

The Challenge Of Subjectivity In Judicial Decisions

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ABSTRACT: Judicial decisions are intrinsically human judgments made about the rightness and wrongness of actions of other humans. They ought to be made only by human beings. They should not be made by machines or even made by humans in a mechanical manner. This is why the Conduct of the Judge is of paramount importance. Conduct is based on both subjectivity and objectivity of a judge. However, there is no excuse for allowing the purely “subjective notions” of the Judge any play in judicial decision making, let alone a decisive role the “subjective” being understood here, as it is defined in the dictionary, as the “personal and the idiosyncratic”.

Subjectivity in judging is a serious challenge to the independence, impartiality and integrity of the judiciary¹, as well as to fundamental universally accepted values such as democracy and the rule of law. Subjectivity vitiates judicial decisions and renders them arbitrary, biased and illegal.

The year 2021 provides a special reason to reflect on the role of subjectivity in judging. Several global, regional and national codes have been developed to secure judicial independence from external influences. Three global codes have specific references relevant to the issue of subjectivity in Judging.

1. The Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985² provide (principle 2) that “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”³
2. The 1995 Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region declares, “Independence of the Judiciary requires that...the judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source”.⁴
3. The Bangalore Principles of Judicial Conduct, 2002 declares that, “A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct

¹Commentary on the Bangalore Principles of Judicial Conduct - unodc.org. Available at: https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/commentary_on_the_bangalore_principles_of_judicial_conduct.pdf (Accessed: February 14, 2023).

² <https://digitallibrary.un.org/record/161765?ln=en> Basic principles on the independence of the judiciary (no date) United Nations. Available at: <https://digitallibrary.un.org/record/161765?ln=en> (Accessed: February 14, 2023).

³ Basic principles on the independence of the judiciary (no date) OHCHR. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary#:~:text=2,3>. (Accessed: March 11, 2023).

⁴ Beijing statement - international commission of jurists (no date). Available at: <https://www.icj.org/wp-content/uploads/2014/10/Beijing-Statement.pdf> (Accessed: March 14, 2023).

or indirect, from any quarter or for any reason.”⁵

While these global statements are admittedly cursory in their treatment of the challenge of subjective judging, they do set out a clear legal standard on objective judging: judges should make judicial decisions based only on the facts before them and in accordance with law. Indeed, this is an important core principle required to eliminate subjectivity in judging.

Clear and robust principles of Rule of law and analytical frameworks, embedded in substantive as well as procedural (adjectival) laws, to eliminate subjectivity in judging are also available to judges today in a variety of areas of adjudication. We can test this proposition in more detail with respect to four fundamental areas of judicial decision that is also very vulnerable to judicial Conduct:

- (i) Setting limits to the role and powers of courts and judges;
- (ii) Determining facts and guilt/liability;
- (iii) Interpretation of statutes and precedents; and
- (iv) Subordinating judicial decision making to the five "North Star" basic values of a democratic judicial system: justice, democracy, constitutionalism, rule of law and reasoning.

(1) Enhancing Judicial Conduct by setting limits to the role and powers of courts and judges

Constitutionalism demands that the role and power of courts and judges should not be unlimited or set by judges for themselves. Courts should be bounded by clear foundational legal principles. What should this role be?

Quite apart from Constitutional provisions and a vast jurisprudence on the separation of powers, there are a number of widely accepted and timeless principles of law embedded in statutes of daily use at all levels of the judicial hierarchy from which we may construct a clear proposition on the role of a court and of a judge:

A “court”, as defined in Section 3 of the Indian Evidence Act, "includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence"

A court is defined in Section 20 of the Indian Penal Code as "denoting" a judge who is empowered by law to act judicially... when such judge is acting judicially.

Section 2(i) of the Criminal Procedure Code defines a "judicial proceeding" as including any proceeding in the course of which evidence is or may be legally taken on oath.

