature and the executive were enjoined to apply them in making and administering laws. Article 38, which is the keystone of the Directive Principles, lays down that 'the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social economic and political, shall inform all the institutions of national life'. Article 39 mandates the state to direct its policy in such a manner as to secure that all men and women have the right to an adequate means of livelihood, that the ownership and control of the material resources of the community are so distributed as best to serve the common good; that the economic system is not allowed to result in the concentration of wealth and means of production detrimental to the common good; that there is equal pay for equal work for both men and women, that the health and strength of workers, men and women and the tender age of children are not abused; that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength, and that childhood and youth are protected against exploitation. Article 41 seeks within the limits of the state's economic capacity and development to make effective provisions for securing the right to work, education and public assistance in the event of unemployment, old age, sickness and disablement or other cases of undeserved want. Article 42 and 43 provide that the state shall make provision for securing just and humane conditions of work, and for workers to receive a decent wage, humane conditions of work, maternity relief, a decent standard of life and full enjoyment of leisure and social and cultural opportunities.

Some of the important directives relate to the provisions of free and compulsory education for all children up to the age of fourteen (article 45), promotion of educational and economic interests of scheduled castes and scheduled tribes, and other weaker sections (article 46); duty of the state to raise the level of nutrition and the standard of

living and to improve public health (article 47); organisation of agriculture and animal husbandry (Article 48).

Even though made non-enforceable, the Directive Principles have in a significant measure guided the Union and State legislatures in enacting social reform legislation. The courts have cited them and sometimes used them for extending the scope of rights and entitlements in favour of weaker sections. The Planning Commission has accepted them as providing useful guidelines for determining their approach to national reconstruction.

From these discussions it can be concluded that, in the Indian Constitutional scheme the status of human rights is fairly high and inclusive of not only political and civil but also of economic, social and cultural protection of human rights. Notwithstanding this Constitutional commitment; the presence of a strong and independent judiciary; high freedom of press, and a strong human rights movement, there has been growing criticism both nationally and internationally of abuse and violation of human rights by the State as well as by the civil society. Also, there is wide resentment against massive violation of human rights of innocent citizens in the hands of those who have come to be termed as 'terrorists'.

Current Status

The updated Amnesty International Report on the Human Rights in India (1993) while acknowledging India as an open country with a vigorous press and a strong judiciary has stressed that these and other institutions have failed to provide protection to hundreds, if not thousands who died after torture and ill treatment. It further reveals that between 1985 to 1992, at least 459 persons have been deprived in custody of their most basic right of all — the right to life. In September 1992, Asia Watch another organisation in a report not only recorded cases of torture, rape and murder of peasants and tribal villagers by security forces, but also accused the police of intimidating and even killing journalists and human rights activists on the pretext of fighting Naxalites (political extremists). A report produced by Asia Watch and Physician of Human Rights documents what it calls systematic human rights violations by the security forces, including deliberate interference with medical care to the sick and wounded and assaults on doctors and other health professionals. At the national level, independent civil liberties organisations like People's Union for Civil Liberties (PUCL), People's Union for Democratic Rights (PUDR), Association for the Protection of Democratic Rights (APD), Citizens for Democracy (CFD), the Andhra Pradesh Civil Liberties Committee (APCLC), the Committee for the Protection of Democratic Rights (CPDR), Maharashtra Nagar People's Movement for Human Rights (NPMHR) and many others have published results of on the spot investigations of human rights violation by the state and its agencies. (In this regard reference may be made to a report titled 'Re: Who Are The Guilty' — a report of the joint inquiry into the causes and impact of riots that followed Mrs. Gandhi's assassination from October 31st to 10th November 1984 prepared by PUDR and PUCL. Also reference may be made to 'Riots in the walled city', a report produced by PUDR in 1987, detailing the violation of human rights including the killing of innocent in police firing when communal riots broke in the walled city of Meerut in 1987). Some of these organisations have

also been forthright in exposing the violation of human rights of the weaker and poor at the hands of the civil society.

If the state and its agencies have come under attack for abuse of human rights some of the reports, national as well as international, on the violation of human rights disapprove of terrorists and militants for violating these rights of innocent citizens, e.g. a report produced by PUCL (1990). Again a report produced by Asia Watch and Physician of Human Rights and referred to earlier lists the attacks by militant groups on the medical professional and civilians suspected of being police informers.

Thus, it seems that despite the firm declaration by the founding fathers of their commitment to human rights and the availability of a necessary mechanism such as a strong and an independent judiciary, a robust and lively press and a growing network of committed NGOs, these rights have been violated and abused by the state and its agencies as well as by terrorists/armed opposition groups and sometimes even by members of the civil society.

Causes & Perpetrators of Human Rights Violations

Going into the details and complexities of the causes of the continuation of human rights violations in India is neither intended nor necessary within this present work. It is sufficient to mention that causes of such a situation include: lawlessness by the state and its agencies such as paramilitary forces and the police; violence caused by terrorists/armed opposition groups; growing communalism and interfaith intolerance; tense relationships between the individual, the group/community and the state; the underlying structure of caste, class and gender that inhibit freedom; and the increasing criminalization of politics.¹

It is widely acknowledged that there is ample scope for the abuse of power and the violation of human rights within the confines of police stations in India. The massiveness of such abuse can easily be gauged by the revelation that 459 deaths were caused whilst in police custody during the period 1985-1992. Successive National Police Commissions have pointed out that the situation of the police resorting to torture and other forms of cruel and inhuman and degrading treatment is encouraged by many factors including: the lack of investigative machinery available to police; pressure on the police to dole out instant punishment because of the inability of the criminal justice system to deliver justice promptly and effectively; corruption; poor wages, etc. The sense of impunity generated by the infrequency with which police officials have been held publicly accountable for their actions, the rare convictions of those responsible for abuse of human rights in custody, and the length of legal proceedings, further encourages the perception, particularly at the lower rung of the police hierarchy, that a resort to torture is acceptable. Again the police enjoy wide powers under various laws which allow them to arrest, detain and investigate. Detainees can be kept in police custody for long periods, particularly under legislation permitting preventive detention, during which they are at risk of torture and ill treatment. It is common knowledge that in violation of the law and police procedure, the practice of unrecorded detention is frequently resorted to by the police

and there is little doubt that it facilitates abuse of human rights such as beatings, rape and other forms of ill treatment or torture at the hands of the police. Most torture and ill treatment occurs during the first stage of detention in police custody, when access to outsiders is routinely denied. It is noted that Indian law is silent on the procedure for questioning suspects in police custody; and no provision exists dealing with safeguards in the Code of Criminal Procedure.

The methods sometimes used by the police during law enforcement are also of concern. Amnesty International (1996) has documented discriminatory practices in policing and is investigating reports that the police use violent methods during routine procedures, for example in evictions from illegal settlements, or when land is acquired by the government. In addition, Amnesty International (1996) has documented cases where the police have acted in collusion with other power brokers in civil society, facilitating the torture and ill treatment of people (Amnesty International and India, summary March 1996 page 15).

As with the police, the unpunished recourse to extra legal methods prevents the active recognition of human rights by members of the armed forces. Some violations occur when the army is deployed in civilian areas, particularly at times of civil disturbances. However, it is when it is called upon to deal with situations of internal armed conflicts that most of the violations take place. The existence of special legislation granting the army wide powers leaves civilians including political activists and suspected supporters of armed opposition groups, particularly vulnerable to violations. While the National Human Rights Commission has been vocal in its criticism of many police procedures and practices, the army and paramilitary forces do not come under its ambit. There is, therefore, as will be seen later in this chapter very little scope for the independent investigation of army practices, procedures or violations, nor for bringing those responsible for violations to justice.

