

EVALUATING JUDICIAL PERFORMANCE: A CONSUMER PERSPECTIVE

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AS A body sitting in judgment of the collective destiny of over one billion people, diverse in many respects and united under a democratic Constitution, the Indian Supreme Court is no doubt one of the most powerful institutions of its kind anywhere in the world. During the six decades of its functioning it has received bouquets and brickbats for its acts and omissions. By all accounts, the judiciary, compared to the other two wings of government, has performed well sustaining the trust of the people in its independence, fairness and impartiality. However, critics have faulted it for the enormous delay in adjudicating matters and the consequent problems in accessing justice for a large section of the people. Others have admired its courage in checking the excesses of the executive government and exercising 'activism' in protecting the rights of citizens. Yet others have lamented the falling standards of integrity and independence on the part of some members of the judiciary, which they think, tend to make it the least accountable wing of the government. This paper looks at these differing perceptions on the basis of available evidence with a view to let the reader form his own conclusions on judicial performance.

I Delay, arrears/pendency and access to justice

The Indian judiciary is often criticized, perhaps justifiably, for the unusual delay in the disposal of disputes, for the enormous arrears of cases it accumulates year after year and the poor management of the proceedings showing very little concern for the consequences to the litigant public and to society at large. One has to have some understanding of the court system and its working to be able to appreciate this problem of delay and arrears.

The Indian judiciary consists of the Supreme Court with 26 judges (proposed to be increased to 30), 21 high courts with a sanctioned strength of 725 justices (proposed to be increased by another 100 to 150 judges)

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and 14,477 subordinate courts/judges. For a variety of reasons the working strength at all the three levels is short by 15 to 30 per cent. Compared to India's population this is admittedly an inadequate number. According to the Law Commission (120th Report, 1987) the number of judges per million population in India was 10.5 which may have gone up to between 13 or 14 per million by now. In *All India Judges' Association v. Union of India*,¹ the Supreme Court directed the central and state governments to consider increasing the number of judges five-fold in a phased manner over a five year period in order to achieve the judge to population ratio as 50 per million. The proposal was not acted upon, *inter alia*, due to financial constraints.

In terms of finances the Union Government's allocation for judiciary under the five year development plans is said to be less than one per cent of the total plan outlay. The court system is, therefore, wholly dependent upon the non-plan budget which remains almost static leaving little scope for modernization and development. In respect of the subordinate courts, which handle nearly 90 per cent of all litigation in the country, the budget comes from the state governments. According to available statistics, every state in India except perhaps Delhi, the annual budgetary allocation for judiciary is less than one per cent of the state's annual budget estimates!

In terms of the volume of work, it is estimated that nearly 30 million cases are pending in the court system in India at any given point of time. The average fresh filing every year varies from 15 to 18 million cases which figure is steadily on the rise. The average disposal more or less matches with the filing. On an average the 14,000 subordinate courts decide nearly 13 million cases every year, perhaps the highest figure in the judicial world. The 21 high courts decide on an average 1.5 million cases per year while the Supreme Court decides well over 50,000 cases every year. Despite this impressive output, the arrears/pendency keep on increasing, though marginally, every year. In 2006, the cases pending in the dockets of different courts in the country stood at a staggering figure of 36 million cases in spite of the rate of disposal increasing nearly 30 per cent between 1999 and 2006. It may be of interest to the outside world to note that the average judge in the high courts decides 2374 cases while in the trial courts the average judge manages to decide over 1350 cases every year despite poor infrastructural support. Applying this average, India needs another 1500 high court judges and 20,000 subordinate judges to clear the mounting arrears within a year or two.

1. (2002) 4 SCC 247.



From the above data one can safely conclude that the performance of Indian judges, quantitatively speaking, is very impressive. It is a fact that though the disposal of cases in various courts has considerably increased in recent years, the institution of fresh cases has increased more rapidly making it impossible for the court system to address the huge pendency of 35 million cases. The fact that most of those pending cases are less than two years old is no consolation for litigants who keep on knocking the doors of courts in large numbers. It is interesting to note that a government-appointed committee recently recommended a system of impact assessment on workload of courts before a legislation is introduced and for making provision in the financial memorandum for the estimated cost involved in implementing the legislation. If accepted, the situation in respect of delay and arrears is likely to improve particularly in the subordinate courts.

