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GOD, SAVE THE JUDICIARY

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ABSTRACT

It is the utmost duty of the judiciary to dispense justice. It has been rightly observed by Justice Krishna Iyer that "the true conception of the administration of justice is that the lowly concerns of the least person is the highest consideration to the state and the court". Owing to explosion of population and litigation, the number of cases filed in courts has been on a continuous, multi-fold increase. Currently, the Courts of the country take long periods to decide the matters and settle the dispute. However, it is essential that justice should not only be done but also be seen to be done. In order to effectively fulfil this duty, there are several defects in the judicial mechanism which need to be addressed. The paper aims to highlight some of these problems in the judicial set up of the country. It explores different obstacles such as delay in disposal of cases, mounting backlog of cases, vacancies and corruption in the judiciary, etc. Without urgent and immediate redressal of these problems, the Courts of the country will not be able to effectively redress the problems of the 1.3 billion people who may approach them for justice. The title of the paper is taken from the book written by imminent jurist Fali S. Nariman which fits the present scenario perfectly because if we don't take urgent steps to remedy the problems occurring in the judiciary, we may soon reach a point wherein only God would be able to save the judiciary.

GOD, SAVE THE JUDICIARY!

It has been rightly observed by Justice Krishna Iyer that "the true conception of the administration of justice is that the lowly concerns of the least person is the highest consideration to the state and the court".[2172] In the absence of an effectively functioning justice dispensing system, justice fails to see the light of the day. This is generally attributed to a large variety of factors, most importantly the backlog of cases, delay in adjudication, etc. It is often acknowledged that on an average, the time length of a case from the date of filing to the final disposal crosses the life span of the litigant; and in common folklore, it is asserted

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[2172] Maneka Gandhi *v.* Union of India AIR 1978 SC 597.

that litigations in India are handed down from one generation to another as part of their heirloom.[2173]

It is imperative that we recognise and remedy the several defects of the current judicial system of the country to make justice more accessible. There are system failures that happen everywhere which lead the people to the courtrooms, but we fail to address the systematic problems within our courtrooms, and it is these systematic problems which will be addressed through this paper.

BAKCKLOG/PENDENCY OF CASES

> *"It is not just a crisis, the judiciary is on the verge of collapse on account of the massive number of arrears, especially as far as the High Courts and the lower Courts are concerned."*

These were the words of Justice P.N. Bhagwati in his Law Day Speech in 1985.[2174] It, thus, makes it evident that the problem of pendency and backlog of cases has been plaguing the judicial system since times immemorial. Owing to explosion of population and litigation, the number of cases filed in courts has been on a continuous, multi-fold increase. However, the rate of which they are adjudicated and decided is abysmally low. This leads to a large number of cases pending, or in other words, left undecided in the courts. As in July, 2019, there were more than 43 lakh cases pending in the High Courts across the country, of which more than 8 lakh were pending for more than 10 years in the courts.[2175] This means that the rights and statuses of almost 16 lakh players in the judicial process were not decided even after the passage of almost a decade.

DELAY IN DISPOSAL

The Courts, even if they attempt to dispose the matter, take a long time to finally arrive at a judgement to settle the dispute. This delay can be attributed to a wide variety of causes such as procedural technicalities, inefficiency of the investigating agency, unnecessary

[2173] Yashomati Ghosh, INDIAN JUDICIARY: AN ANALYSIS OF THE CYCLIC SYNDROME OF DELAY, ARREARS AND PENDENCY, Asian Journal of Legal Education, The Sage Publications, 2017.

