SESSION 4: CIVIL PROCEDURAL REFORMS

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PANELISTS:

1. Dr. Sudhir Krishnaswamy, Vice-Chancellor, NLSIU, Bengaluru
2. Justice (Dr.) Shalini Phansalkar-Joshi, Former Judge, Bombay High Court
3. Mr. Hiram E. Chodosh, President, Claremont McKenna College, USA

CHAIR: Shri N. L. Rajah, Senior Advocate, Madras High Court

ABSTRACT:

The fourth session of the second edition of the Indian Democracy at Work Conference focussed on civil procedural reforms. The session bore witness to an enlightening discussion on several aspects of reform including institutionalizing case management in civil courts, mitigating challenges in the functioning of Commercial Courts, and updating pecuniary jurisdictions of civil courts. By the end of the session, there emerged a broad consensus among the members of the panel regarding certain steps that were of paramount importance towards achieving the larger goal of civil procedural reforms; at the same time, each speaker also put forward their own distinct possible solutions for the same.

Opening Remarks By Shri N.L. Rajah, Senior Advocate, Madras High Court

Shri N.L. Rajah, in his opening address, deliberated on ten changes which could be made to reform our civil procedural system, out of which five were structural in nature, and rest were non-structural reforms. According to him, the problems that required fixing at a structural level were:

1. In our country, we have a huge number of law commission reports which have not been translated into legislation. The speaker enumerated some prominent examples, including the 79th report on delay and arrears, 144th report on conflicting judicial decisions, 221st report on speedy disposal, 230th report on reforms in judiciary and 245th report on pendency, delay, arrears and backlog. This rich repository of information on reforms in the civil justice system must be translated into action.

2. There is a complete lack of availability of data on the causes of the problem. Countries like the USA and the UK have an equivalent to the Judicial Statistics Act, under which matters are properly docketed, tracked, classified, and segregated, making it easy to retrieve information on the status of the matter. In India, such detailed information is not available. To buttress his stance, the speaker illustrated that close to 40 lakh of the 2-3 crore cases pending before criminal courts are cheque bounce cases. These cases can be segregated and disposed off easily if granular data on the cases is available. The speaker called for passing a similar Judicial Statistics Act in India.

3. Expenditure on courts as a percentage of GDP is a meagre 0.09%, one of the lowest amounts on the judiciary compared to Germany - 0.39%, UK - 0.38 %, Australia - 0.37 % and France - 0.23%.

4. The judge-to-population ratio is rather abysmal too, with only 20 judges per 100,000 population. The UK has close to a 100, the USA close to 75, and Germany 35. Moreover, of the 20 sanctioned judges, one third of the posts are vacant.

5. Ideally, every litigation which is passed must be accompanied with a judicial impact assessment report, which would give governments an idea as to how much they should set aside financially for the reform to be implemented on the ground. However, this is not the case. The speaker explained his argument with the example of the Commercial Courts Act. Although the union government has passed the Commercial Courts Act, many state governments haven't been able to implement it in the manner it was intended. A PIL has been filed in the Supreme Court to look into the implementation of this Act.

Shri N.L. Rajah opined that apart from the aforementioned structural reforms, there were other reforms which could be undertaken immediately. They were:

1. The Commercial Courts Act calls for every High Court in the country to display information regarding these cases such as cases filed and disposed of on their website. However, according to a study by the Vidhi Centre for Legal Policy, only eight High Courts in the country have even started doing the same. Only the Delhi High Court has executed it with purpose and intent.

2. Another problem of civil justice according to the speaker is the non-segregation of minor matters from the more complicated and detailed ones. In this regard, the speaker opined that the Gram Nyayalayas Act, 2008 must be strengthened to ensure that all non-major disputes be resolved at the village level itself, instead of travelling all the way to the High Courts.

3. The Alternative Dispute Resolution Law, while in place for some time, needs to be translated into action on the ground and properly implemented.

4. The next problem stated by the speaker had to do with the Legal Services Authority Act. The speaker believes India has one of the finest legal aid systems on paper, with all women, members of ST SC, and all children being entitled to free legal services. However, the Legal Services Authority suffers from very scanty budgetary allocation. In

contrast, the speaker commented, in welfare societies, legal aid is given prime importance, citing the example of how the England Bar went on strike after there was a threat to cut down the budget of solicitors officers providing legal aid services.