It is a matter of deep concern that the bulk of cases pending (nearly 60 to 65 percent) relates to criminal matters. On the recommendations of the Eleventh Finance Commission, every state had set up fast track courts to deal with pending sessions cases. These courts have been quite successful in reducing the arrears. Since most of the arrears are pending in magisterial courts, efforts are now being made to extend the fast track courts to the magisterial level as well. Also, evening courts are being established in certain states like Gujarat and Tamilnadu to contain the mounting arrears in their jurisdictions. Parliament amended the Criminal Procedure Code in 2005 making provision for settlement of criminal cases through the “plea bargaining” process. It is slowly picking up in some states despite opposition from a section of judges and the bar.

Similarly, on the civil side, alternate dispute resolution methods are being employed through the now well-known indigenous institutions of *lok adalat* (peoples’ court) organized under judicial supervision particularly during week ends. The number of settlements thus reached particularly in compensation suits is very impressive and encouraging. Besides giving it statutory authority under the Legal Services Authority Act, 1987, Parliament has now come up with the idea of making ADR a routine exercise in all civil disputes by enabling judges to attempt settlement at the first hearing itself. This is being done through mediation, conciliation, arbitration or judicial settlement organized under the amended section 89 of the Civil Procedure Code. The government has also extended liberal grant for court computerization and development of infrastructure support systems. An ambitious programme of timely justice through proper planning and management of court information, budget and personnel is now initiated by the National Judicial Academy working directly under the Supreme Court to streamline judicial administration. For an impartial observer, future looks



promising for delivery of timely justice.

A related issue which has been troubling administration of justice is one of equal access to all, a constitutional guarantee. The Legal Services Authority Act set up a network of legal aid centres with state funding throughout the country to be managed by the judiciary. It might have succeeded in giving legal representation to indigent clients in litigation before courts and in providing a forum (*lok adalat*) for settlement of cases through negotiation and mediation. However, it has not been able to provide access to equal justice to all persons particularly women, *dalits*, tribals, children and the disabled persons. Special schemes devised for the purpose are mostly on paper only. Complaints of discrimination, atrocities and denial of justice are rampant in the media against which the legislature make further amendments to the laws and institutions. Implementation, however, continues to be poor for a variety of reasons — social, economic and political. Judicial activism and public interest litigation have tried to address the issue with limited success. The legal aid apparatus could not respond meaningfully to the challenges partly because of the way it is administered and its inability to build bridges with civil society. Judiciary has to share part of the blame in as much as legal aid is under its control and management.

Access, therefore, remains a big issue in India's multi-cultural society in the context of the constitutional promise of equality, social justice and rule of law. The government had set up several statutory commissions outside the judiciary with mandate to look after the rights and entitlements of different sections of society. They have very little power to give reliefs for which they depend again on the overcrowded court system.

II Judicial activism, constitutional governance and human rights protection

Judiciary is what judiciary does which in turn depends on the matters brought before it by the litigant public. In a country in which one-third of the people are illiterate and live below the poverty line, it is natural that the court system is being used mostly by the well-to-do sections to agitate their claims. The system expects people to know their rights and assert their claims according to the legally prescribed procedures, which indeed is beyond the capacity of the one-third population being poor and illiterate. The language and procedure of law is alien to their culture and they do not have the resources to fight long drawn procedures in courts. Legal aid can also help only if it is sought and people do not know from where they can get it and how. Indeed, adversarial adjudication is heavily loaded in favour



of the urban middle and upper classes. It is in this context, the Indian judiciary invoked “activism”, relaxed the *locus standi* doctrine, entertained letter petitions from public-spirited individuals on behalf of groups of disadvantaged people, mobilized court-appointed commissioners to ascertain facts and gather evidence, and developed social-context reliefs and remedies unknown to jurisprudence in the past. The rationale for court intervention was the constitutional jurisdiction provided for enforcement of fundamental rights (article 32) and the power of judicial review of executive/legislative action. So was born judicial activism and public interest litigation in the 1980s which, while enlarged the capacity of higher courts to reach justice to vast sections of people who otherwise would not have received it, also brought the judiciary in direct conflict with the other two branches of government. Volumes have been written on the subject in support and against this aspect of courts’ functioning and no assessment of judiciary is complete without appraisal of the role of court in this regard.