[2174] Amir Ullah Khan, DELAYS, COSTS AN GLORIOUS UNCERTAINTY – HOW JUDICIAL PROCEDURE HURTS THE POOR , Available at http://www.delhihighcourt.nic.in/library/articles/mid%20day%20meal/Delays,%20costs%20and%20glorious%20uncertainity%20-%20how%20judicial%20procedure%20hurts%20the%20poor.pdf

[2175] The Economic Times, available at https://economictimes.indiatimes.com/news/politics-and-nation/out-of-43-lakh-cases-pending-in-high-courts-over-8-lakh-a-decade-old/articleshow/69974916.cms?from=mdr

adjournments etc. These factors directly violate an individual's fundamental right of Speedy Trial[2176], a right which has been held by the Courts to be "component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings."[2177]

Delay in disposal of cases not only leaves certain rights in abeyance, but also amounts to mental torture and anguish to the honest litigant, resulting in heavy burden on their pockets. On the other hand, this delay is seen as an opportunity by the dishonest litigant to keep the case going on and not letting it reach its end. This delay also leads to a large increase in the number of undertrials in the country who are left to rot in prisons leading to a lack of prisons in the country. Further, it also affects the memory of not only the judges, but also the witnesses, sometimes also consequently leading to the non-appearance of the witnesses. Finally, this delay is detrimental to the trust that the public reposes in the judiciary, which diminishes with increase in delay of disposal of these cases.

The problem of delay in disposal of cases first arose for discussion by the Rankin Committee established in 1924, set up under the Chairmanship of Justice Rankin of the Calcutta High Court. Since then, this has been the subject of various committees and reports of the Law Commission of India. The Law Commission through 14th, 27th, 58th, 71st, 144th reports and more addressed the question of delay giving several recommendations to curb the problem. However, the most significant of these committees was the Justice Mailmath Committee which began working in 2000. On the basis of their recommendations, amendments were made in legislations to prevent/minimise delay such as fixing a time limit for filing written statements, promotion Alternative Dispute Resolution mechanisms, specifying a time limit for arguments, restricting the right to second appeals in certain cases, etc. Through these, it is evident that the judiciary as well as the government have been trying to address this problem of delay.

The Hon'ble Courts have repeatedly held, through various judgements, Speedy justice and fair trial are necessary for justice to actual be served. The Courts have believed in the phrase that "Justice delayed is justice denied." This has been interpreted to be an indispensable component of Article 21 of the Constitution of India guaranteeing the Right to Life and

[2176] Hussainara Khatoon *v.* State of Bihar, AIR 1979 SC 1369, see also Sheela Barse *v.* Union of India, 1986 (3) SCC 632.
[2177] Babu Singh *v.* Union of India, AIR 1979 SC 1713.

Liberty, according it the status of a fundamental right. The continued prevalence of this menace in the judicial system does not only affect the participants involved, but also significantly diminishes the faith of people in the judiciary as watchdogs of democracy and protector of their rights.

VACANCIES IN JUDICIARY

Another major factor is the lack of adequate number of judges in the judicial set up. By a study of 2018-2019 it was observed that India has merely 20 judges for every million people in the country, compared to 107 judges per million people in United States of America and 100 judges per million in United Kingdom, wherein both countries have a significantly lesser population. It is obvious that the number of cases filed in the country will surpass the rate at which the cases can be dealt with easily if the number of judges dealing with the cases is so low. This highlights the need to increase the number of judges in the judicial set up.

However, one can see the emergence of a paradoxical situation wherein on one side, the need to increase the number of judges is felt and on the other side, there is a huge number of judicial postings left vacant. As on 1st April 2020, there is one vacancy in the Hon'ble Apex Court of the country, which has a sanctioned strength of 34 judges, and almost 400 vacancies across the various High Courts of the country.[2178] Additionally, as of 2017, the subordinate courts have 5,676 vacancies against a sanctioned strength of 22,704 judges.[2179] A lack in the appointments of the judges.

It was observed by the former Chief Justice of India, Jst. T.S. Thakur, that "vacancies in the judiciary, especially state High Courts have become a national challenge, and efforts were being made to persuade the government to expedite the matter."[2180] A number of Law Commission reports have also dwelled on the problem and recommended an increase in the strength as well as in the appointments to these posts.

[2178] Vacancies of judges in the Supreme Court of India and the High Courts, available at https://doj.gov.in/sites/default/files/Vacancy%2801.04.2020%29.pdf

[2179] Roshni Sinha, EXAMINING PENDENCY OF CASES IN THE JUDICIARY, Policy, August 8, 2019, available at https://www.prsindia.org/theprsblog/examining-pendency-cases-judiciary.