Apart from the army there are several paramilitary forces in India, including Central Reserve Police Force (CRPF), the Border Security Force (BSF), the Rashtriya Rifles and the Provincial Armed Constabulary (PAC) who operate with very few safeguards. Amnesty International and other groups as mentioned earlier and in the later part of this chapter have documented a number of occasions when members of these forces have committed violations (and sometimes even gross violations) of human rights. As with the armed forces, the National Human Rights Commission (NHRC) is not empowered to examine reports of violations by paramilitary forces and, again with notable exceptions, very few of the forces have ever been held publicly accountable for their actions.

The Prison Act 1894 which has been regularly criticised remains in force. Repeated calls, most recently by the National Human Rights Commission for the standardisation of prison manuals, which set out guidelines for the management of prisons, have not yet been heeded. Despite the concern expressed about the prison system by the judiciary (as can be seen in a later section of this chapter) and other national as well as international human rights groups stories keep on trickling out about the conditions in prisons which contravene the UN Standard Minimum Rules for the treatment of Prisoners and the UN Body of Principles for the protection of all Persons under any Forum of Detention or Imprisonment.

Although prison officials can be identified as perpetrators of human rights violations, many of the problems in prisons emanate from the slow legal proceedings which means that detainees await trial for many years, and from the inadequate facilities provided to house detainees. Whatever the cause, the effect is undisputed. In November 1995, the NHRC expressed concern at the 'dismal' conditions in many prisons all over the country, including the inadequate diet, lack of sanitation and poor medical facilities, and called for urgent action to improve them. The Commission described an almost 300% increase in the number of reported deaths in judicial custody in 1995 caused by poor nutrition, lack of medical care, overcrowding and in some cases, torture. Overcrowding in prisons is endemic throughout the country. For example, Tihar Jail in Delhi, according to a study, built for 2,500 detainees now houses 9,000 inmates, 8,000 of whom were reported to be awaiting trial.

There has been a growing increase in the incidences of human rights abuses by armed political activities other than the state and its agencies, which contravene minimum standard of human behaviour as expressed in a number of international instruments. Apart from national human rights groups such as PUCL and PUDR, international groups including Amnesty International have expressed their concern at the number of reports from all over India of abuses by armed opposition groups, including armed militants and private armies. It has condemned the deliberate killings of thousands of civilians in Punjab. In Jammu & Kashmir, armed separatists groups have captured and killed or mutilated alleged informers, and in the North East of India, many armed opposition groups have committed abuse including torture and deliberate killings of civilians.

Victims of Human Rights Violations

The victims of human rights violation in India come from every community and every region. Amnesty International has been able to identify those most vulnerable: political and social activists, suspected informers, scheduled castes, scheduled tribes and other disadvantaged communities, minorities, women, children and refugees.

Political & Social Activists

Political and social activists are targeted for human rights violations across the country is the view commonly shared by most students of Human Rights in India. Groups targeted according to them are groups like 'Naxalites' (extremists) active in different parts of the country and suspected members of armed opposition groups active in Jammu and Kashmir, Punjab and north-east areas. Amnesty International has also highlighted violations of the rights of activists working with specific communities, or in the context of land, labour and property struggles. In recent years tribes in certain parts have united and protested on the question of compensation for land lost to their communities, the distribution of surplus land and low wages etc. These demands have been supported in some instances by groups like Naxalites — who have engaged in violent opposition to authorities, particularly in Andhra Pradesh and Madhya Pradesh. According to reports prepared by civil liberties groups, police have carried out widespread arrests and torture

of tribes suspected of involvement in such protests (1989 PUCL report). Similarly, Amnesty International is investigating reports of ill treatment in the context of evictions of squatter or slum settlements with the collusion or complicity of the police. For example, in 1992 Amnesty International expressed concern at the shooting of a woman who was protesting at her eviction from land as a result of the Sardar Sarovar Dam project.

Scheduled Castes/Scheduled Tribes and Other Disadvantaged Communities

Many of the backward communities designated as 'scheduled castes' and 'scheduled tribes' by the Constitution, together with other socially and economically disadvantaged communities some of which are designated as 'other backward classes' by the Constitution, are the more vulnerable lots so far as human rights are concerned. The vulnerability of these communities has led to many deaths in custody. The Sunday Observer in January 1988, stated that 16 (backward people) had died in prison in Bihar between November 1983 and January 1988, allegedly because of ill treatment and torture. In 1990 in Maharashtra, state government suspended several police officials ordering an enquiry into the killing of a teenage nomadic tribe youth and the torture of his pregnant sister reports Amnesty International. The boy was reportedly beaten to death for trying to prevent seven police officers abducting his sister.

In some instances the desire for autonomy expressed by indigenous communities for example in north east India, has resulted in acute tensions resulting in violations by the armed forces and abuses by armed opposition groups.

Criminal Suspects

Criminal suspects and defendants form a large portion of those whose human rights are grossly violated and are subjected to torture. The most common purpose of torturing criminal suspects is to extract a confession or to secure information about a petty offence like pick-pocketing. Children have been among the victims, as have people who are ill or physically disabled.

Minority Groups

The Muslim predominated states like Bihar, Uttar Pradesh and West Bengal also top the list in police torture, extra-judicial executions and 'disappearances' within the minority community. The tension between the Muslim and Hindu communities in Uttar Pradesh has led to communal riots and widespread killings. After communal rioting in Meerut in May 1987 during which the death toll was put at 91, over 600 people were detained in Meerut. According to press reports, 32 of those 'disappeared' and were presumed killed. But the government did not accept official responsibility for the killing.

Politics in India is increasingly being defined on communal grounds. The resultant inter-communal tension puts an onus on the state to provide communities under threat with protection and to ensure the peaceful co-existence of people with ethnic, religious or cultural differences. However, it is in situations where state interference has been called for that serious violations have occurred many times. In the past Amnesty Interna-

tional has responded to reports of communal bias in policing in Bombay and in the activity of the armed forces in Jammu and Kashmir.

Women

Women who have been arrested as suspects in petty criminal cases are also among the victims of human rights violations. Recognising this, Amnesty International's 1995 global campaign, Human Rights are Women's Rights, highlighted the cases of individuals and groups of women who have often been 'invisible' victims. The Government of India has also recognised the particular vulnerabilities of women by its ratification of the UN Convention on the Elimination of Discrimination Against Women, in 1993 and earlier of the UN Convention on the Political Rights of Women, in 1961 and by passing numerous laws and amendments to legislation that seek to address specific violations of the rights of women.

Amnesty International has documented the violation of women's rights in the context of internal armed conflict, for example, rape and torture by the armed forces and in the custody of the police. Concern remains that few convictions of police officers for crimes against women, the delay in introducing legal safeguards to protect women prisoners and the problems of the legal process exacerbate the specific vulnerabilities of women.

Children

Children are the most vulnerable group and tend to have less defence against human rights violations than adults and are unable directly to access the legal system to seek remedy for violations. Amnesty International 1996 has reported many violations of the rights of children, or of close relatives in India, despite the government having acceded to the 1989 UN convention on the Rights of the Child in 1992. Article 18 of the Constitution recognises the rights of the child to be protected from economic exploitation and performing any work that is likely to be hazardous etc. Children defined by the UN Convention as anyone below the age of 18 years have been tortured and have died in police custody. In the situations of internal armed conflict, children have been directly targeted and have been affected by the violations against members of their families. Amnesty International has also documented instances of the rape of girls by members of the police, the armed forces and armed opposition groups. There is another gross violation of children's human rights in the form of child labour in various hazardous employment despite the constitutional provisions vide Article 24 which states that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any hazardous employment. This article is in consonance with clauses (e) and (f) of Article 39 which directs the state to ensure that the tender age of children is not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength and that they are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation. Similarly, Article 45 directs the state to provide free and compulsory education to children up to 14 years of age within a time limit of ten years of the Constitution coming into force.