A catena of judgments of the Supreme Court of India have distinguished a judicial proceeding from other proceedings by defining it as the adjudication of a dispute between two or more parties solely by applying law to facts proved through evidence, after listening to both sides, but not in order to advance policies or in the interests of expediency.

In essence a judicial proceeding is one in which a determination of rights, liabilities or disabilities is made solely on the basis of proven facts whose proof is established on the basis of evidence - not on policy grounds or on the basis of expediency. This means that policy and expediency are prohibited in judicial proceedings.

Section 19 of the Indian Penal Code defines a judge as every person who is empowered by law to give a definitive judgment in any legal proceeding, civil or criminal.

Section 9 of the Civil Procedure Code defines a judgment as a statement given by the judge on the grounds of a decree or order.

Section 8 of the Civil Procedure Code defines a judge as the "presiding officer of a civil court".

Section 2 of the Civil Procedure Code defines a decree as the formal expression of the determination of the rights of the parties with regard to the matters in controversy in a suit and an order as a formal expression of any decision of a civil court which is not a decree.

An excellent and precise definition of the role of a court may be derived from the definition of "facts in issue" in Section 3 (Interpretation Clause) of the Indian Evidence Act, 1872, as follows: the role of a court is to determine the existence or non existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding.

From these definitions we may formulate a definition of a role of a judge and a court as , A court is an activity that is authorized and carried out in accordance with law for purposes specified in law. This activity (the court) is presided over by a judge in accordance with law. The function necessarily involves several factors other than a judge, is a court.

A judge is the function (not a person) of presiding over a court adjudicating a dispute between two or more parties regarding the existence or non existence, nature or extent of any right, liability or disability under the law, asserted or denied in any

⁵ *The Bangalore principles, 2002* - united nations office on drugs and crime (no date). Available at: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (Accessed: January 21, 2023).

suit or proceeding, determined solely by applying law to facts proved through evidence, after listening to both sides - not in order to advance policies or in the interests of expediency. The result of the adjudication is formally expressed in decrees. The reasons for the decisions of the court are set out in a judgment.

These provisions are drawn from democratic doctrines of limiting the power of the State and separation of powers to prevent the concentration of power. They distinguish between *jus dare* (giving the law) which is the province of an elected legislature and *jus decire* (declaring the law) which is the province of the Judiciary. They distinguish between State proceedings where decisions are made to advance the policies and expedient interests of the government of the day (executive proceedings) and proceedings where an objective determination is made on disputes regarding the existence, non existence, nature or extent of right, liability and disability based on enduring principles of justice regardless of the policies and expediency of the day (judicial proceedings). The availability of judicial proceedings, so defined, producing decisions with consistency, stability and predictability is an essential public good not to be compromised by the individual urges of judges to pursue their subjective vision. They distinguish between giving relief for past injustice- which of course should, and does affect the future, and laying down rules for future conduct. Subjectivity in judging would be greatly eliminated if judges make the choice to discipline themselves to stay within rule of law-based limitations on the role and power of judges and courts. Judicial creativity and the quest of justice can be pursued within such a framework - there is actually enormous scope for that.

(2) Enhancing Judicial Conduct in Determining Facts and Guilt/Liability

The thinking of jurors about determination of facts and guilt is constrained by courts through clear instructions (as further discussed below). Tomes have been written about appreciation of evidence by judges. However, the ground level reality remains, especially in trial courts, that the manner in which judges determine facts and guilt still vary considerably from judge to judge and is seen more as an art, a matter of personal judicial style, rather than a matter of judicial science.

Although the approach of modern law to evidence is drawn from science, unlike scientists, judges are neither bound to follow, nor held accountable for following, commonly accepted logical methodologies for making crucial determinations of fact and guilt/liability. It remains an area in which there is considerable subjectivity in judicial decision making. This need not be so. The 1872 Evidence Act provides a very precise logical framework for determination of facts and guilt/liability.

