CHAPTER VII

CONCLUSIONS AND SUGGESTIONS

The progress of the society is largely dependent upon proper application of law to the society. The mere existence of a particular piece of legislature cannot solve the problems of society unless the judges interpret and apply them to ensure its benefit to go to the right quarters. It follows therefore that the administration of justice is a very solemn duty which should be performed not only with clean hands but also with clean conscience and should in no way be influenced by extraneous considerations. The administration of law must empire confidence in those for whom it is adopted or enacted. If the administration of law fails to inspire the confidence of common man the judge would be failing in his duty of administering justice.

The judges whom are faced with numerous complex disputes are under an obligation to find a solution acceptable to society or at least to the majority of the people. For this, judges are bound to give reasons justifying their decisions. Judicial institutions have a vital role to play not only for resolving *interse* disputes but also to act as a balancing mechanism between the conflicting pulls and pressures operating in the society.

The courts of law are the products of the Constitution and are the instrumentalities for fulfilling ideals enshrined therein. An independent and impartial judiciary is essential elements in a Federal Constitution for maintain the supremacy of the

Constitution. The Indian Judicial system at present is under great stress and strain and is almost in the grip of crisis. The mounting arrears in High Court and even in Supreme Court are becoming a cause of real anxiety to the Nation. The prestige of the Indian Judiciary is seriously impaired by unprecedented accumulation of cases. It seems the main reason for decline in the rate of disposal in Apex Court is its preoccupation with constitutional and public interest litigation. Both the Bench and Bar are to be great extent responsible for delays. Prof. Baxi suggests the "total transformation of the system as a remedy to solve the crisis of Indian legal system".

No single court irrespective of the number of judges could dispose of all the cases arising in a vast country like India and which litigants would seek to bring before it if the right of appeal were unrestricted. Three days out of five in a week are vitally lost in the consideration of special leave petitions alone in the Supreme Court and the tide is still rising. The issue thus seems to be beyond self-resistant and calls for legislature correction by bringing Art.136 in line with Arts.132 and 133 restricting the jurisdiction of the Apex Court to questions of law of national importance only. Our system also provides for many appeals which obviously delay the final disposal of cases.

The power to appoint judges is often criticized for its abuse. The machinery for appointment of judges therefore, should also change. The judicial appointment should not be shrouded in secrecy as at present.

There appears to be a controversy as to the true scope of Art.124 (2). One view is that the consultation provided for with

such of the judges of the Supreme Court and the High Courts in the states as the President may deem necessary for the purpose, is not mandatory. It is open to the executive to consult the persons mentioned therein or not to consult them at all. The consultation provided for is a mere formality and the same does not in any way limit the powers of the President who always acts on the advice of the Council of Members. Another view is that the consultation provided for in Art.124 (2) is mandatory and the executive must gibe due regard to the recommendation made by those consulted.

There is also an opinion that the expression "every judge" in Art.124 (2) includes the Chief Justice and hence the President is bound to consult the persons mentioned in Art.124 (2) while appointing Chief Justice. Ina case of the appointment of the judges of the High Court it is done by the President after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court concerned. Here Union Law and Home Ministers, though not mentioned in Art. 217 of the constitution have come to play a pivotal role regarding the information about an eligible candidate. Sometimes it has been noted that the Chief Justice sends recommendations regarding the persons to be appointed as Judges to the Chief Justice sends recommendations regarding the persons to be appointed as Judges to the Chief Minister who if agrees, recommends to the Governor. The last word thus tests with the Chief Minister. This procedure brings clearly politics in the appointment of Judges.

The Law Commission of India in its 121st Report has recommended the selling up of an eleven-member National

Judicial Service Commission (NJSC). There is no final view on the actual limits of the power of the executive in such matters.

There have been issues regarding the transfer of Chief Justice and other Judges of the High Courts outside their respective home states. The word "consultation" has always been contention between the executive and the judiciary what does it imply? Does it mean concurrence of apex judiciary headed by Chief Justice of India? What is the nature of consultation? These are the questions of utmost importance agitating the judicial minds in the country.

