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ABOUT LAWYERS AND JUDGES IN AMERICA

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A recent bestseller The Client (by John Grisham), -also made Into a popular film, -should be of absorbing Interest to judges and lawyers alike. A big-time criminal, Barry the Blade, head of a Mafia, or in American slang, 'the mob', has killed a U.S. senator by way of contract killing at the behest of some big corporations who found the senator's environmentalist concerns inconvenient. The case against him rests only on circumstantial evidence. The corpus delicti is missing. The accused, -or the 'defendant', as per American English-has burled it under a disused garage in his own lawyer's house without the latter's knowledge. In an unguarded moment, much later, he discloses it to his lawyer. The lawyer, Jerome Clifford,- though himself a cunning and corrupt sort, willing to buy the police officials, jurors and even a pliable judge, and having contacts with unscrupulous politicians, -is shocked and unnerved. He is too afraid of "the mob" to let the Investigators, the F.B.I, into the secret. He decides to commit suicide. He goes to a secluded spot in a suburban forest in his car, far from his city. He has planned to get himself gassed Inside the car, He is drinking heavily and taking pills while waiting for the gas to have its effect" Two boys Mark (eleven) and Ricky (eight) happen to be nearby for a stealthy smoking session. They are sons of a poor working class woman, a divorcee from a tyrannical husband, The boys' curiosity Is excited by the strange contraption In the lawyer's car, Mark cuts off the gas supply by disconnecting the hose from the silencer pipe. The morose lawyer catches hold of Mark and is furious at his interference. Mark however sweet-talks him into revealing the reason for his attempt to commit suicide, Clifford does shoot himself In the end. The horrified boys then run away, Ricky Is so panicky that he is reduced to a neurotic wreck. Mark makes an anonymous call to the police that a dead body is laying in the forest. Though he does not reveal his Identity the police is able to trace him with the help of the tape of his voice.

On being questioned Mark tells the police that he did see the suicide but denies knowing anything else. His denial does not convince the Interrogators. He is mortally afraid of the mob, -just as was even Clifford, -apprehending that If they come to know about his knowledge of the senator's corpse they would finish him. He does not tell even his mother. The FBI and the senior Attorney Roy Foltrigg want to employ all legal means to make Mark talk. Mark had viewed quite a few criminal trials on the T. V, and thus knows a lot about the Fifth Amendment, the right to silence, the right to counsel, and so forth. Apart from the F.B.I., the mob is also after the boy. The press is chasing him too.

While his younger brother, attended by his mother, is in hospital, Mark manages to slip way for a while, hunting for a lawyer in a large building complex housing lawyers' offices. There are different specimens of lawyers. One, called the ambulance chasers, who specialise in Injury claim cases, charging contingent fee, advertising on T.V. and on hoardings and in telephone directories-like Gill Teal, calling himself the People's Lawyer. The boy ultimately stumbles into a kindly middle-aged lady lawyer Reggie Love who does not care for money when it involves defence of juveniles and deprived women. Ably assisted by her paralegal secretary Clint, she takes up Mark's case for a token fee of one dollar, ultimately spending thousands of dollars from her own pocket on him and his case. She is most scrupulous and yet cunning, and formidable. The boy also gets the protection of the equally kindly and dedicated but strong, self-confident and overbearing juvenile Judge Harry Roosevelt, -who has declined promotions to higher courts because he loves his present Job. The problem Is that, legally, Mark Is not a defendant but a witness of crime, and a witness has no right to silence; the fear is not of self-crimination but of exposure to the mob's fury. How Reggie Love and judge Roosevelt are able to foil the over-hasty attempts of Roy Foltrigg and the FBI to get Mark to speak, and how they ultimately help the course of Justice In the senator's murder case,-while protecting the boy and his family,-is woven into a fascinating story. The book is just unputdownable. You get interesting glimpses of a variety of lawyers and judges and of the criminal Justice system of the U.S.A.

But this was in the realm of fiction,-though apparently quite plausible. unlike the run of Bollywood films made by legally- illiterate directors and script writers. Let us turn to a factual story .Two Journalists Bob Woodward and Scott Armstrong conducted an intensive research into the working of the Supreme Court during the first seven years (1969-1976) of Warren E. Burger's tenure as Chief Justice. Though laymen, they read many of the cases decided during that period and the background material, consulting many books by leading constitutional writers. They interviewed more than two hundred people, including several Justices, more than 170 former "law clerks" besides other former employees, all on condition of anonymity, and got hold of a lot of confidential material which formed part of the decision making processes In the Court. The result was The Brethren a book which proves that fact is not only stranger than fiction, but is much more interesting too. If one reads it along with Quarrels that Have Shaped the Constitution, edited by John. A Garraty, which gives a blow-by-blow account of how the most famous cases reached and were decided by the Supreme Court, one gets a lot of insight into the working of the American judicial system generally and the Supreme Court in particular. Allan Farnsworth's An Introduction To The Legal System of The United States provides useful background information enabling us to appreciate these two books.