The Evidence Act introduced, as far back as in the nineteenth century, a revolutionary, science-based, materialist approach to fact and guilt determination. It was a radical departure from traditional Indian approaches where facts and guilt were determined in unstructured, personalized, idiosyncratic and arbitrary ways, often involving irrational and superstitious approaches based in religion (such as through ordeal).

In his seminal 69th Law Commission of India Report on "The Indian Evidence Act" (1977), then Law Commission Chair and former Chief Justice of India Justice P.B. Gajendragadkar, a renowned jurist, recognizes the role of the law of evidence as a weapon against judicial subjectivity. He says, "one of the objects of the law of evidence is to restrict the investigations made by courts within the bounds prescribed by general convenience". In other words, the purpose of the adjectival law of evidence is basically to set boundaries on judicial discretion by requiring that judicial thinking follow the logical framework embedded in the Evidence Act.

The Evidence Act establishes a logical framework for determining facts and guilt requiring that:

- (i) only things that are perceivable to the senses or conscious mental conditions are to be considered facts;
- (ii) only facts in issue are to be considered by a court (i.e., facts from which the existence or non existence, nature or extent, of right, liability or disability asserted or denied in the case before a court necessarily arises) or related facts;
- (iii) in order for a court to believe that a fact is proved, the matters placed before it must logically lead to the conclusion that it exists or that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists (using the relevant standard of proof); and
- (iv) facts necessary to prove each element of the law under which claims are asserted or denied must be proved applying the relevant standard of proof in order for the assertion or denial to succeed.

In this framework, the logical relationships between the claim or denial asserted in a legal proceeding, on one hand, and facts (the things/mental conditions) from which such assertion or denial necessarily follows (facts in issue and related facts), on the other hand emerge from the facts themselves. Metaphorically, it is almost as if the facts tell a story about guilt/liability! The framework, if implemented in letter and spirit, is a formula for eschewing subjectivity.

The above logical framework for determining fact and guilt in the Indian Evidence Act is derived from these key provisions

of the Act:

Section 3 of the Evidence Act defines "fact" basically as a thing capable of being perceived by the senses; or a mental condition of which any person is conscious. This scientific, materialist, secular definition of fact excludes prejudices, biases, blind beliefs and superstitions, including religious in nature, from being elevated to the status of facts.

Section 3 also defines "fact in issue" meaning and including "any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows."

Section 3 also provides that "one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts."

Section 3 provides that "A fact is said to be proved when ", after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the Circumstances of the particular case, to act upon the supposition that it exists".

Examples of the application of a logical framework for determining facts and guilt to an actual case may be found in instructions given by judges to juries in the United States prior to juries commencing their deliberations.

The main elements of a methodology for thinking about determination of facts and guilt may be extracted for example from the instructions of the judge to the jury in the recent trial of a police officer for the murder of George Floyd in Minnesota, USA⁶ (words in quotation marks are quotes from the George Floyd instruction to the jury) :

