

ENFORCEMENT OF JUDICIAL DECISIONS : A CRITIQUE

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This article seeks to undertake a comprehensive analysis of the problem of the enforcement of the judicial decisions, from an individual perspective. As a natural corollary, the author tries to present the facts from their historical perspective to the present scenario and tries to explore the grey areas what are the major hindrances in the procedure itself which slows down the pace of justice delivery mechanism and execution of judicial decisions.

Introduction.

“Without Justice, life would not be possible and even if it were it would not be worth living.”²

If we take a close look at the Constitution, we will find that the Rule of Law runs like a golden thread through the entire fabric of the Constitution. Whatever change we wish to bring about in the socio-economic structure the same has to be through the process of law.

Universally, power is classified into three Executive, Legislature and Judiciary. The function of the legislature is to legislate, of the executive to execute (the law) and of the judiciary to adjudicate (the disputes). This is essential in the successful working of the state, for concentration of power in the hands of one individual or even body of persons leads to despotism. Therefore the doctrine of the separation of the three powers and vesting it in different authorities is regarded as essential in the democratic welfare state system. The vitality of the doctrine of separation of powers lies not in any rigid separation of functions but on a working hypothesis of law administration and law adjudication. Thus the making of policy, implementation of policy and control of policy are three dominant aspects of a governmental setup, which are separated for this purposive and generalized exercise of power. Perhaps the most important aspect of

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² Giorgio Del Vecchio (Justice)

separation of power is judicial independence from administrative direction and that is the only aspect of the doctrine on which all democracies concur.³

An independent and impartial judiciary and a speedy and efficient system are the very essence of civilization. The courts in India have taken too much on themselves, making it cumbersome for them to be able to render justice speedily and efficiently.

Securing justice - social, economic and political to all citizens is one of the key mandates of the Indian Constitution. This has been explicitly made so in the **Article 39-A** of the **Constitution of India** that directs the State “*to secure equal justice and free legal aid for the citizens*”. But the experiences of last 67 years show that the State has failed squarely on addressing some very basic issues—quick and inexpensive justice and protecting the rights of poor and the vulnerable. The justice delivery system is striving hard to come up with the adjudication of more than 30 million cases which are clogging the system. There are cases that take so much of time that even a generation is too short to get any type of redressal.

Under the Constitution of India, enforcement of the right is itself a fundamental right of the citizen however, realization of the right lies in its effective enforcement. If this enforcement is obstructed at any stage then the right stands violated.

Historical Analysis

The origin of the state (Rajya) as well as the office of the king and the conferment of power on the king to maintain the rule of law has been explained in the Shanti Parva of the Mahabharata. The Mahabharata on the topic of Rajdharma discloses that in very early periods of civilization in this country great importance was attached to dharma and it was self imposed by the individuals. Consequently everyone was acting according to Dharma and there was no necessity of an authority to compel obedience to the laws.

The propounder of the Dharmasastras declared that the king (state) was absolutely necessary to maintain the society in the state of Dharma which was essential for the fulfillment of Arth and Kama. Rajdharma which laid down the dharma of the king was paramount within the

³ Friedman, Law In A Changing Society, p 279

constitutional setup of the state, as envisaged by the Rajdharma, the king was given the highest position in the society but dharma was placed above him, since its very definition made it clear that Dharma (Law) was the King of Kings. The King was the highest Executive (Shaska) as well as the highest Judiciary (Nyaya Dhiksha) out of the seven saptangas or seven constituents or limbs of the state, quite naturally the king was recognized as the just and the most important constituents.

Thus it was a recognized notion that:

*“Dharma aided by the power of the King will make the Weak prevail over the Strong”*⁴

Thus the executive power was exclusively reposed in the king and the king with utmost honesty had to execute the judgment. In ancient India it was the duty of the king to protect his subjects and putting down the wicked. Administration of justice was the personal responsibility of the king. He is to preside over the highest court and render justice to the litigants. After deciding the case the King is supposed to enforce the decision.

It is evident from the provisions of the Rajdharma that ensuring the welfare of the people was the quintessence of the Rajadharma. It was achieved only by having laws regulating the conduct of individuals and their enforcement through the officers and the servants of the state.