The 1981 census had put the figure of child labour at 13.64 million out of a total of 263 million children in India. Of these 4.3 per cent were girls as against 2.1 percent boys below the age of 14 years. The census also disclosed that 78.71 per cent of child labour is engaged in cultivation and agriculture, 6.3 per cent in fishing, hunting and plantation, 8.63 percent in manufacturing, processing, repairs, household, industry, 3.21 percent in construction, transport, storage, communications and trade and 3.15 percent in other services. The National Sample Survey of 1988 puts the figure higher at 17 million out of 270 million children, but according to the Operations Research Group, a Baroda based NGO there were 44 million child labourers in India in the year 1983. About 21 percent of them were in urban areas and nearly 7 percent engaged in agricultural including livestock, fishing, plantation, etc.. A report by Centre of concern for child labour in 1992 stated that these children whose number was unofficially estimated at 44 million contributed about 23 percent to the household economy and account for six percent of India's total force.

It is shocking for any nation that believes in children as its important human resource to have this high a percentage of children as a work force. What is more disturbing is the fact that a very large proportion of working children belong to factories engaged in work of a hazardous nature which may be most dangerous to their health and well-being. Child labour is common and perhaps the highest and oldest is carpet making and the second highest the match and firework industry and then the glass industry.

The amount of child labour is on the rise despite social consciousness and social prohibitory laws which place restrictions on the employment of children.² Laws restricting the employment of child labour include: The Children Pledging of Labour Act, 1933, The Factory Act 1948; Plantation Labour Act 1951; The Apprentices Act, 1961; Beedi and Cigarette Workers (Conditions of Employment Act) 1966 and the most important one is the Central Act known as The Child Labour (Prohibition and Regulation) Act 1986. Such laws cannot prohibit employment of children for one reason or the other. The Indian Government perceives child labour as a necessary evil, a concomitant of poverty which cannot be done away with unless poverty itself is eradicated from society.

Realising the gravity of the problems the National Human Rights Commission has shown sensitivity towards children engaged in hazardous industries and laid down in its primary agenda a need to end child labour. This has led to the approval of a series of constructive measures by the central government which the commission commends. These include amongst others, a major programme to end child labour in respect of 2 million children working in hazardous occupations by the year 2000, for which it is proposed to allocate a sum of Rs. 850 crores by the year; the Constitution of National Authority for the Elimination of Child Labour (NAECL) which has adopted a detailed plan of action requiring the convergence of services and schemes of the Central and State Governments at the implementing level; and a National Child Labour Project (NCLP) which is being undertaken in 12 different areas of the country.³

Refugees

Amnesty International (1996) opposes any person being forcibly returned to a country where there is a risk of imprisonment as a prisoner of conscience, of torture, 'disappear-

ance' or execution. India has not ratified the 1951 Geneva Convention relating to the status of refugees, which protects refugees against forcible return to the country from which they fled. Nonetheless, India is bound by the principle of non-refoulement, which is a norm of customary international law.

Additionally, Amnesty International notes the internal movement of people within India as a result of human rights violations in particular regions. For example, large number of residents of Kashmir, from Hindu Communities have been compelled to leave their homes to avoid being targeted by armed opposition groups. Amnesty International has expressed its concerns for the safety of members of the Chakma and Hajong Communities in Arunachal Pradesh, who had been displaced from Bangladesh.

Victims of Armed Conflict

Victims who died in custody were tortured during interrogation or when held during counter insurgency operations in areas where armed opposition groups are active. In north-east India, Jammu and Kashmir and Punjab, most human rights violations are attributed to the army, including the Assam Rifles, and Paramilitary forces such as the CRPF and BSF. Other victims have included people suspected of involvement in political campaigns for land reform, higher wages or autonomy for tribal regions. The National Human Rights Commission's growing sensitivity towards the area of insurgency and terrorism welcomed the growing effort to deal firmly with this scourge on a global basis. In this connection, the commission recommended that in states where the security forces are called upon to assist the civil authorities, the local magistrate or police officers should be associated, in particular, with cordon and search operations, in order to allay misgivings regarding the conduct of personnel of the security forces and to prevent misuse of powers. It further recommended that in areas of insurgency, civil administration should not be allowed to atrophy, on the contrary, it must be maintained and strengthened if human rights are to be respected.

Some Laws which create conditions for violation of Human Rights

There are many laws that create conditions for the violation of human rights and arbitrary action by the police and other security forces. Among these laws the most well known include the Terrorist and Disruptive Activities (Prevention) Act 1987, commonly known as TADA; the Armed Forces (Special Powers) Act 1958; and the Armed Forces (Punjab & Chandigarh) Act, 1983. Though TADA now stands repealed in 1995, as it came under wide criticism from all over the country as well as from the International community of human rights, it is necessary to narrate briefly not only to show this law was draconian but also to show how it was misused and resulted in a gross violation of human rights. TADA was much criticised because of its harshness which was evident due to its characteristics. The Act:

1. Provides for detention without trial or formal charges for up to one year.

2. Places the onus of proving innocence on the detained person.
3. Admits confession to a police officer as evidence.
4. Does not allow for public hearing of trials.
5. Allows identity of witnesses to be kept secret.
6. The definition of terrorist and disruptive activity under the Act is wide and includes any action taken whether by act or speech or through any other media or in any manner whatsoever. Thus, the Act criminalizes legitimate political dissent and free speech and leaves the door open for arbitrary detention.
7. Does not allow for bail ordinarily and finally does not allow for appeal at the next higher court, the High Court, but only to the Supreme Court.

The Act was originally enacted to deal with the situation in Punjab where terrorists had paralysed the citizens with fear, but was later used in almost all states till finally it got repealed in May 1995. According to an estimate, the total number of detentions under the Act in the states and union territories was 67,509. The breakdown of detention for different states is as in the table below:

1	Andhra Pradesh	8,692	14	Meghalaya	15
2	Arunachal Pradesh	104	15	Mizoram	29
3	Assam	11,684	16	Punjab	15,175
4	Bihar	93	17	Rajasthan	468
5	Goa	4	18	Tamil Nadu	235
6	Gujarat	19,263	19	Tripura	47
7	Haryana	1,740	20	Uttar Pradesh	1,098
8	Himachal Pradesh	59	21	West Bengal	531
9	Jammu & Kashmir	2,557	22	Andaman & Nicobar Islands	1
10	Karnataka	215	23	Chandigarh	253
11	Maharashtra	2,217	24	Delhi	1,192
12	Madhya Pradesh	355	25	Kerala	Not available
13	Manipur	1,480			
Total: 67,509					

Source: Legal Perspectives, Annual number of Human Rights 1994, P.76.

The table clearly indicates that TADA was used in states where there had been no terrorist activity. The most glaring example is that of Gujarat where a total of 19,263 persons were detained under the Act despite the non-existence of any disruptive or violent movement in the state. According to a PUDR report quoted in the Hindu (April 28, 1994) although the expiry of TADA is a positive sign, at the end of 1995, some 6,000 prisoners detained under TADA still remained in custody. In 1996, Justice Sujata V. Manohar of the Supreme Court in a case brought by the Shaheen Welfare Association⁴ on behalf of the detainees held under the TADA Act, recommended that 'strict bail' provisions be applied to those detainees accused of serious offences and 'liberal bail' provisions to those who are not.

TADA was used against trade unionists, farmers, minorities and even in civil disputes. It was also alleged in certain quarters that TADA was misused particularly against the minority according to a PUDR report quoted in the Hindu, August 28, 1994.

