Chapter v

Anatomy of judicial system
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Anatomy is basically a word from medical science. It means the study of internal organs of living things. I have purposefully used this term because in my opinion the justice delivery system is vibrating body. It functions because of existence of several organs like society, litigants, advocates and judges. In order to diagnose a particular disease of a living thing, it is necessary to have its anatomical study. Once ill functioning or disease of a particular organ is detected; it becomes easy to suggest appropriate remedy to make the living thing functional again. In the similar way let us try to diagnose the disease of delay to justice delivery system by anatomical study of its organs.

First we will take up the society. It is this gigantic group of human beings from where all the organs of the judiciary i.e. litigants, advocates and judges come. It is for the society that the laws are made and the justice delivery system functions. In spite of this reality the society is indifferent to the problems of justice delivery system. The symptom of withdrawal on the part of society for the justice delivery system is amazingly surprising in fact it is the duty of every citizen i.e. every member of the society to see that the law is enforced. Lord Dennings
expressed his views about the responsibilities of the citizens,

"Every responsible citizen has an interest in seeing that the law is enforced, and that is sufficient interest in itself to warrant was applying for certiorari or mandamus to see that it as enforced."¹

Unfortunately very few citizens carry forward this responsibility. Most of them are not bothered from their democratic right to attempt to ask for or enforce changes in a system if they find it functioning to the detriment of their interest.

Some jurists are of the view that the process of change should begin at the top level of law makers, lawyers and judges and it should go to the society. Justice V.R. Krishna Ayer is one of such thinker. He writes,

"Human right literacy, inspiring legal literacy, must begin with the lawmakers, lawyers, judges and law schools, and reach the forgotten and forlorn consumers for whom go the bells of the constitution toll."²

Gandhiji, however, sounded a different view. He was of the view that society has to carry out its crusade for justice by developing internal mechanism of its own to keep its members away from the law courts. He sounded his views as under,

"I have not a shadow of doubt that society would be much cleaner & healthier if there was less resort to law courts than there is."³

¹. The Principle of Law 1st Edi. P.122
². Justice and Beyond 1st Edi. P.27
³. The Law and the Lawyers 4th Edi. P.3
Gandhiji also expressed his views that awareness of every member of the society of rights as well as liabilities will establish rule of order. He said, 

"If instead of insisting on rights everyone does his duty, there will immediately be the rule of order established among mankind."  


Fifty-five years long journey of Indian democracy however shows that the Indian society believes in the principles of Jesus Christ who referred the God as the best shepherd in the protection of whom all the mankind is safe like sheeps with a considerate shepherd. In case of Indian citizens the politicians, magicians, spiritualists and any other persons having good oratory is their Shepherd. The society is ready to follow dictum of such person as the sheeps follow directions of their shepherd. It is the irony of Indian society that the representatives elected from society enact the laws for society, however the society is not akin to follow these laws. Kahlil Gibran describes perfectly the condition of Indian society in following words,

"You delight in laying down the laws. Yet you delight more in breaking them.

Like children playing by the ocean who build sand towers with constancy and then destroy them with laughter."  

If we have to remove the problem of delay from the justice

1. India of my dreams 1st revised P.44
2. The Prophet reprint 1998 P.53
delivery system it is necessary to change the scenario. Litigations come to the court from society. Even if a person is not a litigant he may be responsible for creating the litigation. Delmar Carlen, an American jurist, elaborately describes the role of society in creating litigation. He writes,

"I do not believe that the courts are the sole or even the primary cause of our difficulties. Some of the blame falls on homes, schools and churches for their failure to teach citizenship and respect for the law. Some falls upon legislative bodies for their failure to provide the courts with adequate personnel and facilities to keep up with the flood of litigation, and for their many other sins of omission and commission, such as their failure to enact adequate gun control legislation to deal with pressing social evils, and to reform substantive & procedural law in general."¹

Eradication of crime is ultimate object of criminal justice system. The system will not succeed unless the society adopts social measure for prevention of crime. Denis Sazbo, professor in university of Montreal, describes the role of society in prevention of crime,

"The prevention of crime is probably the element that best incorporates the criminal policy in social policy. No one today believes that the law alone, with the aid of those who enforce it, is sufficient to prevent crime. It

¹ Judicial Administration: the American Experience 1st Edi. P.85
is generally agreed that without appropriate social measures, there can be no effective prevention."¹

It is necessary to acquaint the society with the functioning of system and create awareness in the society to help the system to eliminate shortcomings in the system. Jerome Frank describes these aspects in following words,

"It can even be a wise to acquaint the public with the truth about the working of any branch of Government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of manmade institutions. The best way to bring about the elimination of those shortcomings of our judicial system, which are capable of being eliminated, is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts." ²

When we think of heavy load of pendency with the criminal justice system we have to think where from these cases come. Number of cases increase in proportion to the commission of crimes. Crimes are committed basically because of insecurity in the members of the society created by increasing inequality between rich and poor. Eminent advocate R.K.Jain, president Supreme Court Bar Association

¹. Criminology and Crime Policy Denis Sazbo University of Montreal 1st Edi. P.102
². Courts on Trial quoted by H.R.Khana in Judging the Judges P.32
has given a thought to this problem. He writes about role of social inequality in the causation of crime. He says,

