REFORMS IN THE ADMINISTRATION OF JUSTICE: BEATING THE BACKLOG

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Abstract

The Indian judicial system since time immemorial has had a problem with massive case load which has translated into severe backlog of pending cases. This paper identifies certain problem areas of the Indian judicial system with an aim to provide solutions to them. The author remains optimistic that suggestions in this paper shall form a part of the on-going reforms of the judiciary.

I Introduction

ANY REFORM movement according to Gandhiji was required to go through five stages: indifference; ridicule; abuse; repression; and respect. [1] Gandhiji's idea of reform holds true especially for contemporary judicial reform in India. The topic of judicial reform is humongous and encompasses an amazing plethora of issues impossible to encapsulate in a single paper. Therefore, this paper focuses on the simple solutions available in the context of backlog and arrears that is continuously faced by the Indian judicial branch. Akin to Gandhiji's approach to reform, this paper has adopted a method of indifference, ridicule, abuse and repression to address the issue of judicial reform in India.[2]

Despite the enormity of the problems associated with the Indian legal system, most of the solutions proffered in this paper are straightforward and easy to implement. Unfortunately, till date several of these simple solutions have never been implemented to address and reform the problems associated with the judicial system.

In the majority of law school programmes, administration of justice is not a taught subject in Indian law schools. A mandatory course on various aspects

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1 Krishna Kripalani (ed.), *All Men are Brothers* (Navajivan Mudranalaya, Ahemadabad, 1960).

2 *Ibid.*

of administration of justice may help in sensitising and training law students on the real causes of the problem and the relatively simple solutions. Only certain decisive steps address the problem of backlog in the Indian judicial system. This would entail fewer lectures and additional implementation plans, fewer legislations and focusing on basic achievement. Neither the problems nor the solutions associated with the Indian judicial system are new, however immediate focus of will and determination are key to addressing the problems. The large numbers of arrears should not be a deterrent. If simple solutions are implemented correctly then it is certain that there shall be a significant reduction in the backlog of the cases.

An old adage by American poet Emily Dickinson s is pertinent to the current problem: if we take care of the small things; the big things will take care of themselves . Therefore in light of this macro plans must give way to common sense, simple and micro solutions. It is imperative that a plan for legal reform must be holistic and not piecemeal, multi-pronged and not partial, curative as well as preventive. For the successful implementation of a legal reform it is necessary for a change in attitude of the judiciary. This would require the message for change to be surgical, bold, unconventional and shocking. The message for judicial reform needs to be strong primarily because the present system is inept to deal with the vast problems, and it moves along due to its inherent inertia. Attitude change is central to any proposal for judicial reform. An attitude change is nebulous, unquantifiable, and non-specific factor, however necessary for legal reform. That said, it is important to embed the ethics of legal reform and alternate dispute resolution (ADR) into the legal education of lawyers and judges alike. During the early 1990s, the Supreme Court had a tangible and substantial arrears problem: the degree of indiscipline was large, the registry was comparatively unorganised and adjournments were a matter of course. During the author s work with the 1993 Ahmadi J case management and ADR project,[3] it was discovered that simple procedural amendments were responsible for a vast attitude change in amongst all the actors at the Supreme Court - judges, lawyers, registry

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3. See the account of the Ahmadi J Initiated project on delays in civil justice administration system in India which led to a report coauthored by the present writer and later to legislative code amendments introducing s. 89 into the Indian Civil Procedure Code w.e.f. July 1, 2002. S.89 allows non-consensual references of parties to a menu of ADRs like Arbitration, Conciliation, Mediation and Lok Adalat forms of judicial settlement. See, in particular, Chodosh, Mayo, Ahmadi and Singhvi, Indian Civil Justice System Reform 30 *New York Journal of International Law and Politics* 1-78 on (1998).

officials, litigants and others. By the year 1997, all actors had vested interests in ensuring that the system functioned efficiently. The procedural amendments ensured that there was a paradigm shift in the attitude change with those involved in the Supreme Court.

