

## Judicial Propriety-An Ethical Aspect of Justice

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### Abstract

The expression “Judicial Propriety” does not occur in any statute or statutory rule for that reason there is no recognised definition of this term. Judges are ancient institution in India, and it is gratifying to think that they conformed to high standards of impartiality and good behaviour. In modern times, there should be a fair hearing without bias, without fear or favour, with judicial restraint and balance of temper, coupled with courtesy and rectitude on the part of the judge.

The word ‘Judicial Propriety’ also known as ‘Judicial Ethics’. Judicial Ethic is an expression, which defies definition. In the literature, wherever there is a reference to judicial ethics, mostly it is not defined but attempted to be conceptualized. According to Mr. Justice Thomas of the Supreme Court of Queensland, there are two key issue that must be addressed : (i) the identification of standard to which members of the judiciary must be held; and (ii) a mechanism, formal or informal, to ensure that these standards are adhered to. A reference to various dictionaries would enable framing of a definition, if it must be framed. Simply put, it can be said that judicial ethics are the basic principles of right action of the judges. It consists of or relates to moral action, conduct, motive or character of judges; what is right or befitting for them. It can also be said that judicial ethics consist of such values as belong to the realm of judiciary without regard to the time or place and are referable to justice dispensation.

Following are the indispensable components for fairness in judicial propriety

### Doctrine of Natural Justice

The present day law contains specific provisions that a court of justice shall decide a case after ‘Full and Fair Hearing’ hearing the parties. In addition to the statutory mandate, there is also the unwritten rule of natural justice embodied in the maxim, “Audi Alteram Partem”, meaning, hear the other side.

The above is a fundamental concept of justice and embodies, by implication, the principal component of judicial propriety. Thus, there could be a fair hearing without bias, without fear or favour, with judicial restraint and balance of temper, coupled with courtesy and rectitude on the part of the judge.

In the leading English case of *Ridge v. Baldwin* the Court emphasised the importance of the

Principle “hear the other side” in these words: “The principle audi alteram partem goes back many centuries in our law and appears in a multitude of judgments of judges of the highest authority.

The Supreme Court has, in several judgments upheld the sanctity of this maxim. For instance in the classic case of *Vishwanathan v/s. Abdul Wajid Justice Md. Hidayatullah* (latter Chief Justice of India) observed that under the said rule the party likely to be affected has the right to be heard in support of his case or defence, as the case may be. Further, that the opportunity to be heard must be reasonable, not illusory. Audi Alteram Partem is divided into two part (1) Notice (2) Reasonable Opportunity of hearing.

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There is a distinction between 'hearing' and 'hearing in a proper and judicious manner'. The former is a rule of law while the latter is a proposition of judicial propriety. Judges and magistrates invariably give a hearing and that satisfies the legal requirement but apart from the legal obligation, judicial propriety requires that the judge ought to be patient and unobtrusive in the process of hearing. Patient hearing is an essential ingredient of judicial propriety.

There is then the oft-quoted dictum of Lord Hewart, C.J., in the English case of *Rex v. Sussex Justices* that- "Justice should not only be done, but should be seen to be done.

### **Free from Bias**

The rule against bias is founded on two maxims of identical purport, namely:

- (i) That no one shall be a judge in his own cause (*nemo debet esse judex in propria sua causa*), and
- (ii) No one can be at the same time suitor and judge (*nemo potest esse simul actor et judex*).

of course, no judge will try a case in which he is directly a party, but there may be cases in which he can be deemed to be a latent party if he has an interest (pecuniary or other) in the cause which he is called upon to try. It is in this way that the judge comes to be regarded, in the eye of law, as being an unnamed party. He is, in the vicarious sense, an indirect party.

The fundamental principles of justice, the most important is that the decision of the judge should leave no room for thinking that he has favoured one party or the other, in other words, there should be no lurking feeling that the decision is the result of bias.

There are many causes from which judicial bias may arise; for instance, some pecuniary or other interest of the judge in the case, his relationship with any of parties, or his hostility to a party in the litigation.

There is no doubt that judges are always conscious of their sublime duties and approach their task with great objectivity and without bias. They are also aware that the highest standards of behaviour are expected of them, that the sanctity of judicial office is supreme. To that end they endeavor to uphold the virtuous image of the occupant of the seat of justice.

### **Neutrality in Dispensation of Justice**

The idea of impartiality in the administration of justice is inherent in the moral order of ancient India. Justice S. Varadachari of the erstwhile federal court of India records thus : "The reputation of the court for impartiality was so jealously guarded that a text of Katyayan declares the *pradvivak* (Chief Justice) and *samyas* (Judge) punishable for holding private conversations with any of the parties.

Impartiality of the judge is his primary attribute. It is also the basic concept of the administration of justice there is no justice if the judge is not impartial. This idea has been given constitutional shape by the judicial oath prescribed for judges of the Supreme Court and the High Courts according to which a judge has to perform his duties "without fear or favour, affection or ill will".

