CHAPTER 7

THE JUDICIARY

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CHAPTER 7

THE JUDICIARY

1[1] *See* also the Consultation Papers on "Superior Judiciary", "All India Judicial Service" and "Financial Autonomy of the Indian Judiciary" issued by the Commission in Volume II (Book 1).

1[1]

Background

7.1.1 Among the noble aims and objectives of the Constitution, the founding fathers accorded the highest place to 'Justice'. The Preamble speaks of "We, the people of India" resolving to secure *inter alia* "Justice – social, economic and political" to "all its citizens". The juxtaposition of words and concepts in the Preamble is important. Most significantly, 'Justice' is placed higher than the other principles of 'Liberty', 'Equality' and 'Fraternity'. Again, the Preamble clearly enjoins precedence to social and economic justice over political justice. People turn to the judiciary in the quest of justice. There is need to review the working of the judiciary during the last half-a-century and more, to assess how far our justice delivery system has been able to ensure equal social, economic and political justice to all the people as ordained by the Constitution and its Preamble.

7.1.2 The Constitution lays down the structure and defines, delimits and demarcates the role and functions of every organ of the State including the judiciary and establishes norms for their inter-relationships, checks and balances. Independence of judiciary is essential to the rule of law and constitutional norms.

The Structure

7.2 Provisions in regard to the judiciary in India are contained in Part V ('The Union') under Chapter IV titled 'The Union Judiciary' and Part VI ('The States') under Chapter VI titled 'Subordinate Courts' respectively. It is, however important to emphasize that unlike other federal systems, for example, that of the United States, we do not have separate hierarchies of

federal and State Courts. In India, though the polity is dual, the judiciary is integrated. For the entire republic of India, there is one unified judicial system – one hierarchy of courts – with the Supreme Court as the highest court and also as the arbiter in matters of relations between the Union and the States and the States *inter se.*

7.2.1 The Supreme Court and the High Courts as the custodians and watchdog of the fundamental rights and freedoms of the people and their constitutional rights have an awesome responsibility. The Superior Judiciary has successfully preserved and protected the fundamental rights of the citizens and vulnerable groups against the innovations of "an excited democracy" and for that purpose, it has drawn substantially upon the Directive Principles.

7.2.2 Speaking of the Supreme court of the United States, a writer said, "the Court has not been infallible. It has made mistakes. It sometimes has run counter to the deliberate and better judgement of the community. But the final judgement of the American people will unquestionably be that their constitutional rights are safe in the hands of the federal judiciary. Throughout the whole history of the United States, it furnishes the highest example of adequate results of any branch of our government. It has averted many a storm which was threatening our peace and has lent its powerful aid in uniting the whole country in the bonds of justice. To paraphrase the language of William Wirt, 'if the judiciary were struck from our system', there would be little of value that would remain."

1[1].

7.2.3 This tribute can fittingly be addressed to the Supreme Court of India too. The Supreme Court of India has admirably discharged its onerous obligations sentinel of the *qui vive.*

2[1] Constitution Law of the United States by Hugh Evander Willis.

7.2.4 But then, there are voices of detraction. Judicial activism has not gone too well with groups of democratic theorists who object to the kind of judicial activism which has tended to turn social and political processes to legal processes and obliterating the then line of demarcation between interpretation and adjudication and exhibiting an ever eager tendency to intervene in the governing process. Constitutional adjudications do have an inevitable legislative element. Judges need great wisdom and restraint in wielding this great judicial powers lest they erect their own predilections into principles. “The irreplaceable value of the power of judicial review”, said a judge, “lies in the protection which it has accorded to constitutional rights that has maintained public esteem for the judiciary and has permitted peaceful existence of counter majoritarian implications of judicial review and the democratic principles on which our federal government rests”.

Appointment, Transfer and Removal of Judges of the Superior Courts

Appointment

7.3.1 Article 124 vests the power of appointment of the Chief Justice of India (C.J.I.) and the Judges of the Supreme Court in the President. The President shall by warrant, make the appointment after consultation with such of the judges of the Supreme Court and the High Courts of the States, as he may deem necessary. Also, the provision speaks of 'after' consultation and not 'in' consultation. In the case of appointment of a judge other than the Chief Justice of India, the C.J.I. shall always be consulted. On a plain reading of the provision, the power of appointment vests in the President. The President, of course, means the Executive *i.e.* The President acting on the advice of Council of Ministers. The C.J.I. and other such judges of the Supreme Court and the High Courts shall be consulted by the President, as he may deem necessary.