"Poverty gives rise to hostility in the personality. This hostility acts against the system as a whole and against the rich in particular. Thus the hostile personality gives rise to the crime. Poverty is due to social factors and that is why poverty alleviation is not only the responsibility of the state but of the whole system. In the present day, though ostensibly there are number of poverty alleviation programs but the stark reality is that the rich are getting richer and poor are getting poorer. The result is that the distance between the poor and the rich has increased and the poor section is justified in thinking that the society is not looking after its interests. It is a shame that even in the 21st century people are dying due to hunger. The question is whether the person whose son or father died of hunger is justified in taking the law in his own hands. For example, if he commits murder in such a situation for some financial gains for his survival, our Criminal Justice System will sentence him either to life imprisonment or death. But the moot question is - should he be convicted at all for the offence committed in a situation, which has been created by the society itself? This is just an illustration. There can be so many other examples, which can be cited for proving
the point that poverty is one of the main causes of crime. That being so, the question arises - what should be done by our Criminal Justice System? Should such a person be treated as equal with other offenders and sentenced to life or death. If the society itself is responsible for making a person criminal, can it morally punish him for the offence committed by him.
A national debate on issues like this is a must."  

Considering the interlink between problems of justice delivery system particularly the problem of pendency and delay in justice delivery and the way in which the society is responsible for the growing pendency of Civil and Criminal cases before the court as well as for the delay in the trial of Civil and Criminal cases the society must have to accept its contribution in the problems presently faced by the judiciary.

Indifference of society for the justice delivery system is glaringly visible in the act of the citizens not to come forward to depose before the court. The plaintiff or the defendant finds it difficult to get a witness to prove his case. Police, hardly, get the panchas to record seizure memo and other panchnamas. Police ultimately have to rely on the evidence of habitual panchas accepting the risk of failure in the trial. Many instances are noticed in which report of the death of human being was not lodged to police station though hundreds of people have

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1. Criminal justice System and the poor Article published in Legal news and views 2002
seen the corpse. The society shall have to learn the rule of self discipline and self governance in order to sort out problems of getting quick and cost effective justice. The society shall also have to learn a lesson that prevention of crime is not possible without the assistance of society. Even after detection of crime, criminal cannot be punished without the active involvement of society.

The active organ of judiciary closely related with society is the litigant. He is the member of the society, however he is amongst particular class of the society which comes in contact with active organs of judiciary i.e. advocates, court employees and judges. He is witness to the working of justice delivery system. It is the litigant who knocks the doors of the court for justice. It is also the litigant who cries for getting justice. He is affected by every correct incorrect decision of the justice delivery system. litigant can be classified in various classes. It is necessary to classify the litigants in different classes considering their relations with the justice delivery system.

It is also the litigant, who is responsible for causing delay in the trial and exploiting the justice delivery system. Yet it is this class who cries foul on every reform suggested for the betterment of the system. Every litigant wants the decision in their favour at any cost. The meaning of justice for them is the decision of the case in their favour. Any order which is against
him amounts to injustice for them. Litigants are up in sleeves to challenge such unjust order before the upper court in the judicial hierarchy.

The litigants can be classified in rich and poor, men and women, politicians, criminals and privileged class. Each of these classes of litigants has their own reasons to come before the court and then to keep their litigation pending by protracting the trial.

We will consider the strategy and reasons of each of these classes of the litigants to come up with litigation before the court and protract the trial.

First of all we take the case of rich litigants. The rich persons are in the forefront to exploit the justice delivery system. The famous litigation of independent India Kameshsing v. State of Bihar (AIR 1951 Patna 91) which lead to first constitution amendment was filed by a representative of a rich class to avoid agrarian reforms. The rich people are always there to exploit every provision of law either to protect their money and property or to create more money and more property.

Most of the civil suits in India come from the moneylenders. This is a class which exploits the needy
individual in the society by providing money at exorbitant rate of interest. They are not afraid of coming to the court of law to recover money, because they have already helped cost of litigation and much more when the document is got executed from the borrower. The moneylender gets a decree for his concocted claim on the basis of documentary evidence. This is one of the mode in which rich succeed to exploit the judiciary by making claim for the amount which is much more than the actual transaction. The judiciary is bound to accept his claim as it is perfectly supported by the documents. In this way but resourceful the class of citizens exploit the society by using justice delivery system as a tool available to them by expending fees of advocates and paying court fees. After independence this practice of a moneylending flourished to such an extent that it started to make the poor and needy more poor. Resolving this problem the parliament was required to legislate a law to safeguard society from the clutches of moneylenders. The statement of objects and reasons of the moneylenders Act 1946 make my point of argument more clear.

"The Statement of Objects and Reasons:-

In the case of the agrarian population the Agricultural Debts Relief Act will adjust and liquidate existing debts, but controlled credit must be provided in future for short-term and long-term agricultural finance in order to secure that the agrarian population will not get hopelessly into debt again. Similarly, in towns and
cities a large section of the labour and lower middle-class population are exploited by many unscrupulous money-lenders and it is therefore necessary to control the operations of the later all over the Province."

