JUDICIARY AT THE CROSSROADS

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The Supreme Court’s judgment in the judges case is marked by incoherence, futility and lack of perspective. Seven opinions running into 1480 pages not merely indicate lack of coherence and deep disunity but also contradict the public exhortations by justices that the law must be simple and intelligible. The futility of the decision is also writ large in the bizarre coalitions of voting: thin minorities have ultimately sustained the power of Law Minister to issue firman affecting judges’ dignity, status, the power of transferring High Court judges without their consent and continuation of the system of additional judges, though with cosmetic clarifications.

And although rhetoric about social philosophy of judges and “people's judges” abounds and although as many as 600 permanent judges are needed to overcome 7,00,000 pending cases (as against the sanctioned strength of 405 and actual strength of 320), only Mr. Venkatramiah issued a mandamus to the Union to review and enlarge the High Court manpower. Other justices preferred the soft option of relying on assurance by the Government that it will immediately review the judge strength. A Committee of five seniormost Chief Justices has now been appointed. But its recommendations will have no constitutional status, like Mr. Bhagwati’s plea for a judicial reforms commission. The Supreme Court has maintained its comity with the executive; but in so doing aggravated the agonies of the Indian people.
Two factors, other than the growing ‘fraternal’ divisions in the Court, account for the intimidating complexity of the decision; one, the argumentative strategies adopted by the Bar, and two, the fact that the decision had to be rendered before Mr. Gupta’s retirement on 31st December, 1981.

Bar’s Image of Judges

The petitions reveal a unique conception of the judiciary. According to this conception, our High Court judges are made of such stuff that they panic at the whisper and whisper of being transferred to another Court; they feel ready threatened by circulars issued by a Law Minister; they tremble with fear at every utterance of the Prime Minister of India or some irate Chief Ministers of States or by assorted politicians; the additional judges of High Courts regard themselves as civil servants litigating over their appointments and promotions!

Believe it or not, the arguments at the Bar depict the appellate Indian judiciary as an effete and paranoid body desperately seeking salvation from an executive singlemindedly pursuing the destruction of the judiciary!

The judges case is notable for its many ironies, the principal one being the pathetic refrain: Our judges are weak; o ye judges, protect them from themselves!

The senior leaders of the Bar mean by independence of the judiciary only the independence of the appellate judiciary. The trial and district judiciary (impermissibly called the “subordinate judiciary”) at whose hand the majority of Indians receive ‘justice’ is of the most marginal concern to the Bar. The Bar entertains a hierarchic, not an organic, conception of judicial independence. No wonder, there was no attempt in this case to question the validity of Article 312, amended by the Forty-Second Amendment, which gives power to the government to constitute an All India Judicial Service for district judges. If implemented, most High Courts will be in future staffed by judicial service judges, who will also eventually populate the Supreme Court. To say that this question did not arise directly in this case will be sheer sophistry. Many questions which did not directly arise were elaborately raised in this case (e.g., the seniormost judge of the Supreme Court should be appointed the Chief Justice of India).

And even the concern for the independence of appellate judiciary appears episodic and opportunistic. If two additional judges of Delhi High Court were not discontinued, the leaders of the Bar, despite their romantic interlude with the problem of arrears in the Janata days, would not ever have raised the issue that the President is constitutionally obligated, under Article 216, to review and increase the permanent strength of High Court judges.

And even now the Bar did not seriously press the challenge to the constitutional validity of the system of additional judges (brought about by Article 214 through the Seventh Amendment) as being in concept and operation subservive of the independence of judiciary, as essential feature of the basic structure.

What is more, people who cried their hearts out at the 1973 supersession, and condemned A. N. Ray for transfer of sixteen High Court judges during the emergency, vehemently argued in this case that the opinion of the Chief Justice of India in matters of appointment of High Court judges should have ‘primacy’ over that of Chief Justices of High Courts! Ironically, those justices who declined to so hold are now being attacked for subverting judicial independence!

At the same time, while counsel made serious allegations of conspiracy to oust Judge S. N. Kumar between Mr. Shiv Shankar and the Chief Justice of Delhi High Court, they made no request to implead the latter as a party! And in the same vein, despite the manifest contradictions between the transferred judge K. D. N. Singh’s affidavit and that of Chief Justice of India, neither of them was put in the witness box! Judges had to decide on evidence which did not permit satisfactory outcomes either way. Now they are blamed for not deciding satisfactorily!

These incomprehensible contradictions and confusions, planned as well as unplanned, set no context for a coherent and viable decision from the Court.