These questions came before the union judicial establishment on two different occasions. Firstly in the case of ***Union of India Vs. Sankalchand Seth*** in 1977 and secondly in the case of ***S.P.Gupta Vs. Union of India*** in 1982 which is popularly known as judges transfer case where it was adjudicated upon by the Supreme Court that word "consultation" does not mean "concurrence" of the Chief Justice of India but it must be effective and imply exchange of views after examining the merits. But in 1994 a nine judge constitution bench of the Supreme Court in a landmark judgment in case of ***Supreme Court Advocate–On-Record Association vs. Union of India*** held that in matters of appointment and transfer of judges of the Supreme Court and High Courts, Chief Justice of India shall have the final say having consulted his colleagues and seniority shall be the sole criterion of the appointment of the Chief Justice of India.

While overruling its earlier decision in ***S.P.Gupta's case*** where it was held that the final authority in appointments and

transfer of judges, the court stated that the opinion of the Chief Justice of India should have the greatest weight in the selection of judges in which the executive functions as a check on selection process exercised by the Chief Justice of India.

Justice Varma delivered the majority judgment and observed "thus, the executive element in the appointment process has been reduced to minimum and political influence is eliminated. It is for the reason that the "consultation" instead of "concurrence" was used in the Constitution but that was done merely to indicate that absolute discretion was not given to any one not even to the Chief Justice of India as an individual, much less to the executive.

There is also the question of proper emoluments of the judges. The life styles to which the judges of Supreme Court and High Court get accustomed during their tenure of office cannot be maintained from within their pensions. The anxiety about the old age and their ability to make two ends meet after retirement lurks in their minds and is bound to adversely affect their creativity. In a society like ours, based on money values, some prestige is attached to wealth that one holds but at the same time it would be wrong to say that the Supreme Court and High Court Judges would command better prestige only if their salaries are raised. It is the standing, the stature, the expertise and the quality of the judgments that a judge renders, which give prestige to the judge. Nevertheless this does not mean that there is no case for raising the salaries of judges.

Another important issue which needs serious attention is the question of physical facilities of judges. Of all the delays

which hamper the administration of justice, those caused by the inefficiency and inadequacy of the services attached to the courts are intolerable. Higher judiciary has not been provided with research staff. Some arrangements in this regard were made in the Supreme Court on trial basis but were abandoned. To enable the judges to preserve high standards of judicial craftsmanship and creativity, a research service should be part of the auxiliary service attached with the Supreme Court and High Courts. The availability of such a research service will certainly contribute to efficiency and save time of the judges who have no alternative but to make individual research themselves as they do not get any assistance of this purpose.

From the above critical appraisal of the independence of judiciary the conclusion arises that the independence of judiciary is of vital importance and paramount importance in the context of the Fundamental Rights of the Constitution. If the judiciary is not independent from the executive of the Fundamental Rights which provide a guarantee against the excesses of the Government and its functionaries cannot be enforced against the Government and its functionaries. Once the independence of judiciary is undermined and judges with pliable conscience are appointed: the constitutional anarchy and legal chaos would follow. Once judges with pliable conscience and subservient to the wishes of the political wing of the State came to the seat of justice the first casualty would be the supremacy of the Constitution.

However, the independence of judiciary is sufficiently guaranteed by the Constitution by providing security of tenure and fixed salary for the judges of the Supreme Court and High

Courts. But in fact the independence of judiciary is being affected by the factors like inadequate salary and pension, temptation of reemployment in a high government job after retirement ad-hoc appointments and the interference of the executive in the appointments and transfer of judges.

SUGGESTIONS

The beginning and end of judicial reform is the appointment of the right kind of judges be it in the Supreme Court, the High Court or the subordinate judiciary. The appointment of judges is the prime and foremost link in the chain of judicial reform.

The procedure for appointment of higher judiciary as per the constitutional text however, underwent a change after the three pronouncements of the Supreme Court, which need to be considered for a fuller and more incisive understanding of the present scenario and its effect on the selection and appointment of judges.

Today we are back to square one because there is a hue and cry that the consultative procedure has become not only cumbersome, but well highly impossible. The Chief Justice of a High Court is by the policy of the government, a judge from outside the state who has little information and knowledge in regard the legal practitioners in the state. In many a state senior most judges constituting the collegiums are from outside with the result that appointments suffer for want of adequate information. It may be noted that broadly there are two areas of

enquiry. One is the area of legal acumen of the candidate to adjudge his/her suitability and the other is antecedents. The Chief Justice of India and other judges of the Supreme Court and High Court can only judge legal acumen. They have no access to the antecedents of a candidate, for which the Executive is the best judge.