"The provisions of the Bombay Money-lenders Act, 1946, have been found to be not adequate to check the evils of unauthorized money-lending, the extent of which is not known but it seems that such unauthorized money-lending is going on in extensive scale. The indebtedness of the weaker sections of the community is assuming alarming proportions and it is considered necessary to amend the provisions of the Bombay Money-lenders Act, 1946, with a view to check this evil and to streamline implementation of the Act." 1

The object of the Act by examination of the scheme thereof appears to be that unwary agriculturist and non-traders and parties who are not indulging in banking and commercial transactions of the kind should be protected.

As the unscrupulous money-lenders were charging usurious rates of interest, indulging in malpractices and taking undue advantage of the weak position of the economically weaker sections of the people, both in rural and urban areas,

1. Object and reasons Money lenders Act
the Maharashtra Debt Relief Act, 1975 was also enacted.

The objects of said Act disclose the condition of the poor people of the state of exploitation of poor for whose benefit the Act was enacted

"And where as the Governor of Maharashtra was satisfied that circumstances existed which rendered it necessary for him to take immediate action to provide for relief from indebtedness to certain farmers, rural artisans, rural labourers and workers in the State of Maharashtra; and for that purpose promulgated the Maharashtra Debt Relief Ordinance, 1975,

And whereas it is now considered that relief from indebtedness should be restricted to liabilities arising out of loans only and debts of workers who hold immovable property the market value of which does not exceed twenty thousand rupees should stand liquidated, and the debts of workers who hold such property the market value of which exceeds twenty thousand rupees but does not exceed forty thousand rupees should receive moratorium for a temporary period;"  

Now the banking companies, financial institutions and insurance companies had taken the place of moneylenders. Unfortunately there is no law to guard the poor litigants against their activities to engage in litigations on the basis of documents

1. object and reasons Maharashtra Debt Relief Act
got executed by them from the borrowers or policy holders either by compulsion or because of no other alternative while entering into agreement.

Poor class of the society is also not much behind the rich class in exploitation of judiciary. Instead of resolving their disputes by amicable settlement this poor class of society comes before the court with litigation just to satisfy its ego. Most of the civil litigation pending before the court comes from the poor class of society. It is this class of society which is attracted to the crimes. Most of the criminals either in rural or urban area come from this class of society. Even the crimes connected with matrimony are more often committed in the poor class of society than rich.

There are sections amongst the poor class which are subjected to social injustice for reasons on their control. Some suffer because they are born in a particular caste and some other because they belong to a minority presence of which is not tolerated by the majority group. All such oppressed persons are poor. Such persons, when there oppressed to such an extent that there is no other way left for them to defend but to attack, they retaliate. It is irony that such persons are then known as criminals. The State, law and the judiciary in such situation protects the real Offenders that is the superior class of the society which had driven name to become criminals and
punish the poor as a criminal.

Majority of villagers belong to the poor strata of the society. The villagers had a particular mentality. Dr Ambedkar expressed his views about the villagers living in villages in India in following words,

"Activities of the villagers in the historical past are shameful. The country was ruled by Hindus, Pathans, Mogul, Marathas, Sikhs and British. The villagers allowed the army of all these rulers through the villages without any obstruction. No doubt the villagers survived, however we have to consider at what cost they survived? I will definitely say that the villagers survived at selfish level. The villagers are more responsible for the backwardness of the country."

People living in villages never believe in social development. These people cultivate and preserve rudimentary thoughts. They never think of losses because of litigation they are proceeding with. The villagers continue litigation even for generations. So this particular section of society, the poor class, bring maximum number of litigation in the courts without being any sufficient reason to engage in litigation.

One more strong class of society of feeble sex more often seen exploiting the justice delivery system by coming up before the court with the litigations like

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1. Contemporary thoughts of Dr Ambedkar P. 64 published by Raghuvanshi Prakashan Pune)
maintenance, matrimonial disputes, custody, sexual exploitations. It is often seen that many of the matters filed by women's are unwanted. Recently an NGO watching in the field of legal and AIDS awareness has alleged that the law relating to rape was being grossly misused at times. The AIDS awareness group has also recounted several measures to prevent the measures of the rape related sections in IPC. In its survey based on three years extensive research, the AAG documented thirty-five of its own cases where it was found that the laws was applied wrongly or abused.\(^1\)

In several instances it was found that the lady coming with allegations of sexual exploitation had given a hoax call when she was caught enjoying sex. State of AD Vs Lancapall, (AIR 2000 SC 3555) and Undarya another Vs State (2000 AllMR Cri 426) are some of the examples in which the courts found version of the prosecutrix unreliable and as the allegations made by her unwarranted.

Similar is the panorama of matrimonial cases. Divorce, alimony and judicial separation are the remedies claimed by many of the women on flimsy grounds. Most of the petitions in these matters are stereotype which certainly disclose that the lady filing litigation does not have any sound reason for claiming the relief, however the fact mentioned in application

\(^1\) Legal News and Views Feb. 2003 P. 33
are engineered by her advocate or continue to mention similar grounds in every petition.