- (1) All the rules of law applicable to the case must be followed regardless of whether the juror believes the law is or should be different, and the law should be understood and applied precisely in accordance with its meanings as interpreted by courts.
- (2) All the evidence heard and seen in the trial must be considered. Anything heard or seen elsewhere about this case should be disregarded.
- (3) The elements prescribed by law for each charge should be identified. Conviction may be based only on a finding that each of these elements has been proven beyond a reasonable doubt.
- (4) Any defense available to the accused must be duly considered.
- (5) There are no hard and fast rules to guide the judgment on whether a witness is to be believed and on the weight to be given a witness's testimony. In determining believability and weight of testimony, consideration may be given to legally well established factors, not to factors that the juror may feel personally to be important (for example, in the Indian context, the caste of the witness).
- (6) The State has the burden to convince jurors by evidence beyond a reasonable doubt that the Defendant is guilty of the crime charged. The Defendant has no obligation to prove innocence. The Defendant has the right not to testify. You should not draw any inference from the fact that the Defendant has not testified.
- (7) Implicit bias must be consciously eschewed through use of logical frameworks for decision making. The instructions say, "We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of and others we might not be fully aware of, which is why they are called "implicit" or "unconscious biases." No matter how unbiased we think we are, our brains are hardwired to make unconscious decisions. We look at others, and filter what they say, through the lens of our own personal experience and background. Because we all do this, we often see life-and evaluate evidence in a way that tends to favor people who are like ourselves or who have had life experiences like our own. We can also have biases about people like ourselves. One common example is the automatic association of male with career and female with family. Bias can affect our thoughts, how we remember what we see and hear, whom we believe or disbelieve, and how we make important decisions. As jurors you are being asked to make an important decision in this case. You must: Take the time you need to reflect carefully and thoughtfully about the evidence; Think about why you are making the decision you are making and examine it for bias. Reconsider your first impressions of the people and the evidence in this case. If the people involved in this case were from different backgrounds, for example, richer or poorer, more or less educated, older or younger, or of a different gender, gender identity, race, religion, or sexual orientation, would you still view them, and the evidence, the same way?"

⁶ *Memorandum opinion vs. Derek Michael Chauvin - live law* (25.06.2021). Available at: https://www.livelaw.in/pdf_upload/derek-chauvin-geroge-floyd-395505.pdf (Accessed: February 16, 2023).

- (8) The instructions also say, “Resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or unconscious biases. The law demands that you make a fair decision, based solely on the evidence, your individual evaluations of that evidence, your reason and common sense, and these instructions.”

A logical framework for a judge or juror to determine facts emerging from the provisions of the Evidence Act and the principles emerging from instructions to juries may be formulated along the following lines.

- (1) Consciously avoid any opinion about guilt or innocence of the accused or liability of the respondent at any time listen to the facts; let the facts and their mutual relationships speak and take you to their own logical conclusion.
- (2) Ensure conscious in difference to the outcome of the case - guilt or acquittal.
- (3) Identify the precise elements of the law that have to be proved for the plaintiff/state to succeed while avoiding a personal view about the appropriateness of the law;
- (4) Consider all the evidence presented relevant to each such element;
- (5) Decide whether to believe witnesses (including expert witnesses), how much weight to give evidence;
- (6) Consciously disgorge bias and prejudice and excluding factors that are not relevant, and
- (7) Decide whether or not each element has been proved beyond all reasonable doubt.

(3) Enhancing objectivity in Interpretation of Statutes and Precedents

The dangers of subjectivity in the interpretation of law and precedent were highlighted by Justice Cardozo in the Nature of the Judicial Process through a powerful quotation from the French jurist, Saleilles, in his treatise “De la Personnalite Juridique”

“One wills at the beginning the result; one finds the principles afterwards; such is the genesis of all juridical constructions. Once accepted, the constructions presents itself, doubtless, in teh ensemble of legal doctrine, under the opposite aspect. The factors are inverted. The principles appears as an initial cause, from which one has drawn the result which is found deduced from it.”⁷

The realm of interpretation of statutes and precedent s highly political because law is inherently political (using the word things not to refer to partisan politics but to mean, as the dictionary defines it, as the structures and forms of power relations between people including on distribution and control of restraints, resources and status). The structure, powers and functions of courts and the Constitution and the laws that create legal institutions emerge from distinct political positions. However, even within these constraints, there is a need to maintain objectivity, consistency and predictability in interpretation of law.

The failure to use canons of interpretation, and the use of wrong canons, weakens objectivity. It is a common basis for appeals to higher courts and for academic criticism. The doctrine of stare decisis provides a strong framework for enhancing objectivity. However, it is much neglected - precedents are often listed in judgments without a clear analysis of their ratio decedendi and its applicability in particular cases. Legal and judicial education can enhance objectivity by developing interpretation of law and precedents as a science and improve the skills and methods required by all lawyers and judges. Unfortunately, however, more often than not, statutory interpretation is a ‘Cinderella’ subject in legal education. Nor does it receive adequate priority in judicial education. The result is Saleilles predicted outcome in which the law is interpreted subjectively - in a person, arbitrary and idiosyncratic way.

