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# LAW STUDENTS, LAWYERS AND JUDGES IN THE NEW MILLENIUM

*By*

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Towards the end of the twentieth century - and particularly in the last twenty years, tremendous advances in science and technology have broken all predictions and have brought about revolutionary changes both in the office and at home. With the internet, the access to knowledge has become unimaginably easy. This year we are also celebrating the fiftieth year of country's Constitution and fifty years of our Supreme Court. There have been great changes in our Court-systems after 1950. Fundamental Rights and the writ jurisdiction in the High Courts and Supreme Court have given opportunity to citizens to challenge the validity of legislative and executive action. With the enlargement of the meaning of the word 'State' in Article 12 of the Constitution, various other authorities and entities have come under Part-III of the Constitution. Judicial review powers have expanded from time to time, Judges have started developing not only the common law but also the Constitutional law and the Administrative law. With public interest litigation coming to stay, judicial activism has increased. The Judge too has become a lawmaker, though invisibly. Meanwhile the Constitution has suffered a large number of amendments in the last fifty years and the power of Parliament to amend the Constitution was challenged and this has led to the evolution of the principle that - even if fundamental rights can be amended, - the "basic structure" of the Constitution cannot be altered. This has been laid down in the famous *Kesawanada Bharathi* case by the Supreme Court of India. Democracy, rule of law, separation of powers, equality, liberty, secular form of Government, judicial independence *etc.*, have been identified as important facets of the "basic structure". Judicial activism has led to the need for judicial restrains and judicial accountability. Meanwhile, law schools have proliferated, lawyers are annually added by about a lakh and there are more than six lakhs of them today. There are complaints that standards at the Bar and on the Bench have come down drastically. Litigation has increased along with the faith of the people in the Courts, resulting in huge backlog of cases. It is at such a juncture that we are taking off into the twenty first centure. We have, therefore, to discuss today about the kind of law students, lawyers and Judges we need in a new era and about the role which the Courts have to play.

Where do we start the debate? Should we start with the role of lawyers or about the role of Judges? In my view, it is neither. We shall have to start with the "basic structure". I am not speaking about the 'basic structure' of the constitution. I am speaking about the basic structure of the judicial and legal family's edifice. The basic foundation is, you will agree, the law

school. Our discussion must, therefore, inevitably start with the student in today's law schools. If the law schools maintain good standards and produce good students, the newcomers will first improve the Bar. A good bar will obviously produce good Judges at all levels. That is the ultimate end. Therefore, we have to first start our discussion with the 'law students', that is to say, the 'lawyers-in-the-making'.

When I was Chief Justice of Delhi High Court, I was included as a member of a three-Judge Committee appointed by the then Chief Justice of India, Justice *M.N. Venkatachalaiah* to go into various aspects of 'Legal Education, Justice *A.M. Ahmadi* (as he then was) was its Chairman and the then Chief Justice of Gujarat, Justice *B.N. Kirpal* (now Judge, Supreme Court) was the other member. We made various recommendations in consultation with the High Court and the Chairman, Bar Council of India and Chairman of UGC. These recommendations have been accepted by the Bar Council of India as also the Government of India and are under implementation in the last six years. We recommended that a retired Judge of the Supreme Court, a Judge of the High Court, the Secretary, Law, Government of India, and the Secretary of UGC should be inducted into the Legal Education Committee of Bar Council of India. This has been done. We advised the closure of substandard colleges, the starting of new colleges on the model of the National Law School University, Bangalore. This is being done. We advised change in the curriculum, the introduction of the Langdell and case method and problem methods, the restriction of theory marks upto about 20 per cent in the law examinations and the rest of 80 per cent to be allocated for legal problems and also for participation in moot-Courts, seminars *etc*. For the purpose of the above 80 per cent marks, students could even be allowed access to books. We also recommended continuous legal education. These two last mentioned recommendations are yet to be implemented. These two recommendations are, in my opinion, important and urgent. If 80 percent marks are to be allocated to legal problems, and books are also to be given to the students, then there can be no grievance or hardship. It will then be known whether the student has secured an in-depth knowledge of the subject. Whatever be the solution proposed by the student for each problem, importance is to be given to the line of reasoning and the method of approach. It is indeed possible that some questions can have more than one solution. This system of examination has various advantages. It will eliminate copying. In such a method, even if a teacher in the examination-hall wants to help a student, it will well-nigh be impossible. One other important benefit of this system is that students will feel compelled to attend classes and study hard. Or else, they will not be able to tackle the questions. In my, opinion, it will not be difficult for the Universities or the Bar Council of India to generate a data bank of a few hundred or thousand questions convening various subjects. The students taking such examination will then be ready to deal with the legal problems from the day on which they enter the profession. I hope this recommendation will soon be implemented.

