

DEMOCRACY AND JUDICIARY¹

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Democracy is one of the “organized system of governance” of a country and its people. It is considered to be one of the most civilized and suitable system in the modern times. Democratic theory is based on notion of human dignity and adult autonomy. To achieve that end people take it upon themselves, the responsibility to manage their own affairs and governance but direct rule is not possible by the masses. The people therefore delegate authority to their freely chosen representatives. In one of the American decisions² it was observed:

“No right is more precious in a free country than that of having a voice in the election of those who make the laws, under which we.....must live.”

Two things are clear one sharing in the governance through the elected representatives and the laws which are made under which the people choose to live or to abide by. The Rule of Law thus assumes great importance in the democratic system of governance. Equally important principles and concepts of democracy are. Liberty and Freedom. People die for it. As a matter of fact Rule of Law is a tool to achieve those objects, namely Human Dignity, Freedom and Liberty. R. G. Ingersoll says, “what light is to the eyes..... what air is to the lungs what love is to the heart, liberty is to the soul of man.”

The people of this country have given unto themselves a Constitution which is supreme and provides for parliamentary system of Government. Sovereignty lies with the people. The elected representatives constitute the Legislature expressing the will of the people through laws setting course of conduct of people. Faithful execution of the laws is the responsibility of the Executive which is accountable to the Legislature. This is how the administration

¹Text of the address delivered by Hon'ble Mr. Justice Brijesh Kumar, Judge, Supreme Court of India, on May 4, 2002, in the seminar organized by High Court Bar Association, Law Institute and Sapru Law Institute, at Allahabad.

²Westperry V. Sanders 376 US (1) 17, 1964 By Justice Hugo L. Black.

and the matters of administrative policy come within the purview of the Executive.

So far the people are concerned, our Constitution guarantees certain rights e.g. right to life and liberty may right to live with dignity, right of equality before the law and protection against any kind of arbitrariness at the hands of the Executive and the State. It also ensures right to education, right to choose an avocation and profession of one's choice, right to achieve excellence in any sphere of human activity. Right of Freedom of expression and right to know and transparency are also guaranteed to the people. In everyday life, protection is needed to safeguard these rights or to seek their enforcement through the Court of Law. This is how judiciary comes in, to play its most important role to enforce the Rule of Law.

Under the Constitution, Judiciary is to act as a watch-god and to keep a vigil on the Legislature as well as on the Executive so as to check any transgression in exercise of their power if it is going beyond the limits prescribed by the Constitution. The democratic system loathes exercise of legislative power in excess of legislative competence or in derogation of constitutional provisions, simultaneously people do not approve of exercise of executive power in excess of their limit. Every legislative and Executive action is to pass through the test of constitutionality if challenged in Court of Law. Conferment of rights on the people alone will have no meaning if no effective machinery is provided to enforce them and to check their violation. Garner once said: 'a society without legislative organ is conceivable but a civilized state without judicial organ is hardly conceivable'. Functioning of a democracy in a country is well gauged by the kind of the judiciary and the judicial system it has. Lord Bryce had aptly remarked: "there is no better test of the excellence of a Government than the efficiency of its judicial system". He further goes on to say: "if the law be dishonestly administered, the salt has lost its flavour. The lamp of justice goes out in darkness, how great is its darkness". It indicates the need of an independent and impartial judiciary otherwise the Government may function in an arbitrary manner, there being no organ to check or resist the violation of Rule of Law. It has been remarked once that the laws may be sound and just but unless they are applied in right and impartial manner, it loses its significance and justice will be a far cry. It also implies that Judges should be completely immuned from any kind of influence in discharge of their

judicial function. Democracy permits free access to its people to the Court of Law, parties when go to the Courts, they go with an assumption that the dispute shall be decided impartially in accordance with the law by judges who are independent and also independent of their personal beliefs.

About the role played by Judiciary, Lord Irvine once said: "Let me begin with a recognition that the significance of the "democratic deficit", the want of parliamentary control over the Executive in recent years, have been, to an important degree mitigated by rigor of judicial review". Praising the high quality of judicial review in his country he further observes that it improves the quality of administrative decision making. This throws light on one of the aspects of judicial working and its scope and extent and the circumstance in which it is expanded and the extent of impact it may have on the administrative decision making as well.

Coming back to the function of judiciary in a democracy through application of Rule of Law, Lord Bridge Harwich observed in relation to position in England "the maintenance of Rule of Law is in every way as important in a free society as the democratic franchise. In our society the Rule of Law rests upon twin foundation - the sovereignty of the Queen in Parliament in making the laws and sovereignty of the Queen's Courts in interpreting and applying the laws".

In relation to the judiciary in democratic countries, sometimes a point has been raised by some critics about the un-elected judiciary which exercises check and control over the other elected wings of Govt. According to them un-elected Judges cannot claim to have a mandate of the public for their decision. But this idea could not catch up generally with the people and in England the idea of candidates for judicial office, entering into an electoral matter, has been considered to be hostile to the very concept of a neutral and impartial judiciary. Lord Steyn in his write up "The Weakest and the Least Dangerous Department of the Government" observed: that so far he knew there was no support in England for the idea of elected Judges. Edmund Burke said the neutrality of impartial Judges can stand guard over fundamental requirements of a democracy.

Important fall out thus is that for successful functioning of democracy, independent, impartial and unbiased judiciary is essential. The Judges'

independence shall not permit any kind of influence to affect his decision. They must also have, independence from any kind of political or executive interference. In this connection quite often a question has arisen in our country as well as other democratic countries including England about the finances for the judicial system so as to eliminate any chance of any influence on that count too.