Another Act which has come under serious attack at national as well as internal level is the Armed Forces (Special Power) Act 1958, which is in force in Punjab, Jammu & Kashmir, Assam and North East States like Mizoram, Tripura, Manipur, Assam and Arunachal Pradesh. To date, many parts of North East India have been declared, 'disturbed' under the Act for an indefinite period of time. This Act gives the security forces very wide powers to make arrests, conduct searches without warrant and to shoot to kill. Section 4(a) of the Act states that any commissioned officer, non-commissioned officer or any other person of equivalent rank in the armed forces may fire upon or otherwise use force even causing death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed areas prohibiting the assembly of five or more persons or the carrying of weapons or objects capable of being used as weapons. Section 5 deals with how arrested persons are to be dealt with by the armed forces. The constitutionality of these sections was challenged in *Inderjit Barna V State of Assam*⁵ in which, for reasons given, the validity was upheld.

The Act also explicitly grants immunity from prosecution to the police and other security forces. Section 6 of the Act states that no prosecution, suit or other legal proceedings shall be instituted except with the previous sanction of the central government, against any person in respect of anything done or purported to be done in the exercise of the powers by this Act. The United Nations Human Rights Committee examined this Act while discussing the Indian Government's report to the Committee and observed that the word 'purported' appearing in Section 6 is dangerous in as much as anyone killing anybody can say: 'Well I thought I was performing my function.' It has been added that this is a highly dangerous word when one is dealing with the right to life. Again, according to Amnesty (1992) the provisions of the Act have been interpreted by security forces as a licence to torture and kill with impunity. Another point mentioned by Amnesty International is that the aforesaid Act violates Article 4(2) of the International Covenant on Civil and Political Rights 1966.

The scope and ambit of the power of arrest conferred on the armed forces by this Act came under consideration before a bench of the Guhawati High Court in *N.N. Chandan Devi V. Risheng Keisheng*.⁶ The bench made it clear that the section does not permit invocation of section 4 power by the armed forces to keep the arrested person in custody for the purpose of interrogation or to be fully satisfied whether the concerned person was really involved in the matter which led to his arrest, because this satisfaction has to precede the arrest and not to follow it. It was also stated that section 5 had to find place in the statute, because in some cases it may not be possible to hand over the accused person to the nearest police station immediately for one reason or the other; but then, the reason must be cogent, genuine and relevant.

In taking this view, the bench put on record the indebtedness of the entire nation to the armed forces for their assistance rendered in distress and difficult days and about their contribution in quelling internal disorder.

However, the National Human Rights Commission has also been at great pains to impress upon the armed forces of India and the police, that even as they must perform their duty to the nation to fight and triumph over terrorism, they must observe interna-

tional standards of human rights and discharge their duty with full respect for the laws of the land and the rights of all people who inhabit it.

However, from the reports made by Indian and international groups it can be concluded that the security forces routinely commit serious violations such as torture, summary, and extra judicial executions and arranging disappearances, while acting under the aforesaid Acts.

National Human Rights Commission (NHCR)

In response to the growing concern at the national and international level of gross human rights violations at the hands of state agencies particularly by armed forces the Government of India took two major steps. The first was to introduce transparency. This became evident when in 1994, the period when Indian armed forces were heavily deployed in the valley of Kashmir on the one hand and the terrorist attacks were at their peak on the other, the Government of India arranged an on the spot visit by a team of diplomats from eleven countries. The government also allowed the International Red Cross Committee to visit Kashmir and meet people and receive complaints from the citizenry there. The second major step taken by the government was the establishment of a National Human Rights Commission in 1993, headed by the retired Chief Justice of India. The Commission was set up mainly to enquire into violation of human rights or abetment thereof; or negligence in the prevention of such violation by a public servant. The enquiry can be *suo motu* or on petition. The institution of this Commission invited mixed reactions. One group thought that the Commission lacked adequate power and would simply be making recommendations for the record and nothing else, but there were others who welcomed the establishment of such a Commission. The functioning of the Commission during its existence of 4 to 5 years and the way it has used its powers and discharged its functions has convinced by and large everyone including its earlier critics of its relevance and its role. Though it is not needed to detail the way the Commission has functioned and the results delivered, a few lines about its functioning may not be out of place.

The Commission during the period April 1995-31st March 1996, registered complaints covering the entire range of human rights problems facing the country and had taken action on a majority of them. Taking into consideration that 1,277 complaints were pending with the Commission on 31st March 1995, a total of 11,472 complaints still required the consideration of the commission in 1995-96. By any yardstick this constituted an extremely heavy caseload. In the course of 1995, the Commission took up 11,153 complaints for consideration, of which 5,894 were dismissed in limine and 1,178 were disposed of with directions by the Commission to the appropriate authorities for action at their end (Annual Report of Human Rights Commission 1995-96 Pages 41-42). The Commission turned its attention as a matter of priority to custodial violence and gave firm instructions regarding the manner in which instances of custodial death and rape were to be reported to the Commission within 24 hours of occurrence, and action taken to probe such occurrences and bring the guilty to justice. It is expected that these

instructions from NHCR will go a long way to curb human rights violations in police custody. The Commission took a clear position urging the non-renewal of the TADA and it is this position of the Commission that proved a major factor in the government ultimately deciding to repeal this law, which by any account was one of the most draconian laws. The Commission made specific recommendations regarding the manner in which human rights violations could be scrutinised or ended in areas of insurgency or terrorism and the manner in which security forces should interact with the civil administration in such areas. It stressed that the primary means of dealing with the problems facing such areas must be through appropriate political measures and initiatives, as such measures could best resolve underlying causes of violence and the violation of human rights in these areas. The Commission has also launched a campaign against the grossest violation of human rights, i.e. child labour. Recently the Commission wrote to the union government to revise the Indian Prison Act of 1894 and has suggested specific corrective measures to improve conditions in jails, and police lock ups. While making these recommendations the Commission believed that in the areas of civil liberties, it was not enough for the Commission to be informed promptly of instances of violations and to press for justice thereafter and felt that protection of human rights required an altogether different perspective and approach which had to be preventive; violations had to be prevented before they occurred. The Commission has acted with firmness and speed when violation have been reported to it and its concern is heightened when the victim is linked to the cause of civil liberties. For instance, the Commission in November 1993, suo motu took cognizance of press reports on the death of about 60 persons in and around Bijbehara in Jammu & Kashmir, as a result of firing by security forces operating in the area and called for reports from the Ministries of Defence and Home Affairs and also the government of Jammu & Kashmir. After receiving these reports the Commission ordered that disciplinary proceedings be initiated under the Border Security Forces Act against 14 members of that force and made various recommendations including that of payment of interim compensation on a graded slab. Various recommendations made by the Commission including its suggestions about the circumstances and conditions in which units of Border Security Forces can be deployed and expected to operate in situations involving only civilian population were later accepted by the government. Again in 1995 the Commission took suo motu action upon reading a press report that one Khazir Aktoon had died while in custody of an infantry battalion in Jammu & Kashmir and that his body had subsequently been found in the river Jhelum. The Commission issued notice to the Defence Ministry and a court of inquiry was ordered. The court indicted three members of the battalion for torture, custodial death and for throwing the body of the deceased into the river with a view to destroying evidence. In addition, senior officers have been held guilty of failure to provide command and control over their men. Again in the course of 1995, the Commission constituted a special bench to enquire into allegations of false encounters made by the police in Andhra Pradesh against the Andhra Pradesh Civil Liberties Committee (APCLC). The Bench held public hearings in Hyderabad and recorded evidence. The Commission also notified the solicitor General of India and the Advocate General of State of Andhra Pradesh. The full orders are expected shortly.

If the Commission has not hesitated to look into allegations of violations of human rights by members of the security forces of the country, it has also been keen to ensure that the rights of the victims of terrorism and armed militancy are not neglected and that they are assisted by all appropriate means. While the most affected states have schemes to provide for relief or rehabilitation to such persons, the Commission has on occasion found it necessary to recommend additional assistance or the inclusion of further categories. Comprehensive recommendations to the effect were made by the Commission following visits which it undertook, for instance, to Punjab and Andhra Pradesh and, after consideration, the state government concerned amended their restrictions in order to respond to the Commission's view.