I then come to a connected problem which is equally important while discussing the above issue. I have been repeatedly asked: 'Sir, Where are the good teachers?". In my view, this aspect is very important. In fact, there is today a great need to update the knowledge of our law teachers and also to bring in a new generation of teachers to implement various new ideas and in particular the above system of examination. This problem of dearth of teachers can be handled only by establishing adequate teacher-training institutes and exchange programmers in collaboration with leading Universities here and abroad. There is then

a need for establishing All India Institutions to train law-teachers in various zones. All these things, in my opinion, are necessary if the quality of our law schools is to improve. Today it is accepted that several students who have passed out from some law colleges in the country and who have joined the bar do not have adequate knowledge of the law. I have been told reliably that some young lawyers while dealing with a problem on the criminal side, do not know whether to look into the IPC or Cr.PC. Some do not have any idea that Order and Rules are part of the Code of Civil Procedure. Some have never read a statute like the Contract Act in full nor the partnership Act nor the Hindu Succession Act, 1956 nor other statutes. They have only read some small books containing a few questions and answers. They have not heard of standard commentaries on most of the subjects. You will agree that there is a lot of work to be done in the field of legal education. Even so, it is gratifying that a few law schools are producing very good students. Having regard to the growth in population, we may accept that we require more lawyers, but we want lawyers having good or adequate standard and not sub-standard lawyers. Thus, the primary need in the new millenium is to overhaul, restructure and strengthen the system of legal education in this country.

We shall next take up certain issues concerning the legal profession relevant in the new millenium. The profession is, as we have already noticed, the bedrock of the judicial system. While dealing with these aspects concerning the profession, I have to place before you certain existing realities and if my lecture is to be meaningful, I have to touch some sensitive issues however unpalatable they may be.

As already stated, we have today lawyers running into a few lakhs in the country. Even year, it appears about a lakh of them are getting added. Of these lawyers, some no doubt come from prestigious law colleges and some from average colleges, but the bulk of them are coming from colleges with below-average quality. Some are located in remote rural areas in the States. Most of these students come into the legal profession. There was a time when invariably every junior lawyer used to work in the office of a senior for a few years so as to gain legal skills and experience. But today, this is not so with most of these young lawyers. From day one, they are on their own. They want to earn from the first day - whether they are fully equipped or not. Pursuant to our Legal Education Committee's recommendations, the Bar Counsel of India made rules to re-introduce the apprentice system. Unfortunately, these rules have been struck down by the Supreme Court on the ground that this system cannot be introduced by way of rules made by the Bar Council of India. But it must be noted that the Supreme Court has not observed that apprenticeship is not necessary. On the other hand, it positively emphasised the need for apprenticeship. It felt that the Advocates Act itself is to be amended. In my opinion, necessary Legislation is to be made in this behalf at the earliest. I am aware that there will be some opposition from some quarters (particularly from those from leading law-schools), but if legislation is made pursuant to observations of the Supreme Court, such objections cannot be allowed to prevail. Further, during our generation and that of our forefathers, there was such a prescription of apprenticeship in vogue all through. When standards in law schools have gone down, the apprenticeship, in my view, is the need of the hour. While considering this aspect, one has to keep in mind that the bulk of the students are coming out of law schools which do not provide adequate legal basics. We should not go by the standards of National Law School or such other goods schools. This suggestion is to be applied as an all India matter.