7.3.2 The appointment of judges of the High Courts is also made by the President (Executive). The President has to consult the C.J.I., the Governor of the State and the Chief Justice of the High Court.

7.3.3 In *S.P. Gupta's Case*

1[1] (popularly referred to as the *First Judges' Case*) one of the points decided was whether, as among the three consultees, the C.J.I. has primacy. The Court by a majority ruled that article 217(1) of the Constitution placed all the three constitutional functionaries on the same pedestal and that there is no primacy given to the C.J.I. In *S.P. Gupta's Case* no question arose with respect to the appointment of the Judges of the Supreme Court.

3[1] AIR 1982 SC 149

7.3.4 In the *Second Judges' Case*

1[1], inter alia, the Supreme Court examined as to who, under the Constitution, has the power of appointment of the judges of the Supreme Court and of the High Courts. By a majority, it ruled that the C.J.I. while focusing his opinion as part of the consultative process must take into account the views of the two senior most judges of the Supreme Court, to ensure that the opinion is not merely his own individual opinion but is in fact the collective opinion of a body of men at the apex level in the judiciary. Also, the opinion of C.J.I. so formed should be determinative and almost binding on the President. The judgement also laid down the procedure.

7.3.5 With regard to the appointment of judges of the High Court, the majority of the judges ruled in that case that the C.J.I. might ascertain the views of one or more senior judges of the respective High Courts, whose opinions were likely to be significant in the formation of the opinion of the C.J.I. The opinion of the Chief Justice of the High Court would be entitled to maximum weight and the opinion of the other functionaries involved must also be given due weight. The opinion of the Chief Justice of the High Court must be formed after ascertaining the views of at least two of the senior most judges of that High Court.

7.3.6 Articles 124 and 217, respectively, provide for the manner of appointment of the judges of the Supreme Court and the various High Courts. It is provided that every judge of the Supreme Court or a High Court shall be appointed by the President by warrant under his hand and seal. The persons to be consulted before such an appointment is made by the President has been provided in the said articles. The Supreme Court in the Supreme Court Advocates-on-Records Association v. Union of India

1[1], (the second judges case) and in re Presidential reference4[1], has in effect emphasized upon "integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment" in which "all the constitutional functionaries must perform this duty

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4[1] Supreme Court Advocates-on-Record Association vs. Union of India (AIR 1994 SC 268).

5[1] AIR 1994 SC 268

6[1] AIR 1999 SC 1

collectively with a view primarily to reach an agreed decision, sub-serving the constitutional purpose, so that the occasion of primacy does not arise" in the matter of appointment of judges. However, in case of disagreement between the President and the Chief Justice of India, the opinion of the latter must prevail. The opinion of the Chief Justice of India means the opinion of a collegium consisting of himself and two senior most judges of the Supreme Court in matter of Second Judges case and himself and four senior-most judges in the matter of Presidential reference case.

7.3.7 The matter relating to manner of appointment of judges had been debated over a decade. The Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced on 18th May, 1990 (9th Lok Sabha) providing for the institutional frame work of National Judicial Commission for recommending the appointment of judges to the Supreme Court and the various High Courts. Further, it appears that latterly there is a movement throughout the world to move this function away from the exclusive fiat of the executive and involving some institutional frame work whereunder consultation with the judiciary at some level is provided for before making such appointments. The system of consultation in some form is already available in Japan, Israel and the UK. The Constitution (Sixty-seventh Amendment) Bill, 1990 provided for a collegium of the Chief Justice of India and two other judges of the Supreme Court for making appointment to the Supreme Court. However, **it would be worthwhile to have a participatory mode with the participation of both the executive and the judiciary in making such recommendations. The Commission proposes the composition of the Collegium which gives due importance to and provides for the effective participation of both the executive and the judicial wings of the State as an integrated scheme for the machinery for appointment of judges. This Commission, accordingly, recommends the establishment of a National Judicial Commission under the Constitution.**

The National Judicial Commission for appointment of judges of the Supreme Court shall comprise of:

(1) The Chief Justice of India: Chairman

(2) Two senior most judges of the Supreme Court: Member

(3) The Union Minister for Law and Justice: Member

(4) One eminent person nominated by the President after consulting the Chief Justice of India: Member

The recommendation for the establishment of a National Judicial Commission and its composition are to be treated as integral in view of the need to preserve the independence of the judiciary.

