# Reforming the Judiciary

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A vital pillar of our democracy is a free and independent Judiciary which is totally autonomous from the other two wings of the State, the Executive and the Legislature, with the judges being immunised from any undue pressure in the judicial process and being fully protected from any arbitrary intervention in the matter of security of tenure and service. As part of the independence of the Judiciary Article 124 of the Constitution provided for appointment of judges of the Supreme Court and Article 227 made a similar provision regarding judges of High Courts. Removal of judges of the Supreme Court and the High Courts is governed by Articles 124 (4) and (5), read with Article 218 which makes Articles 124 (4) and (5) applicable to the High Courts also. Judges of the Supreme Court and the High Courts can only be removed by impeachment, pursuant upon a high powered tribunal concluding that the judge in question is guilty of proved misbehavior or incapacity. Articles 124 (4) and (5) and Article 218 remain a part of the Constitution and do provide a very high degree of protection to Supreme Court and High Court Judges.

However, through the 121st Constitutional Amendment Act of 2014 Articles 124(2), 127, 128, 217 (1), 222, 224(1) and (2), 224 A and 231 have been amended. Now all higher judicial appointments are to be made by the President in consultation with and on the recommendations of the National Judicial Appointments Commission (NJAC). The Commission consists of (1) The Chief Justice of India as Chairman (2) Two senior most judges of the Supreme Court as Members (3) The Union Minister Incharge of Law and Justice as Member (4) Two eminent persons nominated for a three years term by a committee consisting of the Prime Minister, Chief Justice of India and Leader of the Opposition in the House of People and, if there be no leader of opposition, then the leader of the largest opposition party in the House of the People.

The original Article 124(2) stated "Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose … provided that in the case of an appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted". The discretion of the President to consult judges was unfettered as per the words of the Constitution but, unfortunately, the Supreme Court ruled that there would be a collegium of judges in consultation with which the Chief Justice of India will make his recommendations to the President. The collegium finds no mention in the Constitution and one has doubts whether the Supreme Court can restrict the discretion of the President to consult any judge he deems fit, but for so many years government seems to have swallowed the Supreme Court's decision and has meekly accepted the collegium. It is respectfully submitted that the Supreme Court was always free to decide how the Chief Justice, when consulted under Article 124 (2), will render his advice and if the Supreme Court so decided, then he would do so after consulting the collegium. The extension of the role of the collegium beyond this would be, one submits with respect, beyond the competence of the Supreme Court.

The collegium system came under criticism in that people felt that there was a closed circuit of judges who decided by internal consultation who would be appointed a judge. What these critics forgot is that even in the matter of appointment of judges it is the Council of Ministers under Article 74 which would have the final say in rendering advice and the President is bound by this advice. For the Executive to say that it had no role in the appointment of judges flies in the face of the Constitution, as does the Supreme Court's order on the collegium of judges. The Executive has always had the final say in the appointment of judges. However, the restriction has been that a person not recommended by the Chief Justice of India could not be appointed as a judge of the High Court or the Supreme Court. The government was not free to add its own nominees and the maximum it could do is to reject the panel prepared by the Chief Justice of India and send the case back to the Supreme Court for reconsideration. This practice has been followed in the past and has not caused any ripples. Why it was necessary to change the system and create a National Judicial Appointments Commission is beyond comprehension.

NJAC has the Chief Justice of India as its Chairman and two of the senior most Supreme Court Judges as its Members. One wonders whether it was necessary to include the Law Minister of India because he is the authority who would give final advice to the President under Article 74 and whether it is proper for a person to be both a selector and the person who gives the final recommendation will be always be a matter of controversy. Regarding two eminent persons, there is no definition of what constitutes eminence and if the Prime Minister and the Leader of the Opposition, both politicians, decide on a private quid pro quo to appoint unsuitable persons this would certainly affect the credibility of NJAC. In the appointment of civil servants Article 315 provides for an independent Public Service Commission for the Union and for each of the States, with Members being removed from the temptation to toe government's line because Article 319 prohibits a Member of a Public Service Commission to thereafter be appointed for any employment under the Government of India or of a State. For him this is the end of the line of public service and, therefore, he is likely to be truly impartial. However, in the appointment of the judges of Supreme Court and High Courts we are prepared to accept two Members who will be politically nominated and, therefore, may not be removed from bias. This is an issue on which we need a debate and, perhaps, we may have to amend the Constitution once again to place the process of appointment of judges above any criticism because the Commission to select them is itself beyond controversy.

There is another issue which needs to be debated and that is that whereas the Constitution, before the 121st Amendment, gave primacy in the matter of appointment of judges to the Chief Justice of India, after this amendment he is only one member, albeit as Chairman of a six- member Commission in which three persons are clearly not a part of the Judiciary. Even if the system is to be replaced by the NJAC we still need to consider whether the Chief Justice of India should not have a veto power if he disagrees with the Commission on nomination of a particular person as judge.