Though the King was the protector of the people but the King was not the supreme power because Rajdharma provided that the King was also liable to be punished for an offence with one thousand times more penalty than what would be inflicted on an ordinary citizen, the spirit of this rule is that The King was not above the law.⁵

An important aspect discernible from the above provision is that Rajdharma made a clear distinction between judicial and executive functions. While the executive functions were required to be performed by the king on the advice of the council of ministers, judicial power was required to be exercised keeping in view the opinion of the judges.

⁴ Ramajois M.J. Legal and Constitutional History of India, Univ Law Pub. Co Pvt Ltd, New Delhi 2004, Pg 607

⁵ Ibid

The Present Scenario

Laws do not make sense without enforcement and enforcement of the judgments is a big problem in India. Enforcement is dependent on a number of agencies and institutions including the judiciary, the police department and so on, none the less the judiciary can be said to be the critical lynchpin of the formal enforcement mechanism because it is the main arrangement of the dispute resolution.⁶

Most observers would agree that the biggest shortcoming of the Indian judicial system is the slow pace at which cases are processed. Even routine cases sometimes get bogged down for decades in the judicial quagmire. As a result the system has a large and growing backlog of cases.

The cry for speedy justice is going to be shriller in the next three decades as a conservative judicial estimate predicts that case pendency is going to register a five-fold increase to touch 15 crore but the judges' strength will go up only four times to settle at 75,000. At present, nearly 19,000 judges, including 18,000 in trial courts, are dealing with a pendency of 3 crore cases, resulting in a civil case lasting for nearly 15 years and giving credence to the adage "justice delayed is justice denied"⁷.

The Supreme Court-supported National Court Management System (NCMS), devised just four months back, has put the statistics in perspective. "India has one of the largest judicial systems in the world - with over 3 crore of cases and sanctioned strength of some 18,871 judges". An important observation made is that 80% of the cases pending in the High Court are civil cases while criminal cases account for 12-15%.

The enforcement of a right is the fundamental right of the citizen as law devoid of sanction is of no use. The notions of justice according to ancient Indian Dharmshastras requires that the dharma (law) aided by the power of the king (state) shall enable the weak to prevail over the strong. This brings to light that it is primarily the duty of the state to see that the judicial decision given by the court of competent jurisdiction is enforced. The domain of the judiciary is to lay down the judgment but the execution

⁶ The Future of India: Politics, Economics and Governance, Dr Bimal Jain, Penguin 2005.

⁷ <http://timesofindia.indiatimes.com/india/India-to-have-15-crore-pending-cases-by-2040-report-says/articleshow/18054608.cms> (last accessed on 28.07.2014)

of the judgment is the duty of the state. In the democratic state it has been said;

*“must make its law valid.....by compounding it from the experience of the citizens, supremely by associating them with the law making and the executive processes.”*⁸

In a federal Democratic structure the source of power is constitution which essentially demarcates the domain of every organ of government and essentially divides it in between them. Thus the making of policy, implementation of policy and control of policy are three dominant aspects of a governmental setup, which are separated for this purposive and generalized exercise of power. The policy making power essentially remains with the legislature subject obviously to the fundamental policy choice that is constitution itself, Implementation of policy is the handwork of executive organ of government and in the last and most importantly the control of policy is the domain of judiciary.

In a controlling Constitution like the Constitution of India, the legislature lays down the policy, that is it provides the law as it “ought” to be. The Executive is responsible for ensuring that social orderings, mature into legal orderings, in accordance with the policy laid down, in other words the executive ensures the approximation of “is” (fact) to the “ought” (Law). Whenever there is a mismatch in the approximation of “is” to the “ought”, the Judiciary steps in to correct this mismatch, and expound the policy. This is known as policy control and in a controlling constitution like ours; this is what the judiciary is required to do. Any resolution of disputes is only incidental and consequential to the process of policy control.

Enforcement of Judgments

The problem of the enforcement of judgments may be analysed on three different levels-*firstly*, the technical problems associated with the enforcement of civil judgments, *secondly*, the problem in the execution of the criminal cases-it has been included to bring to light the technical barriers in the execution of the judgment and *thirdly*, the unnecessary delay caused in the enforcement at the hands of the state, as state is the

⁸ Stone Julius. Social Dimensions of Law and Justice; Universal Law Publishing Company Pvt. Ltd. Delhi, Chapter 13

protector of the rights of the people. This segregation will help in presenting clarity of thought.