Removal of Judges and remedies for deviant behaviour

7.3.8 **A committee comprising the Chief Justice of India and two senior-most Judges of the Supreme Court shall be exclusively empowered to examine complaints of deviant behaviour of all kinds and complaints of misbehaviour and incapacity against judges of The Supreme Court and the High Courts**. Their scrutiny at this stage would be confined to ascertain whether –

(a) there is substance at all in the complaint; or

(b) there is a *prima facie* case calling for a fuller investigation and enquiry; or

(c) whether it would be sufficient to administer an appropriate advice/warning to the erring Judge or give other directions to the concerned Chief Justice regarding allotment of work to such Judge or to transfer him to some other court.

If, however, the committee finds that the matter is serious enough to call for a fuller investigation or inquiry, it shall refer the matter for a full inquiry to the committee [constituted under the

Judges' (Inquiry) Act, 1968]. The committee under the Judges Inquiry Act shall be a permanent committee with a fixed tenure with composition indicated in the said Act and not one constituted ad-hoc for a particular case or from case to case, as is the present position under Section 3(2) of the Act. The tenure of the inquiry committee shall be for a period of four years and to be re-constituted every four years. The inquiry committee shall be constituted by the President in consultation with the Chief Justice of India. **The membership of the inquiry committee shall not be full time salaried employment. But the terms and other conditions of service of the Members of the committee shall be such as may be specified in the notification constituting the inquiry committee**. The inquiry committee shall inquire into and report on the allegation against the Judge **in accordance with the procedure prescribed by the said Act, i.e. in accordance with the sub-sections (3) to (8) of Section 3 and sub-section (1) of Section 4 of the said Act and submit their report to the Chief Justice of India, who shall place before a committee of seven senior-most judges of the Supreme Court. The Committee of seven Judges shall take a decision as to - whether (a) findings of the inquiry committee are proper and (b) any charge or charges are established against the judge and if so, whether the charges held proved are so serious as to call for his removal (i.e. proved misbehaviour) or whether it should be sufficient to administer a warning to him and/or make other directions with respect to allotment of work to him by the concerned Chief Justice or to transfer him to some other court (i.e. deviant behaviour not amounting to misbehaviour).** If the decision of the said committee of judges recommends the removal of the Judge, it shall be a convention that the judge promptly demits office himself. If he fails to do so, the matter will be processed for being placed before Parliament in accordance with articles 124(4) and 217(1) Proviso (b). This procedure shall equally apply in case of Judges of the Supreme Court and the High Courts except that in the case of a Supreme Court Judge the judge against whom complaint is received or inquiry is ordered, shall not participate in any proceeding affecting him.

It shall also be proper, in appropriate cases, for the Chief Justice of the High Court or the Chief Justice of India, to withhold judicial work from the judge concerned after the inquiry committee records a finding against the judge.

7.3.9 Article 124(3) contemplates appointment of Judges of Supreme Court from three sources. However, in the last fifty years not a single distinguished jurist has been appointed. From the Bar also, less than half a dozen Judges have been appointed. It is time that suitably meritorious persons from these sources are appointed.

Age of Retirement of Judges of the Supreme Court and the High Courts

7.3.10 The Commission recommends that the retirement age of the Judges of the High Court be increased to 65 years and that of the Judges of the Supreme Court be increased to 68 years.

7.3.11 The Commission recommends that in the matter of transfer of Judges, it should be as a matter of policy and the power under article 222 and its exercise in appropriate cases should remain untouched. The President would transfer a Judge from one High Court to any other High Court after consultation with a committee comprising the Chief Justice of India and the two senior-most Judges of the Supreme Court.

