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Editorially speaking...

The National Judicial Academy started organizing regional conferences in different parts of country to attract wider participation of judges. From the year 2006 to year 2015, the Academy has organized more than 63 regional conferences.

The Regional Conferences were designed to disseminate educational objectives to a larger audience. Held across the four zones: north, south, east and west, to discuss common challenges faced in the region, these conferences were hosted in each zone in a given academic year in collaboration with the High Court and the State Judicial Academy. Justices of the Supreme Court of India, the chief justices and other justices of the high courts from the region initiated discussions and allowed exchange of ideas between participants.

Keeping in mind the pressure on the judiciary to deliver timely justice, efforts were made through the medium of regional conferences to help higher judiciary understand the challenges faced by subordinate judicial officers in a particular region and to develop consensus on how to overcome those challenges. Interactions encouraged the use of court management and case management techniques. Peer group discussions presented an opportunity to participating judges to learn from each other on how to tackle the complex issues.

Though till the year 2015, about 63 regional conferences concluded, the sad part was that as the Academy we failed to produce any concrete document on objectives achieved through these regional conferences. This year therefore the Academy took a decision to prepare manuscript/ transcripts of all video recorded regional conference meetings. There is a need felt to highlight country wise problems faced by the trial courts at their individual stations and the solutions proposed by various stakeholders in the justice system to come out of the problems faced. With this objective in mind, the Academy for this year took a break from the theme of regional conferences.

Instead of diverting our energies and time for organizational collaborations for holding conferences outside Bhopal, we at the Academy devoted our time and energy to put together a journal of public lectures delivered by eminent persons, both from the judicial system and outside the judicial system, in regional conferences held from the preceding two years 2014 and 2015. This is second issue of the journal prepared after a gap of almost decade; the first issue being published in the year 2005. This second issue will be helpful to everyone concerned with the justice system to understand where we stand as a system and what kind of reforms are necessary to help the system work more efficiently and effectively.

Dr. Geeta Oberoi
Professor, NJA

Journal of the National Judicial Academy

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Professor Dr. M.P. Singh*

The initial communication from the Director, National Judicial Academy, Dr. Balram Gupta asked me to address the judges at the NJA Regional Conference (East Zone), held in Gauhati on 1st September 2013 on the subject of the rule of law. This gave me the impression that I had to speak on the concept of rule of law. But a few days later, the Director personally asked me to let him know the exact aspect of the rule of law on which I was planning to speak. I thought a little bit before I informed him that in an assembly of judges I would speak on an aspect of the rule of law that has some relation to what the courts do or are expected to do. Therefore, I decided to concentrate on expeditious justice as one of the components of the rule of law. It is in that limited sense that I have used somewhat broad, if not vague, expression "access to justice" as an aspect of the rule of law. But before I focus on that limited aspect of rule of law, let me briefly review the concept of the rule of law known to legal theory and practice.

The rule of law in common law system:

Any discussion on the rule of law in the common law world, as we are all familiar, generally starts with its three propositions by Dicey. To recollect, three propositions are:

1. Absence of arbitrary power,
2. Equality before the law, and
3. Rights of the individual not the product of the constitution, but rather the constitution is the product of the rights of the individual.

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The last proposition, though the most important one for England as well as the rule of law, loses its salience in countries like ours where the rights are enumerated in the constitution. It's importance could be realized by recalling *A.D.M. Jabalpur v. Shivkant Shukla*,[1] where the Supreme Court failed to give any relief to presumably Maintenance of Internal Security Act (MISA) detenues because the enforcement of the right to life and liberty guaranteed in Article 21 under our Constitution had been suspended by the executive in the exercise of its powers under Article 359. In England, the courts could, however, determine whether the executive had such a power under the British constitution. This power of the courts to determine the scope of the power of the executive under the British Constitution is generally accepted as the bulwark of the rights of the people in England as well as the most important aspect of the rule of law. Unless independent courts are able to examine whether any deprivation or infraction of any liberty of an individual is in accordance with law, the claim of rule of law is without substance.

Without reliance on Dicey, Jeremy Waldron in his book[2] starts his description of the rule of law as I quote even though the quote is somewhat long:

"Late one night in 1979, a man called Ya Ya Pedro was standing by the door of his brother's house in London. Another man, Martin Diss, came up to him, identified himself as a police officer, and asked Pedro what he was doing there. Pedro walked away without answering. When Constable Diss repeated his question, Pedro told him to 'fuck off'. Eventually he allowed himself to be searched, but when the policeman began to question him about some keys that he found in his pockets, Pedro walked away again. Constable Diss grabbed him by the arm and said, 'Do you live here?' Pedro replied with another obscenity and swung backwards, striking the constable in his chest with an elbow. As he did this, the constable took hold of his clothing, and Pedro punched him. He was eventually restrained with the assistance of two other officers and they arrested Pedro and charged him with assaulting a constable in the execution of his duty.[3]

When Pedro appeared before the Highbury magistrates, he was convicted and fined £50. But he appealed to the High Court, and the Chief Justice, Lord Lane, with one other judge, overturned the conviction and sentence. They said that when Pedro punched Constable Diss, the officer was not acting in the lawful execution of his duty. The police, said Lord Lane, do not have an unlimited

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1 AIR 1976 SC 1206

2 Jeremy Waldron, *The Law*, 1990.

3 *Perdo v. Diss*, [[1981] All Eng. LR, 59.]

power to detain people for questioning: their powers of legitimate detention and arrest are set down and governed by law. If they go beyond those powers, the person they have got hold of is entitled to strike back in self defence, just as he may resist any other person who attacks him. Lord Lane went on:

> *It is matter of importance, therefore, to a person at the moment when he is first physically detained by a police officer, to know whether that physical detention is or is not regarded by that officer as a formal arrest or detention. That is one of the reasons why it is a matter of importance that the arresting or detaining officer should make known to the person in question the fact that, and the grounds on which , he is being arrested or detained.*
>
> *Constable Diss claimed that he had thought Pedro was a burglar, and that he was authorized by Section 66 of the Metropolitan Police Act 1839 to 'stop, search and detain any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained'. The problem was he didn't say this was the power he was exercising and these were the grounds of his suspicion. So Pedro had no way of distinguishing the situation from one in which he was being unlawfully attacked. That was why Lord Lane held that he was entitled to defend himself, even against a police officer."* [4]

Pointing out that not in all countries people could take that kind of liberty with the policeman and escape punishment[5], Waldron draws a few conclusions from this case. They are: Firstly, it subjects the members of the police force, as far as possible, to the same basic rules of law as every other citizen. Secondly, it embodied a particular attitude towards any particular powers that may be necessary for the police to do their job, i.e. the powers must be known to the people and if necessary they must be expressly told to the people as the court required in this case. Thirdly, he explains:

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[4] *Supra*, at note 3.

[5] See, for example, *Kesho Ram v. Delhi Administration*, AIR 1974 SC 1185 in which the right of self defence was not accepted against the tax inspectors though they attached the property (buffalo) of the accused without due notice because they were covered by the exception to self defence in Section 99 of the Indian Penal Code which gives protection to the public servants for acts done in good faith.

> *When we talk of society ruled by law rather than by men, we are not contrasting human governance with rule by God or reason. Instead we are contrasting a society ordered by settled general rules, which apply equally to everyone, with a society dominated by arbitrary whims of a dictatorial sovereign. Both are cases of human rule, but in the former case human rulers submit themselves to a certain legislative discipline which they simply ignore in the latter case. Theories of the rule of law are attempts to articulate and defend what that discipline requires.*[6]

He adds:

> *The rule of law doctrine is a critical and demanding standard evaluating the form of positive law. It tells us something (though not everything) about the sort of law we want*[7]

Finally, he concludes:

> *The rule of law is neither a simple ideal nor an easy one to live up to. It expresses a number of principles and requirements based on various grounds. They look attractive enough when they are expressed as slogans, but they prove to be strikingly difficult to apply in any straightforward way to the governing apparatus of modern society. That does not mean we should abandon the rule of law. But we should recognize that it is an ideal that has its costs, and we ought to be clear as we can about the reasons why those costs ought to be borne.* [8]

It was this kind of dilemma to which our Supreme Court was drawn in *A.D.M. Jabalpur vs. Shivkant Shukla* wherein the petitioners were claiming that even if the President's proclamation under Article 359 suspended their right to approach any court for the enforcement of their fundamental right to life and personal liberty, they could still ask the courts to examine if their detention was under any law or depended on the whims and fancies of the executive or police officers. Justice Khanna, the dissenting judge, was of the opinion that so long as the executive or police were authorized to detain a

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[6] *Supra*, at note 3, pg. 36.
[7] *Supra*, at note 3, pg. 36-37.
[8] *Supra*, at note 3, pg. 52.

person under the MISA, the courts had the power to examine whether the detentions were in accordance with that law or not. President's proclamation could not cover this elementary principle even if the principles of natural justice or of common law did not apply to such detentions. The power of the court emerged from the principle of rule of law, which could not be suspended by the proclamation of the President and was not suspended by any provision of the MISA. Also the application of the MISA or other laws was not suspended. On this basis, the majority's view that Article 21 was the sole repository of the rule of law and if its enforcement was suspended then the rule of law stayed suspended - was not consistent with the established understanding of the rule of law.

Tracing the evolution of the rule of law in England from Magna Carta 1215 through the Petition of Rights 1628, followed by writ of Habeas Corpus fortified by the Habeas Corpus Amendment Act 1679, the Bill of Rights 1689 and the Act of Settlement 1701 and its further fortification by the US Constitution, French Declaration of the Rights of Man and Citizen and the Universal Declaration of Human Rights, in a more recent works titled: The Rule of Law (2003) Lord Bingham sums up:

> *The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.*

He enumerated as many as ten characteristics of the rule of law to which I will return a little later. His concluding words, in response to the question, he formulates, that if somebody asked him to tell the difference between the good and the bad government, are notable at this stage. He says:

> *I would answer, no doubt predictably: the rule of law. The concept of the rule of law is not fixed for all time. Some countries do not subscribe to it fully, and some subscribe only in name, if that. Even those who do subscribe to it find it difficult to apply all its precepts quite all the time. But in a world divided by differences of nationality, race, colour, religion and wealth it is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion. It remains an ideal, but an ideal worth striving for, in the interests of good government and peace, at home and in the world at large.*

Some such principle of governance in some form or the other could perhaps be traced in all societies, India definitely being included among them. Besides its reception or imposition through the common law of England, we can also trace its roots in our pre-British literature and traditions.[9] But without going that far we can find our Constitution makers alluding to the principle of rule of law in the process of making and later implementing the Constitution even though the expression as such is not used anywhere in the Constitution. A unanimous Constitution Bench of the Supreme Court in *Jaisinghani v. Union of India,*[10] held:

> *It is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion when conferred upon executive authorities must be confined within clearly defined limits... If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law.*

Even in the infamous case of *A.D.M. Jabalpur v. S.K. Shukla,*[11] Chief Justice Ray asserted that *"The Constitution is the Rule of Law"* and that *"no one can rise above the rule of law in the Constitution."* But having said so the majority of the Court failed to uphold the basic principle of rule of law by declining to the high courts the power to examine if detention of a person met the requirements of law. If the interpretation of the Constitution in this case was correct, then contrary to what *Jaisinghani* held, our Constitution failed to satisfy the requirements of rule of law. Therefore, even a written constitution may fail to satisfy the requirements of rule of law. As this was never our understanding of our Constitution, the 44th Amendment of the Constitution overruled *A.D.M. Jabalpur.* Even before *A.D.M. Jabalpur* Chief Justice Ray in *Smt. Indira Nehru Gandhi v. Raj Narain*[12] and afterwards in several other cases the Constitution Benches of the Court have held that the rule of law is part of the basic structure of the Constitution incapable of being denied even by an amendment of the Constitution.[13]

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[9] See, e.g., M. Rama Jois, Legal and Constitutional History of India, vol. I, ch. 1 & vol. II ch. 1 (N.M. Tripathi, 1984)

[10] AIR 1967 SC 1427 at pg. 1434

[11] *Ibid*, at note 1, pg. 1217

[12] AIR 1975 SC 2299, para 59

[13] *e.g. P. Sambamurthy v. Sate of AP*, AIR 1987 SC 663, and *D.C. Wadhwa v. State of Bihar*, AIR 1987 SC 579.

The Rule of Law Beyond Common Law System:

So far I have spoken only of common law system which may give an impression, as Dicey thought, that the rule of law is an exclusive product and domain of common law. The concept of rule of law, however, exists in one form or the other in all legal systems. One of the major, if not rival, systems of law is the civil law system, which has developed the concept of rule of law in its own way. For Dicey, France and Germany did not satisfy his second proposition i.e. equality before the law insofar as they had different institutions or tribunals for deciding the matters of private citizens and public servants. This arrangement in his view put the public servants or state officials in a privileged position vis a vis the private individual. Experience has, however, proved that Dicey was not right in his understanding of the French and German systems. Citing relevance of the rule of law jurisprudence in civil law system Lord Bingham in his book referred to the above without any discussion, translates the German and French concepts respectively of *Rechtsstaat* and l'*Etat de droit* as 'the law-governed state'. (p.7). In a more recent work *Foundations of Public Law* (2010), Martin Laughlin after a detailed comparative analysis of the rule of law in common law and civil law systems takes the view that in view of conflict of opinions among the German scholars on the concept of *Rechtsstaat,* it loses authority (p. 321), while its counterpart in France has "been addressed primarily in the realm of legal thought rather than in legal practice." (p. 323). I have had no close access to the French legal system but had some opportunity to study public law of Germany. As I could gather from the German literature on the subject, which Martin Laughlin also admits (p. 317), the German concept of *Rechtsstaat* is older than the English concept and expression rule of law.

Dicey's division of the concept of rule of law into three propositions mentioned above, presented a picture of formal rule of law and that still continues to be its primary concern in common law. But in Germany, the rule of law is seen both in the formal as well as material sense. The material rule of law requires the realization of a just legal order. It demands that the state power is subjected to specific and un-amendable principles of the constitution and the substantive basic values. The emphasis of the state activity is not primarily on the drawing up of a scheme of formal guarantee of freedom, but rather on the attainment, preservation and grant of material justice within the sphere of the state and other spheres susceptible to state influences. The basic elements of the material rule of law are expressed in Article 1, 19(2), 20 and 79(3) of the German Basic Law. These provisions provide, among others for the inviolability of human dignity and its respect and protection by all state authority; subjection of the legislature, executive and judiciary to the basic rights; establishment of a

democratic and social federal state; exercise of the state authority by the people by means of elections through specific legislative, executive and judicial organs; subjection of legislation to constitutional order; and the immutability of these provisions and principles even by the process of constitutional amendment. The entire chapter on the basic rights further supports and strengthens the material rule of law. Further, the Basic Law itself expressly requires the constitutional order in the land to conform to the rule of law.

The formal rule of law demands that all state activities are based on laws justified under the constitution and in case of unlawful exercise of power by the state, the individual is entitled to a legal remedy in an independent court. The rule of law in that sense is enshrined in the constitution and the legal system of Germany. The principle of legality for the exercise of administrative power is now well established with its two wings of primacy of law and the requirement of law. Certainty in laws is insisted upon and the laws delegating legislative powers to the executive in uncertain terms, making the prospective subordinate legislation unforeseeable and incalculable, have been invalidated by the courts for violation of the rule of law. The principle of proportionality or reasonableness (*Verhaltnismaessigkeit*) has been evolved and established to test the validity of laws and administrative actions. The right to approach the courts in case of infringement of any right by any public authority is one of the fundamental rights enumerated in the Basic Law. The independence of the courts to be so approached has been ensured in the constitution. The principle of separation of powers, which is considered to be an integral aspect of the rule of law, has been recognized. The rule of law, both in its material and formal sense, has thus got fully entrenched in the German legal system and controls as well as guides all state activity.

As the concept of social state is also a basic feature of the French Constitution as well as of most other countries of Europe, we may assume that similar concept of rule of law is applicable in those countries too.

The most notable development in this regard is that the second proposition of Dicey, which led him to deny the existence of rule of law in France and Germany has been reversed in England also by the Tribunals, Courts and Enforcement Act. 2007. On the lines of the German legal system which has parallel courts for different jurisdictions, the Act creates two tiers of tribunals. The tribunals like courts are now under the administrative and financial control of the Lord Chancellor and not of the ministry concerned. They have their own independent administrative support. All matters within the jurisdiction of the Tribunals have been excluded from the power of judicial review of courts including the Administrative Court. The administrative justice in the United

Kingdom now stands side by side concurrently with the ordinary justice of civil and criminal jurisdiction under the canopy of national judiciary headed by the Lord Chancellor. This brings it quite close to the German system of administration of justice.

After an unexpected beating in *A.D.M. Jabalpur case,* which, as already noted, has been redressed through a constitutional amendment, the rule of law in our county has acquired similar dimensions as in Europe. It includes, not only formal binding of the state by law, but also requires the state to ensure certain minimum conditions of life as is expressly required in the Constitution either in the Fundamental Rights or the Directive Principles of State Policy or some other provisions and has been recognized by the courts for the realization of which steps are to be taken by suitable legislative and administrative arrangements. May be the progress is slow but we are consistently moving in that direction.

To conclude, today the rule of law is almost universally accepted as the foundation of political stability and protection against dictatorship that leads to political instability and uncertainty, miseries and destruction. Therefore, in its own interest as well as in the interest of humanity in general every society must adhere to the rule of law.[14]

The Rule of Law and the Access to Justice:

But there is something very serious to worry about the rule of law about which I need to inform the present gathering of judges from district courts to the Supreme Courts. Enumerating eight characteristics of the rule of law as *"it really means to us, here and now"* Lord Bingahm in his book referred to above, states: *"the law in the first place must be accessible and so far as possible intelligible, clear and predictable."*[15] *Besides this of more immediate concern for us is his sixth characteristic in which he says: "Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve."* [16]

To understand and appreciate the salience and gravity of the issue for us, let us recall *Pedro V. Diss.* The incident of scuffle between the policemen and Pedro occurred on 1 July 1979. On 2 July Pedro was presented before the magistrate. The magistrate decided against Pedro on 28 Sept. 1979. The Queen's

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[14] For a comprehensive analysis of these issues by scholars from different parts of the world see, J.M. Maravall & A. Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press, 2003).

[15] *Supra*, at note 14, pg. 37.

[16] *Supra*, at note 14, pg. 85.

Bench Division disposed of his appeal on 9 December 1980. Counting the period while it took less than three months for the disposal of the case at the initial level, the entire proceedings including appeal were disposed off in 1 year and 5 months. Perhaps because of such expeditious disposal of criminal cases in England; Lord Bingham did not include them in his above mentioned proposition.

Much before Lord Bingham, Dieter Conrad, who introduced us to the doctrine of basic structure or features prior to the Golaknath Case, relying upon *"the German meaning of Rechtsstaat which extends, beyond the traditional notion of subjecting government to law, to the positive duty of creating a state of law, i.e. ensuring protection of the laws to all inhabitants"*, wrote:

> *The latter function: to extend justice to all by the protection of law is a core problem of rule of law in India. It is illustrated by the deficiencies in implementing important laws against social abuses and 'atrocities", e.g. the Untouchabilty Offences Act, 1955 [rechristened as the Civil Rights Protection Act] or the Dowry Prohibition Act, 1961. Attention then has to focus on the problems of effective administration of justice. Rule of Law in the narrower compass of limiting governmental exercise of power is mainly ensured in India through the writ jurisdiction of High Courts and [the] Supreme Court. It has proved an effective and popular instrument of control, considerably extended recently through the admission of "public interest litigation". The most alarming deficiencies occur in the ordinary jurisdiction of the Subordinate Courts which handle well above 90% of litigation. These courts are hopelessly overburdened. The resulting inordinate delays of average have led to a state bordering on denial of justice to claimant and near collapse of regular law enforcement. Attempts have been made to alleviate the case load of the civil courts through an imaginative use of informal conciliation proceedings in so-called Lok Adalats. But the success of such promising and unconventional means of dispute settlement would still presuppose a functioning regular court system as a guarantee and last resort. Effective administration of*

> *justice will thus remain on the agenda as the crucial problem of rule of law in India."*[17]

Since then besides extra-judicial surveys and investigations expressing concerns and possible solutions to the problem, of inordinate delays and arrears in the courts, the Supreme Court has also acknowledged that delays in the administration of justice are a threat to and a denial of the rule of law. For example, in *Anil Rai v. State of Bihar,*[18] Justice Sethi Said:

> *Delays in disposal of the cases facilitate the people to raise eye-brows, sometime genuinely which, if not checked, may shake the confidence of the people in the judicial system. A time has come when the judiciary itself has to assert for preserving its stature, respect and regards for the attainment of the Rule of Law.*

A little later in *Zahira Habibullah H. Sheikh v. State of Gujarat,*[19] Justice Pasayat said:

> *"A need for giving finality to trial in criminal proceedings is paramount as otherwise prejudice is caused to the accused persons and in fact it would be a negation of the fundamental rule of law to make the accused to undergo trial once over which has the effect of derailing system of justice".*

As the delays remain unabated, with every passing day the anguish and frustration of the Court seems to be increasing. For example, a few years later with increased anguish, Justice Pasayat spoke in stronger terms in Para 40 of *National Human Rights Commission v. State of Gujarat,*[20]:

> *"Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the*

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[17] [D.Conrad, Die Zukunft des indischen Rechtsstaates, in D. Rothermund (ed), *Erste Heidelberger Suedasiengespreche*, 55 -74 (Stuttgart, 1990) reprinted in D. Conrad, Zwischen den Traditionen, 135 at 147 (Franze steiner Verlag, Stuttgart, 1999)]

[18] AIR 2001 SC 3173, Para 19

[19] AIR 2004 SC 346, para 29

[20] *[2009 (6) SCALE 509]*

> *administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution".*

More recently in *Noor Mohmmed v. Jethanand,*[21] Justice Mishra has also expressed similar concern in Para 12:

> *"It is the obligation of the present generation to march with the time and remind oneself every moment that rule of law is the centripodal concern and delay in delineation and disposal of cases injects an artificial virus and becomes a vitiating element. The unfortunate characteristics of endemic delays have to be avoided at any cost".*

I need not multiply these examples because they are enough to support the age old familiar aphorism attributed to Gladstone that "justice delayed is justice denied". King John's pledge in Magna Carta that he would neither deny nor delay justice, many instances of creative literature giving heart-rendering account of the impact of delays in getting justice. Unless delays in the administration of justice lead to denial of justice, such a concern would have not been expressed against it. If access to justice is an in integral ingredient of rule of law, a society that fails to deliver justice expeditiously cannot make or sustain a claim to rule law. According to Max Weber, one of the preconditions for the existence and sustenance of a legal system in any society, is the monopoly of the state in the exercise of violence of any kind. If a system either fails in acquiring or in sustaining such a monopoly and leaves the citizens or their groups unhindered in the exercise of violence or fails to restrain them in its exercise, it cannot claim to be a legal system, what to say a system based on the rule of law. A legal system which has effective monopoly on violence by ensuring efficient application of law through a well-organized law and order machinery and a system of judicial institutions may lack some other ingredients of the rule of law and may instead be called a system based on the rule by law, it can still make a claim of having an effective legal system.

We may be proud of our Constitution and the democratic polity supported by an independent judiciary with widest possible jurisdiction, supported by individual rights and safeguards to all sections of the society along with

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[21] AIR 2013 SC 1217

membership of all international human rights organization and signatory to all human rights instruments. We may also be proud of having set an unmatched example of working with a democratic constitution baffling the political philosophers and analysts. We may also be proud of a number of other things. But day after day, morning newspapers with bold headlines of increasing gang rapes, killings or mutilation not only in remote rural or tribal areas against the dalits or the tribal's but also in the metropolitan cities including the national capital, arson and looting supported with violence including fire-burnings and killings in all parts of the country, and all sorts of heinous crimes routinely taking place make us doubtful, whether we are living under a system of laws or are still in the state of nature, where life is still short, brutish and nasty. If we reflect back on our Constitution and the system it envisaged and the laws and the legal institutions established under it, we find almost everything in place. Why the system is not then responding in practice? The answer may also be found in the newspaper headlines, among others, of endemic delays in the justice delivery system and ever increasing arrears in the courts, overcrowded jails with majority of the detainees awaiting trial and finally a vast majority of cases ending in acquittals often because of delays creating and impression that use of violence does not entail any evil or adverse consequences.

It is not only the newspaper headlines or the electronic media which sometimes give an inflated account of events or paint a dark picture of the society, but it is also authentically proved and supported by the judicial observations as quoted above. Numerous concerns expressed by the judiciary in extra-judicial pronouncements, report and measures undertaken and plain statistics collected and relied upon by the judiciary, Law Commission and other official bodies. Even though the latest or most reliable date on delays in the administration of justice may not be available, the latest that I could lay my hands on is the Report of the Working Group for the Twelfth Five Year plan (2012-2017) from September 2011 prepared by the Department of Justice, Ministry of Law & Justice, Government of India, the total pendency of cases in subordinate courts in India at the end of 2010 was over 2.7 crores, of which approximately 72% are criminal cases. It further says that in the decade between 1999 and 2010, the total institution of cases had gone up by 66% and disposal by 71% in the High Courts, and in the lower courts by 33% and 35% respectively. Docket explosion combined with inability of the courts to ensure speedy disposal have led to the current scenario of over 3.2 crore cases pending in various high courts and lower courts. The number will naturally go up if we add cases pending in the Supreme Court. Even though the report suggests various measures to improve the performance of the courts and reduce the arrears and delays, we have yet to see when we arrive at a reasonable time of wait.

In such a state of affairs, not only cannot we continue to wear the mask of the rule of law for too long, but we may also lose the claim of having a legal and constitutional system. History teaches us that people and societies, which are open to acknowledging their shortcomings, have always been able to overcome those shortcomings. But those, which are obstinate in not acknowledging their shortcoming, have always failed. Let us, therefore, acknowledge that we have a long way to cover before we reach the goal of realizing the rule of law in our country. Simultaneously, we must also invoke our age old *upanishadic* resolve: *arise, awake* and *stop not until the goal is reached.*

In the end once again I thank the Director, National judicial Academy for giving me the opportunity of speaking before you. Thank you all for giving me a patient hearing.

Professor (Dr.) I.P. Massey*

Judicial Review

The whole history of human civilization in a sense is nothing but a history of the struggle of the people against organized power for the protection of their freedom and dignity. The organized power could be an individual, a group, a party or even an elected body in a democracy. This struggle which started right from the time when men decided to live in a civil society is still continuing and shall continue forever. The struggle also led to a search to an alternative strategy of governance, which developed an idea of constitutional democracy with the power of judicial review. Thus, began an era of written constitution with a power, of judicial review from 1787 when the American Constitution was drafted. From that time the concept of constitutional judicial review has been in very high social visibility and has created a locus of conflict between the court and political organs of the State. Parliament claimed to represent majoritarianism while court claimed to enforce constitutionalism and counter majoritarianism. This represents the dilemma of judicial review in a constitutional democracy. It has generated a hyper sensitive debate in all constitutional democracies of the world and India is no exception. Recent slew of judgments given by the Supreme Court of India dealing with electoral reforms has brought this debate to the center stage in which people have taken extreme positions.

On one extreme are those who argue that constitutional judicial review is chemotherapy for a cancerous body politic. In a context they argue, that in a country where majority of the people are disempowered, and thus, instead of controlling the government are being controlled by it, where political organs of the state are in a state of continuous decline and inadequately represent the will of the people, where governance suffers from a lack of good administration and probity, where accountability mechanisms are weak and fragile, where democratic

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institutions have been systematically weakened, where the Fourth Estate has become a big business and where civil society is fractured and compartmentalized, the judicial review remains the last hope of people for survival of constitutional democracy because it's alternative will be highly painful and risky. In this scenario, societal role expectations from the constitutional judiciary in India have changed. Court is not considered merely as an adjudicatory but as a third organ of the State. Court is seen as an institution of socio-economic transformation, as an institution to enforce the Rule of Law, as an institution to protect freedom and dignity of the individual, as an institution to meet the challenges of multi-culturalism and to save individual from big government, mass society and majoritarianism.

It is further argued that the shelf-life of any constitutional democracy depends on generality of the constitution, creativity of the court and the sagacity of the people. In a society where the third factor cannot be over emphasized, the judiciary remains the anchor of constitutional democracy. In such a situation where people cannot provide brakes, auxiliary judicial brake is the best alternative to save the constitution from being overrun by the political branches of the government.

On the other extreme, are those who argue that in a democracy judicial review is a deviant institution, because it is anti-majoritarian and violates democratic ethos being non-representative and non-responsive in character. Is there any truth in this criticism? In my opinion, the judiciary is neither anti-majoritarian nor violates democratic ethos. Judiciary in any constitutional democracy is neither a distant abstraction nor any divine revelation. It is an institution created by the people, for the people under a constitution, which 'we the people' have given to ourselves with the purpose of enforcing constitutionalism and counter- majoritarianism. Even otherwise, democracy does not mean 'majority rule'. It means majority rule consistent with the Rule of Law and constitutional values. The Court articulates and infuses these values in majoritarianism and makes democracy a rule of law democracy. The Court is an essential part of a democratic process which represents collective conscience of the people and public reason. It seeks to protect constitution and democracy by imposing enforceable limitations upon the freedom of the state. The court not only interprets the law and constitution but also takes legislative initiatives on matters of public policy. In 2013, the law passed by the Parliament to protect women from sexual harassment at workplace was at the initiative of the court in *Vishaka*[1]. The Court is also responsible to the people in the sense that public

[1] *Vishaka and others v. State of Rajasthan and others.*, (AIR 1997 SC 3011)

trust and confidence is its survival strategy. It is the people who have isolated the court from any immediate responsibility to any other institution or the people because it was necessary to maintain the independence and impartiality of the court. Constitution also provides the same oath for the judges to protect the constitution as is provided for the political organs of the state. In conclusion 'establishment of the court with a power of judicial review' violates no democratic principle. 'It is a creation of the people as constitutional umpire for their safety and isolated from responsiveness to any institution or changing public views'[2]. It is a part of a constitutional democratic process and is a co-equal branch of governance with equal power but is not a rival in power.

The concept of judicial review is of divine origin as it has been abstracted from the natural law theories. Today, judicial review has become a universal concept and has come in contemporary supremacy to constitutional mainstream. There is a definite shift from parliamentary supremacy to constitutional supremacy and from political review to judicial review. Even Britain, which was the home of Parliamentary supremacy, has made a shift to judicial review after Parliament passed the Human Rights Act, 1998. Nevertheless, judicial review still remains in an enigmatic silence for most of the constitutional democracies. Like the American Constitution, the Indian Constitution also does not expressly provide for judicial review. It can only be implied from the scheme, various provisions and historical context of the constitution.

Judicial review is judicial power in action to maintain the supremacy of the constitution by determining constitutional validity and legality of any law and execution action or inaction; to protect the constitution from fleeting and spasmodic sentiments of the people and transient majorities in the parliament which may make the constitution a plaything in the hands of political parties to serve their partisan ends; to interpret the constitutional generalities; to articulate its values and verbalize its silence; to enforce constitutionalism and counter majoritarianism; to reconcile constitutional asymmetries and decide 'order of values'; to meet the challenges of federalism, multiculturalism, democracy and to protect, enforce and invigorate the fundamental rights of people including minorities who have no access to the majority in the parliament or any public space in the society including unpopular minorities.

Contribution of Judicial Review:

Exercising its power in a creative and innovative manner, the Supreme Court has developed some of the finest principles and doctrines of constitutional jurisprudence for which it is admired not only in India but abroad also. Through

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[2] Black, The People and the Court (1960)

these principles and doctrines it has made some seminal contributions to the democratic constitutional jurisprudence in India. Some of these contributions can be recollected as:

1. Court has protected the constitution and democracy by imposing substantive limits on the power of the Parliament to amend the constitution. This substantive limit has now been extended to other forms of state actions also. Thus, in a sense we owe our constitution and democracy to the creativity and boldness of the judiciary.

2. Court has protected the life, liberty and dignity of the individual by importing the concept of "Due Process" into Article 21 of the Constitution both in the substantive and procedural aspects.

3. Court has invigorated *Right to Equality*[3] by holding that protection of Article 14 is available not only against unreasonable legislative classification but also against any arbitrary state action. Thus, court was able to enforce the norms of good-governance and probity in the governance in order to make administrative people-centric.

4. Court was able to provide 'equal access to justice on equal basis to all' by innovating the strategy of Public Interest Litigation/Social Action Litigation. This was achieved by lowering the threshold level of the doctrine of *locus standi* from 'personal injury' standing to 'social concern' standing. Thus, the court was able to extend its long arms and reach justice to the deprived and disempowered sections of the society whose rights were suffering from atrophy and waste for a long time. Constitutional judiciary also used this strategy to decide diffused rights and various matters of vital public importance.

5. Exercising its power in a highly imaginative manner, the Court has developed an impressive edifice of normative human rights jurisprudence. For instance,

   (a) The Court has preserved the fundamental rights of the people for posterity by holding that fundamental rights constitute the basic features of the constitution which cannot be abridged even by amending the constitution. Final judgments in this behalf rest with the court and not with the political organs of the State.

   (b) The Court has invigorated the fundamental rights of the people by

[3] Article 14, The Constitution of India 1950.

collapsing the artificial compartmentalization between political and civil rights given in Part-III of the constitution and Economic, Social and Cultural right in Part-IV of the constitution which were hitherto considered as merely directives and hence not enforceable in a court of law. Court has even transported some of the directives into the fundamental rights, which are of contemporary importance and value. This has enriched fundamental rights and made them more meaningful for the people. For example, by transporting 'Right to clean Environment' from Part IV to Part III of the Constitution, Court has enormously enriched 'Right to life' under Article 21 of the Constitution. A person cannot live a life of dignity in any unhealthy environment. Thus, the fine balance between Fundamental Rights and the Directive Principles, which is a basic feature of the constitution, was creatively maintained, no matter after some initial hesitation.

(c) By creatively interpreting Articles 21, 19 and 14 as an 'organic whole' the court has developed a second Bill of Rights for the people, which contain some very important rights contemporaneous to the fundamental rights given in the constitution. This Bill of Rights includes rights, to mention only a few, Right to Clean Environment, Right to Sustainable development, Right to livelihood, Right to Human Dignity, Right to Privacy, Right to Free Press, and Right against Arbitrary Actions of the State. This has made the whole concept of human rights relevant and meaningful to the needs and aspirations of people.

(d) The Court has expanded its judicial capabilities for better protection, enforcement and invigorations of Fundamental Rights of the people. These capabilities include:

(i) Awarding compensation is exercise of its writ jurisdiction in cases of constitutional tort violating the fundamental rights of the people. In some cases court has also awarded exemplary damages.

(ii) Pro-active ascertainment of facts and investigation.

(iii) Pro-active monitoring of compliance to court's directives. For this purpose the court uses the innovative tool of continuous mandamus.

(iv) Pro-active legislation to meet an urgent social need or to fill a gap in law, which in the interest of justice cannot wait dilatory legislative action.

6. The Court has preserved its own power of judicial review and extended its reach by holding that 'Judicial Review' is a basic feature of the Indian Constitution, which cannot be abridged even by amending the constitution. The Court has further fortified its power of judicial review by eliminating all 'No-go' areas from the constitution by holding that no "finality" or "conclusive" clauses in the constitution can bar the jurisdiction of the court. The court has extended the reach of its power of judicial review by exercising its jurisdiction over execution actions committed to the subjective satisfaction of the executive.