5. Finally, the speaker called for a revolutionary system of paralegals to improve the quality of our civil justice delivery system. The paralegals currently are poorly equipped with adequate training. This reform has been set into motion as the Skill Development Council of India has accepted the proposal of the Palkhivala Foundation on establishing a system to train qualified paralegals who can contribute to the civil justice delivery in innumerable ways.

Dr. Sudhir Krishnaswamy, Vice-Chancellor, NLSIU, Bengaluru

Dr. Sudhir Krishnaswamy began his address by stressing the fact that Rule of Law was critical for India in the 21st century, and had not received adequate attention in the past. He opined that the debate on Rule of Law in India both, in the popular and academic sphere, has a strange fork - some suggest that the State is too strong, and feel that there is excessive police and regulatory power. On the other hand, there is another discourse that is strongly precommitted to state capacity building. Dr. Krishnaswamy went on to elaborate on some of the work done by Prof. Susan Rose-Ackerman at Yale University, on how building the Rule of Law in a developing society has this bipolar dimension. He then stressed on how in India, there was a lot of emphasis on the aspect of state capacity building, as opposed to controlling the state. He further noted that the concept of Rule of Law in the common law system emerged as a mode of negotiation between various bases of social power, specifically between the monarchy and the nobility in Britain. Identifying such bases of social power in the context of contemporary India would aid in recognising when it is time for a discourse that addresses the dichotomous demands of Rule of Law reform.

Dr. Krishnaswamy spoke on three themes of civil justice. Firstly, he explained the need for an empirical approach that combines with legal doctrine. He stressed that empirically grounded analysis was critical and we therefore need to bring large end empirical data to solving legal issues. He added that former Indian policy discourse has overly relied on doctrinal analysis, and only compounded historical failures in this field. Calling for a fundamental shift in approach to civil justice reform, he observed that the legal fraternity in India has not yet adopted the empirical approach at the scale and intensity required.

The second issue Dr. Krishnaswamy spoke on was static modelling. He opined that a lot of analysis on civil justice reform centred on what economists would call "supply side analysis". In India, he noted, most of the policy reform had historically focused only on supply side analysis. He illustrated that with the example of the judge-to-population ratio, and how it was widely felt that an improved ratio would usher in a new era of civil justice. Dr. Krishnswamy opined that the problem with this approach was that it ignored the "demand" side. He stressed that any analysis of the demand would show us that it was a variable, and not a fixed number. However, in Indian policy discourse, demand is widely perceived to be static. He called for embracing the view that both the demand and supply side were variables. He defined the problem of civil justice reform as an optimization problem - which of the potential disputes can be reasonably addressed given the constraints of the GDP and the development status of the country. By simply increasing the supply, and increasing the strength of judges, we would only heap more cases on them rather than solving the problem, opined Dr. Krishnaswamy. He also illustrated how, interestingly, commercial dispute resolution in the Delhi High Court has slowed down since the passage of the Commercial Courts Act, and more so since the amendment made to the Act in 2018.

Thirdly, Dr. Krishnaswamy opined that we must look at the issue of incentives rather seriously. In our legal system, he elaborated, we have various players with their own separate interests. He added that any attempts at reform must be laser-focused on changing the incentives of the various actors to be able to succeed. He explained through the example of Singapore how

changing the incentive structure for settlement helped in the transformation of the Singaporean legal system.

Dr. Krishnaswamy opined that the preferred approach to legal system reform in India should be to conduct small, natural experiments, and then extract the learnings into the wider system. He called for an understanding of incentives and an almost randomized controlled trial type intervention, along with analysis of the results and later, scaling up the interventions.

To conclude, Dr. Krishnaswamy stated that the effectiveness of civil justice reform can be assured only if it is informed by such empirical methods and frameworks of analysis.