While the institutionalisation of the NHRC and the record of its functioning in the past 4 years have not only proved its utility and significance in evolving a culture of respecting human rights, it is equally important that in certain areas such as providing an independent investigating agency the Commission would go a long way in making these investigations far more effective. In a vast country such as India, the redress of grievances must be swift and near to home. Much time, money and energy can thus be saved and better services rendered if more state level human rights commissions are established as the Protection of Human Rights Act 1993 envisages. By March 1996, State Human Rights Commissions came into existence in the states of West Bengal, Himachal Pradesh, Madhya Pradesh and Assam only. The human rights cells had come into being in the states of Andhra Pradesh and Kerala and in the Union Territories of Daman and Diu and Dadra and Nagar Haveli, Delhi and states of Jammu and Kashmir. Further there has been progress during 1995-96 in the notification of human rights courts 'for the purposes of providing speedy trial of offences arising out of human rights violations' as envisaged under the Act. Such courts have now been notified in the state of Andhra Pradesh, Assam, Sikkim, Tamil Nadu and Uttar Pradesh. More states are expected to follow suit.

Human Rights and Judicial Process

The relation of the judiciary to human rights is fundamental. The respect for various human rights and fundamental freedoms mentioned in authoritative international and national texts depends to a significant degree on the quality of the judiciary and the judicial process. The International Declaration for Human Rights emphasises that every human being has the right of 'equality before the law'; 'presumption of innocence' and 'the right to fair and public hearing by a competent independent and impartial tribunal established by law'. The judiciary is important in relation to all human rights, since the judiciary is ultimately the instrument from which human rights victims can seek redress of the injustice they suffered, particularly when other ways of seeking redress have failed.

It can be safely stated that one wing of the government that has shown sensitivity and respectability to the cause of human rights is the Indian judiciary. It has not only condemned the violation of human rights, but has also innovated new rights and remedies in favour of defendants, prisoners, those languishing in jails for unusually long periods, inmates in women homes and children and many others. When it came to remedying the

violations of human rights of these virtual prisoners the response of the Supreme Court went beyond mere restoration of liberty. With judicious caution the court examined a variety of assistance that could remedy the wrong done to the individual.

The following decisions are the telling testimonies of the courts readiness to recognise the basic rights that are inherent in every individual.

In Prabhakar Pandurang's case,⁷ the Supreme Court held that the mere fact of confinement in prison cannot prevent the detenu from exercising his fundamental right to freedom of speech and expression. The detenu was allowed to publish his book. Similarly the court reiterated in *DBM Patnaik V. State of Andhra Pradesh*⁸ that even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution.

Highlighting the perspective of the Supreme Court on the rights of prisoners in *Mohamed Guasuddin V. State of Andhra Pradesh*,⁹ Justice K. Iyer issued several directions to the state to convert the 18 months sentence 'into a spell of healing spent in an intensive care ward of the Penitentiary'. He further propounded a new theory of sentencing when he observed that justice should be tempered with mercy and that in sentencing an accused the reform aspect of punishment should be borne in mind. J.K. Iyer reiterated the need for humane jail conditions in *Hiralal Vs. State of Bihar*,¹⁰ in which a 12 year old boy was convicted of homicide. The court directed the jail authorities to give the boy reform type of work in consultation with the medical officer and the jail.

The Supreme Court took a big stride forward on the issue of prison reforms in *Sunil Batra Vs. Delhi Administration*.¹¹ The two petitioners Batra, an Indian, and Sobhraj, a French national, challenged the inhumane treatment in jail as illegal. The former questioned solitary confinement without legal sanction pending his appeal against death sentence passed by the Delhi High Court and the latter questioned the distressing disablement by bar fetters of defendants for unlimited duration of time in the prison. The court held that prisoners were entitled to all fundamental rights consistent with constraints of legality and constitutionality. The court gave its ruling in the light of the reinterpretation of Article 21 in *Maneka Gandhi's* case laying down the following principles suggested by J.Desai.

1. A prisoner could not be 'wholly denuded of' fundamental rights, 'no iron curtain could be drawn between the prisoner and the Constitution' and the prisoner is 'entitled to all constitutional rights unless they have been constitutionally curtailed'.
2. the prisoner's liberty was circumscribed by the very fact of his confinement.
3. Conviction of a person did not reduce him to a non person whose rights were at the mercy of the prison administration.
4. lawful imprisonment implied necessary withdrawal or of limitation on some of the prisoners fundamental rights.
5. the question of prisoner's fundamental rights must be viewed against the background of modern reformist theories of punishment.

The court felt it could not take a 'hand-off' attitude. On the one hand it had to safeguard the human interests of the convict, speak against the dehumanising atmosphere in the prison, and ensure his rehabilitation; and on the other hand it had to preserve internal order and institutional security.

The court in its decision opposed solitary confinement because it found it 'gruesome', 'revolting' and 'degrading' and having a 'dehumanising effect'. As regards bar fetters, it held that to subject a prisoner to bar fetter for unduly long period of time without due regard to the safety of the prisoner and the security of the prison was violative of the basic human dignity and hence impermissible under the Constitution. Batra marks a maturity of judicial concern for conditions of detention. For the first time in Indian history, the Chief Justice of India (Beg CJ), along with his brethren (Justice Krishna Iyer and Justice Kailasam) visited the Tihar Jail to ascertain the actual conditions. Batra is as fundamental a decision for administration of criminal justice as Keshavanand is for constitutional development, observes Prof. Baxi.¹²

In *Charles Sobraj V. Supdt. Central Jail, Tihar*,¹³ the court though turned down the applicant's plea for better conditions in jail and for transfer from the high security ward. It firmly held that 'undue harshness and avoidable traumas, under the guise of discipline and security gain no immunity from Court writs'.

Francis Coralie Mullin's case¹⁴ provided another opportunity to the apex court to advance the cause of the prison justice. The court, through Justice Bhagwathi, observed that 'right to life' includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, mixing and mingling with fellow human beings etc. It upheld the detenu's right to have interviews with her lawyer, relatives and friends as it was a necessary component of her right to life and personal liberty.

The two more important decisions of the apex court concerning prison justice are that of *Hoskot*¹⁵ and *Hussainara*¹⁶ cases. In *Hoskot* the accused was convicted and sentenced to three years imprisonment in 1973 for various offences such as cheating and attempting to cheat, forgery, etc. He was supplied with a copy of the judgement only after he had served his full term of sentence of 3 years. In the prison he was virtually at the mercy of the prison authorities without even being informed about his legal right to prefer appeal against his sentence. The court took an exception of the issue and observed that procedural safeguards are an indispensable essence of personal liberty and fundamental rights guaranteed under Article 19 and 21 of the Constitution. The court held that (i) service of a copy of the judgement to the prisoners in time to file an appeal, and (ii) provision of free legal services to a prisoner, who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service, are state responsibilities under Article 21.

In the *Hussainara* case the Supreme Court found that thousands of prisoners on trial charged of bailable and cognisable offences could not move the court for their release because they were unaware of their rights to be released on bail, and being indigent they could not engage a lawyer who could apprise them of their rights. The court while considering Article 21 of the Constitution as interpreted in *Maneka*, held that in a criminal case legal aid to the poor is a constitutional mandate not only by virtue of Article 39A but also by Articles 19, 14 and 21 which cannot be denied by the government.

The case of *Sheela Barse Vs. Maharashtra*¹⁷ relates to custodial violence on female prisoners in police lock ups. In this case, Bhagwathi J gave significant directions in order

to make the safeguards provided in the Constitution and the law for prisoners readily available to them. He gave directions to secure legal aid for prisoners detained in police lock ups.