7. Vigour of any constitutional democracy depends on the tool of interpretation the court employs and doctrines and concepts it uses in the interpretation of the text of the constitution and the choices it makes. Today, 'textualism' and 'originism' as tools of interpretation are not available to court for interpreting the text of a constitution as the constitution cannot be made captive to its framers. Therefore, imaginatively, court has used 'Living contextualism' consistent with the 'sprit of the constitution' structuralism and deconstructionism as tools for interpreting the text of the constitution to bring constitution nearer to the life-line of the people. In the same manner the reasoning process of the court had not been 'syllogistical' but 'anological'. Thus, the court was able to develop some of the finest principles of constitutional jurisprudence by creatively interpreting the text, values, open-texture expressions, silences and gaps of the constitution. This has made the constitution a living instrument.

Assessment of contribution of Judicial Review to uphold the Rule of Law:

Finally an assessment is not an end but a continuation of the discourse on the role of the courts in upholding the Rule of Law in India. I do not expect that all will agree with my assessment because agreement is not a *sine quo non* of any mature democracy. One of the fundamental principles of a democracy is that when two persons honestly disagree on any question then both may be right. However, agreement or disagreement, both must be thoughtful and in good faith.

Anyone who surveys the whole spectrum of exercise of the power of judicial review by the constitutional courts will come to an inescapable conclusion that

in spite of various internal and external problems, sometimes serious, faced by the judiciary, inspite of a few aberrations and some periods of despondency, on balance sheet, the court has been able to acquire the trust and confidence of people and still remains the most dispassionate and trustworthy institution, (i) to translate constitutional mandates into constitutional commands; (ii) to articulate constitutional values; (iii) to protect the freedom and dignity of the individual; (iv) to protect the rights of the minorities including unpopular minorities; (v) and to put a check on the abuse of power by the administration. Judiciary has shown a positive and constructive approach to law, a desire to protect and invigorate constitutional democracy and to establish an inclusive pluralist and a rule of law society in India. It has shown courage, as Lord Denning said, "to cut channels from the main stream to reach justice to the arid regions of the society". The court has shown desire to interpret the constitution consistent with its spirit. The court has demonstrated willingness to forge new tools and design new strategies to meet the requirements of justice of the most disempowered and deprived sections of society who rights suffer from atrophy and waste. After an initial hesitation, the Supreme Court by articulating and ordering constitutional values has developed some of the fines principles of social justice and human rights jurisprudence.

Fact remains that in a constitutional democracy, no power of any organ of the state can be absolute and final so also the power of judicial review of the court cannot be limitless. If the powers of the political organs of the state are limited by judicial review, the law and self-restraint limit the power of the judiciary. Therefore, judiciary must exercise power with wisdom, responsibility and humility, keeping in mind the principles of comity and subsidiarity.

Exercise of all public power is a public trust, therefore, must be exercised in the best interest of the beneficiary-the common man of India. While explaining the role of a judge in exercising the power of judicial review, Cardozo emphasized that *"a judge must not yield to spasmodic sentiments of the people in the society; he must not yield to unregulated and vague benevolence; he must exercise his discretion on informed traditions methodized by analogy; and must exercise power to meet the primordial necessity of order in social life"*. To this prescription may be added that a judge must act like a statesman and must exercise jurisdiction with care and caution where judicially manageable standards do not exist. Court should not allow its forum to be used by political rivals to settle scores and contest which otherwise should be sorted out in political arena or the parliament. Court must not allow dilution of democratic accountability and political responsibility.

Much of the Indian Constitution was shaped by the Western Constitutional jurisprudence, hence western traditions of judicial review have also impacted our traditions of judicial review, no matter our lived experience is absolutely unique. Court is intervening on behalf of the disempowered majority of people to protect their freedom and dignity by upholding best traditions of constitutional democracy. Therefore, any talk of 'judicial overreach' if put into context, would contradict our life experience. Leaving aside a few aberrations, the court is neither infringing legitimate majority rule not trying to establish judicial supremacy but is merely trying to discharge its constitutional obligation within constitutional limits in the best interest of the people. Who can argue that *Vishaka*[4] (protecting women against sexual harassment at workplaces), *Vineet Narain*[5] (making Central Vigilance Commission an independent body), *Laxmikant Pandey*[6] (protecting children from abusive adoptions) ; *Prakash Singh*[7] (directing police reforms to make police public centric) ; *Nandni Sunder*[8] (abolition of dehumanizing Salwa Judam) and recent slew of judgments providing for electoral reforms to make democracy meaningful are instances of judicial overreach.

The present century is not a century of separation of powers or even checks and balance, it is a century where all the three organs of the state must exercise their constitutional powers as an 'organic whole' to meet the needs and aspirations of the Common man of India. It is instructive to know that in the whole constitutional history of the USA spanning over more than two centuries only on four occasions the decisions of the Supreme Court were overturned by the Congress, whereas in India it has become frequent. If humility is virtue of judiciary it is also a virtue of political organs of the state as well. Fact remains that, 'Mutuality' and not 'Exclusivity' is our survival response as a constitutional democracy in this age of free competition in a globalized world.

Nothing can better explain the role of the constitutional judiciary in upholding the Rule of Law in India better than Shri Krishan Kant, Former Vice-President of India, who on inauguration of golden jubilee celebrations of the Supreme Court of India said:

> *"The Supreme Court stands as a beacon of truth and hope. Over fifty years ago when we started what Nehru called our tryst with destiny, only a few could have foreseen that the Apex Court would become a driving force of the destiny.*

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[4] *Supra*, at note 1.

[5] *Vineet Narain & Ors. v. Union Of India & Anr.*, 1996 SCC (2) 199.

[6] *Laxmikant Pandey v. Union Of India & Ors.*, 1992 AIR 118.

[7] *Prakash Singh vs. Union of India*, (2006) 8 SCC 1.

[8] *Nandini Sundar and Ors. v. State of Chhattisgarh*, (2011)7SCC547.

> *The history of democracy will note the contribution of the Indian Apex Court with honour.*
>
> *The record of the Indian Supreme Court and the superior judiciary is an ennobling saga of a deep awareness of the nuances of law as well as a profound appreciation of the contemporary reality. What freedom we have today, our liberties and our rights owe much to what the superior courts have done in the last 50 years in enforcing the Constitution in letter and spirit".*

It is to the credit of the constitutional judiciary that even today society shares the same perceptions. However, if the same perception and faith is to continue in future also, judiciary must jealously guard its institutional identity integrity and independence both from internal and external onslaughts.

No tour d'horizon of the exercise of power of judicial review by the constitutional judiciary in India can ever be complete because of the contrasts, convergences and contradictions inherent in the actual exercise of the power by the courts which is further complicated by the self-enlargement of the review power. Therefore, one has to feel content with what is 'told' and also with what remains 'untold'. Nevertheless, for any keen and positive observer it is heartening to notice that due to creativity and boldness of the supreme judiciary, today India continues to be the largest vibrant constitutional democracy in the world.

Dr. Justice B. S. Chauhan*

> *"Only the Rule of Law can guarantee security of life and the welfare of the people... It is the power of punishment alone, when exercised impartially in proportion to the guilt, and irrespective of whom the person is, that protects this world and the next."*
>
> *Arthashastra*

'Justice' is among the top aims and objectives to be achieved by the Constitution, as enshrined in the Preamble. The objective of 'justice', social, economic and political is directly incorporated in the mandate of Articles 38 and 39, which amplifies the concept of justice. Social justice includes 'legal justice' which means that the system of administration of justice must provide for a cheap, expeditious and effective instrument for realization of justice by all sections of the people, irrespective of their social or economic position or their financial resources.

The concept of *rule of law* has existed in the society even during the classical era. Plato hoped that the best men would be good at respecting established laws, explaining that

> *"Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a State."*

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Even Aristotle advocated the rule of law :

> *"It is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardian, and the servants of the laws."*

In 1607, a dialogue between King James I and Chief Justice Edward Coke resulted in establishing that the *"law is above the King"* and that is how the Supremacy of Law, one of the key features of the Rule of Law came to be established.

A 17th century English churchman and historian, Thomas Fuller, became famous for his immortal words, *"Be ye ever so high, still the law is above you"*. Celebrated English judge Lord Alfred Thompson Denning, in the year 1977 in the case *Goriet v. Union of Postal Workers,*[1] used these words with a slight modification, *"Be you ever so high, the law is above you"*.

The Rule of Law means: (i) Supremacy of law, (ii) Absence of arbitrary power on the part of the authority; and (iii) Equality before law and equal subjection of all subjects to the ordinary law of the land. It implies many notions: such as a State regulated by law or law and order or separation of powers etc. The decisions of the courts ultimately depend on the court's philosophy of the rule of law, officially recognized and traditionally followed.

In 1973, in *Kesavananda Bharati v. State of Kerala,*[2] the Supreme Court held that the rule of law is basic foundation of our democracy. It is a basic structure of the constitution which cannot be changed/abrogated even by amendment of the constitution.

In *De Keyser's Royal Hotel Ltd.*[3] case, the UK Parliament had authorized making of ordinances for the successful prosecution of war and one of the ordinances provided for the acquisition of private property though it mentioned nothing about compensation. The courts of England held that though the Parliament undoubtedly authorized the acquisition of private property for the purpose of war, it had not authorized such acquisition without just compensation, which was an inherent part of the rule of law.

Another classic example of the application of the principle of rule of law

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[1] (1978) AC 435: (1977) UKHL 5.
[2] AIR 1973 SC 1461.
[3] (1920) AC 508: (1920) UKHL 1.
[4] *Somerset v Stewart* (1772) 98 ER 499

is furnished by *Somerset's case* in 1772.[4] Somerset was an African chieftain captured by slave traders who wanted to take him to the United States. While the ship was anchored on the Thames at London, in route to Baltimore, the cries of Somerset were heard, prompting two Englishmen to file a petition for habeas corpus. They applied to Lord Mansfield for the writ. England had not passed any anti-slavery statute as some continental countries had done; and, therefore, Somerset's captor pleaded that he was doing nothing illegal by slave-trading. Where is the law, demanded he, that I should not buy or sell a slave? Rejecting his plea Lord Mansfield observed that it was in the legal and political climate of England, in which the institution of slavery could just not survive for a moment. It was the principle of rule of law which required legal support and justification to be given by a captor for depriving others of freedom; for being free and remaining free no legal justification was needed or produced; freedom is presumed and is the rule; restraint is the exception which must be established and justified by reference to specific legal authority.

In *State of Orissa v. Dr. (Miss) Binapani Dei & Ors.*,[5] the Apex Court held that violation of the principles of natural justice would amount to abrogation of the rule of law for reason that such principles are part and parcel of the rule of law.

In *S.G. Jaisinghani v. Union of India & Ors.*,[6] the Apex Court held that in a system governed by the rule of law, discretion when conferred upon the executive authorities must be confined within clearly defined limits. Thus decision to be taken should be predictable and the citizen should know where he stands. Any order which is arbitrary or irrational and does not satisfy the test of reason cannot be held to be in consonance with the rule of law.[7]

In *Smt. Maneka Gandhi v. Union of India & Anr.*,[8] the Supreme Court held that unless a law is found to be reasonable, just and fair, it is liable to be struck down as arbitrary and unconstitutional.

In the case of *E.P. Royappa v. State of Tamil Nadu*,[9] the Apex Court held that "Equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch."

In *Delhi Transport Corpn. v. D.T.C. Mazdoor Congress*,[10] the Apex Court

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[5] AIR 1967 SC 1269.
[6] AIR 1967 SC 1427.
[7] *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325.
[8] AIR 1978 SC 597.
[9] AIR 1974 SC 555.
[10] AIR 1991 SC 101.

held that there was a need to minimize the arbitrary use of power, especially when it comes to precious rights such as life, liberty and property. Further, it was observed that an individual does not become wise simply because they occupy a high seat of power. There is only a presumption that those who occupy high posts have a high sense of responsibility. This is neither legal nor rational. In particular, in a society pledged to uphold the rule of law, it would be unwise to leave any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law.

The Constitution gives so many assurances in Part III that it would be difficult to think that they were the playthings of a special majority. As Judges, it is our paramount duty to maintain the rule of law and the constitutional norms of equal protection. Our tradition of common brotherhood requires that every citizen must do his duty towards the nation as well as the fellow citizens because unless everyone does his duty, it is not possible to achieve the goals of equality and justice enshrined in the preamble.[11]

In India, the rule of law, which is enforced by a strong, and an independent judiciary govern us. India is rightly acclaimed for achieving a flourishing constitutional order, presided over by an innovative and activist judiciary, aided by a proficient bar, supported by the State and cherished by the public. However, at the same time, the courts and tribunals where the common man might go for remedy and protection of his rights are beset with massive problems of delay, cost, and ineffectiveness. Potential litigants avoid the courts; in spite of a longstanding reputation for litigiousness, existing data suggests that Indians avail themselves of the courts at a low rate and the rate seems to be falling. Still, the courts remain gridlocked. The spirit of the *Supremacy of Law* and the *Equality before Law* takes a hit when the matters remain pending in the court for a long period of time. Some pending cases are over 100 years old.

In *Imtiyaz Ahmed v. State of U.P.,*[12] the Supreme Court called for a data from all the High Courts regarding matters in which investigation or trial had and is presently stayed in pursuance to directions under Article 226 or Section 482 Cr. P.C. After analysis of date, the Court noted that the highest pendency of cases is in *Calcutta High Court (31.1%) followed by Allahabad (28.6), Patna (8.8%) and Orissa (8.2%).* The Court held that when investigation or trial is stayed for a long time it has an adverse impact on the quality of justice eventually meted out because evidence may no longer be available. Witnesses may not be able to recall the events properly, and some may have moved away or even died.

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[11] *State of Maharashtra v. Sarangdharsingh Shivdassingh Chavan*, (2011) 1 SCC 577.
[12] (2012) 2 SCC 688.

This demonstrates the power of an unduly long delay has the effect of bringing about blatant violation of the rule of law and adverse impact on the common man's access to justice.

Access to justice is a guaranteed fundamental right under the Constitution and particularly under Article 21. Denial of this right undermines public confidence in the justice delivery system and incentivizes people to look for short cuts and other forums where they feel that justice will be done quicker. In the long run, this also weakens the justice delivery system and poses a threat to the rule of law. It may not be out of place to highlight that access to justice must not be understood in a purely quantitative dimension. Access to justice in an egalitarian democracy must be understood to mean qualitative access to justice as well.

The concept of access to justice cannot be understood in the narrow sense of simplicitor easy access to courts; but it means an easy and quality access to justice for the litigants. Justice must not be done but seem to be done. Getting a matter listed in court is of no consequences for a litigant unless it comes on board and effective hearing takes place. The principles of rule of law and due process are closely linked. The rights of an individual can be protected effectively only when he has effective recourse to the courts of law.

It can be noted that the persons who are languishing in prisons are from under privileged sections in society while the rich and powerful manage to escape. There is an increasing tendency to take up matters relating to influential persons or those that are in the glare of the media or of big corporate houses, which adversely affects the common man whose plight goes unnoticed. By the time justice may be delivered to him, it may not be fruitful, in fact only more cumbersome.

Further, it has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether the trial has been conducted in a manner whereby it cannot be said that there has occasioned a miscarriage of justice. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson eye to the needs of the society at large and the victims or their family members and relatives. In a criminal trial, the focus on protection of rights of the accused is so great that in the tussle between the prosecution and the defence, the actual victim or his family are forgotten.

A fair trial must mean fair not just for the accused, but also for the prosecution, courts, victim and the society as a whole. Each one has an inherent right to be dealt with fairly in a trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial clam. Fair trial means a trial in which bias or prejudice for and against the accused, the witnesses, or the cause, which is being tried, is eliminated. If the witnesses are threatened or are forced to give false evidence that would result in a total violation of right to fair trial. The failure to hear material witnesses is certainly denial of fair trial.[13]

Fair hearing is cardinal to delivery of justice, which is so very essential for all round peace, and development of man and society. Hearing is of paramount importance in dispensation of justice. In *R.v. Chancellor of University of Cambridge*[14] it was observed "*... even God himself did not pass sentence upon Adam before he was called upon to make his defence*". Fair trial for a criminal offence consists not only in technical observance of frame and forms of law but also in recognition and just application of its principles in substance to find out the truth and prevent miscarriage of justice. Successful trial tactics are rooted in the primary realities of thorough preparation, fairness to the Court and one's adversaries and the moral standards of an enlightened bar. It would not be an exaggeration if it were stated that a 'fair trial' is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity that is governed by Rule of Law. Denial of 'fair trial' is crucifixion of human rights. It is ingrained in the concept of due process of law. In *K. Anbazhagan v. Supdt. of Police,*[15] the apex court held that free and fair trial is *sine-qua-non* of Article 21 of the Constitution.

Despite the absence of any special legislation to render justice to victims in India, the Supreme Court has taken a proactive role and resorted to affirmative action to protect the rights of victims of crime and abuse of power. The court has adopted the concept of restorative justice and awarded compensation or restitution or enhanced the amount of compensation to victims, beginning from the 1980s. As an illustration of not letting legal technicalities impede access to justice, the Supreme Court paved way for a new class of litigation by way of Public Interest or Social Action Litigation, with the intention of making the legal system more accessible to the poor and disenfranchised.

Treating the unequals as equals is also a form of inequality and therefore,

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[13] *Mohd. Hussain v. State (Govt. of NCT of Delhi)*, AIR 2012 SCC 750.
[14] (1723) 1 Str 557.
[15] (2004) 3 SCC 767.

the Court redefined the doctrine of locus-standi. Traditionally, the doctrine required a prospective litigant to show that some personal legal interest was invaded by the defendant/respondent and it barred a person who had no relation with the dispute to be heard in the courts. The person had to have a personal stake in the outcome of the controversy to be able to file a case in the court. However, now any member of the public may approach the Court on behalf of a victim who is unable to do so, due to poverty, disability, or socially or economically disadvantaged position subject to the claim being of a nature of class action and not a mere personal injury. The basic purpose behind the relaxation of the doctrine of standing is to promote the rule of law. The courts have a duty to ensure that the rights of the people are not violated by the act on any individual or the State and for this, the rule of locus has been relaxed, for where there is a right, there should be a remedy. The law should come to the aid of the aggrieved and mere technicalities and social injustice should not impede the basic right of access to justice.

There is wide acceptance that access to justice in India requires reforms so as to enable ordinary people to invoke the remedies and protections of the law. There is a dire need for the implementation of the mandate of Article 39-A of the Constitution and make access to justice easier for those with grievances. We can find a paradigm shift in the approach of the Supreme Court towards the concept of legal aid from a *'duty of the accused to ask for a lawyer'* to a *'fundamental right of an accused to seek free legal aid'*. But in spite of the fact that free legal aid has been held as necessary adjunct of the rule of law, the legal aid movement has not achieved its goals. There is a wide gap between the goals set and the goals met.

A major problem in providing legal aid is lack of will on the part of the lawyers to take up such matters. Even where they take up such matters, such matters sometimes get neglected and thereby, the purpose is defeated. Another major obstacle to the legal aid movement in India is the lack of legal awareness. People are still not aware of their basic rights due to which the legal aid movement has not achieved its goal. It is the absence of legal awareness, which leads to the exploitation, and deprivation of rights and benefits of the poor. It is the need of the hour that even the women of the society should be imparted with legal knowledge and should be educated about their basic rights. It is also essential that the same is carried out at the grass root level of the country. Education has a wider implication for it is the stepping stone for growth and development. In the words of Swami Vivekananda "it's a manifestation of perfection already in man". Legal education makes men law abiding and socially conscious. It helps in bringing and establishing socio-economic justice. It is *sine-qua-non* for the

development of rule of law and a sustainable democratic order. Therefore, quality education is to be imparted to people taking into consideration the changing needs of the society and in the changing era of globalization.

A Survey conducted by Walk Free Foundation, an Australian based rights group on the issue of global index on modern slavery has depicted a very glooming picture. As per the report, there are about 60 million slaves in the modern era and 50% thereof are in India.

The global slavery index 2013 defines slavery as the possession or control of people to deny freedom and exploit them for profit or sex, usually through violence, coercion or deception and also includes indentured servitude, forced marriage and abduction of children to serve in wars. The report referred to herein above suggests that the slavery ranges from bonded labour in quarries and kilns to commercial sex exploitation. Some people are still being born into hereditary slavery, a staggering but harsh reality, while other victims are captured or kidnapped before being sold or kept for exploitation whether through marriage, unpaid labour or fishing boats or as domestic workers. Others are tricked and lured into situations they cannot escape with false promises of a good job or an education.

The Rule of Law requires as part of it that justice itself be made more accessible and easy for the people of the nation so that faith in the judiciary and law is restored. Every judicial officer functioning at any level of the judiciary must ensure that the Rule of Law is upheld. In this manner the institution of judiciary can once again be made the protector of rights in the nation.

Justice Madan B. Lokur*

It is a great privilege and honour given to me by the National Judicial Academy to deliver today's lecture as a part of the lecture series initiated by the Academy. In due course of time, I am confident that the lecture series, a novel step in itself, will assist in a better dissemination, appreciation, and understanding of the law.

The topic selected for today's lecture the "Rule of Law" has a very large amplitude and its essence has been distilled over time after due consideration by legal scholars, many of whom have written articles and books on the subject. Perhaps I may be doing injustice to the subject by delivering a short lecture, but fortunately, the scope of the subject of today's lecture is substantially curtailed by limiting it to a perspective and that is what I propose to place before you, though with an obvious caveat that this is only a perspective on the Rule of Law.

The Rule of Law is a concept not easy to define, despite Dicey's articulation in his *Introduction to the Law of the Constitution.* The Professor incorporated two fundamental principles, namely, "the absolute supremacy of predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government" and "equality before law, or the equal subjection

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* Judge, Supreme Court of India, Public Law Lecture delivered at the NJA Regional Conference (West Zone), held in Jodhpur on 1st June, 2014.

of all classes to the ordinary Law Courts."[1] The views expressed by Dicey have been debated and discussed over the decades but we have still not found an acceptable definition of the concept of the rule of law. Indeed, being a concept, it is perhaps difficult to define – we recognize the rule of law when we see its presence and when it is cast aside, we feel its absence.

The Universal Declaration of Human Rights (UDHR), described by Eleanor Roosevelt as "the international Magna Carta of all men everywhere" refers to the rule of law in its preamble in the following words, but does not attempt to explain its meaning or content:

> *"Whereas it is essential, if man is not to be compelled to have, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"*

Similarly, the Constitution of South Africa, promulgated in 1996, and amongst the more recent constitutions in the world, provides that the Republic of South Africa is a sovereign, democratic state founded on the supremacy of the constitution and the rule of law as one of its values. The rule of law is accepted as a "value" but its content is not explained.

Finally, the Constitutional Reform Act of 2005 enacted in the United Kingdom refers to the rule of law in section 1 which provides that the Act does not adversely affect the existing constitutional principle of the rule of law, without

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[1] "It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else. It means, again, equality before the law, or the equal subjection of all classes to the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the "administrative law" (droit administrative) or the "administrative tribunals" (tribunaux administratifs) of France. The notion which lies at the bottom of the "administrative law" known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil Courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs. The "rule of law, "lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defines and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land."

explaining the concept. Section 17 of the Act requires the Lord Chancellor to take an oath to respect the rule of law but this section also does not define the concept.

How then do we proceed to understand, or attempt to understand the "rule of law"? In a 2004 Report of the Secretary-General of the United Nations the rule of law is referred to as principles of governance and a measure to ensure adherence to those principles.[2] This is significant since the rule of law is intended to govern societies in an orderly manner and that is possible only if some basic rules are adhered to or if not voluntarily adhered to, enforced. Adherence to the laws of the land is one of the keys to effective governance by the rule of law. On this, Plato says in *Laws:*

> *"Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state."*

The Reports mention the following specific ingredients of the rule of law, and which I believe should be the cornerstone of any discussion on the subject. These are:

(i) A principle of governance in which all persons, institutions and entities, Public and private, including the state itself, are accountable to laws that are

   a. Publicly promulgated

   b. Equally enforced,

   c. Independently adjudicated,

   d. Consistent with human rights norms and standards.

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[2] Report of the Secretary-General on the Rule of Law and Transitional justice in conflict and Post-Conflict Societies (S/2004/616): "It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to law that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision- making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

(ii) Measures are necessary to ensure adherence to

a. The supremacy of the law;

b. Equality before the law;

c. Accountability to the law;

d. Fairness in the application of the law;

e. Separation of powers;

f. Participation in decision-Making;

g. Legal certainty;

h. Avoidance of arbitrariness;

i. Procedural and legal transparency.

The first principle of governance is that all persons, institutions and entities, including the State, are accountable to laws. This is clearly embodied in Article 12 of our Constitution which defines "the State" in an expansive and inclusive manner to include not only the Government of India but also State Governments, the Parliament and Legislatures of the States and all local or other authorities within the territory of India or under the control of the Government of India.[3] Although there has been much debate over the interpretation of Article 12, the issue is now settled by decision rendered by a Bench of seven judges (5:2) of the Supreme Court.[4] The decision traces the development of the definition of "the State" which was initially "treated as exhaustive and confines to the authorities or those which could be read *ejusdem generis* with the authorities mentioned in the definition of Article 12 itself."

This was followed by the view that the definition of the "the State" would be coloured by the remedies available against the authority keeping in mind its statutory duties or its public duties. The position today is that an authority is "the State" under Article 12 if it is financially, functionally and administratively dominated by or under the control of the Government. However, the control must be pervasive and not merely regulatory. While it is obvious that a citizen can require the enforcement of her fundamental rights guaranteed by Part III of the Constitution against the Government, what is of importance is that this

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[3] Article 12. Definition. – In this part, unless the context otherwise requires, " the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

[4] *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology,* (2002) 5 SCC 11.

enforcement is also possible against an authority falling within the definition of "the State" in Article 12 of the Constitution, making such authority not only subject to the rule of law but also subject to the constitutionally guaranteed rights of citizens.

Similarly, for the purposes of the fundamental rights chapter in our Constitution, the word "law" has been given an expansive and inclusive definition. It is not confined merely to law enacted by a competent legislature but includes any ordinance, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.[5] Such a 'law' must have a statutory character[6] and it is axiomatic that it is available to the general populace, otherwise it remains nothing more than an internal document in the nature of an executive decision, executive instruction, executive order or an executive circular, none of which could be classified as "law" for the purposes of Article 13 of the Constitution.

That for a law to be recognized as such, public promulgation is necessary was settled long back. In *Harla*[7], the Crown representative appointed a Council of Ministers to look after the government and administration of the State during the minority of the Ruler of Jaipur. The Council of Ministers passed a Resolution purporting to enact the Jaipur Opium Act. The Resolution, was neither promulgated, nor published in the gazette, nor made otherwise known to the public. Setting aside the conviction of the appellant under the Jaipur Opium Act, the Supreme Court had this to say:

> *"Natural Justice requires that before a law can become operative it must be promulgated or published. It must be broadcasted in some recognizable way so that all men may know what it is, or, at the very least, there must be some special role or regulation or customary channel through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recessed of a chamber to which the public have no access and to which even their accredited representative have no access and of which they can normally know nothing, can nevertheless affect their*

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[5] Article 13. Laws inconsistent with or in derogation of the fundamental rights. – (3) In this article, unless the context otherwise requires, -
(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

[6] *State of Jharkhand v. Jitendra Kumar Srivastava*, (2013) 12 SCC 210.

[7] *Harla v. State of Rajasthan*, AIR 1951 SC 467.

> *lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilized man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot into being in this way. Promulgation or publication of some reasonable sort is essential."*

Though the decision of the Court was based on the principles of natural justice, it is trite that these principles must form essential ingredient of the rule of law.[8]

All laws in India are enforced equally and with an even hand. For the purpose of enforcement of the law, it is of no consequence that the petitioner is citizen of India or not. The heart and soul of our Constitution finds place in Article 21, which makes no distinction between an Indian and a foreigner in so far as equal protection of the laws is concerned.[9] This was explicitly stated by the Supreme Court in *O. Konavalov v. Commander,*[10] *Coast Guard Region.* On this basis, the Supreme Court struck down an order of preventive detention passed against a foreign national on grounds that are available to Indian citizens. For example, an order of prevention detention was struck down due to non-consideration of a representation by the appropriate government against the order or preventive detention.[11]

In a rather dramatic case, a lady H from Bangladesh was gang-raped in the Rail Yatri Niwas in Calcutta by railway employees.[12] An advocate practicing in the Calcutta High Court instituted a public interest litigation praying, *inter alia*, for the award of compensation to H. One of the contentions raised in the Supreme Court was that the Railways were not liable to compensate H since she was a foreign national. The contention was rejected on two grounds: Firstly, based on the domestic jurisprudence sprouting from Article 21 of the Constitution which is available to every citizen of this country and also to a person who may not be a citizen of this country. Even those non-citizens who come to India as tourists

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[8] *K.T. Plantation (P) Ltd. v. State of Karnataka,* (2011) 9 SCC 1: "Violation of principle of natural justice may undermine the rule of law resulting in arbitrariness, unreasonableness, etc., but such violations may not undermine the rule of law so as to invalidate a statute."; ECIL v. B Karunakar, (1993) 4 SCC 727: "The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights."

[9] Article 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

[10] (2006) 4 SCC 620. It was started: "The principles enshrined in Article 21 [of the Constitution] are equally applicable to a foreigner as they are to a citizen."

[11] *Kubic Darusz v. Union of India,* (1990) 1 SCC 568.

[12] *Railway Board v. Chandrima Das,* (2000) 2 SCC 465.

or in any other capacity are entitled to the protection of their lives in accordance with constitutional provisions. Secondly, on the ground of human rights jurisprudence, based on the UDHR, the Court held that the applicability of the UDHR and the principles thereof may have to be read, if need be, into the domestic jurisprudence.

Internationally accepted human rights norms and standards, as in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which was ratified by India with some reservations, was linked with constitutional provisions to fill the legislative vacuum and provide for the protection of women from sexual harassment at workplace in *Vishaka.*[13]

International law and conventions (other than those relating to human rights) have also been given due importance by the Supreme Court. In a fairly recent decision,[14] a direction was given to the Central Government to take steps to include red sandalwood (*Pterocarpus santalinns*) in Schedule VI to the Wildlife (Protection) Act, 1972.[15] This was for three reasons, namely, that both the Convention on International Trade and Endangered Species of Wild Flora and Fauna (CITES) and the International Union for Conservation of Nature (IUCN) had determined that red sandalwood is an endangered plant species. It settles that the provisions of treaties and conventions not contrary to municipal laws are deemed to have been incorporated in domestic law, and red sandalwood is found nowhere in the world, except in South India and there is an obligation on the world to safeguard this endangered species for future.

An independent judiciary has power to judicially review administrative action as well as legislation to adhere to the rule of law. In so far as the independence of the judiciary is concerned, we have been rather fortunate that there has been no reason to assert judicial independence – it has always been taken as granted, except for a brief period post *Kesavananda Bharati*[16] when the idea of a committed judiciary was advocated[17] and post *A.D.M. Jabalpur*[18] during the days of internal emergency in the mid-seventies. Much later, two of the judges on the Bench admitted an error of judgment in agreeing with the majority view in *A.D.M. Jabalpur.*[19] Times have changed since then. Over the years, the

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[13] *Vishaka v. State of Rajasthan,* (1997) 6 SCC 241.

[14] *T.N. Godavarman Thirumalpad v. Union of India,* (2012) 4 SCC 362.

[15] Schedule VI relates to specifies plants.

[16] (1973) 4 SCC 225.

[17] Leila Seth, *On Balance: An Autobiography,* Penguin India, 2003.

[18] (1976) 2 SCC 521.

[19] Justice Chandrachud: http://indiatoday.intoday.in/story/judges-must-look-within/1/162792.html accessed on 29th May 2014 and Justice Bhagwati: http://archive.indianexpress.com/news/35-yrs-later-a-former-chief-justice-of-india-pleads-guilty/847392/ accessed on 29th May, 2014.

Supreme Court has made it clear that the independence of the judiciary is a part of the basic structure of the Constitution.[20] Adverting to the independence of the judiciary and the rule of law (though not in the context of the basic structure) Justice Bhagwati had this to say:

> *"The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic policy. If there is one principle which runs through the entire fabric of the Constitution, it is the principles of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effectives."*[21]

Similarly, in *L. Chandra Kumar,*[22] judicial review of legislative action by superior courts was held to be a part of the basic structure of the Constitution. The Supreme Court went bit further and held that judicial superintendence (review) of decisions rendered by courts and tribunals are also a part of basic structure of the Constitution. It was said:

> *"The power of judicial review over legislative action vested in the High Courts under Article 220 and in this Courts under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Courts to test the constitutional validity of legislations can never be ousted or excluded.*
>
> *We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation is equally to be avoided."*

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[20] *Kumar Padma Prasad v. Union of India,* (1992) 2 SCC 428, *Registrar (Admn) v. Sisir Kumar Satapathy,* (1999) 7 SCC 725, following the precedent set in *S.P. Gupta v. Union of India,* 1981 Supp SCC 87.

[21] *S.P. Gupta v. Union of India,* 1981 Supp SCC 87.

[22] (1997) 3 SCC 261.

Both aspect of the rule of law, that is, independence of the judiciary and judicial review are now firmly entrenched in our jurisprudence and there does not seem any possibility of reversal.

Another facet of the rule of law, as articulated by Dicey, *"excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority"*. However, this has been the subject of debate over decades and it has long been accepted that some amount of discretion or 'play in the joints' is necessary in decision-making. The Supreme Court accepted a pragmatic view when it observed *"The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles of guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need."*[23] In the field of administrative law, it is not the decision that is judicially reviewed but the process of decision-making. Judicial review of administrative action is tested on the trishul of illegality, irrationality in the sense of Wednesbury unreasonableness[24] and procedural impropriety.[25]

Article 14 of the Constitution[26] is a firm check on the exercise of legislative power. Initially, it forbade class legislation but not reasonable classification for the purposes of legislation, both substantive and procedural. However, to pass the test of reasonable classification the two tests to be fulfilled were (i) that is classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) the differentia must have a rational relation to the object sought to be achieved by the statute in question.[27] However, beginning with *E.P. Royappa*[28] the principle of arbitrariness was articulated in the interpretation of Article 14 of the Constitution not only for testing the constitutional validity of legislation but also for testing the validity of administrative action. A simple matter of service jurisprudence involving the application of Article 16 of the Constitution[29] led to the conclusion that Article 16 is only an instance of application of the concept of equality enshrined in Article 14, where Article 14 is the genus and Article 16 is a species. It was observed that "Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore,

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[23] *Supreme Court advocates-on-Record Association v. Union of India,* (1993) 4 SCC 441.

[24] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.* (1948)1 KB 223.

[25] *Tata cellular v. Union of India* (1994) 6 SCC 651.

[26] Article 14. Equality before law. –The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

[27] *Bushan Choudhry v. State of Bihar,* AIR 1955 SC 191.

[28] *E.P. Royappa v. State of Tamil Nadu,* (1974) 4 SCC 3.

[29] Equality of opportunity in matters of public employment.

informs both Articles 14 and 16 is equality and inhibition against discrimination." Bringing this within the concept of the rule of law, it was said:

> *"From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality."*

A series of decisions thereafter, including *Maneka Gandhi*[30] confirmed that the doctrine of arbitrariness, anathema to equality, was here to stay and act as a check not only in respect of legislation but also in respect of administrative action. The doctrine of reasonable classification was simplified in the following words:

> *"When a statute vests unguided and unrestricted power in an authority to affect the rights of a person without laying down any policy or principle which is to guide the authority in exercise of this power, it would be affected by the vice of discrimination since it would leave it open to the authority to discriminate between and things similarly situated."*

The "arbitrariness doctrine" has since overtaken or found greater favour than the "reasonable classification doctrine" in the interpretation and application of the broad-based equality principle of Article14. However, this is not to say that the "reasonable classification doctrine" has been given up – far from it.[31]

The supremacy of law, with the exercise of discretion being limited and subject to judicial review, with a check on arbitrariness in State action and legislation, has strengthened the rule of law in our country.