I shall next come to the need for intensive 'continuing legal education' for lawyers below 5 years standing and yet another type of training for those below 10 years standing. In addition, special training is necessary in special areas like intellectual property, environment, arbitration, human rights and other new subjects — apart from training in the traditional subjects in the substantive and procesural branches. This exercise to be undertaken by the Bar Council of India or the State Bar Councils and the Bar Associations at the District level. Continuing legal education for lawyers is a worldwide phenomenon all over the globe in most countries. There is, in my view, nothing wrong in realising that our knowledge of law and the level of our skills of drafting, legal research and study and argument have to be augmented from time to time. At my level, nearly forty years after joining the Bar and even now as a Judge of the Supreme Court, I feel that what I do not know is more than what I know of the law. Law is a mighty ocean. Every case which comes before us presents us an opportunity to read and do research and think of enlarging our knowledge. You are aware that judicial officers are given training from time to time in our country. Then why not lawyers? In the USA there are Institutes meant for continuing education, which Judges of the Superior Courts not only from the USA but also from other countries attend. It is only when we realise that there is so much of law that we do not know, that we can condescend to take lessons in the law. This requires great humility on the part of the lawyers, judicial officers and Judges. It is, in my view, a feeling that we know everything about law and there is nothing to add to our knowledge, that gives rise to opposition. Then less we know, the more of this feeling. We have to come out of this delusion. Today there are so many new developments in the legal field in almost every branch which we are unaware of. One should only refer to new legal literature - both in new law books and the law journals of various countries. It is only when you reach the ocean that you can discover how vast it is. I do not mean to say that 'continuing legal education' for lawyers must be made compulsory. In some countries where compulsory training was introduced, the lawyers attempted a mechanical pass rather than imbibe the true spirit of learning the law. In other words, lawyers must be made to realise the real efficacy of such an exercise. If the lessons are made interesting and useful, the lawyers will, in my view, come and join in the programmes voluntarily.

Legal skills are at the heart of the profession. Skills can, to some extent, be taught in the college. But skills have to be acquired by personal experience or by learning from the experience of seniors. Experience transmitted from our seniors to us saves us time running into scores of years. It requires great patience for young men to observe the skills of expert lawyers and emulate and practice those skills. How many young lawyers today are prepared - after their work in the Court room is over early - to sit in a Court hall and observe the way any senior lawyer or a good lawyer is arguing in Court or the way any Judge is proceeding with the case? Lawyers have to learn to stay back in the Court till the end of the Court's sittings and observe. Only then, can they see how a witness can be examined in chief or in cross or a case being argued. At other times, there is need to sit in the library and read the law journals or law reports. Some times, it is necessary to discuss with other knowledgeable lawyers to clear one's doubts. Indeed if one has the urge to learn, one can know where to look for or seek help from. Unfortunately, with the advent of writ jurisdiction and the Motor Accidents Claim cases and Land Acquisition cases, hard work and research have receded to the background. These branches have contributed to deterioration even in the ethical standards at the Bar. Today, in a

writ petition, one can easily get away by using the words 'arbitrary and capricious and therefore violative of Article 14'. The precision and hard work, which at one time was the hallmark in civil cases, has given way to a casual and easy-going approach on the civil side - both by the lawyers and Judges. Then, on the criminal side, young lawyers think that getting a bail order is the end of their work for the day. These attitudes - if I may say so, without meaning any disrespect to our young friends - should change and a more serious attitude to the profession must set in, the new millenium.