The Politicians is another class of society, which exploits the justice system to his benefits. The politicians from village level to the central level believe in filing cases against their opponents. They are smart enough to drag the trial against him for years together. The judgment of the court in their favour is being used by them to improve their image in public. When any decision is given against him, the politicians are not afraid of condemning the judiciary or bypassing the order against their interest. Dr Ambedkar while expressing his anguish about Indian Democrats says,

""A democratic form of government presupposes a democratic form of society. The formal framework of democracy is of no value and would indeed be a misfit if there was no social democracy.""

Unfortunately even after 55 years of independence Indian society was not able to absorb even the primary virtues of democracy. In this way though we developed framework for democracy, the persons functioning as government, who are coming from society are not democrats. we're not the democrats by heart and brains. The society is therefore exploited by the few who are in the game of power. Most of the people even do not exercise their power to vote. This helps

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1. Legal News and Views Feb 2003 P. 28
further the persons in the game of power. The unscrupulous persons, who are not voted to power by the majority rule the country or misrule it in the name of democracy. In order to remain in power and politics they take refuge of the Courts and plunge into the protracted legal battles. There are many examples of this attitude of politicians. The best suited here is the case of A.R.Antulay V. R.S.Nayak AIR 1984 SC 718. The case dragged for more than two decades. The delay and opportunities to challenge every other order help the politicians to save their face from the controversy created by the litigation till the matter is forgotten by the common men.

Even the criminals exploit the justice delivery system by protracting the trials till he is assured that the witnesses are coming to depose in his favour. The criminals use different provisions of law to protract trial. Existence of the judicial hierarchy and the provision of appeal and revision assist the criminals to take advantage to protract the trial. The criminals in this way succeed to go unpunished and continue to commit series of crimes without being held guilty for any for a long period or may be never.

The white collar criminals are there in almost all professions. May it be the profession of doctors, advocates, professors, traders or of any other skilled work. Some of them conduct the profession as business so as to earn more
money. To achieve this end they are ready to adopt every unethical way. There are very few laws to punish white collar criminals. Their unethical activities are not yet defined as offences. They take advantage of this situation and pose themselves to be the professionals with clean image in the eyes of law.

The privileged class, which basically consist of advocates, officers, quasi judicial functionaries, executives, police men are taken here as the persons constituting privilege class. This class also tries to exploit justice delivery system by influencing the judicial verdict by some or the other way.

In this way the society never thinks that justice delivery system is an institution which should be considered as last resort for solving the disputes. The society forgets that the organ of judiciary is created to prevent exploitation of society at the hands of other institution and even against the State. It is there to maintain harmony in the society.

The people cultivate a myth that the dispute between the two could always be resolved by a third. Speaking about this myth Gandhiji writes,

"If people were to settle their own quarrel, a third party would not be able to exercise any authority over them."
Truly men were less unmanly when they settled their disputes either by fighting or by asking their relatives to decide for them. They become more unmanly and cowardly when they resorted to the court of law. Surely the decision of 3rd party is not always right. We in our simplicity and ignorance, imagine that a stranger by taking our money gives us a justice." 1

Unfortunately justice delivery system is being utilized by the society not to have harmony but as a battle field for fighting battle of their egos. Unless the society realizes its mistake and stops exploiting justice delivery system, it is not possible to expect any better out come from the justice delivery system.

Advocates are one of the most vital functionaries of justice delivery system. It is expected from the advocates that they should assist the courts in coming to appropriate conclusions about appreciation of evidence, application of law, interpretation of statutes and thus exploring the truth. In the words of Gandhiji lawyers are there to maintain purity of statutes. He writes,

"Lawyers should be guardian of law and liberty & as such are interested in keeping the statute book of the country pure & undefiled." 2

Gandhiji reposes faith in lawyers by mentioning,

"A true lawyer is one who places truth and service in

1. The law and the Lawyers 4th revised P.235
2. The law and the Lawyer 4th Edi. P.144
the first place and the emoluments of the profession in the next place only.---
The duty of the lawyer is always to place before the judges, and help them to arrive at the truth, never to prove the guilty an innocent." 1

Unfortunately barring few most of the lawyers never think of discharging their pious duty. There are several reasons for this. Advocacy never is thought to be a noble profession in the society. Neither the brilliant students think of taking education in law nor good education is often provided in the law colleges. Until recently the law colleges were allowed to be run as night colleges and without having regular teaching staff. One can imagine quality of education parted in such colleges. In this way the students i.e. the whole batch of the mass coming to assist and run judiciary is not provided qualitative legal education. The sediment class of students, who are coming to the law colleges, when not provided with appropriate education, constructive and creative faculty of their mind does not develop. When such students are coming out as advocates they are unskilled professionals coming in the courts to train themselves at the cost of the litigants.

Only few of them develop themselves as successful advocates. Rest of them remain unskilled and without standard for their whole life.