The U.S. Supreme Court has been having only nine Justices for the last hundred and fifty years or so. All or such of the nine Justices as are available, collectively decide each and every case, except in a vacation when a single Justice may pass an interlocutory order. They sit in court for hardly a hundred days in a year. How are they able to cope with the work? For this, we have to understand the basic differences between our system and theirs. In India there is an integrated judicial system, with one I.P.C., one Cr. P.C., one C.P.C. and one set of courts, with the Supreme Court as the final Court of correction. In U.S.A. each State has a separate constitution, apart from the U.S. Constitution. For interpretation of State laws and for trial of cases under them the State courts have the final authority: The Supreme Court can come into the picture only in cases of conflict between a State law and a federal law, or when a State law is said to be inconsistent with the U.S. Constitution. There are two sets of courts. The judges of an apex State Court are appointed by the Governor, -in some States after election for a term,-while the President appoints Justices of the Supreme Court and also of other federal courts functioning in the States for trial of cases either under federal laws or between parties belonging to different States (if any party so desires) or where the federal Government, i.e. U.S.A., is a party. The federal courts' consist of district courts and Circuit appellate; courts. "Districts", unlike our revenue districts, are big territories covering sometimes even a whole State, -there being only 90 district courts located throughout the fifty states. There is also one for the District of Columbia,- which is like our Union Territory of Delhi, -in which the nation's capital Washington is situated, - and for which the laws are made by the federal legislature, the Congress. There are only twelve appellate federal courts, called the circuit courts.

The Supreme Court's original jurisdiction is very limited like that under our article 131. It does not have any original jurisdiction like the one under article 32 of our Constitution. No appeal lies to it as of right in circumstances like those mentioned in articles 132, 133 and 134. It does not have to decide seniority disputes or even to interpret inheritance or taxation or rent control laws, or the like, or any factual controversy, or to enter into appreciation of evidence. Nor does it have any unlimited jurisdiction, as under our article 136, to hear special appeal from any court or tribunal in the country. It entertains only appeals and certiorari petitions against judgments of circuit courts,- and rarely those of State courts. They are all called "cert petitions" The Supreme Court receives thousands of them but admits for oral argument,- or "grants cert" In -not more than about two hundred in a year. A cert will not be granted merely because the impugned decision is wrong on facts or law or that a party has been denied justice, but only when the Supreme Court in its absolute discretion decides that it is a case which requires It to lay down or clarify the law or a constitutional issue.

The **Brethren** mentions seven decision -making steps (in the U.S. Supreme Court) as under:

1. The decision to grant cert. At least four of the nine Justices must vote to hear a case. Four is a number one short of majority. If the majority were to be insisted on It could lead to the apprehension that the Court is already committed in favour of the petitioner-appellant. At the same time insistence on four votes ensures that only petitions which stand a reasonable chance of being allowed are set down for oral hearing. These votes are cast in a secret conference attended only by the Justices, and the actual vote is not ordinarily disclosed. This is not, repeat not, preceded by any oral arguments of counsel either in open court or in chambers. The cert petition itself should contain the factual background, the relevant statute law, case law and the contentions of the petitioner. This material is first studied by individual Justices with the help of their "clerks". These Justices' Clerks are In fact young men and women who are carefully selected by a committee from among toppers of the prestigious Law Colleges and Universities. They are hired for a year or two and then go back to start their career. Some "clerks" have later risen even to Justiceship of the Supreme Court. Each Justice is allowed the services of two or three clerks. They are sworn to confidentiality, and can be hired and fired at the Justice's will. These clerks digest the material into a readable brief for their Justice and discuss the' case among themselves and with the Justice. Often the clerks of two or more Justices informally interact with each other, unless forbidden by their boss. The views of clerks thus subtly influence the decisions of the Court. They cannot however enter the conference room of the Justices. It may be mentioned here that the court receives hundreds of petitions from prisoners who want their conviction or sentence to be reviewed on one technical ground or another. They are not sent through counsel but by unrepresented petitioners. They are sort of our pauper petitions or jail appeals or post card petitions of habeas corpus. Copies of such petitions are not circulated to the Justices. The Chief Justice's clerks study them and prepare a list of such petitions, briefly mentioning the points involved. Only that list i.e., the summary, is circulated among the Justices. In an exceptional case when any Justice wants to see the petition it is sent to him. Unless any Justice specifically desires any such petition to be considered at a conference, these petitions are deemed to be rejected without even the formality of a vote or being brought up at a conference.
2. Once the court agrees to hear a case, it is scheduled for written and oral arguments by the lawyers for the opposing sides. The written arguments, called legal briefs, are filed with the Court, i.e., in the registry, and are available to the public. The preparation of these briefs and of the oral arguments generally involves many people's participation besides financial support from a still larger number of people. For the racial segregation case (Brown v. Board of Education) , for instance, the