Contempt of Court

7.4.1 Article 129 recognizes the power of the Supreme Court to punish for contempt of itself and similarly article 215 of the Constitution recognizes the power of the High Court to punish for contempt of itself. Judicial decisions have been interpreted to mean that the law as it now stands, even truth cannot be pleaded as a defence to a charge of contempt of court. This is not a satisfactory state of law. Article 19(1)(a) of the Constitution guarantees

to all citizens the right to freedom of speech and expression. Article 19(2) saves reasonable restrictions on the exercise of such right by the operation of any existing law and enables the legislature to make such law imposing, in public interest, reasonable restrictions on the exercise of the freedom. Therefore, article 19(2) of the Constitution will not save a law in relation to contempt of court if it impinges upon the right to freedom of speech and expression unless the restrictions are reasonable and are in public interest. If the restrictions that operate upon such rights are unreasonable, they will stand annulled by the operation of article 19(1)(a) of the Constitution. A total embargo on truth as justification may be termed as unreasonable restriction. It would, indeed, be ironical if, in spite of the emblems hanging prominently in the court halls, manifesting the motto of "*Satyameva Jayate*", in the High Courts and "*Yatho dharma statho jaya*", in the Supreme Court, the courts could rule out the defence of justification by truth. The Commission is of the view that the law in this area requires an appropriate change.

7.4.2 A mere legislation by the Parliament amending the Contempt of Courts Act, 1971 alone may not suffice because the power of the Supreme Court and the High Courts to punish for contempt is recognized in the Constitution. Therefore, **an appropriate amendment by way of addition of a proviso to article 19(2) of the Constitution, to the effect that, "in matters of contempt, it shall be open to the Court on satisfaction of the *bona fides* of the plea and of the requirements of public interest to permit a defence of justification by truth". The recommendation in this regard has been made in para 3.8.2 earlier.**

Other Courts and Tribunals: Power to Punish for Contempt:

7.4.3 The power of court to punish for contempt of itself is part of sovereign power and can inhere only in a sovereign. Articles 129 and 215 recognize the existence of such power in the Supreme Court and the High Courts as they exercise *inter alia* the sovereign judicial power. Parliament and State Legislatures exercise sovereign legislative power. It is for that reason that the power to punish for contempt of itself

inheres in Parliament and State Legislatures as part of their privilege. No other court, tribunal or authority can have a power to punish for contempt of itself, either inherently or conferred by a law of legislature. It is only the power to punish for contempt of itself mentioned in articles 129 and 215 and the privilege of Parliament and State Legislatures that is implicit in the words “in relation to the contempt of court” occurring in article 19(2) of the Constitution.

7.4.4 The jurisdiction to order arrest of a person or attachment of properties of a person to implement or execute an order of court or tribunal is a sanction of law to enable the enforcement of the orders against those who are bound thereby (example Order XXXIX, Rule 3 of the Code of Civil Procedure). They are remedial in nature.

7.4.5 Courts other than the Supreme Court and the High Courts do not have inherent jurisdiction to exercise a power of ‘contempt of itself’. Section 10 of the Contempt of Courts Act, 1971 confers power on the High Court to exercise the same jurisdiction, powers and authority in respect of contempt of the Courts subordinate to it. Under the proviso thereto, no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it, where such contempt is an offence punishable under the Indian Penal Code, 1860. Section 228 of the IPC provides for such a situation and rightly does not describe it as the contempt of court. (See also illustratively sections 178, 179, 180 of the Indian Penal Code, 1860 and section 10A of the Commissions of Inquiry Act, 1952.

7.4.6 Section 15(2) of the Contempt of Courts Act, 1971 enacts that in the case of criminal contempt of a subordinate court, the High Court may take action on a reference made to it by the subordinate court or on a motion made by the Advocate General, “Criminal Contempt” deals with scandalizing or lowering or tending to lower the authority

of any Court (not any Tribunal or other quasi-judicial authority) prejudicing or interfering or tending to interfere or obstructing or tending to obstruct administration of justice in any other manner. These are the limited areas which could be the subject of legislation in the legislative field of Entry 14 of List III and if necessary, read with Entries 1 and 2 of List III of the Seventh Schedule to the Constitution of India.

7.4.7 **The Commission, therefore, recommends that a proviso be inserted in article 129 that the power of court to punish for contempt of itself inherent only in the Supreme Court and the High Courts and is available as part of the privilege of Parliament and State Legislatures, and no other court, tribunal or authority should have, or be conferred with, a power to punish for contempt of itself.**

Judicial Review of Legislation: Article 13 and the power of the Supreme Court and the High Courts to declare a law unconstitutional or ultra vires or as beyond legislative competence

