



Risk Management In the Judicial Process

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By
D.K. Sampath

**National
Judicial Academy
Bhopal, India**

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**NATIONAL JUDICIAL ACADEMY
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INTRODUCTION

"Risk Management in the Judicial Process" is the product of reflective thinking of an experienced lawyer who having reached the top of legal practice renounced it all to devote time and effort towards evolving alternate methods for fair and fast dispensation of justice to the common people. D.K. Sampath is a living legend of law in Tamil Nadu, respected both by the legal fraternity as well as the people because of his dedicated services in the cause of justice. He became more active when he retired from legal practice in early 1980s and took to free legal aid services in the rural countryside in and around Chennai and Chenglepet. The Tamil Nadu Legal Aid Board endorsed his idea of Village Level Mediation for enlarging Access to Justice for the poor. He soon became a change agent in the justice delivery system in the State, innovating, experimenting and in the process, increasing the credibility of the justice system in the minds of people who had little to do with it earlier.

That was the period, the National Law School was started in Bangalore. His services were requisitioned as Professor in Clinical Legal Education in which position he not only revolutionized the

method of teaching legal skills to law students but also pioneered programmes which linked up the law school to neighboring communities through the programmes of Legal Aid. As the Director of the National Law School, it was my privilege to use the tremendous learning, enthusiasm and capacity of septuagenarian Sampath to inspire young minds to the advantage of teachers and students alike. He has been a source of strength in innovative legal education at Bangalore and Kolkata. Together, we published a book on Judicial Education and Training in 2000. But for his advanced age (he is now nearing ninety years old) he would have been my colleague at the National Judicial Academy at Bhopal. Despite his physical age, he is mentally young and he wrote the manuscript of this book in the hospital while convalescing after a heart operation. After editing out some portions I put the rest in print without much change because I felt that if I do so it might hamper the spirit and simplicity with which Sampath dealt with the subject. I wrote this introduction after a close reading of the manuscript, in order to give the reader a bird's eye view of the content and concerns of the book.

* The National Judicial Academy will be receiving hundreds of judges from all over the country for different programmes, all of whom, I am sure, will find the ideas contained in this book interesting and instructive. Of course, the opinions in it are those of the author and do not necessarily reflect those of the Academy. The Academy records its profound thanks to Mr. D.K. Sampath for this contribution, which may help reforming the system to make it more efficient in the delivery of justice.

Risk in Judicial Process:

Decision making on contested facts and arguments, which affects the rights and duties of others, is part of the daily functioning of a judge. Though he has the law and procedure to guide him,

there are risks of varying degrees because of the discretion involved, and the possibility of opposing viewpoints being sustained under the same law and procedure. With experience, every judge acquires expertise in managing risks efficiently, quickly and in a manner acceptable to standards of justice. However, the initial phase of a judge's career is full of doubts, apprehensions and hesitation to decide one way or the other, not because of ignorance of Law but because of the desire to do the right thing.

The pressure of workload, the demand for performance, the introduction of technology, and the explosion of laws in every aspect of modern life have contributed to proliferation of risks in the judicial process, more importantly at the trial level. Judicial training and continuing judicial education are intended to assist the judge in coping up with the management of these risks in a manner acceptable to the peers, fair to the parties in the litigation and promotive of the credibility of the justice system.

If risks are inevitable in the legal system and intelligently handling them is the key to development of the judicial process in tune with social change, it is incumbent on every judge not to delay taking it or try to mitigate consequences one way or the other. There may be genuine doubts about the relative benefits of one or other courses of action. Wisdom lies in managing the risks in a professional manner as they come even if bonafide mistakes occur in the process. While giving a wealth of information on how to manage risks judicially, the learned author correctly observes that, "...it is more a lack of effort than a lack of vision that holds back the legal system from marching with the rest of society".

In a lucid, simple and practical way, Mr. Sampath narrates the series of risks which arise in the processing of a civil litigation and suggests measures to overcome them. They appear to be natural and reasonable to any legal mind though it needs some

efforts to internalize it in practice. By putting himself in the shoes of a Judge, the author takes us through the vicissitudes of a litigation to explain what he means by Risk Management in Judicial Process. Being an experienced lawyer himself who played the game for over three quarters of a century, he is conscious of the dynamics of judicial decision making and how clever lawyers try to influence it one way or the other. He, therefore, takes us through a variety of fact situations as they evolve in the progression of litigation and illustrates the Risks and their implications in admission and Appreciation of evidence at different stages of the trial. Conscious of the Judicial role and accountability, the author cautions the Judge where caution is needed and encourages him to be firm and decisive when the situation so warrants.

Type of Risks and Role of Lawyers:

Many risks are created deliberately or otherwise by the parties to the litigation or their lawyers in the hope it will advance their interests. In the process, a number of unethical or even illegal practices have crept into the system, putting the very institution to numerous risks. The author has many harsh words to say on the role of the legal profession. "The legal profession has not internalized any norm which creates a sense of shame or guilt at some of the members being motivated rather by self-interest than by rules of professional conduct. The tolerance of such conduct shows scant respect for rights of others. The person defiant of such norms of propriety does not face the risk of forfeiting the goodwill of the society or even that of the immediate legal community. There is no/or little risk of any private cost for violating the norms. The risk of such practices corrupting the judge is also very much there. The cost of being ostracized by the fellow practitioners of law is all but absent. The cost to the claimant is wealth and the cost to the legal system is loss of credibility."

Management of Risks: Implications:

The book divides Risks into those which arise in the administrative role of the judge and those in his judicial role. Though the Risks in the administrative side are relatively few and are remediable to a large extent by effective supervision and system changes, those on the judicial side are too numerous and are critical to the outcome of the judicial function-delivery of justice. In the judicial system there are certain structural risks arising from the limitations of language, the compulsions in following precedents, the dominance of the male gender in the profession, distortions in evidentiary rules, the demand for speedy disposals, the developments in other branches of knowledge giving new meaning to legal concepts and rules, changing character of judicial interpretation, the changing nature of advocacy etc. These inherent risks of the system can result in injustice if not properly managed. And management depends on awareness of the risk, capacity to disaggregate them from facts and principles and ability to resolve it without appearing to be unfair. Giving numerous examples, the author tries to educate the reader how to cultivate these capacities in Management of Risks.

One of the important risks obviously is delayed justice. These are caused by a variety of factors on many of which the judge has little control. At the same time, ultimately the judge is accountable for the delay in dispensation of justice. Accused has not been brought from jail by police. Witnesses have not turned up. Laboratory report is not received. Lawyer is not prepared. There is a strike of ministerial staff. The causes are endless. With the advent of computers and automation many of these causes are likely to disappear. Then management will assume a different quality and structure. There will always be more work than the Judge can manage. Judicial reforms are inevitable if delay is to be reduced.

Meanwhile, there are several steps identified in the book which help a conscientious judge to manage the situation far more efficiently if he is prepared to take some risks on the administrative side. This is where the skills of Personnel Management, Time Management and Records Management become important. Technology is a great input in this regard. But the mindset of the Judges, Lawyers and Court Staff has to change.

Values and Accountability in Risk Management:

The role of values in Risk Management is dealt with in a full chapter in the book. Drawing upon illustrative examples which a trial judge handles every day in Court, the author explains how value assumptions on human nature and transactions can play a decisive role in the exercise of judicial discretion and judgement. The author illustrates how being a bit cautious in coming to conclusions can help. Truth is the ultimate value in judicial proceeding. But in perceiving truth, there can be many ways, each riddled with risk possibilities because of the way the legal system (Law of Evidence) is structured. In criminal proceedings the value premise of the judge can aggravate risk prospects in decision making. It is in the management of these risks the judge has to exercise caution and train his mind to adopt a balanced approach where justice is not only done but seen by the parties to have been done. It is a question of attitude which can be cultivated through training and experience.

Discussing how judicial accountability exists in the system, the author writes about accountability on the judicial as well as administrative sides. Each has distinct types of Risks involved and the judge needs to be familiar with the procedures available to reduce or manage such Risks. He poses the question whether the justice system can be 'fast' and at the same time 'fair'? The answer is yes. There are areas of procedure where the system can be

much faster than today without compromising fairness. It requires a different mindset to identify such areas and act to make a difference in the outcome. Technology can help in a big way to make this transformation work.

Risks are inevitable in any system including the judicial system. Learning from experience and using that knowledge to minimize or contain Risks is what is called Risk Management. Thus, the author argues that knowing the nature of the Risk and its causal factors is a pre-requisite to management of risks. Blaming it as part of the system's faults is not acceptable in the service sector as the consumers have a right to demand quality and efficiency. Thus, witnesses' turning hostile is not sufficient excuse for non-performance of the criminal justice delivery system. Nor the excuse of perfunctory nature of investigation. The orders of the Supreme Court in the Best Bakery case illustrate how the above type of risks have not been properly managed by both the trial and appellate courts the way they were expected to do in criminal proceedings. This case is a supreme example of how the risks continue to plague the system with the judges being unable to manage them. Judicial accountability is related to the capacity to manage risks inherent in operating a system based on adversarial adjudication. Unscrupulous parties may manipulate and generate risk situations to support private ends. This puts the system in great jeopardy. It may lose its credibility. Judges have added responsibility to avoid such risks introduced by manipulators and manage the system to sustain credibility of the public in the justice system. Lack of motivation on the part of judges to achieve excellence is seen to be a contributing factor for collapse of the system. Judges need to understand this and respond suitably lest the risks should assume larger proportions.

In the concluding chapter of this interesting study of Risks and Risk Management in Judiciary, Sri Sampath takes us to a

management approach to judicial administration. Judiciary is a knowledge industry. Lawyers and judges are knowledge workers. The advent of information and communication technology makes the field of knowledge workers challenging and stimulating if the motivation level is maintained. The mind set is important as it can facilitate change as well as inhibit it. "An organization of knowledge workers has to take learning seriously", says the author.

For the legal and judicial system to manage change in the present context would require, according to the author, a vision and a set of policies futuristically oriented. "An aimless drift or just a survival attitude may not be conducive.... The first step is the realization that present practices are to be changed.... what is aimed at has to be much speedier justice.... The strategy has to be built on this assumption.... The chance of failure is the risk factor.... The risk of obsolescence is real for the legal system today.... There is a performance crisis in the legal system".

How one wishes that the above message dawns on every member of the legal-judicial fraternity so that they seek to renounce the obsolescence and become change agents for faster and fairer justice in Society. This monograph is a guide towards that end.

20th April, 2004

Prof. (Dr.) N.R. Madhava Menon
Director, NJA

I RELEVANCE OF RISK MANAGEMENT TO LEGAL SYSTEM

The Constitution of India has given the concept of Rule of Law a centrality. The legal system has pivotal role in that context. The judge has a dominant role in it. There can be no change in the legal system without the challenge being met by the judge. What needs to be done, what can be done and what is being done are the three streams of thinking that have prompted this essay. It does not aim at presenting techniques. It is more a lack of effort than a lack of vision that holds back the legal system from marching with the rest of society. The lack of effort is perhaps attributable to an apprehension that there would be more risks than benefits resulting from any efforts to change. The object of this presentation is to explain that Risk Management has its place in our existing laws. With the new emphasis on speed, other risks may emerge and they may have to be managed! For this, some fresh thinking may be needed. To show this, automation has been taken up as an example. The appropriateness of this theme has to be perceived in

the context of the fact that in the legal system, the focus is on the process. It may also be seen that automation would leave enough autonomy for the judge to exercise his leadership qualities. Does Risk Management anyway negate that?

What is Risk Management?

Risk Management has emerged as a separate subject in recent years. It first appeared in the field of insurance. Since then it has surfaced in many other contexts. It has gained centrality in business management. It is based on the premise that real economic progress involves risk-taking. In the thinking of those engaged in business, progress and success are associated with taking risks. This is the route by which performance related criteria emerged with consequential rewards. Internal performance standards are meant to link performance to expectations.

The concept of Risk Management is relevant to the legal system also. May be, the judge is a member of a profession. He is not conducting any business. Self restraint is the badge in the face of opportunities for self gratification. But he also runs administrative machinery, the Courts of Law. Thus, he has twin roles, judicial and administrative. Even in the adversarial model, the judge manages the legal system.

There are many risks that creep into the various stages of the internal performance. It is true of both roles. Let us take the judicial role. The risks in the day to day functioning of the judge have to be taken note of first. The risk of preconceived notions is one of the dangers to be avoided by the judge. Of course, this is more relevant to the earlier stages of the trial, when the full picture has not yet unfolded before him. He has only the pleadings for perusal. When a judge, before taking up a case, runs a quick eye over the pleadings in that case, his mind is stimulated to a

responsive feeling. It may not yet be a conclusion. Most probably it is not, unless the judge is given to hasty habits. It is not uncommon to see people responding to an experience without thinking. Reading a material presented in the course of performance of the professional duty is an experience. It becomes progressively deeper and deeper. After reading the defendant's reply some judges do come back to the plaintiff's statements in the pleadings for a more careful study. In the course of evidence something said by the party and his own witness may trigger a second reading of what has already been perused in the pleadings.

For a conclusion, a certain amount of criticalness is called for. It has to be arrived at as a logical result. Such inference and derivation may come later when all the facts, circumstances and principles governing the matter on hand are before the court. A surmise or a fancy is not a decision. If the pleadings are very cogently drawn up, tightly presenting the sequential order in which the events happened, a judge may opine that it sounds probable, but it is not yet a conclusion, much less a decision. The tentative response to what has been perused is that it deserves to be further probed and evaluated. No more than that at that stage. Anything more would be pre-judging. Any misreckoning at that early stage would embarrass him when evidence to the contrary unfolds at subsequent stages in a convincing and conclusive manner. Thus, the judge has to guard himself against raising a barrier to his own logical thinking at a later stage. It is a tentative appraisal of the respective versions, as presented by the parties. Often we find, pleadings extracting in extensor that is really evidence. Evidence need not be pleaded. Even documents have to be referred to in the pleadings only if they form part of the cause of action or if they are otherwise relied on. For example, if the claim is to be saved from limitation. But, whenever, evidence is set out extensively, with the

ulterior motive of creating a prejudice in the mind of the judge, even in that first perusal, it is best to ignore it. Of course, it is more easily said than done. Sometimes, what is tendered at the trial may vary from what is found in the pleadings; so the impact created by the promised evidence may not be commensurate with what has been actually adduced. This is a risk that the judge has to face and avoid. One of the ways of managing such a risk is to skip the evidentiary portions in the pleadings at the earlier perusal.

Needless to say, vituperative pleadings should not be allowed to influence the tentative response of the judge to the case pleaded.

It would suffice for the judge, at this stage of scrutiny to confine himself to verification, if on the facts pleaded, the relief sought for can be had by the plaintiff. Further, the judge looks for what would unsuit the plaintiff when the written statement is perused by the judge. In other words, the existence of a cause of action and an express traverse of the same are looked for by the judge before the case is opened by the parties. He has to guard himself against any assessment of the relative versions. A quick glance at the issues framed in the case would confirm his expectations as to who is to begin. Now he is ready and receptive.

The judge has to be discerning and perceptive while he is receptive. Otherwise, he would find his mind loaded with a lot of materials that had to be rejected later as irrelevant. Loading and off-loading is not to be mistaken for the appreciation of the evidence. Sensitivity should be sharp enough to enable the judge to decide where he should show a sympathetic perception and where, a strict assessment. The context of the evidence has to help the judge in deciding these things. It is part of the appraisal. Acceptance or rejection comes only thereafter. If the judge has already made up his mind, then, he would be tempted to reject any piece of evidence that is not compatible with that conclusion. This is a risk

particularly applicable to a trial judge while recording evidence. An otherwise acceptable piece of evidence may, thus be lost to the judge. This is the inevitable effect of a hastily arrived at conclusion. It affects the receptivity of the judge's mind.

Subconsciously, he would look for grounds for rejecting such evidence. He may inflate the importance of anything that looks like a justification for such rejection. Thus, the quality of the judgement is vitally affected. It undermines the credibility of the conclusions arrived and used in the reasoning in support of the final decision.

At that stage, variability is the characteristic feature of the picture emerging from witness to witness and from document to document. The judge has to keep his mind flexible enough to receive the changes without resistance if acceptable. This is not vacillation. Occasionally, even a single document may bring about a kaleidoscopic change. The judge should not fight shy of accepting the consequent shift in the credibility, relative as it is. He would find it difficult if he has anchored himself in any one conclusion already. He has to remember that preponderance of probabilities tilts the scale in civil litigation. Hence, as the trial progresses, the shift in the preponderance is to be expected in many cases. And the judicial mind has to leave some space to accommodate such shifts. This is not fickle-mindedness. Flexibility within permissible limits is used to avoid the risk of rigidity. This pliancy would invest his thinking with certain suppleness but for which responsiveness to evidence would be conspicuous by its absence. The judge has to keep his mind open for fresh impressions till the picture is complete. In short, the judge has to build up for himself an intellectual discipline that is conducive to supple-mindedness. The risk of mental rigidity would foul the judicial thinking in different guises such as, consistency, cogency, logic or firmness. But in truth, it is just obstinacy or stubbornness. Such un-yielding

opinionatedness is only a refusal to be persuaded in the face of positive evidence. The risk is all the greater as it is disguised as a virtue. Such weaknesses masquerading as strengths, are all the more dangerous to judicial thought processes. Skills of advocacy, when a party profits by such conclusions, would be brought to bear on strengthening the mental rigidity of the judge. He has to see through the camouflage and have the courage to avert that risk.

It should not be missed that many of these risks arise out of the nature of the tasks that a judge is called upon to perform and the system through which he delivers the services.

