MEDIA AND JUDICIARY: REVITALIZATION OF DEMOCRACY

Abstract

This paper examines how media and judiciary act in the interface between common man and the government. Media, being the fourth estate of government, impacts the quality of democracy in any state and asserts its role by strengthening and intensifying the quality of democracy. The Indian judiciary, in order to uphold the great values enshrined in the Constitution, acts by stepping in when the Parliament and the executive ride roughshod over citizens' rights. The paper also looks at the circulation of misinformation by media as an imminent threat to the social order and as an active contributor to 'moral panics'. Thereafter, it analyses some significant judicial pronouncements keeping a check on the powers of bureaucrats and other administrative authorities.

I Introduction

> It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we were all going direct to Heaven, we were all going direct the other way.

-Charles Dickens[1]

THOUGH DICKENS wrote this describing the French Revolution, these observations aptly apply to the contemporary times. The media and the judiciary are the institutions which are supposed to instill hopes in the worst of times, wisdom in the age of foolishness, spread light in the season of darkness, and so on, as these are supposed to be impartial. Only impartial people can state the truth which is unfortunately the first casualty in the present age. Denis Diderot's comment is apposite, "[w]e swallow greedily any lie that flatters us, but we sip only little by little at a truth we find bitter." Vested interests perpetuate status quo and the truth hurts it. There are arduous and seamless efforts to bury the truth, but truth can be eclipsed but it can never be extinguished.

The judiciary and the media, besides the civil society, are the best instruments to checkmate power. Roles of these two institutions are

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1 Charles Dickens, *A Tale of Two Cities* (Penguin Classics, UK, 2003).

complementary but ironically the two have acquired an adversarial role. Both are required to protect the common man from the onslaught of state as well as individual might and act without fear or favour. This paper enumetates the challenges posed by the functioning of media on the one hand, and judiciary, on the other, in an attempt to sitvate their role in a democratic society.

II Media- The fourth estate

While the legislature, the executive and the judiciary from the three pillars of the democracy, press remains the fourth estate. It is an institution which wields immense power and influence and thus must be fixed with responsibility and accountability. In 1927, Bhagat Singh lamented the decline in the standard of journalism in an article written in *Kirati*. He wrote: "the profession of journalism, which was highly respected once, has become extremely dirty today. These people provoke the feelings of people by giving bold headlines against each other and make them fight. Not at one or two places, but at several places riots broke out because local newspapers published provocative articles."[2] The important question is that why is media's credibility being questioned? It is because the way 'facts' are being presented? It is often said that reporting has to be truthful and objective but the question is: is hundred per cent objectivity ever possible or is it a myth? If everyone is subjectively objective how can there be a conscious effort on the part of reporter to give an 'objective' report?.

Objectivity in reporting, personal elements and ethics

The fact is that it is well-nigh impossible for the reporter to remain detached, especially in cases of national interest or communal riots. However, the question arises how much truth is to be dished out if it is likely to damage the public interest, peace or national interest? In cases of communal riots, the government has tried to curb the freedom of the press on the ground of maintaining peace, but the Supreme Court has held in number of cases that the government should curb riots, not the freedom of the press. However, now there is a colossal change in the approach with the advent of terrorism. Apart from the moral dilemma and the question of ethics, there are deliberate distortions of facts due to vested interests. It has several facets-ownership pattern of the media houses, flamboyant ambitions of proprietors and

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2 Chaman Lal (ed.), *Bhagat Singh Key Rajneetik Dastavez* 17 (National Book Trust, New Delhi, 2007) (translation supplied).

journalists who want promotion of business interests, berths in Rajya Sabha or tickets for Lok Sabha, *padma* awards and other nefarious favours. Some of them have successfully got these berths. Many journalists have used this medium as a shortcut to power. The ownership pattern is the most crucial issue. If an industrialist runs many industries and also owns a media house, how can she/he delink her/his commercial interests? The media house is also one of the commercial ventures. One thing that is crystal clear is that mobilizing revenue for the sake of running a newspaper or TV channel seems justified, but running a newspaper or a TV channel for mobilizing revenue is wrong and despicable. An attempt was made in 1971 by the Indira Gandhi government when 'Diffusion of Ownership and Delinking from Big Business Bill' was introduced in the Parliament. One of its provisions was to delink the media house from general business. However, it could not see the light of the day under the pressure of the corporate world. The extensive media coverage and other technological innovations have made the information ubiquitous but disinformation and misinformation are also in circulation in equal measure. Social media is grist to the mill. Some old video of killing of person of one community by another will go viral leading to riots or some false information would be circulated leading to chaos. The gruesome lynching of Syed Sharifuddin Khan at Dimapur who was taken out of jail by an impetuous mob and dragged for seven long kilometers with stones being thrown at him continuously has put a serious question mark not only on the role of administration, the legal system but also the role of media which is not able to differentiate between patriotism and macho nationalism. Unverified news about the citizenship of the accused added fuel to the flame. Xenophobia for Bangladesh had its manifestation in macabre dance of death and scrimmage on the streets of Dimapur. Sanjib Baruah has rightly commented: [3]

> Sociologists use the term "moral panic" to describe heightened public anxiety, triggered by media frenzy, about an individual, a minority group or a subculture seen as an imminent threat to social order.
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> The media has always been an active contributor to moral panics. But it seems that in a new media environment that includes mobile phones, the internet and social networks,

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3 Sanjib Baruah, "Reimagining Dimapur" *The Indian Express*, Mar. 18, 2015.