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[30] *Maneka Gandhi v. Union of India,* (1978) 1 SCC 248.
[31] *Natural Resources Allocation, In re,* (2012) 10 SCC 1.

This leads up to the doctrine of separation of powers, which finds place in our jurisprudence and has once again been recently affirmed. It has long been held that the separation of powers between the legislature, the executive and the judiciary is not rigid but the differentiation is sufficient, such that one organ of the State does not assume the powers of another organ.[32] Therefore, though the legislature can alter the basic of a judgment[33] it cannot annual or nullify it.[34] Indeed, it is this *separation of powers* that has been held as a basic structure of the Constitution in Coelho[35] the Supreme Courts encapsulated some significant features as a part of the basic structure of the Constitution in the following words:

> *"Equality, rule of law judicial review and separation of powers from parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary."*

A recent decision of the Supreme Court in the *Mullaperiyar Dam case*[36] again tackled the issue of separation of powers. An earlier decision of the Supreme Court[37] had concluded, as a fact, that any apprehension to the safety of the Mullaperiyar Dam by raising the water level from the present 136 ft. to 142 ft. was baseless and that there was no report that the safety of the dam would be compromised- the report was to the contrary. To overcome this finding, the Kerala legislature amended the Kerala Irrigation and water Conservation Act, 2003 limiting and fixing the full reservoir level of the dam at 136 ft. and thereby prohibiting any increase in the water level and legislatively enacting that the dam is endangered on account of its age, degradation, structural or other impediments. In short the decision of the Supreme Court was set at naught.

While striking down the amendment and discussing the doctrine of separation of powers, the Supreme Court introduced the principle of equality enshrined in Article 14 and concluded that:

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[32] *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.

[33] *Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality*, (1969) 2 SCC 283.

[34] *P. Kannadasan v. State of Tamil Nadu*, (1996) 5 SCC 670.

[35] *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1.

[36] *State of Tamil Nadu v. State of Kerala*, MANU/SC/0425/2014.

[37] *Mullaperiyar Environmental Protection Forum v. Union of India*, (2006) 3 SCC 643.

> *"Breach of separation of judicial power may amount to negation of equality under Article 14. Stated thus, legislation can be invalidated on the basic of breach of the separation of powers since such breach is negation of equality under Article 14 of the Constitution."*

It was further held that,

> *"The law enacted by the legislature may apparently seem to be within its competence but yet in substance if it is shown as an attempt to interfere with the judicial process, such law may be invalidated being in breach of doctrine of separation of powers."*

A critical feature of the rule of law is access to justice and participation by the party in the adjudicatory process. This is an aspect that is a bit worrying in the Indian context. Although there can be no doubt that all hearings in our courts are open and anybody can attend those hearings, what is really troublesome is the inability of persons to physically access courts, delays in disposition and litigation costs in seeking justice.

Our courts have been rather liberal in allowing a party in person to appear and argue a case. In *Pepsico*[38] a senior counsel arguing the case was instructed mid-stream by the appellant not to appear in the appeal. The court then asked the representative of the appellant to argue the appeal but he sought an adjournment which was declined. On the conclusion of submissions by the respondent, the representative sought permission to argue the appeal. In spite of such "reprehensible conduct" the Supreme Courts heard the representative of the appellant and then decided the appeal. Indulgence granted by the superior courts is sometimes misused by a party in person but that is not unexpected.

What is troubling, however, is the staggering number of cases pending in courts[39] and horrendous delays in the disposal of thousands of them. Criminal appeals have been known to take several years to reach final hearing and a delay of ten years is now a cliché. A popular system of dispute resolution is the Lok Adalat and anecdotal evidence suggests that litigants participate in this system not because it is more efficacious but because it brings about a quick result, even though it may be unsatisfactory to an extent. Is there nothing to it to presage a partial breakdown of the rule of law?

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[38] *Pepsico (India) Holdings (P) Ltd. V. State of Kerala,* (2009) 13 SCC 55.

[39] Over 30 million at various levels.

Article 39-A of the Constitution provides, *inter alia*, for grant of free legal aid so that a citizen is not denied the opportunity to secure justice due to economic or any other disability.[40] Parliament has enacted a progressive legislation in the form of the Legal Services Authorities Act, 1987 and several positive schemes have been framed under it. Yet, how many persons actually benefit from the statutory mandate and the statutory schemes? Legal aid for the poor has euphemistically been described as poor legal aid giving, at best, an illusion of justice since a large number of lawyers providing services under the banner of the National Legal Services Authority are either untrained or disinterested professionals. For a litigant who can afford to pay a fee, the cost of litigation is prohibitive.[41] Notwithstanding some negatives, there is public confidence in the justice delivery system and, therefore, in the rule of law.

Finally, I leave you with a thought and a question that is difficult to answer – *does the rule of law support an unjust or unfair legislation?* I would like to give an example. When Gandhiji and thousands others deliberately broke the obnoxious unpopular salt law in 1930 on the culmination of the Dandi march and signaled the commencement of *satyagraha* or the civil disobedience movement, were they liable for committing an offence? What is the relationship, in such a case, between the State and the citizen and does the rule of law have primacy over an unjust or unfair legislation rejected by the citizens? I leave you with these thoughts. Thank you for your patience.

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[40] Article 39-A. Equal justice and free legal aid. –The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

[41] Frontline magazine, April 20-May 3, 2013.

Justice A.K. Sikri*

We are in the age of democracy, that too substantive and liberal democracy. Such a democracy is not based solely on the rule of people through their representative, which is known as "formal democracy", but it also has other percepts like the Rule of Law, human rights, independence of judiciary, separation of powers etc. The framers of Indian Constitution duly recognized the aforesaid precepts of liberal and substantive democracy with the rule of law as an important and fundamental pillar. At the same time, in the Scheme of the Constitution, judiciary is assigned the role of upholding the rule of law. My focus today is to demonstrate that while upholding the rule of law, the courts perform a vital function *viz.* protecting the Constitution as well as democracy which are essential not only for national integrity but are also the pre-requisite of nation's welfare. Before dealing with the deeper discussion on this central theme, let us first discuss, in brief, the meaning of the rule of law, constitutionalism and democracy, as well as their inter play.

The meaning of the Rule of Law:

This principle highlights that the law is above all and is to be given supremacy. It also emphasizes the principle that every individual or corporation or all the branches of the Government are supposed to act according to law, with the underlying message, *'howsoever high and mighty one may be, law is above him.'* The essence of rule of law is to preclude arbitrary action. Dicey who propounded the rule of law gave distinct meaning to this concept and explained that it was based on three kindred features:

1. Absence of arbitrary powers on the part of authorities;
2. Equality before law: and

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* Judge, Supreme Court of India. Public Law Lecture delivered at the NJA Regional Conference (East Zone), held in Bilaspur on 11th May, 2014.

3. The Constitution is part of the ordinary law of the land.

There are therefore three aspects to the rule of law:

1. A formal aspect which means making the law rule;
2. A jurisprudential aspect which is concerned with minimal condition for existence of law in society;
3. A substantive aspect concerned on balancing between individual and society.

Though the three aspects of the rule of law are overlapping, and their boundaries blurred, we still find that there is an essential difference among them. It is, therefore, necessary to discuss these three aspects in brief.

(1) Formal aspect of the Rule of Law:

It is the fundamental concept of the rule of law that there has to be 'rule of law' as distinguished from rule of men and women. The rule of law, in this sense has a double meaning; the legality of Government and enforcement of the law. Here, we are concerned not with the content of the law, but the need to enforce it, whatever its contents. In that sense, it is governed by the principle of public order. However, this idea is an impoverished notion of the rule of law, as it does not concern itself with the contents of law. In this weak form, the rule of law exists even in a dictatorship.

(2) The Jurisprudential Concept of the Rule of Law:

According to this concept, the rule of law includes certain minimum requirements without which a legal system cannot exist, and which distinguishes a legal system from an autocratic system where the leader imposes his will on everyone else. Professor Lon Fuller has described these requirements collectively as the *"inner morality of law"*. However, among philosophers, there is disagreement about the contents of these minimum requirements. Fuller requires that the law be general; legal rules must be publicized, clear, intelligible, and stable enough to enable citizens to conform to them; the law must not be overly retroactive; statutes should not be in conflict with one another; the law should not demand the performance of acts beyond one's powers; the rules must be administered as announced. Other philosophers have offered different lists of requirements. Notably among them are John Rawls (A theory of Justice) and Joseph Raz (The Rule of Law and its virtue). However, for our purpose it is not necessary to venture into a detailed discussion on the list of requirements.

(3) The Substantive Concept of the Rule of Law:

In addition to jurisprudential concept, which is important and an essential condition for the rule of law, the substantive concept of the rule of law is equally important and inseparable norm of the rule of law in real sense. It encompasses the 'right conception' of the rule of law, propounded by Dworkin.[1] It means guaranteeing fundamental values of morality, justice, and human rights, with a proper balance between these and the other needs of society. Justice Barak, former Chief Justice of Israel, has lucidly explained this facet of rule of law in the following manner:

> *"The rule of law is not merely public order, the rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to live in dignity and develop himself. The human being and human rights underlie this substantive perception of the rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive rule of law "is the rule of proper law, which balances the needs of society and the individual". This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. The Judge must protect this rich concept of the rule of law."*[2]

The primary feature of the rule of law, thus, is absence of arbitrary powers on the part of governmental authorities and ensuring equality before law. But in fact the Rule of Law has conceptually transformed over a period of time. On this behalf, it may be of use to refer to the conference, which was organized by the International Commission of Jurist in New Delhi in January 1959. The idea of the Rule of Law as a modern form of the *law of nature* was formulated in this conference known as Delhi Declaration. It defined, broadly, that the rule of law means to protect the individual from arbitrary Government action and to enable him/her to enjoy the dignity. The most important aspect of the rule of law, as per this Declaration, is an independent judiciary. Another aspect of the rule of law is the existence of effective Government capable of maintaining law and order

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[1] Aharon Barak, Begin and the Rule of Law, Israel Studies, Volume 10, Number 3, Fall 2005 , pp. 1-28

[2] Ronald Dworking, Taking Rights Seriously, HUP, 1977

and of ensuring adequate social and economic conditions of life for the society. In a nutshell, the 'Rule of Law', which is a fine sonorous phrase, it is a dynamic and ever expanding and can be put alongside the brotherhood of man, human rights and human dignity. About the modern Rule of Law, Professor Garner observed:

> *"The concept in its modern dress meets a need that has been felt throughout the history of civilization, law is not sufficient in itself and it must serve some purpose. Man is a social animal, but to live in society he has had to fashion for himself and in his own interest the law and other instruments of government, and as a consequence those must to some extent limit his personal liberties. The problem is how to control those instruments of government in accordance with the Rule of Law and in the interest of the governed."*[3]

As the independent judiciary is pre-requisite of the rule of law, and the role of Judge in a democratic society is to bring about the realization of the rule of law, it is for this reason that the courts are empowered to refuse to enforce a statute because it grants wide discretionary or arbitrary power. The rule of law also leads to the conclusion that the final interpreter of the law should be the court and not the legislature or the executive. The doctrine of purposive interpretation is based on the rich aspect of the rule of law.

The Concept of Liberal Democracy:

At this juncture, question arises as to what is democracy? Conceptually, it has two bases. The first is the sovereignty of people. In that sense, sovereignty is exercised in free election wherein people choose their representatives, who in turn represent their views. This aspect of democracy manifests itself in the majority rule.

However, second normative base of the democracy is 'substantive or liberal democracy'. It is equally, and under certain circumstances more important than the first base. In this sense, democracy has its own internal morality based on the dignity and equality of all human beings. The substantive requirement of democracy is based on such fundamental values as tolerance, good faith, justice, reasonableness and public order. Thus, two limbs of this substantive democracy would be (i) dignity and equality of all human beings & (ii) good governance.

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[3] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012); Jonathan T. Molot, The Rise and Fall of Textualism, 106 Colum. L. Rev. 1, 3 (2006).

The aforesaid two bases of the democracy are to be balanced. Democracy is not just the law of rules and legislative supremacy; it is a multidimensional concept. Whereas it recognizes the power of the majority, simultaneously it also highlights the limitations on that very power. Power of the majority commands legislative supremacy, while liberal democracy enshrines supremacy of values, principles, and human rights. In case of an internal conflict, the formal and substantive elements of democracy must be balanced to protect the essence of each of these aspects. As the final arbiter in the matter of dispute, it becomes the duty of the courts to achieve this balance.

The basic spirit of our Constitution is to provide each and every person of the nation with equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status. Granville Austin while analyzing the functioning of Indian Constitution in first 50 years has described three distinguished strands of Indian Constitution; (i) protecting national unity and integrity, (ii) establishing the institution and spirit of democracy; and (iii) fostering social reforms.[4] The strands are mutually dependent and inextricably intertwined in what he elegantly describes as "a seamless web" and there cannot be social reforms till it is ensured that each and every citizen of this county is able to exploit his/her potentials to the maximum. The Constitution, although drafted by the Constituent Assembly, was meant for the people of India and that is why it is given by the people to themselves as expressed in the opening words "We the People". The most important gift to the common person given by this Constitution is the chapter on "fundamental rights" which may be called as the Human Rights Charter as well.

Speaking for the vision of our founding fathers, in *State of Karnataka v. Rangnatha Reddy,*[5] the Court speaking through Justice Krishna Iyer observed:

> *"The social philosophy of the constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere, ensouls such a value system, and the debate in this case puts precisely this soul in peril.... Our thesis is that the dialectics of social justice should not be missed if the synthesis of Parts III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socio-cultural vacuum, since socio-cultural*

[4] Granville Austin : the Indian Constitution : Cornerstone of a Nation, OUP, 1999

[5] AIR 1978 SC 215.

> *changes are the source of the new values, and sloughing off old legal thought is part of the process the new equity-loaded legality. A Judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension I his complex duties."*

In *Dattatraya Govind Mahajan v. State of Maharashtra,*[6] he observed;

> *"Our Constitution is a tryst with destiny, preamble with luscent solemnity in the words 'Justice- Social, economic and political.' The three great branches of Government, as creatures of the Constitution, must remember this promise in their fundamental role and forget it at their peril, for to do so will be a betrayal of chose high values and goals which this nation set for itself in its objective Resolution and whose elaborate summation appears in Part IV of the Paramount Parchment. The history of our country's struggle for independence was the story of a battle between the forces of socio-economic exploitation and the masses of deprived people of varying degrees and the Constitution sets the new sights of the nation... Once we grasp the dharma of the Constitution, the new orientation of the karma of adjudication becomes clear. Our founding fathers, aware of our social realities, forged our fighting faith and integrating justice in its social, economic and political aspects. While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown Social Justice"*

In *National Human Rights Commission v. State of Arunachal Pradesh,*[7] this Court observed:

> *"We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws."*

The description of rule of law constitutionalism and liberal democracy in modern era, as outlined above, would clearly show not only close connection but overlap thereof. These are intertwined concepts. Foundation of liberal

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[6] AIR 1997 SC 915.
[7] AIR 1996 SC 1234.

democracy is the constitutionalism with rule of law as its important pillar. Likewise, an ideal constitution will have the provisions for vibrant and substantive democracy with inherent features predicted on the rule of law that ensures absence of arbitrary powers on the part of authorities, equality of law and human rights. An ideal constitution, in its scheme would also have provisions of separation of powers with independent judiciary as well as good governance. Ultimately, in the scheme of the constitution, judiciary is assigned the role of upholding the rule of law and while doing so, it is to protect the democracy as well as the Constitution. It is in this sense, where the rule of law draws sustenance from substantive democracy and a vibrant constitution and then forms the role of protecting democracy.

What is the role of a Judge, in the aforesaid scheme of things? Certainly, the first and primary role is to decide the disputes that come before the courts of law and in the process to determine the law by which the dispute should be decided. A Judge is supposed to decide the cases according to the law of the country. However, if the role of a Judge is confined to the aforesaid, it would be taking a myopic view. It is now well recognized that the courts, while deciding the cases do not merely state the law but at the same time, create it as well. Regarding the common law, this is certainly true. However, a historical study of the legal system in a common law country (and that applies to India as well) would show that the legal system is not the same today as it was 60-70 years ago. Many changes have been brought and these changes are good for the society. The changes involve creation as well. This has happened because of judicial policy, purposive interpretation of legal text as well as bold and expansive interpretation of the fundamental rights, particularly Article 14, 19 and 21 of the Constitution. In this manner, the Indian courts have endeavored to protect the Constitution and the democracy. I would be limiting the discussions on following aspects:

1. Expanding horizon of human rights with pre-dominant motive to accord proper human dignity to citizens of this country.
2. Access to justice to marginalized and vulnerable section of the society, with pre-dominant purpose of ensuring equality.
3. Mandating good governance as a basic feature of the Constitution.

Expanding Horizon of Human Rights:

The Concept of equality in Article 14 so also the meaning of the words 'life', 'liberty' and 'law' in Article 21 have been considerably enlarged by judicial

decisions. Anything which is not 'reasonable, just and fair' is not treated to be. While interpreting Article 21, The Supreme Court has comprehended on diverse aspects such as children in jail are entitled to special treatment,[8] health hazard due to pollution,[9] beggars interest in housing,[10] health hazard from harmful drugs,[11] right of speedy trial,[12] handcuffing of prisoners,[13] delay in execution of death sentence, immediate medical aid to injured persons,[14] starvation deaths,[15] the right to know,[16] right to open trial,[17] inhuman conditions an aftercare home[18]. A most remarkable feature of this expansion of Article 21 is that many of the non-justiciable Directive Principles embodied in Part IV of the Constitution have now been resurrected as enforceable fundamental rights by the magic wand of judicial activism, playing on Article 21 e.g.

1. Right to pollution-free water and air.[19]
2. Right to a reasonable residence.[20]
3. Right to food, clothing, decent environment and even protection of cultural heritage.[21]
4. Right of every child to a full development.[22]
5. Right of residents of hilly areas to access to roads.[23]
6. Right to education[24], but not for a professional degree.[25]

A corollary of this development is that while so long the negative language of Article 21 and use of the word 'deprived' was supposed to impose upon the State the negative duty not to interfere with the life or liberty of an individual

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[8] *Sheela Barse v. Union of India*, (1986)3 SCC 596.
[9] *M.C. Mehta v. Union of India*, (1987) 4 SCC 463.
[10] *Kalidas v. State of J&K*, (1987) 3 SCC 430.
[11] *Vincent Panikurlangara v. Union of India*, AIR 1987 SC 900.
[12] *Reghubir Singh v. State of Bihar*, AIR 1987 SC 148.
[13] *Aeltemesh Rein v. Union of India*, AIR 1988 SC 1768.
[14] *Parmanand Katara v. Union of India*, AIR 1989 SC 2039.
[15] *Kishan v. State of Orissa*, AIR 1989 SC 677.
[16] *Reliance Petrochemicals Ltd. v. Indian Express Newspapers Bombay Pvt. Ltd.*, AIR 1989 SC 190.
[17] *Kehar Singh v. State (Delhi Admn.)*, AIR 1988 SC 1883.
[18] *Vikram Deo Singh Tomar v. Stet of Bihar*, AIR 1988 SC 1782.
[19] *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420.
[20] *Shantistar Builders v. Narayan Khimalal Totame*, AIR 1990 SC 630.
[21] *Ram Sharan Autyanuprasi v. UOI*, AIR 1989 SC 549 .
[22] *Shantistar Builders v. Narayan Khimalal Totame*, AIR 1990 SC 630.
[23] *State of H.P. v. Umed Ram Sharma*, AIR 1986 SC 847.
[24] *Mohini Jain v. State of Karnataka, AIR 1992 SC 1858.*
[25] *Unni Krishnan J.P. v. State of A.P.*, SIR 1993 SC 2178.

without the sanction of law, the width and amplitude of this provision has now imposed a positive obligation upon the State to take steps for ensuring to the individual a better enjoyment of his life and dignity, e.g.-

1. Maintenance and improvement of public health.[26]
2. Elimination of water and air pollution.[27]
3. Improvement of means of communication.[28]
4. Rehabilitation of bonded labourers.[29]
5. Providing human conditions in prisons[30] and protective homes.[31]
6. Providing hygienic in a slaughter-house.[32]

The common golden thread which passes through all these pronouncements is that Article 21 guarantees enjoyment of life by all citizens of this country with dignity, viewing this human rights in terms of human development.

The concepts of justice social, economic and political, equality of status and of opportunity and of assuring dignity of the individual incorporated in the Preamble, clearly recognize the right of one an all amongst the citizens of these basic essentials designed to flower the citizen's personality to its fullest. The concept of equality helps the citizens in reaching their highest potential.

Thus, the emphasis is on the development of an individual in all respect. The basic principle of the dignity and freedom of all individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not

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[26] *Vincent Panikurlangara v. UOI,* AIR 1987 SC 990.
[27] *Mehta M.C. v. UOI,* (1987) 4 SCC 463.
[28] *State of H.P. v. Umed Ram Sharma,* AIR 1986 SC 847.
[29] *Bandhua Mukti Morcha v. UOI,* AIR 1984 SC 802.
[30] *Sher Singh v. State of Punjab,* AIR 1983 SC 465.
[31] *Sheela Barse v. UOI,* (1986) 3 SCC 596.
[32] *Buffalo Traders Welfare Ass. v. Maneka Gandhi,* (1994) Suppl (3) SCC 448.

economic growth; it is human dignity.

Access To Justice to the Marginalized and Vulnerable Section of the Society:

Who are these vulnerable groups? In general terms, vulnerability is the susceptibility to physical or emotional injury or attack. It is typically associated with victimhood, deprivation, dependency or pathology. 'Vulnerable Groups' are defined as those who are likely to have additional needs and experience poorer outcomes if these needs are not met. From human rights perspective, Vulnerable Groups are disadvantaged people who are unable to acquire and use their rights.

Human right applies universally to all. It is a hard reality on the ground that there are certain groups who are vulnerable and marginalized lacking full enjoyment of a wide range of human rights, including rights to political participation, health and education. Certain groups in the society often encounter discriminatory treatment and need special attention to avoid potential exploitation. This population constitutes what is referred to as vulnerable groups.

In India, there are multiple socio-economic disadvantages that members of particular groups experience, which limits their access to health and healthcare. The task of identifying the vulnerable groups is not an easy one. Besides, there are multiple and complex factor of vulnerability with different layers and more often than once it cannot be analyzed in isolation. The present document is based on some of the prominent factors on the basis of which individuals or members of groups are discriminated in India, i.e. structural factors, age, disability, mobility, stigma and discrimination that act as barriers to health and healthcare. The vulnerable groups facing discrimination are:-

- Women
- Scheduled Castes (SC)
- Scheduled Tribes (SC)
- Children
- Aged
- Disabled
- Poor Migrants
- People living with HIV/AIDS, and
- Sexual Minorities

- Transgender

There are enumerable decisions under the aforesaid head advancing justice to such persons belonging to the vulnerable groups which are the outcomes of liberal interpretation of constitutional values, using Public Interest Litigation as a tool for enforcement of rights of such people, adopting purposive interpretation coupled with innovative method welfare legislation, plugging statutory lacunae while ensuring justice to such persons. For the sake of brevity, those judgments are not discussed herein.

Mandating Good Governance:

In a recent judgment pronounced on January 18, 2010 in the case of State of *Uttaranchal v. Balwant Singh Chaufal & Ors.*,[33] the Supreme Court has revisited the entire law on PIL, including its origin, extent and evolution. Speaking for the Court, Hon'ble Mr. Justice Dalveer Bhandari, scanned through the position relating to PILs prevailing in various countries, including Australia, USA, England, Sri lanka and even Nepal. Tracing its origin and evolution in India, the Supreme Court has divided the PIL in three phases:-

- ***Phase-I:*** It deals with cases of this Court where directions and orders were passed primarily to protect fundamental rights under Article 21 of the marginalized groups and sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this court of the High Courts.
- ***Phase-II:*** It deals with the cases relating to protection, preservation of ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments, etc.
- ***Phase-III:*** It deals with the directions issued by the Courts in maintaining the probity, transparency and integrity in governance.

As is clear from the above, Phase-III that is the present phase focuses on good governance. In fact, the democratic and representative character of governance has been treated to be a basic feature of the Constitution.[34] Governance is a concept of wide import. Every feature of the Constitution which imposes a limitation or which sets out principle and measures for the exercise of power can be said to be a spoke of the wheel, of convulsing towards fulcrum of good governance. It applies to accountability and record to constitutional

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[33] JT 2010 (1) SC 329.

[34] *Keshavanandan Bharti v. State of Kerala*, (1973) 4 SCC 225.

limitations and prescriptions.[35]

It can be seen that besides the enforceability of Fundamental Rights or other guarantee and basic features of the Constitution as a principle of good governance, certain provisions of the Constitution can also be linked with or related to accountability in governance. The power conferred on the President of India to take decisions in relation to suspension of the government of a State in certain circumstances is one such provision calling for accountable exercise of power.[36] Similarly, the power conferred on the Election Commission to be in-charge of the superintendence, direction and control of the preparation of electoral rolls and the conduct of all elections in the country, is also a matter of power coupled with duty.[37] Since free and fair elections is said to be the backbone of, and vital to democracy, the Election Commission is entrusted with a duty to ensure free and fair elections.

Again, in last few years, landmark judgments are given by the Supreme Court for cleansing the election system as also given heavily on the issues of corruption which are plaguing this country, as can be discerned from a number of judgments.[38]

The Role of Subordinate Judiciary:

At this juncture, I would like to briefly touch upon the role of subordinate judiciary as well. What has been discussed until now may give an impression that upholding the rule of law and in the process protecting the Constitution and democracy is the function of higher judiciary, namely the Supreme Court and the High Courts. It needs to be clarified that subordinate courts also play equally important role in enforcing rule of law and thereby taking care of the different aspects of democracy and constitution which are covered above. Professor N.R. Madhava Menon has neatly summed up the prominent role, which is played by the trial courts, in such cases, in the following words:

> *"There is a wide perception on the part of the public and even amongst a section of lawyers and judges that matters*

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[35] *Vineet Narain v. UOI,* (1998) 1 SCC 226.

[36] *State of Rajasthan v. UOI,* (1978) 2 SCR 1; *S.R. Bommai v. UOI,* (1994) 3 SSC 1.

[37] *Mohinder Singh Gill v. Chief Election Commissioner,* (1978) 1 SCC 405.

[38] *Rameshwar Prasad v. UOI, (2006) 2 SCC 1; P. Venugopal v. UOI, (2008) 5SCC 1; Centre for PIL* v. UOI, (2011) 4 SCC 1; *Ram Jethmalani v. UOI,* (2011) 8 SCC 1; *Dr. Subramanian Swamy v. Dr. Manmohan Singh,* (2012) 3 SSC 64; *Shahid Balwa v. UOI,* 2013 (11) SCALE 75; *Lily Thomas v. UOI,* (2013) 7 SCC 653; *Resurgence India v. Election Commission of India,* 2013 (11) SCALE 348; *People's Union for Civil Liberties v. UOI,* (2013) 10 SCC 1; *Dr. Subramanian Swamy v. E.E.I.,* (2013 10 SCC 500.

> *of human rights are to be raised only in constitutional courts and the C.P.C., Cr. P.C. and Evidence Act are the governing law for justice administration at the subordinate level. This is a travesty of justice and the notion of rule of law. After all, Constitution is the fundamental law and nothing contrary to its provisions can claim legality in any court or authority. The interpretation of fundamental rights in the Constitution by the Supreme Court is binding on all courts under Art. 141 of the Constitution itself. In this view of the matter there is no substance in the argument that human rights issues have to be agitated before constitutional courts only."*

He is also strong supporter of "social justice adjudication" or "social context adjudication" in contra distinction to adversarial system, in order to achieve social justice.

Prof Madhava Menon describes it eloquently:

> *"It is therefore, respectfully submitted that "social context judging" is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."*[39]

Let me emphasize here that a Judge is supposed to decide the case in accordance with the law. If a dispute between husband and wife comes before the Court, the Court has to find out who is at fault. It has to return such findings on the basis of evidence laid before it. Law is to be applied on the facts that are

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[39] Delivered a key note address on "Legal Education in Social Context."

established on record. Therefore, it is not at all suggested that every case has to be decided in favour of the wife in a dispute between husband and wife or in favour of the women if it is a dispute relating to property between her and other family members. The judicial system still remains adversarial and, therefore, a Judge is supposed to work within the system. In the process, while undertaking social context, a Judge is supposed to impart equal in an unequal society. This can be achieved at two levels, viz.:

a) Ensuring level playing field; and

b) By innovative and purposive interpretation of statutory provisions in deciding "hard cases".

c) Other measures.

a. Level Playing Field:

Let me start with key points. The harsh reality is that most people find an appearance before the courts to be daunting experience, particularly people who have difficulty in coping with the language or those who are socio-economically disadvantaged in society. Those at a particular disadvantage may include people from ethnic minority communities, individual with disabilities (physical or mental), woman, children and those who are through poverty or in other reasons are socio-economically excluded. Many of them may simply feel to be intimidated to inadequacy or to articulate to speak up. This justifies special or different treatment to be provided to such people ensuring fairness or equality of opportunity. Identifying situations in which an individual may be at a disadvantage because of some personal attribute of no direct relevance to the proceedings and taking the appropriate steps to ensure that there is no consequent obstacle to achieving justice is an important skill. This is all part of the art of judge craft that may be performed during case management. Part of that skill lies in identifying situations of disadvantage at an early stage, and discreetly dealing with them without prejudicing other parties. They can arise at any time and in any type of case. The equality of judicial decision making is crucial.

Neutral application of legal rules is fundamental to high-quality judicial decision making. Decision based on erroneous perceptions, interpretation or understanding may lead to faulty decisions and this to substantive unfairness. It is important to emphasize that we are not concerned about equal treatment but about fair treatment. It is not sufficient to treat everyone in the same way- equal treatment may itself amount to discrimination.

Fair treatment means affording equal opportunity for the parties to achieve justice. How to achieve this? Some of the steps, which are to be borne in mind,

are listed below:-

i. Special Needs:

Some people, for a variety of reasons, find it difficult or impossible to:

- Attend at a court,
- Function in a court room,
- Understand what is going on, or
- Be understood by others

As judicial office-holders, we should demonstrate an awareness of the feelings and difficulties experienced by those appearing before us. Every effort should be made to help in an effective way whilst maintaining a balance between assisting and adjudicating to enable people to participate fully in the proceedings.

ii. Avoid Delays:

It is not only the final decision, but the entire process in judicial decision-making is relevant. If application under Section 125 Cr. P.C. is filed by destitute woman is decided after five years and this undue delay in disposing of request for interim maintenance, even if the ultimate decision is in her favaour, it may be of no worth to her.

iii. Sensitization while Analyzing the Needs:

A judge is supposed to analyze the facts and evidence appearing before him/her in an impartial and objective manner. While doing so in the case of gender issues, a Judge is supposed to be sensitive regarding key points:

a. Though women and girls comprise more than half the population, they remain disadvantaged in many areas of life.

b. Stereotypes and assumptions about women's lives can unfairly impede them and might frequently undermine equality.

c. Care must be taken to ensure that our experiences and aspirations as women or of other women, are not taken as representative of the experiences of all women.

d. Factors such as ethnicity, social class, disability status and age affect women's experience and the types of disadvantage to which they might be subject.

e. Women may have particular difficulties participating in the justice system,

for example, because of child care issues.

f. Women's experiences as victims, witness and offenders are in many respects different to those of men.

b. Purposive Interpretation and Judicial Discretion:

No doubt the Legislature makes the law, however, while enforcing that law by applying the same in a given case; it is the Judge who states, by interpretative process, what actually the law is. It is, therefore, a myth that a Judge merely states the law and does not create it. Hard reality is that, while interpreting a statute and declaring what the Legislature meant thereby, Judge is the final arbiter in deciding as to what law is. While performing this function in social justice adjudication, the Judge is supposed to bridge the gap between law and society. The law regulates relationships between people. It prescribes patterns of behaviour. It reflects the value of society. The role of the judge is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it.

In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both constitutional and statutory interpretation, a judge must sometimes exercise discretion in determining the proper relationship between the subjective and objective purpose of the law. Indeed, a theory of interpretation cannot be constructed without interpretive discretion as its foundation. Interpretation without judicial discretion is a myth. Any theory of interpretation- internationalism, originalism, purposivism and so on-must be based on an inherent internal element of interpretive discretion. Discretion exists because there are laws with more than one possible interpretation.

In the process of interpreting the statutory law, the judge attempts to find out the intention of the legislature and in this pretense, it is his final word as to what the legislature intended and thus, what the law is. After all, the legal practice is pervasively interpretation. It is, therefore, now widely accepted that in this whole process, the judge or the judiciary makes the law as well.

c. Other Measures:

We have seen that various rights of the accused persons are acknowledged as a part of fair trial which may pertinent to grant of bail, rule against any governing, providing suitable defense lawyer/legal aid etc. It becomes the duty of the subordinate judiciary to implement those judgments while dealing with the cases and any enumerable examples can be given.

Further, we have to keep in mind recent amendments in CPC as well as Cr.P.C. enabling settlement through ADR methods in civil cases and through plea-bargaining in criminal cases. The success of these methods entirely depends on the pro-active approach of the subordinate judiciary. Prof. Menon succinctly explains other measures, which can be taken, in the following words:

> *"The law of presumptions and of shifting the burden of proof has also been evolved in different legislations, to moderate and neutralize the inequalities in the adversarial process of adjudication. When it was found that the system was still functioning unequally and fairly particularly against the poor and marginalized sections of people like women and children, Parliament enacted separate legislations to create new judicial structures and procedures like the family court, the Juvenile Court and the like.*
>
> *They need, therefore, to adopt a proactive stance to overcome technical biases and manipulative lawyering inherent in the system of adversarial adjudication. In doing so, the judge is called upon to probe suspicious facts avoiding technicalities of procedure, appreciate the evidence and contentions in the peculiar social and culture context of the case, seek legislative purpose in interpreting laws and drawing inferences, and adopt affirmative action measures in granting remedies and reliefs. This is the only way left if adversarial legalism were to be continued and at the same time equal justice-social justice were to be delivered to the poor and marginalized. This approach is indeed needed more at the trial courts level rather than at the level of High Courts and Supreme Court. This is what "social context judging "or equal opportunity adjudication" is about."*

I may end by referring to "virtue jurisprudence" which is being debated for deciding social context issues. It highlights a virtue centered theory of judging. "Virtue jurisprudence" is a normative and explanatory theory of law that utilizes the resources of virtue epistemology, virtue ethics and virtue politics to answer the central question of legal theory[40]. In a sense, virtue jurisprudence is a new theory, drawing on the resources provided by recent developments in moral philosophy, but virtue jurisprudence is also a very old theory, rooted in Aristotle's conception of ethics, politics, and the nature of law. This theory demonstrates that apart from well known judicial virtues, namely, (i) judicial temperance; (ii) judicial courage; (iii) judicial temperament; (iv) judicial intelligence and (v) judicial wisdom.

There is another crucial and central virtue, namely, "virtue of justice". Lawrence B. Solum has beautifully summed up this virtue in the following words:

> *"We call high judges, "justices", we call the building they occupy the "halls of justice", and we call what they do, "the administration of justice". If we know anything about judges, it is that they ought to be just. If judges should possess the virtue, then surely they should possess the virtue of justice."*[41]

He highlights at least three ingredients in the virtue of justice as it applies to judges; "Judicial impartiality", "judicial integrity" and "legal vision". I emphasize this legal vision while deciding "hard cases". If this *'Legal Vision'* is kept in mind, it will bring about just results and that should be the approach of a Judge in *'Social context adjudication'*.