The principle of judicial neutrality followed by English courts extends also to the aloofness of judges in matters social and political, also constitutional, arising in cases before them, subject to certain psychological limitations. The same is the position in India as explained in the following observations of the Supreme Court defining the extent to which the detachment of the judge can be carried. Judges must, no doubt, be impartial and independent. They cannot, in a period of intensified socio-economic conflicts, either become tools of any vested interests of *functi* from the Bench of Zealous reformers

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propagating a particular course. Nevertheless, they cannot be expected to have no notions whatsoever of their own, or to have completely blank minds on important questions indicated above which, though related to law, really fall outside the realm of law. They cannot dwell in ivory towers or confine their processes of thinking in some hermetically sealed chambers of purely legal logic artificially cut off from the needs of life around which law must respond. Their differing individual philosophies, outlooks and attitudes on vital questions resulting from differences in temperament, education, tradition, training, interests and experiences in life, will often determine their honest choices between two or more reasonably possible interpretations of such words as 'amendments' or 'constitutional power' in the constitution."

Apart from the judicial functions of the judge, the doctrine of judicial neutrality extends also, within limits, to the private life of a judicial officer. Thus, it is expected that he will not identify himself with any partisan interests or publish his personal opinion on constitutional, social or political controversies. Juristic opinion is divided as to the extent to which a judge is to limit himself in the aforesaid matters. In any case, the point is left to the judicial conscience of the judges.

### **Independent and Integrated Judiciary**

'Civility in a judge is his ornament, independence his divine virtue'. By independence of the judiciary is meant that there shall be no interference in the judicial functions of the judges by the government or the executive authorities under it. The judges are free to arrive at their decisions regardless of the administrative policies or the political philosophies of the party in power. They can strike down, if found illegal, an administrative decision of the highest executive authority. Likewise they can review legislation and declare it as inoperative, if found unconstitutional.

The principle of judicial independence did not originate with British Rule. It was fully understood and enforced in ancient India. Katyayana, Manu and other lawgivers emphasised the supreme importance of judges being independent and fearless even of the king. The same position obtained in Islamic jurisprudence and was particularly demonstrated during the regime of the first four successors of Prophet Mohammad, namely the Caliphs Abu Bakr, Umar, Usman and Ali.

The independence of the judiciary is guaranteed by the constitution, which enacts that, every Judge of the Supreme Court will hold office until the age of 65 years and that every Judge of a High Court until the age of 62 years- Art. 124 (2) and 217 (1) respectively. Judges services are not called "pleasure tenure" as of civil services.

As for other member of the Judicial Service in a state, it has been provided that the Governor in consultation with the Public Service Commission and the High Court shall make their appointment. Also power has been vested in the High Court as regards the posting and promotion of and the grant of leave to such members articles 234 and 235.

Law of contempt of court vouchsafes the independence of the judiciary also. Under article 129, Supreme Court Judges and under article 215, High Court Judge has the power to take contempt of court proceedings against any person or authority (including Members of Government). There is then the Contempt of Courts Acts 1971 and also provision in the I.P.C. and Cr. P.C. dealing with the power of courts to punish for contempt of court.

In all India Judges Association case, Supreme Court observed that judicial independence couldn't be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. It is trite to say that those who are in want cannot be free. Self-reliance is the foundation of independence. The society has a stake in ensuring the independence of the judiciary and no price is

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too heavy to secure it. To keep the judges in want of the essential accoutrements and thus to impede them in the proper discharge of their duties, is to impair and whittle away justice itself.

### **Judicious Mindset and Speaking Judgments**

Lord Justice Farwell in *Latham v/s Johnson*, observed that there should be no display of emotion or sentiment in a judgment. A judge neither rewards virtue nor chastises vice. Sentiment is a dangerous will-o-the-wisp to take as a guide in the search for legal principles. In *Public Prosecutor v/s Diraviya*, Madras High Court, held that the language of judgment should be sober and temperate, never satirical or factious.

In *Ishwari Prasad Misra v/s Md. Isa*, Supreme Court held that a High Court judge against any subordinate judicial officer should make no personal remarks. In *State of U.P. v/s Mohd. Naim*, Hon'ble Supreme Court held that if the State Government considers that the observations made by a court in respect of a department or officers through whom the State Government can be considered to be the party aggrieved by such observations. Hon'ble Supreme Court also held that the High Court can in the exercise of its inherent jurisdiction expunge remarks made by it or by a lower court if it be necessary to do so to prevent abuse of the process of the court or otherwise to secure the code of justice; the jurisdiction is however of an exceptional nature and has to be exercised in exceptional cases only. The Supreme Court also held that it is a principle of cardinal importance in the administration of justice, that the proper freedom and independence of Judges and Magistrate must be maintained and they must be allowed to perform their functions freely and any body, even by the Supreme Court. At the same time it is equally necessary that in expressing their opinion Judges and Magistrates must be guided by considerations of justice, that play and restraint.

### **Judicial Discipline and Self Restraint**

The expression 'judicial discipline' is to be construed as implying trained behaviour of self-control (or restraint) to be observed by judges in the conduct of their judicial functions. This concept of judicial discipline is accepted by judges throughout the world.

In all establishments, save the judiciary, discipline is regulated by external sanctions. In the case of judges, the sanction exists in the good conscience of the judges themselves without any outside pressure or fear of consequences. This is as it should be because the judiciary is an autonomous, independent institution within the framework of the constitutions of all countries.