Today, we see our young students who go abroad to foreign Universities in sciences as also in law doing extremely well. Nobody wastes time there are no strikes in the colleges nor in the Courts. People are absolutely serious in the work till they acquire their qualification or make a mark in the profession. Not a minute is wasted. In fact, we are reading news items that several countries want our computer professionals. If that be so, why are we fighting shy of improving legal standards in our own country? Will there be a day in the new millenium when there will be a demand for our lawyers to be called by litigants abroad to argue elsewhere, in Courts or arbitrations. If we want to resist foreign lawyers coming here, should we not create a situation when those in industry or in multi-national companies located in India would think of engaging our own lawyers? By the time, under the WTO foreign lawyers set foot in India, should we not create a situation where the foreign lawyers are not needed in India? On the other hand, a nation-wide strike went on for a long-time in an emotional setting without examining what was the need of the hour. The Law Commission of India was not, as clarified by its Chairman, Justice B.P. Jeevan Reddy, welcoming foreign lawyers. The Commission was involved in an exercise of regulating or restricting the role of the foreign lawyers with a view to protect our own local lawyers. But, in spite of the elaborate clarification given in the media by the Law Commission, nobody was even in a mood to listen. Effigies were burnt. The Law Commission's moves were misunderstood. Nobody realised that it intended to protect our Bar rather than to periodically affect its interests. I do not know why moffusil Bar Associations went on strike on the issue of foreign lawyers. I doubt very much if, any foreign lawyers would even intend to address a Munsif Court or a District Court in India. Lawyers as a whole did not try to understand what would be happening in a few years under the WTO and what steps our Bar would have to take in the present. In matters involving the raising of our standards to equal the capacity of any foreign lawyers, particularly in fields like arbitration, intellectual property, environment, or corporate law, an emotional attitude is most unwelcome, for it will only keep us blind about the realities even of the near future.

I shall next refer to another peculiar ailment of the Indian Bar, before I make some positive suggestions. For quite sometime, strikes by Bar Associations have been rampant. There are guidelines issued by the Supreme Court a few years ago that strikes are to be avoided at any cost. A rare exception was mentioned by referring to a situation where the independence of the Bar or of the Judiciary or of the rule of law is under jeopardy as was during the Emergency. But, unmindful of all these guidelines, strikes go on. In one State, I am told, there is a continuous strike on fixed days at regular intervals every month for the last several years for a separate Bench of the High Court. There are again strikes for so many unjust causes that you will be suprised to note. In one place in the North, I am reliably told, that a local Bar went on a strike because a dog which used to live in the Court compound and towards which the lawyers had affection died! Another instance

was one where a clerk of a lawyer died! I do not deny that on certain issues between the Court and the Government on the one hand and lawyers on the other, there can be some causes for friction. But strikes are not the remedy. By going on strike, the bar is paralysing the administration of justice and preventing justice to be rendered to the litigats and the cases which are listed on those particular days have to be simply adjourned. The Delhi High Court recently held that the strike by the Bar amounted to contempt of Court as also professional misconduct. It is now a reality that, at the drop of a hat, strikes are organised mostly by those lawyers who do not have work or who can afford to abstain from Court. The whole Bar and the judiciary is under seize by a small group of relentless lawyers. Some time ago when some Judges from the American Supreme Court were on a visit to India there was a strike by lawyers, reported in the news papers. It appears, those Judges were suprised and asked how "self-employed professionals could go on strike"! I wish those who organise strikes go abroad or be shown the orderly working of Courts in other countries and the dignified manner in which the members of the Bar conduct themselves. It is necessary to know how distant we are today from the standards laid down by our forefathers at the Bar or from the contemporary standards abroad. Can the members of the Bar in India on the rolls take an oath today that they will not go on strike in the new millenium except on such rarest occasions as mentioned above? can we make it a condition on the date of enrollment for a lawyer to take an oath that he will not go on strike? When there is a strike, thousands of litigants who are expecting some result to come out go home disappointed. Do you know that in some Courts, where pendency is heavy, the next date of hearing will be after six months or even one year. When some of us have our own personal cases in Courts which get adjourned for years, only then can we realise the gravity of the harm done by strike by lawyers.