The quote by Zig Ziglars captures the requirements of attitude change in the Indian judiciary: Attitude, not aptitude, determines altitude i.e. how high you soar.

In order to ensure changes in the Indian judicial system, the importance of teamwork cannot be under emphasised. In this fight against arrears, the entire judiciary, and the entire legal system, has to function as a seamless web. The role of judges and the judiciary as a whole, and particularly of the Supreme Court, is vital since it can act as catalyst and role.

II Core issues of concern regarding judicial reform

As mentioned above, the Indian judicial system has several problems associated with it. This paper discusses ten of these core problematic areas of concern that need to be addressed immediately to initiate the legal reform process in India. Generally, these areas of concern are very basic and can be dealt with in a straightforward manner.

Judicial vacancies

Any discussion of judicial reform must begin with central problem of judicial vacancies that currently exists in the country. Case backlog and an unreasonable case-loads are symptoms of the problem with judicial vacancies. As on January 18, 2016 the approved judicial strength of all the twenty four high courts is 1044. Of these only 601 posts stood filled and 443 vacancies amounted to approximately 42 percent of Indias high court posts remaining vacant.

Further analysis of the data regarding vacancies in the court goes to show the widespread nature of the problem. For instance, over 50 percent of the 160 posts in Indias largest high court, High Court of Allahabad, are vacant for many months. It is important to note that Uttar Pradesh s population is several times higher than the whole of Europe put together. Although the Punjab and Haryana serves two states and one union territory, 33 out of 85 positions remain vacant in the high court. 33 out of 94 posts in the High Court of Bombay remain vacant and 21 out of 60 in Indias capital are similarly vacant. Just fewer than 50 percent (23 out of 53) remain vacant in one of Indias largest geographical state, Madhaya Pradesh. Similarly, in the State of Karnataka, thirty one 31 out of 62 positions in the high court remain vacant.

The symptoms of vacant judicial positions are accentuated in states with a small designated judicial strength as they cannot afford even one vacancy. For instance, Sikkim has one out of three positions vacant, Uttarakhand has five out of 11 positions vacant, Himachal Pradesh has six out of 13 positions vacant and Chhattisgarh has 13 out of 22 two positions vacant, and similarly, the State of Jammu and Kashmir has seven out of 17 positions vacant.

In these smaller states, even a single vacancy can emaciate the high court and bring the work to a halt. It would be almost Orwellian and comical, if it were not tragic, that some years ago the National Judicial Appointments Commission (NJAC) increased the sanctioned strength of almost all our high courts significantly, however till date even the original strength of the courts are unfilled for several months.

The problem of vacant positions exists in the lower levels of the judiciary as well. As on October, 2015 there are over 2.7 crore cases, and about 3300 vacancies against a sanctioned strength of 17,715 in the lower judiciary.[4] Also worth considering is that India has one of the world s lowest and most woefully inadequate judges-per-million-of- population-ratio. In 1987, India had 10.5 judges per million of population. In 1987 itself, the Law Commission of India strongly recommended an increase of 50 judges per million of population by 2000. The Supreme Court in the *All India Judges Association* case decision of 2002 confirmed the requirement for 50 judges for every million people.[5]The current arrangement for appointing judges and filling in vacancies is the duty of the judicial branch as well as the executive branch of the government. The judiciary, having appropriated to itself the appointment power, admittedly without constitutional sanction, and having reiterated that appropriation of power as per the National Judicial Appointments Commission (NJAC) judgment,[6] it is incumbent on the judiciary as a whole, to ensure that there is absolutely no delay in filling the vacancies. Unfortunately, even a basic requirement such as a binding protocol for high courts and the Supreme Court, to ensure that movement of files at each level of the judicial appointments process ensures punctual appointments has not been created till date. A judicial vacancy is known from inception since every judge s

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4 Figures as assessed by Department of Justice and published in the *Indian Express*, Oct. 4, 2015

5 *All India Judges Assn.* v. *Union of India* (2002) 4 SCC 247.