In *Veena Sethi Vs. State of Bihar*¹⁸ the Court's attention was drawn to the atrociously illegal detention of certain prisoners in the HazariBagh Central Jail for two to three decades without justification whatsoever. The Supreme Court directed the release of the prisoners forthwith.

In recent cases, however, the Supreme Court has also started granting monetary compensation for wrongs arising out of violation of fundamental rights. *Rudal Sah*¹⁹ marked the beginning of this and is an admirable example of exploitation of criminal judicial process in recent years which came before the Supreme Court for reparation. The petitioner was detained in jail for 14 years after which he was 'acquitted'. The excuse for his detention was that he was insane. The court granted him compensation of Rs.35,000 as a palliative, and indicated that a suit for compensation over and above this amount would lie in an appropriate court. It held that Article 21 would be devoid of substantive content if the powers of the court were limited to passing orders merely of release. The court observed that one way in which due compliance with the mandate of Article 21 could be secured was to mulct the violators by way of payment of monetary compensation.

Showing its rising concern in cases of human rights violation, the Court in *Sebastian Hongray Vs. Union of India*²⁰ further developed the principle of compensation. The court considered the case of two missing persons alleged to have been illegally taken under army custody and issued a writ of habeas corpus when the missing persons were not produced. The court directed exemplary cost of Rs. one hundred thousand to each of their wives. What is important, is that the court even directed that a complaint should be filed under the criminal procedure code to take action against the persons responsible for what appeared prima facie a murder of two persons.

In another case of *People's Union for Democratic Right V. State of Bihar*²¹ police firing was ordered on a peaceful procession and congregation of six to seven hundred people, killing 21 persons including children. Despite the fact that a writ was pending before the Patna High Court, the Supreme Court decided to make binding observations on the issue of compensation for violation of Human Rights.

Death in custody is another heinous crime perpetrated and committed by those whose duty it is to ensure to protect and safeguard the society. Torture by third degree methods by the police is a barbarous act and must not be allowed to exist in any society. Relatives of people killed in custody by the police have found it particularly hard to obtain compensation, because torture is hard to prove — the police usually being the only witness. In *Nilabat Behera Vs. State of Orissa*²² the Supreme Court observed that 'it is an obligation of the state to ensure that there is no infringement of the indefeasible right of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, defendants or other prisoners in custody, except according to procedures established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty in the

very nature of things circumscribed by the very fact of his confinement and therefore, his interest in the limited liberty left him is rather precious. The duty of care on the part of the state is strict and admits no exceptions.' The Supreme Court after taking into consideration the age and income of the deceased directed the State to pay Rs. 150,000 as compensation to deceased's mother.

The Supreme Court in a recent case of Charanjit Kaur Vs. Union of India,²³ without the support of any precedent, awarded the highest compensation of Rs. 6 lakh to the wife and two minor children of the deceased, who held the rank of major in the Indian Army. The deceased died in mysterious circumstances while in the custody of the military authorities. The court considered this case as a glaring example of gross negligence and callousness on the part of the military authorities.

The Guwahati High Court at Kohima in Geeta Sangma Vs. State of Nagaland²⁴ directed the Government of Nagaland to pay Rs. 150,000 in the nature of palliative to the widow, 3 minor children and mother of the deceased who died of torture by the police by use of third degree method.

There are dozens of such cases²⁵ where courts have awarded compensation for violations of human rights which serve as an imperative approach to keep a check and secure the respect of human rights from the police and other paramilitary forces.

The Indian judiciary has in the recent past demonstrated its willingness to use judicial power not only in the service of the first and second generation of human rights but also for serving the cause of a new generation of human rights focusing on issues of socio-economic justice. Emergence of jurisprudence of PIL discussed earlier in chapter 6 of this work is evidence of this approach. Though it is not intended to repeat that discussion in this part of the Chapter frequent reference to cases discussed in chapter 6 highlight the judicial approach to expand the human rights approach for ensuring socio-economic justice is the signature tune of the Indian Constitution.

In the early 80's, the Supreme Court in a case popularly known as *Asiad workers' case*²⁶ demonstrated its concern for human dignity and elimination of economic exploitation. Article 23 of the Constitution enacts a general prohibition against 'traffic in human beings and "beggars", i.e. forced labour'. The court in order to check human exploitation in this case gave a very wide meaning to the word 'force'. It said that the word 'force' must be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or services even though the remuneration received for it is less than the minimum wage. The labour or services provided by him clearly falls within the scope and ambit of the word 'forced labour' and Article 23 and that such a person would be entitled to come straight to the apex Court for enforcement of his fundamental right under this Article by asking the court to direct payment of minimum wages to him. The highest court in the land in its concern for safeguarding human dignity and basic human needs took a very innovative approach in giving meaning to the word 'life' appearing in Article 21 of the Constitution. The court in the case of *Francis Coralie*²⁷ said: '... The question which arises is whether the right to life is limited only to protection of limb or faculty, or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and

all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over head and facilities for reading, writing and expressing oneself in diverse forms; freely moving about and mixing and co-mingling with fellow human beings.' The court however, recognised that the magnitude and content of the components of this right would depend upon the extent of economic development of the country; but in any case, the concept of 'life' must include the right to the basic necessities and the right to carry on such functions and activities as constitute the bare minimum expression of the human self. Again a Constitution Bench of the Supreme Court in *Olga Tellis*²⁸ giving an expanded meaning to the word 'life', held that right to life includes the right to livelihood. Further taking the expansive approach, the court in *Ramsharam V. Union of India*²⁹ said that: 'it is true that life in its expanded horizons today includes all that give meaning to a man's life including his tradition, culture and heritage, and protection of that heritage in its full measure would certainly come within the encompass of an expanded concept of Article 21 of the Constitution'. This is a remarkable endorsement by the Indian judiciary of a third generation of human rights.

Affirming judicial abhorrence of human exploitation in the form of bonded labour the Court in *Bandhua Mukti Morcha*³⁰ adopting a visionary approach stated that it is the plainest requirement of Article 21 and 23 that bonded labourers must be identified and released and on release, they must be suitably rehabilitated. The court further held that the Bonded Labour System (Abolition) Act, 1976, had been enacted pursuant to the Directive Principles of State Policy with a view to ensuring basic human dignity to the bonded labourer and any failure of action on the part of the state government in implementing the provisions of the legislation would be a clearest violation of Article 21 as well as Article 23. The court expounding further said that whenever it is found that any workman is forced to provide labour for no remuneration or nominal remuneration, the presumption would be that he is a 'bonded labourer' unless the employer or the state government is in a position to prove otherwise by rebutting such presumption. The state government must apply this test throughout its territory for the purpose of ascertaining whether there are any bonded labourers or not.

Without adding further to the cases discussed here, it can be easily concluded from the approach evolved in these cases, in unison with the techniques and strategies invented such as: institutionalising of PIL, issuing commissions, appointing mechanism for monitoring implementation of various interim orders passed, relaxation of various court procedures and requirements, that the courts in India have not only acted as the protector of individual liberty or as an instrument to keeping check on agencies such as the police, army and paramilitary forces, indulging in human rights violation, but also as an instrument for serving the cause of socio-economic justice and thus as a harbinger of a third generation of human rights.

Human Rights Groups and Human Rights Movement

The Human Rights movement particularly the civil liberties movement in post independent India was a product of the democratic consciousness that burst out on the national scene after the Emergency.