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[40] Lawrence B. Solum, Virtue Jurisprudence (A Virtue Centered Theory Of Judging).
[41] *Ibid.*

Justice S.B. Sinha*

The Concept of the Rule of Law:

The notion of the "rule of law" though seen popularly as a modern and at times also a western concept, stems from many traditions, ancient[1] as well as modern. While the concept continues to be a dynamic and contested one, there exists a wide agreement with respect to its certain elements. In invoking the term rule of law, everybody agrees that it is a concept based on the 'universal knowledge' that human beings have propensity to abuse power. It is based on a common realization that power corrupts and absolute power corrupts absolutely, and therefore those having power need to be subjected to some kind of restrictions. The concept of rule of law aims to prevent arbitrariness in law making governance and also in adjudication, and to make each and every human being accountable to law, irrespective of power and position. It is a concept, which is seen to exist in contradistinction to 'rule of man' and 'rule according to law'.

Although most civilizations of the world claim the ideal of rule of law, it is Edward Coke, who said that King must be under God and Law, is commonly

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*Former Judge, Supreme Court of India. Public Law Lecture delivered at the NJA Regional Conference (West Zone), held at Bhopal on 27th April, 2014.

[1] The concept can be traced to ancient Greece, as well as ancient India; the concept was familiar to ancient philosophers such as Aristotle, who wrote "Law should govern". In modern times, in 16th century, Edward Coke is said to be the originator of this concept when he said that King must be under God and Law and thus vindicated the supremacy of law. The first known use of this English phrase occurred around 1500 A.D. Another early example of the phrase "rule of law" is found in a petition to James I of England in 1610, from the House of Commons:
"Amongst many other points of happiness and freedom which your majesty's subjects of this kingdom have enjoyed under your royal progenitors, kings and queens of this realm, there is name which they have accounted more dear and precious than this, to be guided and governed by the certain rule of the law which giveth both to the head and members that which of right belongeth to them, and not by any uncertain or arbitrary form of government...."

said to be the originator of this concept. In a democracy, it is now well accepted that the concept of rule of law means that the holders of public powers must be able to justify publicly that the exercise of power is legally valid and socially just. The rule of law implies that every citizen is subject to the law, including lawmakers themselves. While Coke is seen as originator of the concept in modern times, the most famous formulation of the concept is by British Jurist A. V. Dicey, who gave the oft-repeated following three principles: (i) Absence of discretionary power in the hands of the government officials. By this Dicey implied that justice must be done through known principles; (ii) Absence of special privileges for a government official or any other person and subjection of all the persons irrespective of status to ordinary courts of the land. This does not mean that the law must be the same for everybody irrespective of functions or service. His insistence was that a government officer must be under the same liability for acts done without legal justification as a private individual.

While rule of law, as a concept aims to vindicate supremacy of law in contradistinction to that of a king or of 'God', and has elicited wide consensus amongst the modern nation states since 16th century onwards, it has also been subject of much discussion and divergences of opinion. The concept of rule of law, undoubtedly, has travelled far ahead from what it appears to have been at the time of its origin. 'Judge made law', something which must have been an anathema to the progenitors of the concept, is now a reality to fathom in countries like India.

The Rule of Law: A Contested-Dynamic Concept with 'Minimum Consensus':

With respect to this concept the questions that has remained unanswered for a long time and have generated debate and discussion has been: *rule of which law?*- King's law, divine law, natural law, or the law made by popular will/ governing majority. Is it about the law written in the books- the statute law, as claimed by the positivists for a long time or does it also include statute law plus certain principles, derived either from constitution or common law, as contended by 20th century philosophers like Ronald Dworkin?

The related questions have also been: what should be the role of the judges in a county/civilization which claims to uphold rule of law? Can the term 'rule of law' be re-coined as 'rule of justice'? For a country to be claiming respect for rule of law, is it sufficient for law or any rule to be legally valid or should it fulfill the conditions both of validity and justness?[2] And if rule of law has to

[2] The issue also been debated predominantly, in 19th and 20th century, in terms of moral and legal validity of law. Some of the main protagonists of the debate are John Finnis, Fuller, Hart.

encompass both law and justice, the debatable issue is who decided what justice in a given situation is?

In modern times, the concept of rule of law gave rise to terminologies like "formalist conception" and "substantive conception" of rule of law. The former equates rule of law to procedural justice, to certainty, predictability and uniformity ensured by strictly following the letter of law. The latter, on the other hand, gives importance to what are seen as 'higher principles' like equity, 'balancing of interests', and justice- social, economic and political, tailored to respond adequately to each situation.

Jurists, philosophers as well as political scientist have debated the above issues since a long time. However, despite on-going debates, gradually there has emerged, what can be called a 'minimum consensus' with respect to the concept of law. In current times hardly anybody denies that rule of law, as a concept, has to be a combination of law and some 'higher principles'. And those principles can be based on natural law, common law or can derive on some political values which find expression through the Constitutions. No country can claim to be upholding and respecting rule of law, unless its judicial system is able to achieve the goal of delivering timely justice through law.

Not only that the concept of rule of law has evolved in a manner which perhaps was not contemplated by its, especially modern era, originators. It is true that during transition from ancient to modern times, especially during 18th and 19th century the concept of 'Higher Law' – the principles or laws which can be seen as 'beyond human' – be that natural law, divine law- came to be discredited and questioned. However, as it is now well known, the idea of law as including some 'Higher Law' found its place back in the concept of rule of law, mainly with the advent of what is called 'human rights era' in early 20th century.

Currently, despite some divergence of opinion, there is a wide consensus amongst most of the democratic Nations that rule of law is about law which encompasses the ideas of human rights and human dignity, the law has to be just and reasonable, it has to uphold values of equality and equal worth of all human beings. The 'limiting factors' for legislations, the international community now agrees, are the concepts of human rights and equality. It is also well accepted that not only judiciary has to play an important role in keeping the nations on the track of rule of law, it also has to invoke the principles based on the concept of human rights and equality to check arbitrariness, unbridled human discretion, abuse of power and resort to arbitrariness in governance, in promulgation and implementation of laws. In India, like many other civilized nations, the actions of executive, the laws made by the legislature and upheld by the judiciary are to

be rested on the touchstone of human rights and fundamental rights enshrined in the Constitution- Judicial review of both 'Legislation' and 'Administrative Action' being the basic feature of the constitution of India.

Having made values as part of law, it is now widely accepted that the concept of rule of law as used in modern democratic societies is different from and much broader than the ideas such as rule by law and rule according to law. Under the rule "by" law, law is an instrument of the government, and the government is above the law. In contrast, under the rule "of" law, no one is above the law, not even the government. The core of "Rule of Law" is an autonomous legal order. Under rule of law, the authority of law does not depend so much on law's instrumental capabilities, but on its degree of autonomy, that is the degree to which law is distinct and separate from other normative structure such as politics and religion. Also, well accepted is the idea that role of judiciary is much more than that of a body which has to apply mechanically some 'given law' to set of facts brought before the judges. "Judge made law" is no longer such an alien and strange concept in most civilized nations which claim to uphold rule of law. In terms of Article 141 of the constitution, the law laid by the Supreme Court is the law of the land.

While role of judiciary in upholding rule of law is well-accepted, the idea of rule of law has also been shrouded in much skepticism. While some scholars have been of the view that the concept has become meaningless due to ideological abuse and general over-use, some others think that it is a concept which does mean anything concrete.[3] While the earlier propounders of the concept, aimed to limit discretion and bring predictability and certainty in social life, since 20th century the concept, many scholars argue, seems to have lost its sheen. A emerging school of law, named realists in 20th century America casted shadows of doubt on the claim of objectivity and neutrality of law, as the theorists demonstrated the influence of human subjectivity and interpretation and implementation of law.[4]

Whatever may be the skepticism hardly anybody can deny rule of law is an ideal to be followed, to be striven for all civilized nations. As Bingham states,

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[3] Commenting on the concept of Prof. Judith Shklar stated, it may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. Prof Brian Tamanaha described the rule of law as 'an excessively elusive notion' giving rise to a 'rampant divergence of understandings' and analogous to the notion of the Good in the sense that 'everyone is for it, but have contrasting convictions about what it is'; See Tom Bingham, Rule of Law, Penguin Books, London 2010, p. 5.

[4] Chester Rohrlich, "Judicial Technique", American Bar Association Journal, Vol. 17, No. 7, 1931, p. 480.

"belief in rule of law does not import unqualified admiration of law, or the legal professions or the courts, or the judges. We can hang on to most of our prejudices. It does, however, call on us to accept that we would very much rather live in a country which complies, or at least seeks to comply, with the principle."[5]

Undoubtedly, striving for it poses tough challenges for the legislature as well as for the judiciary, especially in countries like that of India. Yet, the consensus amongst nations to make efforts to abide by the principle of supremacy of law has resulted into efforts to develop measures to evaluate adherence to the concept of rule of law.

Means to Evaluate Respect for the Rule of Law:

Having achieved, what can be called a *'minimum consensus'* with respect to the concept of 'rule of law', one of the main concerns for international community during the last few decades has been to develop measures or standards to evaluate adherence to the concept of rule of law by different nations. In recent times one such effort was *Rule of law Index* by a US based organization named World Justice Project. In its 2014 report, which surveys rule of law standards in 99 countries of the World, there is a working definition of the rule of law based on four universal principles, derived from internationally accepted standards. According to this project the rule of law is a system where the following four universal principles are upheld, (i) individuals and private entities are accountable under the law, (ii) the laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property, (iii) the process by which the laws are enacted, administered, and enforced is accessible, fair and (iv) justice is delivered timely by competent, ethical, and independent representatives and neutrals, who are of sufficient number, have adequate resources, and reflect the make-up of the communities.

These four universal principles are further developed in the following nine factors, which measures how the rule of law is experienced by ordinary people in 99 countries around the globe, which are as follows[6]:-

1. **Constraints on Government Powers-** In a society governed by the Rule of Law, the government and its officials and agents are subject to and held accountable under the law. Modern societies have developed systems of checks and balances, both constitutional and institutional, to limit the reach of excessive government power, and to subject the government power, to legal restraints.

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[5] Ibid., p. 9.
[6] Supra.

2. **Open Government-** Open government is essential to the Rule of Law. It involves engagement, access, participation, and collaboration between the government and its citizens, and plays a crucial role in the promotion of accountability. Requesting information from public authorities is an important tool to empower citizens by giving them a way to voice their concerns and demand accountability from their governments. Open government is far more than transparency, and encompasses elements such as clear, publicized, and stable laws; administrative proceedings that are open for public participation; official drafts of laws and regulations that are available to the public; and the availability of official information.

3. **Absence of Corruption-** Conventionally defined as the use of public power for private gain- is one of the hallmarks of a society governed by the rule of law, as corruption is a manifestation of the extent to which government officials abuse their power or fulfill their obligations under the law. Forms of corruption vary, but include bribery, extortions, improper influence by public or private interests, and misappropriation of public funds or other resources.

4. **Fundamental Rights-** Under the Rule of Law, fundamental rights must be effectively guaranteed. Rule of law abiding societies should guarantee the rights embodied in the Universal Declaration of Human Rights including the right to equal treatment and the absence of discrimination; the right to life and security of the person; the right to the due process of the law; the freedom of opinion and expression; the freedom of belief and religion; the absence of any arbitrary interference of privacy; the freedom of assembly and association; and the protection of fundamental labor rights.

5. **Order and Security-** Human security is one of the defining aspects of any Rule of Law society. Protecting human security, mainly assuring the security of persons and property, is a fundamental function of the state. Not only does violence impose wounds on society, it also prevents the achievement of other aims, such as exercising fundamental human rights, and ensuring access to opportunities and justice. In extreme situations, violence might become the norm if legal rules are not enforced. Under the rule of law, the state must effectively prevent crime and violence of every sort, including political violence. It encompasses three dimensions; absence of crime, absence of civil conflict, including terrorism and armed conflict; and absence of violence as a socially acceptable means to redress personal grievances.

6. **Regulatory Enforcement-** Public enforcement of government regulations is pervasive in modern societies. A critical feature of the Rule of Law is that such rules are upheld and properly enforced by authorities, particularly because public enforcement might raise the scope for negligence and abuse by officials pursuing their own interest. Appropriate and effective enforcement does not only mean that it occurs without public or private meddling, but also that regulatory proceedings are conducted in a timely way that respects the due process of law.

7. **Civil Justice-** In a Rule of Law society, ordinary people should be able to resolve their grievances and obtain remedies in conformity with fundamental rights through formal institutions of justice in a peaceful and effective manner, rather than resorting to violence or self-help. Civil justice requires that the system be accessible, affordable, effective, impartial, and culturally competent. Effective civil justice also implies that court proceedings are conducted in a timely manner and judgments are enforced without unreasonable delay. Finally, in a rule of law society, it is essential that Alternative Dispute Redressal mechanisms provide effective access to justice.

8. **Criminal Justice-** An effective criminal justice system is a key aspect of the rule of law, as it constitutes the natural mechanism to redress grievances and bring action against individuals for offenses against society. An effective criminal justice system is capable of investigating and adjudicating criminal offences effectively, impartially, and without improper influence, while ensuring that the rights of suspects and victims are protected.

9. **Informal Justice-** For many countries it is important to acknowledge the role played by traditional, or 'informal', systems of law, including traditional, tribal, and religious courts as well as community-based systems in resolving disputes. While recognizing the importance of these informal systems, a necessary element of the rule of law is that informal systems are effective, impartial, and protect fundamental rights, and are held to the same standards of fairness in resolving disputes as formal systems.

India's position on the 'Rule of Law Index' developed by the World Justice Project:

If one considers position of India on the above-mentioned index, India fares very well as far as formal commitment to rule of law is considered. As one of the critics mentioned India's record on paper distinguishes it from its peers and neighbours. The country fairs very well in following the legislative process. There is no doubt that the legislative process in India is transparent, democratic,

the laws are well publicized, they have characteristic of generality. Independence of Judiciary is a basic structure of our Constitution, and there exists machinery consisting of body of judges who are in principle impartial and neutral. India also fares well on openness of government and democratic controls. In the category of open government our county rank 30th in the 99 countries surveyed and first among six in the region. In the category, limited government powers, which evaluates the checks on government India ranks 35th in the 99 countries and is first among six in its region. However, the country's record appears to be rather poor when it comes to the category 'order and security' where the rank is 95th out of 99 globally and 4th in the region representing six countries.

Our record also appears to be cause of concern in categories like 'civil justice' with 90th global rank, and also in regulatory enforcement and absence of corruption with 81st and 72nd rank respectively. However, situation appears little better in criminal justice and fundamental rights with 48th and 63rd rank respectively. Despite some positive features, the overall scenario is not very encouraging, since the global rank for India is 66th and even in the region there are two countries which have gained a better rank than India, as we have managed only a third rank amongst six in the region. Whatever may be the rank in one or the other index, we cannot ignore that every element of India's rule of law supply chain- including the legislators who draft the laws and the police, prosecutors and courts who enforce them—is problematic. Indeed, the supply chain, never strong to begin with, has become deeply broken—threatening not only the rule of law but a belief in the value of law itself.

The Role of Judiciary in upholding the Rule of Law:

While the above ranking gives a cause of concern, we in India, certainly are not at the point of no return. As experience in India shows striking balance between uniformity, predictability, certainty on one hand and the substantive justice on the other hand is an uphill task. Constant requirement for such a balancing by the judges often makes law susceptible to subjectivity, at times of a much higher degree than acceptable.

Although India may be lagging behind on the rule of law index developed by a US based organization, it must not be overlooked that there are some bright spots, one of them being judiciary of our country, especially when it comes to jurisprudence from the Supreme Court. From human rights to women's rights, from environmental jurisprudence to criminal jurisprudence the Supreme Court has played an important role in placing India on the world map. Right to privacy, concern for fair trial even for terrorists and other accused in heinous crimes

are hallmarks on Indian jurisprudence. Public Interest Litigation, the innovation of Indian judiciary which opened the doors, even of the apex court for the masses, is world famous. Indian judiciary has played an important role in many aspects. It even directed release of Pakistani prisoners who had completed their terms of sentence on the premise that India is a country governed by rule of law. The Supreme Court in doing so rejected the contention of the government of India that the Indian Prisoners in Pakistan who had completed there terms of sentence have not been released.

It is a well-accepted fact that amongst the three organs, it is judicial system which has the maximum responsibility to ensure adherence to the principles of rule of law. It is judiciary which has to act as a 'watchdog' to check and punish deviations from the above standards.[7] Although, as far as judiciary in India is concerned it is undoubtedly performing its role of guardian and protector of rule of law in the country, especially when it concerns responsibilities and duties of executive and judiciary.[8] It cannot be overlooked that judiciary also has had and continues to have some dark spots. Most (in)famous of them being *A.D.M. Jabalpur v. Shivkant Shukla*[9], during emergency, with an attempt to equate rule of law with absolute power of the executive and the legislature, in complete disregard to the principles of liberty and individual rights.

Yet, such examples cannot detract us from the fact that the Higher Courts have been playing a significant role in expounding and evolving the concept of rule of law. Courts have been using their power of judicial review rather actively, as and when the need has arisen, to keep a check on legislative activity. Courts have time and again come down heavily against unguided and excessive use of

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[7] Recently in *H.G. Rangangoud v. State Trading Corporation of India Ltd.* reported in (2012) 1 SCC 297 the Court opined "Rule of law is the basic rule of governance of any civilized democratic policy. It is only through the courts that rule of law unfolds its contours and establishes its concept. For the judiciary to carry out its obligations effectively and true to the spirit with which it is sacredly entrusted the task, constitutional courts have been given the power to punish for contempt, but greater the power; higher the responsibility".

[8] In *T.N. Godavarman Thirumulpad (102) v. Ashok Khot* the Court mentioned:
disobedience of this Courts order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the Rule of Law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs.

[9] (1976) 2 SCC 521.

[10] *J. Jayalalithaa v. State of Karnataka*, (2014) 2 SCC 401: the Court stated that discretionary power has been exercised for an unauthorized purpose, it is generally immaterial whether its repository was action in good faith or in bad order becomes vulnerable and liable to be set aside.

discretion.[10] However, the Supreme Court has always been conscious about the necessity of some amount of discretion to be vested in the executive as well as in judges. In *State of Punjab v. Khan Chand*[11], the Court mentioned,

Vesting of discretion in authorities in the exercise of power under an enactment does not by itself entail contravention of Article 14. What is objectionable is the conferment of arbitrary and uncontrolled discretion without any guidelines whatsoever with regard to the exercise of that discretion. Considering the complex nature of problems faced by a modern State, it is but inevitable that the matter of details should be left to the authorities acting under an enactment. Discretion has therefore, to be given to the authorities concerned for the exercise of the powers vested in them under an enactment.

The enactment must, however, prescribe the guidelines for the furtherance of the objects of the enactment and it is within the framework of those guidelines that the authorities can use their discretion in the exercise of the powers conferred upon them. Discretion which is absolute, uncontrolled and without any guidelines in the exercise of powers can easily degenerate into arbitrariness. When individuals act according to their sweet will, there is bound to be an element of 'pick and choose' according to the notion of the individuals. If a Legislature bestows such untrammeled discretion on the authorities acting under an enactment, it abdicates its essential function, for such discretion, is bound to result in discrimination which is the negation and antithesis of the ideal of equality before law as enshrined in Article 14 of the Constitution. It is the absence of any principle or policy for the guidance of the authority concerned in the exercise of discretion which vitiates an enactment and makes it vulnerable to the attack on the ground of violation of Article 14.

The Supreme Court for India has adequately settled many of the questions, which render the concept of rule of law a contested one in other countries. As far as Indian legal system is concerned, there is hardly any dispute that law cannot be restricted only to statute law. The Court has time and again emphasized the importance of combining procedural justice and substantive justice. Judges in India, it is undisputed, are not mere inert/'neutral' interpreter of laws. Giving a broad definition to the concept of rule of law, the Court in a recent judgment[12] mentioned,

> *The rule of law is not merely public order. The rule of law is social justice based on public order. The law exists to*

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[11] (1974) 1 SCC 549, Constitution bench (five judges) judgment.

[12] *National Legal Services Authority v Union of India*, AIR 2014 SC 1863, p.125.

> *ensure proper social life. Social life, however, is not a goal in it self but a means to allow the individual to life in dignity and development himself. The human being and human rights underlie this substantive perception of the rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive rule of law "is the rule of proper law, which balances the needs of society and the individual."*

This is the rule of law that strikes a balance between society's needs for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. It is the duty of the Court to protect this rich concept of the rule of law.

Emphasizing dispassion and neutrality in delivery of justice, the Court has mentioned that the judgment, to stand the test of Rule of Law idea, must actually satisfy the test of reason and democratic form of policy. So said, Justice Bhagwati in his dissenting opinion in *Bachan Singh v. State of Punjab*[13] stating-

> *Now if we look at the various constitutional provisions including the Chapters on Fundamental Rights and Directives Principles of State Policy, it is clear that the rule of law permeated the entire fabric of the Constitution and indeed forms one of its basic features. The rule of law excludes arbitrariness; its postulate is "intelligence without passion" and "reason freed from desire". Wherever we find arbitrariness or unreasonableness there is denial of the rule of law. That is why Aristotle preferred a government of laws rather than of men... "Law" in the context of the rule of law, does not mean any law enacted by the legislative authority, howsoever arbitrary or despotic it may be. Otherwise, even under a dictatorship it would be possible to say that there is rule of law.... But still it is not rule of law as understood in modern jurisprudence... What is necessary element of the rule of law is that the law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of polity....*

The Supreme Court has been encouraging even the judges of the lower courts to play a pro-active role, especially in the administration of criminal justice

[13] (1982) 3 SCC 24.

system. The charter of rights that are to be protected and upheld by the State is continually being expanded by the courts time and again, using the Directive Principles to understand the Fundamental Rights in India.[14] The charter of fundamental rights embodied in part III of the Constitution has been expanded adequately to respond to the changing demands of society. The charter of rights to be respected by the Courts in India, include civil and political rights as well as social and economic rights. There have been active efforts to keep a check on abuse of power by the executive, especially the police. Judiciary has been taking active interest to ensure that various freedoms promised to individuals through our Constitution remain sacrosanct.

Fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society. Thus, fair trial must be accorded to every accused in the spirit of the right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case.

In the process of exploring the concept of the rule of law, the Courts have gone to the extent of recognizing reputation of a person as a right, and also an element of personal security. The right to reputation has been considered as a necessary element in regard to right to life of a citizen under Article 21 of the Constitution which calls for Protection by the State.[15] Furthermore in Sahara *India Real Estate Corpn. Ltd. v. SEBI*,[16] the Court struck a balance between freedom of expression vis-à-vis freedom of trial, in the context of postponement of reporting a matter which is *sub judice,* holding that though open justice

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[14] In *M. Nagaraj v. Union of Indi*a reported in (2006) 8 SCC 212 the Court stated:
"31, At the outset, it may be noted that equality, rule of law, judicial review and separation of powers are distinct concepts. They have to be treated separately, though they are intimately connected. There can be no rule of law if there is no equality before the law; and rule of law and equality before the law would be empty words if their violation was not a matter of judicial scrutiny or judicial review and judicial relief and all these features would lose their significance if judicial, executive and legislative functions were united in only one authority, whose dictates had the force of law. The rule of law and equality before the law are designed to secure among other things, justice both social and economic, Secondly, a federal Constitution with its distribution of legislative powers between parliament and the State Legislatures involves a limitation on legislative powers and this requires an authority other than parliament and the State Legislatures to ascertain whether the limits are transgressed and to prevent such violation and transgression. ..
118. The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction...."
[15] Umesh Kumar v. State of A.P., (2013) 10 SCC 591.
[16] (2012) 10 SCC 603.

promotes transparency and public confidence, openness is not an absolute requirement for every case. Exceptions can be created where the core function of the judicial system, namely, to render unbiased decision, has to be preserved.

In *Subramanian Swamy v. Manmohan Singh*[17] the right of private citizen to file a complaint against a corrupt public servant was equated with his right to access the Court in order to set the criminal law in motion against a corrupt public official. It was stated that the right of access, a Constitutional right should not be burdened with unreasonable fetters. When a private citizen approaches a court of law against a corrupt public servant who is highly placed, what is at stake is not only a vindication of personal grievance of that citizen but also the question of bringing orderliness in society and maintaining equal balance in the rule of law. The sanctioning authority must bear in mind that what is at stake is the public confidence in the maintenance of rule of law which is fundamental in the administration of justice.[18]

The Courts have also recognized the right to privacy as a fundamental right.[19] In *M. Nagabhushana v. State of Karnataka*[20] it was said that principle of finality of litigation is based on high principle of public policy. That is why it is perceived that the plea of *res judicata* is not a technical doctrine but a fundamental principle, which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues, which have become final between the parties.

While trying to exercise check on other organs of the State, the Supreme Court has also been trying to put its own house in order having shifted its gaze on the chief justices, high court judges and judicial officers. In *H.C. Puttaswamy and Ors. v. The Hon'ble Chief Justice of Karnataka High Court,*[21] the court minced no words, as it stated,

The Chief Justice or any other Administrative Judge is not an absolute ruler. Nor he is a free wheeler. He must operate in the clean world of law; not in the neighbourhood of sordid atmosphere. He has a duty to ensure that in carrying out the administrative functions, he is actuated by same principles and values as those of the Court he is serving. He cannot depart from and indeed must remain committed to the constitutional ethos and traditions of his calling. We need hardly say that those who are expected to oversee the conduct of others

[17] (2012) 3 SCC 64.
[18] Also see *Maninderjit Singh Bitta v. Union of India,* (2012) 1 SCC 273.
[19] *Amar Singh v. Union of India,* (2011) 7 SCC 69.
[20] (2011) 3 SCC 408.
[21] AIR 1991 SC 295.

must necessarily maintain a higher standards of ethical and intellectual rectitude.

It has repeatedly been mentioned by the court that, judges and judicial officers, have to present a continuous aspect of dignity in every conduct. If the rule of law is to function effectively and efficiently under the aegis of our democratic set-up, judges are expected to, nay, they must nurture an efficient and enlightened judiciary by presenting themselves as a role model. Needless to say, a judge is constantly under public gaze and society expects higher standards of conduct and rectitude from a judge. Judicial office, being an office of public trust, the society is entitled to expect that a judge must be a man of high integrity, honesty and ethical firmness by maintaining the most exacting standards of propriety in every action. Therefore, a judge's official and personal conduct must be in tune with the highest standard of propriety and probity.[22]

Challenges for the Judiciary in Respecting the Rule of Law:

The description above shows positive contributions of Indian judiciary, especially of the Supreme Court, in upholding and respecting rule of law. Taking into account these positive contributions shall we resort to the "glass half full" philosophy, and maintain our optimism and pat our backs on good track record of India, especially Indian judiciary? Or shall we move towards considering that our concern for upholding rule of law does not match our efforts? Shall we move towards looking into those avenues which can reveal a rather grim scenario?

While judiciary in India has been playing an active role to ensure that other organs of the State maintain high standards of respecting rule of law, does it apply to the same high standards to the Judicial System or the institution of judiciary? Is our house in order? Shall, as judges, deliberating in National Judicial Academy recognize and identify the avenues where we are failing in respecting rule of law?

As mentioned above, one of the most important attributes of rule of law is clarity in laws and certainty, predictability in implementation of laws. Do our legal and judicial system fare well in respecting this attribute? Recent legislative activity, especially the nature of it, raises serious doubts. Can the recent trend of 'knee-jerk reaction laws' or 'pre-poll legislations', the former in the form of 2013 Criminal law amendment and the latter 2014 Ordinance to amend SC/ST Act, 1989 be considered as legislations to uphold rule of law? While laws are expected to be open-ended, to allow sufficient flexibility and growth, is it not true that too much ambiguity or linguistic incoherence may result into unbridled

[22] *Arundhati Ashok Walavalkar v. State of Maharashtra,* (2011) 11 SCC 324; *State of W.B. v. Debashish Mukherjee,* (2011) 14 SCC 187; also see, *Renu and ors. v. District and sessions Judge, Tis Hazari,* 2014 (2) SCALE 262.

or unguided discretion?

While legislature is expected to promulgate laws, judiciary, as we all know, also has to contribute significantly in development of law and making law more clear? Are our Higher Courts really contributing in the direction? While conflicting opinions can be a sign of healthy democracy but shall we not raise the question, conflict and inconsistency to what extent? Can the references be kept pending for many years and at times decades altogether? Does our Supreme Court speak in one, coherent voice? Can we have *25, 26, 27 Supreme Courts* in India? Can we have different benches of the same High Court taking extremely conflicting positions on questions of law, which are of national importance? Doesn't development of law, imparting clarity to law require judiciary to function as an institution?

Is the process by which laws are enacted accessible? Do we have adequate resources to implement all the schemes that are laid down by the Government for welfare of marginalized and weaker sections of society? We often blame then Government for insufficient funds, for poor judge population ratio, but do we as a judicial institution know what exactly do we want in terms of resources? While asking for more funds do we know how to utilize the funds already sanctioned or allocated?

Is our criminal Justice system able to provide security of persons and property? Shall we not take seriously the allegation, made by none less than by a former President of India, Dr. A.P.J. Abdul Kalam that the criminal justice system in India is about punishing or sending to gallows only the poor?

Is Judiciary not responsible for subverting rule of law, not having been able to understand and deal with its problems of delays and arrears? To what extent is the judiciary responsible for retarding economic growth?

On the administrative side, within the judiciary, has it been possible to adhere to the value of 'rule of law'. The concept, as is well known about supremacy of law, about curbing arbitrariness and unguided discretion in decision-making? To what extent in our internal functioning, in terms of recruitment/ appointments, performance evaluation, transfers, promotions etc., have we been able to observe the principles of law? Have we, in judicial organization, displaced rule of man with rule of law?

Most of the questions raised above, undoubtedly are rather uncomfortable questions? Nobody can deny a beginning has to be made, to at least raise these questions, and what place more befitting for the purpose than this august institution- the Nation Judicial Academy.

Prof. N.R. Madhava Menon*

As early as 1954, Parliament through a Resolution recognized the need for "revision and modernization of laws, substantive and procedural with a view to realize that justice is simple, speedy, cheap, effective and substantial" and for the same set up the first Law Commission under the Chairmanship of Shri M.C. Setalvad. Realizing that mere revision of the laws would not bring about speedy, cheap and effective justice, Parliament mandated the Commission to review the system of judicial administration in all its aspects so that timely justice is accessible to all at reasonable costs. The Commission on its part identified its task in the following terms:[1]

a) "The operation and effect of laws, substantive as well as procedural, need to be looked at with a view to eliminating unnecessary litigation, speeding up the disposal of cases and making justice less expensive.

b) The organization of courts, both civil and criminal to be reviewed;

c) Recruitment of the judiciary to be streamlined, and

d) Level of the bar and of legal education has to be enhanced."

After four years of thorough study, research and consultation, the Setalvad Commission in 1958 submitted a two-volume report (nearly 2000 pages) on reform of judicial administration, which still continues to be the base document for any discussion on judicial reform. As it rightly pointed out, the five main components of judicial reform are:

i. Elimination of unnecessary litigation;

ii. Speeding up of trial proceedings and disposal through ADR;

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[1] Reform of Judical Administation, Vol. I, Law Commission of India, P. 3 (1958)

iii. Structural reform of the Courts and procedures;

iv. Streamlining judicial selection and appointment ; and

v. Professional development of the bar, inter alia, through reform of legal education.

In other words, judicial reform is more about structural change in the system and improvement of the quality of personnel (lawyers and judges) involved in judicial administration rather than mere reform of the laws. After all, laws are not self-executing. They need institutions and personnel who make laws deliver results. In fact, if good institutions and competent personnel are in place, even when the laws are deficient or inadequate, justice can still be delivered through interpretative logic and purposive action. Therefore, judicial reform agenda, as Setalvad Commission rightly diagnosed should concentrate on structure and organization of courts as well as selection and competence of judges (and lawyers). The agenda remains the same even after sixty years when we discuss the subject of Justice Reforms. The only additional item in the reform agenda, I may submit, is an ideological orientation in administration of justice arising from a social justice philosophy beautifully captured in the preamble to the Constitution of India. Dispute resolution, according to me, is no more the job of a neutral umpire presiding over an adversarial process of unequal parties, but a value-added, result-oriented, pro-active justice delivery mechanism informed by the constitutional goals, values and philosophy.

Barriers to Reform:

The most important barrier, which Setalvad faced in 1950s and reformers face today is the lack of relevant judicial data without which, no scientific analysis of the problem can be done nor any verifiable reform strategy can be proposed. Merely borrowing the reforms from other jurisdictions and trying to inject them from above will not serve the purpose as the system is steeped in orthodoxy and there are very many vested interests including litigants who want to keep system as it had been. Judges in India are overworked with outmoded support systems on which they preside, but with very little control over them. Seldom do judges have a clear idea of their dockets, which keep growing by the day with no one in command. Court and case management are being talked about in judicial academies and higher echelons of judicial administration. The trial courts, which deal with over 90 per cent of all litigation, with honorable exceptions, are still operating in a style, which Setalvad found them 60 years ago!

The problem in judicial administration is one of numbers. A justice system which was set up to service the needs of a few million people is today involved in serving the legal needs of over 1.2 billion people, one sixth of the human race! In terms of numbers the personnel involved are roughly 18,000 judges and a million lawyers. Despite all the inadequacies of the system, on an average, over 1.5 crore cases per year are disposed off by the judges, perhaps the largest turnover for any judiciary anywhere in the world. At the same time, the system receives on an average nearly 2 crore fresh filings per year creating an overload problem not easy to tackle with the present infrastructure. Thus perceived, the problem of arrears and delay in the judicial system is one of judicial overload for which, as the Supreme Court declared a decade ago[2], a fivefold increase of courts and judicial personnel is required. This is a task, which the State Governments are disinclined to undertake. The lawmakers are therefore seeking alternate strategies by way of diversion, settlement, and management through ICT as well as policies, which may contain and reduce litigation itself. The judiciary, in turn, is asking the Government to make a judicial impact assessment of every law being made with a view to provide funds for adjudicating cases arising under the law.[3] The issue is not of availability of funds alone; it is of political will on the part of Central and State Governments vis-à-vis rule of law and administration of justice.

Civil Justice System Reforms: The Indo-American Study:

Nearly four decades after the Setalvad Commission Report on Judicial Administration, a non-official committee of experts from the USA (Stephen Mayo and Hiram Chodosh) along with a former Chief Justice of India and an Additional Solicitor General of India (Justice A.M. Ahmadi and Dr. Abhishek M. Singhvi) came up with a report on Indian Civil Justice reform[4] in the context of economic reform of the 1990s. The report questions the viability of the adversarial system and the way it operates in Indian courts. It pointed out that an excessive judicial passivity and near-absolute control of proceedings by parties in unequal positions in the adversarial litigation led to abuse and delay with impunity. Further, non-availability of alternatives to litigation and inefficient court administration systems resulted in litigation clogging the system. The study pointed out that a backlog of 25 million cases and reported delays in excess of 20 years currently undermine the effectiveness of the system of

[2] *All India Judges Association v. Union of India,* AIR 2002 SC 1752.

[3] Justice Jagannath Rao Committee Report on Judicial Impact Assessment, Ministry of Law, Govt. of India (2009).

[4] Hiram Chodosh, Stephen Mayo, A.M. Ahmadi, A.M. Singhvi, Indian Civil Justice System Reforms: Limitation and Preservation of the Adversarial Process, 30 New York University Journal of International Law & Politics, 1 (1997-98).

enforcement of substantive civil and commercial rights. The report concluded that backlog and delay have broad political and economic implications for Indian society.