6 *Supreme Court Advocates-on-Record-Association* v. *Union of India* 2015(11) SCALE 1.

retirement date is predetermined. A monitoring system for judicial vacancies and appointments must be created in a manner so as to have the notification for the new appointee issued at least one month prior to the retirement or transfer of the incumbent. The monitoring system, and time lines must apply equally to the executive and a prompt reiteration by the collegium shall result in immediate and compulsory notification by the executive. Passing the buck between the executive and judiciary is unfortunate and no excuses would suffice since the power of appointment is now overwhelmingly, if not solely with the judiciary.

The delay in fulfilling the sanctioned strength vacancies is usually attributable to the selection process, internal ego problems, procedural delays and file movements - none of which are substantial hurdles. It is suggested that a core group of judges should be created with the mandate of monitoring the movement on such issues and achievement of certain results for the high court and lower courts. The sad truth in India is that most of us, whether part of the legal system or lay men, if tasked with the obligation of finding the best advocates suitable for judgeship in each of our high courts, would be able to do so in one month of concentrated search and analysis. Unfortunately, having found such suitable names, one indulges in a dangerous cocktail of local bar politics, judicial politics, personal rivalry, petty egos and the like, resulting either in inordinate delay, ensuring withdrawal of the candidate s name after ruining his practice or sabotaging his appointment as also his fair name and reputation.

III Supreme Court s collegium system of appointment

The Supreme Court s collegium system is responsible for appointing judges to all the constitutional courts. The collegium system for appointing judges was created on the basis of precedents laid down in cases like, *In re Special Reference 1 of 1998*, *S.P. Gupta* v. *President of India* and *Supreme Court Advocates on Record Association* v. *Union of India*.[7]

In case a uniform evaluation system is used for the purpose of appointing judges to the high courts and Supreme Court, questions regarding the influence of personal subjectivity, ego and petty politics in the collegium s final decision shall be easily addressed. For instance, this process could involve potential

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7 In *re Special Reference 1 of 1998*, AIR 1999 SC 1; *S.P. Gupta* v. *President of India*, AIR 1982 SC 149; *Supreme Court Advocates on Record Association* v. *Union of India*, AIR 1994 SC 268 .

candidates being marked on several core criteria: quality of past judgements, personal integrity, success at bar, demeanour, accuracy, and reliability. A modified list could be applied to bar appointees, since, obviously, they would have no judgements to show. The evaluation system should be flexible enough so that judges of the collegium may change the core criterion for the evaluation system, or the weightage given to a single criterion depending on the vacant position. Nonetheless, the suggested evaluation method shall present a transparent system of appointing judges. In doing so, all alleged accusations of nepotism shall be nullified.

It is imperative to note that the unavailability of a uniform criteria for the appointment of judges allows subjectivity, personal animosity and anecdotal aberrations to flourish. It also precludes uniformity and comparisons, over several generations of the courts and the temporal duration of a judge. In addition to this absence of uniform criteria for the appointment of judges seriously undermines consistency in the judicial system.

If various stakeholders implement such a simple method of judicial appointments then the mechanism shall be logical, consistent and transparent. In case such a method is implemented, it is expected that over a period of time, the repository of evaluations shall establish a precedent for future appointments of judges.

If the foregoing changes do not form a part of the judicial reform process, the author can expect the *status quo* to continue or, worse, an attempt by the reformers to preserve this closed decision making process of appointing judges.

A recent example illustrates the lack of foresight and planning in regard to the pressing need for completing the full sanctioned strength of the courts. For example, the judiciary and the executive should have planned in advance about the predictable delay likely to ensue in the constitutional skirmish about the NJAC The bench, comprising J S Khehar, J Chelameswar, Madan B Lokur, Kurian Joseph and Adarsh K Goel JJ, delivered its verdict on a plea by a batch of petitioners who have described the NJAC as a threat to the independence of the judiciary and an act of overreach by the executive.The executive and the judiciary are duty bound to ensure that the skirmish between them does not result in a most unaffordable standstill on judicial appointments. A pragmatic solution ought to have been found out in advance.