NAACP (National Association for the Advancement of Colored People), -for which Thurgood Marshall (later, the first black Justice of the Supreme Court) was the leading counsel, -had raised substantial funds for legal research and for conferences with social scientists, historians and constitutional experts. The oral arguments are presented to the Justices publicly in the courtroom; a half hour is usually allotted to each side. As each Justice comes fully prepared,- the case having being thrashed out first with his clerks and later with his brethren at conferences, and again with their clerks between one conference and another ,- much of the half hour is often spent by the lawyers answering questions shot out at them by the Justices. In view of the strict time-constraint for oral arguments. the lawyers often go through an intensive preparatory drill, or rehearsal, at moot courts presided over by eminent constitutional experts sympathetic to their cause. These experts grill the prospective counsel with incisive questions so as to prepare him for the real thing. A case may be argued In the Supreme Court not only by professional lawyers but even by academics. On most constitutional issues, activists could be found to support rival causes and it Is they who organise and finance these preparations. If Government (through the Department of Justice) supports the case of either party and its lawyer wants to advance oral arguments, time for his arguments has to be shared by the petitioner's or respondent's counsel (as the case may be) out of his half hour quota.

The Justices are not addressed as "Your Lordships" or .'My Lords". (In fact this is an anachronism inherited by only our sub-continent from the colonial masters. Even in Australia and Canada which were colonised by Immigrants from England Itself this has not been adopted, and Justices of even the apex courts are addressed as "Your Honour"). They are addressed as "Your Honour". They can even be addressed more simply as "Chief Justice Rehenquist" or " Justice Marshall", etc. There are no **jamadars** to help them sit In or rise from their chairs. Only the Justices wear robes, not counsel.

3. A few days after oral arguments, the Justices discuss the case at a closed door meeting called the "case conference". There is a preliminary discussion and an initial vote is taken. As in the cert conference, at which Justices decide which cases to hear, only the Justices attend the conference. The nine members of the court often refer to themselves collectively as "the conference". Extempore judgments Immediately at the close of arguments are thus out of question. Often when Justices are unable to thrash our their differences they order a re-hearing (oral) in court.
4. The next crucial step is the selection of one the nine Justices to write the majority opinion. The Chief Justice, if he is in the majority, can assign himself or another member of the majority to write the opinion. When he

is not in the majority the senior Justice in the majority makes the assignment. This is the tradition in India too, the only difference being that here the bench being chosen by the Chief Justice himself he is almost always in a majority. In U.S.A. there is no such choice available, as all the Justices always form the bench.

5. While one Justice is writing the majority opinion, others may also be drafting a dissent or a separate concurrence. It can be months before these opinions, -a majority, dissent or concurrence, -are sent out and circulated to the other Justices. In some cases, the majority opinion goes through dozens of drafts, as both the opinion and the reasoning may be changed to accommodate other members of a potential majority or to win over wavering Justices. As the Justices read the drafts they may shift their votes from one opinion to another. On some occasions, what had appeared to be a majority vanishes and a dissenting opinion picks up enough votes to become the tentative majority opinion of the Court.
6. In the next to last stage, the Justices "join" a majority or a dissenting opinion. Justices often view the timing, the sequence and the explanations offered for "joins" as crucial to their efforts to put together and hold a majority.
7. In announcing and publishing the final opinion, the Justices choose how much of their reasoning to make public, In India the Judges give their "judgments" and in England the Law Lords (the House of Lords) deliver their "speeches", while the Justices in the U.S. Supreme Court deliver their "opinions".