Though it is difficult to generalize, a student of Indian judiciary can discern at least two fundamental shifts in its approach to issues of constitutional governance and judicial protection of human rights. If in the first 25 years after the Constitution, the court was largely conservative and positivist in its approach, in the next 25 years, the court was liberal and activist thereby infusing a new life in the working of the Constitution with a central role assigned to judiciary itself. Of course, it disturbed the pre-existing balance of powers and raised sharp criticism both from the executive and the legislature. The people by and large welcomed the shift, rose in defense of the judiciary and thereby thwarted attempts to contain the expansive judicial review jurisdiction of courts. The popular support was so intense and widespread that the government could do nothing even when the court so interpreted the provisions of judicial appointments so as to effectively exclude any executive role in it. It is interesting to see how the judiciary came to exercise such near absolute power probably not envisaged by the framers of the Constitution.

The Indian Constitution does exhibit the trappings of a federal system though in fact there is concentration of power in the Union Government. Because of the dominance of a single party in power both at the union and state levels for nearly two decades, many constitutional conflicts did not arise for adjudication. However, when this situation changed in early 1970s, the union executive invoked its powers to dismiss state governments opposed to its authority, to impose emergency in the country and curtail dissent including press freedom. During that period there was talk of “committed judiciary”. The judiciary even gave a judgment justifying unbridled exercise of executive power during emergency to the detriment of the right to life



and liberty.² The process culminated in the supersession of senior judges who resigned when their junior who was in the good books of the government was appointed Chief Justice of India.

The judgments of the court rendered during this period (1950-75) on two fundamental rights, right to property and right to equality are indicative of the approach the then court had in looking at state powers *vis-à-vis* citizens' rights. This is well documented in all textbooks on Indian constitutional law and is unnecessary to be repeated here. The courts' approach in the interpretation of the concept of compensation when property was acquired by state was contrary to the Parliaments' agenda on land reform and social justice. This conflict led to a series of constitutional amendments including the introduction of the IXth schedule consisting of legislation expressly declared to be outside judicial review. The court continued the same approach in defense of private property in the "Privy Purses" abolition matter and in bank nationalization issue which angered the government so much that when the opportunity arose during emergency, it dropped the right to property from the list of constitutionally guaranteed fundamental rights.

A similar confrontation between the executive and the judiciary arose during the period in the matter of reservation for backward classes which, incidentally is continuing even now. The issue was the scope of the right to equality and the claim for preferential discrimination or affirmative action in favour of certain disadvantaged sections of society. In *State of Madras v. Champakam Dorairajan*³ the Supreme Court invalidated a government order (GO) reserving seats for non-Brahmin students in medical/engineering colleges. A Brahmin candidate who would have been admitted on merit but for the reservation under the GO, challenged it on the basis of unfair discrimination based only on caste. The court had no hesitation to strike down the GO on the basis of prohibition of discrimination on grounds of religion, caste, sex etc. under article 15(1). Parliament nullified the judgment through a constitutional amendment adding a new provision (clause 4 of article 15) which enabled the government to make preferences for socially and educationally backward classes of citizens. When the state action under the amended provisions was challenged, the Supreme Court again held that the caste of a group of persons cannot be the sole or predominant factor for ascertaining whether a particular class is backward or not.⁴ Court also said that reservation cannot be allowed to exceed

2. *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

3. AIR 1951 SC 525.

4. *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649.



