

Interview

## **More than terrorism, the danger faced by India is that the judiciary is slowly losing its independence: B.V. Acharya**



[S. RAJENDRAN](#)



A view of Supreme Court in New Delhi. File photo: Shiv Kumar Pushpakar

*B.V. Acharya, Senior Advocate and one of Karnataka's eminent lawyers for several decades and five times Advocate General of the State is of the view that the investigating agencies such as the Central Bureau of Investigation (CBI) and the Enforcement Directorate (ED), by their conduct, should inspire confidence in the minds of the people.*

*Acharya who has handled a string of corruption cases including some of them against chief ministers and senior political leaders is of the view that conferment of absolute and unchecked power to the police, the CBI or even the ED is dangerous since it may result in a "police state".*

*In this interview with S. Rajendran, Senior Fellow, The Hindu Centre for Politics and Public Policy, 85-year-old Acharya who actively practices in the Karnataka High Court says "democracy has survived in our country mainly because of a strong and independent judiciary. However, the situation is different today". Excerpts:*

**The role of the Central Bureau of Investigation (CBI) and that of the Enforcement Directorate (ED) is now under focus thanks to the investigation of cases against prominent political leaders. Having been a Senior advocate for a long time and the Advocate General of Karnataka, as well, do you have anything to say in the matter, more so, since corruption is rampant in public life.**



**B.V. Acharya**

Any honest and sincere attempt by any agency which is likely to lead to eliminate or to reduce corruption in public life is welcome. However, recent investigation of cases against some prominent political leaders do not seem to be an impartial and honest attempt on the part of the investigating agency to eliminate corruption.

A ruling party misusing the investigating machinery to selectively target their political opponents, by foisting cases against them is not a new phenomenon. This vindictive politics has been active since quite some time. No political party which has come to power is

free from this accusation at the Centre as well as in the States. At the centre all parties in power have indulged in this malpractice. The case of Congress government in Karnataka divesting the Lokayukta police of their power to investigate and prosecute corruption cases, and transferring the same to the newly formed Anti Corruption Bureau (ACB) which is directly under the control of the political executive, is a glaring instance of the politicians trying to get full control over the investigating agency. Soon after the establishment of the ACB a case was registered against a prominent Bharatiya Janata Party (BJP) leader [a former Deputy Chief Minister] alleging irregularities by the Committee headed by him regarding regularisation of unauthorised occupation. The complaint is by a Congress leader and alleged offence had taken place 15 years earlier. This is only one instance of political vendetta and the matter is now pending in the Supreme Court.

**How is that the recent cases are against only the leaders of the opposition and not the leaders of the ruling party? This cannot be a co-incidence. Can it be said corruption among politicians is confined only to opposition parties?**

The investigating agencies such as CBI and ED must by their conduct inspire confidence in the mind of the people. In the first place these agencies must demonstrate that they are honest and impartial even in the matters of targeting particular individuals for their actions. Unfortunately this is not happening. On the other hand, their performance has led many opposition party leaders to be in the queue to join the ruling party, as they feel that this is the safest way to escape from the radar of the investigating agency. Hence, the charge that these investigations are commenced at the dictates of political masters and that their actions are not bonafide cannot be said to be baseless.

**Do the provisions for grant of anticipatory bail in corruption cases impede investigation? Should there be constructive changes in the relevant law?**

I do not agree with the proposition that the provision for grant of anticipatory bail in corruption cases impede investigation. As a matter of fact in my opinion

in corruption cases it is absolutely unnecessary for the investigating agency to arrest the accused and keep them in custody for long. In fact, till recently in corruption cases whether it be a trap case or a case of possession of disproportionate asset, the accused were not arrested and they were only called for questioning. But, still we have seen many corruption cases having been investigated efficiently and successfully and prosecuted before the court of law without the accused having been arrested or kept in custody prior to conviction by the trial court.

The case of Jayalalithaa, former Chief Minister of Tamil Nadu and others is one of the instances where without arrest and detention, the case had been prosecuted successfully, ultimately resulting in confirmation of the order of conviction and sentence by the Apex Court. [Jharkhand Mukthi Morcha] JMM MPs bribery case is another such instance. In Karnataka in quite a large number of cases alleging acquisition of disproportionate assets as also other offences under the Prevention of Corruption Act, charge sheets have been filed without arrest or long pre-trial detention ending in successful prosecution. In the circumstances, I am clearly of the opinion that no change in the relevant law regarding grant of anticipatory bail in corruption cases is needed.