1. The law and the Lawyer 4th Edi. P.259, 212
While speaking about the dwindling standard of the legal education S.V. Kanitkar, Member Bar Council of Maharashtra writes,

"The admission to the law student should be either given on merits i.e. on the basis of percentage---as a result those who have secured higher marks would get admission first so that the cream of the students can be also attracted to the law. Secondly the Bar Council of India may also think with the help of State Bar Councils to hold entrance examination with the help of University before giving admission to the law colleges." ¹

Chief Justice Anand (as he then was) expressed his concern on this issue in following words,

"All those connected with maintenance of the standards of legal education must be prepared to take hard decisions to save the situation. A concerned action on the part of the bar, the bench and the law teachers is called for to improve the deteriorating standards of legal education." ²

It is thus expected that the standard of legal education should be raised to meet the standard of other professional courses. Similarly, persons taking profession of advocate should

1. Indian Bar Review Sep/Dec 1998
observe specific ethical standards.
Arun mishra, president of Bar Council of India, while speaking at all India Seminar on Judicial Reform expressed his views about the ethical standards of the lawyers in following words,

"The morality of the lawyers must be higher than that of rest of the society. Let us live with strength & honour. It is required that lawyers should be more conscious of their social, professional and moral responsibility in conducting cases before courts quickly with sincerity honesty to protect our own system. ¹

With much pain, we have to accept the reality that barring a few most of the lawyers does not stand to the ethical standards. Expressing his concern about this problem Justice Krishna Ayer expresses his thoughts about present generation of advocates and judges in following words,

"The present generation of lawyers & judges, with a considerable number of exceptions, is moving towards professionally amoral, even immoral moves." ²

The advocates adopt all sort of tactics. It will keep the litigation of the client pending in some or the other court. This tactic helps them to milk money from the litigant. Justice Krishna Ayer commented on this practice of advocate as under,

"At times thoroughly selfish interest drives some lawyers to block measure essential for public justice &

¹. Adress by Arun Mishra Indian Bar Review Sept/Dec. 98 P. 38
². A Judicial Imbroglio - a resolvent Submission in Judging the Judges P. 47
3. A Judicial Imbroglio - a resolvent Submission in Judging the Judges P. 47

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common will." 3

This is not the problem which is faced only by the Indian justice delivery system. This problem is there even at America. Jurist Delmar Carlen writes about the tactics of the advocates, "Another cause of delay in both, civil & criminal cases, is adjournments. They are freely asked and freely granted. ----- Any lawyer who pleads a previous engagement or who has been recently substituted causes can expect a very sympathetic hearing when he asks for an adjournment."1

It appears that inherent insecurity of the advocates drive them to keep the cases pending in order to show that he is a busy lawyer. Lord Dennings writes about such practice of British Barristers,

"It is, I Know, a common ploy among barristers to "seem busier" than they are, if you are busy, you are successful, if you are not busy, you are a failure. So it is important to "seem busy". I well remember when I was young at bar and expecting a client, I would set out on my table the briefs and cases for opinion, all tied up in red tape, so as to seem busy but most of them would be 'dead'. They had been finished and done with long before. It was only after ten years or so that my table would be crowded out with live instruction putting on one another"2

1. Judicial Administration: The American Experience 1st Ed. P.71
2. The Due Process of Law 1st Edi. P.89
The advocates keep their clients engaged in some or the other legal battle at various fronts. For example, if a married woman comes to a lawyer with a request to resolve a matrimonial dispute, the lawyer will not only file a matrimonial dispute but he will file criminal cases like prosecution u/s 498-A IPC for subjecting married woman to cruelty, u/s 406 IPC for criminal breach of trust for keeping unauthorisedly articles belonging to married woman and even for assaulting parents of married woman all on fictitious grounds. With the series of litigations he get more money and satisfy the ego of his client by saying that he is keeping the person who tortured her, at bay. The advocate by his such an attitude minimizes the possibility of settlement. The clients who comes of the advocates in search of justice ultimately finds himself cheated. There are even other eventualities.

As I mentioned earlier the some of the elements of the society exploits justice delivery system to gain money. This is not possible without the help of advocate. In this process the looser is the government and money at stake is the public fund. In the litigations like compensation in land acquisition cases and claims motor accident claims public funds and funds of insurance company are being claimed excessively. It is being said that most of the amount of this claim is pocketed by the advocate fighting for the cause of bereaved client. In this way major of the amount instead of going to the aggrieved persons
make the advocate rich. This is because the advocates earn heavy amount as fees. The advocate, earning huge amount by this practice, thus become unavailable to the poor clients. Father of the nation, commented about this problem of the system in following words,

"There is something sinful in a system under which it is possible for a lawyer to earn from fifty thousand to one lakh ruppes per month. Legal practice is not-ought not to be a speculative business. The best legal talent must be available to the poorest at reasonable rates." 1

It is very difficult to remove these bad practices from the profession of advocacy by any statutory provision or code of conduct. It is for the advocates to create a pressure-imposing inbuilt mechanism. Self imposed code of conduct can only help them to eradicate evil of such practice. It has been observed that any step against even the unjustified interest of the advocates provoke advocates to resort to strike and paralyze the working of the courts. This again results in delay. Ashwini K. Ray, a noted academician from JNU writes about this attitude of the advocates,

"The more complex cause for delayed justice caused by recurrent lawyers' strikes could also be reduced by some financial costs made obligatory for the lawyers on strike to pay as part of their democratic obligations

1. The Law and the lawyers Revised Edi. 130
to the litigants, particularly the adversely affected party in any dispute, who becomes the unwitting victim of such strikes." ¹

Recently Supreme Court increased the timing of the courts in order to increase the pace of justice delivery and to implement the recommendations of FNJPC. In order to oppose this move of Supreme Court the advocates resorted to strike. Supreme Court declared that advocates have no right to proceed on strike. In spite of such a verdict the advocates proceeded on strike. Unfortunately, the advocates have decided not to assist the courts and to function unless the timings prevailing before the changes are restored. The tangle is still unresolved. The advantage of change in timings does not reach to the litigants as advocates are not ready to work during increased hours.