reasonable limits and 68 per cent reservation was clearly unreasonable. Because of the political support caste-based reservation brings to parties, such measures continued in different states through all types of dubious methods employed to determine backwardness. The court, in turn, continued strict scrutiny of such classifications, put the burden of proof on the state and struck down schemes which did not fulfil the exacting standards in distributing quotas to different groups. Ultimately in the *Mandal* judgment⁵ the court changed its earlier position and conceded the argument that caste-based reservation is legitimate provided the government excluded the “creamy layer” from among the beneficiaries. In fact, in *A.K. Thakur v. Union of India*,⁶ the court went further and allowed reservation in both state and privately managed educational institutions under article 15(5). Of course, there are many issues in this debate still open including the status of minority educational institutions which may upset the majority view of the court in respect of equality and affirmative action by means of quota or reservation.

To return to the story of the shift in the approach of the post-emergency court, one can highlight several instances where the court interpreted fundamental rights expansively, intervened effectively to check executive excesses tending to change the constitutional balance and exercised powers outside the strict judicial domain ostensibly to promote rule of law and good governance.

The expansion of civil liberties through courts happened as a result of three independent processes. Firstly, the assumption of judicial activism and liberalization of the doctrine of *locus standi* opened the doors of court for large sections of disadvantaged people to seek justice through what is called public interest litigation (PIL). Relaxation of court procedures and democratization of judicial remedies in PIL matters led to the rehabilitation of bonded labour, improvement of conditions of custodial institutions, prevention of environmental degradation, stricter enforcement of labour welfare, greater accountability of law enforcement agencies and greater respect for rule of law in governance. Through techniques such as “continuing mandamus”, the court monitored the implementation of its orders and put the contempt power to good use in order to discipline recalcitrant civil servants. Secondly, through a liberal and ingenious construction of the phrase “procedure established by law”, the court brought in the American concept of “due process” in the interpretation of right to life and liberty under article 21. Simultaneously, the court adopted an activist

5. *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

6. (2008) 6 SCC 1.



approach to read and implement several directive principles of state policy (not judicially enforceable) in conjunction with the fundamental rights of liberty, dignity and equality by invoking the doctrine of harmonious construction. What followed was a profusion of rights considered integral to life and liberty. These included right to legal aid, right to education, right to clean environment, right to better living conditions in jails and mental asylums, right to privacy, right to speedy trial etc. The court said that right to life guaranteed under the Constitution is a life with dignity and not animal existence and, therefore, the court is justified in directing the executive to fulfil its obligations under part IV of the Constitution through writ jurisdiction.

Thirdly, and more importantly, the court invented the now celebrated theory of 'basic structure' under which the court put limitations on Parliaments' power to amend certain fundamental aspects of the Constitution. These include fundamental rights of citizens, independence of judiciary, judicial review, democratic character of the polity and many others yet to be specified. In 1973, overturning its own earlier rulings, in the *Kesavananda Bharati* case,⁷ the Supreme Court held that Parliament does have the power to amend any part of the Constitution, but it cannot be so exercised as to alter or destroy the 'basic structure' of the Constitution, a theory which it reaffirmed in many later decisions. The decision was perceived by many as an assault on parliamentary democracy and a challenge to its federal character.⁸

Judicial activism in the sense of aggressive use of judicial power to defend and promote basic rights was widely welcomed and earned a name for the Indian judiciary even outside the country. However, its use as a counter-majoritarian check on legislature proved to be problematic for the judiciary itself. When the court tried to become an oversight body on proceedings in the legislative bodies, it was stoutly resisted as an assault on democracy. The confrontation, started in 1964 when the Allahabad High Court granted bail to a person sentenced to jail by the state assembly for its contempt. The assembly directed the judges be brought before the house for contempt. In turn, the high court restrained the Speaker from issuing warrant against the judges. The matter was ultimately resolved by the intervention of the President. However, the court took the view that it had the power to review the warrants issued by the legislature. Again, the anti-

7. *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461.