> there can be situations when the crime and punishment move from the courts to prisons to the street. And the street can turn into a theatre of the absurd, or a reality television of a frightening variety. The lynching of Syed Sharif Khan was the mediated spectacle of capital punishment of a person who – it is now believed- may not have been guilty of any crime.

Journalists need to learn from Herodotus who sailed to Tyre to verify one small fact when he was berated with inaccuracy after he wrote his first book. Marshall McLuhan wrote, "Archimedes once said, 'Give me a place to stand and I will move the world. Today he would have pointed to our electric media and said, 'I will stand on your eyes, your ears, your nerves and your brains, and the world will move in any tempo or pattern I choose."[4]

Media trial

These are some of the challenges that need to be tackled but all this should not be used as an *alibi* to scuttle the freedom of the press. Despite its shortcomings, it has also done yeoman services. But there is a consistent effort to curtail the freedom of the media which is being portrayed as the new monster. Surprisingly, now even the courts, which always protected this freedom, are taking a dim view of the role of media. Much has been written on media trial, and there is a general complaint that it prejudices trial. The Law Commission in its 200th report[5] has recommended a law to debar the media from reporting anything prejudicial to the rights of the accused in criminal cases, from the time of arrest to investigation and trial. The commission has observed, "[t]oday there is a feeling that in view of the extensive use of the television and cable services, the whole pattern of publication of news has changed and several such publications are likely to have a prejudicial impact on the suspects, accused, witnesses and even judges and in general on the administration of justice."[6] This is criminal contempt of court, according to the commission; if the provisions of the Act impose reasonable restrictions on freedom of speech, such restrictions would be valid. It has suggested an amendment to section 3(2) of the Contempt of Courts Act, 1952. Under the

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4 Marshall McLuhan, *Understanding Media: Extentions of a Man* 68 (1964). .

5 Law Commission of India, 200th Report on Trial by Media: Free Speech versus Fair Trial Under Criminal Procedure Code, 1973 (Aug., 2006).

6 *Ibid*.

present provision such publications would come within the definition of contempt only after the charge-sheet is filed in a criminal case, whereas it should be invoked from the time of arrest. Moreover, it suggested that the high court be empowered to direct a print or electronic medium to postpone publication or telecast pertaining to a criminal case.

On November 3, 2006, then Chief Justice of India, Y. K. Sabharwal expressed concern over the recent trend of the media conducting 'trial' of cases before courts pronouncing judgments, and cautioned: "[i]f this trend continues, there can't be any conviction. Judges are confused because the media has already given a verdict."[7] Recently, the Government of India banned *India's Daughter* by Leslee Udwin, herself a rape survivor. The same platitudinous arguments were adduced- interview by the convict is abhorrent, it will prejudice the judges, and so on. Even the Delhi High Court refused to lift the ban saying judges are not from outer space, meaning thereby that they also are prone to influences. Earlier, Leslee Udwin made a documentary *Who Bombed Birmingham* showing how the administration and judges had colluded. After its release, seven accused, languishing in jail for 17 years were acquitted. In the United States (US), the *O. J. Simpson case* attracted a lot of pre-trial publicity. Some persons even demonstrated in judges' robes outside the court and lampooned Etoo, the trial judge. Yet, Simpson was acquitted. The judge was not prejudiced by media campaign or public opinion.[8]

Mahatma Gandhi refused to obey the court's order as a journalist and faced the trial under the Contempt of Courts Act on April 22, 1919, B.C. Kennedy, the District Judge of Ahmedabad, wrote a letter to the Registrar of the Bombay High Court, submitting for the determination of the high court, certain questions regarding the conduct of two barristers and three pleaders who had taken the *satyagraha* pledge- "to refuse civilly to obey the Rowlatt Act and such other laws as a committee to be thereafter appointed may think fit." Gandhi, as the editor, and Mahadev Desai, as the publisher of *Young India*, published the said letter with comments in its issue dated August 6, 1919 while proceedings against those barristers and pleaders were pending before the high court. Gandhi and Desai were charged under contempt, and the high court ruled that comments on or extracts from any pending

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7 Sudhanshu Ranjan, "Media on Trial" *The Times of India*, Jan. 26, 2007.

8 *Ibid*.

proceedings before a court cannot be published without the leave of the court. They were pronounced guilty. Gandhi sent his explanation to the chief justice that he published it as he believed it was of great public importance and that it was a public service to do so. The registrar replied to him that the chief justice was not satisfied by the explanation. The advocate-general gave him a form of apology which Gandhi refused to publish but added that he had no desire to pre-judge. He wrote:[9]

> I had fully in mind the honour of journalism as also the fact that I was a member of the Bombay Bar and as such expected to be aware of the traditions thereof…I am unable to say that in similar circumstances I would act differently from what I did when I decided to publish and comment upon Mr. Kennedy's letter…I shall respectfully suffer the penalty that Their Lordships may be pleased to impose upon me.

He took the responsibility for the publisher also. Ultimately, he was let off with a reprimand: "[t]he Court finds the charges proved. It severely reprimands the respondents and cautions them both as to their future conduct."[10] The media has stopped the miscarriage of justice in many cases like Jessica Lal, Priyadarshini Mattoo, Ruchika Gehrotra, *etc*. The murderers of Jessica Lal were acquitted and would have escaped unscathed in appellate courts but for the furore in the media. In Priyadarshini Mattoo's case, the appeal was pending before the Delhi High Court for six years as documents could not be translated into English. But once it was taken up by the media, the accused was convicted within four months. How does one explain it? One cannot blame others for one's own idleness.