[2180] Vacancies in judiciary a national challenge, says CJI TS Thakur, available at http://indianexpress.com/article/india/india-news-india/vacancies-in-judiciary-a-national-challenge-says-cji-t-s-thakur-2985733/

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CORRUPTION IN JUDICIARY

The menace of corruption has been rapidly engulfing almost all the sectors of the country. Even the judiciary, considered as the fairest organ of the government, has not escaped this evil. Being at such powerful and influential positions, some judicial officers attempt to misuse their office for personal or/and private gain. Corruption is not a feature of just the lower courts, it is also evident in the higher Courts. As the judges gain seniority, they make use of the power to avoid contempt of court and with the increased seniority and popularity amongst the fellow judges, it is close to impossible to get impeached and/or convicted in such charges of corruption.

Justice Veeraswami Ramaswami was the first judge of independent India against whom the impeachment proceedings were initiated for disproportionate wealth. Even though he was found guilty by the committee investigating him, when put to vote in the Lok Sabha, the motion failed. Justice was attempted to be done by filing a petition in the Hon'ble Supreme Court in which the decision of the Parliament was upheld and unfortunately, the judge was free. In 1995, the Chief Justice of Bombay High Court, Justice A.M. Bhattacharjee, was found to have received Rs. 70 lakh from a publishing firm as book advance. Later, he was forced to resign and did not face any charges. Impeachment proceedings were also initiated against Justice Soumitra Sen, former judge of the Calcutta High Court. It was for the first time in independent India that the impeachment motion was passed in the Rajya Sabha. However, he resigned before the proceedings could begin in the Lok Sabha, and therefore, was not impeached. These are just some of the many incidents pertaining to corruption of judges which have actually come to light.

In addition to corruption, the judiciary also, more often than not, witnesses' cases of sexual harassment and demanding sexual favours. However, being in a position of authority and power, they tend to get away with it. Justice Arun Madan, former deputy Registrar of Rajasthan High Court sought sexual favours for himself and a fellow judge for giving a particular decision in a case. The Committee set up to investigate this found prima facie evidence against Madan, who resigned soon after.

In 2012, the controversy revolving around Justice A.K. Ganguly had erupted in which he was accused of sexually and physically assaulting an intern. In this case as well, there was prima facie evidence against him. However, he was given a clean chit by the Ministry of Home Affairs stating that there was no case against him. More recently, the former Chief Justice of

India, Justice Rajan Gogoi, accused of sexual harassment, has received membership of the Rajya Sabha. All this highlights the continuously degrading morality of the officials who are in office to protect the constitutional morality.

The entire judiciary is infected with the termite of corruption which is rampant and continuously increasing. Corruption threatens the rule of law, democracy and human rights and is an impediment to fairness and social justice, and even more so when those intended to protect the individuals from any violation of rights, are the ones who are indulging in such acts of corruption.

PROCEDURE OF APPOINTMENT OF JUDGES

In a democratic polity wedded to rule of law an independent judiciary is sine qua non.[2181] This is ensured with the applicability of the concept of Separation of Powers. This concept forms a part of the basic structure of our Constitution and hence, no law or amendment can abridge or violate it. This essentially stipulates that an organ of the government may not intervene in the functioning of the other organ. However, in order to prevent the organs from misusing their freedom, the Constitution has put a system of checks and balances in place, wherein one organ may ensure that the other is not misusing its powers.

This check is maintained by the Executive on the Judiciary by playing a crucial role in the appointment of judges. Currently, the Collegium system is in place for the appointment of judges wherein the Chief Justice of India along with 4 senior most judges of the Hon'ble Supreme Court recommend appointments and transfer of judges[2182]. However, the Constitution of India explicitly states that the appointment of judges have to be done by the President of India, aided and advised by his council of ministers, after consultation with the Supreme Court judges, in the form of "warrant of appointment"[2183]. It is due to this conflict of method of appointment that the judiciary and executive stand at loggerheads. This conflict was finally resolved in 2015 when the Apex Court upheld the Collegium System, in order to reduce executive interference and protect the independence of the judiciary.[2184]

[2181] B N Srikrishna, Judicial Independence, The Oxford Handbook of the Indian Constitution, edn. 1, Oxford University Press, South Asia Edition, 2016, pp. 349.
[2182] All India Association of Bar *v.* Union of India, 1980 (4) SCC 562.
[2183] Article 124(2), CONST. OF INDIA, 1950.
[2184] Supreme Court Advocates on Record Association *v.* Union of India, (2016) 5 SCC 1.