The Indo-American study proposed three sets of recommendations to improve the delivery of civil justice in India: court administration, case management, and consensual dispute resolution. These reforms, the authors of the report claim, limit the adversarial model by increasing both judicial intervention in the early stage of claim preparation and the availability of consensual alternatives that offer a wide variety of calibrated resolutions. Along with court management reforms, these steps put limit to parties-controlled traditional Indian litigation process. Simultaneously they seek to preserve a more effective adversarial process for those matters that cannot be consensually resolved.

Systemic Causes to be Corrected:

The study identifies three main procedural factors contributing to arrears and delay: (1) free access for civil claimants to the courts with incentives for frivolous, party-controlled litigation processes including initiation without cause, extension without excuse and motions without merit; (2) discontinuity, repetition and fragmentation of the legal process without early or accountable judicial interventions such as court administration and case management mechanisms; and (3) limited opportunity or incentive for consensual settlements including limited venues for ADRs. These systemic causes, the study found, arose from insufficient investments in human and institutional resources. These systemic defects led to functional distortions of the adversarial procedure with its emphasis on formal procedural justice and win-lose legal outcomes. The study therefore concludes that the adversarial model is poorly designed to meet the needs of a rural population with widespread poverty, illiteracy and unfamiliarity with formal legal procedure.

There are some observations in the Indo-American study on civil justice system, which require critical examination from the functionaries of the system. Let me highlight few of those observations:

(i) Internal court management system lacks accountability for the administration of the case load. Administrative institutions fail to monitor and track the status, substance and pace of civil litigation, thus forcing the courts to duplicate efforts and allowing controversies to languish without resolutions.

(ii) Judicial management of the legal process is undisciplined and thus unreasonably protracted and fragmented providing lawyers with opportunities to conduct vexatious, frivolous and dilatory litigation.

Available alternative and consensual means of dispute resolution and flexible remedial action are limited. With systemic disincentives against early settlement, the system drags on endlessly. Thus full adversarial trial remains practically the only available alternative.

Serious Charges Against The Justice Delivery Systems:

Judges are not in command; Lawyers are undisciplined; judicial administration has no accountability, these are serious charges against the system. Enormous workloads, poor institutional support and inadequate funds are offered as defenses. The practice of judicial rotation which force judges to move from one court to another every three to five years is also said to be the reason for low judicial incentives to be accountable for caseload management. This reality dampens initiative to improve and possibly leads judges to feel relieved when matters are extended, stayed or adjourned. On the basis of this analysis of the problem, the study recommended a three-fold solution that included Consensual Dispute Resolution (CDR), court administration and case management. Through Court administration judges ensure that courts and the litigants have fulfilled their functional responsibilities in a timely manner.

Through case management, parties are helped to prepare factual and legal support for their respective positions so that courts frame issues in time to commence trial. In all three strategies, judges have pro-active, administrative and supervisory roles to perform. The Report provides the procedural mechanisms to put the three reforms into operation. For example, case management, according to the study, is an early managerial intervention by a judicial officer in the parties' preparation of civil case. It is a judicial process that attempts to achieve a timely and qualitative resolution of a dispute. Its primary features are the early identification of disputed issues of fact and law, establishment of a procedural calendar for the life of the case, and the initiation and co-ordination of consensual process aimed at the resolution of the case other than through a court trial. In short, case management expects to establish judicial responsibility for the otherwise party-controlled adversarial preparation of civil cases for trial. Together with court administration and CDR, case management is expected to reform the civil justice system towards timeliness, efficiency and accountability.

The National Mission on Strengthening Justice Delivery:

In October 2009, on the basis of a Vision Document adopted at a Judicial Conference in New Delhi, the Government of India approved a National Mission for reducing pendency and delays in the judicial system and enhancing accountability through structural change, higher performance standards and capacity building of institutions involved. There have been many attempts in the past to achieve the goals, which did not yield the desired results because of lack of institutional capacities, inadequate, funding and want of political will to undertake the reforms needed. When it was realized that without judicial reforms the development agenda cannot be carried forward, the Thirteenth Finance Commission made specific recommendations for grant of substantial funds to the judiciary for the improvement of delivery of justice.

At the instance of then Law Minister, the Union Government announced a series of policy initiatives aimed to bring down pendency (the life of a case in the system) from an average of 15 years to 3 years within a three-year period! It was considered by many as too ambitious for a system used to chronic delays, outmoded procedures and indifferent management. With money made available and the strategies and plans worked out in consultation with the judiciary, the Government has come up with a National Mission to accomplish the goal within a period of five years coinciding with the Twelth Five Year Plan.

Finance Commission Catalyzes Action:

For a long time, the judiciary was outside the radar of the Planning Commission, which distributed development grants. And when it started providing funds, it turned out to be too small to make any capacity improvement of the system as a whole. Neither did the State Government increase the number of courts required to handle the mounting number of cases nor did the existing courts received the infrastructure needed to process the cases efficiently. Some sections of the Judiciary are still to acquire the ICT support systems to modernize its processes with the result it is continuing to labour under the weight of over three crore pending cases for a long time. Recommending support required to improve judicial outcomes, the Finance Commission stated, *"....At the very least, current filling need to be disposed of, to prevent accumulation of further arrears. The enormous delay in disposal of cases results not only in immense hardship, including those borne by the large number of under-trials, but also hinders economic development."*

Prescribing a condition that the government (Centre and State), the single largest litigant in the country, frame a litigation policy aimed to reduce avoidable and unnecessary litigation, the Finance Commission recommended grant of

Rupees Five Thousand crores for improving Judicial outcomes through six strategic initiatives. These included increasing the number of court working hours using the existing infrastructure by holding shifts courts in morning/ evening hours, increased use of Lok Adalats to ease pressure on courts, promotion of the use of Alternate Dispute Resolution methods outside the court system, intensive training of judicial officers and public prosecutors for enhancing their functional capacities, addition of better facilities in judicial academies of every state and creation of the post of Court Managers in every judicial district to assist the judiciary in their administrative functions. A series of orders were issued by the Central Government sanctioning the funds and providing Guidelines for utilization of the grant. Activities have started, though in a slow pace, heralding the arrival of judicial reforms long awaited by the litigant public.

Strategic initiative of the Mission Plan:

The Department of Justice, which is now headed by an independent Secretary level officer under the Ministry of Law and Justice, has assumed the role of the Mission Directorate with the Secretary to Government as the Mission Leader. For the first time, the Planning Commission has constituted a Working Group on Justice for preparing the demands of the justice system under the Twelfth Plan and one can expect continued support, besides the Finance Commission allocations, for the Mission initiatives of the Justice Department. In short, the time is opportune for a major breakthrough in the delivery of justice if the National Mission now proposed for 2012-17 could generate the required momentum among the actual players including judges, lawyers and litigants. The first step in this direction is to understand the implications of the Strategies Initiative of the Action Plan and to respond adequately to the role and responsibilities envisaged under it.

The Action Plan contemplates five Strategies initiatives, which include policy changes, re-engineering procedures, human resources development, leveraging ICT and improving infrastructure of subordinate judiciary.

Among the policy initiative, the Government has already initiated legislations proposing to increase retirement age of High Court Judges and to enhance judicial standards and accountability. To exclude unnecessary litigations, National and State litigation policies are announced and are in the process of implementation as part of the National Mission. The long awaited All India Judicial Services is being taken up for consideration. Improving the capacities of the judiciary proportionate to the workload is under way through the mechanisms of "judicial impact assessment" as part of the legislative process.

For improving the human resources of the judicial system, legal education reforms are also being considered as part of the Mission. Thus perceived, one can say that the policy support for the National Mission is well under way which shows the political will for systemic changes to achieve the goals.

Re-engineering of court processes removing bottlenecks and fast-tracking procedures constitute a major strategy to reduce delay in litigation. This may require amendments to statute and rules of court for which the Law Commission is being asked to work out appropriate steps. Together with Lok Adalats, mediation, plea-bargaining and negotiated settlements, a large portion of pending cases are expected to be resolved without taking much of judicial time. Clubbing together similar kinds of cases, leaving administrative functions to trained Court Managers, introducing modern management tools and systems for docket and case management etc. are other process re-engineering strategies mooted to reduce delay and pendency. In fact, since 2007 the e-courts project was initiated at a cost of Rs. 440 crores (now revised to Rs. 935 crores) for provision of ICT infrastructure to district and subordinate courts and to computerize judicial records. This is scheduled for completion by December 2014 enabling the National Arrears Grid to be fully operational for integration with the Mission Plan. With introduction of e-courts along with video conferencing, e-filing and related ICT-enabled services, the justice delivery system can be transformed to become people-friendly, less expensive and expeditious.

Of course, the human resources component will still be critical for maintaining the quality of justice and, as such, the Mission proposes not only increasing available manpower by filling up vacancies in judicial posts at all levels but also strengthening their training through the network of judicial academies. Similar efforts to provide continuing education and training for lawyers and public prosecutors are also under way with the involvement of Bar Councils and law schools. In fact, many of the short comings in the institutions and procedures can be overcome if motivated, competent personnel are available in the system in adequate numbers.

Another significant component of the Mission is about the development of infrastructure of district and subordinate courts long neglected by the State and the Centre. During the twelfth plan all 18,000 courts in the country are expected to have adequate building and equipment to be able to operate with maximum efficiency. Towards this end, substantial funds are sought to be provided by the Union Government on a 75:25 sharing basis. The States have been asked to develop the designs of modern court complexes in every district and estimate their requirements for funds and hopefully the judicial architecture

will soon see a decisive change towards efficiency and litigant-friendly environment.

The Gram Nyayalayas to help the rural folk to access inexpensive justice at their doorsteps is another step envisaged under infrastructure development. With police modernization, development of forensic sciences inputs, criminal tracking network system and similar initiatives now being implemented, it is hoped that criminal justice will soon have a human face while providing better support to the justice system. Now since the plan is ready and the funds are made available, what is needed for the success of the Mission is timed-bound implementation on mission mode by the functionaries and popular support to sustain the momentum from within and outside the system.

Tribunalization Has Not Strengthened the Justice System:

The number of tribunals set up by the State and Central Government for various sectors of the justice system to be managed by all kinds of so called experts having little knowledge of law seem to have weakened rather than strengthened the justice system. In a vast majority of cases, decisions rendered by the tribunals land up in the High Courts through writs under Article 226 of the Constitution and finally in the Supreme Court of India under its plenary jurisdiction under Article 136. It is time to examine whether it is prudent to continue with more and more tribunals or increase the number of courts at all levels. Together with the introduction of an All India Judicial Services, the judiciary should be able to cope up with the diversity of litigation now being handled by the tribunals. Litigants also seem to think that they get justice only in the established courts supervised by High Courts and Supreme Court.

Impositions of Costs Seems to help Strengthen the Justice Systems:

Though law allows imposition of costs for abuse of judicial proceedings, courts seem to be reluctant to exercise the power effectively to check the dilatory practices and manipulative lawyering on the part of advocates/ parties. The fear of exemplary costs can save the system from unscrupulous lawyers who are a law unto themselves and sometimes bully the judges to get favorable orders.

The Supreme Court in its judgment on May 6, 2014 in the case of *Subrata Roy Shahara v. Union of India*[5] had said:

> *"The Indian Judicial system is grossly afflicted, with frivolous litigation. Ways and means need to be evolved,*

[5] Writ Petition No. 57 of 2014.

to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side, of every irresponsible and senseless claim. He suffers long drawn anxious periods of nervousness and restlessness, whilst the litigation is pending, without any fault on his part. He pays for the litigation, from out of his savings (or out of his borrowings), worrying that the other side may trick him into defeat, for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for, what he has lost, for no fault? The suggestion to the legislature is, that a litigant who has succeeded, must be compensated by the one, who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly, pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs".

.... This abuse of the judicial process is not limited to any particular class of litigants. The State and its agencies litigate endlessly up to the highest Court, just because of the lack of responsibility, to take decisions. So much so, that we have started to entertain the impression, that all administrative and executive decision making, are being left to Courts, just for that reason. In private litigation as well, the concerned litigant would continue to approach the higher courts, despite the fact that he had lost in every courts hitherto before. The effort is not to discourage a litigant, in whose perception, his cause is fair and legitimate. The effort is only to introduce consequences, if the litigant's perception was incorrect, and if his cause is found to be not fair and legitimate, he must pay for the same. In the present setting of the adjudicatory process, a litigant no matter how irresponsible he is, suffers no consequences. Every litigant therefore likes to take a chance, even when counsel's advice is otherwise. The

practice to pass illegitimate claims is so rampant, that in most cases, disputes which ought to have been settled in no time at all, before the first court to go, up to the highest Court... When the litigating party understands, that it would have to compensate the party which succeeds, unnecessary litigation will be substantially reduced. At the end of the day, Court time lost is a direct loss to the nation. It is about time, that the legislature should evolve ways and means to curtail this unmindful activity."

Reforming the Bar : Imperative for Strengthening the Justice System:

No reform in the justice system can succeed without the involvement of the bar for which the organization and management of the profession must undergo radical changes. Bar Associations are becoming more powerful in influencing the lawyers' professional conduct than Bar Councils in some places. Bar associations are being formed on the basis of political party affiliations dividing the bar and destroying its integrity. Money and party affiliations control elections to bar councils and senior members of the bar are either indifferent or themselves involving in abetting such practices. No wonder the public image of the profession is the first casualty and the regulator becomes ineffective in regulatory functions. Has the profession failed in self-regulation is the question raised by lawyers themselves. A fresh look at the Advocates Act has become imperative for strengthening the justice delivery system.

Justice R.V. Raveendran*

Background:

Indian Judiciary presently consists of around 30 Supreme Court Judges, 700 High Court Judges, and 15,000 Trial Judges for a population of 122 crores. This leads to a Judge-Population Ratio of 13 judges per million as against 110 per million in U.S.A. and 60 per million in Australia.

The number of cases pending in Indian Courts is about 27 million in the trial courts, about 4.5 million before State High Courts and about 70,000 before the Supreme Court. This means an average case load of 2,000 cases per judge. All trials, either civil or criminal, are non-jury trials. Except review petitions in the Supreme Court, all cases are heard in open court and all parties have the opportunity to put forth their cases in writing supported by oral submissions.

After independence, for several years, the number of civil cases and number of criminal cases pending in courts were of equal proportion. Gradually, the proportion of criminal cases has increased. At present, out of the 27.5 million cases pending in trial courts in the country, only about 83 lakhs are civil cases and 192 lakhs are criminal cases, that is, a ratio of 2:5. In most of the States, the criminal cases far outnumber the civil cases. In the states of Bihar, West Bengal, Madhya Pradesh, Orissa, Uttarakhand and Delhi, the ratio between civil and criminal cases is around 20:80; in the states of Uttar Pradesh, Chattisgarh, Assam and Rajasthan the ratio is around 25:75; in the states of Maharashtra, Gujarat and Kerala, the ratio is around 35:65; and in the states of Andhra Pradesh (united), Punjab, Haryana and in Chandigarh and other union territories, the ratio is almost equal, that is, 50:50. The exceptions appear to be only Karnataka and Tamil Nadu where the civil cases are reported to be much more and the ratio between civil and criminal cases being around 60:40.

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* Former Judge, Supreme Court of India, Public Law Lecture delivered at the NJA Regional Judicial Conference (West Zone), held at Uttan on 2nd November 2014.

There are two views about this skewered ratio. The first view is that this shows an unhealthy situation, that is increase in civil cases shows the confidence of the common man in the judiciary, as he voluntarily approaches the courts with a desire to find a solution to a pending dispute in a civilized manner through the decision of a public adjudicator; and increase in the number of criminal cases shows increase in criminal activities, unrest and violence. It is stated that the existing skewered ratio on account of high pendency of criminal cases shows that the common man is losing confidence in the judicial system (on account of delays, uncertainty of outcome, inflexible results, high costs, etc); and as a result more and more are disinclined to approach civil courts for relief and take law into their own hands, thereby increasing crimes and consequently increasing the criminal cases. The second view is that the common man's trust and faith in the judicial system remains unshaken; and the steep increase in criminal cases is on account of criminalisation of various acts which were not earlier crime, but merely civil wrongs. They refer to the example of dishonour of cheques being made a criminal offence (which was not so earlier) by an amendment to Negotiable Instrument Act, which has led to an increase in the criminal pendency by as many as 2.5 million cases. Another example given is in regard to wrongs relating to marital relations being criminalised by creating the offences of domestic violence, marital cruelty and dowry harassment, etc. which has led to a large number of criminal case. Be that as it may.

Out of the criminal cases, the cases relating to offences triable by court of Sessions constitute hardly 5%, other warrant cases triable by Magistrates constitute 20 to 25% and summons cases constitute the remaining 70 to 75%. Though law makes a provision for plea bargaining, it has not been effective.

Disputes relating to lands and buildings, employment (in particular relating to government and quasi-government employees), family relations and compensation claims (motor accidents and land acquisition) constitute the bulk of civil disputes. Special fora outside the judiciary deal with consumer disputes. About 80% of the civil cases go to trial and only about 20% of the cases get settled at pre-trial stage.

The Indian judiciary has been statutorily entrusted with the following legal service functions under the Legal Service Authorities Act, 1987: (i) spreading legal awareness; (ii) providing legal aid; and (iii) implementing Alternative Disputes Resolution processes.

The pluralistic Indian Society is multi-religious, multi-caste, multi-lingual, multi-regional and multi-layered. Arable land is limited. Unemployment is high. By Indian Standards, about 27% of the population that is nearly 300 million are below the poverty line. By international standards, nearly 75% of Indians are

poor and 45% are extremely poor. The poorer sections, due to their social and economic backwardness, find it difficult to access justice. Caste and community based differences, strife, fights, rivalries are eroding the peace and prosperity of the country.

Most of the contested cases – civil and criminal – take two to five years for disposal. In some states and in some category of cases, the period of pendency may go up to ten years. In some states, due to heavy pendency of cases, criminal and civil appeals can take even two decades for hearing and disposal. Indian courts have become synonymous with delay.

The Supreme Court enjoys the reputation of being the only hope for the country against political nepotism, arbitrariness and inefficiency. When public interest litigations espousing public causes or exposing scams come up before the Supreme Court, and the court makes populist observations or scathing remarks or pulls up the establishment, the court is very 'popular'. But when it comes to delays in disposal, its reputation takes a beating. Another harsh reality is that credibility of High Courts is lower and the credibility of lower courts are much lower.

These social, economic, and political factors throw four challenges to the Indian Judiciary: (i) How to render speedy and effective justice? (To deal with the problem of delays and lack of effective justice). (ii) How to popularize ADR processes? (To improve personal and commercial relationships in the society, to take the load from the shoulders of courts to reduce cost and save time for litigants and to provide flexibility/choices in solutions/reliefs). (iii) How to provide access to justice to the needy and downtrodden? (To deal with lack of access to justice to the poorer and weaker sections of society) (iv) How to maintain its credibility and regain the trust and confidence of the general public? (To deal with erosion of credibility of judiciary as an institution and the gradual loss of trust and confidence of the common man in courts).

Providing an effective solution depends upon identifying the problem and its various dimensions. *How effective an answer is - depends upon how clear the question is.* Let me, therefore, first identify and describe the areas where problems and challenges arise:

(i) Rendering speedy and effective justice.

(ii) Popularising ADR processes.

(iii) Providing access to justice.

(iv) Maintaining credibility.

Challenge I: Rendering Speedy & Effective Justice:

The biggest challenge is the huge backlog and the delay in disposal of cases. The pendency in high courts and trial courts is steadily increasing. A decade ago, that is at the end of 2004, about 34 lakh cases were pending in the high courts and about 246 lakh cases were pending in the trial courts. This has risen to around 44 lakh cases in the high courts and around 275 lakh cases in the trial courts.

Courts function under procedural laws, which are old and somewhat, outdated. The Code of Civil Procedure is a century old. The new Code of Criminal Procedure is more than 40 years old and it is only a rehash of an earlier Code, which was a century old. The Evidence Act is of the year 1872. These procedural laws were enacted when litigation were few. They were made with meticulous care to ensure fair play, uniformity and avoidance of judicial error. They provide for appeals, revisions and reviews. They enable filing of innumerable applications, which often results in the main matter itself being lost sight of. They enable motions for adjournments, which are routinely sought and given. Delay has thus virtually become a part of the judicial process. The Chief Justice Warren Burger of American Supreme Court once remarked: *"All litigation is inherently a clumsy, time consuming business"*.

The proliferation of laws and increase in population has resulted in an enormous increase in the quantum of litigation. There has been no Judicial Impact Assessment in regard to new legislations. To give an example, insertion of a provision in Negotiable Instrument Act making dishonouring of cheques, a criminal offence, has resulted in an annual filing of about 2 million criminal complaints. There is no increase in the strength of Judges corresponding to the increase in litigation. The overloaded judicial system has to struggle with huge pendency, insufficient manpower and elaborate procedural laws. A powerful bar with a mindset tuned to think of life-cycle of cases in terms of years and decades rather than months and a vested interest in adjudication of cases rather than negotiated settlement, does not help matters. The response of the Executive to the demands for more Judges, more Courts, and better infrastructure has been lukewarm. The response of the Legislature to the demand for better laws has been slow. It has become quite common for civil disputes, in particular litigations involving family divisions (partitions/succession), evictions, easements and specific performance, to be fought for several decades through the hierarchy of courts. In commercial litigations, delay destroys businesses. In criminal cases, the major punishment in most cases is the harassment of pending criminal prosecution rather than the ultimate result. In family disputes, delay destroys peace, harmony and health turning litigants into nervous wrecks. The

delays, when considered with other factors associated with litigation, in particular, the inflexibility in decision-making, technicalities in laws, high cost in regard to some category of cases, make the litigants feel that justice has become elusive and illusive. Consequently, there is a real danger of confidence in the rule of law and the existing justice delivery system, getting eroded.

As a result, people with grievances, causes of action, and complaints start thinking of solutions outside legal framework to get quick relief. A landlord who wants possession from a tenant, knowing that litigation may take years, starts thinking of engaging the services of musclemen to evict the tenant. More and more reports are received about citizens approaching the underworld or unscrupulous police officers to settle claims and recover properties. Moneylenders, and even Banks, instead of approaching Law Courts, have started entrusting debt collection to dubious agencies, who coerce, threaten and bully borrowers to repay the amounts due. Though well aware that such methods are illegal, costly and risky, more and more persons are misled into believing that recourse to illegal methods, will give swift, decisive and effective result. In this process, the society gets criminalized. This is the most dangerous among the several fallouts of delay.

The injustice caused on account of delay in criminal cases also requires to be noticed. At any given point of time, there are about three lakh under-trials in prisons, which is about two-third of the prison population. In some states like Bihar, nearly 80% to 85% of the prison population is made up of under-trials. Only in a few states, the percentage of under-trials in prisons is around 50%. More than three thousand under-trials are rotting in jails for more than five years. There are nearly two thousand children behind bars as their mothers are under-trial prisoners. Empirical studies show at least 50% to 60% of the under-trials in jail are acquitted on completion of trial. When the under-trials who are behind bars for two or three or four or five years and thereafter acquitted, he/she has no remedy for the years lost, freedom lost, reputation lost. Same is the position for convicted accused, who continue in jails during the pendency of their appeals, hearing of which may take anywhere between one to two years, and even 20 to 25 years in some states.

Challenge II: Popularizing ADR Processes

A litigation ending in a contested decision invariably leads to bitterness, hostility and enmity between the parties to the lis, as the losing party continues to nurture a grievance against the successful party. In a civilized society, parties are expected to accept the decisions of Court with grace, but that seldom happens in reality, particularly in suits relating to partition among family members,

disputes between neighbours, disputes between partners and disputes between spouses. On the other hand, if there is a settlement by conciliation, there are neither winners nor losers, as the result is acceptable to all. It is said that decision on contest creates two enemies whereas a consensual decision creates two friends. Settlement of a good percentage of cases by a continuous process of conciliation has the following other beneficial fall-outs also : (i) The pressure on Courts and Legal Practitioners on account of heavy pendency is eased with the result that the Court's Board comes to manageable limits. As a result, Courts can deal with contested cases, more effectively, thoroughly and expeditiously. (iii) The cost of litigation is reduced considerably as the expenses of a long litigation are avoided. There is enormous saving of time and energy for litigants and witnesses. (iv) The average period of pendency of cases will come down drastically and it will be possible to have decisions in any litigation within a short and reasonable period. But is it happening? The answer unfortunately is 'no'. Hardly 15% of cases get settled in India at Pre-Trial stage. 85% of cases go to trial. If so, what are the reasons for ADR processes not attaining the required popularity and acceptance among litigants?

Reluctance of litigants - Every litigant believes that he has a very strong case. Such impression is based either on his own perception of the case, or on the assurance of success given by his counsel. He, therefore, feels that any settlement involves giving up a part of his right or claim by showing a concession to the other side. As a consequence, when a matter is brought to the negotiating table, many a litigant starts with an initial resistance and prejudice, as he believes that he will get a larger relief by prosecuting or contesting the litigation and there is no need to settle the matter by agreeing for a lesser relief. The awareness about the efficacy of ADR processes is sketchy. The litigants largely go by the advice of their counsel who are not favourably inclined towards ADR processes.

Reluctance of lawyers - The reluctance on the part of some sections of Advocates, to settle cases by ADR methods, stems from their fear that they may not be able to charge or receive the full fee, if the case is settled. The fee received for a case involving a full-fledged trial with possibilities of one or more appeals, it is felt, is several times more than the fee that can legitimately be claimed if a matter is settled without trial. In mofussil areas where the lawyer population is high in proportion to pending litigation, there is a feeling of insecurity associated with ADR process. At many places, the members of the Bar are of the view that encouraging settlements and early disposal of cases will affect their livelihood. In small towns, say where the number of lawyers is 30 to 40 and the total pendency of cases is about 600 to 800, many members of the Bar have hardly 10 to 20 briefs. Such lawyers feel that longer pendency

provides them with a steady income and that they can ill-afford to settle cases by adopting ADR methods. Such insecurity is prevalent among sections of City Lawyers also. Lawyers also express reluctance to persuade their clients to arrive at a negotiated settlement for another reason. It is stated that when a Lawyer suggests a settlement, many a client start doubting his capacity and integrity. Therefore, a section of the Bar feels that when they have been engaged to conduct cases, their duty is to conduct cases, and not to assist in settling them.

Proliferation of Lawyers - One paradox is more the lawyers, less the settlements by ADR processes. Let us see how. There are more than 1000 Law Colleges in India. There are nearly one and quarter million lawyers in India. Every year there is an influx of 70,000 to 75,000 law graduates into the legal profession. Most of them became litigators. Comparatively, very few go into corporate legal field. As a result, the saturation point has already been reached with reference to the existing quantum of litigation. Let me illustrate its adverse effect. If there are 10,000 cases in a town with 100 lawyers, each lawyer would have an average of 100 briefs. In such a situation, the members of the Bar would all have sufficient work. Consequently, they will settle cases, which deserve to be settled and fight only those, which merit a fight and also advice clients against unnecessary litigation. On the other hand, for the very same 10,000 cases, if there are 1000 lawyers, then the average number of cases per lawyer becomes ten. If a lawyer has only ten cases and he has to eke out his livelihood from those ten cases, his entire attitude changes. He naturally will not let go of any of those ten cases. Even if any case deserves to be settled, he will not permit it to be settled. His tendency would be to hold on to each case and prolong the case to the maximum extent, so that his meagre income is not affected. Quality of the Bar is not improving by proliferation.

Absence of compelling needs to use ADR processes - Yet another reason for non-development of ADR processes is the absence of any compelling reason for the litigant to prefer ADR settlement route. Contrary to the popular belief, except in some highflier cases, litigation is not at all costly in India. Further the litigant incurs the major part of the expenditure when he initiates the litigation by way of court fee and lawyer's fee. The court fee payable is usually a nominal fixed amount (except in a few categories of cases, where the court fee is payable *ad valorem* on the claim or market value). Even where *ad valorem* court fee is payable, in the case of agricultural lands (which constitutes the subject matter of majority litigation in rural areas) court fee is payable, not with reference to the actual market value of the property, but with reference to a nominal value based on the revenue assessment of the land. The lawyers' fee is traditionally

fixed on a lump-sum basis. The subsequent expense is not much. In developed countries when a civil dispute *goes to trial,* the litigation becomes prohibitively expensive. The loser has to pay *actual* costs of the other side. Therefore, litigants in those countries think twice before proceeding to trial and make a genuine effort to settle their cases before trial. Consequently, hardly 15% of cases go to trial in developed countries. Unlike developed countries, a litigant in India, on losing a litigation does not bear or pay the actual costs of the other side, but only pays a very nominal amount as costs and that too not in all cases. The absence of fear of being mulcted with heavy costs, in the event of the case going to trial and ending against him, therefore, acts as a dis-incentive to the litigant to adopt ADR process.

Non-use of ADR process in government litigation - Wherever the Government or a Statutory Authority is a party to litigation, the chances of a negotiated settlement are rather dim. The reluctance is not on the part of the government or the statutory body, but on the part of the officers in charge of the litigation. Where the Government or a statutory body is a litigant, the reluctance to settle by adopting ADR process, stems from the self-interest of the government servant to 'cover' himself against accusations of graft. The officers concerned always have an apprehension that corrupt motives may be attributed to them, if they agree to a settlement, or that they may be found fault with, by their Official Superiors or by the Audit. This results in a 'pass the buck' syndrome. There is a tendency on the part of the officers of the Governmental and Statutory Authorities to shift the responsibility for dispute resolution to an adjudicatory forum. An officer of the government will refuse to settle a claim for One Million, but will readily accept a decision of the court or the Arbitrator and pay Ten Million to a claimant.

Challenge III: Providing Access To Justice

Each grievance and complaint of weaker sections, poor and down-trodden is invariably a cry for justice, involving a human problem relating to life, liberty, food, shelter, safety or security. Poverty and ignorance are the twin barriers denying them the access to justice. Financial aid, legal awareness and easy access to justice, can remove these barriers and give them a level playing field to seek and secure justice.

The socially and economically backward classes and the poor, when subjected to injustices and inequalities, when not able to access effective and speedy justice, either on account of ignorance of their rights and remedies, or want of funds to litigate, tend to take law into their own hands. Several disputes which ought to have found solution in civil litigation end up as crimes. As a

result, there is an alarming trend of reduction in civil cases and increase in criminal cases.

There are also political and social ramifications of discontent arising from the inability to get justice. If the poor and weaker sections cannot go to Police for fear of being ignored, harassed or being falsely implicated, and if they cannot approach courts, for want of easy access, then they do not have any effective forum to ventilate their grievances. That leads to resentment, frustration, and a feeling of injustice and helplessness, which, becomes a dangerous mix erupting into sudden and serious violence. Those subjected to injustices and not having access to justice, became easy prey to calls for terrorism, anarchy, insurgency and vigilantism, tearing the very fabric of democracy.

Indian Judiciary, by tradition, follows the British system where the Judge is considered to be a neutral umpire who is not expected to investigate into truth, but merely consider the oral and documentary evidence placed before him, hears the arguments and then decide in favour of one who has made out a better case on law and facts. He takes no active or positive part in moulding or guiding the case nor seeking truth. Of course, in an ideal adversarial litigation, where the parties are evenly matched and are represented by competent lawyers, truth and justice may ultimately prevail and it may be proper for the judge to merely sit, listen and watch. But what happens where the dispute is between a rich and powerful on one side and a poor and down-trodden on the other? What happens when the litigation is between the poor citizen on one side and the mighty state on the other? What happens if persons in power act against the interests of the government for personal gain? What happens if the person who comes knocking at the doors of the court is a woman, child, aged, infirm or disabled who do not have any resources to fight? What happens when a native tribal, who does not know what his rights and obligations are, is catapulted into a litigation, where the adversary is either the government or a scheming land shark or a ruthless loan shark? Should the Judges keep quiet and watch when the interests of the poor and weak are mauled and destroyed? Should the judge merely sit and watch when a false and trumped charge is brought against an innocent by the police or when the rich and powerful cover up their misdeeds and draw red-herrings with the help of smart lawyers? Should the Judge sit and watch when sabotaging the trial begins from the very stage of registering the complaint and the basic evidence is not presented by the prosecution? Is it not the duty of courts to not only do justice, but also to ensure that justice is being done?

Challenge IV: Maintaining Credibility

It is John Marshall, I recall, who said: *"Power of Judiciary lies, not in deciding cases, not in imposing sentences, not in punishing for contempt, but in the trust, faith and confidence of the common man."* Great institutions when they grow, tend to become unwieldy and lethargic and find it difficult to keep pace with the growing expectations. Resultantly, there is erosion of credibility and trust. Let us examine some factors leading to such erosion in the case of Judiciary. I have already referred to delay and access to justice. Improving the efficiency of Judiciary is a separate subject.

The uncertainty of the outcome

Litigants hate uncertainty. Lawyers hate uncertainty. A lawyer likes to be able to predict the outcome of a case, with reference to the prevailing legal position as applied to the facts of the case. Citizens arrange or conduct their affairs in accordance with the settled position of law. If a citizen is before a court, he expects the same treatment and same relief as others who are in a similar position.

The outcome of a case depends on several things - the facts, the legal position, the manner in which the case is presented, the ability and efficiency of the Advocates, the care taken by the litigant to place all relevant facts on record, and the understanding capacity, personal philosophy, integrity and impartiality of the Judges at trial and appellate level. In short, there are several factors beyond the control of the litigant which lead to uncertainty regarding the outcome. A litigant may win in the trial court, but lose in appeal. He may win in the trial court and first appellate court, but may lose in a second appeal. On the other hand, he may lose before the trial court as also in the first appellate courts but succeed in the second appeal. The hierarchy of appeals and revisions lead to reversals and further reversals. This again leads to uncertainty as to what the result will be, when someone wants to initiate a legal action. Nothing is certain.

The law declared by the Supreme Court is binding on all courts in India and the legal position enunciated by the State High Court is binding on all the courts in the respective States. To deal with the large number of cases, the Indian Supreme Court normally sit in divisions that is either Benches of two or three Judges. In High Courts, the Judges sit either singly or in a bench of two Judges. Due to work pressure, many a time, the previous binding decisions are not noticed. This leads to divergence and inconsistency and lack of uniformity in decision-making.

The personal philosophy of the Judges also adds to the uncertainty and inconsistency in views. Benjamin Cardozo in *The Nature of the Judicial Process – Lecture I,* put it aptly thus:

> *"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction in thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions ... ... It is often through these sub-conscious forces that Judges are kept consistent with themselves, and inconsistent with one another."*

On account of their personal philosophies, some Judges are identified as acquitting Judges and some as convicting Judges; some as liberal and some as strict in compensation cases; some as pro-labour and others as pro-management. Resultantly, many similar cases may end up with different results with different Judges.

Uncertainty and lack of uniformity is a serious problem. But when coupled with other aggravating factor like the capacity (knowledge and commitment) or the integrity of the Judges, it becomes a credibility/confidence eroding factor.

Disproportionately high number of acquittals

> An eminent lawyer recently wrote with anguish, in a newspaper article – *"In India, many major crimes are not reported. If reported, seldom registered. If registered, the true perpetrator is seldom identified and many an innocent is framed (who himself becomes a victim). Even if the true perpetrator is identified, he is not charged. Even if charged, not properly prosecuted. Even if prosecuted, he is usually not convicted. Even if convicted, not adequately punished. At each crucial stage – reporting the crime, registering FIR, investigation, prosecution, charging, letting evidence and conviction, the system has enough loopholes to allow criminals to walk free."*

The large number of acquittals in criminal cases is mainly due to three reasons. The *first* is the criminal procedure, which is tailored to give effect to the doctrine that "Let hundred guilty go unpunished but not one innocent should be wrongly punished", is constantly misused by defence lawyers. The *second*

is the lacunae in investigation (by the police) and in prosecution (by the prosecuting agency). The sabotaging of trials due to corruption or political pressure is common and it is widely believed that: recording of complaints/first information is delayed; many a time, cases are not even registered; material documents are fabricated, tampered, interpolated; cognizable offences are converted into non-cognizable offences and non-cognizable offences are converted into cognizable offences; search and seizures are tailor-made and many times involves planting of material; third degree methods are used to extract false confessions. The *third* is delay. When there is delay witnesses forget; witnesses die; witnesses are threatened, or witnesses are bought and either their mouths are shut or they are made to turn hostile. As a result, majority of contested criminal trials result in the acquittal of the accused, by giving benefit of doubt, on the ground that guilt has not been proved beyond reasonable doubt. Emboldened by the lack of convictions, slowly and steadily, more and more commit crime as they believe that they can get away with the crime, creating a crime-ridden society. Unfortunately, the blame for the high percentage of acquittals (almost 75% in contested criminal trials) is placed at the doorsteps of the Judiciary.