Now I shall come to certain positive aspects. Today, we are having a situation where the technology invented by computer scientists can help and go a long way in improving the standards at the Bar. There are various software programs for lawyers which can help them render better services to their clients and better assistance to the Courts and Judges. For example, lawyers can receive various standard formats for drafting pleadings in civil cases of various types - plaints, execution applications, company petitions, MACT applications, complaints in consumer Courts; drafting various types of applications under the criminal law/drafting appeals, revisions. Software can be made available for drafting various types of instruments/documents to be filed before the revenue and registration authorities. When a case is filed a check list in the computer can tell you what defects remain to be cured before the Court can receive the case and register the same. Case law of the Supreme Court and the High Court is now available in CD Rom. I hope that computers will be used more and more to improve drafting techniques and to add to the lawyer's knowledge of law. Cause lists of the Supreme Court and High Courts are now on the Internet by the evening. I hope, the same thing will happen in the lower Courts so that lawyers can arrange their work well in advance the previous day.

In my view, three other important procedures remain to be introduced in our country soon. One is the need for written submissions in the Court, before oral argument. The second is limitation as to time for arguments. The third relates to the importance of alternative dispute resolutions systems.

I shall take up the question of written submissions before the oral argument. The

time of the Court is important and it must be ensured that there is thorough preparation and cases are not normally adjourned in the course of arguments to enable the Counsel to look up something in regard to facts or law. In most countries including the USA and UK, it is mandatory to file written submissions before the oral argument. The length of the page and number of pages are restricted. This system has its advantages. It tells the lawyer in advance that he will not normally get a second opportunity to look up facts or the law and this makes him work hard, imagine or take into account the various possible arguments of his opponent and the questions that a Judge is likely to put. It is a part of the procedure that no fresh points which are not there in the written submissions will be allowed at the time of the oral argument. The chronology of events is a must. Such a chronology is mandatory in various High Courts, including the Delhi High Court and the Supreme Court. A file is not received unless a detailed chronology of events is set out at the first page. Normally the chronology runs into four or five pages. Today, it is a common feature that Counsel will be searching, during oral arguments, to give the dates of important events, when asked by the Judge. I some times wonder how any preparation is at all possible for a lawyer without a complete list of dates. It will be realised that several crucial points of importance for a case can be spelled out only if one knows that manner in which events have happened. Courts take serious view if any important date is omitted. Sometimes, after the defendant or respondent files his pleadings and the plaintiff or petitioner files his further rejoinder, a fresh consolidated list of dates is to be filed.

In the written submissions, one has to set out the submission in detail with reference to each issued, by referring to the oral or documentary evidence and the relevant statement of case-law. If this is mandatory, lot of home work has to be done by the lawyer before he starts to argue the case in Court. Both sides are to file their submissions simultaneously and it is not like one side filing its/his written submissions first and the other side filing a reply. Normally, not more that 5 or 10 pages are to be allowed for each side. The requirement of brevity of the written submissions makes it precise and definite. The written submissions filed in the case will be helpful to a lawyer for it will enable him to start off his oral argument without much fresh preparation for he is the author of written submissions. Even if the case is taken up suddenly, he can be ready for the arguments.

The advantage of written submissions by both sides is that the Judge will feel it very handy while considering the issues and he can know which document or witness is relied upon for any particular purpose. Of course, I have to add a word of caution. A Judge is not supposed to copy the submissions of any one side verbatim. The written submissions will be part of the record before the appellate Court and it can find out what was argued in Court and also see if the Judge in the Court below had applied his mind to the rival submissions. This is so far as written submissions are concerned.

I shall now deal with the second aspect as to limitation of time for oral arguments. Today, having regard to the large volume of cases in Courts, it is time that the length of the oral argument is restricted. You must have known that in the US Supreme Court, each side has only half an hour, and as soon as the time is over, a red light comes up and the Counsel has to stop immediately. In other Federal Courts in the US the cause list itself mentions the time limits agreed to before the concerned Court officer or the time limits fixed by him. Some cases are allotted 10 minutes, 15 minutes or so on for each side. The time allocated for a side includes the time consumed by the Judge

while putting questions. I shall give you an example of what happened in a US Court when we visited that country recently. A Judge was telling the lawyer that he has five minutes more to spare out of his allocated time and asking him if he would like to reserve it for his further reply to his opponents' submissions. I may say that, in the beingning, if this procedure is introduced, Courts can be flexible for some time with a plus 25 per cent extra till the lawyers get accustomed to this procedure.