Relevance and Scope of Risk Management:

Before proceeding further, a threshold issue has to be answered. How far is the concept of Risk Management relevant to the functioning of the legal system? Are there any factors which trigger risk in this area of work? With the advent of automated consultation, has there been any augmentation of such risks? The computer may generate quicker access to information about legislations and court decisions. Does it in anyway undermine the Risk Management strategies already in place in the legal system? The advances in other fields of knowledge like communication, storage, retrieval, processing, classification, selection etc. have exerted a powerful pressure on the legal system. What is its response in the context of Risk Management to these trends?

There is another aspect of the legal system that needs to be addressed before proceeding further. The role of the judge in the legal system has to be assessed. Of course, he is not a passive onlooker. He has a well defined role, indeed many roles. Administrative role, adjudicatory role, supervisory role, corrective role etc. But let us confine ourselves to the judicial role at this stage. Has he any opportunity to quantify and organize his Risk

Management skills as an input when he hears and decides a case? May be the final outcome is the result of interaction of all these. Even so, it would suffice for our present purpose to take note of the nature, quality and the quantum of judge's Risk Management, regulation or control.

An illustrative context can be used to explain the nature of powers of a judge to control the risk of litigation becoming infructuous. If for instance, a party sues to prevent a construction by a neighbour by trespassing across the boundary line, then the suitor seeks a permanent injunction decree preventing the threatened trespass and the proposed construction. On coming to know of the preparation for filing the suit, the other party hastens to sink the foundation and build on it, with a view to render the prayer for injunction, inappropriate. In such circumstances, the plaintiff has to carefully frame his relief sought to suit the changed conditions. He may ask for mandatory injunction for demolition, if need be, in the alternative. For this he has to apply for an amendment to the prayer. If it is not granted, there is the risk of the suit becoming infructuous. The suit would be dismissed as restrictive injunction asked for would no longer serve the purpose. Thus, the court exercises its power to manage such a risk by granting the relief of amendment. To say that such provisions in the Civil Procedure Code contribute to the delay in the disposal of the suit is to miss an essential need for managing such risks. Defendants in adversarial proceedings would readily use such strategies to render the suit infructuous. The court should have the power to forestall such moves. Such a power would enhance the credibility of the legal system. The court's ability to manage the proceedings in such a way as to avoid an unwanted result is Risk Management. Of course, the risk was the result of the tactics of the defendant to over reach the arm of law. If the high handed construction had

been done after issue of an interim order preventing it, perhaps, the court would have felt called upon to act suo motto to undo the mischief with a view to restore the credibility of the legal system.

What if such a situation had arisen without the defendant promoting it? Let us take the case of a suit for injunction restraining the defendant from cutting a stand of trees. Plaintiff claims that he is the tenant of the defendant and is entitled to half the share in them. Further, he planted those trees. Hence his right to cut them is jeopardized by the owner defendant denying the tenancy and by his attempt to cut them. After filing the suit, there is a storm and the trees fall to the ground. There is no conduct of party to over reach the arm of law. As a result of Act of God, the prayer for injunction is rendered inappropriate. To avoid the suit becoming infructuous, would the court allow the plaintiff to amend the relief as one for recovery of value of the trees in respect of the tenant's share? To avoid the risk of the action becoming fruitless, the Court can allow the moulding of relief necessitated by subsequent events, namely, the storm. Does the court manage the risk of an unwanted result, namely, an infructuous end to a suit?

Thus, such powers as amendment may have to be looked at afresh as part of the skill of the court in Risk Management. Any perception of such powers as causes of delay in disposal has to be avoided. Indeed even in the absence of specific provisions, the court can exercise its inherent power to control such risks. Inevitably this raises the question as to whether such contexts would be covered by the concept of Risk Management.

It is generally understood that by Risk Management is meant averting an unwanted result. In the above illustrations the defendant may want the suit to be dismissed; but he may not want the restoration of status quo ante by the court being rendered helpless to hear the case at all. Many more contexts can be thought of

where the judge, in his adjudicatory role, foresees the risks and averts them or manages them after they surface or at least controls their effects, if more cannot be done. Any reader who is familiar with court craft knows how the lawyers prompt the judges to exercise such powers in due time by moving petitions or motions to that end.

Assessing the evidence tendered before him is a difficult task for a trial judge. It is beset with risks peculiar to his role. The rival versions were being unveiled before him stage by stage and he has been receptive to the same while recording them. To assess the evidence is to rate the testimony. Even here, it is comparative. The judge has to keep in mind the reason why he does it. He has to use that piece of evidence to formulate the reasoning in support of his conclusions which together integrate into his decision of the case. There are many dimensions in estimating the value of the evidence in question. At the outset, the judge has to test its veracity. He has to appraise its truthfulness. Otherwise spurious evidence may find its way into his reasoning and render his judgement vulnerable. When the decision is re-examined in an appeal, the lawyer may attempt to capitalize on it by arguing that false in one is false in all. That is the risk in the process of reasoning that a judge adopts. Once he is convinced that the piece of evidence is genuine, he may have to examine its admissibility in law. After this he may examine its relevancy. All evidence offered albeit true, may not help the judge in arriving at a conclusion. It must be pertinent. The judge tests it, if it has a bearing on the case. It may demonstrate or establish the truth of the fact in issue. It may affirm something already proved. It may authenticate some other evidence, the proof of which falls short of the standards expected by courts. Sometimes it may itself be one of the facts forming the bundle of facts which make up the cause of action. In such a case, the decision itself may turn on the judge's acceptance or rejection

of such evidence. Naturally, the court would scrutinize such facts carefully, leaving no stone unturned. He may check and re-check, examine and re-examine, assess and re-assess such evidence, first by a scrutiny of the evidence directly bearing on its proof and then by adverting to the facts and circumstances probalilising it. Such investigation, may often lead the judge into fitting that piece of evidence under scrutiny into the overall picture to see if it fits into it. The judge should have by then an overall picture of the case to be used as a touch stone. Thus, as the trial progresses, the picture of the case emerges in the mind of the judge with the filling up of more and more gaps. That is how the framework for the judge's further thinking is put in place. If this is not done, there is a risk of the trend of reasoning in one part of the judgement running counter to that in another part.

If the piece of evidence is central to the case, occasionally, the judge may think fit to reject the overall picture that has already been shaping in his mind, when he finds the proved fact falsifying it. He may have to start reassembling a fresh picture from the pieces shattered. There is a risk of the judge avoiding this thankless task by rejecting the key fact for some flimsy reason. The temptation is to prefer the easy way when there is an option. There is really no such option for a conscientious judge. The pressure exerted by statistical returns pose a grave risk to the honest judge spending more time and energy in re-shuffling the facts and circumstances to form a fresh pattern to be integrated into a whole. Thus, a piece of evidence is exposed to multi-dimensional assessment before it is accepted by the court. The risks posed by spurious evidence, fake and feigned to mislead the court are perversions of truth, sometimes so closely simulating it. This should not mislead the court into accepting it, as true. Such a counterfeit presentation of evidence, may be totally untrue or an exaggeration or a

misconstruction. It is for the judge to analyze it and find out the extent of manipulation of truth before he rejects it totally or partially. The risk of rejecting the baby with the bathwater is real. He has to guard against it. There are, thus, risks in acceptance and rejection of evidence. Management of such risks is part of judicial skill.

Another risk surfaces by reason of adversarial character of the judicial proceedings. The amorphous picture taking shape in the mind of the judge may survive the jolts and the shifts at the stage of the changing preponderance of probabilities during the trial. The lawyer acting in the best interests of his client gives this picture a battering by skillful presentations to suit his client's version. It does not coincide with the conclusions firming up in the judge's mind, then there is the risk of its being unsettled. That will only result in confusion. The judge can ill afford to keep the picture incipient for long. By the time the lawyer addresses, it is past the early stages and hence, the judge has to see to his conclusions being crystallized. This is often done by an occasional question by the judge to the lawyer addressing him at the time. There is an interesting shift in such questioning.

In the earlier stages, the judge may seek clarifications before he makes up his mind, one way or the other. At some stage the lawyer will find the judge's questions are more for gathering further material in support of conclusions reached already. The thrust of the questions would show this. He may at this stage run the risk of betraying his mind. It cannot be helped. The judge is not called upon to simulate to avoid such premature disclosure of his mind. It is no part of his function to so shroud his thinking. Actually, there is an element of fairness, if the judge gives the affected party a chance to muster his arguments against the view then held by the judge. To expect a judge to manage this risk of disclosure by make believe observations to the contrary is to put a needless strain on

the credibility of the system. On the other hand, the judge would do well to welcome such contrary arguments to afford him an opportunity to test the soundness of the conclusions he has in his mind. To dissemble is to run with the hare and hunt with the hounds. Such two faced hypocriticality does not enhance the image of the judge or the legal system. In managing the risk of disclosing his mind, the judge endangers the credibility itself. Intelligibility and comprehensibility are the hall marks of the high office of the judge. They are not to be sacrificed under the guise of Risk Management. Transparency is a part of the credibility of the legal system. To be transparent is to be easily understood. A judge has to be articulate but in a well defined manner. He would then be predictable. He is accountable for everything he does. Hence, transparency is the way he manages the risk to his accountability. The words and even the gestures of the judge should be interpretable easily. That will facilitate the interaction between him and the lawyers in the case. The end result so produced would be the richer for it.

II

THE JUDGE'S AMINISTRATIVE ROLE

Let us now turn to take a brief look at the administrative role of the judge. Of course, in this area, the lawyer's assistance is conspicuously absent as he has no role to play in the administrative field. The problems arising in the internal administration of courts may, if at all, surface in the representations presented by the bar as a body to the presiding officer whenever the necessary focus is on any specific problem. Thus, the burden on the judiciary is more onerous in ensuring Risk Management in the administrative field. Indeed, valuable right of parties are jeopardized by any slackness in this respect. An illustration would bring home the truth as to how damaging it can be to the legal system as a whole.

The judge is the administrative head of the court presided by him, He exercises management skills in that role. The procedural and other rules framed as subordinate legislation stipulate for various registers to be maintained by the courts. The state government provides periodically the printed registers and other forms for this

purpose. It is one of the functions of the judge as administrative head to ensure that they are duly maintained and updated. Let us take for instance the suit register. The Code of Civil Procedure, 1908 specifies this register in the Code itself without leaving it to be identified under the rules framed by the High Court. The suit register contains many columns in each page with headings which include the date of institution of the suit, the number assigned to it, the nature of the litigation so commenced, for example title suit, money suit etc, a brief summary of the pleadings, the date of the decree passed, the result, appeals if any, the execution petition filed for implementing the decree, the date when full satisfaction was entered, if it is a money decree. Thus, a succinct profile of the entire case from start to finish can be had from this. More details would of course, be available from the pleadings filed by the parties, the evidence adduced by them at the trial and the judgement rendered by the court. Suppose the party has to face a challenge to his title from a descendent of the same opponent, the earlier judgement would conclude the matter in favour of the successful party. But it is more than two decades since earlier litigation terminated finally. The administrative rules require the old records of the court to be destroyed. This is obviously an act of practical prudence for creating space for storage of fresh records accumulating every successive year. The stipulated periods vary from 3 years to 12 years from the date of final disposal of appeal, depending on the nature of the suit, whether it is a money claim or claim to title to immovable property or of any other such classification. Now for no fault of the party he has lost valuable evidence of a favourable adjudication of his title by lapse of time. He has no copies. Thus, the litigant is exposed to the risk of having to face a fresh round of litigation. The very credibility of the legal system which renders an adjudication of rights at great expense of time, money and effort is at stake.

Such a risk is managed by a requirement that the suit registers are not to be destroyed at all. A party in the above predicament would be advised to apply for a certified extract of the entries relating to his earlier litigation from the suit registers which are saved from the operation of rules governing destruction of records. The risks to which the successful parties as well as the credibility of the legal system as whole are exposed are both well managed by such preservation of public records.

Before parting with this topic it has to be re-emphasized how the risk of the ability of the party to prove his success in the earlier litigation was the result of the court's own action to comply with the rules governing destruction of records. When management creates a situation potentially prejudicial to a party, the skilled management expert would anticipate it and put in place a Risk Management device. Making the suit register a statutory record mandated by the Civil Procedure Code itself (and not the rules) and saving it from periodic destruction would certainly appear to be sound management practice in the context of risk control. No doubt, the extract from pleadings and decrees recorded in the suit register would be classified as secondary evidence under the Indian Evidence Act, 1872, the pleadings and the decrees themselves being the primary evidence. But, then, putting in place a reliable source of secondary evidence sanctioned by the statutes governing the procedure to be available in the event of unavailability of primary evidence, is a commendable piece of foresight in risk anticipation and management. It is a well met managerial challenge. Microfilm storage is perhaps one of the answers.

Time takes its toll on evidence. Risk Management is well provided for in the Law of Evidence. It is built into the Evidence Act itself. Man is mortal. The courts rely on oral evidence in many contexts. In the nature of things, memory fades with time. What he

remembers may not always be the same as what he saw. Moreover, when he says he heard this said, he may sometimes unconsciously embellish it with more details for acceptability. The rule against hearsay evidence is really a rule of Risk Management. The rule of best evidence itself is designed to avoid anything unreliable passing muster as good evidence. Both the rule of best evidence and the rule against hearsay evidence have their own exceptions. The entire subject of secondary evidence is conceived only to avoid a situation of the judge being left with no evidence at all in the anxiety to accept nothing but the best evidence. Again Risk Management is seen in the wholesome rule that secondary evidence is admissible in default of primary evidence for reasons acceptable in law, such as its loss, unavailability except at great cost or delay etc. Even the lacuna created by want of evidence is filled up by the presumptions in law. The Evidence Act provides for the presumption of genuineness of documents more than 30 years old only on this principle. That avoids the risk of a true document being left unproved by sheer lapse of time. Of course, some conditions have been imposed before a presumption can be raised in respect of ancient documents. It must be produced from proper custody. There is a lot of case law on what is proper. Again, what is 'custody' is debated in cases from the point of view of 'possession', 'control' or even 'domain'. Thus, the law manages the risks arising out of impermanence of evidence and then organizes safeguards around those protections. All with the view to raise fences around the vulnerabilities of judicial decision making process. That is the essence of the system. In law, Risk Management is an integral part of the legal system. In fact, that is the essence of a system, one part being supportive of another, and the whole functioning as a totality.

Such examples can be multiplied endlessly. No purpose is served except showing how risk ridden the whole exercise of legal

vindication of rights is, often. In fact some people turn to it, hoping that an endless exposure to such risks would ruin their opponents. Of course, in the process, they ruin themselves too. Some others look forward to such risks and gamble in litigation. For some engaged in agriculture, a seasonal occupation, litigation presents itself as an exciting alternative. Unfortunately, it may not confine its demands on their time, attention and resources only to the off season. Thus, the main objective to be served by the legal system is often lost sight of. It is a systemized conflict management apparatus, setup and managed by the government officials with public funds, contributed by litigants themselves in the form of court fees paid on the value of each cause. This is supplemented by the fines levied and collected in criminal courts and grants by the government itself. This predominantly state run institution is also enriched by the significant participation of non-officials, like lawyers, their staff and others. It is this blend that daunts the occasional attempts at reform and restructuring.

Even in the functioning of the legal system, one sees the system furnishing the frame work and values infusing life into it. The base structure of ministerial staff of various cadres form the support system, often missed while assessing the functioning of the system as a whole. A suit is deemed to be instituted on presentation of the plaint. This is received by a ministerial officer. So the suitor's earliest contact with the system begins at the stage. Any Risk Management practice has to take this and other features, so characteristic of the legal system, into consideration. Above this base is the superstructure of tiers of judicial officers. They are, in the discharge of their tasks, informed by the values, like justice, fairness, impartiality, but, relentlessly driven by the persistent pressure of disposal standards. The emphasis of one at the expense of the other may vary in degrees from one judge to another, but no judge is free from it. They formulate their own ideals

according to their own value system but organize their performance according to the expectations laid down by the norms fixed by courts higher to them.

The lawyers with a key contribution to make are very much in the picture. They are often euphemistically called officers of the court. But they are not. They cannot be. No doubt they owe many duties to the court. Their ethics dictate it. But, they also owe a loyalty to their clients. They are also motivated and inspired by a zeal for search for the truth. That zeal is often motivated by the cause they represent. Thus, as a whole we have a legal system riddled with hierarchies, supervisions, inspections, returns and statistics in one wing while the other wing, free from all these constraints and a sense of accountability to the clients who engage them, functions in a more uninhibited fashion. One delivers what is inspected and the other delivers what is expected. The inspection is by those above them in the case of subordinate judiciary. The expectation is by those who engage the lawyer, uninhibited by any stipulation, except a favorable result, perhaps.

What does the future hold for the legal system? What are the recent trends? At the grass root level, about seven or eight decades ago the causes that kept the lowest courts engaged were mostly property cases, in the form of money suits or land cases. Money is lent and not repaid, trespass on land and the steps to evict the intruder. Little later contracts made and to be enforced, damages arising from the breach of contract figured largely in the cause list. Tort cases emerged later on. Injuries to persons or reputation came to court for compensation. Thus, we find the trend being a reflection of the initial investment in real property moving on to most of the interaction in trade and business being based on contracts and then on to the discoveries of science having an impact on daily life. The change of the pattern of litigation in civil courts

would be obvious when it is noted that there has been a flood of litigation in respect of claims for compensation for loss resulting from highway accidents. The statute governing the use of motor vehicles was amended and a summary procedure has been evolved to adjudicate these claims. The courts have adjusted themselves to quick changes in this field. The challenge to the administrative side of the courts has been efficiently met in evolving procedure for handling large amounts in each case by way of compensation paid by insurers or the vehicles concerned. In fact, the legal profession has not followed promptly with confidence building measures to have these amounts properly paid over to the parties. The leaders of the profession were not concerned with these problems as it arose only at the trial court level. The top rung in the profession suddenly and belatedly woke up to large scale threats to professional integrity spawned by these cases. Corrective action has to be taken before vested interests become entrenched. A quick buck is difficult to resist. The risk is to the integrity and the image of the legal profession. When the legal profession ignores such risks, the perception of the people about the system as a whole becomes tarnished. Does the legal system any longer stand for fair play and honesty, asks the aggrieved party.

