JUDICIAL ACCOUNTABILITY

JUDICIAL BEHAVIOUR has been receiving attention especially since 1998 when a former judge of the Supreme Court observed that:[1] "everything was rotten about the Indian judiciary." To a query, why the judge did not say this while he was in office, the reply was: "I was afraid of the safety of my wife and children."

These statements conceal more than what they reveal. If the power-holder in the judiciary has had to feel so badly and so strongly, there obviously is some rot somewhere. This suspicion becomes a reasonable belief when compared with the more recent statements by the outgoing chief justice of the Supreme Court that "all is not well". Compared to the first statement, the anguish conveyed was muted. Nonetheless, it communicated enough for a serious thought on what ails the Indian judiciary. In context, one stands reminded of Churchill's statement in the British House of Commons that even if India became free, she cannot escape the 'bureaucracy or the judiciary'. The bureaucratic side was testified by Mark Tully,[2] who said that the 'first mistake that independent India committed was for the IAS and the IPS to continue in the style of functioning of the ICS and IPS officers. The power circuit design that was to serve the interests of the occupier regime holding the country under what was essentially a defence power exercise was palpably repugnant to the requirements of a controlling Constitution creating a limited government under the rule of law.

The judiciary has come into adverse notice because of many difficulties created in connection with both access to justice and delivery of justice. A monopolistic power group that has emerged in the class of advocates strengthened by the compulsions of an adversarial system has made the difficulties more acute. Recent expressions of resentment against the judiciary are examples of suppressed dissatisfaction and discontentment with the entire system. While many among the common populace know that the judges enjoy some immunity, they do not know the limits of those immunities. None seems to know that there is no immunity for crime for anyone holding any judicial office under the Judicial Officer's Protection Act, 1850 and the Judges (Protection) Act, 1985. Even if it purported to, it would be void under article 13(1) of the Constitution by reason of the adoption of the basic postulate of equality

1. *Times of India* December 18, 1998.
2. Former B.B.C.'s India- Watcher.

of status and opportunity.

Article 14 of the Constitution has encrypted a great principle for ensuring the rule of law in words that conceal reference to its potential as a brooding omnipresence in the sky bringing under its sweep all the six bands of the power spectrum.[3] With reference to the judicial process, the coercion band, the ethical count band, the influence count band, the time count band and the interests-affected band weigh more than the head count band of the power spectrum. The pre-eminence given to judicial opinion stemming basically from its impartiality and objectivity would tend to give a greater coercive force to judicial pronouncements and generally secure obedience. This subsumes the ethical and the influence count. The interests-affected seem to derive support and inspiration from the judicial pronouncement primarily for the above reasons. Even the time count seems to receive notice and application through the doctrine of precedent but its fuller dimensions that stand encrypted in the silent strength of article 14, does not appear to have received adequate notice.

The Supreme Court has lent strength, through its holding in *Budhan Choudhury*[4] and *A. R. Antulay*,[5] that judiciary is "State" for the purpose of constitutional limitations on power. Article 14 significantly addresses the time-count by not allowing any time gap for approximating the 'is' to the 'ought'. The words "shall not deny to any person the equal protection of the laws" would place the duty on the state to deliver on ground the promise of the laws. Articles 32 and 226 significantly speak of these superior courts being empowered to issue writs for enforcement of fundamental rights. Tragically, however, the procedure attending judicial process in India as injected by the Britons, seems to have been permitted to continue largely through non-application of mind to the parity-of-power principles ingrained in article 14 and seems to have consequently destroyed the substance thereof. The compulsions of article 14 not to deny the equal protection of the laws has consequently suffered. All the procedural hurdles placed in the way of access to justice by the colonial masters seem to have been mechanically continued resulting in a ceremonial worship of procedure, very often to the denial of substantive guarantees of the laws. As a consequence, the lawbreaker has derived a positional advantage and the law-abiding person is very often left to wonder whether obeying and respecting the law was a folly. To access justice, he has to satiate the greed of the professional lawyer to make a fast buck as also the insatiable appetite of the state to fleece more

3. As identified by one of the greatest jurisprudents of our time, Professor Julius Stone.

4. *Budhan Choudhary* v. *State of Bihar*, (1955) 1 SCR 1045,1049.

5. *A.R. Antulay* v. *R.S. Nayak*,(1988) 2 SCC 602.

money for asking a question in the court. No wonder, the common man finds corruption a cheaper alternative for speedy justice.

Hindrances to speedier and informal access to justice can be considered as 'un-Indian'. The king in ancient India ensured compliance with every applicable law and restored the *status quo ante* the violation. The administrative process was informal and quick and it was regarded as part of the duty of the king to strictly and impartially enforce law. It was his duty to protect the people at any cost. The king was punishable a thousand times more severely than a common man for any violation of law. Rank imposed obligations to inflict heavier punishments for failure of duty. Even the chief justice would be punished as severely as the king for violation of law. Clearly, it was the duty of the state to ensure compliance with every law. The subject had to just inform the king of his injury or wrong and thereafter it was the duty of the king to render speedy justice strictly in accordance with law. This informal access to justice formed persuasive appeal with the Moghul emperors like Humayun and Akbar. In fact, Akbar is famed for having hung a bell in his courtyard for registering camplaints, and would appear on the balcony to receive the complaints in person. The Birbal stories illustrate how the follow up action was taken. It is a matter of history how these native ingenuities and devices for speedy delivery of justice were lost in the quagmire of power and the state became less and less concerned about approximating the 'is' to the 'ought'.