III Judiciary- Sentinel on the qui vive

Nothing Indian in the Indian judiciary

Now it would be appropriate to switch over to the role of the judiciary. There is no gain saying the fact that on umpteen occasions our courts have stepped in when the executive as well as the Parliament have run roughshod over people's rights and the damage would have been irreversible but for it. However, it is also true that on several occasions it has left citizens high and

9 M.K. Gandhi, *The Law and the Lawyers* 86 (compiled by S. B. Kher, Navjivan Publishing House, Ahmedabad, 2004).

10 *Id.* at 97.

dry to fend for themselves. In fact, the innocent, credulous people of this country have never been able to find a kindred soul in this great institution, the judiciary. One of the most striking aspect about it is the absence of anything indigenous- the language, the apparel, and the mode of addressing judges of the higher judiciary.

Judicial attitude in India

In the last 65 years, the Supreme Court gave two judgments which can be considered to be most dangerous-the *Habeas Corpus*[11] and the *Second Judges* case.[12] The first is the example of extreme self-abnegation, the darkest day for the Supreme Court, and the latter is the example of extreme self-assertion which altered the basic structure propounded by itself by disturbing the doctrine of separation of powers.

Taking recourse to article 142

In *Prem Chand Garg* v. *Excise Commissioner,*[13] the Supreme Court made it abundantly clear that it cannot pass an order inconsistent with the express provision of any statute. A Constitution-bench while deliberating on the scope of article 142 struck down a rule made by the Supreme Court itself which required the petitioner to deposit security in proceedings under article 32 for the enforcement of a fundamental right as it imposed a financial obligation on the petitioner and the non-compliance with it would result in the dismissal of the petition. The court refused to accept the plea of the solicitor-general that the language of article 142 has a wide sweep and made its scope expansive, and that it should be interpreted liberally since it spells out the constitutional charter of the court's powers.

However, this observation was taken to be *obiter dicta* as the question raised in the case did not pertain to an order made under article 142 being repugnant with some substantive law. Nevertheless, subsequently, a larger bench of seven judges in *A. R. Antulay* v. *R. S. Nayak*[14] endorsed the statement of law made in *Prem Chand Garg's* case making it a binding *ratio* that

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11 *ADM, Jabalpur* v. *Shiv Kant Shukla* (1976) 2 SCC 521.

12 *Supreme Court Advocates-on-Record* v. *Union of India* (1993) 4 SCC 441.

13 (1963) Supp 1 SCR 885 at 899-901.

14 (1988) Supp 1 SCR 56.

substantive law cannot be superseded. Thus, *Antulay's* case reinforced the proposition that the Supreme Court does not have any power to pass an order under article 142 which is incongruous with any other constitutional or statutory provision. However, In *Delhi Judicial Service* v. *State of Gujarat,*[15] the Supreme Court ruled that its powers are not fettered by provisions of statutory laws. In *Union Carbide Corporation* v. *Union of India,*[16] the Supreme Court took recourse to this article for upholding the settlement between the Union of India and the Union Carbide Corporation (UCC) which, among others, terminated all civil and criminal proceedings pending before any court. Nevertheless, the court again realized its limitations that it cannot gloss over an express provision of law in *Supreme Court Bar Association* v. *Union of India,*[17] when it held that it could not suspend the license of a lawyer while punishing him for the contempt of court as this power was specifically assigned to the bar council.

In *M.S. Ahlawat* v. *State of Haryana,*[18] reference was made to *Supreme Court Bar Assn.* case[19] wherein it was held that the order passed by the Supreme Court by issuing a show-cause notice and conviction summarily under section 193 of the Indian Penal Code for making false statement, was one without jurisdiction and that article 142 could not be invoked for passing such an order. In *M.C. Mehta* v. *Kamal Nath,*[20] the court clarified that power under this special jurisdiction cannot be exercised as it amounts to contravention of the specific provisions of a statute. A five-judge bench of the apex court reiterated this position in *E.S.P. Rajaram* v. *Union of India.*[21] Speaking for the bench, D.P. Mahapatra J observed that article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly. Again, in *Laxmidas Morarji (Dead) by LRS* v. *Behrose Darab Madan,*[22] the Supreme Court in a matter of eviction made it clear that the constitutional

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15 AIR 1991 SC 2176.

16 (1991) 4 SCC 584.

17 (1998) 4 SCC 409.

18 (2000) 1 SCC 278.

19 *Supra* note 18.

20 (2000) 6 SCC 213.

21 (2001) 2 SCC 186.

22 9 (2009) 10 SCC 425.

power conferred upon it under article142 of the Constitution of India has to be used sparingly though the same is not restricted by any of the statutory enactments. The case was pending for 42 years. The court clarified that acting under article 142, it cannot pass an order or grant relief, which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case.