It is also to be argued that the collegiums has now to consist of four instead of two senior most judges of the court in the appointment of a High Court Judge. The Supreme Court Judge, acquainted with the particular High Court is also to be consulted, raising the number to six. The increased number of consulters has made the consultation process cumbersome and delays in filling up vacancies are bound to occur. Every communication has to be in writing and the views of the consulters are to be communicated to the government.

There is no indication as to what happens if there is no consensus among the consulters or if the majority disagrees with the Chief Justice of India. *S.P.Gupata's* case has already lain down that the entire correspondence between the various authorities concerned is open to public scrutiny since the entire record was summarized and made public in that case.

- Indian legal system has adopted various principles and doctrines from the English and the American justice administration systems. It shall be immensely beneficial to the society to the system and to the future of the nation, if the Indian system incorporates the spirit of these systems with regard to the appointment of Judges to the Apex Court.

- The judiciary shall keep a check on the abuse of power by the executive and the legislature through mechanisms of judicial review and the kind but "Quis custodiet ipsos custodes" (who watches the watchman).

- The goal of securing separation of the executive and the judiciary could be achieved by ensuring that the merit of a prospective appointee is assessed by persons holding judicial office themselves, namely, the Chief Justice of India and of the high courts and other senior judges of the Supreme Court and the High Courts.

- There are also certain human rights which need affirmative state action for their enforcement; and where the State fails to do so, the judiciary has to step in and compel such affirmative state action in order to make these human rights effective. It is therefore absolutely essential that the judiciary must be totally free from executive pressure or influence and must be fiercely independent. Independence, of course, is a quality which must come from within the heart. It must be a quality which is part of the very fabric of the judge's existence; but even so judges must not be exposed to executive threats inducements or blandishments and must remain absolutely independent and fearless.

- The power of appointment of judges to the superior courts is also a large power; and to my mind at least in Third World countries vesting it exclusively in the executive is likely to undermine the independence of the judiciary. It is; of course, true that in most of the democratic countries this power is given to the executive because the executive

is accountable for its actions to the people through Parliament.

- But in effect and substance, this accountability has ceased to exist because in many countries, instead of the legislative controlling the executive, it is the executive which controls the legislative and the legislative check has disappeared. Moreover, accountability can be "enforced" through discussion only after the appointment is made and it is a *fait accompli*.

- The power of appointment, therefore, must be vested in a Judicial Service Commission composed of judges, lawyers and law academics of eminence presided over by the chief justice where the executive should also have representation and this Judicial Service Commission should recommend a name which must be accepted by the government. That alone would ensure the appointment of persons with ability and integrity and eschew political interference.

- National Judicial Commission should be constituted to look into the accountability of the judiciary system. Life and liberty of the people in the country are in the hands of these judges. We are entitled to know their character life. If needed, amendment must be made to the Constitution with regard to the appointment of judges and their misconduct. We have every right to speak about the misconduct of a judge.

- There is now insistent demand from the public that in matters dealing with appointments and other misdemeanors by Higher Judiciary needs to be carried out by an Independent Body using transparent criteria, instead of the present unsatisfactory mechanism shrouded in secrecy and controlled by a small cabal. It is for this reason that National Commission to Review the Constitution headed by former Chief Justice of India Mr. Justice Venkatachaliah has also advised the constitution of a National Judicial Commission.

- No judge should be removed except for proved misbehavior or incapacity and only after a disciplinary inquiry by his peers who are chosen by the chief justice or president of the Supreme Court and not by the executive. This procedure should also not be allowed to be set in motion unless a resolution is passed by Parliament by a special majority at the instance of a sizeable number of members.

- The other factor which may tend to impair the independence of the judiciary is the transfer of judges by the executive. Transfer can be a potent weapon of oppression or retaliation, and to vest the power of transfer in the executive would be to give the executive power to control the judiciary. The executive can transfer a judge from one place to another and by doing so not only punish him but also convey a message to other judges that if they do not behave they too will be subject to transfer.