Historically in British the independence of Judiciary came a little late where at one time Judges used to be in office during the period of good behaviour and pleasure of the King. Later however by Act of Settlement in 1701, giving security of tenure and removal of the Judges upon the Address of both Houses of Parliament brought change in the position. Independence of Judges as it is obvious is main concern and valued under American system too. And it was said by Hemilton that Judicial independence was essential to ensure impartial administration of justice and to enable the courts to act a check on the other branches of the Government. But ups and down have been seen in different countries and once President Roosevelt threatened to pack the Court with additional justices in order to salvage the New Deal. In our country also the idea of committed judiciary was once floating but it was difficult to bear the onslaught of the public opinion against such an idea. In Germany also judicial independence has been provided to the Judges. The German Constitution does not say anything about removal of Judges and all that is said is that the Judges are independent and subject only to law. Whatever control is there it is with the Judges themselves alone. In our country too, as all of us are aware that Judges are provided full independence and protection from any kind of chance of being influenced in any manner in their functioning. The removal is by impeachment by the Parliament.

There is some murmuring almost universally about the accountability of the Judges were they may exceed their authority or lose objectivity and independence. Therefore, some have expressed a balancing between independence and accountability. On this question it has been observed by David P. Currie in one of his Articles "The critical question is neither how to make Judges independent nor how to control them but rather how best to reconcile the complete values to find the happy medium the golden mean, how in other words to optimize the costs and benefits of judicial independence and accountability". The means of accountability, if at all necessary (debatable

question) have to be found out with care which may not in any manner diminish independence of the Judges. The author in "Law and Contemporary Problems" observed about American situation saying "But I think the principal reason our untidy arrangement works is that the players respect the system. The Judges know they are expected to follow the law; Legislature and Executive know the Judges are supposed to be independent. Nobody want to destroy the system – a system in which no one has absolute power in which there are effective checks on all branches of Government in which Judges are both independent and accountable in which we eat our cake and have it too. It is impossible, of course. But it works. And it will continue to work so long as we believe the impossible dream."

One of the aspects which also needs a mention is how far the personal views of a Judge and his belief in any philosophy can and should influence his decision making. When I joined the Supreme Court, one of my dear friends, a retired Judge of another High Court while felicitating me wrote: "Judicial power is not meant to give effect to the will of the law alone – it should also be exercised and often exercised to given effect to the will of the Judge with enlightened disposition tempered with broad vision". In writing this he definitely had the backing of what Cardozo wrote in his book "Judicial Process" so as to indicate my point of view in support of objectivity in the process of decision making, I may only be permitted to quote what I wrote back him:

"..... Ideally, the will of the Judge must take a back seat while the force of the exercise of the judicial power must be propelled by the law and the existing circumstances so as to appropriately apply the same with some wider comprehension. It is true personal element, in looking at a problem may not escape Judge's own experience and view. To attain absolute objectivity may sound a bit utopian but the extent to which it can be attained would depend upon the effort made and capacity to detach self from the rest. Perhaps easier to say than to do. Constant effort however, to achieve the ideal, and unceasing endeavour for the same may be a better pursuit. Cardozo wrote about sub-conscious forces in the judicial process and also emphasized that it was difficult to say that personal measure is eliminated altogether in decision making. You know it well when he has beautifully described it as "inescapable relation between the truth without us and the truth within' but he is also perhaps inclined to prefer judicial process and decision making without personal

element," when he says "the training of the Judge, if coupled with what is styled as the Judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions. It will help to broaden the group to which his subconscious loyalties are due. Never will these loyalties be utterly extinguished while human nature is what it is". Interestingly, he also writes; "the eccentricities of Judges balance one another. out of attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements...."

I have always believed that a Judge must imbibe and develop the capacity and ability to act as one who has specialized in process of decision making. He has to be different and above those who are not entrusted with his onerous responsibility. They cannot be captive of their environment and circumstances of grooming not to the experience of their own. They must develop a sense with the help of which they can come out of their shell and see the things as they are. They must have the ability to see the things independently from the point of view of others by keeping themselves in position of those in respect of whom they have to make a decision. The Rule of Law is the only safeguard in the matter of decision making and to protect the democratic system and its values. Personal views, faith and philosophy must be kept aloof and should not be thrust of inflicted upon those who are to be affected by their judgments. Judicial office and exercise of judicial power is not the appropriate means to implement one's will, whim or views and philosophy of any nature. Whenever it may seem to a Judge that there is a conflict between his personal ideas and views and the laws, since he is called upon to implement and uphold the Rule of Law, the former has to give way and there is no option but to adhere to the latter. This is what is expected by the people depending upon the laws and the Rule of Law which is essence of democratic society. They may not be prepared to accept the personal views and prejudices of the Judges and rightly. Attainment of state of mind of detachment from one's surroundings and circumstances, personal views and faith must be a constant endeavour to achieve, and it is an effort which is always in process of perfection.

The democracy without a strong and independent Judiciary has no meaning. It ceases to be a democracy. Some one has rightly said take out the wing of

Judiciary from a democratic polity see then what remains. It would only be power and absolute power unchecked and infinite. It may result in anything but governance by democratic means. Needless to say that in our country the Judiciary has a successful and good record of upholding and maintaining the democratic principles of governance and Rule of Law and any aberration there from has always evoked desired response.