Now even divorces are being granted under article 142. In *Anil Kumar Jain* v. *Maya Jain*,[23] the Supreme Court allowed divorce on the ground of irretrievable breakdown of marriage as the wife had refused to stay with the husband. The most astounding fact is that the court reached this conclusion without overruling the law laid down in *Smt. Sureshta Devi* v. *Om Prakash*.[24] In this case, the court held that the consent given by husband and wife to the filing of a petition for mutual divorce had to subsist till a decree was passed on the petition and if either of the parties withdrew the consent before the passing of the final decree, the petition under section 13-B of the Hindu Marriage Act, 1955 would not survive and would have to be dismissed. The court has itself admitted that in case of irretrievable breakdown of marriage, the Supreme Court alone can do justice, meaning thereby that those who cannot afford to move the apex court have to suffer in silence. It is submitted that the court could have made the irretrievable breakdown of marriage as a ground for divorce by creatively interpreting section 13(1-A) of the Hindu Marriage Act, 1955,[25] which provides ample hint for it. It reads:

> Making absence of cohabitation and non-restitution of conjugal rights grounds for divorce is nothing but irretrievable breakdown of marriage.

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23 (2009) 12 SCALE 115.

24 (1991) 2 SCC 25.

25 The Hindu Marriage Act, 1955 (Act no. 25 of 1955), s. 13 (1A) reads:

Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground:

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upward after the passing of a decree of restitution of conjugal rights in a proceeding to which they were parties.

Surprisingly, the apex court did not take recourse to this extraordinary power in *Omprakash* v. *Radhacharan,*[26] and allowed the property acquired by one Narayani Devi, a childless widow who looked after her when she was driven out of the matrimonial home. It is surprising to note that the Supreme Court did not invoke article 142, when it itself admitted that it is a hard case. If the court's power is not limited by any provisions of any statutory law, then why did it not do 'complete justice' especially when injustice in this case was so glaring that it made it a hard case? Had Narayani written her will, she would never have given her property to her in-laws. The technocratic decision of the Supreme Court may be contrasted with its decision in *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik* [27] wherein it disregarded the express provision of section 112 of the Indian Evidence Act, 1872 that a child born during marriage is a conclusive proof of legitimacy. The question is: if article 142 confers all power on the Supreme Court, then must we abrogate the Constitution?

Cleansing the body politic: Judicial overreach

The Supreme Court, in *Lily Thomas* v. *Union of India,*[28] invalidated section 8 (4) of the Representation of People Act, 1951 as *ultra vires* of article 14 of the Constitution which guarantees the right of equality before law and the equal protection of law. It was an exception created to save the membership of a sitting member of Parliament or state legislature on conviction by a court under sub-sections (1), (2) and (3) of section 8 which disqualify a person from contesting election from the date of such conviction and shall continue to be disqualified for a further period of six years after his/her release. The sub-section (4) makes a distinction between two classes- those aspiring to contest elections for Parliament or state legislative assembly or legislative council and those already members of them- as disqualification, in case of a person who on the date of the conviction is an member of Parliament (MP) or member of legislative assembly (MLA) or member of legislative council (MLC), shall not take effect for three months from the date of conviction, and if within that period, an appeal or application for revision is filed against the conviction or the sentence, then it will not take effect until that appeal or application for revision is disposed of by the court.

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26 (2009) 15 SCC 66.

27 (2013) 7 SCC (LS) 811. See observations made by C.K. Prasad and J.S. Khehar JJ.

28 (2013) 7 SCC 653.

The judgment was widely hailed by the civil society. It is true that Parliament refused to take cognisance of the malaise and did not come forward with a law to contain it, and so the activism of the court has got accolades and public support bequeaths legitimacy to its overstepping. The two-judge bench has conveniently overlooked the judgment of the five-judge Constitution bench in *K. Prabhakaran* v. *P. Jayaraja* [29] which clearly ruled that Parliament by enacting section 8(3) and section 8(4) has chosen to distinguish between two categories- one, a person who is an MP or MLA on the date of conviction, and two, a person who is not- which is a reasonable classification as "it is based on a well laid down differentia and has nexus with a public purpose sought to be achieved". The question is: can a division bench overrule a constitution bench? Articles 102(1) and 191(1) of the Constitution have laid down the disqualification for the membership of both houses of Parliament and state legislative assembly and council respectively and also empower Parliament to make further laws about disqualification. However, there is no mention as to when the disqualification becomes effective. So, it is for Parliament to make reasonable categories. Lead counsel for the petitioner, Fali S. Nariman, argued that the classification made by the apex court in *K. Prabhakaran's* case is an *obiter dicta* and not the binding *ratio*. This is a wonderful example of casuistry–when a principle laid down by the court suits someone they call it *ratio*, otherwise it is *obiter*. It is a common practice among lawyers to use the past decisions with such interpretations as to make *obiter dicta, ratio* and *vice-versa*. It is inscrutable to treat the reasoning given by the court in favour of section 8(4) of the Representation of Peoples Act, 1951, as *obiter* as the court clearly said that when the survival of the government depends on razor thin majority, the disqualification of even one member may affect the stability of the government and change the character of a party. Further, if the disqualified member is acquitted subsequently by the higher court and in the meanwhile somebody else has been elected, it will lead to a baffling situation. And if the by-election is not held, then that constituency would go unrepresented. The counsel for the government did bring it to the notice of the court but it refused to accept it and accepted Nariman's reasoning, perhaps because it did not want to follow the precedent. Instead of relying on *Prabhakaran's* case, the court relied on the decision of the Constitution bench in *Election Commission, India* v. *Saka Venkata Rao*[30] which held that article 191 lays down same set of disqualifications for election

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29 (2005) 1 SCC 754.

30 AIR 1953 SC 210.

as well as for continuing as a member. If there was any confusion, the best course of action for the division bench would have been to refer the matter to a larger Constitution bench. The Supreme Court, in *Government of Andhra Pradesh* v. *P. Laxmi Devi,*[31] clearly held that striking down of a statute by the court is a grave step. The court should declare a law *ultra vires* not merely because it is possible to take such a view but only when the unconstitutionality is beyond question and no other interpretation is possible. The Supreme Court also dismissed the review petition filed by the union government on September 4, 2013.