The history of India is evidence of the fact that the executive has attempted to control the judges in the Courts. In 1973, the Indira Gandhi government overlooked three judges with greater seniority (a significant determinant in the selection of judges) to appoint Justice AN Ray as the Chief Justice of India. It was believed that the other three senior judges were not considered as their judgement in the Keshavananda case[2185] was not in favour of the government. There was further outrage when the government overlooked Justice HR Khanna, the only dissenting judge in the Emergency case, for the post of Chief Justice of India in 1978. This was repeated in 2018, when the Centre sent back the name of Justice K.M. Joseph who was recommended by the Collegium for elevation from the Kerala High Court to the Supreme Court. It was claimed by the Government that this appointment did not satisfy the norms of the Supreme Court as there were judges senior to him and moreover, Kerala was adequately represented in the Supreme Court.

There now exists a form of tassel for power between the Executive and the Judiciary. While the collegium system is often accused of being rigid, opaque and also for promoting nepotism, casteism regionalism, any increase in the involvement of the Executive would be detrimental to the independence of judiciary. However, despite the existence of the collegium system, since the appointment can be delayed and the final appointment is to be made by the government, certain decisions are observed to be given in favour of the government. A notable example of this is Justice Gogoi, who although was accused of sexual harassment, was not only appointed as the Chief Justice but also consequently given a seat in the Rajya Sabha after his retirement. This sets an extremely wrong example for the future judges that even if they indulge in wrong activities, they will get away with it.

LACUNAE IN LEGISLATURE IMPACTING JUDICIARY

It is certain that for the effective functioning of the government, all the organs of the government have to work together, in harmony, while maintaining the system of separation of powers. In addition to fulfilling their duties and responsibilities, they also have to keep a check on the other organs whilst making sure that they do not encroach into the terrain of the other organ. In India, the 3 organs of the government are *firstly*, the legislature, which is primarily responsible for drafting legislations, *secondly,* the executive, responsible for the implementation of the laws and *lastly,* the judiciary which focusses on the settlement of

[2185]Keshavananda Bharti and Ors. *v.* State of Kerala and Ors., (1973) 4 SCC 225.

disputes and adjudication of the rights and claims of the individuals arising out of the laws. The judiciary's work is, therefore, almost entirely dependent on the laws made by the legislature.

It is pertinent to note here that in most instances when the doors of the Courts are knocked, it is due to the faulty and inadequate legislations that have been implemented by the legislature. These laws actually do the opposite of what they are intended to; they increase the instances of injustice and chaos where in fact they are directed at maintaining the social order and peace in the society.

HASTY LEGISLATIONS

The legislature is responsible for drafting laws for almost 1.3 billion individuals. In order to effectively regulate such a large number of people, each with different backgrounds, views and understandings, it is essential that the Parliament takes into account the majority of stakeholders and consider that impact of the laws on the lives of the people. In order to accomplish this monumental task, the Parliament follows a two-pronged procedure: *firstly,* consider the technical, expert advice of the Parliament subject committees followed by a deliberation by the Members of the Parliament to effectively shape the law and *secondly,* a continuous and periodic assessment of the implementation and effectiveness of the law on the society.

However, in the present scenario, the Parliament (and the government) is in a rush to pass and implement laws. It is due to this hurry that the laws are not being scrutinized properly. In its reports, the National Commission to review the working of the Constitution had observed that "our legislative enactments betray clear marks of hasty drafting and absence of Parliament scrutiny from the point of view of both the implementers and the affected persons and groups".[2186] Additionally, certain laws are passed in a hurry to curb some public outrage, without considerable analysis of its effectiveness. An example of this would be the National Investigation Agency Act passed post the 2008 Mumbai terror attack.

