CHAPTER II

ROLE OF JUDICIARY IN THE MODERN STATE
Since the beginning of the civilised society, human race has always been conscious of justice and has been intolerent of any attempt to interfere with individual liberty and dignity. The instinct of justice being a basic instinct, it is not astonishing that every member of a civilised society tries to attain it through the instrumentality of law. The history of mankind reveals that human wisdom has invented different methods, means, instruments and devices to meet the structural changes in the social system. With the march of time, there has been a major movement to bring about the structural changes through the instrumentality of law. Law has become the bedrock of society and an instrument for 'social Engineering' (1). Since enforcement of law is generally through the justice delivery system, the judiciary is rightly regarded as the "backbone of civilised society." (2)

The role of the judiciary has recently been the subject of much discussion all over the world, especially in the developing countries.

2. Ibid.
In all most all developing countries the poor, as a class, suffers injustice at the hands of the affluent and the entrenched for a variety of reasons notwithstanding the existence of legislations which are intended to benefit them. This is only because of their ignorance and lack of awareness of their legal rights, that they become an easy prey to manipulations by their adversaries. It therefore, becomes imperative that every citizen of every nation must have access to justice to enable himself to defend his rights and to redress his grievances. Every civilised society is therefore, obliged to ensure that the doors of justice are open to the rich and the poor, alike, for the obvious reason that those who are denied access to the system will otherwise be forced to evolve extra-judicial methods to seek redressal of the injustice done to them.

It cannot be overlooked that since in every democratic system of government, laws derive their power and authority from people, the judicial system owes its existence to the will of the people. Thus standing between individual citizens and the wielders of power, The judiciary has become "the ultimate and yet unwilling arbiter in the arena of democratic politics."(3)

The human rights movement has also in many ways made the judiciary a very "dynamic and important government
institutions." (4) The sudden thrust onto the centre stage has made judging a difficult and complex exercise, especially in the developing countries, and the time seems to be ripe to develop a fresh, innovative and principled approach to the role that the judiciary can play in a changing society.

To be successful in a modern state, the judiciary must be augmented by a vision which aims at containing social conflict while furthering the cause of social justice. The courts are suddenly presented with numerous cases involving constitutional principles and found that they have to react accordingly. The courts as guardian of the constitution and the rights of the citizens must fulfil their role fully and effectively and to meet this end they must enjoy the faith of the people. Justice Aurthur T. Vanderbelt in his 'challenge of Law reform' has rightly observed: "It is in the courts and not in the legislature that our citizens primarily feel keen, cutting edge of law. If they have respect for the work of the court, their respect for the law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society." (5) Many supreme courts, throughout the world are increasingly active, but not solely

4. Ibid.

in an unilateral attempt to usurp power from other governmental agencies. They are propelled forward by citizen groups which have become increasingly aware of the human rights. Due to the activities of public interest groups and civil rights movements, questions of "Judicial review and judicial activism"\(^6\) have become the most interesting areas of litigation before the judiciary.

It has also been said that the judiciary is the only governmental body which looks after the minority interests whether political, cultural or racial. As Justice HOLMES noted, "Fear of mass irrationality, has led people who no longer hope to influence the legislature to look to the courts as expounders of the constitution"\(^7\) or as J.H.ELY concludes, "the tricky task has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule."\(^8\)

Until the 1960s, the supreme courts throughout the world generally followed a 'hands-off'\(^9\) policy to issues of minority rights or individual freedom. Only with the judicial interventions in the 1960s, did minorities finally get access to remedies formulated by an activist judiciary. Today, the role of judiciary as the protector of minority interests is widely accepted.

One of the most important functions of the courts today is the judicial review and constitutional interpretation. It means that the power of the courts to judge whether the acts of the correlated branches of the state, i.e. legislative and executive are in consonance with the constitutional norms, and if, necessary, to clear these. It is in exercise of these powers that the courts today are playing significant roles in making and influencing the policymaking of the government. Though judicial review is not so much concerned with the decision-making process, it certainly ensures that the decision-making process is within the limits of law and in consonance with justice, equity and good conscience and adherance to the basic norms of justice and the objectives to be reached.