In *Chief Commissioner* v. *Jan Chowkidar*, the court disqualified persons behind bars from contesting elections. Relying on section 62(5) of the Representation of Peoples Act, 1951, which debars a person in police custody from taking part in vote, the court said that sections 3, 4 and 5 entitle only an elector to contest, and so a person who is not an elector cannot contest elections. This is taking logic too far. Section 2(e) defines an elector as a person whose name is entered in the voters' list and is not disqualified under section 16 of the Act. It is important to note that there is no mention of section 62(5) in section 2(e). Criminalisation of politics is a disease lacerating the body politic of the country. But the judiciary cannot go overboard without jurisdiction in the name of cleaning up the system. It is true that Parliament has miserably failed to rise to the occasion and that is the reason that people don't raise questions about the accountability of the judiciary whether it is acting within its jurisdiction. It is heartening that Parliament amended section 62(5) of the Representation of Peoples Act, 1951 clarifying that those behind bars are eligible to contest elections though they would not be able to vote. On the basis of this amendment, the Supreme Court allowed the review petition filed by the government. Had it not been done, it would have opened up floodgates of misuse.

Encounter killings

In *People's Union for Civil Liberties* v. *State of Maharashtra,*[32] the Supreme Court gave guidelines to be observed in cases of encounter killings. The guidelines include: whenever the police gets any intelligence or tip off about the movement of criminals, it will be recorded in writing; if an encounter takes place subsequently in which firearm is used by the police party which

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31 (2008) 4 SCC 720.

32 (2014) 10 SCC 635.

causes any death, then an first information report (FIR) is to be registered immediately and a report is to be forwarded to the court under section 157 of the Criminal Procedure Code, 1973 (CrPC) without delay; an independent investigation shall be conducted into the incident by the Central Investigation Department (CID) or police team of another police station under the supervision of a senior police officer which will identify the victim and take his/her colour photograph, recover and preserve evidentiary materials like blood-stained earth, hair, fibre and threads, identify scene witnesses, determine the cause, manner, time and location of death, ensure that intact fingerprints of the deceased are sent for chemical examination, will ensure that post-mortem is conducted by two doctors in the district hospital, one of them preferably being in-charge, and the process must be video graphed, fingerprints of the deceased must be sent for chemical analysis; magisterial inquiry must be held in all cases of death; six monthly statements of all cases where deaths have occurred must be sent to National Human Rights Commission (NHRC) by director general of police (DGPs); the police officer(s) concerned must surrender his/her weapons for forensic and ballistic analysis; no out-of-turn promotion or instant gallantry rewards shall be bestowed upon the concerned officers soon after the occurrence; and the family of the victim may complain to the concerned district judge if it finds that the guidelines have not been followed and the district judge will redress the grievances, among others.

The fact remains that encounters are invariably presented as cases of private defence which is available to every person. Lord Thomas Babington Macaulay granted the right of private defence in the IPC as he was befuddled to notice the poltroonery of the common man who cringed before the high and mighty despite being assaulted and humiliated. If it is a case of private defence, why should there be guidelines as it will only legitimate the bestiality of the police who can create a virtual world where all guidelines are tenaciously observed. For example, the direction to register FIR in every encounter death case has been circumvented by the police. FIR is being registered in every case of encounter killing but there is a fraud being played. The police shall register an FIR against the dead person under section 307 of the IPC (attempt to murder) alleging that he attempted to murder a policeman. Since the accused is dead, the police closes the case themselves without taking it to the court. The apex court has failed to see through the shenanigan. Further, independent investigation by the CID or police team of another police station will only legitimate the encounter as it is not expected that CID or policemen of another police station will not exculpate their brethren as they themselves

indulge into such activities. In some cases, cops have been held guilty in police inquiry but these are few and far between. The direction of the court is in supersession of its earlier orders that the Central Bureau of Investigation (CBI) ought to be appointed as the investigator and prosecutor in all cases of custodial killings.

Striking down discriminatory laws: Sterling service

In *Dr. Subramanian Swamy* v. *Director, CBI*,[33] the Constitution bench of the Supreme Court has done a sterling service to the society by setting aside section 6-A of the Delhi Special Police Establishment Act, 1946 which requires the prior sanction of the Central Government to conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 if the allegation relates to the employees of the Central Government of the level of joint secretary or above. The idea of equality is an anathema to the privileged class which ingeniously innovates justifications for creating privileges for itself. Section 6-A of the Delhi Special Police Establishment Act, 1946 has its genesis in the "single directive" (SD) which was introduced in 1980s when P. Chidambaram was the minister of state for personnel. The justification adduced was that officials of the joint secretary level and above take policy decisions and exercise discretion. Hence they needed to be protected from vexatious and frivolous litigation. When the British Government enacted the CrPC, government servants were given protection as section 197 provides that prosecution against them cannot be launched without prior sanction of the government. The British had come to rule; so they wanted to protect their officers. They did not have such a provision in their own country. After independence, the Government of India, following in the footsteps of the colonial rulers, not only refrained from tinkering with these laws but provided for similar protections while legislating other laws. Thus, section 19 of the Prevention of Corruption Act, 1988 also enjoins the investigating agency to take prior sanction from the government for prosecution. So, senior bureaucrats had double protection- both from investigation as well as prosecution. The Supreme Court, in *Vineet Narain* v. *Union of India*[34] set aside the SD on the ground that once the jurisdiction is conferred on the CBI to investigate an offence by virtue of notification under

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33 (2014) 8 SCC 519.