Inadequacies in the legal system

The justice delivery system will be considered to be satisfactory when it renders speedy, fair and efficient Justice at a reasonable and affordable cost which results in maintenance of rule of law, securing human rights and ensuring constitutional good governance. To achieve this goal, it is not sufficient to merely improve the performance of Judges but a parallel effort should be made: (i) to reform the legal profession; (ii) to improve legal education; and (iii) to ensure that better laws are made and bad laws are repealed.

Murmurs regarding integrity of Judges

When there are murmurs about lack of integrity, Judiciary should maintain a constant vigil to ensure that corruption in any form does not enter its halls and corridors.

There are different views on the question whether corruption in judiciary should be discussed and dealt with. One view is that instances of corruption should be considered as mere aberrations and there should be no open debate as that tends to erode the confidence in the judiciary. It is pointed out that the trust and confidence will continue only if the judiciary is seen as a noble, virtuous and incorruptible institution; and if there is a constant talk or debate about corruption in the judiciary, even when the corruption is negligible, people will lose their faith in the judiciary, thereby eroding the strength of the judiciary.

Another view is that the corruption in the judiciary is to be openly discussed and widely published, so as to send a warning signal to erring Judges and to instill confidence in the system. Proponents of this view argue that corruption should be exposed and dealt with publicly instead of sweeping it under the carpet. Transparency, they say, is the key. There are others who take the middle path and argue that while there is no need for unwarranted publicity and debate in regard to corruption, there is need for firm and swift internal action whenever corruption raises its head. As the standard of probity expected of Judges is high, and as the expectations from the judiciary are also high, it is argued that the damage to the institution on account of unnecessary adverse publicity would be irreparable; and that therefore, there should be more internal debate within the Judiciary for devising ways and means to eradicate corruption and take firm and prompt action in regard to complaints of corruption.

There is also considerable disinformation about the extent of corruption. Firstly, some honest judicial officers have a strange tendency. Each think that he alone is the personification of honesty and that it is their exclusive virtue. They tend to look down upon all others with a supercilious high-brow that others are not maintaining their standards and levels of honesty, probity and impartiality. On the other hand, a corrupt judicial officer, to ease his conscience, force himself to believe that everyone else is also corrupt and therefore there is nothing wrong in his being corrupt. The result is that in the judiciary itself, many may be responsible for creating a wrong perception about the extent of corruption in the system.

There are several instances of lawyers, when they lose cases, attributing the result to the inefficiency of the Judge and much worse, alleging lack of integrity of the Judge, rather than admitting the weakness in the case or slipshodness in conducting the case. Some designated court officials and touts operating in courts also spread baseless rumours of corruption, to settle scores for the strictness of the Judge. When a Judge has a particular philosophy, as for example, when a Judge is an 'acquitting Judge', everyone in the legal fraternity will know that his judgments will have a high percentage of acquittals. Unscrupulous court-clerks and lawyers knowing about the 90% chance of acquittal will inform the accused or his relatives that they can influence the decision and take money in the name of the Judge. When the innocent Judge renders the judgment of acquittal, he earns the sobriquet of a 'corrupt Judge' from the litigant or his family. When the judge convicts the accused, the money is returned by the clerk/lawyer saying that the deal did not go through. There are several other instances where Judges are wrongly blamed of corruption. Be that as it may. That subject needs a separate article.

Problems and Solutions identified during several Conferences and Workshops of Judges:

Discussions and debates among judges in various law conferences have repeatedly identified the following causes for the delay: (i) Inadequate number of judges; (ii) Lack of infrastructure; (iii) Lack of efficient secretarial assistance; (iv) Incompetence of court staff; (v) Lack of co-operation from members of the Bar; (vi) Shortage of Public Prosecutors; (vii) Incompetent or shoddy investigations by police and other investigating agencies; (viii) Delay in service of summons/notices to accused/ defendants / respondents by Process Servers and Police; (ix) Judges being burdened with extra-judicial work (like Legal Services) diverting their focus and time from judicial work.

Conferences and workshops of judges also throw up the following standard solutions: (i) Adopting case management techniques; (ii) Revamping of registry; (iii) Effective use of information technology; (iv) Levy of high costs as deterrent; (v) Shortening pleadings, evidence and arguments (that is Members of the Bar making an effort to be brief in pleadings, evidence and arguments by better preparation and research);(vi) Grouping and classification of cases wherever possible for wholesale disposal; (vii) Discouraging unnecessary leave and absence by judges and court staff; (viii) Improving the efficiency of the registry by strict supervision and by proper training of the court staff; (ix) Increasing number of judges so as to maintain a healthy judge-population ratio; (x) Improving the infrastructure; (xi) Providing technology aids and better secretarial assistance to judges; (xii) Building awareness among litigants and prospective litigants about alternative dispute resolution procedures.

In spite of identification of some problems and some solutions, very little has been done or is being done to address the problems and put in place effective solutions. This is because, some of the solutions are in the hands of judges, some of the solutions can be provided only by other stakeholders, namely the government, the Bar and the general public. Therefore, it is necessary to identify the problems that can be addressed by High Court, problems that can be dealt by judges themselves, problems that can be sorted out by the government and the problems that can be tackled only with the assistance from the Bar and members of the public. Let us now see what each can do:

(A) What Judges can do?

i. Judges should improve their judicial skills and administrative (management) skills.

ii. Judges should use technology and apply and adopt case management/ case flow management principles, for enhancing the quality and

increasing the quantity of decisions for providing access to justice and for expediting the disposal of cases.

iii. Judges should keep in mind the constitutional values and goals and make a sincere attempt to render justice, rather than mechanically 'disposing of' cases being obsessed with statistics.

iv. Judges should maintain ethical standards and values in judicial life.

v. Judges should encourage ADR process and meaningfully participate in ADR processes.

(B) What High Courts can do?

i. Train the judges to increase their potential – capability and efficiency.

ii. Train the court officers, secretarial assistants, clerks and sub-staff, so that they can function as efficient support staff.

iii. Should support judges in their work and protect them from unwarranted criticism, media pressure and political interference. This means that the High Court should not take note of the complaints against judges, in particular anonymous complaints not supported by any material.

iv. Regulate and streamline the reporting of decisions, so that they are not deluded with divergent views or wrong views. All and sundry decisions should not be marked for reporting.

v. Avoid, or at least reduce drastically, deputing or posting judges to non-judicial/non-adjudicatory work.

vi. Liberate judges from Legal Services, in particular organizing and conducting legal awareness programmes and Lok Adalats.

vii. Periodically assess the performance of judges and offer them guidance and counselling and redress their grievances.

viii. Recommend measures for institutional reforms, adequate infrastructure, and facilities for the judges.

(C) What Governments can do?

i. Asses the number of courts required periodically and provide the additional courts with adequate infrastructure and staff, in consultation with the High Court.

ii. Entrust the services relating to legal aid and non-adjudicatory Alternative Dispute Resolution process to the Executive for implementation in consultation with the High Court/other stake holders, by appropriate amendment to Legal Services Authorities Act, 1976.

iii. Simplify procedural laws to expedite hearing and disposal of cases.

iv. Improve the legal system by improving Legal Education and providing for compulsory apprenticeship.

v. Establish an All India Judicial Service and create a Judicial Management Cadre to manage the administration of judiciary at all levels.

vi. Establish a Research & Training Centre for development of Legislative Drafting, Judicial Impact Assessment, training Law Officers.

vii. Improve the functioning of investigating agencies (Police) and prosecuting agencies (Directorate of Prosecution) to ensure proper and timely investigation by investigation agencies and prosecution of accused.

viii. Curb/discourage/prohibit trial by media which affects the independence and impartiality of Judges (without infringing upon the freedom of the media).

(D) What the Bar can do?

i. Render proper assistance to Courts for effective and timely disposal of cases.

ii. Protect the reputation of the Judiciary.

Let me refer to some of these solutions in greater detail.

(A) The Role of Judges

Improving the potential, capability and efficiency of the members of the judiciary:

A judge has to develop five judicial skills to discharge his functions efficiently. They are: (i) thorough knowledge of the procedural laws; (ii) broad acquaintance of the legal principals and substantive laws; (iii) skill of conducting a proper hearing, in particular, in recording evidence and hearing arguments; (iv) marshalling the facts to deduce findings of fact and apply the law

appropriately, to reach proper conclusions and decision, and put the facts, reasons and conclusions in the form of a cogent judgment/ order; (v) skill of disposing interlocutory applications and dealing with requests for adjournments, to ensure that they do not impede the progress of the case. A judge also requires five administrative skills to be effective, that is (i) time management; (ii) board management; (iii) staff management; (iv) Bar management; and (v) self-management. I have dealt with these judicial and managerial skills in detail in my article *'How to be a Good Judge – Advise to new Judges'*[1].

Effective use of information technology and case/case-flow Management Techniques:

Information Technology has helped in making the judicial administration more efficient and transparent, apart from reducing corruption in the Court Registries. The older judges will recall the days of chaos, delays and irregularities in issuing certified copies, listing cases, tracing files, etc. before computerisation. Information Technology has also helped on the judicial side in recording evidence, in maintaining judicial records and in accessing case laws. Status of cases of Supreme Court and High Courts and some trial courts are now web-hosted. Lawyers can keep track of cases at the click of a button and litigants can ascertain the status of a case without visiting the lawyer's office or court. This facility should be extended in regard to all courts. The next stage is to convert courts into e-courts fully or at least partially, so that filing, maintenance of records, recording of evidence and hearing arguments, are all computerised. Video conferencing will avoid personal appearances of parties and lawyers at routine hearings. Video recording of evidence and hearing of arguments through video conferencing can also avoid travel of parties and lawyers, congestion in courts and speeding of hearings. Information Technology can also play crucial part in effective grouping of cases and in following up of the progress of the old or sensitive cases.

Most of the High Courts have formulated case/case flow management rules. The Judicial Academies, both National and at State levels, have been training judges in adopting management techniques for expediting hearing and early disposals. The said Rules require revision and modification/fine tuning to usher in an era of efficiency, transparency and quality.

Shifting emphasis from 'disposals to 'justice':

Every judge should imbibe the constitutional goals and values, in particular Fundamental Rights, Directive Principles, as also Charter of Human Rights,

[1] 2012 (9) SCC J-5.

and keep them in view while rendering justice. This becomes relevant while dealing with cases relating relating to weaker sections – social backward, economically backward, physically weak and infirm (due to age or illness, etc.; women, children, mentally challenged). The goal of every judge should be to render justice fairly and equitably, but in accordance with law. Unfortunately, there is a growing tendency on the part of judges to lay emphasis on 'disposals' rather than rendering 'justice,' due to the tremendous pressure on judges as a result of the following:

(a) Fixing of quotas by the High Court, which requires the judges to decide minimum number of cases and earn minimum number of units every month. Fixing of quotas, many a time, is unrealistic, impractical and statistics oriented and requires constant revision.

(b) Directions by the Supreme Court and by the High Courts to dispose of cases expeditiously, either by fixing time limits for disposal, or by directing that hearings be held day to day.

The Supreme Court and High Courts, while issuing such directions, consider only the urgency of the case before them and the need to dispose of such case expeditiously. They do not take note of the fact that there may be several older matters or there may be several more urgent matters requiring the attention of the judge. The pressure on account of such directions comes in the way of judges doing justice to deserving cases by making their own assessment of the comparative urgency of the cases. An observation about the need for early disposal rather than a positive direction for time bound disposal would be more appropriate and enable the judge to render better justice.

While certain amount of pressure to dispose of the cases is inevitable, an effort should be by the concerned to reduce such pressure so that judges can function freely, equitably, justly and fairly.

Improving the Ethical Standards and Work Culture of Judges:

Improving the ethical standards and work culture of judges is a vast subject which requires a separate article. I have dealt with the aspects relating to ethical standards of judges (integrity, judicial aloofness, independence, judicial humility and impartiality) in detail in my Article *'How to be a Good Judge – Advice to New Judges'*[2]. I do not therefore propose to repeat them here.

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[2] 2012 (9) SCC J-5.

Making effective use of ADR Mechanism:

Considerable effort has been put in to popularise ADR processes, particularly in court annexed mediation and an indigenous form of conciliation (known as Lok Adalats or People's Fora where the Judges act as conciliators). The focus in these Adalats is on motor accidents claims and petty criminal cases. The court annexed mediation centres concentrate on family disputes and commercial disputes.

The Legal Service Authorities and Mediation Committees, have been attempting to spread awareness in regard to ADR processes. Special workshops are held to educate Judicial officers about the relevance and importance of ADR processes and need to refer pending cases to court annexed ADR processes. The Civil Procedure Code has made it mandatory for all courts to refer pending cases to ADR process. Government is slowly encouraging ADR process where it is a litigant. Programmes are also held with the co-operation of bar associations to familiarise members of the Bar with ADR processes and its advantages, so as to remove their doubts about the efficacy of ADR processes, clear their apprehension that ADR will reduce their briefs and affect their livelihood. Once the Bar understands the need and efficacy of ADR process and realizes that it will provide easier and quicker remedies to the litigants, ADR process will become a meaningful tool for effective settlements.

But, either the efforts are insufficient or the methods used are not very effective. As a result, ADR processes have yielded only a limited success. We are nowhere near the target of settling 80% to 90% of the cases at pre-trial stage. Hardly 10% to 20 % of cases get settled in pre-trial stage, most of which are directly negotiated settlements between parties without the recourse to ADR processes. Experience shows that success of mediations and Lok Adalats is dependent upon the commitment and interest shown by the respective High Courts and the commitment and expertise of the Mediators/ Lok Adalat Members. Institutionalization and constant education of lawyers, litigants and judges by awareness programmes, is the solution for improving the ADR mechanism.

(B) The Role of High Courts

Training Judges

Judicial Academies have been established for training Judges in almost all the states. The National Judicial Academy conducts special workshops for high court judges and senior members of District Judiciary. Newly appointed trial judges at entry level are given extensive initial training for about a year or

two by the State Judicial Academies. All Judges are given opportunities to participate in periodical refresher inter-active courses and brainstorming sessions. They are given training in case management and case flow management techniques and use of information technology to enhance the efficiency of justice delivery system and to quicken the process of adjudication.

But the training is found to be inadequate in many States. Further, as several posts are lying vacant, many a time newly appointed judicial officers are posted without undergoing the full course of training. The quality and period of training differs from State to State. Many Judicial Academies do not have qualified, experienced and committed faculty. Another embarrassing problem arises when the Judicial Academies request sitting High Court Judges to give lectures regularly. Some very good and articulate Judges may be otherwise busy or not interested in giving lectures; and some High Court Judges who may be keen to get lectures, may be woefully inadequate as lecturers are not well versed on the subject. Bad or wrong training is worse than no training.

Training Support Staff

Judges are not able to work at the optimum level of efficiency for lack of administration and secretarial support from the support staff. Judge requires assistance of competent support staff with integrity to function effectively and efficiently. For example, an inefficient or inexperienced steno-typist can slowdown the disposals of a judge, by recording evidence slowly or incorrectly, or by not transcribing orders/ judgments promptly and accurately, requiring considerable time for editing and redrafting. Similarly, a court officer, by not maintaining the order sheets properly or failing to call cases and organize the work of the court efficiently, may overburden the court on some days and under-burden the court on some other days, create confusion and commit mistakes, thereby affecting the efficiency of courts. Similarly, the pending clerk can delay the progress and disposal of cases by failing to maintain the case records properly; by failing to place the relevant papers in the file; by failing to issue summons, notices and reminders as and when necessary; and to safeguard the records. There have been repeated complaints from judges about lack of support staff or lack of support staff with experience. Prompt filling up of vacancies, giving initial training and thereafter-periodical refresher training to court staff and providing for regular supervision of their work will go a long way to improve the functioning of the courts.

Supporting and protecting Judges

Normally, the losing side is dissatisfied with the decision. Further, if a judge is firm and refuses unwarranted requests for adjournment, he incurs the

displeasure of the lawyers. Parties are interested in getting interim reliefs and lawyers expect judges to be liberal in granting interim orders/bails, etc. The judges who are firm and strict in granting interim orders/bails become unpopular. This leads to some unsuccessful litigants, and unfortunately even a section of the Bar, indulging in unnecessary character assassination of judges, by sending anonymous complaints and sometimes even signed complaints. Even judges of high courts are subjected to such frivolous complaints. While serious complaints supported by material certainly require action, there is a tendency on the part of some High Court judges and vigilance departments of High Courts to initiate action merely on the basis of anonymous complaints. High Courts should ensure that vigilance section acts fairly and properly without harassing judges, and at the same time, taking action on genuine complaints. Instances are not wanting where disgruntled elements have unjustly heaped complaints on judicial officers who are on the verge of promotion, thereby denying or delaying their promotions. High Courts should protect judges from malicious attacks, false propaganda, etc. to save judges from trauma, anxiety and depression.

Regulating/ streamlining the reporting of decisions, to improve the efficacy of precedents:

The *ratio decidendi* of the superior courts (Supreme Court and the respective High Court) is binding precedents and the lower courts are required to decide cases in accordance with the law laid down or interpreted in the binding decisions. In regard to the decisions of the Supreme Court, Article 141 of the Constitution contains a mandate that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The Supreme and High Courts sit in divisions and each Bench of the Supreme Court is also the Supreme Court and each bench of the High Court is also the High Court. This sometimes gives raise to divergence in views where the later decision does not notice or overlook an earlier decision on the point and proceeds to decide the issue, which is covered by the earlier decision, in a different manner. In fact, such divergence has itself given raise to several decisions laying down principles as to which decision should prevail and be followed. As the number of judges increases and the workload increases, there are more and more chances of different Benches laying down law differently, creating enormous problems for the lower courts which have to follow the decisions. Courts waste valuable judicial time trying to harmonise divergent views or deciding which decision should be followed. As a result, a case which can be decided by spending an hour or two, has taken days for being decided.

Further, many decisions which are reported are not worthy of reporting, either because they do not lay down any law or put forth any new interpretation,

or because they are decided basically on facts and do not constitute precedents. But, there is no system of effectively curtailing the decisions, which have the status of precedents, and the decisions, which do not constitute precedents. The only remedy is development of a system whereby preferably a Committee of Judges selects the cases, which have value as precedents and marks them accordingly for reporting, thereby weeding out the large number of cases which do not merit being reported as precedents. I have dealt with this issue in my article *'Precedents – boon or bane?'*[3]. Unless some filtering is done, the existing system of reporting all and sundry cases, will put an unnecessary strain on the lower judiciary. I have suggested the following self-regulation guidelines for reporting of cases in my Article *'Rendering Judgments – Some Basics'*[4], which are extracted from the United States DC Circuit Rules:

i. Is it the first case to resolve a substantial issue of law?

ii. Does it alter, modify or significantly clarify a principle of law previously enumerated by the court?

iii. Does it alter specifically call attention to an existing rule of law that appears to have been overlooked and forgotten?

iv. Does it criticize or question or express any doubt about any existing principle of law?

v. Does it resolve an apparent conflict between two divergent decisions or viewpoints?

vi. Does it reverse a reported decision or affirm a reported decision on grounds different from those set forth in such decisions?

vii. Is it of general public interest or importance in the light of other factors warranting publication?"

Restricting deputation of judges to non-adjudicatory function

Let me next refer to the consequences of indiscriminate use of judges to non-adjudicatory functions. A large number of judges are made to work on deputation that is as Law Officers in Law Department, as Registrars of Tribunals, as Secretaries of Legal Service Authorities and Directors of Mediation Centres, etc. Further, a large number are posted as Registrars and Deputy Registrars in High Courts and City Civil Courts. In many States, an alarming number ranging between 15% and 40% of the judicial officers in the cadre of District and Sessions

[3] 2015 (8) SCC J-1.
[4] 2009 (10) SCC J-1.

Judges work on deputation. Each District Judge spends a considerable part of his/her judicial career on deputation. This is not a healthy trend. Deputations to posts which do not involve adjudicatory work blunts the judicial skills and disturbs the judicial temperament and impartiality developed over a period of time; and when they are again posted to preside over courts after long deputations, their efficiency, productivity and sometimes, integrity, are adversely affected. Deputation should be restricted only to posts like Principal Law Secretary. There is no point in deputing judicial officers to work in the Law Department to give advice to Government, thereby converting judges to Law Officers. Even within the judiciary, there is no point in appointing senior judicial officers to do purely administrative work as Registrar (Admin), Registrar (Statistics), Registrar (Recruitment), Registrar (Vigilance), Registrar (Judicial). The Supreme Court and each High Court virtually waste judicial talent in posting half-a-dozen to dozen Judges to non-judicial work. Judges should adjudicate and discharge judicial functions. Administration and management should be left to the executive or wherever necessary, by employing experts in management. Senior judicial officers should fill only the post of Registrar General in the Registry and Director of the State Judicial Academy.

Liberating judges from legal services:

Judges are specialists in adjudication who are required to maintain judicial aloofness and physical distance from lawyers, litigants and politicians. On the other hand, when they function as chairpersons and secretaries of Legal Service Authorities/Committees at High Court, District Court and Taluk levels, they are required to frequently organise legal awareness/legal literacy programmes and Lok Adalats. No legal literacy/legal awareness programme can be conducted without the effective co-operation and assistance of either the members of Bar or the district administration (which includes police) or the local elected representatives. Depending upon the nature of the legal literacy programme, it becomes necessary for a judge to work in close association with the members of the Bar/officials of the district administration/elected representatives (normally MLAs and Members of Panchayats). Similarly, for holding Lok Adalats, judges will have to work in close association with the members of the Bar, officers of insurance companies, banks and government officials.

Many a time, judges are to put to embarrassment when the persons with whom they will have to work in legal services are litigants before them. Further, if judges are obliged to take the assistance from elected representatives, district administration, members of the Bar, officers of Insurance companies and financial institutions, there is a great risk of integrity of some of the Judges being compromised. There is every likelihood of some of these persons whose

assistance is sought by judges for legal services, unscrupulously seeking favourable treatment from the judges; and if they are persons from whom the judge has to repeatedly seek assistance for future programmes, the judge will be constrained to show some kind of favour or concession. This feeling of 'obligation' towards officials of district administration, elected representatives, etc. increases where the High Court judges attend the legal awareness or legal literacy programmes, and huge memorable functions are expected.

Further, organising every legal literacy camp or legal awareness camp or mega Lok Adalat programme requires considerable preparation and organisation. On the date of the function, or the preceding days, the court work virtually stops, and no judicial work, or studying of files or dictation of orders/ judgments is possible for the judges, when High Court judges regularly visit for attending these functions. High Court judges are also required to frequently travel to attend these functions and they also lose the benefit of valuable weekends for reading/preparing judgments.

It is no doubt true that the Legal Services Authorities Act entrusts legal services to the judges. When the said Act was enacted, no assessment was done of the time required for this work and no provision was made for additional manpower required to handle the work exclusively. Ideally, the organisation of all Legal Services-related activities including awareness events/workshops should be organised by the executive, or the non-judicial officers of the judicial department; and the role of the judges should be limited to merely attending the legal awareness/legal literacy camps/workshops/ functions, as guests/speakers.

I may also refer to another collateral fallout. Normally, in relation to their judicial functions, judges are not entrusted with any funds for expenditure, nor required to submit accounts. With the entrustment of duties relating to Legal Services, huge amounts running into crores of Rupees are being entrusted to Judges, which are required to be spent for providing infrastructure for legal services and for organising legal service events. This has given rise to corruption and indiscriminate spending. Judges should be free from such responsibilities and financial distractions..

A time has come for revisiting the Legal Services Act to remove Legal Services from judges. Judges should not be required to organise events or functions connected with legal services. Sooner the judges are liberated from Legal Services, the better it will be for enhancing quality and productivity of the judiciary and maintaining the judicial independence and aloofness and integrity.

Redressing the grievances of Judges

While there are grievance redress mechanisms for lawyers, for litigants, for judicial staff, judges themselves do not have any realistic and effective mechanism for redressal of their grievances. The High Courts should put in place an effective grievance redressal mechanism.

The Principal District and Session Judge and the Administrative Judge (known as Portfolio Judge in some States) are required not only to supervise their respective districts, but should also function as Guides, Mentors and wise counsel whenever necessary. Either on account of pressure of work or on account of absence of specific procedures, if trial Judges err, they should be guided and counselled by the High Court Judges or the Principal District and Sessions Judges, as case may be. There should be a periodical review of the work of judges and counselling, to optimise their functioning and ensure that judges work peacefully and free from pressures, fears, influences.

Recommendations to the Government

It is necessary for the High Courts to regularly assess, plan and execute the institutional reforms required for improving the performance of the judiciary, assess and plan for additional infrastructural requirements keeping in view the expected increase in the judge strength and work load, and also seek upgradation of the working conditions of and facilities for judges to enable them to optimize their functioning. Having done so, they will have to make necessary recommendations to the government periodically and pursue the same so that it can obtain the sanctions, finances and consents required for implementing the above.

(C) The Role of Government

Increasing the number of judges

As the quantum of litigation increases, there is a need for a corresponding increase in the number of judges to decide them. Apart from the general periodical increase in litigation, whenever the government criminalises wrongs by declaring certain wrongs as criminal offences, there is marked spurt in the number of criminal cases resulting from such newly created offences. The two classic examples (referred to above) relate to dishonour of cheques being made offences by amending The Negotiable Instrument Act and certain acts/omissions connected with marital relationships being made as offences relating to domestic violence, cruelty and dowry harassment under the Protection of Women from Domestic Violence Act, 2005, Indian Penal Code (Section 498A) and Dowry Prohibition Act, 1961 (Section 4).

All developed countries and several developing countries have systems in place for judicial impact assessment that is, assessing the probable increase in workload on account of enactment of a new law or a new provision in an existing law and providing for adequate increase in judges' strength and infrastructure to meet the spurt in the litigation as a result of such new law/ provision. Such assessment and consequential provision for increase in judges' strength is lacking in India. At all events, there is no effort to identify the increase in workload and automatically provide for increase in the judges' strength. For example, the Parliament started providing direct first appeals to Supreme Court under the Terrorists and Disruptive Activities Prevention Act, 1985/1987 (TADA Act), Unlawful Activities (Prevention) Act. As a result, Supreme Court became the first Appellate Court dealing with facts. Each of these cases takes months for hearing and disposal. I may give the example of Bombay blast case which had to be heard by a Bench exclusively for nearly six months. If all the first appeals provided to Supreme Court are to be heard without affecting the normal disposals of the Supreme Court, the strength of the Supreme Court may have to be increased by at least one-third.

It is also necessary for the government to provide the required infrastructure and periodically upgrade the same so that judges can function efficiently and effectively.

Simplifying procedural laws

The Legislature has made efforts to amend the procedural laws to reduce delays and to expedite trials. In civil cases, examination-in-chief of witnesses is now permitted by way of affidavits. Recording of cross-examination by Advocate-Commissioners is permitted and is resorted to in regard to formal witnesses. The Civil Procedure Code is amended making it mandatory to refer all cases to ADR process (Section 89) . The Criminal Procedure Code is amended to provide for plea bargaining (Sections 265A to 265L). Evidence Act is amended to permit electronic records as evidence. But many archaic procedural provisions remain. Even amendments relating to use of ADR in suits and plea bargaining have failed to yield the expected results due to ineffective nature of the amendments.

Statutory amendments implementing the recommendations of Law Commission and Criminal Justice Reforms Committees will be a solution. Strengthening the investigation and prosecution wings and constant co-ordination between the concerned agencies will be another solution. Any alternative system which will protect the innocent but punish the guilty, and at the same time able to achieve a conviction rate of 80% to 90%, will act as a

strong deterrent to crime. It is no doubt true that any reform of criminal justice system should also take note of the fact that many a time, the accused himself is a victim of framing by trumped up charges. While strengthening the existing system, the basic safeguards that are available to an accused should not be weakened nor there interference with fair trial or human rights. A fine balance will have to be worked out and achieved by law-enforcement agencies, keeping in view the interests of the society, interests of the victim and the interests of the accused.

Several quasi-judicial Tribunals have been constituted under various enactments to deal with specialized cases relating to labour, government servants, armed forces, consumer disputes, taxation etc. In addition, the Parliament has enacted Gram Nyayalaya Act 2008 (Village Courts Act) which contemplates establishment of nearly 10000 rural courts to deal with routine civil and criminal cases in a summary manner, with the object of "providing access to justice to the citizens at their doorsteps and to ensure that opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities." Shift systems in courts, evening courts, and mobile courts, are tried in some areas. Several specialized Tribunals are being constituted to expeditiously deal with cases relating to specific subjects.

The tendency to criminalise what till now were considered to be mere infractions, by treating them as serious offences, without proper research, debate and consideration, should be avoided. It is a matter of concern that whenever there is a strong media outcry and public outrage as a result of some shocking incident, laws have been made or amended as a knee-jerk reaction. It should not be forgotten that hard cases make bad law. A perversity or extraordinarily gruesome offence should not be the benchmark for punishing offences of a lesser degree.

Improving the legal system:

In his Article "Building a world class legal system: Roles and Responsibilities", Prof. N.R. Madhava Menon suggests the following steps to improve the legal system:

i. Segregate professional legal education from the rest and identify professional law schools to be given autonomy and infra-structural support towards giving a fair chance to show competitive excellence of world quality. Entrust legal education regulation to an independent Regulator.

ii. Re-introduce compulsory apprenticeship and pre-admission professional entrance examination for all those seeking entry to the Bar. Make continuing education mandatory for all Advocates every five years.

iii. Re-organize legal aid services under an independent authority with equal participation of lawyers, judges and consumers of justice.

iv. Establish independent Mediation and Arbitration Councils on the model of the Bar Council and initiate separate licensing system with disciplinary bodies for mediators and arbitrators.

v. Develop an All India Prosecutorial Service with specialized training programmes for at least one year to all prosecutors. Install rigorous performance standards and weed out inefficient or corrupt. Reward performance.

vi. Establish an All India Judicial Service and impart specialized training for at least one year on a prescribed curriculum. Introduce transparency in performance assessment. Fast track promotions be introduced to reward merit and hard work.

vii. Establish Advanced Legal Research Centres with specific mandate for policy development, legislative drafting, judicial impact assessment, proposals for institutional reform and criteria for performance assessment of legal and judicial institutions/personnel.

viii. Establish a separate Department of Criminal Justice at Central and State levels under a high-powered Board representing judiciary, police, prosecution and Home Department accountable to the Legislature and having control over all Forensic Science Laboratories.

ix. Create a well-trained and qualified managerial cadre to manage the judiciary at all levels. Create a data base on judicial statistics and make judicial planning and budgeting evidence-based.

This requires a concerted effort by the Executive, Legislature, Judiciary and the Bar. Even a few of the reforms will make a marked difference.

Improving investigations and prosecutions

Nearly 80% of the litigation in India is criminal cases. Investigation and prosecution are in the hands of government. The investigating agencies and prosecuting agencies have a crucial role to play in expediting disposal of criminal cases. At present, for want of proper investigation and prosecution, nearly 70% to 80% of the criminal cases end in acquittal. Such large number of acquittals

and the visible delay in disposal of criminal cases affects the very credibility of the judiciary as an institution.

Therefore, there is an urgent need for the investigation and prosecution wings of the government being adequately staffed, properly trained & strengthened and strictly disciplined, so that their performance levels will increase. It should be remembered that in countries like Japan, even 2% to 3% acquittals are not tolerated; and in countries like USA, even 10% acquittals are not tolerated, whereas, in India, as noticed above, there are 70% to 80% acquittals. Strengthening of the judiciary will be meaningless unless there is a corresponding strengthening of the investigating agencies and prosecuting agencies.

(D) The Role of Bar

Render proper assistance to court

Though Judges are supposed to control the progress and conduct of cases, more often than not, it is the lawyers who control the progress of a case. In many cases, they file unnecessary applications, seek unnecessary adjournments, examine unnecessary witnesses, and indulge in unnecessary cross-examination and lengthy meandering arguments. By and large, lawyers are more inclined towards trial and decision than towards negotiated settlements, as adjudication (with appeals and revisions thrown in) is more remunerative than negotiated settlement. For lawyers appearing for parties interested in dragging on the proceedings, adoption of methods for prolongation is part of the professional work. As a result, each judge is required to spend much more time than what is actually required in regard to each case, thereby reducing the productivity of the court and increasing the longevity of the cases. Lawyers should be trained to keep the pleadings, evidence and arguments brief, so that there can be more effective and speedier decisions.

Protect the reputation of the Judiciary

Whenever a case is weak or without merit and is consequently lost, the lawyer should have the courage to tell the truth to the client. But if instead, he tells the client irresponsibly that a case is lost because the Judge is foolish or corrupt, just to save himself from blame, he is bringing down the good name of the institution. The client may never come back to courts if he is told that he lost the case because the Judge is foolish or corrupt. Next time, he has a grievance or problem, he may choose to go to the local mafia (or even to police to exercise muscle) for getting relief, rather than approaching a court. The survival of the judicial system depends upon the confidence reposed by members of the public, in courts and judges.

There is nothing wrong in lawyers expressing an honest opinion about decisions of judges or criticising the flaws in judgments. In fact, appeals and revisions are meant for that purpose. But it is common knowledge that some members of the Bar make unwarranted derogatory comments about judges, in the corridors of the court or in the Bar room, when they lose cases, which shake the faith of the common man, in courts.

There are also complaints about some lawyers attempting to influence the Judges. They should not indulge in such practices and should also discourage any such efforts on the part of their clients. On the other hand, if a lawyer comes to know that a particular Judge is corrupt, he is duty bound to immediately bring it to the notice of the High Court or its Vigilance Cell, so that appropriate action can be taken against the erring judges.

Conclusion:

It is hoped that all stakeholders, namely the Judges, the High Courts, the governments and the Bar, will discharge their respective obligations sincerely so that the justice delivery system is strengthened and the rule of law becomes vibrant.

Dr. Balram K. Gupta*

I am happy to be associated with this series of Public Law Lectures. It was only in early 2013 when I took over as Director, National Judicial Academy, India. I initiated the idea of Public Law Lectures at each Regional Conference. Since then, this is the 12th Regional Conference. Eminent Judges of Supreme Court of India, Chief Justices of High Courts and accomplished Professors of Law have been associated with this series of Lectures. I never realized that I would soon be part of this series. I am grateful to the National Judicial Academy, India to provide this opportunity to me to deliver the 4th Public Law Lecture of the year 2014-15.

Strengthening the Judicial Human Fabric is the focus of my lecture. Judicial Human Fabric and Judicial Culture, they are inter-woven. They are inseparable. It is the judicial culture, which weaves the Judicial Human Fabric. Thus, building and nurturing of Human Fabric and Judicial Culture is the recipe for strengthening the Justice Delivery System.

I have long association with the High Court of Punjab and Haryana. Le-Corbusier, the French Architect provided the structure and design to this temple of justice. It was inaugurated in the year 1955. Pepsu High Courts became part of the Punjab High Court in 1956. My father was associated with the Pepsu and Punjab High Court on the administrative side. We shifted to Chandigarh in 1956. I have seen this Court grow in stature and in size.