I know there will be some resistance to these procedures in the beginning but soon, Counsel will realise the value of these procedures. Counsel can know when to expect his case in the cause list to be reached and when the case above his case is likely to finish.

I shall now come to the third aspect referred to by me earlier. This relates to the mandatory alternative dispute procedures. Sooner or later, these procedures must be introduced. In our country, we are now accustomed to a system where every case - big or small - is to be decided by the Judge by way of adjudication. This is a mind set from which we have to come out. In the USA only 12 per cent of the cases go for adjudication by the Court finally. The rest of the cases are all decided at the stage of negotiation or mediation or conciliation. Lawyers participate at these stages vigorously and honestly without compromising the interests of their clients. In commercial cases or in matrimonial cases and for that matter, in every type of case, a litigant saves time if his case is settled without much of a trial. Lawyers do not lose anything so far as their fee is concerned for they can bargain for a decent fee even if the matter is settled. Parties leave the Court as friends with satisfaction and with least wastage of time.

As a matter of professional ethics, it is, in my view, necessary that lawyers have to limit the adjudication by the Court to the minimum. In our country, there is a habit of disputing all facts set out in the pleading of the opposite side or putting him to strict proof. You will find that in every suit by a Bank the authority of the person who signed the plaint is disputed without any justification. There may be unimpeacheable documents in another case but the opponent is compelled to prove all the documents by calling witnesses. In several cases, handwriting experts are examined on each side, without any justification. Professional ethics demand these practices to be given up. That is why, in most countries abroad, Courts will impose heavy costs on the side which indulges in such attitudes which result in unreasonable consumption of Courts time. I would also suggest that while part of such costs should go to the opposite side who has been unnecessarily compelled to produce evidence which was not necessary, the other part should go towards the Court's fund for legal aid. Of course, Judges must learn to impose costs judiciosuly.

That brings to an end the new attitudes which in the Bar, in my opinion, should adopt in the new millenium.

I shall finally come to the role of Judges. In a lecture delivered last year before the A.P. Judicial Academy, I have referred to several aspects of a Judge's conduct which require to be modified. I shall briefly summarise some of the more important aspects. Judges have to sit in Court at the appointed time and sit atlast till the Court time is over for the day. In several Courts, it is the experience today that most Judges do not sit in Court on time or they rise very early. Members of the Bar sometimes do not know when a Judge will sit in Court or leave the Court. The next aspect is about giving a reasonably good hearing. It is the complaint of several lawyers and litigants that in a good number of cases, Judges do not give a proper hearing to the extent

necessary. Of course, I am not referring to lawyers who go on repeating or who are irrelevant. The other aspect is about prompt delivery of judgment within a reasonable time. There are several instances of judgments not being delivered for months and in some cases, for years. A stage has reached with regard to some Judges that applications are filed in higher Court to direct the Judge in the lower Court to deliver judgment. Again, one finds that in some cases, the judgments are bereft of adequate reasons. The giving of adequate reasons in a judgment by a Court of law need not be stressed for the first time today. In a case decided by me in the Supreme Court (under Employees' Provident Fund Act), I have referred to the principle that is now accepted in Australia that a litigant has a right to a reasoned judgment. It is only when reasons are giving by the Judge that the lawyer can know that the Judge has understood the case and the litigant feels that no other extra-judicial considerations have prevailed with the Judge. Further, if the appellate Court has before it a reasoned judgment of a subordinate Court, it will be easier for it to Judge the correctness of the judgment. I may add that judgments of superior Courts must necessarily be reasoned because they act as precedents in the same Court and are binding on the subordinate Courts. Today, it is not unusual to frequently come across order in important cases - even in original writ petitions or criminal or civil appeals, like "No merit, dismissed". Inspite of several judgments of the Apex Court that this is not the way to dispose of cases, still some cases are disposed of as above and this puts a lot of strain on the higher Court. Firstly the appellate Court has to find out what the case is about, what the disputes are and what would have been the ostensible reason for dismissal of the case. Sometimes, the conclusion may be correct but to find that out, the appellate Court has to spend the same amount of time as the trial Court has already spent. Is the appellate Court intended to supply the reasons for confirming a judgment of the lower Court? Again, if reasons are available on record, an appellate Court can easily find out if the reasons are faulty. A reasoned judgment is the basic fundamental requirement.