34 (1998) 1 SCC 226.

section 3 of the Delhi Special Police Establishment Act, 1946, the powers of investigation are governed by statutory provision which cannot be curtailed by an executive instruction. The court was quite forthright that the law does not classify offenders differently for treatment thereunder, including investigation of offences and prosecution for offences according to their status in life; every person accused of committing the same offence is to be dealt with in the same manner in accordance with the law, which is equal in its application to everyone.

However, the court itself adumbrated at a solution that such an important provision cannot be by way of executive order; it must have a statutory basis. A clever executive lost no time and Central Vigilance Commission Ordinance, 1998 dated August 25, 1998, restored the provision of obtaining prior approval of the Central Vigilance Commission (CVC) before investigation of the officers of the level of joint secretary and above. It was again deleted on the intervention of the court by issue of another ordinance promulgated on October 27, 1998. The government incorporated it in the CVC Bill as the Supreme Court had directed in the same judgment to give statutory basis to the CVC. When the bill was referred to the standing committee of Parliament, all parties scrambled to have provision to protect senior civil servants. Kuldip Nayar J was the only dissenting voice in the committee and he was flabbergasted to see the solidarity of political parties on the issue. The reason is obvious; if senior bureaucrats do something illegal, it is with the concurrence of the minister concerned. It is true that honest civil servants must not be harassed. Finally, through amendment, Section 6-A was inserted and came into force on September 12, 2003 which was challenged in this case. However, the government could not adduce a single instance of harassment when the SD was not in force between December 18, 1997 (the date of *Vineet Narain* judgment striking down the SD) and September 11, 2003 (when the CVC Act came into force) except the period between August 25, 1998 and October 27, 1998 when the CVC Ordinance, 1998 was in force. Moreover, there is no corresponding provision for officials of state government. Besides, local police of the state government are not required to take any prior approval for investigation. So the argument of frivolous litigation is hocus-pocus rightly debunked by the court. Further, seeking prior approval amounts to alerting the accused who gets full opportunity to destroy the evidence. Many a time, senior officer, on receiving application for approval, sends the file to that very officer for comment against whom allegations have been made. In umpteen number of cases, sanctions have been delayed indefinitely and sometimes denied.

The Supreme Court raised a valid question, namely: "How can two public servants against whom there are allegations of corruption or graft or bribe taking or criminal misconduct under the Prevention of Corruption Act, 1988 can be made to be treated differently because one happens to be a junior officer and the other, a senior decision maker." This question should have been raised in *Vineet Narain* itself instead of asking for its statutory base.

In *State* v. *Indian Hotel and Restaurant Association,*[35] the Supreme Court struck down another arbitrary provision that discriminated between dance in bars and restaurants and that in five star hotels. Sections 33A and 33B of the Bombay Police Act, 1951 allowed dance in five star hotels but prohibited it in bars and restaurants. The differential treatment was struck down as invidious and blatantly discriminatory and violation of article 14.

Protection to *babus*

The term 'bureaucracy' literally means 'rule by desks or offices' which is suggestive of its impersonal character in principle, the ground reality is diametrically opposed. Claude-Henri de Rouvroy Saint-Simon was the first to appreciate that it was the conflict of classes that led to the of the feudal system of government and of the ecclesiastical world view. He targeted in particular the class of useless bureaucrats, idlers and wastrels whom he contrasted unfavourably with the men of industry who should shape the future.

In India, bureaucrats are considered depraved, uninnovative, arrogant, abrasive and anti-poor. The genesis of the problem lies in adopting the colonial bureaucratic structure without even the slightest of modifications. No country, after dismantling the yoke of colonialism, did so. The Britishers came to India to rule, not to serve. So, district magistrates and superintendent of police had sprawling bungalows, several orderlies, chauffeur-driven cars and several other amenities which gave them the trappings of rulers. Penderel Moon, an Indian Civil Service (ICS) officer, has written in his book, 'Strangers in India' that ICS officers used to go to various universities in England and showed them a tantalizing future if they agreed to go over to India. Ironically, these bureaucrats remained rulers even after the country attained independence. Centre for the Study of Developing Societies (CSDS) and Lok

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35 (2013) 8 SCC 519.

Niti conducted a survey for ascertaining people's opinion about bureaucracy. Most of those interviewed felt that these officers are arrogant and insensitive. Two-thirds of them said that they would like to approach political leaders in case they need any help instead of bureaucrats. Further, civil servants have adequate protection under article 311 of the Constitution. Administration faces threats not only from corrupt politicians but also from corrupt and insensitive bureaucrats.

While it is true that the credibility of the political class is at its lowest ebb, it will not be fair to apportion all the blame on them and exculpate civil servants. The report by Hong Kong-based political and economic risk consultancy ranks bureaucracies across Asia from 1 to 10, with 10 being the worst possible score. India scored 9.26 on this scale which is worse than Vietnam, Indonesia, the Philippines and China. The report makes a searing indictment that India's bureaucracy was responsible for many complaints businessmen had about India, like lack of infrastructure and corruption, and adds that Indian bureaucrats were seldom held accountable for wrong decisions. It further says, "This gives them (bureaucrats) terrific powers and could be one of the main reasons why average Indians as well as existing and would-be foreign investors perceive India's bureaucrats as negatively as they do."[36] Singapore remained the country with the best bureaucracy, with a rating of 2.25.