The first human rights group in the country — The Civil Liberties Woman — was formed by Jawaharlal Nehru and some of his colleagues in the early 1930s with the specific objective of providing legal aid to nationalists accused of sedition against the colonial authorities. However, this efforts were short lived. The excitement and hopes generated by the national liberation subsumed the political spirit of independence thus it was not until the late 1960s that the real emergence of human rights groups took place. Notable amongst these were the Association for the Protection of Democratic Rights (APDR) in West Bengal, The committee for the Protection of Democratic Rights (CPDR) in Maharashtra, Citizens for Democracy (CFD), New Delhi, The Jammu and Kashmir People's Basic Rights (Protection) Committee, the Naga People's Movement for Human Rights (NPMHR), The Andhra Pradesh Civil Liberties Committee (APCLC) and, some time later, the Association for Democratic Rights (AFDR) in Punjab. It was only after Jayaprakash Narain launched a major agitation against Mrs. Gandhi and her government that a large number of prominent liberals and humanists came together in 1975, to form the first national human rights organisation, the People's Union for Civil Liberties and Democratic Rights (PUCLDR). Within a few months, a series of political developments helped consolidate the scattered concerns for the rights of the poor and oppressed on the one hand and for the agitating middle class dissidents on the other. The announcement of the Emergency on June 26, 1975 proved to be a catalytic event. Even after the defeat of Mrs. Gandhi at polls in 1977, these civil rights activists maintained a relatively low profile almost for two years. It was in October 1980, after the fall of the Janta government and the return of Mrs. Gandhi to power, that a major national convention took place in Delhi which led to the split of the PUCLDR into two segments — People's Union for Democratic Rights (PUDR) and Peoples Union for Civil Liberties (PUL). Today there are a wide range of organisations specifically concerned with issues of civil liberties and democratic rights. It is important to mention that there are in India thousands of groups and movements struggling for the distribution of justice. There are also advocacy and support groups. As far as civil rights and democratic rights groups are concerned, they have taken up five major activities: 1) fact finding missions and investigations; 2) public interest litigation; 3) citizen awareness programmes (including publication of perspective statements on specific issues); 4) campaigns and 5) the production of supportive literature for independent movements and organisations. In periods of major crisis they have also thrown their weight with independent action groups and mass movements in providing relief and rehabilitation and carrying out lobbying on behalf of the oppressed and the victimised. This collaboration was clearly evident following the riots of November 1984, that broke out after the assassination of Mrs. Gandhi. These groups have successfully raised three kinds of issues; 1) direct or indirect violations by the state (police lawlessness, repression of legislation, political manipulation and terror by mafia groups etc.); 2) denial in practice of legally stipulated rights as well as the inability of government

institutions to perform their functions; and 3) structural constraints which restrict the realisation of rights, e.g. violence in the family, landlord's private armies, the continuing colonisation of tribes etc.

An Emerging Perspective of Human Rights in India

The conventional liberal and legal approach to human rights is important, and will continue to remain so. In India, however, the human rights approach in the recent past has been vigorously expanded and redefined. An effort is being made to extend the structural limits while the formal democratic system has extended the effective citizenship rights to a vast segment of the population who exist on the peripheries of the formal and organised economy and polity. Recent human rights initiatives by various action and struggle groups have taken the form of the organisation and empowerment of the tribes and backward people, the poor and women. An initiative launched by AWARE — an NGO — in organising the tribes in Andhra Pradesh and Orissa is one instance. With the efforts of AWARE a huge population of tribes in many districts of Andhra Pradesh and Orissa have not only been provided with legal awareness and assistance in the realisation of their rights but have also been provided with various development facilities, health care, sanitation facilities etc. The hope is that, through such organisations, these disabled and deprived sections will articulate their needs and press their claims, not as passive subjects, but as self confident citizens advancing their legitimate rights to survival and well being.

Thus it is in this context, that the new thoughts on human rights issues are taking place in India. New issues are being identified and new strategies of action are being devised by various action groups and people's organisation. The emergence of public interest litigation is one example of such a newly devised strategy in the hands of these organisations. These action groups and people's organisations are not necessarily organisations devoted to human rights per se. Many of them may not even identify themselves as human rights organisations but they are playing a vital role by creating conditions for the impoverished to convert their needs into rights and in that sense they all are engaged in expanding the frontiers of the civil society to include the hitherto oppressed and marginalised peripheries by means of promoting and advancing, even if indirectly, their human rights.

Conclusion

India, since independence, has remained firmly imbedded in rule of law and democracy (except during the brief spell between 1975-77 when an emergency was imposed and civil rights were suspended). In addition to adherence to the rule of law and principles of democracy the presence of a strong and independent judiciary, free press and the growth of a wide network of NGOs has contributed greatly to the awareness of human rights and the protection of human rights of individuals, groups, minorities and others.

It is in the recent past that human rights on certain occasions and in certain areas have come under threat at the hands of various state agencies and also sometimes at the hands of armed political deserters (extremists). But it is to be noted that the role played by human right activists, the judiciary, NHRC and others in these circumstances in building pressure for the respect of human rights and the various strategies innovated, confirm India's commitment to the cause of human rights. Of course there is no denial that a lot could have been done and a lot needs to be done if India wishes to implement its constitutional commitments to protect, preserve and foster a human rights culture.

Notes

1. The term Criminalization of Polity is used popularly to indicate a growing nexus between those who indulge in various crimes, including economic crimes, in influencing politics and politicians of the day.
2. UNI, '44 million child labour in India.' The Economic Times, 15.11.1993.
3. Annual Report 1995-96. National Human Rights Commission, Govt. Of India, page 29.
4. Shaheen Welfare Association V. Union of India AIR 1996 SC Supplement 2957.
5. AIR 1983 Del 81.
6. 1982 (1) G.L.R 756.
7. State of Maharashtra vs. Prabhakar Pandurang, AIR 1966 SC 424.
8. AIR 1974 SC 2092.
9. AIR 1977 SC 1926.
10. AIR 1977 SC 2236.
11. AIR 1978 SC 1675.
12. Upendra Baxi, The Indian Supreme Court and Politics (1980).
13. AIR 1978 SC 1514.
14. Francis Coralie Muller V The Administration Union Territory of Delhi & Ors AIR 1981 SC 746.
15. MH Hoskot V State of Maharashtra AIR 1978 SC 1548.
16. Hussainara Khatoon V State of Bihar (1980) 1 SCC 88, 91, 93, 98, 108.
17. AIR 1983 SC 378.
18. AIR 1983 SC 339.
19. Rudal Sah V State of Bihar AIR 1983 SC 1086.
20. AIR 1984 SC 571.
21. AIR 1987 SC 355.
22. 1993 ACJ 787 SC (1993) 2SCC 746.
23. 1994 ACJ 499 (SC).
24. 1994 Accident Claims Journal (ACJ) 787 (SC).
25. See generally Riberiro Cardinho V Union of India (1990 ACJ 804 Bom); Ganga Devi V. Commissioner of Police (1993 ACJ 893 Del); Kewal Pati V State of Uttar Pradesh 1995 (3) SCC 600.
26. PUDR Vs Union of India AIR 1982 SC 1473.
27. AIR 1981 SC 746.
28. (1985) 3 SCC 545.
29. AIR 1989 SC 549.
30. AIR 1984 SC 802.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that this is crucial for ensuring the integrity of the financial statements and for providing a clear audit trail. The text also mentions that proper record-keeping is essential for identifying trends and anomalies in the data.

2. The second part of the document focuses on the role of internal controls in preventing fraud and errors. It highlights that a strong internal control system is necessary to ensure that all transactions are properly authorized and recorded. The text also discusses the importance of segregation of duties and regular reconciliations.

3. The third part of the document addresses the need for transparency and communication in financial reporting. It states that clear and concise reporting is essential for providing stakeholders with the information they need to make informed decisions. The text also mentions the importance of disclosing any potential risks and uncertainties.

4. The fourth part of the document discusses the impact of technology on financial reporting. It notes that the use of software and automation can significantly improve the accuracy and efficiency of the reporting process. The text also mentions the importance of ensuring that the technology used is secure and reliable.