Justice (Dr.) Shalini Phansalkar-Joshi, Former Judge, Bombay High Court

Justice Shalini Joshi began her address by stating that Rule of Law is the bedrock of any democracy as well as the basic structure of the Constitution of India. She stated that Rule of Law means maintenance of public order, protection of rights, and fair and equitable enforcement of justice, including settlement of civil disputes between individuals and individuals and government. The speaker highlighted the differences between the criminal and civil justice system, the latter operating only on two pillars; the bar and bench. She also highlighted the common reasons for the delays in civil disputes resolution, which are:

1. Inadequate strength of judges
2. Huge number of cases
3. Inadequate infrastructure
4. Scanty budgetary allocation - less than 1 percent of our GDP

Next, Justice Joshi highlighted the various initiatives undertaken thus far to resolve some of the issues related to the matter. These include promoting and strengthening alternative dispute

resolution mechanisms, establishing Gram Nyayalayas, laying down timelines for submission of written statements, process re-engineering in the form of computerization and digitization, grouping of matters and the establishment of Commercial Courts. The speaker went on to elaborate the initiatives undertaken by other countries which could serve as models to look at in India. They include:

1. An emphasis on alternative dispute resolution, illustrated by the USA and Canada
2. An emphasis on arbitration, illustrated by Singapore
3. An emphasis on procedural reforms such as making litigation expensive, curtailment of adjournment by imposing heavy costs, track system and case management as illustrated by the UK and Australia

The speaker also explained the UK model in greater detail by referring to a report by Lord Woolf. The major recommendations made in the report that she quoted were:

1. A transfer in the responsibility for the management of civil litigation from litigants and their legal advisors to the courts
2. Management to be provided by a three-tier system; an increase in small claim jurisdiction, a new fast track for cases in the lower end of the scale, and a new multi-track for the rest
3. An enlarged jurisdiction to give summary judgements as incorporated in Commercial Courts Act
4. All cases where a defence is received to be examined by a procedural judge who will allocate the case to the appropriate track, giving scope for pre-trial resolution
5. In large courts, judges engaged with the management and trial of civil proceedings to work in turns
6. The fast track to have a set timetable of 20-30 weeks, limited discovery, a trial confined to less than 3 hours, no oral evidence from experts, fixed costs etc.

7. On the multi-track, case management to be provided by at least two interlocutory management hearings
8. The multi-track cases to proceed according to a fixed time-table

Justice Joshi next highlighted the elements of Australia's model, which included a shift from a laissez faire approach to an acceptance by the courts of the philosophical principle that it was their duty to take interest in cases from an early stage and manage them through a series of milestones. With respect to case management, the speaker opined that it involves exercising effective control, monitoring progress and processes, removing roadblocks, ensuring satisfaction, effective use of judicial resources, establishing trial standards, and monitoring caseloads towards swift, timely and satisfactory disposal of cases. It also entails judicial control over case progression, shifting the responsibility of conduct of litigation from litigants to the court, differentiating between different types of cases, prioritisation, and conducting pre-trial procedures to identify the contentious issues.

Justice Joshi added that M. Soloman and D. Somerflot had identified the following aspects of court and case management:

1. Judicial commitment and leadership
2. Court consultation with the legal profession
3. Court supervision of case progress
4. The case of standards and goals
5. A monitoring information system
6. Listing for credible dates
7. Strict control of adjournments

The speaker stated that despite having theoretical knowledge on case flow management, the challenge lies in effective implementation of the same. She noted that there were no specific rules for case management in the country. She added that while a Supreme Court appointed

Committee considered the suitability of case management systems, the suggested draft rules were not comprehensive. Based on the draft rules recommended by the Committee, certain high courts have drafted rules for trial courts, but there is no uniform system.

Justice Joshi also elaborated on the pecuniary jurisdiction of our civil courts. She noted that it was not uniform across the country and was determined by the Civil Courts Act of each state. While it is less in certain states such as Madhya Pradesh, it was considerably higher in some others including Maharashtra. She highlighted the positive impact of enhancing the pecuniary jurisdiction, which includes:

1. Making courts easily accessible by reducing costs and time
2. Speedy listing, hearing and disposal of cases
3. Reducing the burden on the High Courts
4. Faster disposal restores the people's faith in the judiciary

Justice Joshi concluded by stating that the pecuniary jurisdiction ought to be reviewed and revised periodically, ideally every three years, to respond to a dynamic economic system.

Mr. Hiram E. Chodosh, President, Claremont McKenna College, USA

Mr. Hiram E. Chodosh began by concurring with Dr. Sudhir Krishnaswamy that there is a rule of law paradox. According to him, the judiciary is the best institution to manage such a paradox but it is also the most neglected branch of government.

He went on to note that although an assessment and reimagination of the Indian civil justice process is necessary, recognition and critical reflection on the reasons for the failure of past well-meaning attempts at reform is essential.