(4) Enhancing Judicial Conduct through Value rationality: Subordinating judicial decision making in individual cases to the five basic values of a democratic judicial system: Justice, Democracy, Constitutionalism, Rule of law and Reasoning. The constitutive values of the Republic, for the protection of which an independent judiciary was created, such as justice (comprised by liberty, equality, dignity and fraternity), democracy, Constitutionalism, rule of law and reasoning must perforce discipline the rationality (“vale rationality”) of every judicial decision at every level of courts. Every decision of every court affects the enjoyment of these values and their attendant rights. Each decision must secure and protect these values. This is why Article 39A of the Constitution of India specifically requires that "the State shall secure that the operation of the legal system promotes justice" If not, these values cease to have any meaning to the lives of the citizenry. Yet, the fact of the matter is that these values are widely seen as external to the judicial decision making matrix of courts, especially at the trial and intermediate levels. There is no shared judicial decision making framework that requires that the

⁷ VOORHIS, J.O.H.N.V.A.N. *CARDOZO AND THE JUDICIAL PROCESS TODAY*. Available at: <https://core.ac.uk/download/pdf/215561146.pdf> (Accessed: March 1, 2023).

rationality of all courts systematically integrates these values into the rationality of judicial decisions. Nor is there a framework to hold courts accountable for their protection.

A clear common framework for holding judges and courts accountable for protecting these constitutive values in every decision will provide an important safeguard against judicial subjectivity. A brief discussion of how an objective approach may be developed to each of these values follows.

Justice

The idea of justice provides rationality to adjudication it is the highest goal adjudication serves. Justice is without doubt the central value of the legal and judicial system.

Unfortunately, however, justice is not a legal concept. It is not even a technical concept. It expresses a ubiquitous feeling that exists deep in the minds of every human being, and, as far as we can understand it, perhaps also in other organisms. It is therefore a word that allows minds to run amuck without any thinking required and is naturally a fertile ground for judicial subjectivity.

The legal idea of justice has not been narrowed by academic work or by judicial pronouncements. There are a large number of widely divergent academic theories of justice.

There are myriad approaches to justice articulated in judgments across the world. Elimination of subjectivity - the personal and the idiosyncratic - in judging requires, as a matter of priority, the development of an acceptable, legally and logically sound, shared understanding of justice.

The following is an illustration of a framework for a common approach to justice in the Indian context, It is only a brief summary of what requires a far more elaborate description.

1. Derived from its root word “jus” (which means, a right in law, or, the right value established by law), "justice", in the context of judicial systems, is the “standard of right human conduct” required by law.
2. Individuals and groups may, and do, disagree on what values constitute right human conduct (i.e., standards governing how humans must behave to each other).
3. Courts are bound by the values of human conduct established in the Constitution. Therefore I would argue that justice is the standard of right conduct prescribed by the Constitution.
4. For the purposes of Indian courts, a summary of the Constitutional values of right conduct are found in the 85-word Preamble as well as in Fundamental Rights and Directive Principles of State Policy. The four core constitutional values found in the Constitution are liberty, equality, fraternity and dignity.
5. Constitutional justice therefore prevails when actual human conduct is consistent with these Constitutional values.
6. The highest responsibility of courts is to ensure that the conduct of the State towards people and of the people toward each other comply with Constitutional values. Every court should be accountable in its judgments to show how its decisions secure justice, i.e., the Constitutional values of liberty, equality, dignity and fraternity.