The only logical solution would necessarily rests in the continuance of the old collegium system till a final decision. Combining the period from the

beginning of the NJAC challenge to the post-verdict invitation of suggestions by the Supreme Court s constitutional bench, India would easily have lost over nine months, possibly a whole year, with virtually no appointments in 24 high courts. Unfortunately, given the burden on the courts, such a delay in the Indian judicial system was regrettable.

The myth of being underfunded

The lack of reform in the judicial system has often been linked to underfunding. In addition to this the judicial branch has generally received comparatively lower funds than other sections of the government. However, any arguments for underfunding of the judiciary as a reason for judicial decay are not valid reasons, since almost 80 percent of the funds allocated to the judicial branch remain unutilised.

There is no doubt that the planned allocation for judicial infrastructure is abysmally low, being 0.071 percent of the ninth plan (1997-2002) and 0.078 percent of the tenth plan (2002-2007). Yet the table published in March, 2015 that of the specific fund allocation of Rs 5000 crore by the 13th Finance Commission for diverse judicial objects like morning and evening courts, alternate dispute resolution (ADR) centers, lok adalats, legal aid, and judicial academy the highest utilization out of the allocations was well below 50 percent and in most cases 60, 70, and 80 percent of the funds allocated remained unutilised in the period 2010 to 2015.

It is expected that the budget for 2015-16 shall increase the allocation for the judiciary significantly; from Rs 1931.53 crore in the last budget to over Rs 3500 cr. Increased allocation of funds to the judiciary would raise new hope.

Appointment of *ad-hoc* judges

One way of reducing the large number of vacant judicial positions is by making *ad-hoc* judicial appointments. This is sanctioned by article 224A of the Constitution.[8] The constitutional provision permits *ad-hoc* appointments for either five years or till such time an identified class of cases are cleared.

The provision requires that the chief justice with the consent of the Central Government is allowed to appoint *ad-hoc* judges, provided that the candidate has been a judge of the same court or any other high court. This constitutional mechanism has the advantage of appointing judges to vacant judicial positions with the confidence that they possess the legal knowledge and experience

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8 The Constitution of India, art. 224A

required to fulfill the duties of a vacant judicial position. Indeed, article 224A permits even retired judges from other high courts to be appointed to any of the high courts in India. This appears to have become a forgotten constitutional power, rarely used in the apex court and almost never at the high court level, where it can be an effective weapon to deal with old forgotten pending cases.

This is particularly relevant in the context of inordinately delayed new judicial appointments discussed in the foregoing paragraphs. For instance, in England for centuries, it has effectively used the system of recorders at the lowest judicial rung to decided cases. They are Queens counsel (*i.e* .,senior advocates) who join the bench at the lowest level for a limited period of two years and dispose thousands of petty criminal and civil cases and then return to their practice. In India, practicing advocates could be employed on a temporary basis to address an assigned number of pending cases within a reasonable period of time.

Changing the roster for allocation

It is also imperative to tailor and fine tune roster allocation according to movement of pending arrears. For instance, as on November 10, 2015[9] the total pending cases in all courts across India below the high court level was 2.03 crore, of which 67.29 lakhs were civil cases and 1.35 crore criminal cases. 30 percent of these were two to five years old, almost 18 percent were five to ten years old, 10.4 percent were over ten years old and the predominant bulk of over 41.8 percent were less than two years old.

Unfortunately, a similar updated data is not available for all the 24 high courts. By 2013, high courts in aggregate had 44 lakh odd pending cases, where 34.32 lakhs comprised civil cases and 10.23 lakhs were criminal. A pilot project by a Bangalore based organisation, Daksh,[10] provides evidence that a very small percentage of cases pending were older than ten years and a small, manageable number were five to ten years old, while the bulk, expectedly, were pending for less than two years. The search also revealed a case pending in the Jharkhand High Court for 57 years. Previously, in a lecture, the author has referred to a 1950 pending case in Madhya Pradesh High Court, a 1951 pendency in Patna High Court, a 1955 pendency in

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9 Data obtained from National Judicial Data Grid.