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convicted there is a presumption in law that he is innocent. Therefore, arrest and detention as a matter of routine should be avoided. Investigating agencies cannot take shelter under the provision for anticipatory bail to cover up their inefficiency and in some cases dishonesty.

In *Siddharam Satlingappa Mhetre Vs State of Maharashtra & Others* (2011) 1 SCC 694<sup>1</sup>, the Supreme Court while pointing out that several decisions rendered by the court earlier were per in curium, as the ratio in the Constitution Bench

judgment in *Gurbaksh Singh Sibbia* {(1980) 2 SCC 565}<sup>2</sup> was ignored or over looked, reiterated that guiding principles for grant of anticipatory bail are almost same as bail, and one need not make out any special case for grant of anticipatory bail. It cannot be termed as an extraordinary remedy when relief should be granted only in exceptional cases.

**Do you concur with the view that refusing anticipatory bail is tantamount to surrendering an individual's liberty to the mercy of the executive, particularly with reference to economic offences?**

Grant or refusal of an order of anticipatory bail lies within the sound discretion of the judge concerned, who taking into account all the facts and circumstances of the case should take a decision. Personal liberty of a citizen is precious and is one of the most cherished fundamental rights enshrined in the Constitution of India. It is the duty of the Courts in the country to ensure protection of this fundamental right. It is common knowledge that the power to arrest conferred on the police is quite often misused for extraneous considerations.

In *Arnesh Kumar vs. State of Bihar & Others* (2014) 8 SCC 273<sup>3</sup>, Supreme Court has clarified that a person accused of an offence should not be arrested, merely because the investigating agency has the power to do so. The power to arrest must be exercised only where it is absolutely necessary. Realising the misuse of power to arrest, the Legislature has amended Cr.P.C by introducing the provision like section 41A where there is a prohibition from arrest, unless the conditions specified therein are satisfied. Even with all the amendments, as on today, it is our experience that this power is quite often misused and the guidelines prescribed by the Supreme Court are flouted.

A court granting anticipatory bail at least should bear in mind the preconditions prescribed for arrest and in a given case the court finds arrest itself is unnecessary, the anticipatory bail should be normally granted. Grant of anticipatory bail must be a rule and denial an exception. I agree that refusing

anticipatory bail in the normal course is tantamount to surrendering individual liberty to the mercy of the executive.

It is the duty of the courts to uphold the personal liberty of an individual. Unfortunately, this fundamental duty governing the matter as laid-down in the aforesaid Constitution Bench judgment in Gurbaksh Singh Sibbia's case, subsequently followed in the well known case of Siddharam Satlingappa Mhetre is being ignored by the recent decisions of the Supreme Court. While earlier decisions attached great importance to the question of individual liberty of a citizen, some recent decisions lean in favour of investigating agencies.

The Supreme Court in an attempt to dilute importance of individual liberty has been trying to carve out exceptions and one such exception is with reference to economic offence. The Supreme Court in the recent *P. Chidambaram Vs. Directorate of Enforcement* virtually nullified the safeguards ensured by the previous judgments including the Constitution Bench Judgment referred to above. This trend to overlook even the Constitution Bench Judgment to deprive the citizen of his liberty by accepting the claim of the executive that the investigation of economic offence being a difficult task, anticipatory bail should be refused in such cases is hardly commendable. Decisions which clearly put anticipatory bail on par with regular bail are overlooked and contrary view point is expressed. In short, judgment of the Supreme Court in *Chidambaram Vs. E.D* renders Section 438 Cr.P.C<sup>4</sup> virtually a dead letter.

**In a recent instance, the order of a court in a prayer for grant of anticipatory bail was delayed by several months. Should there not be a specific time frame in disposal of such petitions?**

The provision for anticipatory bail is contained in Section 438 of the Code of Criminal Procedure which enables a citizen who apprehends unlawful arrest at the hands of the police or investigating agency to approach a court of law to obtain an order what is known as 'Anticipatory Bail'. Prior to enacting section 438 in the Code, in the year 1973, there was no such provision. The provision

authorises the court to pass an order directing any authority arresting the persons to release him forthwith on bail on such conditions as the court may impose. This power is to ensure that a citizen is not detained in custody without sufficient cause and his personal liberty is not curtailed by illegal or other actions of the police or other authorities. The necessity for court of law to decide such an application on priority basis cannot be over emphasised.