8. These issues are discussed in detail in a book brought out with a provocative title by a popular commentator on public policy and governance. Pran Chopra (Ed.), *The Supreme Court Versus the Constitution* (Sage Publications, 2006).



defection law which gave power to speakers of legislatures to determine “defection cases” invited judicial interventions raising the wrath of legislatures and political parties. Finally, the Supreme Court was caught in the wrong foot in 2005 when it issued a series of directions to the Speaker of Jharkhand Assembly on how to conduct the floor test within the prescribed period and with video recording of the proceedings. Obviously it was an unwarranted interference with the powers and privileges of the legislature by the judiciary. It was a non-speaking order, impossible to implement if the assembly had ignored it. Many called it an unconstitutional action of the apex court which deserved to be reviewed and corrected before long. It is said that where there are no judicially manageable standards, it is prudent for the courts to avoid intervention and let the democratically elected bodies to address the problem politically.

III Judicial corruption, judicial independence and judicial accountability

The Indian Constitution contains detailed provisions intended to secure the institutional independence for the judicial wing essential to deliver free and fair justice even against the state. Today, an entirely judiciary-driven process of selection of persons for appointment to higher judiciary is in place in which the executive has neither any say nor any veto power. India is perhaps the only country in liberal democracies where the judges alone appoint judges to the higher judiciary. The contempt jurisdiction which the judiciary enjoys is vast enough to ensure compliance of its orders and directions. The power of judicial review over executive and legislative actions and the theory of ‘basic structure’ judicially evolved, critics say, can make the judicial wing a potential threat to parliamentary democracy. Though such a view is exaggerated and partisan, there is no gain saying the fact that the enormous power and independence that judges of the apex court have come to possess make it absolutely essential that its approach is transparent, impartial and restrained, free from corruption and narrow loyalties inimical to constitutional values and principles. Can the people of India have that assurance?

It is a matter of satisfaction that in the life of Indian Supreme Court there have been only two instances where the impeachment of judges was resorted to for corruption and impropriety. For alleged improprieties in financial management, a chief justice of a high court who later became a judge of the Supreme Court was put on impeachment proceedings though the motion could not be passed in Parliament because of abstention by the then ruling party. This was in 1991. Seventeen years later this year the



Chief Justice of India asked the government to impeach and remove a sitting judge of the Kolkata High Court for misappropriation of the clients' money while he was a lawyer which he returned only on the orders of court and that too after his elevation. Outside these two "proved" cases of judicial corruption, there have been a series of instances in the recent past wherein allegations against judges of the higher judiciary have been probed through an in-house mechanism devised by judges themselves and resulting in resignation or voluntary retirement of the judges concerned. Media reported allegations against a former Chief Justice of India having judged a case in which he reportedly allowed conflict of interest go unchecked, leading to suspicions of corruption. It is not clear whether the immunity of judges against criminal prosecution extends to retired judges as well. The judgment in *Veeraswamy* case⁹ prohibited the police from registering a criminal case against a judge of a Supreme Court unless the Chief Justice of India is consulted in the matter and if the Chief Justice is of the opinion that it is not a fit case for further proceeding the case is not to be registered and investigated.

The growing criticism of the judiciary for its alleged lack of accountability is now taking its toll. The Constitution has no provision for disciplining a judge of a superior court short of his removal through the cumbersome process of impeachment. If in the initial four decades there were hardly any allegations of judicial misdemeanor, in the last two decades there have been many uninvestigated allegations of judicial misbehaviour which no doubt, sullied the image of the judiciary as a whole. Stopping work being assigned to the errant judges is an ad hoc and ineffective measure. In the absence of an effective remedy, the bar in some instances resorted to the unconventional method of disciplining judges by passing resolutions demanding their resignation and boycotting their courts. In some cases such unconstitutional methods did yield results by forcing the errant judges to resign. While the higher judiciary in India has powers to discipline every organ of government, it is ironical that it has no effective powers to discipline its own members! Judicial accountability is inseparable from judicial independence. The challenge before the nation is how to secure judicial accountability without impairing judicial independence.

9. *K. Veeraswami v. Union of India*, (1991) 3 SCC 655.