The Supreme Court gave a significant judgment in *T.S.R. Subramanian* v. *Union of India,*[37] directing the union and state governments to ensure that officers should be given a fixed tenure and that they should not be given any verbal orders. The court further directed that independent civil service boards (CSB) should be constituted at the central and state levels so that there is complete transparency in transfers and postings of civil servants. 83 former bureaucrats and police officers had filed a public interest litigation (PIL) in the apex court asking it to come to the rescue of honest civil servants who are pressured by dishonest political executive. The petitioners quoted the recommendations of the Hota Committee (2004),[38] which recommended the constitution of CSB, Main Recommendations of the Second Administrative

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36 Sudhanshu Ranjan, "Bureaucrats are not saints" *The Deccan Herald*, Nov. 6, 2013.

37 AIR 2014 SC 263.

38 Government of India, Report on Civil Service Reforms (2004), *available at*: http://www.performance.gov.in/sites/default/files/document/CivilServiceReforms2004.pdf (last visited on Aug. 10, 2015).

Commission (2008),[39] the statement adopted at the Conference of Chief Ministers on Effective and Responsive Administration (1997),[40] recommendations of the Jha Commission (1986) which recommended fixed tenure and the report of the Santhanam Committee (1962).[41] The court has expressed concern about the political interference in administrative functioning:[42]

> We notice that much of the deterioration of the standards of probity and accountability with the civil servants is due to the political influence or persons purporting to represent those who are in authority. Santhanam Committee on Prevention of Corruption, 1962 has recommended that there should be a system of keeping some sort of records in such situations. Rule 3(3) (iii) of the All India Service (Conduct) Rules, 1968 specifically requires that all orders from superior officers shall ordinarily be in writing. Where in exceptional circumstances, action has to be taken on the basis of oral directions, it is mandatory for the officer superior to confirm the same in writing. The civil servant, in turn, who has received such information, is required to seek confirmation of the directions in writing as early as possible and it is the duty of the officer superior to confirm the direction in writing.

The judgment of the Supreme Court raises several issues including: are political masters solely responsible for the debilitating and deteriorating health of the body politic, and whether the Supreme Court within its domain to issue such directions? Transfers and postings have undoubtly, become on industry filling the coffers of politicians. Even some journalists have made

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39 Government of India, 10th Report on Refurbishing Of Personnel Administration (Nov. 2008), *available at:* http://arc.gov.in/10th/ARC_10thReport_ preface_ contents.pdf (last visited on Aug. 10, 2015).

40 *Available at*: http://persmin.gov.in/otraining/UNDPProject/undp_modules/ Reform%20Initiatives%20in%20Admn%20N%20DLM.pdf (last visited on Aug. 17, 2015).

41 In 1962, Lal Bahadur Sastri appointed K. Santhanam to preside over the corruption committee. Because of its thorough investigative work and recommendations, the committee earned a reputation as Santhanam's Committee on Prevention of Corruption which led to the establishment of the central vigilance commission (CVC).

42 *Supra* note 38 at 278.

fortunes milching this industry by right connections. Transfers are, more often than not, used as rewards and punishments, and often upright officials are punished while those adept at blandishment get rewards. The fact is that bureaucrats are corrupt and self-seekers with a few happy exceptions. Rajiv Gandhi described the nature of bureaucracy with these words: [43]

> We have government servants who do not serve but oppress the poor and the helpless, who do not uphold the law but connive with those who cheat the state and the whole legions whose only concern is their private welfare at the cost of society. They have no work ethic, no feeling for the public cause, no involvement in the future of the nation, no comprehension of national goals, no commitment to the values of modern India. They have only a grasping mercenary outlook, devoid of competence, integrity and commitment.

The question that comes up is that whether the direction to introduce the CSB is implementable. Till date there has been only *pro forma* compliance. Rule 3(3)(iii) of the All India Service (Conduct) Rules, 1968 has still not been amended as directed by the court because instructions do not come from superior officers only but also from some smalltime functionaries sitting in the offices of chief ministers/ministers. However, the prayer made by bureaucrats for such a direction reflects on their supine character. If an officer does not have the guts to say 'no' to verbal directions, a direction by the apex court will hardly help. The problem is not with legal and genuine orders but with illegal orders meant to curry favours. When squeamish civil servants are a rarity, bureaucrats bending over backwards are too willing to oblige as in an unwritten spoil system they are suitably rehabilitated in commissions/high commissions, *raj bhavans* and Parliament post-retirement.

On September 22, 2006, the Supreme Court directed to give the security of tenures to cops also in its historic judgment in *Prakash Singh* v. *Union of India*.[44] The court directed the central and state governments to abide by a set of seven directives spelling out practical mechanisms to kick-start police reforms. It aims at achieving twin objectives of functional autonomy for the police- through security of tenure, transparent and streamlined appointment

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43 Quoted in N.C. Saxena, *Administrative Reforms for Better Governance* 13 (National Social Watch, Daanish Books, Delhi, 2012).

44 (2006) 8 SCC 1.

and transfer processes, and the creation of a buffer body between the police and the government and making the police accountable. The court required the central and state governments to implement the directives by December 31, 2006 and file affidavits of compliance by January 3, 2007. The responses of state governments have been diverse, some complying technically but defeating the spirit of the judgment while others taking exception to it and asking the court to review it. The court dismissed their objections and reiterated that directive must be complied with. However, the compliance, if at all, is partial and technical.