Then comes the importance of the Sense of justice. Some Judges are interested in fast disposals and think that a large number of disposals would bring credit to them. I do not agree with this philosophy of disposals. A litigant comes to Court for justice and expects a good hearing and a proper adjudication on merits. Judgments must be qualitative and mere numbers will not help.

A Judge has to conform to the law. If it is possible to stretch the law within reasonable bounds he can do so but he cannot go about the law. Long back *Cardozo*, J., said in a famous quote:

> "The Judge, even when he is free, is still not wholly free. He is not innovate at pleasure. He is not a knighterrant at will in pusuit of his own ideal beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to "the primordial necessity of order in social life". Wide enough in all conscience is the field of discretion that remains".
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> (The nature of Judicial Process (1921))

But that does not mean that Judges cannot be creative artists. When a Judge fills a lacuna in the law, the scope of his judicial law-making is like the scope of the gap the law creates. This gap is not infinite. One must try to discern where he is going beyond the bounds. *Cardozo* said:

> "If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the Legislator gets it, from experience and study and reflection, in brief, from life itself.....He (the Judge) legislates within gaps. He fills the open spaces in the law". (Cardozo Judicial Process) (1921)

That was what *Holmes*, J., started earlier:

> "I recognise without hesitation that Judges do and must legislate but they can do so only interstitially; they are confined from molar to molecular motion. (*Southern Pacific Co. v. Jenses* (244.4.S.205,221) (1917)

A Judge must notice that some bounds are set by the Constitution, some by the statute in question and some by the stautory rules. Precedents and binding authorities are entitled to respect.

Some Judges said that judicial activism has become a necessity because the Legislature is dormant and the executive inactive. Of course, this is their personal opinion. Some Judges have also stated that when the Legislature and the executive are inactive, the normal activity of the judiciary is in itself being wrongly characterised as 'judicial activism'. There can be some truth in this statement but I would say that in recent times, there have indeed been several cases of excessive judicial activism sometimes even intended for sheer publicity in the media. Public interest litigation has come to be called, in some quarters, 'publicity interest litigation'. There were, it is recorded instances where some Judges had prompted some journalists to come forward with public interest cases. Apart from these extreme situations, Judges are to keep in mind that judicial restraint is necessary in matters calling for some relative judicial activism. Apart from the limitations mentioned above it is necessary, while dealing with Constitutional matters that Courts have to have regard to the principle of separation of powers. *Hamiltion* said long ago :

> "The judiciary.....has no influence over either the sword or the purse" (The Ferderalist, 480) (B. Wed.) ht, 1961).

It has recently been held by the Apex Court that even if the Apex Court has some superior powers to pass orders to meet the ends of justice under Article 142, the Court cannot circumvent statutory limitations validly imposed.

Yet, within these limitations, public interest litigation has done a lot of good in various areas. I do not propose to list them out for here I am only emphasising need for creative judicial activism within the parameters of the Constitution and the law.

Thus, Judges must make law but within the reasonable bounds. I shall conclude by referring to a famous statement of Lord *Reid*.

> There was a time when it was thought almost indecent to suggest that Judges make law. They only declare it. Those with a taste for fairy tales seem to have thought that in some *Alladin's* cave, there is hidden the Common Law in all its splendour and that on a Judge's appointment, there descends on him knowledge of the magic words 'Open Sesame'. Bad decisions are given when the Judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more. So we must accept the fact that for better or for worse, Judges do make law."

(*Reid*, "The Judge as Law Maker J. Soc'y Teachers of Law 22) (1972)

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