And, the surviving prospects for coherence were extravagantly dissipated by the inclusion of Mr. A. C. Gupta whose retirement was not quite unforeseeable.

The whole history of the Indian Constitution can be written in terms of pressure of work. It was drafted in hurry. Frequently amended in haste, it has been interpreted by the Supreme Court also in “hurry now, repent at leisure” fashion. The massive 1973 Kesavananda! avalanche delivered by eleven judges was the way it was because Mr. S. M. Sikri was due to retire (and Mr. Chandrachud then complained
of hurry). The vital issues in Minerva Mills\textsuperscript{2} and Waman Rao\textsuperscript{3} had to be decided the way they were in 1980 because Mr. Untwalia was to retire (and Mr. Bhagwati then complained about the hurry). And, in 1981, the judges case\textsuperscript{4} had to be so decided as Mr. Gupta was to retire (with the distinction that judges were in such hurry that they had no time to complain about the lack of time!). The Indian masses will have to endure the fact that the about-to-retire judges will continue to be given opportunities to write requiems even at the cost of well-reasoned and viable interpretation of the Constitution.

Insistence on Open Government

The decision contains many positive results, prominent among which is the Court's insistence on open government. Despite the valiant defence of 	extit{ancien regime} by Mr. Fazal Ali, the Court ordered disclosure of all correspondence (save the Intelligence Bureau's report on S. N. Kumar) on appointment and transfer of judges, rejecting the State's moving contention that such public disclosures may jeopardise the image of the judiciary and thus hurt public interest.

The Court has narrowed the class of documents for which Government can claim secrecy. It has established judicial supremacy over executive claims of secrecy; and affirmed court's power to inspect all documents classified as "privileged". What is more, the Court has held that Justices involved in the process of judicial appointment and transfer are as much accountable as other holders of public power. The Court has shed the mystery and mystique surrounding judicial appointments and transfers. It has majestically affirmed people's right to know the truth. If judges err in the appointment process, they are now accountable to people and must face the nemesis of public opinion. The general insistence on accountability places a powerful weapon in the hands of people with which they can seek to revitalize the decadent political culture of contemporary India.

The decision radically liberalizes the law of standing. The architect of this aspect of the decision is Mr. Bhagwati; and its impact on law and society will easily outlive the current carefully orchestrated chorus of partisan denunciation of his overall decision.

Now, all High Courts, and the Supreme Court, must listen to complaints about violation of fundamental rights or excesses of public power made by public spirited citizens or groups on behalf of people who are denied justice "by reason of poverty, helplessness, disability or socially or economically disadvantaged position."

And the Court will not even insist on regular writ petitions; even letter written by citizens on behalf of "people who are living in poverty and destitution, who are barely eking out a miserable existence with their sweat and toil, who are helpless victims of an exploitative society and who do not have an easy access to justice" will suffice for the courts to act. The sword of socialist justice has been at least unsheathed; and it is a powerful sword menacing vested interests in the bar, administration, media and even judiciary.

No contemporary court has gone so far in legitimating public interest litigation; and legitimization of epistolary jurisdiction is truly a social invention worthy of emulation everywhere.

But the Court will not allow abuse of the new jurisprudence. Petitioners who seek to activate court for poor people out of political or ulterior motive may not have standing. Similarly, if persons injured by excesses of public power do not want the benefit of judicial review, even public interest litigants may not be accorded standing.

This last caveat can be easily misinterpreted by those who read as they run. But it does not affect the standing on behalf of deprived and dispossessed groups whose fundamental rights have been violated. The women in Agra Protective Home, the blinded under-trials or prisoners tortured in Kanpur or Chhatarpur jails or women on sale like Kamala, cannot be used to deprive public interest litigants of their standing by a simple device of indicating their lack of consent to such litigation. This is so because no person is entitled to waive his fundamental rights, the violation of which is prohibited under the Constitution which judges take on oath to uphold.

But this limitation applies to rights other than fundamental rights. In this very case, Mr. Ismail conveyed to the Court that he did not wish to contest his transfer; Mr. Vohra did not file an appearance. None of their fundamental rights were violated; indeed, the question was whether they had any constitutional rights at all. Neither Mr. Ismail nor Mr. Vohra can possibly be counted among the deprived and dispossessed millions of India. It was entirely proper for the Court to respect the dignity of their choice.