The fountain of Justice in front of Court No. 1 continues to flow 24x7. The continuous flow of this fountain of justice is the insignia and symbol of the role that has been played by the Judicial and legal coparcenary of this region. The Magna Carta of 1215 (800 years old) reminds us that justice is not to be sold, not to be delayed and not to be denied. 26th November was the law day. We the people of India adopted the Constitution of India 65 years back. Six and

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* Senior Advocate, Former Director, NJA, India. Public Law Lecture delivered at the NJA Regional Conference (North Zone) held at Chandigarh on 3th November, 2014.

half decades is good time to provide our judges and lawyers, the umbrella of the constitutional fabric.

The building up of the human fabric with the texture of sound Judicial Culture would in turn strengthen the Justice Delivery System. The Judicial Human Fabric must be durable, long lasting, founded on Culture to build up the trust and confidence of the people in the Institution of Judiciary. In a Constitutional Democracy, Judiciary plays the pivotal role in keeping the different organs of the State within the Constitutional framework and the Rule of law. Our Courts are open houses. They are open to all. The litigants, the lawyers and others. Accordingly, the manner in which our Judges perform at all levels is being watched and observed by the Public. Therefore, it is imperative that the conduct and behavior of our Judges should be such which would go a long way in nurturing the trust and confidence of the people. Judges are not engines of power. They are engines of Justice. They are social engineers and architects. They innovate new tools and techniques to make 3-dimensional Justice – social, economic and political practically viable.

It has rightly been said that a Judge should never exhibit arrogance. Only elegance. A Judge should never loose temper. A Judge should never be short-tempered. In fact, Judge should only cultivate scientific temper. Coolness of mind should be an integral part of a Judge's personality. A cool and balanced mind is essential for holding the scales of Justice evenly. An angry mind is the antithesis of Justice. Temper is something, when kept under control, serves you the best.

A judge can perform much better. Equally, Evenly and Fairly. A judge should never be sarcastic. Never be discourteous. Lord Denning in his *'The Family Story'* has shared that on Mondays, he used to hear the petitions of those who wished to appear in person. He also records that they will not take 'No' for an answer. In fact, they used to exhaust his patience. Still, he never lost his temper. It would be meaningful and educative to make reference to an incident which took place in Denning's court.[1]

On a particular Monday, a lady argued her own case. She was given patient hearing. The petition came to be dismissed. The lady got furious. She lost her temper. There were three books lying in front of her. She picked up each book, one by one, to throw them to hit Lord Denning. Lord Denning saved himself. He ducked. Each time the lady missed the target. Lord Denning kept his cool. Didn't say a word. The lady walked up to the exit door. Stopped. She said, how

[1] Alfred Denning, Baron Denning, *The Family Story* (1981), *Butterworths.*

cool even in a war situation. She walked out. Lord Denning said, a matter of sudden provocation. This speaks of judicial temperament.

Fali S. Nariman in his book, *"The State of the Nation"* has shared an incident, which happened in the Indian Supreme Court in February 2004.[2] He was sitting in Court No. 2. A party was arguing his own case in person. During the course of arguments, he raised his voice 'a bit' in order to put emphasis on a particular point. The judges told him, not to raise his voice. He did not listen to them. His tone continued to be loud. The judges asked the court martial to physically remove him. Fali Nariman told the court martial not to touch him. The marshal carried out the directive of the judges and the person was removed from the court. The case was dismissed. Fali Nariman was deeply upset. The same evening, Nariman went to meet the then Chief Justice of India, Justice V.N. Khare at his residence. He apprised Hon'ble the Chief Justice of the incident. Chief Justice Khare was visibly disturbed. The litigant in person was sent for. The Chief Justice apologized to him on behalf of the Court. The dismissed case was restored. It was ordered that the same bench would hear the case again. This is the quality, which judges must possess.

Judicial mind need to be different. Judges need to learn to absorb different and difficult situations. M.C. Chagla was the Chief Justice of Bombay High Court. It is relevant to bring out his sense of justice and fairness. Equally, his extra-ordinary judicial demeanour. The incident finds mention in V. Sudhish Pai's book, *Legends in Law.*[3] A veteran lawyer, K.L. Gauba filed a civil suit in the City Civil Court, Bombay against the Chief Justice. The suit was that the Chief Justice had no right to direct 'no parking' signs to be put up outside the judges' garages. Chief Justice Chagla went to the Civil Court and gave evidence. Lawyer K.L. Gauba subjected Chagla to 'unnecessary' and 'lengthy' cross examination. The questions were 'personal' and 'hurtful'. They were 'totally irrelevant'. This all caused Chagla mental 'anguish'. A few months later, the same lawyer appeared in the Court of Chief Justice Chagla. It would be good to reproduce the words in which the treatment given to the lawyer has been described:

> *"He heard him with all patience and treated him with uniform courtesy and what is more – the judgment was given in his favour! Justice was done as it ought to be done".*

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[2] Fali S. Nariman, *The State of The Nation: In Context of India's Constitution* (2914) Hay House India.

[3] V. Sudhish Pai, *Legends in Law- Our Great Forebears* (2013) Universal

A judge should never be revengeful. Incidents take place in court. They ought not to be carried in mind. No bias. No prejudice. A judge's mind should be like the clean slate. If something written, soon it be wiped out. The mind once again should be virgin. Ready to consider afresh. Closed and biased minds cannot do justice. M.C. Chagla was Chief Justice of Bombay High Court from 1947 to 1958. His statue in front of Court No. 52 stands with the inscription:

A great judge, a great citizen, and above all, a great human being.

Still another example of Judicial temperament. In London Times, sometime back, a story appeared. Along with the story, there were photographs of three Lords of House of Lords. The caption was: "Old Fools". One of the Lords happened to come to India. Fali Nariman happened to meet him. Fali Nariman asked him that the Lords were described as "Old Fools" and yet no contempt notice was issued? The Lord smiled and asked what was there to issue the contempt notice? 'Old' is a matter of 'Fact'. 'Fool' is a matter of 'opinion'. Why contempt notice? How cool. How balanced. This is reflective of judicial temperament. Under the Indian Constitution, there is a fundamental duty of every citizen to develop scientific temper. The judicial brethren would be able to render 'wholesome' justice, if they are able to cultivate the virtue of cool mind. Control temper. Justice would flow.

Humanism and compassion are integral part of Judicial Fabric and Culture. Harold Laski, the political thinker once wrote a letter to Justice Holmes. He said: *How much I wish if people could realize that Judges are human beings.* Justice Holmes responded by saying: *How much I wish if Judges could realize that they are human beings.*[4]

Humanism and compassion are the Constitutional fundamental duties of every citizen of the country. This is more in the case of judicial brethren. We do not need computerized justice even in the computerized age. Judges divorced from Humanism and Compassion will not be able to render wholesome Justice. It is only the well-nurtured judicial human minds punctuated with compassion and humanism who can make Justice wholesome and complete as envisaged under article 142 of Constitution of India. Judicial human fabric must be weaved in compassion and humanism.

Judges function in different situations. Difficult situations. To act with restrain and caution is part of their culture. This requires tuning and training of the judicial mind. This requires a lot of effort. Not easy. There are some principles of judging. Be bold. Be fair. Be polite. Be firm. Be human. Be patient. Probably,

[4] *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski,* Volume I (1916–1925), Edited by Mark DeWolfe Howe, Harvard University Press, 1953.

many more could be added. Each principle needs elaboration. The fact remains that it is the collective effect and impact which makes the judge. These principles are not new. They are old. They need to be cultivated. Nurtured. They are integral to the personality of a judge. Each action and each utterance of a judge must reflect these principles. These principles provide durability and longevity to the judicial fabric. This would strengthen the justice delivery system. The level of legitimacy of the institution of Judiciary would go up.

Judges must show respect by treating everyone with dignity. By being polite and courteous. By listening carefully. May it be the testimony of the witnesses or the arguments of the lawyers. It was Socrates who gave a four-way test to judges. *Hear courteously. Consider Soberly. Answer wisely. Decide impartially.* The Judicial Human Fabric weaved into one common thread on these fundamentals would surely strengthen the Justice Delivery System.

Judicial Culture is like the rainbow. It is the same from Kanyakumari to Kashmir. From Goa to Gurgaon. From India to the United States and beyond. Across the globe. The basics of Judicial Culture remain the same. In all jurisdictions. All over the world. *Fairness. Due Process. Principles of Natural Justice.* They remain the same wherever you may go. They do not change. They are uniform. They are unwritten principles. Uniformly applicable. In fact, they are the fundamentals. They are the minimum in order to ensure justice to flow smoothly without any obstacle. Resultantly, justice based upon these fundamentals would ensure the constitutional guarantee of Justice to one and all.

Judges must display courage and boldness. Virtues like *honesty, integrity, hard work* and *professional merit* are part of a judge's culture. *Courage and boldness* are no less important. In fact, more important. On the Indian Judicial map, the example of Justice H.R. Khanna is reflective of the kind of judicial boldness which is required of judicial brethren. Indira Gandhi lost her Election Petition on June 12, 1975. On appeal, the Supreme Court granted her a conditional stay. She could neither vote nor speak in the Lok Sabha. It was on June 25, 1975 that Internal Emergency was imposed. Many prominent leaders were detained without charge and trial. The fundamental rights contained in Articles 14 and 21 of the Constitution of India were suspended. The Press was gagged. Numbers of Habeas Corpus petitions were presented in order to get the leaders released on the ground that the orders were ultra vires and beyond the statue. It was also alleged that the orders were mala fide. The Constitutional Bench of five-judges of the Supreme Court heard the petitions. This Constitutional case is: *A.D.M., Jabalpur v. Shivkant Shukla,* also popularly

known as Habeas Corpus case.[5] Nine different High Courts had already decided the petitions in favour of the petitioners. Therefore, it was thought that there would be smooth sail in the summit Court. Four Judges took the view that the petitions were not maintainable. Justice Khanna was the lone dissenter. The majority in the apex Court took the view that there was no remedy against the illegal detentions.

Justice Khanna took the view that the petitions were maintainable. He held that even during emergency, the people of India could not be rendered remedy-less under the Constitution. Justice Khanna was superseded for his bold dissent to be the Chief Justice of India. His portrait adorns the Court Room No.2. This example of Justice Khanna demonstrates that judges should be prepared to make sacrifices but not to succumb before the powers be. They take oath to decide cases without fear or favour, affection or ill-will. Very true. Occasions come during the life span of judges when they have to make sacrifices in order to decide according to their conscious and be bold. Justice Khanna is no more. His example would continue to inspire generations of judges not to be timid and coward.

Nelson Mandela spent 27 years in jail in South Africa. Referring to Caesar's speech, Mandela says, *"Cowards die many times before their death. Valiant never taste of death but once"*. History is replete with examples where judges have shown courage and boldness. This is part of judicial fabric and culture.

Judges must think positive. Act positive. Do positive. Negativity is counter productive. Judiciary as an institution is a productive organ. Let me share the story of Alfred Nobel. Long time back, he was reading the newspaper in the morning. He found his name in the obituary column. It said *"king of dynamite and merchant of death is no more"*. This was shocking for him. He went into depression. This is how people are going to remember me. This depression for a couple of days remained. He thought of doing something positive so that the posterity could remember him. He created a Trust. Instituted the Nobel Prize for the richest contributions in the fields of Literature. Physics. Chemistry. Economics. Medicine. Peace. Alfred Nobel is no more. His fragrance continues. The contribution each year in the variety of fields continues to enrich the world community. This is the result of positivity of mind. This is service to humanity. Our judges must nurture the same. Our posterity would remember them for their living contribution in the domain of justice.

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[5] AIR 1976 SC 1207

Forget not, doing or rendering of justice is the best kind of service to humanity. Think of any Society. For that matter, any country. Without the role and contribution of judges. Language fails to translate the meaning of justice. They make Rule of Law inter-act with Rule of Life. Judges ensure that each action whether of an individual or of the Government is in accordance with the Rule of Law. They also ensure that the Parliament and State Legislatures remain within the parameters of the Constitution. In ensuring all this, they need to provide a clear shift from legalistic to justice orientation.

In order to do *'complete justice'* or *'to meet the ends of justice'*, the courts can pass any order or give any direction under Article 142 of the Constitution of India, Section 151 of CPC or Section 482 of Criminal Procedure Code. This, in fact, is the mandate of Rule of Law. This mandate is also integral to judicial fabric and culture. They are to bridge gap between law and justice. Justice cannot be computerized. It is to be humanized. Computerized justice is not constitutional mandate. Justice is by human-beings (Judges). For human-beings. Each situation is to be filtered through compassion and human touch. Judges deal with problems of human-beings. Therefore, Justice cannot be divorced and separated from humanism. Humanized justice is wholesome justice. Judges play their role in open courts. At all levels. They must continue to do so. They render selfless service. We bow to them in open court. We owe this and much more to them. Therefore, we have trust and confidence in our judges and the judiciary.

Judicial decision-making is important. Judges do what other avoid. Equally important is judicial communication in Court and through judgment writing. They inter-act with lawyers every day. Judges talk to and question witnesses in court. Judicial communication needs to be disciplined. In communication, they must not be harsh. They be polite. Easily communicable. Understandable. Not too talkative. Very talkative and silent judges do not make good judge. A lawyer must know what is in the mind of the judges. Equally, judgment writing is also a part of judicial culture. It is with experience that judges nurture the art of writing judgments. Factual canvas. The issues involved. The application and interpretation of law. A judgment must be written in a language easily understandable. Equally digestible. The winning party must know the reasons for the view taken by the court. Equally, the loosing party must know the reasons for having lost. There must be transparency of reasons in every judgment. The judgment is final product of the judicial mind. It must be reflective of the openness and the rationality of the judicial mind. Good judgment is one which satisfies both the parties. They must know, why I have won? Why I have lost?

Judicial culture is to be strengthened and nurtured through the medium of judicial education. Judicial education is all about providing of opportunities to judges. To meet. To share their experiences. To gain knowledge. To update themselves. To sensitize to the fast changing social needs. To learn the tools of judicial decision making. To develop judicial temperament. To cultivate the habit of giving fair hearing. To consider every matter soberly. To decide impartially. In short, judicial education is all about making a good human-being in order to be a good judge. Judicial education has never been part of the legal education. In our law schools, no effort has been made towards judicial education. This role now needs to be played by the National Judicial Academy, India and the State Judicial Academies around the country. The task is gigantic. Achievable. The necessary effort must be made by all stake-holders. I am confident. We would provide the lead in strengthening the judicial fabric and culture which in turn would help in strengthening the justice delivery system. It would also build up the necessary trust and confidence of 'we the people of India' in judges and the judiciary.

Justice Ruma Pal*

In 1986, the Supreme Court said, *"Broadly speaking, the Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field"*[1]. In the same case, the Supreme Court acknowledged that it was impossible to draw the line demarcating the frontier between the public law domain and the private field, which would be determined by the circumstances of each case. The use of the word *"domain"* has led to a lot of judicial confusion. Ordinarily it means, "an area owned or controlled by the Government"[2]. In the legal context it can mean *"the spheres of activity of the Government"*[3] and earlier cases excluded Government activities pertaining to the private law field from the scope of judicial review. The question is-is the distinction any longer relevant? This great divide between public and private law which was originally important, in my opinion, at present is paradoxically without a division as far as the spheres of activity of the public authorities are concerned and perhaps we will have to re-define the scope of "public law" to mean any action of a public authority.

Broadly public law means the law, which is administered by public bodies in the interest of the public and affecting members of the public in general, as a group or individually. Public law would also cover disputes between States and statutory bodies but the bulk of Indian jurisprudence on Public Law has grown out of claims based on the Constitution by individuals, groups of individuals and legal bodies against State action whether such action was Executive or legislative. Private law on the other hand is the law governing individuals and their relationship with each other such as the Sale of Goods Act, the Contract Act, the Succession Act, the Transfer of Property Act, etc.

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*Former Judge, Supreme Court of India, Public Law Lecture delivered at the NJA Regional Conference (East Zone) held in Kolkata on 1st February, 2015.

[1] *Life Insurance Corporation of India v. Escorts Ltd.*, AIR (1986) SC 1370.

[2] Concise Oxford English Dictionary, Oxford University Publications, Oxford, 12th edition, 2011.

[3] *Ibid.*

Courts holding government and its officers accountable did not start with the Constitution. In 1773 by the Regulating Act the British Parliament intervened for the first time to control the East India Company's administration. It authorized a Supreme Court to be established by Charter at Fort William, Calcutta, which was done by Charter in 1774 investing it with the same powers as the King's Bench in Britain. Thereby the Supreme Court at Calcutta was empowered to issue writs of mandamus, certiorari and certain other writs in addition to other civil remedies available. The court proceeded to entertain cases and issued writs of certiorari against officers of the Company's court the consequence of which was that the company's government, the Council, not only took steps to employ military force to prevent the orders of the court from being carried out, but also petitioned the authorities in England against the actions of the Court as attempts to extend the authority of the English law to the inhabitants of Bengal and Bihar. Accordingly Regulating Act of 1773 was amended in 1781, and the power to issue writs was explicitly made applicable only to British subjects within the territorial limits of the presidency town of Calcutta.

When similar courts were established in the Presidency towns of Madras and Bombay there was a similar restriction.[4] All Presidency High Courts established under the High Courts Act, 1861, although exercising the common law power of issuing writs in the nature of mandamus were limited by Section 45 of the Specific Relief Act 1877 and suffered a similar restriction in respect of the territorial limits within which a writ could issue. High courts which were not Presidency High Courts, viz., the High Courts of Allahabad, East Punjab, Patna, Nagpur, Orissa, Assam, etc. did not have any of these powers. The power of non-Presidency high courts in India to issue a writ of habeas corpus was given for the first time by section 491 of the Criminal Procedure Code, 1861.

At the same time however, Courts' powers to hear and try suits against Government and a public officer for acts done or purported to have been done in his official capacity were continued by the Civil Procedure Code, 1877. The distinction between the power to issue writs and to hear suits against the Government was only procedural. A suit had to be filed within 6 months of the accrual of the cause of action and was subject to a notice being given giving particulars of the claimant and the suit could only be filed after 2 months from the date of service such notice.[5] This has been reproduced in substance in section 80 of the Civil Procedure Code, 1908.

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[4] See *Ryots of Garabandho v. Zamindar of Parlakimedi*, AIR 1943 PC 164; *Election Commissioner v. Saka Venkata Rao, AIR* 1953 SC 210.

[5] Section 424.

A litigant's right to ask for a writ was not subject to these pre-conditions and therefore offered a quicker remedy. Earlier reported cases are in suits against Governments filed in Courts now normally seen as private law fora. Thus the question of the validity of the Bengal Money Lenders Act, 1940 was determined ultimately by the Privy Council in suits filed by creditors against their debtors for recovery of loans.[6] Similarly the issue of whether the Bombay City Civil Courts Act, 1948 was ultra vires the Legislature of the State of Bombay was determined by the Supreme Court in proceedings arising out of a suit filed for recovery of money.[7] The object of this historical exercise is to show that traditionally the jurisdiction to entertain claims against the government was available whatever the cause of action whether arising out of public or private law by all courts.

When the Constitution came to be drafted, the jurisdiction to issue writs was conferred only to High Courts and the Supreme Court. However all courts could and still can grant similar reliefs against the governments in suits as are now granted by writ courts including declaratory decrees and injunctions whether prohibitory or mandatory.

The question is did the Constitution limit the Courts' powers of judicial review to public law matters? There is nothing in the language of Articles 32 and 226 themselves which limits the Constitutional writ jurisdiction to only causes of action arising out of laws affecting the public in general. Nothing in the Constituent Assembly debates indicates that the framers of the Constitution had intended such limitation.[8] Being a fundamental right itself, Article 32 provides a "guaranteed" remedy to have direct access to the Supreme Court for the enforcement of all the fundamental rights if necessary by issuing directions or orders including by issuing writs. In other words the jurisdiction is neither circumscribed to writs nor to those situations commonly considered by the courts to be within the ambit of writs. Coupled with these powers is the power of the Court to "pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it".[9] The High Courts' powers of judicial review are in a way, wider, as they are authorized under Article 226, to issue directions, orders or writs to any person or authority, including any government to enforce fundamental rights and "for any other purpose". What judicial power could be more widely and expressly constitutionally conferred?

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[6] *Prafulla Kumar v. Bank of Commerce Ltd.*, AIR 1947 PC 60.
[7] *State of Bombay v. Narrottamdas Jethabhai*, AIR 1951 SC 69.
[8] Constituent Assembly Debates, 7th June 1949.
[9] Article 142.

Nevertheless harking back perhaps to the jurisdiction historically enjoyed by the King's Bench, writ courts built their own barriers. For example in 1966 *Lekhraj Sathramdas Lalvani v. N.M. Shah, Deputy Custodian-cum-Managing Officer*[10], the Supreme Court held that "a writ of mandamus may be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdictions". No constitutional relief could therefore be granted in Private Law matters arising out of for example, contract, tort or the transfer of property. In judicially reviewing a decision what was important was the source of the power. Other barriers included locus standi and the nature of right claimed. For example, no petition for the issue of a writ of mandamus was entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claimed a right.[11]

The barriers were soon whittled away. When the State of Assam resumed property leased out to the petitioner, the High Court of Assam dismissed the writ petition *in limine* holding *inter alia* that a writ would not lie in contractual matters. The Supreme Court set aside the High Court's decision saying "the appellant in the present case is not merely attempting to enforce his contractual right but important constitutional issues have been raised"[12] - the "important" Constitutional issue being whether a person could be deprived of his property except in accordance with law.

With the subsequent generous interpretation of fundamental rights, particularly Articles 14 and 21, virtually every action of the executive raised a constitutional issue. Article 14 was construed to include the right to be treated reasonably because "equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14".[13] The requirement

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[10] (1966) 1 SCR 120; see also *Mohd. Hanif v. State of Assam,* (1969) 2 SCC 782.

[11] *Suganmal v. State of M.P.,* AIR 1965 SC 1740.

[12] *Mohd. Hanif v. State of Assam,* (1969) 2 SCC 782, p. 786.

[13] *E.P. Royappa v. State of Tamil Nadu,* (1974) 4 SCC 3; see also *Ramana Dayaram Shetty v. International Airport Authority of India,* (1979) 3 SCC 489, p. 511.

for reasonableness was held to include subsidiary facets such as natural justice[14], the giving of reasons[15], perversity or the failure to take relevant factors into considerations or acting on irrelevant considerations, proportionality[16], partiality[17], absence of malafides[18] and transparency[19].

Consequently, now, the Supreme Court says *"Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of fundamental rights guaranteed by the Constitution."*

I would add that "every action" would include matters traditionally seen as pertaining to private law. Two examples of the multitudinous cases on the point would suffice to support this conclusion. In a case which arose out of a landlord tenant dispute it was said that "even in respect of its dealing with its tenant, a public body (in that case the Bombay Port Trust) must act in public interest, and an infraction of that duty is amenable to examination either in civil suit or in writ jurisdiction.[20] In the second case a Division Bench of the Orissa High Court dismissed a writ petition, inter alia, opining that it involved enforcement of a contract qua contract and thus not maintainable. Although the Supreme Court upheld the operative portion of the judgment, it disagreed with the reasoning. It held: "It is trite that if an action on the part of the State is violative of the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field".[21]

Although courts have refused to judicially review actions of the State which are political or sovereign in character, academic matters and problems of high finance and broad fiscal policy and generally disputed questions of fact are not entertained or where alternative remedies are available it is not because

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[14] *Maneka Gandhi v. Union of India,* (1978) 1 SCC 248, p. 289 : The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable.

[15] *Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay,* (1989) 3 SCC 293, p. 304: The State must act validly for a discernible reason not whimsically for any ulterior purpose.

[16] *Coal India Ltd. v. Mukul Kumar Choudhuri,* (2009) 15 SCC 620.

[17] *Noble Resources Ltd. v. State of Orissa,* (2006) 10 SCC 236, p. 243.

[18] *E.P. Royappa v. State of T.N.,* (1974) 4 SCC 3, p. 38: Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former.

[19] *Mahabir Auto Stores v. Indian Oil Corpn.,* (1990) 3 SCC 752, p. 763: persons concerned or to be affected, should be taken into confidence.

[20] *Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay,* (1989) 3 SCC 293, p. 304.

[21] *Noble Resources Ltd. v. State of Orissa,* (2006) 10 SCC 236, p. 243.

of a lack of jurisdiction but a self-imposed rule of prudence. Apart from these "limitations" the jurisprudence on judicially reviewable actions has continued to expand. For example the earlier insistence on the existence of a right and its violation as a precondition to a claim for relief by way of a writ has given way to a petitioner being able to approach the court even at the pre-contractual stage on the basis of a "legitimate expectation" since "due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law"[22]. At the same time the negative right not to be deprived of life under Article 21 has been construed as a positive right to life with "life" including the right to live with dignity, to shelter, education, privacy, legal aid, a clean and pollution free environment and the right of women to freedom from sexual harassment etc.

Public law remedies have also been extended by the Supreme Court to the realm of tort and in exercise of jurisdiction under Article 32 of the Constitution, the Court has awarded compensation to persons suffering personal injuries because of the tortuous acts of officers of the Government.[23] The infusion of 'reasonableness' into executive action also permeated into the legislative field. In the *Maneka Gandhi* case, construing Article 21, which injuncts the State from depriving any person of his life or personal liberty except according to procedure established by law, Krishna Iyer, J held: *"Law" is reasonable law, not any enacted piece of legislation"*[24]. In other words whatever the source of the law, the laws must be informed by public interest and not "to elevate political gain above the public good".[25]

All these instances represent what Wade & Forsyth in their book on *Administrative Law* have described as 'The rebellion by judges against unfettered discretion'. The authors sum up the law as obtaining in England now saying:

> *"The powers of public authorities are therefore essentially different from those of private persons. A man making his will may... dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in this the law does not affect the exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives.*

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[22] *Food Corporation of India v. Kamdhenu Cattle Feed Industries*, (1993) 1 SCC 71, p. 76.
[23] *Common Cause v. Union of India*, (1999) 6 SCC 667, p. 703.
[24] *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, p. 338.
[25] Elliot and Thomas, p. 350.

> *This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. ... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for public good".*

Where the state is the respondent, Public law is wider than and subsumes private law. "Public bodies may be empowered to act in a way which in many cases is only permissible because the actor is a public body, the Revenue's ability to levy tax being a prime example of this. Conversely, it may be desirable to restrain public bodies from acting in certain ways without this behaviour giving rise to any private law causes of action. This means that public law must contain events in addition to those on the private law map to which the law must respond but which do not fit easily into the private law categories".[26]

Indian courts have no doubt imported many jurisprudential concepts from the English Courts. The principles laid down in *Ridge v Baldwin*[27] in which the House of Lords for the first time extended the doctrine of natural justice into the realm of administrative decision making has been relied on in several cases[28]. Similarly the decision in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*[29] setting out the standard of unreasonableness of public-body decisions that would make them liable to be quashed on judicial review, known as Wednesbury unreasonableness has also been adopted. But Indian decisions have in a sense outstripped English law on the ambit of judicial review. Judicial review in England is still only available against a body exercising public functions in a public law matter and judicial review is not available to enforce purely private law rights.[30]

In India, the Supreme Court has at times itself laid down guidelines, which would be in keeping with the Constitutional requirements to curb Executive discretion. For example it has framed guidelines for the exercise of discretionary allotment of petroleum products' agencies[31], for regulating the allotments of Maruti cars out of the discretionary quota[32] and so on. Interestingly in England

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[26] Williams: Unjust Enrichment and Public Law.
[27] (1964) AC 40.
[28] For example, *Rampur Distillery Co. Ltd. v. Company Law Board,* (1969) 2 SCC 774, p. 781.
[29] (1948) 1 KB 223.
[30] Judial Remedies in Public Law: Lewis (5th edn.) p. 9.
[31] *Centre for Public Interest Litigation v. Union of India,* (1995) 3 SCC 382.
[32] *Ashok Kumar Mittal v. Maruti Udyog Ltd.,* (1986) 2 SCC 293.

the Government has published a booklet entitled "The Judge over Your Shoulder" which "aims to convey to public servants the legal principles with which their actions must comply if they are to survive scrutiny by the Courts"[33].

With the nature of duties performed by a public authority becoming irrelevant, the ultimate public law applicable is the Constitution and the relevant questions for determination of the ambit of judicial review are whose action is complained of and whether there is a Constitutional element for the purposes of exercising jurisdiction under the powers of judicial review? What has been described as "public authority" occasionally has been described in Article 12 of the Constitution as "State" or the government and Parliament of India and the government and Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India".

Earlier decisions construed the word "authorities" to include only statutory corporations. Thus a society incorporated under the Societies Registration Act for scientific study of problems affecting particular industry in a trade, was excluded from the purview of judicial review even though the Prime Minister was the President of the society, the Government appointed nominees to the Governing Body, the Government could terminate the membership of the Society and the Society's activities were financed by the government.[34] Probably the court was influenced by the provisions of the Code of Civil Procedure which limits claims to those against the Government or Public Officers in their official capacity.[35] Some High Courts have drawn a distinction between "State" as defined in Article 12 and "Government" for the purposes of the Code.[36] In substance however "ordinary" courts continue to have the same jurisdiction as writ courts. This is evident from the fact that writ courts have often relegated the petitioners to a suit because the cases involved disputed questions of fact, which are not generally entertained in the writ jurisdiction, or where the petitioners have an equally efficacious alternative remedy whatever the nature of the wrong complained of may be.

As far as the Constitution is concerned over a period of time the word "State" was construed to include instrumentalities or agencies of natural persons through whom the government may act or employ to carry out its functions[37].

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[33] Public Law: Elliot and Thomas, p. 243.

[34] *Sabhajit Tewary v. Union of India,* (1975) 1 SCC 485.

[35] CPC Part IV section 79 and 80.

[36] *Natwarlal v. District Panchayat,* AIR 1990 Guj 142; *V. P. Nair v. Kerala SEB,* AIR 1989 Ker 86.

[37] *Ramana Dayaram Shetty v. International Airports Authority of India,* (1979) 3 SCC 489; *Ajay Hasia v. Khalid Mujib Sehravardi,* (1981) 1 SCC 722.

Six tests were laid down for determining whether an entity was an authority, instrumentality or agency of the State. Now the "enquiry has to be not as to how the juristic person is born, but why it has been brought into existence"[38]. The rationale behind this is the increasing outsourcing of what are or should be governmental functions. The recent decision of the Supreme Court holding that the BCCI is subject to judicial review appears to be an application of this principle. I have not read the judgment and I cannot comment on its correctness. But the ratio is in keeping with the judicial mandate: "The courts should be anxious to enlarge the scope and width of the fundamental rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities, to the basic obligation of the fundamental rights".[39] I also agree with a comment in an article in a Newspaper on the judgment which said

> *"Some fear that this decision of the Supreme Court would open up the floodgates, bringing a number of societies and other such private associations within the court's powers of judicial review. But, as the English Barrister Michael Beloff once wrote, 'It is an argument which intellectually has little to commend it... For it is often the case that once the courts have shown the willingness to intervene, the standards of the bodies at risk of their intervention tend to improve'".*[40]

Public authorities in India have been judicially forced to come a long way from the days of the British when Lord Mansfield, an English judge, advised someone who was about to assume office as a Governor in one of Britain's colonies, never to give reasons for his decisions.[41] Now Jurists urge that "Courts should not be wedded, in the public law realm, to their traditional dispute resolution function; rather there is a strong public interest in courts readily issuing advisory declarations in order to articulate or clarify the legal framework within which those who owe duties to the public are required to operate. In this way, the judicial role becomes more forward looking one that aims to ensure that public administration is conducted in a lawful manner in the first place".[42]

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[38] *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology,* (2002) 5 SCC 111.
[39] *Ajay Hasia v. Khalid Mujib Sehravardi,* (1981) 1 SCC 722, p. 732.
[40] Suhrith Parthasarathy: The Hindu: 27th January 2015.
[41] Amartya Sen, *The Idea of Justice,* Harvard University Press, 2009.
[42] Laws, Judicial Remedies and the Constitution as paraphrased in Public Law: Elliot and Thomas, p. 244.

Justice V. Gopala Gowda*

The Constitution of India was adopted and enacted, *inter alia,* to secure to all citizens of this country, through Preamble, which is basic structure of the Constitution, JUSTICE – Social, Economic and Political. The State is duty bound to establish social order in which legal system of the country provides justice to all the citizens. Access to justice has to be ensured to all the citizens irrespective of social, economic and political barriers. The golden goal set out in the Preamble of the Constitution is to be achieved through sustained and productive efforts.

The hierarchy of the judicial system is eminent. At the apex of the entire judiciary is the Supreme Court of India with a High Court for each State or a group of States. Under the High Court there is a hierarchy of Subordinate Courts. Each State is divided into judicial districts presided over by a District and Sessions Judge, below him there are courts of civil jurisdiction, known in different States as Munsif, Sub-Judge, Civil Judge. The criminal judiciary consists of the Chief Judicial Magistrate and Judicial Magistrates of First and Second Class.

However, our Indian Judiciary is facing many serious challenges which are acting as stumbling blocks in the administration of justice. The most important ones include:

1. Low Civil Filings:

People are losing faith in judiciary. It is mainly because of long delays at all points, the reluctance of all the adjudicators to give the adjudications and the inevitable adjournments. That is why people are approaching the Alternative Dispute Resolution measures like Arbitration, Mediation, Conciliation and Negotiation, which believe in summary justice.

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* Judge, Supreme Court of India. Public Law Lecture delivered at the NJA Regional Conference (South Zone) held in Bangalore on 1st March, 2015.

Law is a benevolent profession. Lawyers and Courts have always been the last resort for the helpless and the despoiled litigants. But of late there is attrition of people's trust and faith in the Indian judicial system. The main cause for such attrition is jobbery (corruption) and delays. The considerable delay in reaching the conclusion in any litigation adds to the costs and makes the absence of an effective mechanism for their recovery even more problematic.

However, the lack of awareness of legal rights and remedies among common people acts as a formidable barrier to accessing the formal legal system but the ultimate reason for any type of judicial discipline is to maintain public confidence in the judiciary. The reason behind this principle is easy. A legal system can function only as long as the public accepts and abides by decisions rendered by the courts; the public will accept and abide by these decisions only if it is convinced that the judges are fair and impartial; anything that tends to weaken that conviction should be avoided. In other words, justice must not only be done, but must also appear to be done.

2. Achieving fine balance between the phrases *Justice Delayed Is Justice Denied & Justice Hurried Is Justice Buried*

As the nature of State has changed from police to welfare, in ultra-modern welfare State the role of law in society, as a means of social control, has assumed tremendous importance. Since State performs numerous and multifarious activities, the zone of legally prohibited activities is constantly and continuously increasing day by day.

The dual role of law in society as an instrument of social change as well as a means of social control has created confusion about the actual effectiveness of law in society. Law, as an instrument of social change, is not able to precipitate desirable social changes in society effectively. On the other hand, modern society is also growing rapidly due to heavy influence of ultra-modern scientific, technological and biological developments. The negative consequences of these developments have caused serious problem of law and order in society in various ways. There has been phenomenal increase in rate of crimes in society; the nature of crime, means and methods of committing crimes have also considerably changed. All this has posed a number of problems to law enforcement officers.

The recurrent conflict of interest between the phrases 'delayed trial' and 'speedy trial' has baffled the legal policy planners, legislators, researchers and the Courts.Speedy trial of offences is in the interest of society. The police methodology of solving crimes has been highly defective. Rate of convictions, acquittals and strictures passed from time to time against police by the Courts are sole testimony of the fact. The persons charged with offences, i.e., accused,

are generally looked down in the society. An alarmingly large number of men, women etc. charged with offences are put behind bars for years awaiting trial in Courts of Law. They languish in prisons for years to come due to faulty procedure. Subsequently, it turns out that many innocents suffer if one goes by the rate of acquittals. This is against the fundamental principle of Anglo-Saxon criminal jurisprudence, which states that ten guilty may go unpunished but one innocent should not suffer.