The question of equal protection is intricately related to a society's perception of equality. In this context, judiciary has to play an important role as it is required to deliberate among these competing arguments and conflicting values in the context of a particular case. Its political role thereby has to be very specific manifestation. Unless it is creative enough to formulate judicial remedies which minimise conflict and maximise consensus, the courts may in fact contribute to a deteriorating relationship among minorities in a given society. The judiciary armed with a realistic approach can therefore, help to sort out fact from fiction and present day realities from past expections and as one of 'the judiciary's specific roles is to ensure the effective implementation of government
policy in the case of individual citizens, the necessary corollary is that it should devise mechanisms to ensure that such implementations are taking place. And yet such mechanisms should not result in the judiciary acquiring a coercive executive role. The task in these sensitive cases is to devise mechanisms which will aim at a consensus and protect minorities without flagrantly violating majority rule. The courts should avoid partisanship and attempt to formulate remedies which have the support of all parties. This would of course, require them to go beyond the general judicial remedies of damages and punishment. To be creative, in this regard, is therefore the fundamental challenge. The judiciary must define executive mechanisms which will have some meaningful impact on the lives of those who have brought their grievances before the courts.

Only an imaginative judiciary with an instinctive sense of justice will be able to transcend the forces of social divisiveness and deliver judgements which will be respected by all sections of society. The judiciary is often seen as a pious centre of governmental power. Thus it becomes a challenge for the judiciary to institute a process of judging that will be more open, more sensitive and defiantly honest. And such a judicial system, in fact, has a special meaning for the developing countries of the world.
It is thus obvious that in every civilized society governed by the rule of law, the justice delivery system has a vital role to play, more so, in a system of constitutional government where it is called upon to play a "dual role of interpreting and applying the law upon controversies between not only individuals inter se, but also between a citizen and the another."(10)

It is in this context that the role of judiciary has to be understood and appreciated. Moreover, in a fast developing nation like India, which has been troubled with many complex problems, the judiciary has a much more important role to play. Since the days of the British Raj, it has come a long way to become the most prominent and outstanding wing of the constitutional system for fulfilling the mandate of the constitution.

In an open society as ours, with the legacy of Anglo-Saxon Jurisprudence, we do cherish the values of American and British system. But at the same time, we have an added advantage of Gandhian philosophy, a unique gift to us and to the entire world, the relevance of which is recognised for all time to come.

Social justice has been the watchword of our constitution. How and in what manner to make social justice a reality in life

in respect of food, shelter, education, prosperity and growth of the nation, is the job of the administration of justice in India. It calls for development of distributive and equalitarian justice. In this contest one has to understand the different modalities by which social justice is achieved. And this subject calls for an appreciation of what role the judiciary would play in Indian democracy.

The judiciary under our constitution is conceived as "an arm of social revolution"(11), upholding the equality that Indians had longed during colonial days, but could not gain. "The task before the constituent assembly, according to Pandit Nehru, was "to free India, through a constitution to feed the starving millions and to clothe the naked masses and to give every Indian the fullest opportunity to develop himself according to his capacity."(12) With a view to achieving this end, the framers of our constitution applied the western ideas of free and democratic tradition to the Indian conditions on the edifice of Gandhian philosophy that inspired the countries and colonies fighting for freedom from imperialism. So the fundamental rights "when understood in that context are full juice to be extracted and enjoyed, provided they are safeguarded from erosion, whenever

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12. Ibid.
there is change of government."(13) Whatever be the composition of the government, the judiciary remained and continued to remain without any fetters from any quarters. Because unless, there is a independence judiciary to safeguard, these rights would go to the wall converting our democratic country to a totalitarian system.

It should not be forgotten at all that our judiciary has a colonial past and a democratic destiny. It would not become an arm of social revolution, unless, it is able to shake off its colonial heritage. There are many, who feel that with the present conservative outlook and delay-oriented procedure, it has little capacity to undertake new challenges. There are also those who believe that unless revolutionary changes are brought about in its structure, its process has little to offer to millions of poor and down-trodden needing its help to secure and sustain justice.

In a developing nation like India, there has been a wide-spread concern for law as a tool for bringing about homogeneity in the heterogeneous population having socio-cultural diversities. The changing system of law usually affects the illiterate, the poor and the common man whose indigenous systems are subjugated under the pressure of modernisation. Though there

are several devices to bring about change and reformation in the society, yet reformation through law is perhaps one of the most effective and safest methods to achieve this end. "It has been the lesson of history that people take law in their hands only when law fails to take people in its hands".\(^{(14)}\) As the great Jurist justice Salmond rightly points out "Law is the body of rules that can be amended provided the law makers deem it necessary to do so in the larger interests of the society"\(^{(15)}\). But law cannot do anything on its own without the proper implementation. Thus it is the judiciary which has been entrusted with the responsibility of implementing the laws. It is the judiciary that puts laws in operation through various decisions. It is the function of the judiciary to eliminate the conflicts and promote co-operation and understanding among people. It should provide a ground for a free and democratic life. It should also seek to regulate relations between the state and its citizens for the welfare of the both.