7.5 Parliament/State Legislatures enact laws in exercise of sovereign power of the State. Their validity either on the ground of unconstitutionality or on the ground of lack of legislative competence can be adjudicated only by another limb of the sovereign power, viz. the Supreme Court and the High Courts. No other authority can exercise such powers and cannot be conferred such powers even by legislation. To so confer and vest a sovereign power in any authority except on another limb of sovereign, viz. the Supreme Court and the High Court, would amount to an impermissible abdication of sovereign power exclusively inhering under the Constitution, only in the Supreme Court and the High Court as judicial limb of sovereign power. The decisions of courts to the effect that an authority constituted under a statute cannot question only those legislative provisions under which they are constituted but can adjudicate on the unconstitutionality

and lack of legislative competence of other legislative enactments may be inconsistent with basic postulates of the constitution. Article 228 of the Constitution and Order XXVII-A Rule 1 of the Code of Civil Procedure, 1908 and sections 395 and 396 of the Criminal Procedure Code, 1973 are instances of recognition of this position.

It is, therefore, recommended that a suitable provision may be inserted in the Constitution to the effect that except the Supreme Court and the High Courts no other court, tribunal or authority shall exercise any jurisdiction to adjudicate on the validity or declare an Act of Parliament or State Legislature as being unconstitutional or beyond legislative competence and so *ultra vires*. Such a provision may be made as clause (5) of article 226.

Financial Planning and Judicial Autonomy

7.6.1 Judicial administration in the country suffers from deficiencies due to lack of proper planning and adequate financial support for establishing more courts and providing them with adequate infrastructure. For several decades the courts have not been provided with any funds under the five-year plans nor has the Finance Commission been making any separate provisions to serve the financial needs of the courts.

7.6.2 The Commission had issued a detailed Consultation Paper

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7[2] *See* Volume II (Book 2) of the Report.

1[1] for eliciting public opinion on financial autonomy for the Judiciary. It considered all the responses and reached certain conclusions.

Judicial Councils

7.7 **The Commission recommends the setting up of a 'Judicial Council' at the Apex level and Judicial Councils at each State at the level of the High Court. There should be an Administrative Office to assist the National Judicial Council and separate Administrative Offices attached to Judicial Councils in States. These bodies must be created under statute made by Parliament. The Judicial Councils will be in charge of the preparation of plans, both short term and long term, and for preparing the proposals for annual budget**.

Budgets for subordinate judiciary

7.8.1 **The Commission is of the view that the budget proposals in each State must emanate from the State Judicial Council, in regard to the needs of the subordinate judiciary in that State, and will have to be submitted to the State Executive.** Once the budget is so finalized between the State Judicial Council and the State Executive, it should be presented in the State Legislature.

7.8.2 Government of India should not throw the entire burden of establishing the subordinate courts and maintaining the subordinate judiciary on the State Governments. **There is a concurrent obligation on the Union Government to meet the expenditure for subordinate courts. Therefore, the Planning Commission and the**

Finance Commission must allocate sufficient funds from national resources to meet the demands of the State judiciary in each of the States.

Functioning of the Judiciary

7.9 In terms of performance, there has been a certain amount of uneasy dissatisfaction in the functioning of the judiciary. In particular, the problem areas are:-

i) Undue delays in the disposal of cases and lack of sensitivity (accountability) to the mounting arrears of cases.

ii) Injecting avoidable uncertainties in the law and thereby making the task of the Executive more difficult and sometimes unmanageable.

iii) Lack of transparency in judicial appointments and transfers.

iv) Poor management of resources and ineffective standards of judicial administration including legal aid.

v) Absence of strategic Action Plans for clearance of arrears in courts.

Judicial Delays

7.10.1 One of the reasons for the delay is often said to be the inadequate judge strength and the inadequacy of the number of courts and the infrastructure facilities in them. According to an eminent member of the Bar, the best solution to tackle the arrears is "to appoint less number of judges and more competent judges". This was the view of the Report of the Arrears Committee (1989-1990) constituted by the Government of India on the recommendation of the Chief Justices' Conference. The Committee said: "the failure on the part of the Executive to produce adequate number of competent judges from time to time has substantially contributed to the mounting arrears." The arrears can be substantially brought down with better management, computerization of court system, increased settlements by Lok Adalats, the effective and greater use of provisions of the Civil Procedure Code with all its congenial amendments with the cooperation of the lawyers and the court staff. The competence of the judges in terms of quality and quantity of disposals should be assessed by the superior court judges and reputed senior advocates.