Speedy trial of cases is also in favour of prosecution. The prosecution does not face the problem of disappearance of witnesses, evidence etc. Delay may occur at any stage of case, which causes problem of prosecution. Speedy trial of offence is also in favour of the accused because if he is innocent, he will not suffer for a longer period. However, sometimes it may go against the accused if he is really guilty of the offence. In such circumstances, delay appears to be the best defence to him. The speedy trial of offences strengthens administration of justice. There may be various causes of delay, such as, the absence of witnesses, absence of counsel, adjournments, crowded lists, failure to examine witnesses though present, absence of a system of day to day hearing, delay in the delivery of the judgments etc.

The fundamental right to speedy trial for the aforesaid reasons acquires peculiar nature and is generically different from other Constitutional rights of the accused. It is precisely for this reason that the effects of its deprivation cannot be predicted in advance.

The Law Commission of India in its various reports has also made a number of recommendations and suggestions in this connection. For example, 58th report of the Commission took note of imperative need to reduce load in the higher Courts. Similarly in 79th report, the Commission concluded that search for solution is to be regarded as quest and periodical redefinition of methods is necessary. It further emphasized the need for speedy implementation of many reports dealing with the problem of delay and heavy backlog of arrears.

The Constitution of India does not specifically guarantee the fundamental right to speedy trial but it has been included implicitly due to judicial activism shown in respect of Article 21 which deals with fundamental Right to Life and Personal Liberty. Justice Bhagwati in *Hussainara Khatoon*[1] case, emphasized that the Right to Speedy Trial was implicit in Article 21. He asserted that mere semblance of procedure was not enough and speedier trial meant reasonably expeditious trial. However, the Court did not provide a categorical answer as to what would be the effect of denial of speedy trial.

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[1] (1980) 1 SCC 81

Further evolution of the right to speedy trial took place in *State of Maharashtra v.Champa Lal,*[2] wherein it was held that if the accused himself was responsible for delay, he could not take advantage of it. Quashing of conviction on this ground depended on the facts and circumstances of the case. The court said that a delayed trial was not necessarily an unfair trial. The Court asserted that if the accused had been prejudiced in conducting of his defence, it could be said that the accused had been denied the right and the conviction would certainly have to go.

There has been systematic evolution of the right to speedy trial in India. In the beginning, the right developed in cases involving under trials etc. But later on it blossomed fully in cases involving corruption. It appears that time has come when the fundamental right to speedy trial should be expressly guaranteed by the Constitution. However, a speedy trial means a speedy, quick or expeditious trial but it is also true that a delayed trial is not necessarily an unfair trial. No time limit can be fixed and the denial of the right will depend on the facts and circumstances of each case. If the accused is responsible for delay, no benefit can be derived by him. The right is available at all stages of the case, viz. investigation, inquiry, trial appeal, revision and retrial. The effects of the right are quashing of conviction, charge or issuance of appropriate directions as per the facts and circumstances of the case. The right is available if the accused has invoked the jurisdiction of the Court.

3. Lack of Innovative Ways of Affording Justice through Trial Courts to Vulnerable Sections of the Society

The role of the judiciary is highly crucial in any democracy. In our country, where on the one hand, judiciary is applauded for delivering some of the most prominent judgments that have improved the conditions of life for a number of groups and individuals; on the other hand, it is still struggling to keep the faith of the people in the institution alive by dealing with various obstacles in the way of quick and correct dispersion of justice.

Indian Judiciary today faces many impediments like huge amount of delay and pendency of cases, inappropriate judge-population ratio, lack of infrastructure, lack of funds, degradation of judicial ethics, snail pace in computerization in the age of Information Technology, faith in the system, accessibility, impact of legislations, procedural pitfalls etc.

The above problems caught attention of the general public and thus there started an age of judicial reforms. This led to a number of amendments in various

[2] AIR 1981 SC 1675.

legislations, specially the civil and criminal procedural laws, to speed up the litigation; various reports were published by the Law Commission of India proposing solutions to tackle the problem; State Judicial Academies were established in every state and the National Judicial Academy was established in Bhopal to give a platform to all the Judges to discuss the problems and work out a module to deal with them.

All these efforts have regulated the problems to a great extent but, however, we still need more time to cope up with the situation completely. Twenty first century calls for changing our approach as the social scenario has been fast changing.

Delivery of legal services to the rich and the corporate class is organised not through individual lawyers but through a series of networked law firms. These firms employ hundreds of lawyers and domain experts all over the country to provide highly specialised single-window services to their clients, of course at prices determined by the market. The middle class, which cannot afford their services, go to individual lawyers or publicly-funded legal aid services organised under the Legal Services Authorities Act. In this scheme of things, it is the poor and marginalised rural and tribal communities who are left out. They suffer injustice or seek justice through informal systems, including the so-called "khap panchayats." It is this sort of situation prevailing in the countryside that provides a fertile ground for the exploitation of the poor and for the growth of extremist forces, undermining the rule of law and constitutional governance.

We, therefore, need an alternative delivery system with a different model of legal service providers in rural and tribal areas. How can one fix the land rights of the poor when they have neither 'pattas' nor other valid documents? How do water rights and forest rights get protected from exploitation? What happens to government-sponsored schemes for food, sanitation, health and employment, aimed at alleviating the misery of the poorest of the poor? How to ensure that children in school are not abused and exploited? What can be done to prevent atrocities against the Scheduled Castes and the Scheduled Tribes in villages, and their forcible displacement? Where do they get credit for their livelihood activities and how are we to prevent victimization in the process? Do they have fair market access for their produce? What happens to the bio-diversity of rural and tribal areas? How best to preserve and protect traditional knowledge and other intellectual property rights of the rural poor? What about the labour rights of the unorganised rural poor? How are the rights of farmers to be protected against profit-hungry multinationals' monopoly on seed, fertilizer and pesticide business? Are the villagers being exploited by state agencies like police, forest officials, banks, revenue officials and mining lobbies because of

the inaccessibility of the justice system? Why is it that the Gram Nyayalaya Act, supposed to extend quick and cheap justice to the rural poor, is neglected by lawyers and judges?

All above mentioned questions are required to be answered. The Judiciary has promoted some innovative ideas like Public Interest Litigations, Fast Track Courts, and Alternate Dispute Resolution Mechanisms etc. but there is still a huge gap between poor and access to justice. To fill that gap some other innovative measures are required. For example, *'Lawyers Co-operative'* where students seeking to set up practice in rural areas will form themselves into what may be called lawyers' cooperatives or rural law firms, and train in advocacy before public bodies, administrative authorities, Gram Nyayalayas and regulatory agencies, besides courts and tribunals. They will be assisted by trained para-legals from among school dropouts and social activists of the area.

The fee for each legal service will be fixed and notified by firms and they will be affordable. These rural law firms will be organised professionally on the lines of urban law firms in terms of technology and quality of services. Cheap, prompt and reliable services will be the hallmark of rural law firms. The law school will give the successful candidates not only an L.L.B. degree but also a diploma in rural legal practice, which will distinguish them from the rest. Another example could be *"Mobile Court Hearing"* where to make justice more accessible to the people, Customized buses with courtroom and mediation rooms can go to places where justice is inaccessible due to insufficient number of judges, high dockets, or distance. Equipped with all amenities of a regular courtroom, cases can be heard, tried, and decided.

However apart from these, there is a strong need to strengthen and restructure the legal education in India which should emphasize not only on theoretical learning but also on practical learning with the help of technology in order to help the law students to come up with further innovative ideas to make the justice available at the door step of the poor in efficient and affordable manner.

4. Lack of Quality and Responsiveness of Trial Court Adjudication

There is a strong requirement to bring the structural reforms in the functioning of Trial Court in order to enhance the quality of justice and responsiveness of courts. These structural reforms should focus on need of *increase in Judge - Population Ratio,* so that each court should have an ideal number of cases to hear and judges can work effectively ; *filling of increased number of vacancies on time,* so that there is no delay in justice on account of vacancy; *using technology and electronic gadgets like computers, printers,*

dictaphones, internet etc. , so that working of these courts go high and enable them to work for speedy trial; *establishing separate agency for service of summons and warrants,* so that no delay is caused in servicing of summons and warrants for presence of witnesses in the court during trial; *keeping the list of witnesses by the prosecution,* so that only relevant and material witnesses could be included and unnecessary witnesses could be curtailed; *filing of all the relevant documents by Police along with charge sheet,* so that no time is wasted in summoning the documents; *recording of statements of witnesses through Video C.D.* , so that long examination and cross examination by advocates could be avoided; *replacing statements under Sec. 161 Cr.P.C. taken by police by Statements under Sec. 164 Cr.P.C. i.e. before magistrate,* so that they are treated as genuine and trustworthy; *ascertaining the presence of accused by way of video conferencing from jail,* so that trial is not delayed due to non-production of accused from jail to court during proceeding in the court; *proper training and vocations of judges on a regular basis to improvise their drafting, hearing and writing skills along with the skill of taking correct and fast judgment* so that Judicial Accountability can be fixed.

The problem has no easy or instant solutions. Summarizing all, a concerted strategy, including reduction in case loads, scientific management of courts, simplification trial procedures, limiting the number of adjournments, mustering of public support, toning up of the investigation machinery, strengthening of prosecution, streamlining process service and activating the conscience of the legal profession, needs to be evolved. Our laws are archaic and full of loopholes. We need better, modern and efficient laws. We need more lawyers and more judges. We need more courts and more benches. We should have fast track courts for specific type of cases.

Easier judicial procedures, approachable courts, better lawyers, efficient laws are what will make our judicial system stronger. If these challenges are not recognized immediately and if far reaching judicial reforms are not initiated with a great sense of urgency and devotion, the judiciary may also fall in public esteem endangering the whole civil society and adversely affecting the public good. The judiciary should recognize that it is an organ of state with the sole objective of serving the public in a fair, efficient, expeditious and accountable manner. We have been singularly fortunate that several outstanding judges over the decades have ensured that judiciary can function in an independent and fearless manner. The time has now come when concerted efforts should be made to make judiciary efficient and effective without usurping the functions of the other organs of State.

It is the need of hour that legal and judicial setup be streamlined right from lower level so that the gradually deteriorating confidence of common man in the judiciary could be restored. The judiciary is responsible to provide fair and expeditious justice. It is also responsible to safeguard the legal and fundamental rights of the citizen for which immediate attention is required to be paid to make the judiciary most competent and suitable to the need of the society in our democratic setup.

5. Lack of Judicial Ethics in Trial Courts

If all the sections of the society are accountable for their actions, then there is no reason why the Judges should not be so. According to Lord Denning M.R. *"Judges trying a case is himself on a trial"* and is expected to follow certain ethical values to maintain the integrity and credibility of the office of the Judge.

Judges must be cautious of their role and responsibilities while engaging in public speech. Law is supposed to be founded upon morality and judges have to do with making law and its interpretation. Hence, the ethical obligation rests harder upon their shoulders. Judges must constantly be aware of their role and position in society and cannot be frivolous in the use of their words. It need not be stated that the words from a judge whether inside or out of the courtroom carry far more weightage than an average citizen. And while a judge may feel similar frustrations as an ordinary average citizen, he must weigh his freedom against his ethical obligations as a judge who must not state his views in public over controversial issues that are sub-judice or likely to be adjudicated upon by courts. In certain case it may also amount to prejudging issues and create needless controversy.

Further, a judge must respect and honour his judicial office. It is an institution of public trust and he must endeavor to leave such office with higher respect and public confidence than when he inherited it. Societal equilibrium and faith in rule of law depends on the strength of the dignity of the judicial office.

Also, judges are bestowed with the responsibility of judging the conduct of fellow citizens. Therefore it is only natural that they be expected to make truthful decisions in their own lives. If they succumb to making the wrong choices, they lose the moral authority to judge the lives of others. Further, judges are not only held responsible for their own conduct but also for that of their families. Such relationships may sometimes give rise to complex ethical challenges as they may place additional restrictions on the family members of a judge. Therefore, great caution also needs to be exercised by a judge and his

family and friends while conducting themselves. This may even mean that they may have to sacrifice some of their freedoms that they may have otherwise enjoyed.

Further, a judge may often encounter situations where a conflict of interest arises or where there is an apparent conflict of interest which may require him to recuse himself from the matter. Bias is one of the factors that may require recusal. While considering the question of bias, a judge may have to evaluate not only whether he would indeed be influenced in his decision but also whether he may be perceived as being biased which may weaken public trust ultimately. Ethical considerations play a decisive role in influencing a judge's recusal from a case.

Also, being compassionate as a judge is as indispensable judicial ethic. A judge's metamorphosis from a student of law, to a practitioner and later as a judge often desensitizes us to the gravity and the impact of our work on litigants and the general public. We must resist the tendency to treat a case as a routine matter because for the litigant it is often his first brush with the rule of law, after probably having exhausted all his other available options. And the decision of a judge will undoubtedly alter the course of the litigant's life. Thus, while upholding the rule of law if a judge can award a patient hearing to both the parties and be compassionate in his application of law, it often alleviates their suffering and certainly enhances their respect for the judiciary. A sense of compassion in a judge is not a weakness as is sometimes supposed. It is a reflection of the divine spark within him, for pity is a kind of knowledge wherewith men are reminded of obscure and neglected interests which are of the highest concern to humanity.

Speaking of judges, Prof. Griffith in his book 'The politics of the Judiciary' says *"Judges are a product of a class and have the characteristics of that class... The judges define the public interest, inevitably from the viewpoint of their own class."* The strength of our judiciary also depends on their ability to treat citizens of various religious, social and economic backgrounds without bias or prejudice. A class bias where an individual may be prejudiced against another individual not because of who he is but 'what' he is also not uncommon in any society. A judge like any other individual must guard against succumbing to such biases.

Further the creative judge's starting point is a belief in a changing or evolving society, in which there is a continuous need for the law to be modified so as to bring it back into touch with social need. He must juxtapose evolving societal needs with our resilient and visionary Constitutional principles which have stood the test of time.

A Judge primarily interacts with the public through his or her judgments and the same should be carefully crafted in order to enhance the quality of communication. Every order or judgment, no matter how brief, should be a reasoned decision and these reasons should be clearly reflected in the judgment. At the same time a long judgment with superfluous theory, citations and dicta adversely affect the clarity of the law and leads to further confusion and litigation. Hence, a Judge should craft every decision meticulously and include only that material which is needed to lend credence to his or her decision. The judgment is also a reflection of the conscience of a Judge, who writes it, and evidences his impartiality, integrity and intellectual honesty. The judgment writing provides opportunities for Judges to demonstrate their own ability and worthiness to be a participant in the high tradition of moral integrity and social utility. Appreciation and Interpretation of facts, laws, evidence and statutes are the skills that can only be excelled by experience and knowledge, it is important to note their importance while deciding a matter. A Judge is expected to have a nodding acquaintance with all subjects that come up before him and cannot be excused for lack of familiarity with certain areas of law. He has to be an avid reader.

Integrity is the hallmark of judicial discipline apart from others as reminded by this Court in *Tarak Singh v. Jyoti Basu,*[3] which reads thus :-

> *"Integrity is the hallmark of judicial discipline, apart from others. It is high time the judiciary took utmost care to see that the temple of justice does not crack from inside, which will lead to a catastrophe in the judicial-delivery system resulting in the failure of public confidence in the system. It must be remembered that woodpeckers inside pose a larger threat than the storm outside."*

However, it cannot be left on the civil society to Judge the Judges on the above front but a Judge's role in the society, that is to adjudicate, can be judged by its people. Thus a Judge can be fairly criticised on his knowledge of law or judgment writing skills or his appreciation of evidence. Thus a judicial officer should aspire to be impeccable regarding the above core judicial skills.

To conclude it can be said that the Indian Judicial system is constantly exposed to new challenges, new dimensions and new signals and has to survive in a world in which perhaps the only real certainty is that the circumstances of tomorrow will not be the same as they are today. The task of a Judge is to give meaning to the constitutional values and keeping in mind the constitutional

[3] (2005) 1 SCC 201

text, history and social ideals. The function of a Judge is to give concrete meaning and application to our constitutional values. The task of a Judge should be seen as giving meaning to our public values and adjudication as the process through which that meaning is revealed and elaborated. Constitution adjudication is the most vivid manifestation of the function. As has been mentioned earlier, the stress is not on the fact that we do not have solutions to tackle the problems upfront with the judicial machinery.

It is not lack of vision but lack of efforts that is absent to build a perfect and unblemished adversarial system. We will have to continue the reform and our efforts in the direction till we achieve our aim of making the judiciary efficient and restore the public faith in the judicial system. This institution is not merely another work place. Court is a temple of justice where aggrieved people come with lot of hope in their eyes. Hence, the sacrament nature of the court needs to be continuously maintained so as to strengthen the faith of the people in this institution. It is very important for people to have a sense of belonging towards this institution. In pursuit of happiness of people, it is imperative upon all of you to maintain the dignity of this institution which will come by way of serious compliance with ethics, rules and regulations.

Arun Shourie*

My dear friends and our honourable judges, I can tell you one thing that being before so many judges and judicial officers, it is much better to be on this side of the bench than to be on that side of the bench, because I have that experience also.

I was asked to deliver a lecture about public perception on law and justice system. I will speak as a person who greatly values the judiciary because for a person who has been in journalism and is a writer, you have provided me from past sixty years especially our Supreme Court, a great dike against the executive and the political high handedness.

Firstly, I remember when at one stage we in the Indian Express were uncovering Bofors scandal, the government headed by the then Prime Minister of India, Mr. Rajiv Gandhi, had instituted over 326 cases, inquiries and raids against the Indian Express newspaper. As the courts were there, we did not really worry about these inquiries, cases, raids and in the end, we were saved from these persecutions by the courts. Very recently also a contempt case filed against me by Mr. Subramanyam Swami was decided in my favour after 24 years.[1] Also this case decided in favour of free speech recognizing that the truth is a defence in contempt proceedings and that the commissions of inquiry appointed under the Commission of Inquiry Act 1952 are not the courts etc. Such decisions by the courts raise our confidence in the judicial system and encourage journalists like myself who have always written freely in India.

Secondly, political and executive accountability as it exists today is there today in our society only because of a handful of judges and because of a handful of persons in the press. There is no other source for accountability of the government.

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* Public Law Lecture delivered at the NJA Regional Judicial Conference (West Zone) held at Jodhpur on 17th May, 2015.

[1] *Subramanian Swamy v. Arun Shourie AIR* 2014 SC 3020

Thirdly, the most salutary improvement that have taken place in the last few years, in ensuring accountability of the political executive, have taken place only because of the judiciary - whether you see the declaration of my criminal record or my educational background on the nomination papers - that is there because of the courts directing the election commission. Similarly, the recent judgment overturning the section 8(b) of the Representative of People's Act, so that persons who are convicted cannot continue as members of the legislature[2], it is something people like me have been writing for about twenty years and naturally the persons who had to legislate would not do it for they would be the first to be affected if such change was brought about. So the courts have intervened and brought a wonderful change in this regard.

And finally, the judicial universe in India consist of much fewer persons, persons who are better educated, who are more aware, who go by reading and writing, and therefore it is easier to effect change through the smaller group than let us say through bureaucracy or through the political class.

Therefore today before all of you I speak as a citizen, one who is greatly concerned and apprehensive about many things that we all hear about the judiciary, and about those matters on which any proof is not required but about such matters where mere allegation or the presumption that comes in society is itself corrosive.

Firstly, if People believe I am corrupt, I may be honest, but if they believe that I am corrupt then that belief itself will rob my word of all effectiveness. Such things about being corrupt are now heard and talked about. These things are coming out because probably a very few judges, a very few judicial officers, are not up to the values for which the institution stands for. But as we say that just one-drop of poison is enough to poison the whole bucket.

Secondly, I do feel that like in other institutions, in the institution of the judiciary as well, there has been a fall in the standards. I met in the National Judicial Academy at Bhopal a very senior person for whom I had high regards from your universe, and I asked him who all are judges now a days whose judgments we journalists should be reading and following these days for learning. He did not give me any name. It is very surprising to me.

Thirdly, there has been in this moment a singular opportunity to enforce accountability of political and executive class in India and I was very hopeful three months ago that may be twenty politicians who are conspicuous before judges or judicial magistrates for corruption for disproportionate assets and so

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[2] *Lily Thomas vs. Union of India* (W.P. (Civil) No. 490 of 2005

on, would be brought to books and sentenced to jail for seven years and thrown out of public life. But when I look at a case like Jayalalitha, I just lose hope.There was this great singular opportunity that we should not have allowed to slip away.

And finally, my concern is that while individually the judges are compassionate, the system as a whole has become heartless in many ways.The reason for being concerned on these matters is that eventually there is actually no protection that any institution or any individual has, except the esteem in which others and the society in general holds that institution.

Take the case of the press. Earlier whenever the executive in India came down with a heavy hand on the press, the hand of the executive got burnt and it had to withdraw. But now with this falling of standards in journalism you find that when the assault comes on the press, people don't rise up to save it from the assault. I remember the Jagannath Mishra's Press Bill to keep the press quiet and Rajiv Gandhi's Defamation Bill to keep the Indian Express quite. However, the revulsion against both the Bills were of such proportion that the government had to withdraw these Bills. Each time Rajiv Gandhi and his supporters would vandalize our (Indian Express Newspaper) offices, or organize protests to shut down our offices, circulation of all our editions would go up. So much so that at one stage, I had to put up on the front page, a very big cartoon of our broken down desk of the Indian Express and behind that was shown that there is a banner on which Rajiv Gandhi is sitting and it was written that he is now the circulation manager. He was our circulation manager. His opposition to us increased our circulation. Faith of people in us even when we were writing against the ruling government was our protection. This did not happen just because of the courts but because of people who felt that free speech is a must for complete freedom.

The same thing holds good for the judiciary. If judges do not retain the esteem and faith of the people then when the assault comes on the judiciary, the people will not rise up. And I personally feel for instance that this whole business of the National Judicial Commission legislation is nothing but a determined effort to bring the judiciary under the control of the political executive. However, I fear that if the judiciary does not enjoy faith and retain the respect, then the response of people to gather around the judiciary would not be as much as it was when Mrs. Gandhi superseded three judges. Therefore it is with that apprehension and concern I will be making a few comments.

Firstly, I will deal with the judges. In that regard I will emphasize that there is no substitute for integrity and for reputation for integrity. I will give

you an example that will be familiar to you. Many of you would remember the Profumo affair, a British political scandal that originated with a brief sexual relationship in 1961 between John Profumo, the Secretary of State for War in Harold Macmillan's government, and Christine Keeler, a 19-year-old would-be model. There were reports that Keeler was simultaneously involved with Captain Yevgeny Ivanov, a Soviet naval attaché, in the Soviet Embassy in London. This was such a big scandal that Profumo had to resign and the repercussions of the affair severely damaged Macmillan's self-confidence, and he resigned as prime minister on health grounds in October 1963. His Conservative Party was marked by the scandal, which contributed to its defeat by Labour in the 1964 general election. So inquiry commission was set up to find out if through Profumo some defence secrets were passed to the Soviet Embassy in London. Lord Denning was appointed as the one-man commission. Our senior judges will remember that Lord Denning did not hold any public hearings. He never met the witnesses including Christine Keeler and others. He never took any notes. But what he said no body disbelieved, and that is reputation.

So we must have that reputation because the institutions do not run, the countries do not run, and the states do not run on a *Danda* but they run on *Rutba*.

Secondly, nothing remains hidden. A lawyer who has special access to a judge would advertise that fact, because that is how he will get more clients. The brokers who are doing, are doing it in the same way, and the collateral considerations will become evident in the pattern of our judgments, and the infirmities of our judgments, and most certainly the biggest litigant will be on the lookout for the weaknesses of individual judge. The biggest litigant is the government. So they will know that this judge is amenable and that this judge likes this thing or that thing, So they will take advantage of that particular inclinations that a judge may have.Therefore I think three things are necessary for our judiciary to always remember. These are:

- Each of us must be absolutely straight and Never accept the extra privilege from the executive
- A judge must have *no price* and everybody must know that and that is not true in every case
- Judges must take swiftest action whenever the slightest allegation is made against a colleague. There is a mistaken notion of loyalty as in politics that we must stand by brother/sister judge, Attitude must be that we are

going to treat a tumor, because tumor otherwise will eat the entire institution

I give you an instance from my interaction at the National Judicial Academy in Bhopal. In the Indian Express, a story was published about one income tax tribunal. How even when their judgment was not even delivered, the entire text of that particular judgment was found in the office of a chartered accountant in Kolkata. Now the Indian express did the follow up, but there was no progress made on that at all. The Judgment was written in a chartered accountant's office and delivered by the office of Income Tax Tribunal. When I pointed this out to a very senior person from the administration on the judicial side from Delhi, he said that "it happens like that because clerks of judges often in the evenings go to work in some firms to make extra money, so it might happen". My question is that *how can this happen that the dictation was done in Delhi and typed in Kolkata?*

And he is one of the important person looking after your welfare on the judicial side. These things should just never happen. We must remember that the institutions go down not as such by the great blow but they go down by corrosion. Whether it is corruption or whether it is falling standard or whether it is shoddy judgment writing, each small slippage brings the system to a lower standard and that in the end, at one point of time, becomes a qualitative habit difficult to change. Therefore every step needs to be taken to not allow ourselves to slip through this very steep and greasy slope and every effort must be made to stop the slippage at the very beginning.

Thirdly, if we are compelled to dilute the standard because of lack of facilities, for instance stenos, research assistants in the higher courts or because of being over burdened with the cases, then we must speak out collectively. We must use well-known fraternity. We must urge the retired judges to voice out problems to get the required facilities so that the justice can be delivered, rather than to dilute the standards because we have to compromise with the circumstances as they are.

Fourthly, I would urge that judges must realize that inspite of their individual compassion, because of the heartlessness of the system, injustice is done to many through the system. For this, please put yourself into the shoes of a person who has been put into trouble. I could give you several instances, two instances from my own family. My unwell wife, who now cannot walk, cannot eat, was issued a non-bailable warrant of arrest against her, for building a farmhouse, which we have not built, on a plot, which we don't own. Non-bailable warrant, for refusing summons five times, which were never

served, and it has taken me three and a half years to get out of this situation. In another case, my wife's younger sister's husband, an Indian, Mr. Ajit Saran was a very big man in the management world. He was in Switzerland when he died in 2001. There was a plot in Rajasthan, which he bought before he died. His son had come from Harvard and therefore my sister-in-law wanted to show him the plot. She took the son there and saw that somebody was making a house there. She thought that she has come to a wrong plot. She asked a man about it and he called the tehsildar who said that Ajit Saran had given the power of attorney in the year 2011. Now actually he was such a famous man that the European Management Magazine had him on the cover when he died in 2001, and here he is giving the power of attorney in 2011? It is a case of clear fraud and the person who had done the fraud admitted the fraud. But even then I had to help my widowed sister-in-law to go to the magistrate, police commissioner and other heads and it took two years to get that thing rectified.

Fifthly, I feel that in India, mediocrity has become the norm. Intimidation has become the argument and assault has become proof. Therefore it is necessary for us to reverse this situation in which it is so easy to get, by doing very little. This is the case in journalism and this is the case in civil service and this is the case even in academics. It is like, once I join the civil service, then by sheer passage of time a donkey will become a horse. I will become more and more senior and eventually a secretary. Therefore I would urge that lifelong learning needs to be strengthened. In the case of print journalism there is a slight check because every morning it comes before the readers. But in many of other cases, like academics, and specially in professions in which the person who is coming to us is coming in a state in which what we say and do is going to determine his life, so he will always be defensive and he will not tell you the whole truth. In those circumstances, it is all the more necessary to have an inner impulse to continue with our lifelong learning.

Sixth, it is necessary to exercise peer group pressure even in such an exalted profession such as the judiciary, to make sure that we produce the best and to keep up with the judgments of Lord Denning, Wendell Homes, to read those things again and again so that we are not going by reading just the headnotes or the passages that the lawyers tell us.

Seventh point that I will make is that every single case that comes before you is of utmost importance because it affects the lives and fortunes of individuals. Also the cases regarding politician, public servant or police or judges should be given extra care and protection. Because they have much bigger multiplier effect on the society. Therefore in these particular cases not only will the person get away, if he is a crook, but the poison in society spreads and

equally the reputation of judiciary suffers. Because people know that he is a criminal and ultimately people will start blaming the judiciary. They think that if criminal gets away from the court also then it must be for some collateral purpose. And you know fully well that the courts are being used keenly by politicians to strike a deal. You must see the waxing and waning of cases against Mulayam Singh, Lalu Yadav, Mayawati. As per the needs of the central government (whichever party be in the central government) for them it waxes or wanes. Therefore this is being done by either directly managing the judge or the judicial officer, or by just presenting a weak case by the prosecution. In either event, the person who is hearing the case, knows exactly what is going on. Therefore I feel that we must be much more active in making the deal impossible. We must document, because not only the judiciary is getting delegitimized but the state of India is getting delegitimized when such crooks get away. For that reason I would request that please document and nail the way the prosecution has weakened the case, wherever it has done so. Also punish for perjury and name the prosecutors who have diluted the evidence and make the listing of what evidence would be required and most importantly don't allow any adjournments in such cases, none.

I cannot imagine how in Sukhram's case, at his residence police caught Rupees 4 crore cash below his bed. After 25 year he is still roaming free and giving lectures on Mahatma Gandhi. He is making and unmaking governments. His case is still pending and he will die before the case has been decided, only because of adjournments.

We usually know that the guilty side is the one that wants adjournments. So why should we allow that and then I feel that it is a change, which the legislature will not bring about. It is very necessary that the judiciary becomes active in this regard, as it became active on section 8(b) of Peoples Representative Act.

As Justice Venkatachalliah Commission has said that in disproportionate asset cases the onus of proof should shift on the person accused, Sukhram must prove that Rupees four and half crores were found on him because Mrs. Sukhram is so prudent that on minister's salary she saved Rupees four and a half crore!

And finally, fine is no punishment to these characters, confiscation of all assets and disbarment from public life forever may be. Corruption is the cancer of stage three in India and we will not be surviving it as a society. Because if the ministers are corrupt, the civil servants will surely be corrupt and the border guards will also be corrupt. Defense purchases will be on collateral considerations than on the needs of armed forces. I would think that on those

cases the courts must give the severest punishment that is possible under the law.

In the minutes that remain I will take four points about judgment writing and their general features.

The first point is related to pendency in judgment writings, which can be attributed to the higher courts for prolixity of the judgment. I remember that *T.M.A. Pai Foundation*[3], consisted of 92,000 words and of *Ashok Kumar Thakur*[4] approximately consisting of 1,26,000 words. Very often, I find that it is like random thoughts that are coming in between passing the judgment and that judges have forgotten the main thesis that they were pursuing. This is very destructive for several reasons and one of the reasons is that it is actually not clear that what the judgment is saying. In these days of headnote jurisprudence in which a lawyer will just read your lordship *such and such judgment this paragraph is there,* so he only reads that paragraph. So, if I have written 25000 words, then I would have forgotten what exactly each paragraph was. This as you know has happened in many cases. There have been series of cases about minority educational institutions in which seven times the Supreme Court has written judgment about the same subject because it was called upon to clarify the earlier judgment. To clarify one judgment led to judgment of the five judge bench, then because there were five judges we should have seven judges, so seven judges gave a judgment so it should be actually heard by eleven judges, eleven judges gave five separate judgments and these were so prolix that to clarify what is the law that has been laid down by eleven judges, seven judges were asked to clarify that and no one could understand what those seven judges have clarified and so a third time, a five judge bench was set up to know what the seven judge bench had found about the eleven judge bench. And you know, if you read the judgment in *Inamdar's case*[5], you know from the very first sentence of the first paragraph, it is written that it is not the end. So this comes about because of the prolixity of judgments. This is what we feel about in general.

The second thing that is hurting us now is the breakdown of discipline in regard to judgment writing in which three judges routinely disregard what five judges have said. Similarly two-judge bench routinely disregard what the three-judge bench said. In a case of a disinvestment of a company which was on the verge of shut down, (Hindustan Zinc) we disinvested it and that company after

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[3] 2002 (8) SCC 481

[4] 2008 (6) SCC 1

[5] *P.A. Inamdar and Others Vs State of Maharsashtra and Others AIR* 2005 SC 3226

disinvestment is now probably producing four times more zinc, which is the defence requirement, than it was before the disinvestment. The complaint was filed twelve years after the disinvestment against the disinvestment decision[6]. It was withdrawn from the Jaipur court and then it was filed in the Supreme Court. A three-judge bench headed by the Chief Justice had said that there is no merit after hearing the counsel and rejected the whole petition. What has happened now, a two-judge bench has again started hearing the whole proceeding. So question is, how can administration function or anything happen and you see the uncertainties created in society and specially in the economic world.

The third point that I personally feel is that the courts have been very often affected by intellectual fashions of the day. I have documented it, with regard to reservations, in a book called *"Falling of the backwards"*. In that book, I have reviewed judgments from 1950 to 2014 and you may read it to know how the judges were affected by the prevailing intellectual fashion. The result was that what was prohibited in the constitution was the caste being the basis of policies and the state decisions. However, now the caste has become the norm and an evil institution of caste has been perpetuated forever and the courts have legitimized the worse instincts of the worst politicians in India. So we must, as it is said, 'speak the truth' to the power, and the power certainly includes politicians, but it also includes the people.We must stand up to those intellectual fashions, and speak a full truth to them also.

The fourth and the last point, which I will dwell upon, is that we must see specially as we rise higher and higher in the hierarchy of the judiciary to be more aware of the meta consequences of the judgments that we are pronouncing. Because that is not just an individual case. It will set the precedent for many other things. And I fear that this is not being done in this way.

In that book there are many examples of this kind but you just see the erosion that has happened. Earlier the touchstone used to be the violation of a fundamental right and that is how we used to see it in the 1950's or 60's or in the times of progressive judges like Justice Bhagwati or Justice Krishna Iyer or Justice Desai. It then became the violation not of the 'fundamental' right but of something you call the 'essence of the right'. Then that became not the violation of the 'essence of the right' but the violation of the 'obliteration of the essence of the right'. Then that became not the violation of the 'obliteration of the essence of one's right' but the violation of the 'overarching principles underlying

[6] PIL filed by National Confederation of Officers' Associations of Central Public Sector Undertakings

different provisions of the constitution'. Then that became not the violation of the 'overarching principles underlying different provisions of the constitution' but the violation of the 'essence of the overarching principles' to such an extent that a new constitution has to be written. This remind one of the example of the ship of Theseus. When the ship was rotting and the parts had to be replaced, the question was when does it become a new ship - after fifty percent of it was replaced, or after seventy five percent of it has been replaced?

If you say that a new ship does not come into existence till it is regarded as an assault on the basic structure of the constitution, then with this criteria, I can bet my life that even a perverse amendment to the constitution like the 39th amendment in which Mrs. Gandhi saved her own election and put it beyond the reach of courts would have passed. Because it was just one person of four offices of the state. Not elections in general, and not all elections can be dishonest. The 42nd amendment would certainly have been legitimized because it is on that principle of ship of Theseus business.

If such commitment to individual objectives is to override overall meta consequences, then please be assured that the executive will find these passages so handy when they undermine the basic structure of the constitution.

That is why I would urge as the final point on judgment that just as we must be absolutely scrupulous so also we must be extremely careful not to give a handle in any particular way to the politicians who are just waiting to curb the institution which is standing in their way and which they regard as obstacle to their complete freedom. I am ever so grateful to all of you for being so patient and kind and thank you very much.

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