10 *The Hindu*, May 4, 2015.

Calcutta High Court and a 1956 pending case in the Rajasthan High Court.[11] The author remains optimistic that these cases shall be decided in a reasonable period of time.

On the basis of the above analysis, the author proffers a few solutions to deal with the back log of pending cases. Courts below the high court must always have approximately three times the judges dealing with criminal case rosters as opposed to those dealing with civil cases. This general principle must be further calibrated, modified and tailored as per individual districts and localities. Furthermore, the reverse is required in high courts where civil case arrears are exactly three times higher in number than criminal ones.

In district, lower and high courts, there must be several dedicated judges who specifically work on dealing with over ten year old cases, another with only two to five year cases and the majority of judges with below two year old cases. A broad classification may also be useful, with one track dealing with over two year old cases and the other with current filings. This is the only way to keep ahead of the battle of the bulge and prevent regression of even the currently healthy high courts and districts court into the abyss of arrears. Given the relatively small proportion of over two year old cases, especially the small number of those over ten years old, it would be easy for the high courts to deal with the pending cases from the 1950 s and 1960 s.

Management of data by professionals

The micro monitoring, statistical analyses, weekly, monthly, quarterly, bi-annual and yearly charts containing statistical and detailed analyses, must be carried out in every high court, district court and lower courts. Ideally this responsibility should rest with someone specially designated as a technical and managerial expert, who are able to both collate and analyse relevant statistics at the ground level.

Information is the biggest weapon and for decades we have woefully and inexcusably underestimated its strength. Moreover, information is something which should never be left to lawyers and judges but has to be entrusted to trained experts in specially created cells in each court complex and ultimately threaded together into one uniform national judicial grid. Just as the mechanics of war is sometimes too complex to be left to generals, law reform based on technical data and sophisticated computerised evaluation techniques is too serious to be left to lawyers and judges.

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11 Lecture delivered by the author at Chagla Memorial Lecture, Mumbai University, Jan., 2007

Uniformity

Despite the current efforts to reform the problems associated with the judiciary, there are significant deficiencies especially in the absence of standardisation and uniformity amongst the various regional courts. High courts around the country revel, for reasons of legacy, history and heritage, use a bewildering diversity of nomenclatures and acronyms to describe the same thing. For instance a writ petition is described differently in at least 10 high courts. Standardisation and uniformity is vital and urgently required. Comparative analysis is not possible in the complete absence of uniformity. Use of technology to analyse raw data is also predicated on the same assumption of uniformity.

It is imperative that a uniform pan India best practice code is implemented at all the high courts, lower courts, and possibly the Supreme Court. The Law Ministry has frequently tried to codify a list of good practices followed by certain courts but institutional insularity has often prevented the uniform adoption of several salutary good practices. These include simple and obvious panaceas like designating a special day in the week for disposal of older cases. This could also involve a minimal but necessary creation of naming and shaming of judges associated with low disposal, based upon charts in intra court meetings. Pre-trial conferences with the trial judge to ensure that the case remains fresh, followed by day to day disposal of cases, designated Saturday meetings between the advocates of both sides and the judge to freeze issues for focused disposal, setting weekly, monthly and quarterly targets for speedy disposal and reviewing failure to achieve intended targets. Another solution could be adopting a sophisticated computerised case law management system monitored by managerial professionals under judicial supervision.

IV The A.B.C.D. of judicial reform

The A, B, C, and D of judicial reforms are all interlinked. A stands for Access, B for backlog, C for cost and D for delay. Cause and effect are inextricably inter-twined in this paradigm: One feeds the other and constitutes both cause and effect. India s unprecedented achievements in being the world s most dynamic judicial system, one of the world s most activist judiciary, invention of remarkable revolutionary legal concepts such as public interest litigations, the basic structure doctrine of the constitutional theory, the vibrant and independent judiciary, and the world s second largest legal fraternity, are all unfortunately emaciated when we are forced to confront the scourge of mountainous arrears of over 3.2 crores pending cases. No one likes to indict one s own country but the following words are not the author s. They are those of one of India s most illustrious jurist, Nani Palkivala:[12]