Here is a context where the focus is on the important question of the relation between law and norms. The situation exposes a behaviour that betrays more revulsion at the infringement of the rights of the injured. The entitlement of the injured to the fund representing the compensation payable by the injurer through the insurer is in jeopardy. The private benefits of the erring individual siphoning off the fund are substantial. He gets a windfall benefit and that too at the cost of the victim. The legal profession has not internalized any norm which creates a sense of shame or guilt at some of its members being motivated rather by self interest than

by rules of professional conduct. The tolerance of such conduct shows scant respect for rights of others. The person defiant of such norms of propriety does not face the risk of forfeiting the goodwill of the society or even that of the immediate legal community. There is no risk of any private cost for violating the norms. The risk of such opportunities corrupting the judge is also very much there. The cost of being ostracized by the fellow practitioners of law is all but absent. The cost to the claimant is of wealth and the cost of the legal system is loss of credibility. Once we perceive that regulation by norms has failed, we feel the need for law stepping in to regulate such conduct. The private cost is nominal as the removal from the rolls or a prosecution for the crime is almost theoretical as it is seldom effectively enforced. Thus, the moral dimension is missing though it affects the interests of an already injured party by exposing him to a second jeopardy. The legal dimension is dormant. Is there any economic value from the point of view of society?

The ignorance and illiteracy of the pedestrian who is generally the victim of the highway accident limits his ability to avail himself of a wider range of choices amongst those who offer to help him. Hence, the exhortation about the freedom of contract (while engaging a counsel) addressed to such victim is a waste of breath. When the need to address the risk is presented to law, the response is to balance the risk of error against the cost of reducing error. So long as it remained a few and far between cases of deprivation of the victim of his lawful compensation, the loss to society may not be such as to justify an elaborate risk avoidance procedure or other safe guards to ensure that the money reached the hands of the victim without any slip between the cup and the lip! But, if unjust enrichment is the rule and not the exception, then, the immediate community of lawyers and judges has to sit up and look for remedial

measures. The solutions like payment of compensation in installments or investment of the compensation before it leaves the custody of court would only be a sanction of the deprivation of the victim himself. The social cost is disproportionate. The real snag is that the legal system has not worked out a risk free methodology for distribution of compensation awarded by courts. The tradeoff between the social cost of the error and the cost of avoidance of such is a matter for legal economics. Is it a mere agency-cost problem? Is there a divergence of interest between the client and his counsel? Would standardization of the quantum of the compensation on a no-fault basis be the answer? The highway accidents would then be treated on a par with workmen's compensation during employment. This would eliminate the intervention of an agent to sponsor the victim's cost and thereby reduce the agent-cost to the victim. Such legislation on the basis of pre-determined no-fault liability would correlate the quantum to the degree of damage. If the victim or next of kin seeks larger amounts, they may have to fall back on their right to sue in tort. Does this affect the adequacy of the remedy in most cases? It is worthwhile to examine the advantages of the substitution of strict liability in the place of proof negligence.

The change in the pattern of work at the primary level is reflected in the higher courts also. Moreover, the advent of the Constitution is a single significant event affecting the legal system. The emphasis has shifted to rights jurisdiction, human rights. The aim of the legal profession has to be to contextualize the role of the legal system in the modern milieu.

Risks are activity centric. Risk awareness responds to any change in the nature of the work of a profession as a whole. New risks emerge with such changes. Enforcement of fundamental rights and involvement in ensuring clean air and water certainly contribute

to generation of wealth. These are the areas where lawyers make their contribution. They make the legal system operative which in turn facilitates personal and commercial transactions producing wealth.

The High Courts and the Supreme Court of India have responded adequately to the challenge posed by the shift in the pattern of their work. The same cannot be said about the lower courts. To some extent, awareness of the subordinate status in the system has inhibited their initiative. For example, their problems arising out of the advent of claims for compensation for loss suffered in highway accidents never reached the ears of the High Courts for years and never made it to the Supreme Court at all. The integrated system should have transmitted the alarms at the lower levels to the highest level in the hierarchy, but it never happened. Why? Has the independence of the judiciary at each level robbed the system of its integrated character? Has the connectivity been sacrificed? Individual judicial officers anxiously commented on the corruption that the influx of these claims has brought. But beyond that there was no collective response or effort to find remedies. This development has to be examined in the context of the legal system as a whole being responsive to its problems. There cannot be a greater flaw in the system than the suitor being denied the fruits of his labour in pursuit of his claim. Is it the view of the legal profession that this is more a social problem than a legal problem? Is it their attitude that the legal and moral domains have to be kept distinct and separate? Of course the siphoning of such funds of the claimants has the trappings of a contractual sanction. But, does it not concern the legal system that such window dressing is no more than a trap for the unwary and ignorant.

For people who are tuned to thinking about concepts and principles such problems may appear pedestrian. They really belong

to the executive functions of the courts. Is it not the duty of the administrative section of the court to ensure that the hard won proceeds of the litigation go undiminished to the successful suitor? This again shows that the administrative functions as delivery points are as important as the judicial performance. Would it be feasible for the courts to issue pay-orders for the amounts decreed which when presented by the party to the insurers directly would be honoured without any more procedural hassles like deposits, check applications and payment-out? Some such simple procedure is called for to avoid the slip between the cup and the lip. It is essential that this is attended to if the credibility of the system in the eyes of the suitor is to be saved.

III**REGIME OF RISK MANAGEMENT
NOW IN PLACE**

How is the regime of Risk Management to function in such a set up? What structure and function should it have? Should it be part of the legal system or outside it?

What is a system? Is it an organized attempt at achieving a desired end? The dominant character of the organization is that is deterministic, in other words, well defined, without leaving anything to chance. Can we say that the legal system fails within the definition? That is exactly the function of procedural law which the courts are mandated to follow. Then, it inevitably results in unpredictability if the rules of procedure are violated or ignored. Rule observance has to become part of our judicial culture. Once the proceedings are robbed of their predictability, they become a gamble. Risks appear at every turn. That is exactly what the abusers of the system want. This is a real risk to which the legal system is exposed by those who are impatient towards or intolerant of these rules of procedure.

In conclusion, it has to be re-emphasized that what the legal system sets out to deliver is "justice according to law". So if you look upon law as inhibitive of justice, the legal system itself is stripped of its legitimacy! The qualification "according to law" is largely meant to make the concept of justice, ascertainable, predictable and responsive to compliance. In fact ensuring compliance is one of the functions of the legal system. If that is the objective of the legal system, then does the system face, any risks in doing so? We are considering the legal system, as a whole.

Yes. There are many other risks. Let us take the risks arising from the instrumentalities used in the field. Language comes to our mind as the foremost amongst the resources at the command of the system. It has multiple uses. The judge often uses it for issuing commands in his ministerial capacity to extract obedience. The same officer as presiding officer in court uses language in eliciting expressions of views from members of the bar appearing in the case or for securing compliance from litigants as witnesses or otherwise. The judge's vocabulary may change in each role. For instance, the responding lawyers may pause to consider what the implications of what they propose to say would be and how it would impact on the judicial thinking on moulding the decision in the case. Thus, it is not a passive response but an active input that comes as response. If the lawyer is motivated more by the objective of ensuring the success of his client's cause than by his duty enjoined by his professional ethics to inform and guide the judge correctly, then there is a great risk of miscarriage of justice. Thus, the very resource readily at the disposal of the legal system namely, the language, its content, style and other skills in using it would deflect the judge from the legitimate purpose of rendering justice according to law. In the lower courts, local languages are now used for recording depositions, for hearing lawyers and even for passing

orders. English is still used in higher courts. The risks raised by use of language are the same.

There are a few features which are peculiarly characteristic of court room discourse. It looks backwards. The presentation of legal principles governing the decision has to be precedent oriented. Even if there be any departure from the track laid down in the already reported case law, the lawyer has to camouflage such deviations as logical developments of the established propositions. Case law can only make incremental accretions unless the earlier decisions call reversal. Thus, the adroitness with which the lawyer clothes a reversal as only an extension of the same view raises a risk in the way of the judge who looks upon the law of precedents as binding on him as statute law. This is so particularly in subordinate courts. Use of language as an instrument of persuasion, throws snares in the decision making process. The judge must be aware of it, guard against it and resist the temptations laid before him. To do this effectively, the judge has to be well equipped in the use of the language. The court language has developed certain characteristic flair for phrases which may not be familiar to non-law persons. The Judge has to keep a sensitized ear open for such devices used before him. This is one of the precautions to be used to manage the risk raised by language.

There is one other aspect which should not escape our attention. It is highly relevant to the discussion on hand. The legal system is and has been, for now a century and more, highly male dominated. We read about one or two names of woman law givers such as Gargei and Lopamudra in ancient India. Beyond that, there has been hardly any feminine influence on legal thinking. This has naturally had its impact on the language and content of law. The words, phrases, gender and even the thinking are male chauvinistic. Indeed till about a few decades back, women were not even

competent to get enrolled in the legal profession. This presented the risk of half the population being excluded from the practice of the profession. That was the result of judicial pronouncements of the High Courts of Patna and Calcutta. Legislation was necessary to annul the same and to give the woman her due place in law. That is the reason why, even the statutes too reflect the monopoly of legislatures by males. In recent years, some pioneering women have entered the legal profession and the judiciary too. They have their task cut out. They are to rid the male overtones in law and courts. May be, the language used in courts itself would undergo a gradual change in the coming years. The discriminations, explicit or implicit, loud or subtle would have to be targeted by these pioneers, if the risk of male monopoly has to be managed adequately. Otherwise the risks of miscarriage of justice arising from gender discrimination cannot be avoided effectively and promptly.

Language is the tool of law. Hence if the tool itself breeds risks, they demand priority attention. That is the reasons why such risks have been taken up for consideration.

There are other risks generated by the laws framed by the country. Take for instance the Law of Evidence or Procedure. In a criminal trial it was found that a husband stood charged with murdering his wife, suspecting her fidelity. At the end of the trial the judge was in a quandary. There was only one solitary piece of 'evidence' against the husband. The murder was said to have taken place inside their house in a closed room. No eye witness. The evidence relied on by the prosecution was a confession statement said to have been by the accused to the police during the investigation after surrender. The law is clear. Such a confession cannot be used against the accused to found a conviction. The judge was morally convinced about the guilt of the accused. But

he felt compelled to acquit him for want of legal evidence. The acquittal was patently unjust in the eye of the man of the street. Justice demanded he be punished but law demanded he be acquitted. How did this conflict between justice and law arise?

Generally, statements made by the accused persons during investigations incriminating themselves are suspect. Experience of courts has shown that often the police take the short cut during investigation by extracting by coercion confessions from the suspects while in police custody so as to save themselves the trouble of elaborate investigations. May be, this is attributable to the fact that the police at that level, not adequately literate and not sufficiently equipped, are unable to resist the temptation. It has to be remembered that any person is presumed to be innocent till he is proved guilty beyond reasonable doubt. Law does not allow such a presumption to be displaced by any tarnished evidence. This is an instance of the risk of trained evidence being used to be set off against the risk of a guilty (unproved) person being let off for want of evidence. The two risks are there. The larger interests of the society are at work on the judge the one tugs at his heart and the other at his conscience. The interest of the society mandates that a guilty person may escape punishment rather than an innocent person being unjustly punished. In managing the risk, the courts administer "justice according to law".

A few instances, in civil and criminal contexts, have been taken for consideration only to show how legal scholars have been aware of the risks generated when a regime of law is erected. For example, the principle of fairness has a centrality in legal procedures. That was considered all important in the context of adversarial character of the procedure. But with the change in the pace of life, speed has become important. The emphasis is slowly shifting to the need for a fast track for trial. The risks of this switch

over of emphasis are yet to be examined after gaining some experience of the fast track. Obviously, the same procedure launched on a fast track may not fulfill the expectations as regard speed. That risk remains yet to be examined.

The other branches of knowledge too are now waking up to the increase in pace in life. A new name, Risk Management, frequently occurs in management studies. It has been carved out as a separate subject. They would not have thought it out step by step to erect barriers to hold at bay the deleterious effects of such risks, if they had not been troubled by their ways not keeping up with the pace of life.

In the example already discussed, the duty of the judge to so interpret the provisions of law as to avoid defeating the main purpose behind the law looms large. That is part of the Risk Management skill. The judge is called upon to avoid or confine the risks perceived as unavoidable. This takes us on to the extent to which the perceptions of the risk influence the processes of judicial decision making in courts. It is generally said that the judgements pronounced by the judges are really subjective. If that were to be so, then the value structure of the judge's thinking becomes relevant. This would at once shift the entire subject from the area of forethought displayed in drafting laws or in applying them to the sphere of relationships between different elements of knowledge that go to make up the judge's thinking. This is particularly true when the judge, leaving aside the codified or decided laws, resorts to the principles of natural justice. Of course, natural justice cannot be equated to the caprice or the fancy of a judge. It is governed by well laid principles, in turn, enunciated in statutes and decisions. Thus, in ultimate analysis, it is the values that form the structure for the decision making process that count.

From what has been stated so far, it is clear that it is the

values held by the judge that alert him to risks involved in the particular line of reasoning that he prefers to others. There is an element of choice there. The fact situation in any particular case may unveil many choices before a judge. His preference for one line of reasoning amongst many others decided by the end result already shaping in his thinking even during the progress of the trial. A trial judge comes to what may be called a contingent decision at various stages. They begin to swim into his awareness as dimly perceived possibilities at the outset, and then develop noticeable shapes as the evidence unfolds and finally crystallizes into a concrete decision. In the meanwhile there are further inputs like data gathered from documents filed and relied on, responses of lawyers to questions by the judge, light thrown upon the problem on hand by statutes and earlier decisions and the like. Till the effect of these inputs are fully felt and perceived, it is a contingent decision that he has in his mind.

It is at this formative stage that the decision making process is most exposed to risks. What exactly is the risk? The risk of injustice. One knows its full dimensions when it is seen only in the narrow context of a particular case as attempted above. But such an analysis is necessary to realize how vulnerable the decision making processes are when a judge is called upon to handle them. His preoccupation has to shift from avoiding injustice to doing justice.

The very format of the legislation in the form of sections incorporating the principles qualified by exceptions, explanations and examples promotes such a negative approach by judges in their appreciation of the case. A proactive approach is called for at all levels. Any judge who does not see a change in his initial tentative decision misses the contingent thinking as part of his judicial skill. He has to avoid rigidity. That is an operational risk in judicial thinking.

Sometimes, the judge finds himself face to face with the most unexpected development in the fact pattern. It may have a shattering effect on his reasoning in support of the contingent conclusion he has so far arrived at. He must have the courage to examine and assess such a surprise development and mould his views, if need be. his conclusions so far arrived at are after all contingent on further evidence to the contrary not appearing. The judge should have at his command the needed flexibility, if he is to combat these risks. This unpredictable fact in an ongoing trial is a potential hazard in any decision making process. This is the risk of the unexpected and unpredictable. It may spring in the form of an unimpeachable record in the custody of a third party to the litigation, say, a government department. They might have produced it on summons only at that stage. Again, it might take the form of an expert opinion or evidence reaching the court belatedly, though applied for in due time. Such risks are not unknown in trial courts. It is part of the judicial skill to keep his contingent conclusions open to revision, if need be, on consideration of such evidence, if it compels a contrary decision. In a legal system where the presiding officer cannot take on an inquisitorial role, gathering evidence on his own initiative, such a hazard has to be faced and resolved calmly and effectively as part of the Risk Management skills of the judge.

One thing has to be made clear at this stage. Facing the unpredictable does not mean abandoning the till then held view only. That would be a narrow and negative reaction. The judge must have at his command, enough creativity, to re-appreciate the evidence already presented in the context of the unexpected factor. Unless such creativity is shown to be more than flexibility, the other participants may feel, compelled to reappraise the judicial skills of the presiding officer. The credibility of the legal system will be at stake.

In business, any risk situation endangers the investment, the reputation, the image and the other assets of the corporate entity. But in the legal system when the judge faces a risk situation what is under challenge is his investment of time and appreciation of evidence. Thus, what is in jeopardy is his own judicial profile. A realistic risk attitude with an awareness of the potentially changing picture is called for. Such a risk has made it more difficult to manage as the judicial trial is teamwork. Many of those who contribute to the sum of total of the input are not the judge's subordinates but peers. The lawyers on both sides would fall in that class.

One of them, may have a stake in the tentative conclusion already arrived at by the judge. He might have sensed it, even if the judge has not thrown any hint. Such a lawyer may make it more difficult for the judge to change his conclusion. But, there is one advantage here. The judge is familiar with the skill of the lawyers before him and they know that judge's thinking process.

They have done other cases as a team. They look forward to working together in future also. Thus, the cultural norms governing Risk Management in such cases may promote harmony and are conducive to success of the effort.