On politically sensitive such as racial issues, the Justices try to arrive at unanimity through a lot of give and take in the language of the opinion and in the terms of operative order. In the Southern part of America racial discrimination and segregation had flourished for more than a century even after the abolition of slavery, and it had the support of the local Democrats as well as Republicans, whatever be the views of the parties at the national level. When the Warren Court, i.e. the Supreme Court during the chiefship of Earl Warren, held racial segregation unconstitutional by demolishing the "separate but equal" (Plessy v. Ferguson, 1898) doctrine, and directed racial integration in schools, the Chief Justice went all out to secure unanimity (Brown v. Board of Education, 1954). Thus all controversial issues were sidetracked, contentious language avoided, and the Plessy ruling was overruled simply on the ground that in the light of conditions in the twentieth century segregation generated "a feeling of inferiority" in children which might well inflict such grave damage in their minds and hearts that it could never be undone. The ruling did not mandate immediate but only gradual desegregation,- which however due to the tenacity of the Southern States dragged on for more than fifteen years through a series of actions *(i.e.,* suits) in sympathetic local courts, designed to stall the process, until ultimately the Burger Court In 1969 had to set a time limit. Which again

was the result of hectic conferences culminating in a compromise between extreme and middle-of-the- road positions.

The Justices of the Supreme Court and other federal Courts are appointed solely in the descretion of the President. Every appointment including a promotion of an Associate Justice (or puisne judge, as we are accustomed to call them) to the post of Chief Justice, is however required to be confirmed by the U.S. Senate (the Upper House of the Congress, -corresponding to our Rajya Sabha). The candidate has to appear before the Senate Judiciary Committee. He may be cross-examined by members about his views expressed in his speeches, writings or earlier Judgments (If any), abou1 his suitability and aptitude, about his conduct while in legal practice or while holding any office, about his income tax returns or other financial dealings, even about his private life. He can take his counsel (one or more) with him. The role of the counsel is however not very clear. For no arguments are to be advanced, and no objections can be raised about admissibility of questions, the committee being not a court of law, and moreover any such objection or interference can only annoy the members which would only endanger the confirmation. One black nominee was grilled some years back on charges of sexual harassment levelled against him by his female subordinate (also a black), and it was a close shave,' but he just scraped through. Several nominees of Nixon, Johnson and Reagan were thus rejected by the Senate.

The Senate is of course a political body consisting of members of both parties, -the Republicans and the Democrats. Often it so happens that the President is a Republican and the Senate has a Democratic majority, or vice versa. This puts the President on guard and he is forced to select candidates who can find general acceptance. F.B.I. (like the Intelligence Bureau in India), the Department of Internal Revenue (corresponding to our Income Tax department) and the Department of Justice (who look into his earlier utterances and opinions) are all asked to check up before his nomination Is announced, and he may even be questioned first by the Attorney General or his deputies in order to find out if there are any skeletons in his cupboard. Though the respective views of Democrats and Republicans do influence their votes the voting is not on party lines. Thus, after two nominees of Nixon (Republican) were rejected by the Senate in 1969 (Democratic majority), when Warren Burger's nomination for Chief Justiceship came up before it, Senator Edward Kennedy (John F. Kennedy's brother, the Democratic leader) let him be readily confirmed without a single question' being asked. President Roosevelt (Democrat) had elevated, apart' from various Democrats. a Republican, Harlan Stone, to the Supreme Court on the eve of World War II.

Though politics does certainly playa part in the nominations and confirmations, the word "politics" in this context should be understood in its nobler sense, not in the sense of advancing the interests of a party or its President. The politics involved is that of issues, -Liberal versus Conservative,

Left *versus* Right. Left and Right of America have no comparison with the Left (pro-socialism, nationalisation, trade unions, pro- tenant, pro-land ceiling, pro-reservations) and Right (pro-free market, pro-compensation, pro-property, & c) of our country. Everyone in America is pro-property, pro-free market economy, anti-socialist. Left or Liberal denotes views In favour of more rights for blacks and other ethnic minorities, for criminal defendants (accused persons), homosexuals (gays), women (right to abortion, etc.) and also pro-freedom of expression (including pornography, publishing defamatory matter, even burning the national flag, etc), -in short, favouring the individual as against Government and Government against big corporations, while Right or Conservative denotes pro-crime control, anti- pornography, etc. Normally Democrats are regarded as Leftists, and Republicans as Rightists. On the bench however such distinctions gradually get blurred as a result of friendly, -though often through strongly expressed views, -discussions among peers As Justices are appointed for life they interact with each other for several decades. John Marshall was Chief Justice for thirty-four years, Holmes was Justice for twenty- eight years. Douglas (the author of a book on the Indian Constitution -From Marshall to Mukherjea)) a strong Leftist Liberal, had a colourful life. He married for the fourth time twenty-six years after his elevation. When Nixon tried to ease him out by veiled threats of impeachment for certain financial improprieties Douglas resolutely prepared to fight back, and Nixon had to climb down.