Whenever new law is codified the advocates are up in their sleeves to challenge validity of said law. It is true that this helps to decide constitutional validity of statutes, however in many cases, though the advocates are quite sure that it is useless to challenge the validity of a statute, he will challenge validity of the statute and in many cases stop the applicability of the said statute or create doubts about the validity of the said statute in the minds of people. similarly, many of the advocates advise the clients to seek remedy from the courts which is not avail-

¹. The Judicial system in a post colonial Democracy; the Indian Experience I in Judging the Judges P. 148
able to him or which may be even in existent in the circumstances they bring up before the court unwanted litigations, increase the pendency and create a cause of delay to other proceedings by wasting the time and energy of the court to consider and decide unwarranted litigation.

Financially we come to the analytical study of vital organ of judiciary, which consist of judges. Constitution of India provide for formation of union judiciary and state judiciary. Union judiciary consists of Supreme Court. State judiciary consists of High Courts and subordinate courts including court of sessions and court of civil judges and magistrates. The constitution provided for establishment of Indian judicial service for the cadre of district judges. This constitutional requirement is not yet materialized even after 54 years of independence. District judges are still appointed by the Governor of the state on the recommendation of the High Court. The judges of subordinate courts are recruited on the recommendations of State Public Service Commission. Some changes are made about recruitment and appointment of judges by first national judicial pay commission (FNJPC) presided over by justice Shetty. These recommendations are in respect of subordinate judiciary. Supreme Court endorsed application of recommendations of shetty commission by its decision in writ petition no. 2001 of 1989. The recommendations of FNJPC are yet to be implemented.

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Pre-Recommendation scenario is that the judges in subordinate courts including District Judges come after some years of practice as advocate. As we have seen earlier the persons entering profession of advocate are coming from sediment or from the remaining part of the intellects after the brain drain of the brains to the studies of medicine, engineering, businessman the management, computers etc. These circumstances will show as to what sort of lot is available for appointment to the post of judges.

In addition to this difficulty about availability of best brains several lacunas are also pointed out in the process of appointment. As I mentioned above appointment to the subordinate judiciary is from bar. Even in High Court the judges come either from the bar or by promotion from the subordinate judiciary. In both the cases the lot available for appointment is coming from the same stock. In the case of Durga charan vs. state of Orissa AIR 1987 SC 2267 it was held,

"He (the High Court Judge, who is member of selection committee) may advise the commission as to the special qualities required for judicial appointments. His advice may be in regard to the range of subjects in respect of which the viva voce shall be conducted. It may also cover the type and standard of questions to put to candidates; or to acceptance of the answer given thereof. But his advice cannot be run counter to the statutory rules." ¹

¹ Durga charan vs. state of Orissa AIR 1987 SC 2267
In Umesh chandra case (Umesh chandra vs. union of India (AIR 1985 SC 1351) it was held that in view of rules provided for the examinations of judges under article 234 of the constitution, the High Court judges participating in the oral examination of candidate for the post of a judge is not entitled to choose a candidate or even to vote for the selection. It is also pertinent to note that in some of the States the marks obtained by the candidate in the written test are not considered along with marks during oral interviews. This practice leaves the candidate at the whims of the officers of state service commission allotting the marks. This practice further reduces chance of selection of a candidate having better knowledge. The contrary practice also attracts criticism. Shariful Hussain, faculty of law, Aligarh Muslim University carried research on this aspect. As per him taking marks of the written test and personality test together may also lead to selection of candidate who is better in personality test. To elaborate his views he provided tables of marks obtained by two candidates in judicial service examination of 1985.

Marks of Prakash Tripathi who secured a place among the selected as a civil Judge by Allahabad Public Service Commission in 1985.
<table>
<thead>
<tr>
<th></th>
<th>Maximum Marks</th>
<th>Obtained Marks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Present Day</td>
<td>150</td>
<td>80</td>
</tr>
<tr>
<td>Hindi Urdu</td>
<td>200</td>
<td>92</td>
</tr>
<tr>
<td>Law Paper I</td>
<td>200</td>
<td>83</td>
</tr>
<tr>
<td>Law Paper II</td>
<td>200</td>
<td>144</td>
</tr>
<tr>
<td>Law Paper III</td>
<td>200</td>
<td>127</td>
</tr>
<tr>
<td>Total of written test</td>
<td>850</td>
<td>526</td>
</tr>
<tr>
<td>Personality test</td>
<td>100</td>
<td>54</td>
</tr>
<tr>
<td>Total</td>
<td>950</td>
<td>580</td>
</tr>
</tbody>
</table>

Marks of Sarfaraz Khan who could not secure a place among the selected as a civil Judge by Allahabad Public Service Commission in 1985