Broadly, the contours of the subject have been delineated by the authors of books on Risk Management as a managerial skill. What has been done above has drawn its inspiration from such a treatment. The attempt is to focus on how Risk Management is as relevant for the judge as it is for a pilot. The plurality of roles of the judge raises some difficulties. The roles often overlap. The risks also overlap, often.

In the past, people wanted justice. Today, they demand justice. They insist on its delivery without delay. That is the business of the legal system. The consumer decides it by his expectations.

Of course, it is difficult for a monopoly service system to respond to such expectations.

What is the expectation? What does the suitor look forward to when he goes to court? His anticipation is to win. But, is there any guarantee of success for all? The essence of adversarial trial is the win-lose result. However, there is the guarantee of a fair trial which should afford him satisfaction even if he fails to achieve success. Anything that affects the fairness of the trial, denies him that response to his expectation. Unmanaged risks endanger the responses of the system to his expectation. Hence, the importance of procedural rules as risk handling measures. In this view, fairness is very important.

IV

THE RISKS OF DELAYED JUSTICE

Justice is a dominant value in judicial thinking. But the judge has to find some space in his thinking for other values also. Even as it is, we have seen how fairness loomed so large in his thinking that it almost left no room for other values. That is because of the adversarial character of the proceedings presided over by him, as we have already noticed. The developments in other fields, mostly in science and technology, have forced speed in delivery of services a central place in almost all departments. However important justice may be, speed in delivery has come to be equally important. This is the impact of science on a subject that is not a science, namely, justice. Whatever is indispensable for assuring the quality of justice must be regarded as paramount? The attitude should not be that it does not matter even if the quality is compromised so long as speed is maintained. This is important as one cannot be had at the expense of the other. In the very nature of things, justice cannot be hurried beyond a stage. The quality would then be at risk. The

other activities which play a supportive role in the delivery of justice can be organized to pick up speed. Finding a just conclusion is the dominant activity and the other activities like delivery of the same are subordinate activities.

Take the case of criminal justice. If anyone watches the proceedings in the public court exercising its criminal jurisdiction he would be shocked to find the reasons for delay. He may find the presiding officer ready to take up the session's case called. He may hear the lawyers on both sides declare that they are ready. Yet, the case will have to be adjourned as the accused is not present. He is in custody. The police have to go to the jail and bring him. They have not done so. Why? They are pre-occupied with some other duty, such as, security duty in regulating the crowd in a procession with some minister leading it. How can you expect speedy disposal of such a case till the police force give priority to court duty? This picture raises a number of questions: but, let us examine one of them. Can the court say that he would get on with the case whether the accused is present or not? Obviously no progress can be made in the absence of the accused. Sometimes, the court does not even get the information that it is not possible to produce the accused in the hope that he might have held up on the way and might come late. Unless the police are made accountable for the waste of judicial time, what is the use of talking about speeding up of delivery of justice? This is an inter-department phase that has attracted repeated attention of various commissions, but in vain.

In another case, a doctor has come to court on summons. He is now working in another place having been transferred. The post mortem records are in the original place where he did the autopsy. The doctor has to go back for want of the post mortem records which should have come from the other hospital. It would

have been otherwise if the medical records are computerized and the data to be used at the trial are transferred to the court using information technology on intimation from the office of the court even on an earlier date. The hospital's efficiency has a bearing on the prompt transfer of such data requisitioned by court.

While trying a claim for enhancement of compensation for a piece of land acquired by the State, the court sees the awarding officer ready to depose. But the data on sales relied on by him for quantifying the compensation are not with him as he has been transferred to another place. If the revenue department can also pick up its pace of functioning, the computer there may come in handy for transfer of relevant data to court long before the date of trial. In fact, when the claim for enhancement is filed, the revenue department is notified by the court that the award is under challenge. On such notice, they have to promptly transfer the data.

These instances show how others beside the judge and the lawyers may also hold up a trial. Lack of coordination may be a want in management skill in the office of the police, hospital, or collector on the other. But, that risk is incidental to the inter-departmental character of the functioning that goes to make up the pre-trial activity of clearing the deck for action. The risk of others not responding to your urgency is always there as an excuse. It has to be managed by the skills of the court's administrative staff as a matter of routine.

It may surprise many to know how many months it takes for the trial court records to be sent to the appellate court. Both the courts may often be in the same building! The appeal would be called and adjourned, 'await records'. An adjournment by even two months would not help as nobody is going to apply his mind to the problem till the adjourned date. This risk of holding up the progress of disposal of appeal that may take less than an hour for hearing

on merits is avoidable. If only the ministerial staff in both the courts had been less lackadaisical. When a computer replaces that person it may be more enthusiastic about doing things on time! To some extent technology may speed up things and eliminate risks of avoidable delay.

The lawyers of the case should have at their command, time management skills as part of their professional equipment. They have to look upon the holding up of the court's work due to lack of cooperation from them as highly unprofessional. More often than not, cases get put off due to the default or delay of the lawyer getting ready to conduct it. Of course, it is up to the judge to create such an atmosphere in his court, that no excuses for not being ready would be entertained. The client engages a lawyer for the latter's personal skills. Another may not command the same skills of advocacy. If the client finds his lawyer on his legs in another court, when his case is called, all his investment in that particular lawyer is in jeopardy. Many judges empathize with the suitor in such a plight and show accommodations. But such occasions should be the exception and not the rule. The risk of overlapping of the lawyer's work in more courts than one is real. It is partly due to the lack of certainty of the case being taken up in court. This encourages the lawyer's default to make alternative arrangements. Once this uncertainty is eschewed, planning may be easier for the lawyers also. All these aspects have been brought up for consideration in the context of Risk Management as they are relevant. Posting of work by court may often be done only keeping in view the court's diary. So many others, parties, witnesses, lawyers etc. have to make it convenient for themselves to be there on that day at that time. The difficulty in establishing a congruence of such convenience is one of the reasons for the delay. Sometimes, when all are present, the court may not find time. The court's own work on any given date is much more than what it can

manage on that day. Thus, there is an element of gamble in this. A more important reason is that there is more work than what a judge can manage in each court.

This is one department that has undergone very little expansion if the docket explosion is taken into consideration. The judge cannot complain. The risk of over burdening the court with work is real and this does affect its efficiency. Whatever be the reason for lack of priority for this branch of government's work etc., the effect is unmistakable. NEGLECT. There is the risk of law persons feeling that they are not indispensable for the rule of law. That affects their motivation. That needs to be revived urgently, otherwise, modernization would be a vain effort. Risk Management would sound hollow to such unmotivated people. The scene on any morning in the subordinate courts is most depressing. The enthusiasm to get on with the day's work is singularly lacking. We have examined how so many factors conspire to create this lack of motivation. Apportionment of blame is not the solution for this. Stimulation of interest is what is needed. That is motivation. The entire system needs to be activated. After all, Risk Management is avoidance of an unwanted result. If they are not interested in any result at all, where is the question of unwanted result and its avoidance? Would quickening of the pace be the animator? The lack of amenities, the condition of disrepair of the furniture, equipment, library etc. fosters this lack of engagement in the cause of justice. Would expediting the entire gamut of proceeding actuate all the participants into purposeful action?

The society with pride in Rule of Law should accord the legal system a dominant position. It may not project that reassuring image if only its apex court is effective. If the values underlying the rule of law are to inform the entire nation, the courts of first instance should be influential as they are the grass roots institutions.

They can command influence only if they project an image of efficiency. Where is the motivation for them to play such a role? Their own self image as being an uncared for and unwanted institution is uninspiring. Such an image puts the rule of law in peril. That is the grave risk that our society faces today. This was not the result that was anticipated when the separation of powers was stipulated for in the Constitution of India. Judiciary, the Legislature and the Executive were to be three arms of the government equally important. Today, the courts closest to the people are the most neglected institution. As an unwanted result, it is a risk which has to be managed firmly, imaginatively and urgently. If this is not so done, the courts at higher level are not immune from the risk. They too are parts of the same legal system.

Administrative means ministerial as opposed to the judicial. The judge has both the functions. When he manages the offices of the court, he discharges his executive functions. When he deals with the causes, he hears and decides he discharges his judicial functions. The risks arising in one are as important as those from the other. In fact, the attitude that the judicial functions are more important than the executive functions itself generates a risk situation. Any default or delay in the ministerial area would affect the judicial function by reason of the delay and consequent arrears. Accumulation of arrears means more administrative work which could have been avoided by expediting the disposal. Thus, each has its own effect on the other. In the administrative work, the judge depends on the ministerial staff of the court. There is no stipulation for a trained person while filling up a vacancy in the staff. Perhaps, only in the case of stenographers, a certificate of competency is insisted upon. In all other areas, the employee learns as he earns. Even this learning is not by any organized courses. It is casual. Skills are handed down from the predecessor to the

successor as a matter of professional courtesy. Needless to say, this does not ensure efficiency in the functioning of the offices of the courts. There is an examination of sorts for purposes of promotion. Testing is not training. The ability to absorb the skills is also often in doubt. The academic qualifications are not high. May be they insist a degree for a few slots at the top of the hierarchy. The judge's time is wasted. The suitors cause is risked. The progress of the matter on hand is halted as the clerk awaits enlightenment as to what has to be done next and how. Such delays breed corruption. All the carefully crafted guidelines are wasted on such persons. If the judge takes on himself the onerous task of training such staff, he has his hands full and it can only be at the expense of his legitimate tasks. The risks arising from the work of the untrained staff are so serious that one is left wondering how the legal system has been left to fend for itself for so long. The lawyers who have to interact directly or through their staff with such ministerial staff of the courts know how exasperating the situation can often be. That they are driven to the necessity of looking for shortcuts leading to corruption is no surprise. Thus, corruption is the inevitable consequence of inefficiency.

There is need for transparency in the field of ministerial tasks. There should be a visual display monitor on the table of the executive wing of the court. It should show the role delineations, who is expected to do what? It would enable the suitor to locate where the stagnation is. This is necessary as there is a chain of activities during the scrutiny of the plaint etc. before it is taken on file. The various stages have to be broken down into identifiable steps. Such a Work Breakdown Structure would be a great help to the processing staff. Piecemeal returns and consequent delays can be avoided by a computerized check list.

Let us take another area where computerization would eliminate delay now seen as unavoidable. A suit is deemed to be instituted on the presentation of the plaint in the office of the court in which it is going to be filed. Now a number of things have to be checked before accepting the plaint. The court's ministerial officer receives the plaint on presentation by the lawyer or his authorized clerk and causes these features to be checked. The clerk who actually does it may take his own time over it and may sometimes need the guidance of some senior ministerial officer on something of which he is not sure. Then the objections for not being taken on file are endorsed on the plaint by the clerk which is initialed by the judge as it is a return by the court. All this normally takes about a week and the return would grant another week or even a fortnight as time allowed for compliance. A couple of returns like this normally delay the numbering of the plaint by a month or more. In fact that it is the earliest stage in the long list of bottlenecks.

This can easily be eliminated by computerization of the scrutiny process. A check list can be prepared of the points that arise for scrutiny at that stage. For example, it can take a form like this:

1. Has the court territorial jurisdiction over the case?
2. Has the court pecuniary jurisdiction over the case?
3. Is the plaint properly signed by all the plaintiffs if there be more than one and by his or their counsel?
4. Are the corrections initialed?
5. Has the plaint been properly valued?
6. Is the court fee paid correct?
7. Is this suit barred by limitation?

8. Is this suit barred by any law?
9. Have the documents sued on and relied on been filed?

These can be drawn up as a check list and fed into the computer on the admission table. On presentation, the court officer can have the plaint checked for compliance of these requisites, by going through the checklist. In the event of non-compliance of all or any of them the plaint is back in the hands of the advocate concerned in less than a minute of presentation. It is up to him to comply and represent with the marked checklist to show compliance.

If the two pictures are contrasted, it would be seen how avoidable that initial delay is. Incidentally but importantly the corruption at this stage can also be eliminated.

If you want a parallel, take the case of a modernized hospital. The schedule of work in the operation theater is prepared the previous day. The in-patients who are prospective candidates for operation have to undergo a number of tests before they are listed for surgery. The results of these tests govern the selection of the date for surgery. All these are computerized. These tests, their results, the recommendations of any specialist, if needed, are all viewed by the surgeon who finalized the next day's schedule. To avoid overcrowding he has a quick glance at the number of operations already slated for that team and then finalizes the next day's schedule. All this is done on the computer, the needed data being made available by the computer in the system. If that is possible in the hospital why it cannot be done in courts?

A check similar to the one at admission of the plaint is to be done at the stage when the work of the court has to be scheduled for the following month. Usually, this is done by listing the cases that would be taken for trial on the respective dates mentioned

against them in the list. Care must be taken to see that the suit is ready for trial (in the case of appeal they're ready for being heard). Again, the checklist method can be adopted as otherwise the listed matter may have to be adjourned for some justifiable reason. An important document filed in that case may be challenged as a forgery and might have been sent to the handwriting expert for scrutiny. His report might be awaited (in a criminal case blood test analysis reports might be awaited, similarly). Another example, a commissioner for local inspection has been appointed and his report is awaited. That may justify an adjournment. A party is dead and the statutory time allowed has not expired for bringing on the record his legal representatives. Any trial in their absence will not bind them and needless complications would arise if this is overlooked. So the check list has to be something along these lines:

1. Are the pleadings in order?
2. Have the issues been framed?
3. Have the documents been filed?
4. Are any of the documents filed in court liable for any curable objection under Indian Stamp Act?
5. If so has it been so cured?
6. Is the suit ready for trial?

This questionnaire can be fed into the computer. Each suit that is otherwise qualified to be included in the list has to be put through this clearance process as indicated above. It is by no means exhaustive. It is only the model of probable objections to inclusion. For instance, if one of the documents already referred to in pleadings as evidence to be relied on is liable for stamp duty as it is inscribed on plain paper signed by all the parties that may block further progress of the trial when the document is shown to the witness

during cross examination. Once that objection is raised on its being violative of the provisions of the Indian Stamp Act, and then the party has to be directed by court to cure it of the infirmity by paying the value together with the penalty payable under the Act. If the party is unable to pay it as it is ten times the lawful duty, the court may have no option but to send it to the revenue department for assessment and collection. The party may prefer it, as unlike the court, the revenue office has the discretion to limit the penalty to twice the amount instead of ten times. This would involve a long delay in a part heard suit as the document has to be sent to the revenue department by the court itself. The Stamp Act requires that the document should not be returned to the party as he may evade the levy by not producing it before the revenue department. On a question of revenue collection, the rules are mandatory. Hence, the check has to be put in early enough even before the suit is to be listed for trial. Such documents should be called for by the court when issues are framed. These safeguards can be computerized and put in place as a Risk Management measure to avoid the risk of long delays at the late stage of trial of the case. Computer scrutiny may be the response to such a risk. The final list may be on the computer, a fortnight before the commencement of the month concerned in the list. Such access to the list shall be deemed to be notice to the advocates and parties concerned.

Similarly, when the judgement is delivered in any case it shall be available for viewing on the computer, that day itself. Thus, time taken for obtaining copies can be drastically reduced. The Copy can be filed so that it may be available at the hearing of the appeal. There is no loss of time.

A few contexts have been taken up to show the feasibility of elimination of delay. There may be other areas too. For instance, Computer printing of judgements by the court would suffice as it

can be done that day itself instead of waiting for the printing press to do it in a leisurely way causing two or three month's delay. Furnishing of the printed copies of judgement is an avoidable cause for delay in the filling or hearing of the appeal. When it can be done by a computer printer, there's no reason why that is not taken advantage of.

The updating of the registers is a laborious act at which dozens of clerks are slaving on the eve of inspection by higher courts. If they are computerized they would stand updated simultaneously with the happening of a transaction. For example, when the court, on a proposal of the pleadings frames the issues it should automatically be reflected in the diary of the case. Indeed, the queries framed in the check loads before listing of suits are to be answered by the computer from the date available in the diary of the case. A search of computerized records would make inspection by the higher courts easier. The connection between the quality and quantity of work would need only a brief glance.

Copyist department in courts is a major cause for most of the delay. Typewritten copies are the rule. Computer copies can replace them. The number of copies needed does not add to the delay if computer printing is resorted to. The cost would also drastically go down. The risk of denial of a remedy to a resource less party is thus managed.

When people go to court's ministerial staff they do not expect to see what they are used to find in government departments. An office in a government department may not surprise them if they see empty chairs, late attendance, early departures, long tea breaks, lack of courtesy or diligence or expedition. People associate the justice concept with certain values like honesty, understanding, fairness, impartiality and other much trumpeted components of justice. They do not compartmentalize their

expectations to public court only. They expect to find them in the courts' executive wing also. Hence, it is all the more necessary that the ministerial staffs in the courts look upon themselves as part of the justice system.

The judge, as the executive head of the administration of the courts has to evolve strategies to combine the response to public expectation, with the loyalty to the values that inform the judicial work. Both practical and idealistic approaches are called for. The judge is expected to have his vision, no doubt. Otherwise he will not feel inspired. He needs to have the ability to concretize his ideas as to how the system should respond to the expectation of the suitors. The vision has to be based on the ideal of suitor satisfaction. The ideas have to be based on the reality of today. This readiness to effectively manage the facts would enable the judge to keep his focus on his vision.

Failure to deliver the anticipated result as programmed is also defined as a risk.