5. The fifth part of the document concludes by emphasizing the overall importance of financial reporting in the success of an organization. It states that accurate and timely reporting is essential for building trust and confidence among stakeholders. The text also mentions that good financial reporting practices can help an organization identify areas for improvement and make better strategic decisions.

Chapter 8

Summary

Since various aspects of the Indian judiciary have been discussed in the foregoing chapters of this report, a brief summing up may not be out of place to focus on the key aspects and the thrust of the report.

1. It has been seen that the Indian federalism has varied segments constituting language and dialect groups, religious communities, denomination, sex, castes and sub-castes, regional and sub-regional divisions, ethnic formations and defined cultural patterns. The Indian Constitution encompasses the rule of law, socio-economic justice for all, not merely by giving and protecting civil and political rights but also by directing the state to strive towards the promotion of the welfare of its people wherein justice, socio-economic as well as political, forms an intrinsic part of the national life. Therefore, the Indian Constitution is first and foremost a social document and the core of its commitment to the social revolution lies in Parts III (Fundamental Rights) and IV (Directive Principles) of the Constitution.

2. The judiciary occupies a very vital position within the Constitution. The superior courts are not only an institution to resolve disputes between parties but are the guardian angels of the Constitution and a medium for bringing about the social revolution which the framers of the Indian Constitution had envisaged. Thus, Article 32, which confers extraordinary jurisdiction on the Supreme Court to issue any appropriate writ for the enforcement of any of the 'Fundamental Rights', is itself a fundamental right; since it is placed in the Fundamental Rights Chapter of the Constitution. Not only this, the Constitution empowers the High Courts as well as the Supreme Court to review any legislative, or executive action. In view of the vital role which the judiciary has to play in the lives of the Indian people, the Constitution has provided for well thought out safeguards for the independence and impartiality of the judiciary.

3. The unwarranted interference from the executive in the matter of the appointment of judges to the higher judiciary has been elaborated on in chapter 3. It has become clear that the government had for a certain period adopted a policy of supersession of inconvenient judges who would not tow the line. Hence the decision of the Supreme Court in Advocate on Records' Associations case (chapter 3) is of prime importance. The court held that the appointments to the higher judiciary are to be made basically on the recommendations of the Chief Justice of India in consultation with senior judges of the Supreme Court. This interpretation on the powers to appoint judges is crucial to ensure that competent and qualified judges are appointed and that they function in a fearless manner.

4. A grave problem facing the judiciary is of arrears and backlogs of old cases. Unless this problem is tackled, the faith in the judiciary is bound to erode and the judiciary will become marginalised and will not be resorted to by ordinary litigants. The common man will resort to extra constitutional forums. This will have far reaching impact on social

structure, commerce, trade and industry. Certain important steps do need to be taken. Some of these are the need for creation of alternative forums for dispute resolution like specialised tribunals, arbitration forums, etc.; training of judicial officers; discipline in procedural matters like adjournments, etc. Vacancies in the Supreme Court and in the various High Courts should be filled without delay. A review of the procedure for appointing the judges is required to ensure transparency of the selection process and to ensure that competent judges are selected; also the conditions of their services need to be improved to attract better talent from the Bar. Urgent steps should also be taken to furnish the courts with more modern equipment to enhance the efficiency of the work in the courts as well as in the administrative department of the courts. As has been noted in chapter 4 it is heartening to see that some improvements are visible in the past few years as a result of awareness building on the need to tackle the problems of arrears. It has been seen that the judges in apex Courts have succeeded in introducing certain procedural reforms and getting on top of the arrears in the apex Courts, though not in all the High Courts and certainly not at the lower levels of the judiciary.

5. The case of Justice V Ramaswamy of the Supreme Court (chapter 5) demonstrates the need for a binding Code of Conduct on the judges. Such a code is required to check judicial impropriety and ensure judicial discipline. Impeachment is not an answer to every situation. The situation of judicial impropriety (as distinct from misconduct justifying impeachment) remains untackled and needs to be tackled. One important step should be the creation of an atmosphere of transparency and accountability with regard to judges. The judges can no longer remain in a cocoon, virtually unaccounted to the republic they serve. In the modern world, rule of law prevails and all institutions and individuals comprising therein should be subject to scrutiny. The media needs to be protected in order that responsible and fair reporting does not get stifled. For this 'truth' should be recognised as a complete defence and answer to the charge of contempt of court. To suppress, or verse, to punish truth is an anomalous situation which no free society should tolerate.

6. The Supreme Court has in the post-emergency era, evolved into a court fulfilling its constitutional role in a fair and fearless manner. The court in the area of judicial activism has done something which no other constitutional court has achieved. It has taken the fundamental rights to the doorsteps of the masses who would otherwise never have been able to knock at the doors of the court. The court has done this by developing new tools and creating the new jurisprudence of public interest litigation (PIL). However, at the same time, the court has failed in not being able to evolve PIL on a sound jurisprudential footing with the result that, in recent times, it has quite often become a peg on which the judges hang their whims and fancies or entertain matters which should never have become a subject matter of PIL. In order that PIL is sustained and developed and in order that judicial activism is not given a set back, the Supreme Court must evolve a sound jurisprudential basis for such types of litigation; otherwise there is a clear danger of PIL going out of control, losing its credibility and the judiciary being tarnished in the process. This may well lead to a situation where the judiciary is once again 'reigned in' and is rendered passive as in the initial years of the Constitution.

7. The presence of a strong and independent judiciary coupled with a free press and the growth of a wide network of NGOs has contributed greatly towards the awareness of human rights and the protection of human rights of individual groups, minorities and others. However, in dealing with political extremists the state agencies (police and paramilitary forces) were given wide ranging powers under draconian laws which sometimes led to human rights abuse. The pressure from the judiciary maintains a constant check on these state agencies and continues to build respect for human rights. A lot of effort is still required to make the state agencies more sensitive to human rights concerns.

8. To conclude, the Indian judicial system and the Indian judiciary comprises a remarkable institution indeed. It has been conceived not only to adjudicate on disputes inter se parties but also to render social justice, realize human rights and to transform the society. The Indian judiciary has made enormous strides in this direction and can be well proud of its achievements. As an active court, determined to render social justice, root out the political corruption, and preserve and protect the environment and address ecological issues, the Supreme Court may well have achieved what no other court in the world has achieved. On the other hand even after 50 years of independence the judiciary continues to be enmeshed with serious problems from within. The problem of arrears has rendered it virtually meaningless for common citizens to approach the court for ordinary grievances. Unless the problem of arrears is tackled, the judicial system will fall into serious disrepute. The problem of judicial discipline and judicial corruption also needs to be addressed, especially at the level of the lower judiciary. For this, the media needs to be unshackled and allowed free and responsible reporting.

Despite the above concerns the common man has always had unfailing faith in the judiciary. The common man perceives the judiciary as the only hope which can salvage the rights of the people, foster human rights, protect the environment and safeguard public interest. The faith of the common man in the Indian judiciary is its biggest asset and blessing.

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In this study, Atty. Mamta Kachwaha analyses and evaluates the quality and development of the legal system in India during the last twenty-five years, with a particular emphasis on the judiciary. The independence and impartiality of the judiciary, the independence and integrity of lawyers, the protection and promotion of human rights and the access to timely and fair justice for all citizens have been key issues in her analysis. Perhaps the most important part of this study is Atty. Kachwaha's incisive analysis of both the advantages and the dangers of extensive judicial power in India.

This study is a joint publication of the 'Interdisciplinary Research Program on Root Causes of Human Rights Violations' (PIOOM), and the 'Centre for the Independence of Judges and Lawyers' (CIJL). PIOOM is part of the University of Leiden, the Netherlands. The CIJL is a component of the 'International Commission of Jurists' (ICJ), which is located in Geneva, Switzerland. Atty. Kachwaha is a practicing lawyer with a LL.B. from Delhi University. She specialises in human rights, social justice and constitutional law.