Execution under The Civil Procedure Code, 1908

The expression 'execution' signifies the enforcement of decrees and orders by the process of court, so as to enable the decree holder to realize the fruits of the decree. Under the Civil Procedure Code, the court has the power and jurisdiction to enforce execution. There are different modes in which the court can execute its decree according to the relief granted in favour of the decree holder. A decree can be enforced by the delivery of any property specified in the decree, by attachment and sale, or sale without attachment of the property, by arrest and detention in the civil prison of the judgment debtor or in such manner as the nature of the relief may require.

Now, it may well be understood how some of these provisions of the code may cause delay or create difficulties to the decree holder in the execution of the decree.

- There is a grave problem in the enforcement of the decisions as the period of limitation for the execution of the decree other than mandatory injunction is 12 years from the date of the decree and in case of mandatory injunction is 3 years from the date of the decree. Such long period assigned for the execution disturbs the time count of the power spectrum thereby affecting the ethical count also⁹. Justice should be time bound otherwise the need of justice will lose its essence.
- The decree should be executed in a period of one month but in the case of public officials and government officials execution shall not be issued on any decree unless it remains unsatisfied for a period of three months, this affects the parity of power. Justice should be balanced and the same has been enshrined under Article 14 of the constitution which states that there shall be equality before law and equal protection of laws to all persons and thereby casts a corresponding duty on the state to ensure that the

⁹ Stone Julius. Social Dimensions of Law and Justice; Universal Law Publishing Company Pvt. Ltd. Delhi, Chapter 13, p. 597.

guarantee is maintained. To ensure its fulfillment an entire mechanism is provided under Article 256 of the Constitution, whereby the executive power of the state is mandated to be exercised in such a manner so as to ensure compliance with every law and the union is empowered to issue suitable directions to ensure that the said mandate is fulfilled. However the unresponsiveness of the state to ensure this compliance disturbs the very notion of legal ordering and creating hindrance in the approximation of 'is' to the 'ought'. The suspension of the remedy or the delayed enforcement in the case of government officials disturbs the parity of power which peeps through Article 14 of the Constitution. The problem of the technicalities might be pleaded but not to subvert justice and enforcement is equally evident as the remedy.

- If the court has to order the execution of the decree by arrest and detention of the judgment debtor in the civil prison there are various obstacles faced by the decree holder like

(a) Requirement of an Affidavit and Notice

In the application for the arrest and detention of the judgment - debtor in prison the decree holder must state an affidavit stating the ground on which arrest is sought for. Then the court will issue a notice to the judgment debtor to show cause as to why he should not be arrested. This is a very tedious task and it takes a lot of time. Justice has become the paper work more it takes birth on the papers and dies in the papers and the remained ashes are shown to the seeker to sustain the existence of a moribund organ.

(b) Insolvency

The court will not order arrest in case the judgment debtor appears in court and proves to the court that he has no property movable or immovable out of which he can pay the judgment debtor. He then can file an application to be declared an insolvent and produce a copy of such application to the executing court. It will take time for the Insolvency Court to decide whether the judgment debtor is actually insolvent or not but till then the execution proceedings will be stalled which results in the delay.

Problems in Criminal Procedure Code

The failure to deliver justice is even more pressing in the criminal justice system. In the criminal cases it has been observed that there is undue delay in deciding the cases followed by a longer time in enforcing it. Our country has an adversarial system of criminal justice, in ancient India in criminal cases justice was at the doorsteps of the aggrieved party but in the present day the Court asks the wronged party to prove the wounds instead of taking notice of their grievances. During the continuation of the case the one who has muscle power and money power wins over the weak party thereby encroaching the right of equality under Article 14, and parity of power is affected as the equilibrium of power is disturbed as both the parties to the case are not at par. Justice is a concept involving the fair, moral, and impartial treatment of all persons.

After the judgment has been given by the court, the parties to the case can be issued the copy of the judgment after filling a form and paying fees for it. Why should the aggrieved party who has already suffered so much be made to pay to get the judgment copy, it is the duty of the state to see that justice is done but sadly the state machinery is not working effectively to enforce the rights of the parties.