The uncharitable critics of this decision must recall that the Bombay lawyers were conferred 	extit{locus standi} only to question the Law Minister's circular because the law was radically altered on this point by the entire Court.
Additional Judges

The decision clarifies many aspects of the Additional Judges system. First, Additional Judges may be appointed only to meet arrears or temporary increase in judicial work. Second, Additional Judge must not be appointed “for ridiculously short terms” such as three or six months; all justices insist on at least one year term, with the exception of Mr. Bhagwati who insists on two years. Third, the Constitution does not sanction the sorry spectacle of a eleventh-hour extension of Additional Judge’s term; the process of extension should be completed “reasonably in advance”. Fourth, Additional Judges are not probationer judges. They have the same powers, privileges and status as Permanent Judges: they cannot be removed during the tenure excepting by impeachment. Fifth, every extension of the term of Additional Judge is a fresh appointment and the full consultation process between the Chief Justice of India, Chief Justice of the High Court, Governor and President must be gone through. Sixth, if the views of Chief Justice of a High Court differ from those of the Chief Justice of India as to the suitability of Additional Judge for re-appointment, the President must choose and the opinions of Chief Justice of India do not command any priority.

The Court ruled that Additional Judges do not have a right to be reappointed as Additional Judges if arrears continue, and seniormost among Additional Judges do not have a right to become Permanent Judge if a vacancy arises. Since 1956 this was the practice; barring a few microscopic exceptions (as Mr. Desai puts it) Additional Judges were made Permanent Judges and their terms as Additional Judges were suitably extended. The Court acknowledged this convention; but held it contrary to the plain text of the Constitution. Curiously, it also held that this invalid convention created some legitimate expectations: therefore, Additional Judges have a right to be considered for appointment or as Mr. Tulzapurkar felicitously puts it a “right not to be dropped illegally”.

The convention followed for a quarter century is strongly condemned. Mr. Bhagwati says, it has “perverted” the purpose of the Constitution; Mr. Desai locates in it “the root of the present malaise.” Mr. Venkatramiah finds it “disturbing”; and Mr. Pathak calls it a “distortion”. But the striking thing is that each one of the seven justices deciding this case was a beneficiary of this system! In fact, all Supreme Court Justices, save Mr. Ism, have been so appointed.

But the piquant result cannot be gainsaid. Their Lordships have, implicitly, declared all appointments based on the convention invalid, including their own! If nothing else, this would at least mean that the all-India seniority list of all justices will have to be revised, cancelling the period during which they unconstitutionally acted as Additional Judges, either because they were beneficiaries of the system or because they were appointed for shorter periods than a year. Not merely a review petition is in order on this aspect but there exists possibilities of quo warranto in regard to those Additional Judges whose terms have been extended in the recent past for a period less than a year or at the eleventh hour.

You may say that this is technical. That is what was said by and on behalf of Mrs. Gandhi when she was unsought for a “technical” violation of election law. The ruthless and remorseless logic of law applies with as much rigour to justices as to the Prime Minister.

Scope of Consultation

From now on, Additional judges have to be appointed after full and effective consultation with all constitutional functionaries. And, that process must start by considering suitability of existing Additional Judges for reappointment as Additional Judges or Permanent Judges. And, all judges agree that “suitability” does not imply consideration of decision given by the Additional Judges as those can be reviewed on appeal.

The behaviour of Chief Justice Prakash Narain in thus reviewing O. N. Vohra’s judgment in Kissa Kursi Ka case was a subject-matter of many a critical observation in the judges case. Mr. Desai had to say that Chief Justice, Delhi, “seems completely unaware of his duty and obligation”; he castigated his position as “so untenable” as to warrant a “strong censure”. Even with these “strong words”, Mr. Desai found it difficult to express himself “adequately”.

But what if the integrity of Additional Judge is under some doubt? Should be held suitable for fresh appointment, and upon appointment be impeached? Only Mr. Tulzapurkar and Gupta take this view. The former described this, rightly, as “the knottiest problem” and holds that unless a suitable machinery “less cumbersome than impeachment” is devised for enquiring into an “errant judge” the suitability of an Additional Judge for further appointment cannot be examined. To examine it would be to mean in effect that Additional Judges are on probation.

The real meaning of Mr. Tulzapurkar’s opinion is that the original appointments should be so made as to ensure clustering of men of outstanding integrity on the bench. The problem of “errant judges” will
then be limited to rare exceptions and should be dealt with through impeachment or other more effective processes. Otherwise, cases like S.N. Kumar's non-appointment may again arise in the future; and they will end up, no matter how they are handled, by inflicting further self-inflicted wounds on the judiciary.

The problem clearly is not of an “errant judge”; it is also of an “errant bar”, which can activate with relative ease cesspool grapevine against any judge they dislike. In any case, the process of consultation does not, and cannot, meet the problem of an “errant judge”; it rather adds to the problem of “errant” Chief Justices! Clearly, the answer lies elsewhere.