Reflecting comparable approach to justice, the Supreme Court of India said in a judgment dated 10 February 2020⁸ (Prathvi Raj Chauhan vs Union Of India on 10 February, 2020) that, the Constitution of India is described variously as a charter of governance of the republic, as a delineation of the powers of the state in its various manifestations vis-a-vis inalienable liberties and a document delimiting the rights and responsibilities of the Union and its constituent states. It is more: it is also a pact between people, about the relationships that they guarantee to each other (apart from the guarantee of liberties vis-a-vis the state) in what was a society riven along caste and sectarian divisions. That is why the preamble assurance that the republic would be one which guarantees to its people liberties, dignity, equality of status and opportunity and fraternity. Courts need to move beyond feudal and colonial concepts of justice as the dispensation of the monarch, or as punishment or vengeance; as the will of God, as the dispensation of the rulers; or as the decisions of the highest courts. Courts need to pay more attention to understanding and following Constitutional provisions in determining their ideas of justice. They need to develop shared approaches to justice and methodologies to apply them in individual cases.

Democracy

There is an infinite variety of approaches to the definition of democracy, its core idea can however be easily discovered in the word itself, “Demos” means the people, “Kratos” means “power”, At the minimum, democracy is the idea that power must be in the hands of people. Therefore no court can be neutral to any opposition to the idea for example that power is best concentrated in the hands of a few people. Every court must safeguard and advance divestiture of power in favour of the people and protect the people against the concentration of power. This approach will again provide a more objective

⁸(2020)4SCC 727

standard to evaluate the functioning of courts.

Constitutionalism

The UNODC commentary on the Bangalore Principles of Judicial Conduct provides the following definition of constitutionalism in the context of judicial conduct:

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content. Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.⁹

Constitutionalism requires that subjective judicial decision making be eliminated. It requires the development of frameworks to curb arbitrary power and discretion, including arbitrary judicial power and discretion. It requires that judicial discretion be understood as an exercise to ensure that judicial decisions are made only in accordance with the law even in the absence of legislative gaps, not as a license for subjectivity and arbitrariness. It requires the judiciary to maintain zones of liberty into which state authority cannot enter.

Rule of Law

The UNODC commentary on the Bangalore Principles of Judicial Conduct provides the following definition of the rule of law in the context of judicial conduct:

“The reason why judicial independence is of such public importance is that a free society exists only so long as it is governed by the rule of law... the rule which binds the governors and the governed, administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought. However vaguely it may be perceived, however inarticulate may be the thought, there is an aspiration in the hearts of all men and women for the rule of law. That aspiration depends for its fulfillment on the competent and impartial application of the law by judges. In order to discharge that responsibility, it is essential that judges be, and be seen to be, independent. We have become accustomed to the notion that judicial independence includes independence from the dictates of Executive Government... But modern decisions are so varied and important that independence must be predicated of any influence that might tend, or be thought reasonably to tend, to a want of impartiality in decision making. Independence of the Executive Government is central to the notion, but it is no longer the only independence that is relevant.”¹⁰

Judges have to be independent as well as lawful at the same time. The rule of law is a concept both about the basis of power and about who exercises power. The basis of power must be law, democratically made, but not personal authority (such as that of a monarch). The power must be exercised by an institution and a function, not by an individual. Again, when applied to individual cases, this non-violable principle provides a powerful safeguard against subjectivity in judging which demands adherence to the logical frameworks for determining the role of courts, facts and guilt/liability discussed earlier.

Reasoning

In essence, reasoning is a structured way of thinking. In law it refers to the grounds of arguments and judicial decisions. Reasoning is a mental discipline.

Legal reasoning should be “logical”. The word logical is derived from the Greek word logos, which means word”. Therefore that which is logical is what is committed to words - written or spoken. At a minimum, therefore, logical reasoning requires that grounds of arguments and judicial decisions should be structured (in conformity with commonly accepted frameworks of analysis and thought) and committed to words - written or spoken.

Reasoning that is logical is therefore basically structured thinking that is committed to words - spoken or written.