In the celebrated judgment in *Gurbaksh Singh Sibbia Vs State of Punjab* reported in AIR 1980 SCC 565, a Constitution Bench of the Supreme Court has emphasised the importance of the provision and has also laid-down various guidelines. One important aspect dealt by the Bench is that if the court finds application to be not frivolous or vexatious, the court is empowered even to grant *ex parte* order and then order notice to the Public Prosecutor. Thereafter it is pointed out that it is the duty of the court to immediately hear both sides and pass final orders in the matter.

Unfortunately, this procedure contemplated is not followed by many courts which are reluctant to grant any interim order. The result is the accused is compelled to abscond till his

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infructuous. An application for grant of anticipatory bail must therefore be disposed of as early as possible. However, prescribing any specific time frame is not practical. There are many provisions in the statute books which require particular class of cases to be disposed of within a particular time. But rarely a case is disposed of within the time so stipulated. Period of six months time to dispose of the election petition challenging election of a legislator is one such instance. It is the duty of the judges concerned to appreciate the need for urgent disposal of the application, particularly those where there is no interim order.



If a High Court Judge after hearing bail application takes more than seven or eight months to reject the same, it speaks volumes of his competency and a High Court Judge on the verge of his retirement does so, it gives scope for unnecessary doubt. If that Judge is given some plum posting by the executive on such retirement, the decision necessarily leads to suspicion.

**It is stated that the provisions of the Prevention of Money Laundering Act (PMLA) are very stringent since the larger effort is to prevent corruption. Can you please elaborate on this matter.**

The provisions of the PMLA are no doubt very stringent and many of them are violative of the cardinal principles of criminal jurisprudence. The Act confers enormous powers on the Investigating Officers (IOs) giving vast scope for its misuse. Provisions envisage or assume that the investigating agency will be fair and impartial. Question is – is it so in practice?

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even a preliminary enquiry. The penal provisions are couched in such wider language that any one can be hauled up without tangible material even though

ultimately he may be acquitted. To commence investigation a case is registered as ECIR which is said to be confidential document not available to the suspect or anyone, unlike in ordinary cases, where FIR is registered, copy of which is sent to court.

According to section 45 of the PMLA, the court can grant bail only if it is satisfied that *prima facie* accused is not guilty of the offence, while in ordinary law, it is for the prosecution to make out a *prima facie* case. The IO is given power to summon any one under section 50 (2) & (3) and he is bound to answer questions which may even incriminate him. Such recording of evidence is treated as judicial



proceeding and witness is liable for perjury. Wide power is conferred to arrest the suspect. In practice one is summoned under section 50(2) as witness and eventually as the recording of the statement is in progress, he is arrested and thereafter his custody is sought for 14 days, (the highest period allowed) alleging that the accused was not co-operative and therefore his custodial interrogation is required. In short, such vast arbitrary powers are conferred on the officers of ED, that anyone targeted by them may suffer endless hardship and harassment. The Supreme Court instead of warning the officials to be circumspect, has cautioned the courts in granting anticipatory bail involving economic offences.

In conclusion it can be said that the provisions of PMLA are not only stringent but are draconian, conferring arbitrary and unchecked powers on the investigating agency. At least some of the provisions of the said Act may not stand the test of judicial scrutiny. [The] claim that the Act will prevent or even reduce corruption appears to be a total misconception. According to the Government, PMLA is an Act to prevent those who have amassed wealth illegally from enjoying the same by portraying it as untainted property. It is highly doubtful whether this will have deterrent effect on a public servant, who in any event suffers long term imprisonment in the predicate offence, upon conviction.

**Custodial interrogation is another matter which has come up for discussion in several fora. Should such an interrogation be the first resort for investigators? Will it help in speeding up the filing of charge sheet? Does it run contrary to constitutional provisions? Can an accused remain silent or evasive during custodial interrogation? If so, the very purpose of such an interrogation stands defeated. What are your views on the same?**

One of the cardinal principles in criminal law is the right of the accused to remain silent. Article 20 (3) of the Constitution of India provides that no person accused of any offence shall be compelled to be a witness against himself. It means that the accused shall not be compelled to provide any material to the investigating agency which will incriminate him. Though there has been some criticism against

this theory from some quarters, as on today this fundamental right of the accused to remain silent is well accepted by the Supreme Court of India.