The Indian society at present seems to be at the cross-roads, where all sections of people such as intellectuals, workers, businessmen and even common men have their own problems. The preponderance of selfish and individualistic approach had gone so deep in the Indian mind that it has virtually shattered


\(^{15}\) Ibid.
our national character. Considered from this standpoint, the role of law and judiciary has become all the more important to tackle these burning issues in order to maintain social equilibrium by reconciling various conflicting interests of the members of the society. According to Justice Kamalakant Verma: "with the establishment of a democratic government, it is all the more necessary to maintain a system which makes for absolute purity in the administration of even-handed justice between man and man and between the state and the subject". (16)

Now, we are passing through a critical phase in the history of mankind. Civilised societies appear to be disintegrating and minorities openly defy the law for their own interests. Terrorists seize hostages and threaten to kill them, and sometimes, even kill them. Students occupy buildings and prevent the functioning of their universities. Only too often their threats succeed. The peaceful majority give in. Moral and spiritual values too appear to be at a low ebb. The sanctions of religion have lost their force. Schools and teachers take interest in social sciences and explain how people behave. They seek to help the misfits, but do not set forth standards of conduct. They do not tell how to behave. We are living in an age when all the traditional institutions are under scrutiny, suspicion and challenges of reassessment. If the

current mood of disillusionment infects the core of law and its institutions, we may lose our last opportunity for the preservation of freedom under the law. It is therefore, a matter of immediate attention of all concerned and the government. In particular, that the need is recognised and justice is made a planned subject and given proper attention. In this context it is appropriate to quote Justice P.N.Sapru: "It is the administration of justice which enables in the ultimate analysis, the individual citizen to express the ultimate of his personality..... As we move towards a new political structure, as society becomes more complicated and the functions of the modern state becomes more and more complicated, the responsibilities of an independent judiciary, which because of its aloofness from political controversies can dispense that justice, which is essential for that good life of the citizen for his rights and liberties become greater and no less."(17)

It is said aptly that power corrupts and absolute power corrupts absolutely. In the constitutional freedom, it is required that the state and its various agencies should act within the prescribed constitutional limits. In most of the democratic societies, the judiciary has been assigned the task of resolving the disputes regarding the meanings to be assigned to various clauses of the constitution and the agencies of the society has violated the constitutional provisions.

17. Ibid.
In this context, the Indian judiciary has to play a vital and important role not only in preventing and remedying the misuse of power but also in eliminating exploitation and injustice. For this purpose, it is necessary to make procedural innovations in order to meet the challenges posed by this new role of an active socially committed judiciary.

"The summit judiciary in India, keenly alive to its social responsibility and accountability to the people of the country, has liberated itself from the shackles of western thought, made innovative use of power of judicial review, forged new tools, devised new methods and fashioned new strategies for the purpose of bringing justice to socially and economically disadvantaged groups." (18)

In India, the judiciary has been empowered with the powers of judicial review. Supremacy of constitution coupled with the judicial review power has been acting as a potent weapon in the hands of the judges to stall the decisions of an executive, which goes against the constitution. Here courts act as a guardian of the people's rights through judicial review which is a litmus test for independent judiciary. The Supreme Court also has an extended jurisdiction to examine any matter of public interest and pronounce judgements, from the past experiences. The judiciary must have the final say.

Here in India, the judges, no doubt have every right to control the proceedings before them, but too much intervention in hearing cases should be avoided. Commenting upon the role of judiciary in law commission observed that: "It is necessary for all to realise that the role assigned to the judiciary under our constitution, is an essential one and that the high ideals, the attainment of which is aimed at by our constitution, social, economic justice, equality, freedom and dignity of the individual will be impossible of achievement unless the judiciary fearlessly discharges its duties in every complaint of excess of power by legislative or executive brought to its notice."(19)

To win the faith of the people and for the peaceful progress of the people during the present age, the judiciary must look outside and should not depend on a long out-grown philosophy. The business of the judiciary is to discover the truth. In the words of justice Krishna Iyer "the dynamic rule of law is an instrument of social change and the judicial process must effectuate this transformation in the social order."(20)

We must remember the famous words of Benjamin Colrado: 'the inn that shelters for the night is not the journey's end. The law like the traveller must be ready for tomorrow.'(21)

21. Ibid.
However, the importance of judiciary in political construction is rather more profound than prominent. In recent years a positive state has been emphasized and a set of democratic doctrines is being developed. It is therefore, obligatory for the judiciary to emphasize its constitutional duties of a state. The obligation of the constitution is not only to find the meaning of 'what has been' or 'what is' but 'what may be'. In order to give shape to the ideals of the constitution, the positive commitments of the judiciary has to be emphasized.