Because of the political angle Chief Justices and Associate Justices often choose their time of retirement In such a manner that the seat vacated by them Is filled by the President of their liking. If the Incoming President is going to belong to the other party they will seek premature retirement so that the present office-holder of their political persuasion, is able to fill the vacancy, Conversely, even if a Justice is not enjoying good health and would have liked to step down he may postpone his departure If the Incumbent President belongs to the party which the Justice dislikes.

Seniority does not enter into calculations at all in these appointments. No 'legitimate expectations' in these matters (as mentioned in our Second Judges' Case), or any such ground, are canvassed or recognised. Very rarely is an associate Justice elevated as Chief Justice, and even when one is chosen he is more likely to be a junior (who had been appointed to the Court by the same President) than a senior (who must have been appointed by some earlier President), Often a judge of a Circuit Court, -not necessarily the Chief Justice of that Court, -is picked up for elevation as Chief Justice of the Supreme Court.
Sometimes an Attorney General or a Solicitor General or other similar officer of the Department of Justice is appointed. Ear1 Warren was Governor of California before his appointment as Chief Justice. Though as Governor he had thousands of citizens of Japanese origin detained without trial during Wor1d War 1" he made I name as a liberal Chief Justice. John Marshall, the eminent Chief Justice who first established the power of judicial review (Marbury v.

Madison, 1803), was a Secretary of State (i.e. a Cabinet Minister) when he was appointed. The politics)f those days was between federalists who favoured a strong Central Government and others regarded as "radicals", who favoured the rights of the States and of individuals. President John Adams, a federalist, was defeated at le polls by Jefferson. In America there is a gap of over a month between the lection results and the new President's Inauguration. Adams, after the election result and before the change-over, quickly appointed Marshall to be the Chief Justice. As the Senate was dominated by federalists, Marshall's confirmation, as also quickly gone through. Marshall continued to act as Secretary of State even after his confirmation. Adams quickly made many judicial appointments right up to the last day of his office, even creating new posts far in, excess of the requirements, so that the judiciary could save the country from the apprehended Kcesses of Jefferson's party. These appointments were made in such a great hurry, through Marshall as Secretary of State.-that some of the appointees could not get their "commissions". i.e. orders of appointment, delivered to them. Jefferson in the mean time took over and got the remaining commissions destroyed. One of the persons who was thus deprived of his appointment as Justice of the Peace (i.e. Magistrate) was William Marbury. He approached the Supreme Court for a writ of mandamus against the new Secretary of State, Madison. The case directly involved matters in which Marshall had played a major role and yet it was tried by Marshall and his Associate Justices. Later hearings were even boycotted by Government, as Marshall's hostility to the Jefferson administration was too apparent. Marshall was in turn afraid that his writ may not be obeyed by the President who was then riding the crest of a wave popularity. Jefferson could even be driven to start impeachment proceedings against him. So in a clever move Marshall held that Marbury and his associates are legally entitled to their commissions, but the Supreme Court could not issue writ of mandamus because the provision of the Judiciary Act of 1789 authorising the Court to issue such writs was unconstitutional. In other words, e Congress did not have the legal right to give that power to the Court. The Court could act and issue writs of mandamus, etc. only in cases coming to it on appeal from a lower court. In this manner its power to hold an Act to be void IS established by the Court.

The American Bar Association enjoys a high prestige in political and legal circles, and its support for a nominee often facilitates his or her confirmation.

According to a 1988 estimate the number of lawyers in America was over lakh. out of whom about one-tenth are concentrated In New York city alone out ten percent (i.e. sixty thousand) are employed by private business concerns. ten percent are in government service, five percent (i.e. thir1y thousand) are members of the judiciary or the teaching profession. The remaining seventy-five percent are in private practice, -for1y-five percent (two lakh seventy thousand) in individual practice and thir1y percent (one lakh eighty thousand) in law

firms. A large law firm may have a total complement of over a hundred lawyers. some of whom are par1ners but most are salaried associates. le best lawyers are often attracted to the work of exper1 counselling and drafting in these law firms: they rarely if ever appear in cour1 but their services e much sought after as advisers, planners and negotiators. It is high time we India take to this pattern of law firms.-which should go a long way towards solving the problem of briefless lawyers who due to their unenviable circumstances go about with a chip on their shoulders, always looking for an opportunity to agitate or go on strike or even enter into fisticuffs with a judge. It due to non-availability of such exper1 services in our country that several American and English law firms, who have opened their offices in Bombay and other big metropolitan towns, have been engaged by top business houses. - multi-national as well as Indian,- much to the chagrin of our lawyers who have ed a writ petition against them in the Bombay High Court.

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