On the point of judicial restraint the Supreme Court has laid down that it is equally necessary that in expressing their opinions, Judges and Magistrates must be guided by considerations of justice, fair play and restraint. It is not infrequent that sweeping generalisation defeat the very purpose for which they are made. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve.

On the point of judicial discipline the Supreme Court held that in the objective discharge of judicial functions there is little justification may, none at all, to assume any attitude other than of judicial restraint or to use a language, while referring to one's colleagues, other than that which has been hitherto adopted by long usage.

### **Civility and Rectitude of Judges**

On considering civility and rectitude of judges of old time Justice Basudeo Mukerji, retired Judge of Allahabad High Court said that a High Court Judge in the early days of 20<sup>th</sup> century conjured up in the mind of the common man an almost mythical figure. There was then a tremendous amount of respect,

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almost awe, for the presence of a High Court Judge the public saw so little of the judges outside the court were the dwellers in 'ivory towers' ? they were not : not certainly in any disparaging sense. The judges of the 'olden days' know everything worth knowing about the customs, manner, joys, sorrows, strength and weaknesses of the people that went before them seeking justice. They were 'His Majesty's Judges.

There is then the stress caused by the living and the social conditions of the present day, which did not exist in the olden days. Added to this there has been, for the same reason, deterioration in the caliber of lawyers, too.

The judges, even today, are learned, patient and courteous. No one is hustled out of a point he tries to make juniors are encouraged. As before, no judge is weighed down with a sense of arrears.

The virtues of the Judge are not exhausted by goodness in the court room. They have to be matched by gentle conduct and graceful manners in private life as well.

The distinctive trait of such a one is his detachment from personal affairs and his attachment to the performance of duty at all times and in all situations. Intense urge for duty, for justice to the people, is one of his virtues. Only such an individual can properly fulfill the role of the judge.

Hon'ble Shri R.C. Lahoti, Chief Justice of India, on delivering Lecture at the first M.C.Satalvard Memorial Lecture on 22<sup>nd</sup> February 2005, said about patience and tolerance of quality of judge. He said that the greatest quality of Judge is to have patience, which is sister virtue of calmness. Calmness is as essential as fearlessness and honesty to the exercise of good judgment in times of aroused feelings and excited passion.

### **Residuary Essentials of Judicial Propriety**

With this context, items other than those generally discussed in the earlier points are being dealt with here grouped under -

#### **(a) Sobriety in Court**

Judges should be sober in the court in their behaviour with the advocate. Encouragement to junior counsel is also an attribute of judges. The position is that in some respects junior counsel is at a disadvantage in conducting cases or presenting arguments. Lack of experience is the reason for this handicap. On occasions, which are, of course, rare, an unsympathetic senior may seem to overawe the junior. It is an unbroken tradition of the Judiciary to show consideration to juniors so as to enable them to tide over their short-comings.

#### **(b) Rectitude in Private Life**

Hon'ble Shri R.C. Lahoti, Chief Justice of India on delivering lecture the first M.C. Satalvard Memorial Lecture said that on the heading of conduct of judge in private, when a judge sits on trial, he himself is on trial. The trust and confidence of 'we the people' in judiciary stands on the bedrock of its ability to dispense fearless and impartial justice. Any action, which may shake that foundation, is just not permitted. Once having assumed the judicial office, the judge is a judge for 24 hours. It is a mistaken assumption for any holder of judicial office to say that I am a judge from 10 to 5 and from 5 to 10 it is my private life. A judge is constantly under public gaze. "Judicial office is essentially a public trust.

Society is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have more vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. It is, therefore, a basic

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requirement that a Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standards of propriety and probity. The standard of conduct is higher than that expected of a layman and also higher than that expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society.

**(i) Attendance by Judges at Private Party in Honour of Lawyer Discouraged**

Sir Jamshed ji Kania, an eminent jurist, laid particular emphasis on professional ethics and held strong views on the conduct of Judges. According to him Judges ought to keep themselves aloof from all controversies social or political. He also said in a party, which is organised in his own honour, that it was not proper for Judges to be present at a private party in honour of a lawyer.

**(ii) Brotherhood of Judges (Respect for other Judges)**

Justice Nasirullah Beg (C.J., Allahabad) stressed the importance of the brotherhood of Judges and explained that it was an integrated whole comprising the entire body of judicial functionaries irrespective of their station. "It is a brotherhood", he added, "which is not confined within the bounds of a particular State- it extends to the whole of India indeed, it embraces the entire world-frontiers of space do not divide it". The traditions of this "brotherhood" require, among other things, that a Judge should be respectful to his brother Judges.

**(iii) Judges not to comment on the conduct of politicians**

Mr. Justice P.N. Bhagwati of the Supreme Court (later on Chief Justice) has expressed the view that Judges should not in their speeches, press interviews or on other occasions comment on the conduct of politicians, including those in authority (Ministers etc.)

It is crystal clear from the foregoing discussion that the principle of judicial propriety must be followed in the court and outside the court in private life for the fairness of justice.

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