Mr. Chodosh enumerated two underlying principles of his approach to civil justice reform through personal anecdotes. First, that any reform or intervention that is too little or too late will

not yield the desired outcomes. It must be timely and must also address the basic structural faults in the system. Second, reforms fail not because of one mistake or error in the reform but because the challenges are simply too great. In other words, a vision to overcome the resistance to change encountered in certain systems despite our best efforts is necessary.

He opined that any effort to reform the Indian civil justice system must tackle at least two structural impediments to change. First, the approach towards thinking about change and executing the same. There is a need to rethink and redo reform. The reform proposals often take the form of negative of the negative which does not address the root cause as to the reason why deficiency is on one side of the normative and not the other. Second, focusing on substantive methods of changing the structural impediments inherent in the system rather than merely adopting superficial proposals. He illustrated the need for a comprehensive outlook through the example of the dilatory Indian justice system. The common response is to develop rules with timelines and deadlines. Such a response by itself, unaccompanied by systems, incentives, and processes to alter the underlying structural dynamics, is inadequate.

He stated that a vision with a set of values that are reflexive is essential for effecting structural reform. According to him, reflexive values entail - committing to our own reform, approaching the challenge afresh every time, experimentation, and a political strategy.

Elaborating on the way to rethink reform, Mr. Chodosh focused on three problems that are commonly encountered in this respect and the thought-process of change. First, a lack of vision as to the intended outcomes from the system. Heeding Einstein's admonition that we tend to measure things that are easy to count but fail to count those that really matter, one must not overly emphasise on comparative statistics and ratios. A vision need not be abstract in nature but rather can be quite concrete, particularly in understanding the role of the judiciary in terms of what it must do, what is it that only it can do, and what it must not do.

Second, failure to confront countervailing structural incentives and values. Systems create vested interests and thereby behaviours which are internalised. The outcomes of a system cannot be altered without confronting the value system of the roles thus played by us in those systems. He then discussed the significance of incentives or values in any system, which foster competitive behaviour over limited resources. These values can either be negatively or positively implicit. Negative when the values are perverse to what people want and positive when they reflect the generally prevalent values. Some instances of such values and incentives are the remuneration and prestige attached to the roles in the system, the managerial role of the judge, and the ideals of authority in the judicial process, whether coordinate or hierarchical.

Third, lack of a coherent theory of change. For instance, a comparative analysis for the purpose of reform is premised on the assumptions that the element that we wish to adopt is in fact the cause of the outcomes that we desire and that it will produce the same results in our systems as well. Furthermore, we often lack an effective practical plan for implementation and also, a measure of success or failure. Mr. Chodosh concurred with Dr. Krishnaswamy on the need for pilot projects on a smaller scale to gain a better understanding of the suitability of a reform proposal.

Every reform is underpinned by a hypothesis of change that a certain intervention shall lead to a certain outcome. A mere change in the procedure or legislation, might not always have the desired effect. Such hypotheses therefore need to be substantiated through empirical analysis, with a clear understanding of the implications of the findings. As the traditional methods of measuring outcomes in the judicial process have been found to be wanting, new ways of measuring justice and holding systems accountable to the new measurements must be created.

Moving on to the practical aspects of bringing about change, Mr. Chodosh first emphasised on the significance of multi-stakeholder participation in the process. Second, beginning from a blank page, unburdened by past practices. Third, opposition to reform must be embraced and the concerns must be addressed. Fourth, pilot projects and experimentation. Fifth, shrink the change

by breaking down the long term vision into small and achievable measures. Sixth, benchmark success by adopting empirical methods and creating a measurement tool. The role of good implementation planning, funding, human capital, and technology integration cannot be overlooked in the process.

Mr. Chodosh spoke about certain initiatives that can go a long way in stimulating further discussion on civil justice reform. A Declaration of Indian Legal Independence can be developed jointly by the intellectual and political classes, civic organisations, and other stakeholders from the grass-roots. This would entail everyone taking responsibility for the structure of the system, free from the colonial traditions. The Declaration can be followed by a national reform process involving vision, true participation, experimentation, measurement and outcomes, implementation plans and adequate support.

Mr. Chodosh then listed five measures to improve the Indian civil justice system -

1. Elimination of judicial rotation which is a product of British distrust. In addition, elimination of rotation of caseloads is also necessary to facilitate accountability of adjudication of a case from beginning to the end.
2. Vastly restrict the scope of appeals. Appellate rights fracture and disperse cases in a way that is uncontrollable resulting in discontinuous proceedings.
3. Move towards continuous proceedings.
4. Reduce jurisdiction across the three tiers of the judiciary.
5. Utilise mediation for disputes that have no serious normative value.