The requirement for structured thought (reasoning) forces use of authorized structures of reflection and analysis, rather than self-made structures.

The requirement that such thought be committed to words in legal reasoning forces us to use only ideas and meanings that can be, and are, captured by available words within languages and vocabularies we know.

⁹ *The Bangalore principles, 2002* - united nations office on drugs and crime (no date). Available at: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (Accessed: January 21, 2023).

¹⁰ *The Bangalore principles, 2002* - united nations office on drugs and crime (no date). Available at: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (Accessed: January 21, 2023).

This requirement also forces me to abandon purely personal and idiosyncratic ("personal") ideas and use only ideas that have been assigned a word. This creates a key foundation of an objective approach to Judging.

Both reasoning and logic requires that the structured reasoning, committed to words, conforms to required analytical frameworks.

What is required to make this scheme work is the availability of an approved analytical framework and accountability for its use - as is the case in other disciplines such as medicine.

As explained, such a scheme is available under the Evidence Act for determining fact and guilt/liability. The analytical framework of the Evidence Act provides that the mutual "connection" and "relation" of "facts" (things perceivable by the senses of witnesses and mental conditions of which witnesses are conscious) "necessarily" leads to the determination of the existence, non-existence, nature or extent of right, liability or disability. This is quite a marvelous and ingenious architecture of logical reasoning. All that is required is conformity to and verification of fidelity.

Logic and reasoning are 'two sledgehammers' that, when used, moderate and weed out inarticulable feelings and emotions (such as rage, jealousy, revenge) from judicial reasoning.

Unfortunately, however, logical reasoning is not taken seriously either in legal education or in judicial education. Few judges realize its central importance to the rule of law and in ensuring the quality of judging. They mistake it often for paragraph numbering, sub-titling and table of contents and language of judgments, paying little attention to the quality of the structure of logical reasoning or the quality of its use.

Conclusion

The transition from subjectivity to objectivity in judging is an integral part of the radical shift in the role of the courts from being defenders of monarchy and autocracy in feudal, colonial and dictatorial regimes to being guardians of democracy and liberty. This challenge was summarized by Justice D.A. Desai a former judge of the Supreme Court of India in the 117th Report of the Law Commission of India on Judicial Officers Training (1986) which he authored as chairperson of the Law Commission. Justice Desai said,

The Indian judicial system is admittedly colonial in origin and imported in structure. Without even a semblance of change in the last four decades since independence [1950s to 1980s] in its mode, method of work, designations, language, approach, method of resolving disputes, it has all the trappings of the system established by the foreign rulers. On the attainment of independence, this system was overnight expected to be an effective instrument of ushering in social revolution in Republican India. On the enforcement of the Constitution in January 1950, this system was expected to adapt itself to facilitate the transformation of Indian society into a nation and to become an effective instrument for carrying out the mandate of Article 38.... Thus from a purely colonial institution operating more or less as a wing of law and order enforcement machinery, it was to become a sentinel on the qui vive"¹¹

Regrettably, however, the desired transition is not taking place.

The transition is not hindered by lack of knowledge about the dangers of judicial subjectivity. There is abundant evidence for it and clear knowledge of its dangers. It is today not hindered by lack of principles and frameworks for objectivity in judicial decision making. As discussed above but there is by now a plethora of principles and analytical frameworks for this purpose.

The transition is obstructed by the gradual excursion of the judiciary to an executive role based on policy making and expediency, prompted by sections of business and civil society who are unable to secure redress from the executive or legislative branches. What stands in the way of the transition in the Indian context is lack of "judicial will"-the reluctance to give up the enormous and unbounded power that the judiciary has acquired in the absence of commonly accepted objective frameworks governing judicial decision making as discussed in this essay. Institutions don't voluntarily give up power.

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¹¹ *The Law Commission Report* (November, 1986). Available at: <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080883.pdf> (Accessed: March 12, 2023).

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