Deterrence is one of the justifications for penal law. The delay in delivering the punishment blunts the discouragement that it presents to the offender. Moreover, if there is a time lag that period tempts the offender to manipulate the machinery with a view to avoid the punishment. Thus, the delay in delivering justice is particularly harmful in criminal law. The presumption of innocence calls for the accused being at liberty pending the proof of accusation. This has led to the development of a whole new branch of law, the bail jurisdiction. This in turn has led to the chances of accused evading law by jumping bail. Thus, delay brings in its trail, all these problems. If delay is avoided swift retribution does enhance the credibility of the legal system. The absconding accused, the hardship to the other accused, in circumstances if they are not on bail, the unduly long incarceration of an ultimately acquitted under

trial, the tampering with the evidence and the fading memory of even honest witnesses are some of the evil that appear in the train of delay in delivering the justice. Even the perception of the society in respect of the crime sometimes undergoes change with passage of time. What would have been looked upon as a just punishment appears to be disproportionately harsh when handed down long years later. The courts need to have a sentencing policy based on principles underlying the theory of deterrence or reformation and this policy has to find a space for the effect of time on the perceptions. This policy needs to be constantly re-examined and reviewed by the courts while dealing with various offences. The anxious thought, bestowed by the judges repeatedly in offences against women and children is such an example.

Is there a sentencing policy here? Is the above only a prosecutorial perception? Is such thinking shared by all law persons? There is also the risk of the absence of congruence in the thinking of the judiciary and that of the legislature in the area of sentencing. If they work at cross purposes, the policy would be in peril. About three decades ago this is what happened in USA. The Bail Reforms Act, 1984, abridged in USA the right to bail to under trials where the accused stood charged with some federal offense. The Speedy Trial Act shortened the pre-trial wait for the federal criminals. These are legislative exercises to reform the criminal justice system in 1980s in USA. The judicial discretion of the sentencing judge was considerably curtailed by the constitution of the sentencing commission which laid down the guidelines for the sentences handed down by courts. Thus, there has been an encroachment on the judicial discretionary functions in a vital area. The courts there responded by laying down elaborate protections and procedural safe guards for the under trials and the accused before the court. Thus, the tug of war between the legislature and the judiciary throws up a risk of there being no consistent sentencing policy to guide

the courts. This underlines the need for a well thought out sentencing policy which would reflect the legislative and judicial thinking and lead to avoidance of the above risks: risks generated by a conflict between legislature and judiciary.

The purpose of a sentencing policy is to invest the verdicts of criminal courts with a reasonable predictability. That is part of the deterrent character. Long delays over years may find some judges viewing the offences differently from how they would have seen the crimes at about the time they were committed. There is an inbuilt element of injustice in this. A Prime Minister as a leader of his party tampering with the loyalty of three Adivasi members of the parliament to defeat a no-confidence motion outraged the conscience of the country then. But the long delay of more than a decade and a half in pursuing the matter in the courts has robbed the case of its criminal odour. May be because of the concerned leaders not occupying the center stage any longer, may be because of other cases of similar offences have surfaced in the meanwhile, or may be the evidence available lost its credibility. Criminal justice is after all an organised revulsion of the society to any crime at a given time. The context of the crime may be relevant at the stage of sentence. The context moves out of focus, if there is a long delay. The criminal law jurists are concerned about the impact of delay on the sentence.

Legal system is a value laden system. Justice, fairness, impartiality and other high ideals have dominated its function. Smooth working and expeditious delivery of results as practical aspects, though never ignored, have not been given the importance they are assigned in other systems. A comparative scrutiny of statutes of the early decades like the Civil Procedure Code, 1908, and the Indian Evidence Act, 1872 with later statutes more recently enacted would show the shift. In the earlier statutes the emphasis

was on fairness. In fact, the concept of fairness as justice itself held sway amongst some thinkers. Hence, speed in delivering justice was never regarded as an objective. With the pace of life increasing manifold such perceptions have changed. Now it is declared that the delay itself defeats justice. Provisions of law formerly designed to freeze the fact situation as it existed on the date of suit to await final adjudication or the theory of relief once granted dating back to the date of suit would no longer suffice to counter the effects of change, fast and inexorable. The race against time has acquired an edge with shrinking of distances. This is obvious in disputes in the business world driven by information technology.

in this race law is left behind. The controversies arising in the business transactions cannot await the court's ways. The temptation is for the business contracts to stipulate that arbitration, negotiation and other non-adjudicatory methods shall be the preferred modes of settlement of their disputes and not adjudication by courts of law. In other words, the public system is rendered redundant. It is like the preference for a courier to the postal system in the area of communication. Similar trends are to be seen in areas like health. Thus, the legal system faces that gravest risk of redundancy now. We will revert to it later.

There is of course a marginal attempt at introduction of some equipment like Xerox as time saving devices. Would this suffice? No. It is the mindset of the litigant, the lawyer and the judge that needs to be recast. That is the first step in the series of measures to be undertaken for managing the risk of redundancy. Make no mistake. It is a serious threat. Courts would soon become memories like those animals of prehistoric times which could not survive the fast changing environment. For some time, the environment of human activity has been undergoing a sea change. The law courts

which are called upon to deal with such environments find themselves totally unrelated to them. Expedition has become as important as fairness.

Merely presenting alternatives is no longer a viable solution. Multiplying the same type of institutions makes no dent. Parkinson's Law inexorably operates. In fact, that is one of the risks to be managed.

Mere values and skill would not convert themselves into concrete actions. Values may inspire. Skills may ensure quality. But the actual work has to be turned out. We often hear protests even from the judiciary that the courts are understaffed and that recruitments are not undertaken in time to fill up vacancies at all levels. The courts have a peculiar problem as there is a dichotomy in their control. The appointment, salary, suspension, punishment and dismissal are by the state government in the case of subordinate judiciary. The training, assessment, inspection, promotion and disciplinary action are by the High Courts. Thus, the High Court has to make representations to the government from time to time on the needed strength. The government may halt further the recruitment of staff in view of proposals for computerization of courts. Retrenchments at later stages may pose problems like agitation, strike etc. The need for computerization is obvious when one considers the phenomenal strides that the IT industry has taken. In fact, banks and other financial institutions are going apace. A beginning has been grudgingly made in the High Courts and Supreme Court.

There are areas in the subordinate court's work where the technology can make a dramatic change, thereby, managing the risks caused by the needless and unbelievable delay in their functioning. But the mindset of the judges, lawyers and the court staff has to change. The dangers that delay poses have to be

realized. That has to be the first step in Risk Management. Delay is not normal. Delay is a risk. Delay is avoidable risk. If not avoided, it drains the national resources like time, money, effort, efficiency etc. The focus has, therefore, to be on the dangers of delay as an immediate task. Steps are called for to avert delay.

Time is a resource. Needless to say, once lost, it cannot be regained. Hence courts have to capture the value of time as a precious resource. Merely saving time by using information technology based facilities would not improve the services delivered by the legal system to the people except perhaps marginally.

The interaction between the values and skills in the functioning of the legal system goes deeper. The one central thought with which we are concerned is that in the legal system values are more important than skills. No doubt, there is some awareness today about the need to upgrade the skills. Often human skills are sought to be replaced by equipment skills. But values have to be realized, cultivated and practiced by the human beings. No substitutes for them.

The adversarial system itself generates and sustains the need for advocates. The dependency of the judge on the lawyers needs no emphasis. The administration of justice is based on the competent and hard working lawyer's performance. Any amount of modernization of court's procedures would not and cannot displace the vital role played by oral advocacy. In the United States Supreme Court, thirty minutes of oratory is considered the maximum endurable. The European Court of Justice also imposes a similar time limit on the duration of oral arguments by lawyers. This preoccupation of the judge with a limit on the duration is hardly conducive to lawyer's freedom from pressures while advocating his client's cause. One such pressure, in England, is the threat of making the advocate liable for "wasted costs" (The Courts and

Legal Services Act, 1990). Brevity can never be forced by coercive means. It is one of the duties of the advocate to be brief as he has to respect the court's time. Use of technology may save court's time. A computer printed argument sheet is no substitute for the traditional oral arguments. Provision of materials in electronic form may enable the judge to move faster. But it can never be a dialogue which examines every nook and corner of the judge's views. The balance between the judge's control and the advocate's freedom to further his client's cause is carefully maintained in the legal system in the interests of justice. Some of the higher courts here have shown a preference to disturb the balance. Written briefs shift the balance to judicial control. That is a shift in value. This awareness has to be created and sustained. Adversarial character of the proceedings and judicial control are ill matched. It is risk ridden.

Awareness of risks is triggered only by values. Management of risks begins only with the values coming in to play.

It is the failure of moral domain that has lent emphasis to the fears expressed in these pages about the way the legal system functions today. Is there any space in judicial training for values being shaped? The focus should be on both values and skill. Of course, there are other factors which are relevant.

For instance, lack of experience. If a judge takes his seat on the High Court of Supreme Court Bench, directly recruited from the Bar, he would have had no earlier judicial experience. That poses a risk situation. True, as a lawyer, he would have had some familiarity with the tasks of the judge. But that is not experience. To some extent, teaming such new appointees with more experienced judges to form a Division Bench is one of the Risk Management measures in such contexts.

Lack of familiarity in certain areas of knowledge may be another source of risk. A judge is expected to have a nodding

acquaintance with all subjects that come up before him. He has to be an avid reader. For instance, when a medical negligence case comes up before him, the judge may not know if adoption of a shorter procedure by the surgeon would create risks to life or safety of the patient. In such cases, the parties call expert witnesses to educate the judge. Some medical journals would be cited in support. But the other expert would swear that the surgeon resorted to the shorter procedure only to find time to do one more operation within the time available and thereby risked the patient's life to earn more money. The judge has to decide which evidence to accept. He cannot abdicate his function. The knowledge, the experience, standing, the ability to defend his opinion and other factors are looked for by the judge in assessing the expert's testimony.

After all, the experts are also motivated witnesses. Albeit their qualifications, their sponsoring of a particular view through their opinion-evidence is to some extent an encroachment in to judicial domain. There is the risk of the judge allowing such a witnesses to share his high seat. The judge has to ensure that the expert continues to be a witness. The ignorance of the judge of that piece of knowledge need not rob him of his role as decision maker. The risk posed by lack of knowledge is further compounded by the pulls of conflicting opinion. Exposure to judicial training may enhance the skill to appreciate the evidence of experts in various fields. After all the judge is used to equally persuasive arguments at the bar without surrendering his turf to the lawyers. The expert's opinion is no more than an argument from the witness box. There is of course, the risk of the judge being unduly swayed by the language peculiar to the expert witness. The court has to strip such evidence of the professional jargon and get to the core of its testimony for assessing its credit worthiness.

Again the judge faces the problem, whether to treat such cases as breach of contract or tort. The claim arises out of a contractual relationship. The contract stipulates for due care and diligence. Default to bring such care to bear on the work amounts in law to a breach of contract. Would the burden on the affected patient be lessened if he is relieved of the obligation to prove negligence?

V

COMPETING VALUES IN JUDICIAL THINKING

Values are not something that you draw upon from a reserve only to shape the conclusion. The values have to inform the thinking of the judge at every stage. On going through the pleadings before taking up a case, the judge has a notion of the drift his thinking takes. He may not and should not arrive at the conclusion at that stage. But the first impression that the pleadings furnish is the framework on which his further thinking is going to hang. Hence, he has to allow his values to come into play even then, so that, he may detect if the case of either party rings true or not. All this is done, partly at least subconsciously.

Let us take a simple illustration. A suit on a negotiable instrument. When the judge reads the plaint, he finds the plaintiff is taking the usual precautions of paying the loan amount to the maker only after the note is written, signed and even attested. The judge's mind absorbs these details in normal course. That the plaintiff took the precaution does not arouse the suspicion of the judge. He is

informed by the value of faith in human nature. But the taking of precautions does not undermine the faith. It is usual in commercial transactions to take vouchers even if you trust each other, as others like tax authorities come into the picture later.

Then the judge peruses the written statement. The defense is discharged. He stops further perusal of the written statement and goes back to the plaint to see if the annexed promissory note sued on bears any endorsement. He finds none. He looks for any separate voucher. Again none. He returns to the written statement to see if there is any explanation for the absence of any endorsement or voucher. The value of faith in human nature initially strong now slowly fades. Would this debtor have repaid such a large sum without anything to prove it? The readiness to believe a version is replaced by a doubt. The value of faith is no longer there. Suspicion has taken its place. May be suspicion is not a judicial trait. Shall we say, caution?

The matter becomes more complicated. The debtor says that he paid the balance in full but the creditor said he would return the original promissory note duly endorsed on returning home. But when the debtor went to the creditor's home, he could not find him, but was later told he was not in station. Thus, it turns out to be an un-vouched payment. It is no longer a question of faith in human nature. It has passed on to the realm of which version is more probable. Preponderance of probabilities balances the scales in civil litigation. Rules of evidence are framed to help. When the creditor produces the promissory note in original without any cancellation then one believes that it is still undischarged. There is no question of values there. Only the probabilities which are based on the usual course of conduct of normal human beings. Hence faith is a belief that motivates an action. But, it is not the same as an expectation generated by experience of human conduct on earlier

occasions. The value pursued is truth. But this has to be culled out of what is made available as pieces of human conduct. Let us remember, how human conduct does not offer all truth. Self interest, fear, profit motive, anger, vengeance and so many such vices deflect the conduct in such a way that the conduct in question may not reflect the truth. Again, it falls in the realm of appreciation of evidence to brush aside all these contrary indications and seek out the truth. So by saying that faith in human nature is a value and so all these should not be doubted is only to miss the ultimate value of truth. So one value may not be allowed to deflect you away from another value. Thus, this is a risk which one has to guard against. It is part of Risk Management skill. Such risks are created by competing values.

This illustrates the limitations of the value structure that the legal system erects to enable the judge to find the truth. but how else to do it? If you manage the risk, the limitations to the system are tackled.

By managing the risks is meant, to control. That is one sense that is relevant for our present purpose. Of course, the phrase has other meanings as well. We are not concerned with them here; Again, an illustration would clarify the meaning. In that trial earlier referred to above of the case of an acquittal of husband accused of murdering his wife for alleged want of fidelity, take the mental condition of the judge. He would have gone through mental torture, if he was a man of conventional virtues. His blood would have boiled when he visualized the accused imagining his wife tainting their marital bed with the illicit presence of another man. But that is only the judge's passion. The agitation of the mind would be no substitute for hard proof, actual or reliable and circumstantial. The judge's personal notions of sexual purity or solemnity of marital oath would not respond to the definition of proof. Trembling with

indignation, the judge would be setting up a private court of his own. He would have abdicated his function as a presiding officer of a court of law. His values are not the ultimate arbiter. Virtue may be a value of moral excellence in the private view of the judge. Can that goad him to imaging evidence which would justify a conviction? The occurrence took place inside the bedroom. The outer doors were bolted. The unfortunate spouses were the only occupants of the house at that time.

No stranger could have had access. All this logic would spring to the agitated mind of the outraged judge. But would mere opportunity suffice? There was not even proof of infidelity in the past. Thus, the judge has to avoid the personal estimate of worth in his value judgement. Is he called upon to make a personal judgement of such a kind at all? He is expected to weigh the evidence, accept what is credible, and apply well grounded reasoning to determine the truth. It would not suffice if he is satisfied. Anybody who reads it has to be satisfied that it is a sound judgement. As earlier noticed, the contingent conclusions are reopened by the judge himself in the process of arriving at his final decision. He must give intimation to the reader of the judgement as to how he so concluded. So many skills have to be exercised by the judge in organizing the words he uses, in their arrangement, sequence, restraint, relative emphasis and selected vocabulary. But then, we are moving on to the realm of a speaking order where we have to stop our consideration of Risk Management in the judicial system. Sometimes, the judge on an impartial appreciation of the evidence may come to a conclusion. He may then find that the law does not support such a judgement. He should not ignore the law. It is a question of attitude to the law. No judge can afford to look upon law as an obstructive element or as an impediment to a just conclusion. He has to use the law to support and promote the conclusion. At

every stage he has to test his reasoning on the touch stone of law. That does not discourage him from attempting interpretations.

Before concluding, it has to be noted that law and language are linked when the judge engages himself in the interpretation of the facts before him. Let us leave law alone for the moment. The style in which the parties present the facts to the judge while on oath as their own witness raises potential risk in the judge's discharge of his duties in interpreting the facts. Some have a passionate way. While a judge need not scorn it, he has to guard himself against preferring it to a more dispassionate presentation by the other party. Similarly, an affluent party may have at his command resources to project aspects of his case that tug at the judge's heart strings. On the other hand, the poor resource less party may have no access to such aids to win over the judge. For example, it may turn on the command of the lawyers' skill each can get in his support. All this exposes the judicial approach to the risks which have to be managed by the sober judge.

Of course, this does not mean that the judge has to render himself proof against normal human reactions when he perceives the resourceful exploiting the poor by using the very system which is designed to do justice. Any perception of justice that denies its support to the victimized on some technicality is no justice at all. The judge's ingenuity should come up with means to restore the law to its legitimate office as the defender of the weak. The legal system affords ample space for the judge to achieve this by ensuring a humane and harmonious decision. In any system, abuse is a risk inherent in the use of it. In judicial system, with discordant objectives like escaping punishments, avoiding rejection of spurious claims, or search for truth and meeting out justice, this risk of abuse of the system is often planned and perpetrated. The judge has to guard himself and the system against it. The choice of the

forum itself may betray the ulterior motive of harassment. A civil dispute may be disguised as criminal case.

Sometimes the legal system is used by some with the ulterior motive of wreaking vengeance, involving the other party in ruinous waste of resources, distracting him from his main occupation, humiliating him, stigmatizing him as one who had been accused of an offense, etc. In other words these are abuses of the legal system. There are ample protections against such abuses. The abuse of the concept of Public Interest Litigation by some corporations to blunt the competitiveness of a rival has led to their finding pseudo sponsors of public interest to figure as petitioners.