<table>
<thead>
<tr>
<th></th>
<th>Maximum Marks</th>
<th>Obtained Marks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Present Day</td>
<td>150</td>
<td>91</td>
</tr>
<tr>
<td>Hindi Urdu</td>
<td>100</td>
<td>92</td>
</tr>
<tr>
<td>Law Paper I</td>
<td>200</td>
<td>53</td>
</tr>
<tr>
<td>Law Paper II</td>
<td>200</td>
<td>120</td>
</tr>
<tr>
<td>Law Paper III</td>
<td>200</td>
<td>105</td>
</tr>
<tr>
<td>Total of written test</td>
<td>850</td>
<td>462</td>
</tr>
<tr>
<td>Personality test</td>
<td>100</td>
<td>68</td>
</tr>
<tr>
<td>Total</td>
<td>950</td>
<td>530</td>
</tr>
</tbody>
</table>

FNJPC suggested selection of judicial officers from the fresh law graduates. Hence forth, it will not be necessary to

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have minimum period of practice as an advocate for selection as a judicial officer. Supreme Court has given a reason that because of this measure, the candidates will come in judiciary without adopting bad voices from the bar. This rationale again may not be useful. It is not necessary that a law graduates after entry in the bar, not necessarily learn bad voices. The persons entering the bar learn the basic knowledge of advocacy. He gets practical training of court working. While at the bar he also gets the knowledge of ethical values of the profession at bar he comes in contact with several sort of personalities practicing as advocate, coming to the court as litigants, touts and witnesses. This practical knowledge is very useful while discharging the judicial function. Entry of the persons without the practice at bar will not provide ability for the judge to become homogeneous with the system which consist of judges and advocates.

Because of all these reasons it is necessary to think about an appropriate procedure for appointment of judges. In order to derive an appropriate procedure for appointment of judges, we will have to first consider what sort of men are required as judges. Four qualities of judges given by Socrates are

1. he should be able to hear courteously,
2. has answer wisely
3. consider soberly and
4. decide impartially

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1. Ramjethmalani quotes Greek philosopher Socrates in judging the judges P. 21
Mentioning about the qualities of judges Lord Dennings, quoting Francis Bacon, made following observations,

"Speaking of Judges he (Bacon)said," above all things, integrity is their portion and proper virtue cursecl is he that who removeth the landmark. The mislayer of the meere stone is to blame. But it is the unjust judge that is the capital remover of land-marks, when he defined amiss of lands and property. One foul sentence doth more hurt than many foul examples. For these do but corrupteth the stream; the other corrupt the fountain."¹

Gandhiji while expressing qualities of judges wrote,

"Character, not brains, will court at the crucial moment."²

Justice V.R. Krishna Ayer adopting the thoughts of Gandhiji expressed his views,

"Judges are the key stone of the arch of justice & must be handpicked, not based on professional income, nor on capacity to quote Coke and admire the wigs nor satisfaction in judicial sadism & up holding elitism and other "vices" but on their intellectual creativity in the art of justice according to law, conscious sympathy for the people of the secular socialist Republic and modern vision of social justice and law reform through the court process."³

Sitaram Yechuri, a Marxist leader expresses his expectation about the qualities of judge in following words,

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¹ Essay LVI of Judicature by Francis Bacon in Landmarks in the law 1st Edi. P.33
² The Law and the Lawyers 4th revised P. 140
³ Justice and Beyond P.25
"The first one is the question of the entire appointment of the structure of the judiciary in our country. This is a very important matter that we must discuss amongst ourselves frankly at the outset, with the highest respect which we have for the judiciary. It is not the integrity of the judges that is being questioned, but it is infallibility of the individual that is under question. In a democracy we have to evolve a system where the fallibility of the individual can be corrected without questioning or doubting their integrity."\(^1\)

Mrs. Indira Gandhi, Prime Minister of India, (as she then was) expressed her vibrant ideas about the qualities of judges while speaking before international conference of appellate judges in 1984,

"The judicial temper is patently different. Judges are expected to be self denying in regard to political and personal preferences. Psychologists and political scientists will ask whether any individual can totally overcome socio economic conditions. Justice O. W. Holmes spoke of the inarticulate major pressures and strained the need for Judges to rely not merely on logic but experience, intuitions of public policy and the felt necessities of time. The assumption in the rule of law is that a person who occupies a judicial seat, will resist the influence of his political or other emotions. Without such a conscious effort at impartibility and

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1. Appointment of Judges and systematic Changes in Judicial system Judging the Judges P. 88
fairplay, how can there be trust in law or orderly national life? But we must content with human limitations and weaknesses. There may be no complete thing as complete objectivity. At the same time we do expect Judges to refrain from giving any appearance of and expression to partisanship, which unfortunately is sometimes absent."