There is a lot of delay in the execution of the death penalty in our judicial system. Ten years of delay and red tapism in seeking vacation of stay on the execution of death sentence left accused Dhananjoy Chatterjee¹⁰ to live with 'living death' for more than a decade. The life calendar of Dhananjoy goes like this : Hetal Parekh a school girl was raped and killed in 1990 : Kolkata Sessions Court convicted and sentenced him to death penalty in 1991 : High Court accorded mandatory confirmation to it in 1992; Supreme Court rejected the appeal in 1994, execution was scheduled at 4:30 AM on 25 February 1994, the execution stayed to facilitate consideration of mercy petition by the President and the stay period went on extending. President rejected the mercy petition on the 23 June 1994; the West Bengal government 'discovered' the file pending for getting the stay 'vacated' and then move the court. The facts of the case bring out the startling fact that the state was responsible in the delay of the execution of the case.

¹⁰ AIR 1994 SC 1209

In Madhu Mehta case¹¹ Supreme Court commuted the death penalty for the convicted because of undue delay in disposal of mercy petition. Dhananjay's case stands out on a totally different footing as the state of West Bengal could not pursue the case with judiciary to get the stay vacated after the mercy petition was rejected in 1994, very fact that ten years elapsed before the state department detected a file pending for execution of Dhananjay entitles him a right to consider that situation to commute the sentence has nothing to do with the most cruel and criminal conduct deserving the death penalty but the punishment needs. Now the case stands executed yet the delay in this case was entirely due to the lethargy of the state which led to his survival and delay in the execution which is undoubtedly traumatic.

The Jessica Lall case, Jessica Lall was an upcoming model. On April 29, 1999 she was working as a celebrity barmaid at Tamarind Court, a bar cum restaurant frequented by socialites. At 2:00 AM a group of young men led by Manu Sharma entered the bar and demanded a round of drinks. Jessica Lall refused since the bar was already closed. Manu Sharma so the story goes, lost his temper and shot her dead. This incident was witnessed by several people and they reported it immediately to the police. After a manhunt that lasted several days, Manu Sharma was arrested.

The case was brought to trial in the month of August that year and almost began to run into trouble. One by one the witness turned hostile and changed their story. What would appear at first sight an open and shut Case dragged on for years. Eventually in February 2006, the Judge presiding over the case freed Manu Sharma and his friends. Indeed he agreed with the defense counsel that the "police had decided to frame the accused". It is believed by many that Manu Sharma was able to use his political connections to subvert the judicial process.

We are not concerned here with whether or not Manu Sharma is guilty. The above case is merely an illustration of how the legal system is unable to enforce some basic laws even in the national capital. Of course this is not just the fault of the judiciary since it also involves other agencies like the police (in this case, the witness protection mechanism has been

¹¹ AIR 1989 SC 2289

particularly failed). However this distinction between various arms of the state is not relevant from our perspectives. The point is that enforcement of judgment and laws is a serious concern.

Delay on the part of the State

The enforcement of the judicial decision is the duty of the state. The executive power of the state is responsible for the due execution of laws. The same thing has been laid down in the Indian Constitution in Article 256 which lays down that executive power of the state shall be so exercised so as to ensure compliance of all the laws in the territory of India. Every right has a remedy and in case of its violation if the remedy staggers behind substantive right it, the state has to enforce the right of the citizen.

It has been an observation that the enforcement of the judgment has become a private business which is supposed to be the exclusive duty of the state. Now the question is that, is the state justified in abdicating its fundamental duty. This failure of enforcement defeats the very purpose of delivery of justice as the non enforcement of the right amounts to denial in a way and this is what can be aptly termed as flouting the expectations attached to the state in the institutionalized power structure rendering the exercise of power to its naked form.