The role of administrator in ordering facts as required by the law is ingrained in the administrative process. The administrator is first required to act to ensure compliance with every applicable law. He is clothed with the necessary administrative powers and the Indian Penal Code, 1860 contains provisions to punish contempt of lawful exercise of power by public servants. The sentinel on the *qui vive* of administrative action is undoubtedly article 14, which articulates what the state should do and what it cannot do. However, the shadows of the immediate pre-constitutional past seem to insulate the public servant from answerability to the ordinary law as administered by the ordinary courts. The requirements of governmental sanction for prosecution survives in section 197 of the Cr PC which mysteriously seems to have passed the constitutional filter of article 13(1) of the Constitution and survives to thwart the equal protection of law postulate of the rule of law. Similarly, the prior notice requirement of section 80 of the CPC survives, although less obnoxiously.

Article 14 is exhaustively articulate that under the Constitution, the state shall "not deny to any person equality before the law or the equal protection of the laws within the territory of India." The state is thus made incompetent to act contrary to any law, existing or enacted, constitutionally filtered through article 13(1) and (2) to avoid

repugnancies *vis-à-vis* any of the fundamental rights guaranteed under part III. The inclusive definition of "state" in article 12 correctly perceived by the apex court to include the judiciary gives dimensions for the restraints on the powers of the judges. The definition of a public servant in section 21 of the Indian Penal Code, 1860 covers the judges. The Judicial Officers' Protection Act, 1850 and the Judges (Protection) Act, 1985 do not confer, consistently with section 166 of the IPC, any immunity for crime. Thus, the laws already prescribe judicial accountability. The Supreme Court has added that any judicial pronouncement violative of any fundamental right is void. The apex court has further said that no citizen can waive any of his rights by any act of his.

For reasons not scrutable and justifications not advanced, judges of the superior courts have frequently resorted to grounds like delays and *laches* for throwing out the petitions of law-abiding persons and denying injunctive relief by prevaricating through procedure. The law breaker has a field day and the aggrieved party is made to suffer the wrong for more than the minimum time required to arrest it as a preliminary to a cure. Procedure destroys the substantive guarantees of law. Curiously, a very meaningful provision in section 166 of the IPC which can discipline erring judges has not received any notice for half a century and more although in every case decided against the state, many could have been scalped under this salutary provision, judges included. There have been instances in other jurisdictions where judges have been punished *e.g.* a judge of the Supreme Court of Tokyo was punished by a jurisdictional judge for a violation of law and also in China where a superior judge was punished for similar reasons by a jurisdictional judge. It would seem to be impossible for such a thing to happen in India because the very idea that a judge could be punished for violation of the laws does not seem to find acceptance through the reasoning that it is a judge who says what law is to be applied.

Judicial power was defined by Chief Justice Marshall of the American Supreme Court as the "power to state authoritatively what the law is". In this light, only the Supreme Court of India can be said to have judicial power and the courts subordinate to it can have judicial functions only. The subordinate courts, principally the high courts, would then be under a duty to stay the impugned conduct where it is continuing or restrain the wrong-doer from doing anything further in the matter pending final determination. The wrong doer would also have to be compelled to restore the *status quo ante* the violation, with reparations for violation of rights for the intervening period.

While this would be the command of article 14, court action so far has not enforced any fundamental right in any case. The pre-constitutional burdens of costs in access to justice have been ceremoniously perpetuated

and burdens, if anything, enhanced. Judicial process as it now stands structured seems more intent in stopping questions than answering them. In the result, it has become accessible only to the rich and creamy segments of the society while the vast multitude of the genuinely aggrieved silently suffer deprivations of rights because access to justice for them is costly, cumbersome, slow and uncertain.

Judicial accountability is within the mandate of article 14. Its non-enforcement is part of the general malaise attending the judicial non-enforcement of any fundamental right, principal among which is article 14, which happens to be a catch-all and a cure-all. For judicial accountability to get started, all that would seem necessary would be for the judiciary to respect faithfully the mandate of article 14 and the denial of any time gap in the approximation of the 'is' to the 'ought'. In this aspect, the pronouncement of the Supreme Court[6] to the effect that any collusion or fraud on the court to procure a miscarriage of justice would be seriously noticed by the court is indeed salutary. Although it was so held in the context of property rights, the principle would have to be automatically applicable to every right. It can perhaps be hoped that this could provide a proper start for a new approach to revitalize article 14. But alongside, punishability of the erring judge who fails to give the protection of the applicable substantive law from the time of violation of rights would have to be predictable and automatic.

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6. *Bhaurao Dagdu Paralkar* v. *State of Maharashtra*, (2005) 7 SCC 605.

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