Transfer of Judges

The near-unanimity (happily but fruitlessly marred only by Mr. Bhagwati’s dissent) recognizing the power of the President to transfer judges without his consent from one High Court to another is quite unfortunate, mainly because it may further reduce the flow of talent from the Bar to the Bench. The safeguards provided against abuse of transfer power, as we shall see, proved illusory in Mr. K. B. N. Singh’s case. But even if they are real, the harsh fact is that a transferred judge may still nurse a sense of injustice constraining him to protest by resigning. When this happens, the transfer power in effect operates as a power to procure resignation of judges, a power nowhere conferred or contemplated by the Constitution.

The judgment also leaves open the possibility of multiple transfers of the same judge. One hopes that one is wrong in thinking, for the sake of independent judiciary, that the transfer power will act as a strong disincentive for those lawyers who esteem power to do justice over extravagant earnings at the Bar.

It is both conceivable and likely that in near future High Courts will be increasingly staffed by district judges; and as and when Article 312 is activated creating All India Judicial Service, District Judges will be so accustomed to being transferred that they would not even think of resigning at further transfers at High Court level. The possibility in not too distant a future of a Supreme Court hearing populated by District Judges elevated to the Court via High Courts promises total transformation of the Court, at least as regards constitutional interpretation.

It is surprising that none of these considerations weighed with the six justices. Instead, they were led, perhaps by the logic of arguments, into quibbling about whether transfer means “consensual” or “non-consensual” migration; when is a transfer a “punitive” or “policy” transfer; or whether the approval of the Chief Justice of India is necessary for government to evolve policies of transfer for judges. The concern for what kind of people will be future judges is conspicuous by its absence at an operational level, though the rhetoric on judicial role abounds.

How did the transfer on effective consultation operate in the case of Mr. K. B. N. Singh? Anyone reading the disclosed documents at once realizes that the Chief Justice of India never stated any grounds of public interest which necessitated transfer of Mr. Singh to Madras. There is nothing on record to show either that the Chief Justice of India advised the President of the personal difficulties voiced by Mr. Singh on the evening of January 8, 1981; on the next day, the Prime Minister approved the transfer. On the last question, four justices upheld the transfer by inference on a close textual analysis of correspondence and affidavits; the other three invalidate the transfer by drawing different inferences. The affidavits filed by Chief Justice of India and Mr. Singh contradict each other; and the statement on behalf of the President that he was not consulted created a problem of interpreting the Chief Justice of India’s affidavit which stated that he had full consultations with the President. A perusal of the opinions, especially of Mr. Tulzapurkar and Mr. Desai, is enough to alert everyone that strong subjectivities, on either side, will ultimately determine the issue.

The simple point is that even on a transfer proposal initiated by the Chief Justice of India, the Court rules by a wafer-thin majority that effective consultations did after all take place. The situation when the executive initiates transfer, and the Chief Justice of India denies consultation, is certainly bound to be more complex even for the four justices who now hold as they do.

Is it reasonable at all to assume that in future transferred judges will take enormous trouble, expense, adverse publicity and uncertainty of outcome to contest the validity of transfer? Most justices will either submit to transfer or quit with dignity. The latter might be the preferred path unless they are convinced that the transfer is made bona fide both by the executive and the Chief Justice of India.

The exclusion of three judges senior to Venkatramiah (Koshai, Chinnappa Reddy and A.P. Sen) from the bench deciding the judges case has deprived the decision on transfer of its authenticity especially when a larger bench was constituted to reconsider, if necessary, Seth’s
case4. The transferred judges were presumably excluded on the ground that their inclusion might be misconstrued.

But if the same principle were to be applied, none of the seven justices should have been included on the bench because each one of them was the beneficiary of the "distortion" and "perversion" of the system of additional judges. The fact that they could still decide that the system was invalid impart authenticity to that decision. It also belies the apprehension that the inclusion of the transferred judges would have necessarily resulted in any anti-transfer decision.

Whatever the idea of independence of judiciary may mean to lawyers, judges, Law Ministers, and Prime Ministers, for the people of India it consists in the way benches are formed. For them, a judge is really appointed only when a bench is formed and for them there is no such thing as the Court outside the bench. For the litigant, the Presidential warrant of appointment means little; what is decisive for him is the daily assignment of cases to judges by Chief Justices who have virtually untrammelled discretion to form benches. It is here that the battle for the independence of judiciary should begin and perhaps, end.

NOTES