These undeliberated and unanalysed laws seek to worsen the problems rather than providing solutions to them. They ultimately result in more burden on the judiciary as once implemented, these laws create more disputes. It is important to understand that a new law

[2186] Chakshu Roy, LAW AND THE SHORT OF IT, Legislation, available at https://www.prsindia.org/hi/theprsblog/law-and-short-it

passed to supplement another law may not be the solution to any problem, but carefully analysing the bill before introducing it may prove to be a better solution.

LOOPHOLES IN LAW

This problem flows from the aforementioned problem itself. When all aspects and implications of the law sought to be introduced are not carefully analysed, they tend to leave some gaps and loopholes in the law. This essentially leads to 2 main problems: *firstly,* by gaps in legislations, the rights and claims of all stakeholders are not adequately established and *secondly,* the offenders may take help of the loopholes in law to escape punishment or penalties or delay the adjudication of disputes.

Perhaps one of the most severe loopholes in criminal law is the presence of gender specific offences, especially sexual offences. In these cases, only a woman may be a victim and only a man may be a perpetrator. This means that if the man claimed to be a victim of some sexual offence wherein a woman is the perpetrator, it would not come under the ambit of sexual offences. This absence of gender neutrality completely negates the possibility of an entire gender of victims. Things are much worse for transgenders in this country, since most of the penal law are essentially binary in nature, considering only males and females.

In some situations, the legislation, though intending to cover certain offence in entirety, may instead legalise some aspect of the offence. This is evident in the Rape laws of the country. The provision of Section 375 keeps marital rape out of the purview of rape.[2187] This is not just morally incorrect, but is also a violation of Article 14 of the Constitution which guarantees equality to all its citizens.

This situation could have been avoided had the legislature duly considered the implications of the law it had promulgated. Another example of this is the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act which was enacted in 1993 to prohibit employment of manual scavengers. However, the effectiveness of this legislation was questioned in the case of *Safai Karamchari Andolan and Ors. v. Union of India and Ors*.[2188], after the judgement of which a new law was passed in 2013[2189] to meet the objectives of the initial act.

[2187] Explanation 2, Section 375, Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.
[2188] Safai Karamchari Andolan and Ors. *v*. Union of India and Ors., 2014 (4) SCALE 165.
[2189] The Prohibition of Employment as Manual Scavengers and their Rehabilitation Bill, 2012

EXISTENCE OF PRE-COLONIAL LAWS WITHOUT AMENDMENTS

It is pertinent to note that most laws came into existence due to the prevailing conditions at the time of their enactment in the society. However, the society and the societal conditions keep on changing with time. For example, the Indian Penal Code is a pre-independence statute which has continued to be in existence. This statute prescribes punishments in the form of fines for a number of offences. For the offence of voluntarily causing hurt on provocation, the maximum fine that can be imposed is of Rs. 500[2190]. This amount may have been a substantial fine during the period in which it was enacted. However, in today's time, Rs. 500 does not seem like a fitting fine. This is just one example of the many which highlights the need for amendment and adaptation of provisions of law to suit the changing needs, situations, circumstances and society in general.

Without amendments in the existing legislations periodically, the legislations will not meet and fulfil the objective of them being implemented. This will, thus, consequently lead to more disputes being agitated and reaching the Courts of the country, thereby, overburdening the Courts and becoming an impediment in effective dispensing of justice.

In India, we follow the principle that all people are equal before law and shall have equal access and protection of law. In order to uphold and continue to abide by this principle, there are several changes required in the judicial mechanism of the country to cure the aforementioned defects. If these are not done urgently, the commoners and citizens of the country will have no where to turn to for redressing their problems and no doors to knock at to get justice. This is not the situation our forefathers would have imagined we would reach and it is therefore upon us to remedy to situation. Afterall, God cannot save the judiciary, we have to.

[2190] Indian Penal Code 1960, s 334.