In the matter of appointment of judges of the Supreme Court and the High Courts Parliament has pushed through a constitutional amendment which our parliamentarians look upon as a necessary reform. But after appointment judges have to buckle down to work and here the question arises whether in adjudication in civil matters or in the trial of criminal matters our courts need to reform themselves internally or be made to do so externally through legislation in this behalf. There are certain

issues which are absolutely fundamental to the justice system in India. All civil litigation is adversarial in which there is a party making a plaint and another party defending itself. The parties may be individual, companies, or an individual or company vs. the State. Generally speaking, in civil litigation the matter relates to a particular right and its enforcement, an issue relating to property, a pecuniary matter or a matter relating to such personal relationships as marriage, divorce, adoption, etc.

The record of civil litigation in India is abysmal and litigation is almost never ending. One can name names or quote specific cases, but if the judicial process is still on perhaps that would neither be wise nor permissible. However, one is aware of a case in the Gujarat High Court in which a writ petition against the order of a tribunal has been pending for over fifteen years without the case reaching a stage of hearing. Surely in fifteen years the High Court could have found at least one day in which the appellant and the respondent could have been asked to argue their cases and the High Court could have taken a decision at its discretion. Similarly, in a case before the Madhya Pradesh High Court on an appeal against the order of a district court directing the occupant of a building to vacate it and hand over possession to the owner the matter has been pending for over eight years, the building is lying unused and is slowly decaying. Can the High Court state in all conscience that such a delay can ever be justified? It is for the Judiciary to take a view on the priorities to be assigned to litigation and then, within the realm of the possible, take steps to ensure that matters are heard within a reasonable time. This is a reform which can only be brought about by the Judiciary. One excuse offered is that the Judiciary is understaffed and overworked. Well, recently the Chief Justice of Madhya Pradesh issued a directive to all courts that they must not give unnecessary adjournments, they must try cases with due dispatch and under no circumstances should a trial be allowed to spill over beyond five years. The M.P Bar Association had the nerve to not only oppose this but also to boycott the Chief Justice's court. Fortunately the Chief Justice stood firm and the boycott ended, but it is symptomatic of the attitude of the Bar, some members of which are rapacious and the Bar as a whole is unwilling to discipline them. This is one area where the Judiciary, from the court of first instance right up to the Supreme Court must take a united view so that litigants and their counsels know that courts mean business and delaying tactics will not work.

Let us come to the criminal justice system. In criminal matters the question is not one of individual rights, property, etc. Here the liberty of the citizen and, in capital offences, perhaps even his life is at stake. We follow Anglo Saxon Jurisprudence in which the governing principle is that a person accused of a crime is deemed to be innocent till he is proved guilty. Under section 101 of the Indian Evidence Act the burden of proving the existence of facts lies on the person who asserts these facts. Under section 102 Indian Evidence Act the burden of proof lies on the person whose case would fail if no evidence at all is given. Under section 103 the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. In a criminal trial, therefore, the burden of proof regarding the accused person having committed that offence lies on the prosecution. The accused does not have to prove his innocence and if he is able to create a reasonable doubt about the evidence led by the prosecution he is entitled to acquittal. Under Article 20 (3) of the Constitution a person accused of an offence cannot be compelled to be a witness against himself. It is for this reason that under the Code of Criminal Procedure a confession made by an accused before the police is not admissible as evidence. Every confession has to be recorded before a Judicial Magistrate who, before recording the confession,

must explain to the accused that he is not bound to make the statement and the Magistrate must be satisfied that the confession is being made voluntarily. If at any stage the accused expresses unwillingness to make the confession then the Magistrate, in order to protect the accused from police pressure, will not send him back on remand to police custody. This is explained at length because under Indian law a statement made by an accused person to the police can neither be used as evidence nor lead to a presumption about the guilt or otherwise of the accused. This is further reinforced by section 26 of the Indian Evidence Act which prohibits a confession made by an accused while in custody of the police from being proved against him. Only that part of a statement to the police may be proved which reveals a fact, leads to the recovery of articles, etc., on subsequent investigation by the police and the actual discovery of the fact through such investigation. This is provided for in section 27 of the Indian Evidence Act.

The police in India is severely handicapped in investigation because, confessions apart, under section 162 Cr.P.C. a statement made to the police by a person other than the accused may not be signed by such person. The only purpose for which such statement may be used is to contradict a witness, but if the witness repudiates the statement he cannot be prosecuted for perjury. Considering the handicaps relating to evidence collected during investigation, the police, while prosecuting the case, can only offer silent prayers that the prosecution witnesses will not be suborned and will stick to the truth when giving evidence. We are all aware of how the rich and the influential can threaten, cajole, induce or even bribe witnesses into being economical with the truth when giving evidence. In the recent case concerning Salman Khan, thirteen years after the incident the accused tried to lead evidence that it is his driver and not he who was driving the motor vehicle which caused one fatality and severely injured four persons.