7.10.2 **The presiding officers in courts should be adequately trained. To ensure competence, there should be a proper selection, freedom of action, training, motivation and experience. To maintain their competence it is necessary to have continuing education for the judges. Some national judicial institutions have to be properly structured to give such training. There should be a proper monitoring of moving the judges where work demands such movement from places where there are no arrears of work. There has to be systematic assessment of training needs of judicial personnel at different levels.**

7.10.3 It is possible for the governments to have a ‘litigation policy’ directed towards reduction of government litigation and protection of public interest by preventive strategies. For instance, in civil cases when a notice under Section 80 CPC is received, the matter should be thoroughly and carefully examined instead of the present tendency of giving a routine recording as file without application of mind, that "the threatened suit may be awaited." The filing of appeals irrespective of the merit of the case should be avoided. Appeals are filed mechanically

irrespective of the merits merely to avoid allegations, quite often unjustified, of improper motives when a decision which affects the interests of the Government is allowed to assume finality.

7.10.4 **The Government should ensure basic infra-structure needed to all courts and arrange to ensure that courts are not handicapped for want of infra-structural facilities, Governments, both at the Centre and in the States, should constitute committee of secretaries to review government litigation with a view to avoid adjudication wherever possible, give priority in filling of written statements, wherever required, and instruct government advocates to seek early decision on government litigation.**

7.10.5 In the Supreme Court and the High Courts, j**udgements should ordinarily be delivered not later than ninety days from the conclusion of the case. If a judgement is not rendered within such time – it is possible that the complexities of the case and the effect the decision may have on another similar situation might compel greater and larger judicial consideration and contemplation – the case must be listed before the court immediately on the expiry of ninety days for the court to fix a specific date for the pronouncement of the judgement.**

Costs of Litigation

7.11 Trade and industry, which resort to the courts most, must share a greater burden of maintenance of the system. A reasonable share of the judicial budget must come from the resourceful class of public of which the business class forms a segment. There was a time when in all civil proceedings costs were invariably awarded and at least a oneline reason given for not awarding costs. Today costs are rarely awarded. An award of costs is a vindication of the

rightful cause and reparation to him for having had to resort to court or defend a case when his/her cause was a good one and the adversary had an unsustainable case. It was also in the nature of retribution to the party who has approached the court on an untenable case or unsustainable defence. **An award of exemplary costs should be given in appropriate cases of abuse of process of law.**

Priority in hearings

7.12 A civil appeal, however high the stakes may be, unless it involves projects of national and public importance should not have priority over criminal cases where accused are in custody. When constitutional questions arise, it should be expeditiously heard and law settled, as it would be contrary to public interest to keep such questions in suspense. To keep tax cases pending for years causes serious public detriment. When there is no stay operating in the case of indirect taxes, the assessee does not know whether he can pass on the tax or not. If the tax had been passed on, if the levy is struck down, the consumer has already suffered the inflated price. The benefit does not go to the consumer who paid the tax, even if the doctrine of unjust enrichment is applied and the tax is not refunded to the persons who passed it on. It is no consolation for the consumer to whom the tax burden may be passed on to be told that the money has gone to some consumer benefit fund. In the case of direct taxes equally, it would deprive the tax payer, the right to utilize funds in his business or on gainful investments. The grant of stay in taxation matters has serious impact on public exchequer. A budget is made for each year. Taxation matters should therefore receive an appropriate priority in disposal of cases. Though the Representation of the People Act, 1951 enacts a provision for disposal of election disputes within a time schedule, the same is invariably breached. A mechanical queue for all cases would not meet the ends of justice.

ADR Systems for Urban Litigation

7.13.1 The Gram Nyayalayas as contemplated by the Law Commission will process 60 to 70 per cent of rural litigation leaving the regular courts in districts and sub-divisions to devote their time to complex civil and criminal matters. With a participatory, flexible machinery available at the village level where non-adversarial, settlement-oriented procedures are employed, the rural people will have a fair, quick and inexpensive system of dispute settlement. Only revision jurisdiction on civil matters and that also on questions of law may be left to the district courts.

7.13.2 Today, the pendency in various courts in urban areas is staggering. Rent and eviction suits constitute a considerable chunk of litigation in urban courts, and that they take on an average three or more years to get adjudicated in the court at first instance, the Law Commission felt that an alternative method for these disputes is imperative. The Law Commission examined several alternatives and preferred to recommend the model of Conciliation Court along with a participatory model where a professional judge interacts with two lay judges and evolves a reasonable solution. There will not be any appeal against the decision and only a revision petition will be permissible on questions of law to the district Court.