> Examining the situation in India which has the second largest number of lawyers in the world? While it is true that justice should be blind, in

> our country it is also lame. It barely manages to hobble along. The law may or may not be an ass but in India it is a snail: it moves at a pace which would be regarded as unduly slow in a community of snails. A law suit, once started in India is the nearest thing to eternal life ever seen on this earth. Some have said that litigation in India is a form of fairly harmless entertainment. But, if so, it seems to be a very expensive way of keeping the citizenry amused. If litigation were to be included in the next Olympics, India would be quite certain of winning at least one gold medal.

Lack of rational policy for public institutions

Further analysis of the circumstances surrounding the pending cases from the 1950s and 1960s established a lack of rational litigation policy for several public institutions. For instance, a 2014 news report[13] describes the pitiable case of a Delhi Transport Corporation (DTC) bus conductor who charged a women 10 paisa instead of 15 paisa in 1973. The relevant department of the DTC recommended dismissal in 1976. Thereafter, the labour court took fourteen years to reverse and recommended reinstatement with full back wages in 1990. In no civilised system would DTC or its counterpart have gone further. However, in the absence of a rational litigation policy, the DTC predictably challenged the labour court order in the Delhi High Court, which took another 18 years to dispose of the DTC challenge in 2008. Undeterred and unrepentant, DTC filed a review petition in the Delhi High Court and refused, in the meanwhile, to either reinstate the bus conductor or pay him back wages or give him his retirement benefits since he had retired many years ago. Unfortunately the Delhi High Court partly allowed the DTC review petition ordering the 70 year old Ranbir Singh to pay the DTC Rs 1.42 in loss of revenue. The amount of Rs 1.42 is based on compounded interest on Rs. 00.05 that the defendant, in 1973, in his capacity as a conductor for DTC, undercharged a female customer. Such verdicts encourage future aberrant behavior of public corporations who should never have appealed in the first place.

The facts from this example raise several questions like, did the relevant DTC officials, including its lawyers were punished for their irrational decisions? Has the DTC or the labour court presiding judge or the high court chief justice, examined the file to understand the reasons for the 14 year and then 18 year old delays at the at the labour court and high court levels? What is the purpose of handing Ranbir Singh a

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12 Quoted from Abhishek Manu Singhvi, India of My Dream in Surendra Kumar & Pradeep K. Kapur, *India of My Dreams* 54 (2006).

13 *Times of India* Nov. 1, 2014

victory which was certainly deserved but entirely pyrrhic? What is it about Indian judicial system that makes a victim out of a victor? Why is there never any closure within any known reasonable time for most Indian legal proceedings?

In fact, if analysis was to dig deeper, it would find post-verdict trauma to be extremely harmful to the litigant. The case of Salman Khan, the actor, is a good example of continuing post-verdict trauma. The actor was directed by the Bombay High Court in 2002 to pay Rs 19 lakhs as compensation to certain deceased and injured in a drunken driving accident. The money was paid promptly by the actor. It was discovered, after 10 years, by the Bombay division bench that the money has not been paid to any of the victims or their families.[14] Obviously this happens because there is no individual monitoring of cases. The author is certain that there is hardly any consequential penal action which will follow against errant officials culpable in such bizarre examples.

V Conclusion

In conclusion, our entire perspective regarding judicial reform has to change. It is imperative to see ourselves as a service industry and from the point of view of the litigant *i.e.*, to use Gandhiji s phrase, the customer has to be king. One cannot indefinitely continue to see the legal system from the point of view of the convenience and earning of the lawyer or the stature and pomposity of the judge. The litigant more often than not wails, *Dopahar tak bik Gaya bazaar Ka har ek jhooth, Aur main ek sach ko Lekar shaam tak baitha raha* . The entire legal family - judges, lawyers, academics, registry officials, litigants, parties - all have a contributory and historic role to play.

14 *The Times of India* Oct. 4, 2012.