Can we not amend Cr.P.C. whereby witnesses during investigation are required to append their signatures to the recorded statements? Can we not empower the public prosecutor in a State where under section 25A, Cr.P.C. the State Government has established a Directorate of Prosecution with an independent Director and a cadre of public prosecutor subordinate to him, to record the statement of witnesses under section 164 (5), Cr.P.C. so that it is under oath and a witness making that statement may resile from it during trial only under threat of prosecution for perjury for doing so? Can we not, if the public prosecutor agrees, provide that such a statement may be read into evidence as part of the examination-in-chief so that the time of the court is spared and the proceedings can move to the stage of cross examination?

The idea is that we should give the prosecution a fair chance of proving its case so that the conviction rate can improve because witnesses are not suborned and the police is not forced to take short cuts such as false encounters because there is a reasonable possibility of bringing the accused to account through a fair trial.

The Constitution of India in its Preamble mandates :- (1) Justice, social, economic and political. (2) Equality of status and opportunity. If there is to be justice then is it not the responsibility of the court to ensure that a person who is poor and cannot afford that level of representation before the court which a rich person can do is, in the interest of both justice and equality, offered the special protection and assistance of the court so that his case does not go by default? Salman Khan, the actor convicted by a Court of Session in Bombay, was driving his car when intoxicated, losing control and mounting the

footpath where his car had no business to be and killing one person and severely injuring four others. Till the conviction is set aside the finding of guilt stands, but because he is a rich and influential actor in the cinematic world of Bombay the Honourable High Court granted him bail instantly. Without in any way showing disrespect to the court one would beg the Honourable High Court to have a ten years review of similar cases, many of which would have bus drivers, taxi drivers and ordinary citizens as the accused. How many of them, after conviction, have been given bail by a superior court within minutes of conviction? Here the question of the credibility of Judiciary, especially in the public eye, is at stake and to the extent that the honourable courts apply corrective measures to all cases by the same yardstick and are not swayed by the social or financial standing of the accused, the stature of the Judiciary would rise and the interests of justice would be promoted.

There is one other issue which must be highlighted. Our courts are swamped by cases with the result that the judicial calendar is very long and cases come up for trial after inordinate delays. Here the Supreme Court and High Courts need to take a view of trial procedures, with encouragement of summary trials and quick justice on issues in which the law permits this. In heinous offences the trial must be on day-to-day basis, witnesses must be protected from undue pressure and the lawyers must not be allowed to unnecessarily delay cases. Salman Khan was able to delay his case for thirteen years through various legal legerdemains and he now pleads this very delay as a ground for leniency. Many judges at district level, in personal conversation, do complain that the Bar members try and use legal tactics to prolong trials, especially where the case of their clients is weak. Judges who resist this are subjected to all sorts of complaints in which the High Court, naturally, calls the judges to account. Here the Bar Council and the courts must come together to enable the courts to proceed with due dispatch in the trial of cases. This will reduce pendency. At the level of a court of record, that is, the Supreme Court and the High Courts, there has to be strictness in admission of appeals. Every case heard by a Magistrate and subsequently decided in appeal by a Sessions Court need not be admitted in the High Court, just as the Supreme Court should be equally strict in the admission of appeals. The Court of Appeal in the United States and the Supreme Court admit only a limited number of appeals and that, too, largely on a question of law.

In the matter of Public Interest Litigation urging the High Courts and the Supreme Court to exercise writ jurisdiction we have gone completely haywire. There are litigants, such as a person in Indore, who revel in filing writ petitions at the drop of a hat. Subramaniam Swami does not even wait for the hat to drop. The higher judiciary is virtually snowed under by the writ petitions filed before it. This is a matter in which our higher judiciary has to be very strict. Any matter which can be agitated before an administrative officer, a tribunal or a lower court must not be allowed to become a subject of a writ petition until all available remedies are exhausted. A petition which prima facie appears to be trivial or frivolous should be rejected out of hand. Unless at the time of motion hearing or for that matter even prior to that by approaching the Registry the petitioner is able to produce convincing arguments that non-exercise of the powers conferred by Article 139 on the Supreme Court or Article 226 on the High Court would lead to a major failure of justice, these courts should not admit writ petitions. Today, apart from hearing writs, neither the Supreme Court nor the High Courts have much time to exercise their appellate jurisdiction and cases involving substantial litigation under normal law remain pending for years. Writs are high profile and bring the judges concerned to public notice. It is not the job of judges to

have their names published in newspapers. It is their job to give justice speedily and that is one area of major failure of the Judiciary. Here the reforms must be internal and generated by a genuine desire to give evenhanded, time bound justice to all. If that happens litigation will automatically reduce and we shall move towards becoming a society of laws.

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