7.13.3 **The Law Commission recommendations in regard to the Nagar Nyayalayas, Conciliation Courts, ADR systems of urban litigation, evidence recording by Commissioners etc. as incorporated in the Code of Civil Procedure (Amendment) Act, 2000 should be brought into force with such modifications as would take care of a few serious objections.**

7.13.4 The Commission noted that in all developed systems normally not more than 15% of the cases go for final adjudication. The rest of the cases are resolved by alternate dispute resolution mechanisms like conciliation, mediation and arbitration. Pre-trial conciliation accounts for the disposal of a large number of cases.

The Commission recommends that the provisions relating to conciliation in the Arbitration and Conciliation Act, 1996 should suitably be amended to provide for obligatory recourse to conciliation or mediation in relation to cases pending in courts. The Commission further recommends that scope and functions of the Legal Services Authorities constituted under the Legal Services Authorities Act, 1987 be enlarged and extended to enable the Authority to set up conciliation and mediation fora and to conduct, in collaboration of other institutions wherever necessary, training courses for conciliators and mediators.

Strategic Action Plans for time-bound clearance of Arrears

7.13.5 **The Commission recommends that each High Court should, in consultation with the judicial councils referred to in para 7.7, prepare a strategic plan for time-bound clearance of arrears in courts under its jurisdiction. The plan may prescribe annual targets and district-wise performance targets. High Courts should establish monitoring mechanisms for progress evaluation. The purpose is to achieve the position that no court within the High Court's jurisdiction has any case pending for more than one year. This should be achieved within a period of five years or earlier.**

Criminal Justice Administration

7.14.1 Criminal Justice System in India requires a strong second look.

7.14.2 **The criminal investigation system needs higher standards of professionalism and it should be provided adequate logistic and technological support. Serious offences should be classified for purpose of specialized investigation by specially selected, trained and experienced investigators. They should not be burdened with other duties like security, maintenance of law and order etc., and should be entrusted exclusively with investigation of serious offences.**

7.14.3 **The number of Forensic Science Institutions with modern technologies such as DNA fingerprinting technology should be enhanced.**

7.14.4 **The system of plea-bargaining (as recommended by the Law Commission of India in its Report) should be introduced as part of the process of decriminalisation.**

7.14.5 **The greatest asset of the police in investigation of crimes and maintenance of law and order is the confidence of the people. Today, such public confidence is at the lowest ebb. The police are increasingly losing the benefit of this asset of public confidence. Hard intelligence in investigations comes from public cooperation. If police are seen as violators of law themselves or if they abuse their powers for intimidation and extortion, public develop an attitude of revulsion and the onerous duties and responsibilities that the police shoulder become more onerous and difficult.**

In order that citizen's confidence in the police administration is enhanced, the police administration in the districts should periodically review the statistics of all the arrests made by the police in the district and see as to in how many of the cases in which arrests were made culminated in the filing of charge-sheets in the court and how many of the arrests were ultimately turned out to be unnecessary. This review will check the tendency of unnecessary arrests. Some statistics indicate that in some districts in the country, nearly 80% of the arrests were made in respect of bailable offences.

7.14.6 **The legal services authorities in the States should set up committees with the participation of civil society for bringing the accused and the victims together to work out compounding of offences.**

7.14.7 **Statements of witnesses during investigation of serious cases be recorded before a magistrate under section 164 of the Code of Criminal Procedure, 1973.**

Victim Orientation and Victomology

7.15.1 The assumption that by punishing the offender the victim receives "Justice" is of doubtful value today because of the decreasing number of successful investigations and convictions. Given the inconvenience, delays, corruption and harassment, many victims tend to keep away from reporting crimes and sometimes there is a tendency to take law into one's own hands.

7.15.2 Among the many reforms canvassed for improving criminal justice is one that advocates a victim-orientation to criminal justice administration. 'Victim orientation' includes

greater respect and consideration towards victims and their rights in the investigative and prosecution processes, provision for greater choices to victims in trial and disposition of the accused, and a scheme of reparation/ compensation particularly for victims of violent crimes.