QUESTIONS AND COMMENTS

The first question was about Dr. Sudhir Krishnaswamy's demand-supply model, and asked for concrete suggestions on quantifying and analysing the demand and offering demand-based solutions. Dr. Krishnaswamy responded by saying that the primary incentive of many litigants in India is to secure an interim order and protract the dispute to the extent possible. An exercise to

constrict such litigation by mandating mediation or other ADR proceedings before court trial has already been tried out. The speaker proposed that a simple method to discourage this litigation strategy would be to place a sunset clause on all interim orders, ranging from a week to a fortnight to a month based on the class of dispute. Parties could be forced to content by the end of the clause, and a way to prevent this from becoming a listing practice of sequential orders must be figured out. Another model to control the demand side suggested by the speaker was to require the party that sought an interim order of a particular magnitude to incur some costs. This would alter the calculus of the parties and the lawyers. The speaker cautioned that we should not take any rule prescription to yield a specific result, and pay careful attention to the interest of parties and that of the lawyers. That kind of thinking is likely to yield better results than the supply side model. Shri NL Rajah added a practitioner's point of view stating that the situation is more complex on ground as cases tend to fall off the list and often, one party is not ready on the date of hearing. Dr. Krishnaswamy described another practice that aligned incentives of all parties according to large studies called ‘outcome date certainty’. Outcome date certainty essentially means that a date of judgement of the court of first instance is fixed and there is no sideways movement despite any challenges along the way.

A follow up question was directed to Justice Joshi on problems faced by the judge in getting both the parties to travel in a path that is delineated and time bound in an efficient manner. Justice Joshi agreed with Dr. Krishnaswamy on placing a sunset clause or outcome date certainty on matters. However, she explained that due to the enormous caseload handled by the judges, even if all parties are incentivized to complete the trial process, it simply may not be possible for the judge to hear the matter on a particular day. In her experience, a High Court judge hears about 100 cases in a day and a District Court judge hears 30-40 cases. In order to make trial time bound and efficient, the supply end must also be strengthened with adequate judges and court administrators.

Mr. Chodosh added that it is necessary to turn this vicious cycle into a virtuous cycle. He opined that the reason there are 100 cases to be heard in a day is because each case is broken down into

fragments, stressing that consolidation is therefore critical. However, consolidation cannot happen unless systems for judicial accountability for a case are established. Referring to the 'outcome date certainty', he stated that in the early 80s and 90s, there were tremendous problems with delay in the California judicial system, and subsequently there was a huge alternate dispute resolution movement. However, research now indicates that the solution that reduced delay was not the alternative dispute resolution mechanism rather, a speedy trial Act, which required the judges to set the date of 'imminent jeopardy'. This date created the incentives for settlement. He stated that the Indian judicial process has become about interim relief, and a sunset clause on these orders may not work as a similar order may be passed on the expiry. He called for serious consideration of the responsibility of a judge for a caseload and a particular case from beginning to end. Dr. Krishnaswamy added that three features - no interim orders, no interlocutory appeals and outcome date certainty - are critical to the elimination of dockets all over the world in common law systems. He augmented his statement with a highly illustrative statistic; with a firm and resolute outcome date certainty, the natural rate of settlement, negotiated by parties and lawyers themselves, climbs from around 30 percent to as high as 70 percent, as per the date from across the common law world. He acknowledged that the politics of generating outcome date certainty is complex as there are many stakeholders and many different directions of push necessary to generate the outcome. However, if 'imminent jeopardy', as mentioned by Mr. Chodosh, is introduced into the Indian legal system, it will change the incentives of the parties and the lawyers

CONCLUSION:

The session witnessed an enriching discussion revolving around the civil justice system, and measures towards its reform. Shri N.L. Rajah noted that some great workable solutions had surfaced through the course of the conversation, and the time is ripe to turn the ideas into action on the ground. Dr. Jayaprakash Narayan noted that the fascinating discussion saw broadly two broad streams of possible remedies for the civil justice system, with one focussing on the supply aspect and strengthening the existing system, while the other revolved around the demand side

and the altering of incentives. He added that while formulating any potential reforms on the matter, it was imperative to look at both the streams with detail.