The bosom of the judiciary is not wide enough for all kinds of hopes and fears of men nor is it in a position to provide solution for any and every problem, although human ingenuity would not be lacking to give some kind of shape or semblance of a legal or constitutional issue. The judiciary has to be much more circumspect and careful in seeing to it that it does not overstep the limits of its power because the functions of being the guardian of the constitution are assigned to it. It is a faith and trust reposed by the framers of the constitution in the judiciary and there is no need to say that judicial despotism is the worst and irrational.

The present age is restless and uncertain and there is no escape in isolation or solitude for men of matter and world. The most serious problem of modern times with all other institutions and the judiciary is the erosion of faith. Unless,
we recreate and re-establish our faith, it will be difficult to reconstruct any system of administration of justice.

Here an independent judiciary, insulated from both internal and external pressures is a pre-requisite of a free society governed by the rule of law. But the very existence of an independent and impartial justice delivery system would be meaningless if access to the system is barred to a vast majority of people. It is therefore, the duty of the judicial system to ensure that a citizen is not denied justice because he does not have the means to secure access to the system.

Thus, to bring meaning to the concept of welfare state, access to justice must be rational, easy to translate our constitutional aspirations of equality and development and must be effective. The welfare states are more often characterised by more and more law as a means of social change. In such a state legal system occupies a vital position. It stands between the new legislatively created rights and entitlements such as those of consumers, tenants, employees, and persons unable to afford the minimum requirements of a decent life and their practical enforcement. The legal system, as it has developed over the past few centuries has often been a barrier against the enforcement of new rights designed to help the disadvantaged and the disabled. The difficult task of 'access to justice' reformers is accordingly to supplement, modify or even by-pass the traditional system with more effective methods for
law-enforcement on behalf of the disadvantaged. This constitutes a profound challenge to the legal system. In this process, public interest litigation has made an effective contribution. Recent growth of private actions instituted by private parties for the protection of public interest is one of the most significant developments in the judicial system. Indeed, this development is leading to far-reaching changes in the style and nature of civil litigation. As early as 1960, Roscoe Pound told American Bar Association: "our administration of justice is not decadent. It is simply behind times."(22) This is all the more true for India today. But we must remember that we have to keep in mind that neither efficiency for the sake of efficiency nor speed of adjudication for its sake which should underlie our concern of law and justice. The ultimate goal is to make it feasible for our judiciary to provide justice for all. Constitutional guarantee of fundamental or human rights become empty promises if adjudication becomes too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it. Only if our judicial system is functioning smoothly can equal justice becomes a reality for all. These are problems of social, economic and political dimensions. Thus in order to approach this problem, our judiciary has to set its perspectives and priorities.

It has been said that nothing ranks more in human hearts than a brooding sense of injustice. It makes one want to pull

things down. When only the rich can enjoy the law and the poor, who need it most cannot have it because the expense for it puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy depends upon making the machinery of justice so effective that every citizen shall believe and benefit by its impartiality and fairness. A system must be developed which will ensure due compliance with the dictates of the constitution.

Sri Justice R.C. Naik (Ex-Chief Justice of Hyderabad) is right when he says that "no country can ever have a bright and prosperous future, unless the foundations of law and justice are well and truly laid and the whole structure of society is properly raised on such solid grounds. The greatness of any country and the high standards of civilization of its people is judged by the security of honour, life and property of its poorest inhabitant." (23)

Sri Justice Raj Prasad says that "there can be no civilization without order and there can be no order without law." (24)

The importance of the newly emphasized role of judiciary in modern states cannot be ignored at all and the role of judiciary in a modern state is perfectly contained in the words of Daniel Webster: "Justice is the great interest of man on

24. Ibid.
earth. It is ligament which holds civilized nations together. Whenever, her temple stands and so long as it is duty honoured. There is a foundation for social security, general happiness and the improvement and progress of our race." (25)

In the following chapter, we will be discussing the drawbacks of the present judicial administration system of India and the factors behind the emergence of the supplementary dispute resolution method of the Lok Adalats. These will be discussed under the sub-title "Philosophy behind the Lok Adalats."

25. Ibid.