In recent times, in many cases the investigating agencies are requesting the courts to deny bail to the accused and remand them to police custody, specifically on the ground that they require the accused for custodial interrogation. In my opinion, this claim for custodial interrogation is totally opposed to the right guaranteed to the citizen under article 20 (3) of the Constitution of India. In *Selvi & others Vs State of Karnataka* {(2010) 7 SCC 263}<sup>5</sup> the Supreme Court has held that this article protects accused, suspects and witnesses from being compelled to make incriminating statements. If the accused is entitled to remain silent and not answer any questions from the investigating agency, which may incriminate him, how can he be compelled to answer such questions when he is in custody? Does the custodial interrogation mean that while the accused is in custody, even though he has exercised his right and wants to remain silent, investigating agency can compel him (either by adopting third degree method or otherwise) to provide material which may incriminate him. Virtually, will it not mean that the accused is compelled to confess to a crime.

Another important contention always urged by the prosecution is that even though the accused was summoned to give his statement and he obeyed such summons and answered questions, he has not been co-operating with the investigation. Does this mean that the accused should give statements which the investigating agency wants him to? In many instances, the claim is that since the accused has been evasive or is otherwise not furnishing direct answers to the questions of the investigating officer, the court should remand him to police custody for the purpose of custodial interrogation. Unfortunately, some times such unreasonable claims are accepted by the courts. This violates the fundamental right of the accused. If the accused chooses to exercise his right of silence, then he should not be remanded to police custody for the purpose of custodial interrogation.

It is the fundamental rule of criminal law that the burden of proving that the accused is guilty is on the prosecution and it has to prove the same beyond all reasonable doubt. The prosecution cannot rely upon any statement extracted from the accused by coercion to prove its case. In fact, while Section 313 of the Code of Criminal Procedure provides an opportunity to the accused to explain the circumstances appearing in the evidence against him, he has also the freedom not to give any explanation. He is also not bound to answer the questions put under section 313 of the Code of Criminal Procedure. It is significant that no oath is administered to the accused while statement under section 313 is recorded. Principle underlining appears to be that in answering the questions he is entitled not to be wholly truthful.

In the circumstances, it will be seen that the concept of custodial interrogation on one hand and the right of the accused to remain silent on the other are totally contradictory concepts. As long

as right to silence on the part of the accused is recognised as his fundamental right, it is not

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permissible for any court to remand the accused to police custody, the main object of which is claimed to be custodial interrogation.

**It is common knowledge that conviction is a rarity in most of the corruption cases. Can you suggest ways that can ensure appropriate punishment for the offenders.**

Successful prosecution and conviction of accused in a corruption case is possible only if there is an efficient and honest IO, an upright and experienced prosecutor and an impartial judge known for his impeccable integrity. How many such men we have in the helm of officers? Accused in corruption cases are rich, resourceful as also influential. Therefore the aforesaid functionaries dealing with the matter must be men capable of withstanding all types of pressures, temptations as also some time threats. Delay in trial of these cases is yet another reason for

acquittal. Delay helps the accused to win over witnesses and in some cases even the victim (from whom bribe was demanded and taken) turns hostile after some time, as he gets frustrated. In few cases prosecutors themselves were accused of taking bribe and in one case the judge was accused of corruption involving crores of rupees to grant bail. Of course, such cases are rare. These are some of the reasons for large scale acquittals.

The best way to secure conviction is to have honest, independent and efficient investigating agency, prosecuting agency and the judiciary who play vital role at different stages.

### **Will the strict enforcement of the relevant laws help in checking corruption at all levels.**

Strict and prompt enforcement of law to confiscate property or money illegally obtained will certainly deter one from indulging in corruption and acquire assets.

Following are some of the steps which can help checking corruption at all levels –

1. Reduce to the minimum discretion vested in the authorities so that scope to show official favour in return for pecuniary gain is minimised.
2. Issuance of definite guidelines, even while exercising control discretion will reduce scope for arbitrary exercise of power in exchange for illegal gratification.
3. Permission for adequate supply of basic necessities will eliminate the need to pay bribe for such services. For example, years back bribe was paid to get a telephone connection or gas connection. Now they call on you and pressurise you to take a connection.
4. Competition in any field helps the consumers eliminating need for indulging in corruption.