What is exactly meant by 'abuse of process'? In fact this phrase is used even in the statute governing the procedure in courts. Does it mean just bending the law in a case where a strict and literal interpretation of a statute would do injustice to the case? No. It does not amount to abuse when flexibility is invested with a view to bring out the real meaning and content of the words and phrases in the enactment. The legislative intent is the thing the judge is after. Interpretation is a judicial skill. When a word means one thing in the colloquial sense but has acquired a different import in the legal sense, the judge has to carefully find out which meaning was meant to be conveyed by the author when the judge is called upon to interpret the deed. So plurality of meanings for the same word presents a risk that the judge has to manage. There are of course aids like, the nature of the deed, the context in which the word occurs, the general trend of the text disclosing what was in the mind of the author of the deed, the donor, the vendor or the testator.

Preference to a type of action when others more appropriate were available would not invariably amount to abuse of process. It is a matter of opinion as to which would serve the interests of the client best. So many factors weigh in such a choice. The cost, the

probable duration of pendency, the nature of the evidence available and even the urgency for immediate interim relief. Sometimes even if main action was justifiable the abuse may be seen in the interlocutory petitions. The judge has to see if the petition has been filed only to jostle for a vantage position with ulterior purpose of using that advantage unfairly against the other party. For instance, a party out of possession sues for a decree of injunction restraining the other party from interfering with his alleged enjoyment of the property. He files a petition falsely alleging possession with him and seeks an interim injunction restraining interference with the same by the other party. This is obviously a case of abuse of process. Under the guise of an injunction order on untrue grounds, the party seeks to regain possession and regularize a plaint with an ill-conceived prayer for a decree for injunction. Illustrations can be multiplied on end. Actions alleging violations of trademarks, not un-often, are really designed to shut out competitors from certain areas. Parties decorate their vengeful personal grievance with all the elements of an offense or a valid cause of action depending on whether they drag in their opponents to a criminal or civil court. The court has to tear the veil and see the reality of a long drawn out litigation being used as a vexatious weapon. Striking off such vituperative pleadings is one of the methods open to the judge to prune the pleadings. But often it may not suffice. The Vexatious Litigations Act may be invoked by the court if such actions are repeated.

All this alerts the judge to the risk of an attitudinal flaw towards law. Such an approach leads to abuse of legal system for a purpose for which it is not meant. In other words, parties have their own private agenda in such cases apart from actual violations or threatened invasion of rights which have to be vindicated in courts of law. The judge, with his experience, suspects this private agenda

in the pleadings, discerns it in the evidence and dismisses it in his judgement as abuse of the system. He has to project an image of intolerance of such burdening of his docket with vexatious litigation. Otherwise, he is exposing himself and his court to the risk of docket explosion. The computerized statistics may show how often this party has vexed the court with such litigation.

But for bringing about such and similar changes for speeding up the work in the legal system, we have to begin with a change in the mindset of the suitor, the lawyer, staff and the judges. Without such a change nothing can be achieved. The profit motive that drives the business world to modernize is not there, for those who function in the legal system as officials and non-officials. Speedy disposal is both a value and a skill. The advocate has to learn new habits of preparing, studying and prosecuting with speed. The staff has to use it as a skill. The judge has to insist on it from others so that he may also practice it. The balance between the various activities has to be maintained. Today, this is lacking and it leads to a waste of resources and skills. The bureaucracy in court offices has seen to it. Unless the Bar cooperates, there can be no speeding up of the functioning of the courts. The preliminary work before a case is opened for trial is done mostly by the lawyers for the parties and in some measure, by the court staff. The judge can speed up his office by providing a better infrastructure such as that created by information technology. He can also include speed as one of the criteria for assessing the work of the staff and for handing out rewards and promotions. The lawyer can lace his work with perceptions about the need for speed. The lawyer has to match the transformation of the court office with similar changes in his office by using information technology. He has to plan his time, schedule his work and keep them meticulously. He has to respect the court's time. It is public time. He has to ensure proper use of the same to make his cooperation with the court effective.

The lawyer's work-culture is relevant for use here also to the extent it has an impact on the functioning of the court. Formerly, an advocate was enrolled by the High Court. It created a psychological effect that he owes a duty to court. In the course of his practice also, the lawyer would be hauled up for disciplinary action for malpractice. The judges formed the tribunal. Thus he was under the disciplinary control of the court; true, this did not concern itself with the day-to-day functioning of the lawyer vis-a-vis the court. Only a professional misconduct would attract this jurisdiction. Now, with the complete autonomy of the legal profession being seen as a hallmark of its independence, the enrollment and punishment are both vested in the Bar Councils. Thus, an unwanted result of this autonomy is that the lawyer runs the risk of ignoring his obligations to the legal system as a whole. He is part of it, however, independent he may be. Perhaps, the judge has a role in nurturing the feeling on the part of the lawyer that he is part of the system by consulting the Bar on all the changes that are made in the functioning of the legal system. The judges may consider the feasibility of forming a task force in each district, made up of a few presiding officers, a senior member of the staff and a representative of the Bar. This group may spear head the changes by examining how the proposed changes would affect the various groups. The judge has to carry the lawyers with him in effecting these changes.

More than all this, the state has to invest more funds in the legal department to equip for speed. It should not be looked upon as a non paying department, as it is now. The institutions taken for comparison may be private institutions as it often happens in the field of health, banking, publishing etc. The legal system is a public system funded by the government. Is that a justification for starving it of funds needed for modernization? Already in many areas like postal service etc., we see a duplication of the infrastructure. This leads to a colossal waste of resources. Would any courier have a

profitable business if the postal department is as efficient as it used to be? Would privately funded schools and colleges be preferred to government institutions if the latter has maintained the quality of services rendered? Would private hospitals be such a success, if the government hospitals are better run? Is there not the risk of courts being duplicated by private forums before long? How are we to manage that risk? Already contracts in the trade, commerce and services field stipulate for arbitration and ousting of the court's jurisdiction. Soon the door of the court would be open only for the poor! This risk of irrelevancy of public courts and redundancy of private institutions for dispute resolution has to be averted urgently in areas of duplication. The criticism that there is no accountability in the legal system has to be answered.

When we say that a person is accountable we mean that he is liable for a reckoning of his work. He would be held responsible for any lapse innate in terms of quality or quantity. Are the judges accountable in this sense? If so to whom? What has Risk Management to do with it? What are the risk to which such obligations of judges are exposed to? How do the judges manage such risks?

The judges are part of the judicial department of the state. Those other two parts of the tripod are the executive and the legislature. The judges are independent of any control by the other. This is not true in the sense of absolute freedom from control. There are enactments like The Civil Courts Act stipulating for appointment and dismissal of the subordinate judiciary by the executive at the state level. Similarly, at the higher level, appointments are made by the National Government at the Center. Of course, certain safeguards like selection of the prospective candidates by the High Court or Public Service Commission's before appointment at lower levels and consultation with the High Court

and the Supreme Court for higher levels are put in place to prevent the authority from becoming arbitrary or a disguised form of control. The Constitution of India ensures their independence at the functional level. There can be and is no interference with the day to day functioning of the courts from the Executive and Legislative limbs of government, State and Central. That is what is meant by the independence of the judiciary. While in service, inspection, appreciation, censure, punishment, promotion, transfer etc. are statutorily vested in the High Court for the subordinate judiciary. The Executive has very little to do with them once they are appointed. Of course, provision of amenities like furniture, books etc, for the courthouse and quarters for residence of judicial officers and facilities are in the hands of the executive wing. This inevitably makes the independence of the judiciary vulnerable. This poses certain undeniable risks to their independence. Here again, the subordinate judiciary has to ask for any such facilities wanted in the courthouse or their residence only by representations through the High Court.

This dichotomy may vary from State to State in details as local enactments govern the establishment of courts subordinate to the High Court. Even in areas of disciplinary control, the High Court can initiate proceedings against any judicial officer of subordinate rank and can even suspend him during the inquiry. But the power of dismissal vests only with the Government of the State. This arrangement, no doubt exposes the subordinate judiciary to pressures, some subtle and some not so subtle arising from the Executive. The intolerance of the Executive of the Judiciary's claims to independence throws up many risks which affect the functioning of the subordinate judiciary. The skills of the officers concerned are very much on demand to tactfully and effectively manage such risks. The conflict rarely comes out in the open. It is there as an undercurrent adding up to the tension under which the judges

function. In most cases, open conflict is avoided. The judge's anxiety to avert a conflict results in neglect of their needs and even necessities. This is not a healthy atmosphere for Risk Management. They cannot reach the political ear of the Executive and the Judicial ear of the High Court is beyond their reach.

This plight of the civil judges subordinate to High Court calls for urgent attention. If unattended, it may pose a grave risk to their efficiency very soon. If couched in strident terms, it runs the risk of insubordination, when addressed to the High Court. If the demands addressed to the government are loud, they run the risk of political overtones. Risk Management in this basic and incontrovertible area still awaits the managerial skills of the judiciary. Who is accountable to whom in respect of provisions of basic amenities to courthouses and judges' residences is a question yet to be asked or answered even after decades of neglect? Public platforms are eloquent about the need for information technology based facilities in courts. Some attempt has been made in the High Court and Supreme Court to introduce them. But it is a far cry in the courts below them.

The hierarchical arrangement of the courts and statutory provision of powers of correction such as review, revision, and appeals etc, are to be viewed in the context of Risk Management as a means of avoidance of errors of judgement resulting in denial of justice according to law. In another sense such an arrangement ensures the accountability of the judiciary. When an appeal is heard the appellate court scans not only the correctness of the decision but also the validity of the reasoning and the quality of the judicial work in that case. Comments in the appellate judgements, though restrained serve the purpose of toning up the quality of work. Remarks in the confidential records of the department are less frequent but more potent. They affect promotion and recognition at

appropriate stages of the career of the judge concerned. Of course inspections by the higher courts periodically are to ensure the efficient functioning of the courts. This is being attended to periodically as rights of parties would be jeopardized by the default of courts inspected to maintain the records and registers as directed by procedural and other laws. The judge in charge of the court is responsible for due discharge of these functions by his ministerial staff. Apart from these routine procedures the High Court has the power to call for any record and order inquiry suo motto or on the complaint of any aggrieved person. In that context also, the accountability is activated.

Thus, the focus is on the accountability of the judge in his judicial and administrative functions in the subordinate courts as a whole. This can be looked upon as part of the organizational safeguards, so characteristic of systems. They are organized as a whole set of connected items. Neglect of one part leaves an echo of malfunction on another part. Procedure, classification, regularity, orderliness and operational correctness characterize such arrangements as part of an elaborate Risk Management system.

Return of documents to parties who have filed them at the earliest stages of the litigation has to be attended to. It also makes for easy coordination between departments. So long as the legal system is part of the larger governmental arrangement, the units of the legal system have to respond promptly and reliably to any demand for statistics that may be needed for reforms to be carried out by the legislations. Information is a great resource. The legal system owes it to the people to avert the risk of such information of public importance being lost or damaged. Modern modes of storage and retrieval are yet to be introduced. Thus, there is the risk of the three limbs, namely, Executive, Legislature and Judiciary not functioning harmoniously if there is no systematic orderliness in their functioning. Indeed, discharge of such functions of the

system as a whole has been insured by enactment of statutes. The risk of mismanagement have been largely averted by mandatory provisions of laws like Civil Courts Act, Criminal and Civil Procedure Codes, Civil Rules of Practice, Circular orders by the High Court, etc. All these are part of a holistic concept of Risk Management at various levels, all motivated by the objective of serving the needs of the suitor who knocks at the door seeking justice.

A study of the laws governing the functioning of the courts, be it procedural laws stipulating how the assertion or recognition of rights is organized or laws of evidence, finality of litigation or denial of jurisdiction, one thing is clear, centrality is given to the adjudication of the right asserted, denied or threatened. No procedural compulsion justifies the forfeiture of the right for vindication of which the party comes to court. In any system so elaborately organized as the legal system, there is always space for sanctions which would ensure due compliance of the demands of the system on the parties, once they placed themselves under its discipline for the purpose of the litigation. Same is true of all other institutions like hospitals, universities etc. The legal system does not deal with any desire to enhance the quality of the seeker of its services but deals with assertion, denial and vindication of that right. Often it is a matter of survival. The element of option to avail of its services is all but absent. Hence, the rules that go to organize the activities in that system have to ensure that the right itself is not endangered while being examined. The procedural laws are particularly clear in their protection of principles of fairness, adequate opportunities, finality in the agitation of such a rights and erection of bars to trivialization of the legal processes. Most of these rules are many decades old, amended from time to time during the last century. While they are time tested, they cannot resist the charge that they have not taken note of change of values during these decades.

The range of the working of the legal system is so vast in variety and volume that the rules had to be more and more specific. Even in areas where the discretion of the judge was the ruling factor, they have been increasingly narrowed down. Of course, imaginatively, space has been left for local variations so that the needs peculiar to certain contexts may be adequately met. The prevalence of rules framed by High Court to rules framed by legislation takes care of this! With each exercise in fine tuning of these rules, the legal system has been ossified imperceptibly. This rigidity has further emphasized the lack of due importance to the speedy functioning of the system. Today speed is all important. The demand for fast functioning has been the motivation behind many recent developments in the field of science. The technologies with regard to the collection, storing, organizing and retrieval of information have transformed the activities of society in many fields all over the world. Can the legal system stand aloof, immune from such changes? Such changes have led to demands by the people for speedy delivery of justice.

The legal system faces today two kinds of risks. It stands the risk of being rejected or bypassed as it is slow-moving. On the other hand, can the framework of the legal system as it is, take on the load of fast moving mechanisms for speeding the delivery of justice, leaving the other values like, farness, with a secondary place in this scheme of things. Can we be fast and fair?

To do justice to this question, we have to identify the areas where the speed is compromised. Then, in such areas, the practices which are not compatible with speedy delivery have to be ascertained. The reason why these practices have survived so many attempts at reforms has to be perceived. The question, if these factors are indispensable in the administration of justice has to be raised and answered. If the answer is in the negative, then

we have to apply our mind to the innovative methods that are to replace them. At that stage, steps have to be taken to prepare the mind of the people who man the legal systems to such changes. Without a radical change in the mind set, it would not be practicable to integrate the changes in the existing system and make the system work smoothly.

Speeding up has to be linked up with accountability. Delay in delivery of justice affects the quality of justice. It undermines the credibility of the system. Delay encourages suspicions of corruption. These would furnish justifications for bypassing the system. Hence it has to be viewed as relevant to the survival of the system too.

Use of the legal system by the suitor involves transfer of information. This is obvious. The party has to afford access for the judge to all the relevant facts and circumstances on the basis of which he seeks a relief from the court. He has them in his possession or control. Now, he delivers the source of these data, namely the deed sued on to the court. This is based on the rule of best evidence which mandates that the document, if any, creating or evidencing the right sought to be vindicated should be before the judge for scrutiny. Incidentally this is resorted to also to prevent a second fraudulent use of the same document.

Can we not think of a central server for the country or at least for each state which will record and maintain all the data pertinent to any judicial action. This will rule out administrative bottlenecks. For enforcement of transactions, it should suffice if the plaintiff produces in court a scanned copy of original deed. The suit when taken on file will require some data, like number, year, parties, addresses, date of filing etc. These can be transmitted immediately to the central server. This affords protection against the same document being enforced for the same right again.

Retrieval of all these can be made by the other party without waiting for the date to be fixed or without travelling to the court center. If there is provision for transmitting a copy of the plaint to the central server at the time of registering the case itself, service of the copy on the defendant is also possible by his retrieval of the same at the central server, through the Information Technology facility.

Automation can begin with the fields of administration, maintenance of records, schedules of work, allocation of cases, grant of copies, research of laws and precedents etc. which are really process dependent items. Once the personnel of the legal system become computer savvy, it can be extended to other areas also. Indeed, a beginning has been haltingly made in the Supreme Court and High Courts but, it is yet to trickle down to the district level where the delay is. But then the users here are the have-nots. Resource saving methods for the resource less does not sound very convincing!

If a re-duplication of a particular facility occurs, then, at first glance it would present itself as not an unwelcome development, because it offers a choice to the people who need the services. Now, institutionalized dispute resolution is the monopoly of the State. On such reduplication, private agencies would throw in their hat. Would it not be a case of the public benefiting from their competitive presence? The element of choice is introduced. The position of the consumer is empowered. The power of choice is exercised by him. It is a sign of autonomy, so runs the argument in favour of market competition. But is this a marketable service? Justice is not a commodity. It is a value. A belief that being just ultimately pays in the long run is what motivates people to look for fairness in their dealings. Fairness may not be sought or shown for fear of punishment. Fairness, particularly, makes long term relationship easy and smooth. Commercial transactions are thus

facilitated. Once fear of punishment is ruled out as a motivating factor, as in Criminal Law, the monopoly of the State in holding out that sanction disappears.

Non governmental institutions for dispute resolution are seen to be as effective as courts run by the State. They act on the present day approach that services are goods. They have to be marketed as such. Indeed the non/governmental agencies score over the State by delivering justice as a service. Thus, the former are preferred as they are speedier. The delivery may be service. Again services may be goods. But justice is not a commodity. The shift in values is seen in the trend.