- The power of transfer may be necessary in the public interest, but it should never be vested in the executive. There must be a Judicial Service Commission which alone

should have the power to affect the transfer of judges. In India, the power to transfer High Court judges is conferred on the government. It is a power exercisable in consultation with the chief justice of India; but even so, it has been abused when the chief justice of India has been weak or submissive.

- Power must be broad-based; it must be shared so that with several minds contributing to the decision the possibility of its abuse or misuse may be eliminated.

- It is also necessary to have proper and adequate training programs and seminars for the judiciary so that the judges realize the value of independence. It is a quality which must be injected into their minds. Periodic seminars can serve a very useful purpose of bringing judges in a country together where they can discuss the pressures and obstacles which each of them face and how they can be overcome.

- Another factor which impairs the independence of the judiciary is the dependence of the judiciary on the executive for resources. The judiciary has no power of the purse. It has to act within the allocation of funds made to it in the annual budget. It cannot spend a cent more even if it is necessary for streamlining the machinery of justice and improving its performance from the ordinarily recognized sources of danger to the independence of the judiciary, there is another source of danger which is often not perceived as such and it is for that reason much more dangerous than the other sources. This source of danger lies in unjust and improper criticism of the judges for the judgments which they deliver.

- There is a pernicious tendency on the part of some to attack judges if the decision does not go the way they want or if it is not in accordance with their views. Of course, there is nothing wrong in critically evaluating the judgment given by a judge because, as observed by Lord Atkin, justice is not a cloistered virtue and she must be allowed to suffer the criticism and respectful, though outspoken, comments of ordinary men and women. But improper or intemperate criticism of judges stemming from dissatisfaction with their decisions constitutes a serious inroad into the independence of the judiciary and, whatever may be the form or shape which such criticism takes, it has the inevitable effect of eroding the independence of the judiciary.

- Each attack on a judge for a decision given by him or her is an attack on the independence of the judiciary because it represents an attempt on the part of those who indulge in such criticism to coerce judicial conformity with their own preconceptions and thereby, influence the decision making process.

- Judges must also remember that the insulation provided to protect their independence and impartiality has been founded on public policy. Public policy can change with times. The discerning public of today, using fast improving information technology has high expectations of the judiciary. If judges by their performance and conduct do not meet those expectations the insulation will slowly but surely is reduced again via public policy.

- Periodic increase in remuneration of the judges and other judicial staff.

- Permanency in office for judges of good behavior, physical and mental capability.

- A more standardized and stringent process for judicial impeachment of tainted judges.

- Inducting 'Rule of Law' values for transparency, effectiveness and openness of judges.

- Enhancement of powers of Judicial Review and widen the scope of Judicial Activism.

The research scholar further submits that the following factors are also relevant and should be kept in mind:

It is also necessary to point out that in some countries, particularly India, appointments of chief justices of High Courts are made on an acting basis and they continue as acting chief justices for months. This is a pernicious practice detrimental to the independence of the judiciary because the acting chief justice would always be in a state of suspense, not knowing whether he should be confirmed or not. While the courts never shun away from their duty of providing access to justice for the teeming millions of this country it would not be incorrect to state that the objective would be impossible to achieve unless justice dispensation mechanism is reformed. There are two ways

in which such reform can be achieved – through changes at the structural level and through changes at the operational level. Changes at the structural level challenge the very framework itself and require an examination of the viability of the alternative frameworks for dispensing justice. It might require an amendment to the Constitution itself or various statutes. On the other hand, changes at the operational level require one to work within the framework trying to identify various ways of improving the effectiveness of the legal system.[1]

Perhaps the most important aspect of judicial reform in India has been the realizations that theoretical suggestions made over a period of time have not really made any difference. The need of the hour is to implement those ideas and experiment with improvements. This is the view that is gaining ground and will in a few years give shape to the justice delivery system making it more efficient, speedy and inexpensive so as to sub serve the constitutional goals."

Reforms cannot generate immediate results and so what are needed are a little more time and plenty of patience. Some of the reforms that have been initiated have already had a positive reaction and there is optimism that the next few years will see a transformation in the justice delivery system in India.

[1] Access to Justice & Judicial Reforms by Justice S.B. Sinha, published in Journal of the National Judicial Academy, Bhopal, India, Vol. 1 2005