We also find some basic observation about quality of judges in our ancient literature. Premkumar, secretary of press Council of India gave a quotation from shukraniti as follows,

"One who is well versed in Civil & Criminal law and procedure rightful of sterling character, impartial towards friends and foes of Dharma abiding nature, truthful, ever active who has established control over anger desire greed and pleasant in speech and demeanor should be appointed as a Judge"

On the basis of these views about the qualities of judges a system is required to be evolved for appointment of the persons having above said qualities. It is not therefore the appointment of judges in subordinate courts is under challenge. In view of the provision under article 124 and 217 of the Constitution of India appointment of High Court and Supreme Court judges is vested with President of India. The President has to function in consultation with Chief justice of India. However an inference drawn by Vikram Raghavan, a student of National Law School of India University, Bangalore on the

2. Shukraniti IV-5-15-18 cited in Role of Judges by Premkumar Secretary Press council of India in Judging the Judges P. 78)
basis of observations of Upendra Baxi which is as follows,

"Though nominally, the President of India performs a large number of functions including making appointments to the higher judiciary, viewed, in the context of the Parliamentary form of governance in India, by which the President is to be aided and advised by his/her council of Ministers in all matters relating to the exercise of functions, the role of the Council is an important issue. Art. 74 makes the advice rendered by the Council of Ministers binding on the President and requires the President to act in accordance with such advice. Though there are no indications in Art. 124 that the President is required to consult the Council of Ministers in the exercise of his/her powers to appoint judges, Art 74 does not contain any exceptions whereby the Council of Ministers are exempted from tendering their advice to the President, when the President seeks to exercise his/her authority for the appointment of judges. This necessarily entails that the President act in accordance with the advice tendered by the Council of Ministers in relation to all matters where he/she is required to exercise the function of appointment. This being the position, for many years after the inauguration of the Constitution, the Council of Ministers had the final say in relation to the
appointment of High Court and Supreme Court judges. The President merely made the formal order of appointment on the recommendation made by the Council of Ministers.\textsuperscript{1}

Hon'ble CJ Anand (as he then was) spoke in his presidential address at All India Seminar of Judicial Reforms by Supreme Court advocates on record on 4-12-1998 said,

"I would like to share with you some thoughts regarding appointment and transfer of Judges. Unimpeachable integrity, merit and suitability with due regard to seniority are the qualities which one must look for while appointing Judges at all levels. Personally speaking, I have always been a votary of collective wisdom. We all have to concede that to err is human and best insulation against error lies in pooled wisdom and wider consultation for selecting the best available." \textsuperscript{2}

Abhishek singhvi, Senior advocate practicing at Supreme Court spoke about the appointment process of High Court and Supreme Court Judges in the light of pre Gupta and post Gupta period(Gupta's case (AIR 1982 SC 149 ). His study disclose that the process adopted before and after S.P.Gupta's decision have not worked well. He writes,

"In a sense the appointment process as far as India is

\begin{itemize}
\item \textsuperscript{1} Judicial appointments in India: Need for a balanced approach Indian Bar Review Vol. 25(1)\textsuperscript{98} P.81
\item \textsuperscript{2} Indian Bar Review sep/oct 1998
\end{itemize}
concerned, has been a collective one. But the debate is not regarding collective nature but regarding how broad based that collectivity should be and secondly how open its selection process should be. India since independence till 1993 experienced executive primacy in judicial appointments but tempered by consultation between the executive and judiciary. This executive primacy theory was upheld in S.P. Gupta’s case in 1982. It has been substituted since 1993 by judicial primacy coupled with what the 1993 Supreme Court Judgment calls integrated participatory consultative process among the senior most Judges.

Unfortunately sad truth is that neither of these two primal or primus theories appear to have worked well, although in all fairness it must be conceded that the current system is in operation only since 1993. A lot can be said about the dangers inherent in substituting absolute executive authority with absolute chief justice authority. If absolute and sole authority is unwise would Lord Action’s power and absolute power apply any the less to the judiciary?"^1

In view of the above observation of the noted person in the field it can be said that the process of appointment of judges right from the subordinate judiciary, in some or the other way, does not help to choose right person at right time. This

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^1 Independence of Judges and Judging the Judges article in Judging the Judges P. 123
Recent events in judiciary have given an opportunity all and sundry to hurl allegations of Corruption and nepotism against Judiciary. "India Today" a fortnightly with wide circulation published an article about Judges of Karnataka, Rajasthan and Punjab & Haryana. The allegations are,

"On Sunday November 2002 three Judges of the Karnataka High Court, along with two women advocates, allegedly go involved in a brawl with a woman guest at a resort. The police arrested but reportedly did not take any action.

In November 2002, Sunita Mallaya, a Jodhpur Doctor, alleged that a deputy registrar of the Rajasthan High Court had sought sexual favours for himself and for Justice Arun Madan to fix a case in her favour.

Three Judges of the Punjab and Haryana High Court sought the help of disgraced PPSC chief R.P.Sidhu to ensure that their daughters and other kin top examination conducted by the Commission. 1

In the year 1990 Bombay High Court started a crusade to clean the subordinate judiciary. In the year 1991 Bombay High Court suspended seven judges which included three small cause judges, one Additional district Judge from Goa, one Chief Judicial Magistrate from Bhandara and two Civil Judges Junior Division (lawyer's collective Oct.1991 page 10).

1. India Today January 20,2003 P.42
Many more officers were then removed from service or made to resign. These events basically disclose that there is necessity of making some mechanism which will effectively bar entry of black sheeps in the judiciary. If the Judiciary succeeds in getting honest, dedicated and clever persons to seat as Judges, judiciary will then more effectively deal with the problem of reducing escalating pendency and will be able to reduce enormous delay in justice delivery.

This is how a society, the litigants, the advocates and the judges contribute to the problem of delay. Everybody has to make some changes in their attitude, responses and sensibility to remedy causes of delay.

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