The union and the states were directed to constitute independent security commissions to decide their transfers and postings of police officers. It is yet to take any concrete shape. The Government of Bihar formed the commission comprising the chief minister, the chief secretary and the DGP. Even in some states where some so called independent members from the judiciary like ex-judges and civil society have been taken, it is nothing more than a façade as they are too pusillanimous to stand up. Several contempt petitions have been filed but there is hardly any action. The Supreme Court agreed to its formation but refused to go by the recommendation of the Hota Committee that its members should not be from the government to ensure its independence. The CSB will consist of government functionaries only. In UP, the CSB consists of the chief secretary, the personnel secretary and the secretary to the chief minister.

It also raises the question of implement ability. Surprisingly, the Supreme Court has not taken a tough stand on many of its directions and, in fact, recanted. One such case is regarding the inter-linking of rivers ILR. The Supreme Court directly forayed into the domain of the executive when it issued *mandamus* to the union government and concerned state governments for (ILR).[45] The story of the inception of this petition is also curious as the court directed to convert an interim application filed in another case pertaining to Yamuna into an independent PIL. A bench of this court took *suo moto* cognizance of a write up published in a newspaper[46] and served notices to concerned authorities. Since then the writ petition is being monitored by the court. During the pendency of the case, interim application

45 *In Re: Networking of Rivers*, writ petition (Civil) No. 512 of 2002, judgment dated Feb. 27, 2012, *available at*: http://courtnic.nic.in/supremecourt/temp/512200232722012p.txt (last visited on Aug. 10, 2015).

46 "And quiet flows the maili Yamuna", *Hindustan Times*, July 18, 1994.

came to be filed wherein the *amicus curiae* in that case referred to the address of then President of India, A.P.J. Abdul Kalam on the eve of the Independence day in 2004 which, inter alia, related to creating a network between various rivers in the country to deal with the paradoxical situation of floods in one part of the country and drought in other parts. The court realized its limitations and said that though it may be in the national interest, this court may not be a very appropriate forum for planning and implementation of such a programme having wide national dimensions and ramifications.

However, the court did not fight shy of giving directions despite realising its limitations and asked the union government, particularly the ministry of water resources to forthwith constitute a committee to be called a 'Special Committee for inter-linking of rivers' and spelled out who would be its members and that the committee would meet once in two months and it would be entitled to constitute sub-committees and would submit bi-annual report to the union cabinet which would take final and appropriate decisions as expeditiously as possible and preferably within thirty days from the date the matters are first placed before it for consideration. There has been no compliance. Surprisingly, on October 31, 2002, a bench headed by then CJI, B.N. Kirpal J gave similar directions. He retired next day. Later, he was asked at the National Law School University of India, Bangalore, as to how he could pass such an order when the judiciary does not have the mandate to direct the executive to take up certain projects, he replied that it was only a suggestion and not a direction.[47] However, the Supreme Court repeated it nearly a decade later.

Contemnors in the *Bandhua Mukti Morcha* case[48] are yet to be punished though it brought Bhagwati J an international award from the Society of International Jurists; there was a specific reference to this case in the plaque. If the court punishes senior bureaucrats in cases of civil contempt severely, the backlog of cases will come down to half. The problematic aspect is if the department has decided to harass an employee or a group of employees who win from central administrative tribunal (CAT) and the high courts, and still the government comes to the Supreme Court, surprisingly the court

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47 Himanshu Thakkar, "Can we laugh away the SC order on ILR as a comedy or tragedy?", *available at*: http://www.rediff.com/news/column/why-inter-linking-of-rivers-is-not- possible/20120309.htm (last visited on June 3, 2015).

48 (1984) 3 SCC 161.

entertains special leave petition (SLP) only because it is filed by the government. No bureaucrat is taken to task for wasting the time of court or for not implementing its directions. Employees retire without getting any promotion; the government keeps seeking adjournments. It is not difficult to see through the nefarious design of the government. But they are not punished.

In 1958, the Law Commission of India made a recommendation for state legal aid and stressed on the right to assignment of counsel at government expense. The Supreme Court also brought the right to free legal aid within the sweep of fair, just and reasonable procedure under article 21 for such accused who cannot afford a lawyer because of poverty, indigence or incommunicado situation. In *Hussainara Khatoon* v. *State of Bihar,*[49] the court was quite forthright that it was not possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there was a nationwide legal service programme to provide free legal services to them, and tersely commented: [50]

> Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them.

Taking serious note of the growing commercialization of the legal profession, the court deplored the vanishing trend of serving the society.[51] In *Indian Council of Legal Aid and Advice* v. *Bar Council of India,*[52] the Supreme Court ruled that it was obligatory on an advocate to maintain dignity and purity of the legal profession. Yet the lawyers are known for doing exactly the same as Jonathan Swift lampooned them that lawyers are "a society of men…bred up from their youth in the art of proving by words multiplied for the purpose that white is black, and black is white, according as they are paid."[53]

*Sudhanshu Ranjan**

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49 AIR 1979 SC 1369.

50 *Id.* at 1375.

51 *Tahil Ram Issardas Sadarangani* v. *Ramchand Issardas* 1993 Supp (3) SCC 253.

52 (1995) 1 SCC 732.

53 Jonathan Swift, *Gulliver's Travels* (1726), ch. 5.

* Senior Journalist, Doodarshan.