5. Definite time frame for complying with demands of the public with exemplary punishment for disobedience. For example, strict rule that birth certificate or death certificate or *khata* etc., should be supplied within time schedule, failing which punishment will follow.
6. Providing opportunities to the victims to file complaints confidentially and strict and prompt action on such complaints will deter the public servant from demanding and accepting bribe.
7. As far as possible, power to take decision should be vested in a body rather than individual.

**What are your views on the need to ensure that the CBI and perhaps even the ED enjoy autonomy – free from political interference in their functioning.**

First let us consider the credibility of the CBI in the estimation of the public. Very recently, Officers of rank No.1 and 2 among them being Director and Special Director at the helm of affairs accused each other openly not only of rampant and high level corruption but also of fabricating evidence against each other and FIRs were registered. (This shows that even in CBI, practice of concoction and fabrication is not unknown). Third in the rank who was appointed as Interim Director was made to sit on a bench in the court hall of the Supreme Court till the raising of the Court, as punishment for having committed contempt of court by dis-obeying the orders of the Supreme Court. Ultimately, that all of them had to be shunted out of the department is a different matter. If this be the reputation that is enjoyed by the premier investigating agency of the country, how can one have the confidence that the agency acts honestly and impartially. So far as ED is concerned, it acts under the direction of the Government.

In the circumstances, while it is necessary that the investigating agencies should be free from political interference and be not under the control of the executive, there is certainly a need to have some independent authority to appoint and to oversee the functioning of these investigating agencies. I am not in favour of

giving absolute autonomy to these investigating agencies, as the same may be worse than political interference. Conferment of absolute and unchecked power to the police, CBI or ED is dangerous and that may result in a “Police State” in our country.

### **Is the Judiciary Independent given the nature of some decisions of some judges?**

Democracy has survived in our country unlike in neighbouring countries, mainly because of a strong and independent judiciary. The founding fathers of the Constitution intended that there should be an independent judiciary which can protect its citizens. But today can we say there is such a strong and independent judiciary? The answer has to be in the negative.

When the Constitution came into force in the year 1950, the Executive did not have any scope to offer any lucrative posts to the retired judges, but as on today the situation has changed. Now, the executive has large number of posts which could be filled only from amongst the retired judicial officers. These among other things have weakened the independence of the judiciary.

More than terrorism and economic slowdown, the danger faced by the country today is that the judiciary is slowly becoming weak and is losing its

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independence. It is the judiciary that has to protect the individual liberty of the citizen from onslaught of the executive or others. All along it is the judiciary which came to the rescue of

the citizen to overcome executive excesses. Barring certain aberrations during emergency when the Supreme Court delivered the infamous ADM Jabalpur case, it has always protected the individual liberty of the citizen. But, today the situation has changed and the judiciary has failed in its duty to protect individual freedom. The result is the executive has an upper hand. The judiciary as a whole cannot be said to be absolutely independent. There is justifiable apprehension

that at least a part of judiciary is not totally free and is under the influence of political executive either directly or indirectly. It is up to the judiciary to erase this impression, which cannot be said to be without basis. During emergency Justice Hidayatulla said “we want forward looking judges and not judges looking forward”. Now we may see at least few judges looking forward. If the people loose faith in the judiciary and in particular the Supreme Court, nothing remains of democracy. We may move in the direction of one party rule and eventual dictatorship.

[**S. Rajendran** is Senior Fellow, The Hindu Centre for Politics and Public Policy, based in Bengaluru. He was formerly Resident Editor/ Associate Editor, The Hindu, Karnataka.

In a journalistic career of nearly 40 years with The Hindu in Karnataka, he has extensively reported on and analysed various facets of life in the State. He holds a Master's degree from the Bangalore University. The Government of Karnataka, in recognition of his services, presented him the Rajyotsava Award - the highest honour in the State - in 2010. He can be contacted at [srajendran.thehindu@gmail.com](mailto:srajendran.thehindu@gmail.com)].

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*[All URLs were last accessed on September 26, 2019]*

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