The commercial contract stipulates the agreed mode as arbitration by an already identified organization like, a chamber of commerce or a guild of the trade or similar bodies' who shared the value of speed with the disputants. Thus, it is the shared value that dictates the preference. But the sharing of the value and the preference is only amongst a select dominant group of people with a command over the resources. This generates and nourishes elitism. This negates the spirit of egalitarianism which our constitution seeks to foster. The institution that the State has put in place as a monopoly, as yet, has failed to respond to this demand for speed. Here provision of funds for modernized equipment for courts to save time would not suffice as a response to the risk that the legal system faces today. The risk is that of relevancy. Slow moving, unresponsive and inefficient institutions are just rejected by the business world today.

When they do business with the rest of the world today, they see the difference between the institutional set up in their own country and elsewhere. Already there are signs that the state monopoly is no longer perceived as the only solution. The exercise of the right of private sale of the hypothecated immovable was

restricted to certain areas only to facilitate quick recovery. The Transfer of Property Act allowed its creation by contract. Many enactments like Labour Laws and Family Laws have their own better run centers for dispute resolution. Banks found colossal funds were locked up as non-productive assets in litigations. They first set up their own tribunals for speedily trying their claims, by-passing the regular courts. Of course, there is a pecuniary limit to the jurisdiction of such tribunals.

At least at the stage of recovery of the decreed amounts, the banks had to come back to Courts. Now, these banks have been empowered to launch recovery proceedings also. Law has been amended in 2002 to enable the banks to seize the secured assets for the claim and to bring to sale such assets. Again, there is a pecuniary limit. It boils down to the creditor himself being empowered to punish the defaulting debtor by seizure and sale. The legal system formerly intervened in such steps to ensure fairness between creditor and the debtor. Now, law is being bypassed with the sanction of law! What does it portend?

When the creditor is a nationalized bank, this empowerment of the creditor-bank shows that the state itself is losing confidence in the value of fairness which the legal system has sought to represent all these years. If the illustration of recovery by the government under the Revenue Recovery Act is taken for comparison, the land revenue is a public due, charged on the land and arising under law. The arrears of loan due to the bank accrue under a negotiated transaction arising out of a contract of borrowing. What the Securitization and the Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance (III of 2002) and the later Act on the same lines seek to do is to empower creditor bank to bypass the law and legal system. How was it done? By enacting a law! The political pressure of the banking community on

the government for jettisoning the legal system is obvious. In a negotiated contract, inequality of the bargaining power, the duress created by the urgency of the need and ignorance of the borrower of the power of the creditor outside the contract and such other considerations arise. All those, may be relevant to the element of fairness in the deal. Those are brushed aside to ensure a quick turnover of resources. Who is responsible for the society losing the benefit of this value? The legal system's unresponsiveness to the demand for speedy recovery of debts is seen as the justification. Many more incursions into the value of fairness would be increasingly seen in the years to come unless the legal system wakes up from its slumber.

Thus, we find echoes of the reluctance of the legal system to adopt speedier ways of functioning, being heard as demand for speed, drowning the insistence on fairness. The legal system itself is party to it by upholding such laws. Is that the only response of the legal system? Would the awareness of the creditor's preference for a speedier recovery be accompanied by the legal system's readiness to speed up its own ways of functioning? The legal system's reaction cannot stop with their understanding of the social problems created by delayed justice. Its claim to independence casts an obligation on it to ensure timely reforms before the institutions in question becomes irrelevant in present day society. That risk stares us in our face today. How are we going to manage that risk? Are we going to attempt it at all? The legal community of law persons, at various levels, faces this challenge.

The challenge is greater because of the disparate groups that go to man the system, the anxiety to preserve the centrality to quality in delivering justice, the monopoly that the legal system enjoys in this service sector, delaying tactics of the abusers of the system, the aura of independence which creates a resistance to

changes and the insulation from the influence of the urgency with which the rest of the society is speeding up its pace.

The Rule of Law being the fundamental assumption of our Society, we may find it difficult to understand how the relevancy of the legal system can be under challenge. The relevancy of the values that fuelled the system is questioned today by the Executive and the Legislature. The Society at large prompts it. The business community with its new found momentum triggers it. All of them need law, but wonder if they need lawyers and law-courts. The legal system can survive only if it recognizes this. As part of the system, the judiciary has to convince the present day society that they are not dispensable.

VI

REVIEW OF RISK

This part will briefly take note of the definition of Risk, method of identification and mitigation of Risks. The closure of the Risk situation and learning from the experience would be the final topics.

If the definitions of risks are first taken up, it will be seen that the variations in the definition are due to different emphasis on some aspects of the concept of Risk. This again shows how Risk in one context may vary from risk in another. For our present purpose, Risk in the legal system has to be examined for its salient features. Risk can be viewed as the danger due to any change to the existing process to which the legal system is exposed. Failure to take appropriate measures to protect the system would also be conveyed by the term Risk to the judicial system. Avoidance of abuses also figures in some definitions of Risk. The structural imbalance between the intake and the disposal of cases would be another way to look at Risk. The definition in Article 106 of the European Union Commission Services in July 2003 takes

note of the operational risk being the risk of loss from inadequate or failed internal processes. These definitions are with reference to risks in different contexts.

One thought runs through all these definitions. That is the unwarranted result being the consequence. So Risk can be defined as the likelihood of an undesirable result. In other words, Risk Management may be understood as the avoidance of unwanted result. For example, the effect of delay in delivery of justice has been considered in Parts I, IV and V. It comes up in the context of frustration of justice, inflation of costs of litigation and loss of credibility of the legal system. All are unwanted results. Loss of credibility is obviously the peril to which the system is exposed. Want of time management skills has been considered in Part I; so too, management skills of judges in Part II. The reluctance to change their ways and attitudinal flaws came up for consideration in Parts II and V. The apathy of the Government towards urgent needs of the courts figures in Part I. All these are failure to take steps to protect the system. Avoidance of abuses has also been taken up as Risk Management. The imbalance between intake and disposal resulting from an absence of sensitization of judges to the problems of the suitor has figured in the context of delay. The need for a multiple value system comes up in the concluding Part. Thus, the various elements in the definitions referred to above have been touched upon.

Listing them as deficiencies of the legal system would have presented a negative thinking. Instead, an attempt has been made to see the legal system as a whole through the eyes of the suitor, the lawyer and the judge; in other words, the service-providers and the service-consumers. The same issues present different facets depending on who looks at them. No doubt that has resulted in a certain amount of over lapping between various parts. But the effort

has been to retain the focus on the unwanted results and how to avoid them. Risk Management cannot begin before identification of risks.

Justice is the vision. The legal system stands for it. It has been there for as long as the concept of justice has been the motivating force in interaction between human beings. Does it inspire all those who participate in the functioning of the legal system? It does not inspire because it has remained a vague and distant ideal. It has to be split into component parts, like values, purpose etc., if it is to be transparent enough to serve as a source of inspiration. Values have been taken up as themes in Part I, IV and the last. An attempt has been made to concretize such values in terms of court work. Reduction of time taken for processing claims before taking them on file, expediting the pre-trial procedures (like filing of documents, framing of issues) and organizing a fast track for the trial. They loom large in the context of delay and its effects. The frustration of the functioning of the system alerts us to identify the cause for the delay and the risk factor is seen in that context also. Again whenever the process goes off course, the end result is in danger. That is why it is often said that the process predisposes the results. Whenever a loss of sense of direction amongst the participants in the system is detected the values are seen to be receding. The principles and beliefs no longer guide the functioning of the system. If the functioning is not quality intensive and service oriented the system is out of focus with reference to its purpose. A clear recognition of the problems is the outcome of a reality based culture. Only then risk identification can be achieved. This is adverted to in Part V. The insensitivity of the human resource of the system to the vision would surface only if the vision is concretized. For instance, each Court has to dispose off case keeping pace with the filing in that Court, it is said. It would mean elimination of accumulation of arrears. That is concrete enough. Substandard

performance would be betrayed by the figures. The insensitivity of the employees is indicative of an unfocussed internal culture. It is typical of a monopoly system and a government department. While identifying such internal problems, it is essential that the realities should be faced. Honesty and due diligence are needed while examining underperformance during the performance reviews. Constant reviews of risk should lead to planning for mitigation of such risks.

Checks and balances have to be built in to the processes to ensure mitigation of Risks. When there is use, there is always scope for abuse. But the degree of abuse would be a small permissible fraction of the total use of the system. When the abuse is seen to be on a disproportionately large scale then there is an indication of the failure of checks against abuse. It puts us on the alert that Risk is more than the likelihood of an undesired result. Something in the system facilitates the exploitation of the system for unwanted results. The checks and balances have to be examined and reorganized to discourage such abuses. This is mitigation of Risks. A review authority has to be set up to undertake a constant review of Risk situation. May be inflexibility of the system denies them the use of the system and drives them to abuse of the system. If this analysis yields on enquiry of the cause of abuse on a large scale, then steps must be taken to enhance the flexibility. That again is a move in the direction of mitigation of Risks.

Another example: When a witness is tampered with, in a criminal trial, the prosecution calling that witness is taken unawares. Having commenced his examination, the prosecution cannot retrace its steps. The procedural law has provisions to enable the prosecution to treat the witness as hostile and put questions in the nature of cross examination. There may be instances of abuse of this provision to get over adverse but honest answers of the witness.

So the procedure insists on court's permission before a witness called by prosecution is treated as hostile. The Court is not expected to collude with parties. But when the procedure is abused to enable witnesses to retract what they have already deposed to, then there is a fouling of the procedural safeguards. It is only to avoid this Risk of systematic perjury that the need for the Court's permission is stipulated. When that check fails, then there is clearly a risk situation putting the entire structure of criminal trial in jeopardy. If this phenomenon of the prosecution witnesses turning hostile repeats itself monotonously in trial after trial as a matter of routine, then people have to wake up to the fact that there is tampering with evidence on a regular basis with connivance of the investigating agency. Thus, in some cases the resiling is sought to be facilitated belatedly by recalling the witness by setting up the excuse of pressure or threat on the earlier occasion to support the false version of the prosecution. It may be true or may not be true. In other cases the prosecution case is in jeopardy by the witness abandoning it in the first instance itself. On both the occasions the need for the court's permission as a check against abuse fails. In fact, of late, the second instance has repeatedly surfaced in the criminal trials and is seen as one of the causes for inordinately high percentage of acquittals. One of the contributing factors is the long interval, sometime even years between the closure of the investigations and commencement of the trial in Court. Deterrence against perjury may serve as a check. But the pernicious habit of the prosecution fabricating evidence to support even a true case has also to be tackled. Of course there may be intrinsic features in a case which make it difficult for the prosecution to garner proof of its case. For instance, in the case of trial of husband accused of murdering the wife on suspicion of infidelity, the only witness, the mother of the witness was torn between the resolve to avenge her daughter's death and the need to prevent the loss of both the parents for the

children, one by murder and the other by death sentence by the Court. The prosecution could do very little in such contexts. But in the other case, political pressure on the prosecution can be reduced by organizing an independent Directorate for Prosecutions which is insulated from the police influence. This Risk to justice in criminal cases can be managed if lessons are drawn for the various contexts. Learning from various experiences and using that knowledge to avert risks in future is Risk Management. Risks caused by competing emotions arising from the context of the case have to be differentiated from the risk caused cynically to defeat justice by pressures using resources like political influences or power of money. All risks have to be mitigated but the latter is more difficult to manage.

Thus, we find the nature of the risk as well as the causal factors is relevant to study the management of such risks for achieving a closure of the risk situation. The solution may depend upon factors causing the risks.

Risks management should be part of the operational support of the legal system. It should not be treated as someone else's responsibility. It should not be an isolated or separate entity. It has to be structured into the system. A healthy environment would be created for decision making if the Risk Management processes are applied early and regularly and not as an SOS to be rushed in times of crisis only.

VII

GENERATION OF RISKS AND CLOSURE OF RISK SITUATION

This part takes us to the theme of manipulation of risks. Amongst the modalities of exploitation of the legal system is the contrived generation of risk situation. A risk context emerges as a consequence of the happening of some events which contribute to such generation of risk. In such cases, risk avoidance methods are called for. Some unscrupulous parties may organize the generation of risk situation so that they may exploit the legal system for their private ends. We have already seen how political pressure or money power twists the legal system to cater to the needs of persons wielding such power. Here, a conflict arises between such a person and the system. He emerges out of the conflict with profit in his hands. When one party is in power, if elections intervene and the other party comes back to power, these prosecutions are in jeopardy. They may not be left to run their course according to law. The hue and cry is that the system is manipulated to contrive a

favourable verdict to the defense. The justification is that there was an initial abuse of the system by the launch of false cases and so what is now done is only rectification. But this is countered by the charge that the manipulation of the trial is wrong, even if it is a false charge. If it is a false case, let it be thrown out. That is the logic. Thus, there is an obvious loss of credibility of the legal system. Initially, the hope that a conviction could be procured for political ends itself does the damage. At the post-election stage the manipulation of the system to avert the danger of unmerited conviction betrays a lack of confidence in the system. What is in peril is the legal system. The loss of credibility in the eyes of the public would undermine the rule of law which is the basic feature of our Constitution. The scheming politicians have put their political interests above the inviolability of the legal system. This risk emerges as a result of cynical generation of such a situation. It is gross misuse of legal system for political ends. This is because of the degeneration of values which is rampant today particularly amongst the politicians. Pursuit of power finds all means as permissible to achieve its ends. Generation of risks to facilitate exploitation of the system has to be seen as a desperate move with no regard to the consequent increase in the vulnerability of the law abiding sections of the society. If the trials of public personalities had been caused by genuine grounds and if they had not been interfered with, they would have afforded a good opportunity for educating the public about the legal concepts of crime, trial, proof and conviction of acquittal. The focus of the public attention on sensational trials would have facilitated such an education. That has been missed. But the pernicious effects like loss of credibility of the legal system have not been missed. The society has lost at both ends. The generation of risk is seen as one of the consequences of the failure of moral regime. When the lack of values dictate the predominance of one's own interest at the cost of public institutions

it can only be looked upon as an adverse effect of moral regime's failure on the legal regime.

Here is another instance. The process was fouled. A chief Justice of a High Court charged with an offence of his possessing assets exceeding his means to acquire them. He had to step down from the high office. Charges were framed against him. The case has been pending in a court of law for two and a half decades and more. How was the criminal justice system so manipulated as to keep it at bay for such a long period? Unless there was a chain of participants in the process, the dormancy for long years stands unexplained. Unlike the case of politicians, the retired judge's fortunes are not going to swing in his favour again. There is no charge of vendetta by rivals here. Perhaps he is only biding his time. Is it not a perversion of the system when other judges in other courts are exhorted to refuse adjournments and when even the power to adjourn has been curtailed to only three adjournments in the civil jurisdiction, how is it that this case has been kept on file in a criminal court defying all duration? Would the faith of the people in the legal system survive such a blatant tarnish? Is not the legal system put in peril for the sake of an individual? The long pendency, rather the long dormancy, can only signify that the credibility of the legal system can be risked to accommodate a party. Why was this done? How was a congruence of interest achieved amongst so many? Why was the risk situation engineered by persons at all levels? Are there no checks in the system to prevent this? Has there been no inspection of that court for two and a half decades? Can this silence be deciphered? Is there no duty to speak? Has no query been raised? Their conscience has to find the answers.

Why does it not shock and shame the people that such perversions happen? Is it because the people do not identify the legal system as theirs? In the first case an attempt was made to

have a political opponent convicted by using the machinery of the court of law, if the accused's version is to be believed; or in the alternative, the process of justice were sought to be fouled to get away with an acquittal if the complaint's version is to be accepted. Either way the goal is sought to be achieved by risking the legitimacy of the system. In the second case, the ongoing process is sought to be stymied by crudely holding up the trial. Significantly enough both are cases where charge was alleged possession of assets of disproportionate value, disproportionate to the means of the accused. Risk in both cases is to the legal system. It is contrived to prevent its normal functioning and get away with a manipulated result, either a contrived conviction or an arranged acquittal or at least frustrated situation as in the second case. It is a no-win situation for the public.

If there had been regular performance reviews, the case that had gone underground for years would have surfaced. The presiding officer of the court would have been held accountable for what was happening in his court. The performance review should not be soft. It should not be perceived as challenge to the independence of the judge concerned. He is presiding over a system and he should feel compelled to account for his doings or defaults. The performance review has to be honest and ruthless if it is to serve any purpose. A soft review is worse than a no review. It has to verify the effectivity of the system's functioning towards its intended goals. The Supreme Court of India has emphasised the importance of effective inspection of subordinate courts to the High Court in the case involving a premature retirement of an Additional District and Sessions Judge in Haryana in its judgement in April, 1999.

The judiciary should have a purpose. Otherwise the performance review would appear futile. For instance, if the declared purpose is that no suit would be pending for more than a year, it is

concrete enough to yield a challenge. Elimination of arrears is bound to inspire the participants in the legal system's work to do their best. Every performance review would be a measure of their progress towards a fulfillment of that purpose keeping the case pending for 25 years is an anathema when seen in the context of the purpose. It would not be tolerated. One of the definitions of risk in Part VII was seen to stress the failure to take appropriate measures to protect the system. There was such a failure in this case.

Avoidance of abuse also figures in some other definitions of Risk. These illustrative cases show the legal system in peril as a consequence of such abuses. These cases also show the abusers using the system, not for its legitimate purpose but for serving their need to clear themselves, unmindful of the danger to the system itself. This may be construed as an attitudinal flaw and lack of values. They do not match with honesty and due diligence which should characterize the performance reviews. If so why did all those people in those courts acquiesce in such acts? Perhaps they did more than acquiesce, they actually cooperated. Why?