In *Mohini Jain Vs. State of Karnataka*¹² the petitioner applied in a medical college in Karnataka but the college was charging an exorbitant amount as Capitation Fees. The petitioner filed a case in the court, it took the court five years to settle the case and the verdict of the case was that “the case of Mohini Jain may be considered for admission” it took the court five long years to decide the case during this period the petitioner would have successfully completed MBBS and even after the lapse of five years admission to her is not guaranteed. Apathy of enforcement machinery and judicial process towards the seekers of justice can be viewed from the condition of the poor victims of Bhopal Gas Leak Disaster¹³, which took a toll of 15000 people. Twenty years had passed to that ghastly incident; still now victims are fighting for its compensation, which fails to measure up the damage caused to them. The decision of the court was

¹² AIR1992SC1858

¹³ AIR 1992 SC248

passed in the year 1991 but the decision has not been enforced from such a long time. This delay in the execution of the judgment is affecting the time count of the power spectrum as justice has no importance if it is not time bound and justice by the court without being enforced remains incomplete.

Not only in India but internationally also it has been accepted that enforcement of the judgment is a right of the party. In the English case of *Hornsby Vs. Greece*¹⁴ the court found it unacceptable that five years have elapsed without measures being taken to comply with the final enforceable judicial decision that the refusal of the license to establish a private school was unlawful. In its view the implementation of the judicial decision was an integral part of the right of access to justice and although it accepted that the authorities should have a reasonable time to suit the most suitable means to give effect to the judgments there had been a complete inertia and indeed a willful refusal to act in this case which had rendered the judicial phase of the proceedings devoid of the purpose¹⁵. Although the length of delay in implementation would be acceptable it has still to be clarified, there can be no doubt that the court has demonstrated yet again the broad reach of the obligation to secure access to justice.

We must, in all seriousness, ask ourselves the question as to how far we have been able to fulfill the mission of law to deliver justice and to what extent we have succeeded in using law as a vehicle for ensuring social justice to the large masses of people in the country.

Suggestions

To bring an improvement in the present judicial dispensation system which is overburdened with number of cases and clogged adjudicatory mechanism some suggestions may be considered upon:

1) Separate enforcement mechanism

Separate enforcement mechanism of Judicial decisions with least or zero dependence on state implementation machinery. There is a need to assist the court in the inquisitorial procedure and therefore there should be a separate system entirely independent of the executive at every level

¹⁴ March 19, 1997

¹⁵ Mc Bride Jeremy, Human Rights And Access To Justice, CJC, Vol 17, July 1998

right from the recruitment to retirement. *Article 50* of the *Constitution of India* can aid in this separation.

All the necessary powers of discovery, investigation and execution of judgments orders and decrees should be vested in them. This will ensure the purity and sanctity of Indian Judicial system enabling this institution of governance to render justice in an independent and timely manner.

2) Decentralization

The issue of the optimal degree or nature of decentralization is crucial in a country the size of India. Issues of durability can also be tied to questions of decentralization, since decentralization allows for experimentation and adaptation in legal frameworks, more directly enforceability often requires decentralization to a level where monitoring and consequent actions can be more effective.

Decentralization is not a new concept but Nyaya Panchayats have existed in India for thousand years and have been a characteristic and distinctive institution of Indian civilization, it has a mention in the Dharmastra. A council or board consisting of five or more members assembled to judge disputes and their decision used to be enforced then and there. This made execution of the judgment swift and easy¹⁶. Therefore decentralization can be an effective weapon to inspire confidence amongst people.

3) Role of Citizens

We may learn from the trends in countries such as the United States and Britain: a greater role of citizens' organizations, in the form of police review commissions, as a direct democratic check on police behavior. However this would be more effective in dealing with sins of commission, rather than of omission and would work better at the local level.

4) Judiciary Should Be More Responsive

Whenever there is a mismatch in the approximation of “is” to the “ought”, the Judiciary steps in to correct this anomaly, and expound the policy. This is known as policy control and in a controlling constitution like ours; this is what the judiciary is required to do. The judiciary should be

¹⁶ Cappelleitti Mauro, Access To Justice, Vol 3, 1979

more active in its task of policy control and scrap down laws which are causing undue delay in the execution of the judgment.

Therefore we can say that effective justice dispensation through the courts requires three elements: Access to courts, effective decision-making by judges, and the proper implementation of those decisions.

As Chief Justice Burger has noted:

“A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law - in the larger sense - cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets¹⁷.”

¹⁷ <http://legaltimes.typepad.com/blt/2010/01/kevin-rings-lawyers-ask-to-delay-retrial-.html?cid=6a00d83451d94869e20120a814102d970b#comment-6a00d83451d94869e20120a814102d970b> (last accessed on 28.07.2014)

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