7.15.3 The case for a viable, social justice-oriented and effective scheme for compensation victims is now widely felt. **The Government at the Union level and in the states are well advised under the directive principles as well as under International Human Rights obligations to legislate on the subject of an effective scheme of compensation for victims of crime without further delay.**

7.15.4 **The tremendous support which the criminal justice might derive from the people once the compensation scheme is introduced even in a modest scale, and the possibilities of advancing the crying need for social justice in a very real sense, are attractive enough for the State to find money to float the scheme immediately.**

All India Judicial Service

7.16 The Commission had circulated a Consultation Paper8

1[1] on 'All India Judicial Service' for eliciting public opinion. After examining the responses received and after detailed deliberations, the Commission decided that the formation of All India

8[2] *See* Volume II (Book 2) of the Report.

Judicial Service would not be a better alternative to the present system. The Commission did not therefore, favour deletion of clause (3) of article 312.

Digital legal information system

7.17.1 The Commission notes that the law libraries available in the country are limited. Further, the cost of maintaining modern law libraries in various parts of the country would be enormous. With a view to providing a satisfactory justice delivery system, access to law books, law journals and other legal literature by all concerned needs no special emphasis.

7.17.2 **The Commission, therefore, recommends that the National Informatics Centre in collaboration with or with the assistance of the Indian Law Institute and the Government Law Departments should set up a Digital Legal Information System in the country so that all courts, legal departments, law schools would be able to access and retrieve information from the data bank of the important law libraries in the country."**

Subordinate Judiciary

7.18 The jurisdiction and nomenclature of subordinate courts in the various States of the country are different. At present, there are three or more tiers of civil and criminal courts below the High Court. Cases at the trial stages are decided by and assume finality at the level of the subordinate courts. The trial system is the cutting edge of the judicial machine. It would, therefore, be necessary that the presiding officers of these courts are impartial and competent. It

will also enhance the quality and quantity of their output. The administration of justice at this grass root level needs standardization.

The Commission **recommends that progressively the hierarchy of the subordinate courts should be brought down to a two tier of subordinate judiciary under the High Court. Further, strict selection criteria and adequate training facilities for the presiding officers of such courts should be provided.** The Commission also recommends that **to cope up with the workload of cases at the lower level and also to curtail arrears and delay, the States should appoint honorary judicial magistrates selected from experienced lawyers on the criminal side to try and dispose less serious and petty cases on part-time basis on the pattern of Recorders and Assistant Recorders in UK. They could set for, say, 100 days in a year and hold court later in the evenings after regular court hours. This would relieve the load on the regular magistracy.**

Habeas Corpus and the Human Rights Courts

7.19.1 Section 491 of the Code of Criminal Procedure, 1898 (since repealed and re-enacted as the Code of Criminal Procedure, 1973) vested the power to issue directions of the nature of *habeas corpus* in all the High Courts. The power was available since the Code was enacted in 1898 when the constitutional provisions of judicial review of the nature provided in article 226 in relation to the High Courts and article 32 for the enforcement of fundamental rights in relation to the Supreme Court of India were not available. The power under section 491 of the Code continued to be available simultaneously with the power of the High Courts and the Supreme Court to issue writs of the nature of a habeas corpus vested in them under article 226 and article 32 of the Constitution respectively even after coming into force of the provisions of the Constitution. However, when the new Code was enacted in 1973, it was thought that, in face of the constitutional provisions under article 226 and article 32, the power of the nature of section

491 of the Code of Criminal Procedure, 1898 is redundant and was thus not provided for in the new legislation.

7.19.2 Since the enactment of the Code of Criminal Procedure, 1973, issues relating to the human rights have found a prominent place throughout the world. In India, the Protection of Human Rights Act, 1993 was enacted with a view to providing for establishment of the National Human Rights Commission and the various State Human Rights Commissions. Section 30 of the said Act provides that the State Governments may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a court of session to be a Human Rights Court to try the offences relating to human rights.

7.19.3 Since the issues relating to human rights, more particularly relating to unlawful detention, have now occupied a center-stage, both nationally and internationally, **it shall be desirable that the Protection of Human Rights Act, 1993 may be suitably amended to provide that, in addition to the powers generally vested in that Court, such courts shall have the power to issue directions of the nature of a *habeas corpus* as was available to the High Courts under section 491 of the Code of Criminal Procedure, 1898. Vesting of such power will go a long way in providing help to the indigent and vulnerable sections of the society in view of the proximity and easy accessibility of the Court of Session."**