There should be a vision for the legal system. Law is a leveler of the high and the low. Everyone howsoever high is bound to act according to law. If this inspires the employees in the legal system then they would look upon themselves as occupying a key position in the Constitutional structure. How to concretize this idea? It is necessary to identify and communicate them to all levels in the establishment. Each employee has to ensure that he plays his role in achieving this vision. In the case that evaded its trial for two and a half decades, would each member from the presiding officer down to the bench clerk calling the cases in public court have acquiesced or cooperated in the unworthy exercise if he had before him the need for his contribution for the achievement of the vision from

level to level in the hierarchy. Everyone must practice it to make it a reality. In the other case where witnesses were seen to give two differing versions, would it have happened if the investigating staff or the prosecutors had been imbued with this vision? Would they have bowed to intimidatory pressures at the earlier swages or after recall? There was no vision. The only motivation was survival. They would rather let the system face the risk! They lack direction. They live from day to day, managing to survive. If they had been motivated by consumer satisfaction then, they would have stopped to wonder if such tolerance of such manipulations would enthuse the users of the system, namely, the suitors. They cannot compromise on one side and hope to find that law's values inspire the people.

In fact, the legal system has put in place elaborate rules of procedure only to ensure that the power of the judge is exercised properly. Amongst various powers the judge has the authority to fix dates for parties to do various things that go to make up their contribution to the trial. Similarly, there is what the judge has to do to conduct and conclude the trial. Power to organize these vests in the judge. But power needs to be controlled; uncontrolled power is no power at all, it is tyranny. It is a risk which is likely to produce undesired results. In court proceedings, the last word is with the judge. Hence, it is essential that his powers be controlled. That is one way of avoiding the risk flowing out of uncontrolled power. The rules of procedure curb the caprice and malafide exercise of power leading to arbitrariness and injustice. If the rules of procedure have been followed, the case discussed above would not have slipped out of control for decades. In the legal system therefore, rules of procedure and their observance have to be looked upon as Risk Management measures, the risk of uncontrolled power of the judge. It ensures fairness which enhances the credibility of the system. The two instances discussed above show how the independence

of the judges alone would not suffice. Nothing can be done if investigation, prosecution and the staff of the courts are not above temptation. Whichever way they are looked at, the ultimate harm or benefit to the system should be the focus. Such unchecked power would have deleterious effect on the process of law. In fact, such restraints are built in to the concept of power itself. Law raises the checks on the exercise of power to the level of conceptual components. They are amongst the ideas that go to make up the concept of power. You cannot have one without the other. That is how the law shapes the Risk Management devices by forging conceptual limitations. Any exercise of power with no limitation against abuse would be a futile exercise in the eye of law. Law treats as void anything done in such an exercise. The risk situation is aborted before it emerges. In Administrative Law, it brushes aside provisions ousting court's jurisdiction considering the legality of executive action in excess of jurisdiction. That is how law erects protection against risk. Apart from the area of Administrative Law, the Law of Procedure also curbs such exercise of power without safeguards against arbitrariness. By building these perceptions in to the procedural law also the court ensures a quality assurance to the suitor in respect of the services tendered to him. This attitude towards quality reduces the incidence of risks. The consumer of the service offered has this contribution to make towards risk avoidance by expectations of an insistence on quality service.

Apart from the risk emerging from the exercise of executive power unreasonably and in bad faith, there is the context of conflict of power between the Law and the Executive. For example, when a statutory power is exercised by the Executive, the aggrieved party had no opportunity to negotiate or bargain. That is where the law steps in to annul the situation of hardship. It does this by striking a balance of power between the Executive and the Law. It is here that Prof. H.W.R. Wade examines the controversy whether

administrators or lawyers would be better judges in this branch of law. The Professor, an authority on Administrative Law, points out how "the essence of judicial control is that the boundaries are drawn by the Law and not the Executive". The risks of exceeding the limits are best examined and prevented by persons versed in law. The French legal system places emphasis on administrative experience as a better safeguard against risks and prefers administrators to maintain the administrative tribunals. Thus, the effectiveness of Risk Management draws its credibility from the persons who articulate the principles governing it and administer the antidotes.

Unchecked exercise of power is prone to create risk to rights of others who are exposed to it. Law manages such risks from the point of view of the source of power, the limitations on its exercise, the quality of the exercise, such as bonafide reasonable exercise, the expertise of the person wielding the power and such other safeguards. This shows the versatility of law in shaping checks and balances to manage risks.

Lack of motivation on the part of judges to achieve excellence in their performance has also been viewed as a contributing factor to the generation of risks. Tendencies towards cooperation are curbed by the ethic of challenge that permeates the legal system's functioning. Courts are run on adversarial lines. The techniques adopted are rooted in and shaped by the procedural laws which nourish adversarial values. For example, plea bargaining in the U.S.A. is not prompted by any value system but only by the expediency of avoiding a docket explosion which again has more to do with the image of the system than any other consideration. In our procedure for trials, maintenance of the conflict is the ethic. It does not promote cooperation in running the legal system. Stray provisions for preferring settlement to trial runs against the grain of

the legal system as a whole. The present legal culture is not for a participatory system. The lawyer, for instance, is not motivated by any value cherished by the society. In fact, such sharing is one of the hallmarks of a group that claims the status of a profession that gives the members a sense of identity. The occupational status achieved by his entering into the profession has to be acquired by the lawyer by a prescribed recognized standard of ability before entry and a peer recognized standard of conduct while he is practicing. Both the standards have been eroded pathetically. That affects the cooperation of the lawyer in avoiding the generation of risks. This leaves the suitor disillusioned about the system. Its credibility no longer engenders his expectations about the quality service being the end product of the system. The declared objective of the system is in peril. A lawyer is now no more than a middleman between the suitor and the court. The sociology of the legal profession calls for a careful study. Today, there are no overarching professional values enriching the personal values of the individual lawyer. The suitor comes in to contact with the lawyer even earlier to his acquaintance with the working of the legal system. It is the duty of the lawyer to unveil the values for which the system stands when suitor is on the threshold. True, the lawyer's profession belongs to the occupational group; but, is it not more than a bread winning activity? Many, if not all, of the risk to which legal system is exposed today are the product of the pursuit of law as a means of livelihood and no more. The suitor's next contact is with the office of the court where he is to initiate his actions and does this in any way enhance his perceptions about the system? What does he see when he goes in to the court-hall to find the judge, in a cynical indifference about what law stands for? Needless to say his exposure to the travails of the trial opens his eyes to the yawning gulf between law and justice. He finds the legal system to be not the justice system he looked for, independent, impartial and informed.

Public disillusionment may be an indicator of judicial failings but no more.

The attitude of the consumer is fast changing when we look at the expectations from the legal system. We have talked about change and change management. How do we identify change and how is it met? Can we create a bench mark against which the present reality can be measured? Future is going to be different. Answers for present day cannot be wrapped in future tense and presented as future answers. They would be yesterday's responses.

When the context changes the responses too have to change. Different clients have different levels of encounter with the legal system. Their expectations would naturally vary. A client suing for recovery of a piece of land would expect an honest consideration of his simple issue. An accused in a murder trial would expect an anxious examination of all the relevant details of his case before a verdict is handed down. A victim of police high handedness moving the court for his liberty would look for a sensitive approach to his plea for justice. The system has to respond to all these expectations. Wherever the topic of reforms to judicial systems comes up for discussions we are used to hear about decentralization, more and more of courts and improvement of infrastructure to achieve speedier justice. May be, these are only projections of yesterday's experience in to the future. Would that be adequate response to tomorrow's context? Would the suitor be satisfied with "more of the same" reforms? The future trends have to be discerned first. The only help that you can have in this exercise of discerning the future is from your values. That is the reason way centrality was given to values in the earlier chapters. Justice is the value. So long as its centrality is maintained, the legal system can manage any change and any risk that may go with it.

In the discussion, we found that the consequences of risks vary from context to context. This may afford a good basis for classification of risk. When the risk is such that the system itself is shut down, it is known as catastrophic risk. For example, when there is denial or failure of justice, it is indeed catastrophic in effect. When the risk is that where major problems result, then it is a major risk. For instance, when there is a frustration of judicial process of which some instances were given earlier, then it is a major risk. If the problems are at a lower level, then it is a medium risk. Destruction of records and the need for secondary evidence taken as illustrative context of risks is a case of medium risk. There are many risks of rather trivial nature which are seen as minor risks. When the handwriting of a judicial officer is so illegible that the paper has to be sent to the officer who has been transferred to some other station, so that the handwriting may be deciphered, it is a minor risk. When a judge does not know the local language and is unable to understand the witness without the aid of a translator, it is a minor risk.

VIII CONCLUSION

There are three ways of looking at the judicial system. The first is obviously the professional skills needed by a judge in the discharge of his duties. Then, the environment in which he has to function. It does influence and control the efficiency with which he discharges his duties. This would include the court staff, the advocates and the roles played by the courts above by way of supervisory duties. The efficiency of the advocates appearing before a judge does affect the quality of his performance. Thirdly, the consumer, namely the suitor before the judge. He has his only impact by way of the type of litigation he brings, the volume of work, his preparedness and most of all, his expectations from the system. Thus, the three factors interact to produce the output of the system

The random thoughts recorded so far may leave the reader wondering, why it should need to be emphasized that the standard of the judiciary has to be upgraded and maintained at a high level,

if the judicial system has to recapture and retain its relevancy.

It has already been taken note of as to how the team that works in the courts is made up of officials and non-officials, the judge and his staff, the advocate and his staff. If it is to be examined as to what motivates them, then, it can be predicted what would enhance the quality of their service. Who employs them? The judge is appointed by the Government. He has a right to expect a congruence of interests between the employer and the employee. But, is it true? The judge is engaged in delivering justice according to law. It has to be of quality if his performance is to be acceptable to the consumers, namely the suitors. For promoting and insuring the needed quality, the infrastructure, such as the staff, the library, the buildings, the furniture, etc. has to be made available to the judge. Alas, the employer, namely, the State appears to be least interested in doing so. If there is any one department in the government that is starved of funds and resources, it is the legal system. In some places, the courts function in what looked like open verandahs. The vacancies in the judicial posts are often not filled up, particularly in the districts. There are courts which have gone without a presiding officer for a year and more even.

The State employs the judge. The client engages the lawyer, is there any identity of goals between them? For the judge, it is delivery of justice. For the lawyer, in idealistic terms, justices, but in realistic terms, each lawyer wants his client's success. These ill matched aims are to be expected when one keeps in mind the adversarial character of the proceedings. So, the judge has to use such assistance as this clash would provide for delivery of justice. At least to some extent the quality of the assistance available from the lawyers. Thus, the quality of such justice would respond to the quality of the functioning of the legal system, as a whole, depends on the commitment of a number of contributors to quality.

Both the judge and the lawyer are knowledge workers. But, would that suffice to furnish identity of motivation for them? Of course, the lawyer would protest that his efforts to ensure the success of his client are also contributions to the efforts to find justice, so that the judge may deliver it. The lawyer's help stops with developing the options for the judge to adopt in delivering justice. The identification and processing of such options are grounded in the value structure of the legal system as a whole. They further the social purpose served by the legal system.

But, there are other aspects of the legal system. The very concept of independence of the judiciary alienates it from the concerns of the Executive in playing a supportive role by way of building up and maintaining the facilities for the functioning of the court. The Executive has to keep it constantly in mind that it is the Constitution of the country which furnished the legitimacy for the legal system. The vital limitation of power is that it would endure only as long as it is grounded in legitimacy. The functional independence of the judiciary has to be maintained in spite of the legal system's dependency on the State for its resources. Thus, we find a number of conflicting factors at various levels which inhibit the enhancement of the quality of the functioning of the legal system. But, one characteristic feature of the office of the court is that the hierarchical arrangement is not very pronounced. It is a more or less a flat organization with some lateral shuffles, like filing department, process department, copyist sections, public court duties and the like. This should be looked upon as more conducive to automation. The nature of the work also is largely repetitive in some areas, like entering details under various heads in prescribed books. All this has been adverted to earlier in the attempt to show that automation of such an office would be more feasible than many other offices organized in tiers.

The Judge's role, as the executive head of the court, is largely supervisory. His participation is largely symbolic, initialing returns, registers, etc. The time that would be saved by automation can be used by the judge to enhance his attention to his judicial functions. On automation of the office the member of the staff who is in charge of the process, has to know it, be it payroll, or attendance or whatever, and master it. He is accountable as he is the programmer. Would such dissociation of the judge from the executive functions undermine his disciplinary powers over the staff?

Let us look at it from the point of view of the management experts. No doubt, one of the roles of the judge is to supervise the workers functioning as the staff of the court. It is a difficult task. The worker has to show his commitment to his work as an index of his efficiency. What he does is a link in the long chain of functions. He takes responsibility for this link alone and has nothing to do with the chain as a whole. He may not even know how the quality of his work affects the quality of results delivered by the legal system as a whole. He is thus insulated.

Outside the courts, the people are unhappy about how the legal system functions. Even when automated, the computer in the court would not capture this dissatisfaction. It handles only the data generated within the court. Man is perceptive, but a computer is not. Is there a risk of further insulation once the offices of the court are technology driven? Such insensitivity would make them less motivated. That is a risk.

There looms a likely development in the area of management of staff. The judge has to alert himself to the risk of homogeneity. With the advent of technology, a separate group emerges. They are the best of the lot; anyway, that is their self image. Before that, the skill culture amongst the employees has been exercising an influence that united them as a group, albeit, a loosely knit group.

Once the personal skill of the individual employee is eliminated by substituting technology for it, this common thread running through the institution may disappear. Of course, there would be the technical expertise in the place of personal skills. But, such expertise would only isolate him as he wears the badge of quality of being an expert in the field. The skill is ability in the practice of any particular activity. That may not isolate the person as it relates to practice. It can be acquired in the course of his career after the first few years of practice by any member of the staff.

Thus, the introduction of technology may often promote elitism in staff. It is often labeled as core competence. This sense of elitism cuts at the root of commonality which informed the day to day functioning of the staff, earlier. It may even give rise to complaints of unfair discrimination. It would no longer be a joint activity and contributing to it. The non experts would no longer be looked upon as contributing to the explicit knowledge of the system. That, again, would furnish an edge to the experts in the matter of rewards, recognitions or promotions. In fact, the activities undertaken by the experts would be looked upon as indispensable to the system. That is conveyed by the expression "core competence". There is, thus, a ranking of the activities and contributions which may not be conducive to a harmonious functioning of the system. As an unwanted result, we may find the motivation of the employees adversely affected. After all, the select functions entrusted to technology also depend on the efficiency of the rest of the staff for due performance. Care has to be taken to see that the change effected by introducing technology does not alienate the staff from the system. There is need to organize training courses for the staff to effect a smooth transition during the change. The priorities have to be explained to them. If they know that the departments were selected on some criteria, such as, areas where

the suitors await the delivery of services, then, there is no likelihood of heart burning that a particular department has been ignored. The staff has to be involved in the participation of change and training programs for them is one of the ways. Change management has to be done skillfully. There are obvious limitations to the initiatives that a judge as head of the system can take as it is a department of the government. The judges can collectively emphasize the need for such training courses for the staff before technology is introduced in the system.

The trend in the change of management systems today is towards a new pluralism. The emphasis in this pluralism is diversity of functions. A single stream of functions is apt to shut out the larger horizon of society's needs. But, if there is the pluralism of function, then the person who takes the decision has to be identified. The judge has the responsibility of delivering the end product of the system, namely, the decision of the court which is "justice according to law". Responsibility without power would be an unrealistic burden on the system. Does it make any difference that the legal system is a knowledge based system? Would pluralism of functions affect its performance capacity? It should not be overlooked how the performance of all the constituent parts is directed towards a single objective of delivering justice. There are of course, many tasks needing to be done to achieve the single purpose. The person in charge of the end result has to exercise control over the constituent parts also to ensure quality. Thus divorcing the executive functions from the adjudicatory functions by vesting them in two different persons may not be the solution we are seeking.

There are many hard working individuals in the offices of the courts. But, as a system it does not project a model of work culture. By now, people are familiar with the perception that information

technology, wherever introduced, has metamorphosized the very ambience of the work place. Such a change may have a deeper effect on the work culture in the legal system. This is an attitudinal change. It is essential if the system is to benefit from technology. The participants in the judicial training would be ill served, if a negative presentation is made. The theme in itself, being risks has a negative connotation. That cannot be helped. It is only to avoid such an image emerging, that the Risk Management practices already in place have been noted at the outset. They are time tested.

Once technology is brought into the picture, we step into the future. The suitors, in view of the exposure, to the achievements of technology in other fields, have expectations from the legal system also. Of course, fresh risks may surface in the new paths opened by technology. Perhaps, the change in work culture wrought by information technology would, hopefully enable us to tackle the performance crisis that afflicts the legal system today. Information technology may be of significant use in such change management. It emerges as a dual use tool. Management systems themselves are undergoing changes.

The objective of relieving the judge of the drudgery of supervising the repetitive functions of the staff can be entrusted to technology. Hospitals and universities have done it. Why not courts?

Each department will have its own specialized knowledge. For example, the copyist department would know how to deliver an error free, clearly printed copy in the shortest time possible. Can this task be harmonized with the goal of speedy justice? Thus, there are two needs- the need for a properly prepared copy and the need to avoid all delay in delivering it. Both these can be integrated into the goal of speedy justice. Whatever cannot be so integrated may not be relevant constituent for the system. In fact, information

must be constantly flowing to the judge on the performance of each department and even each employee. This is necessary for the judge to decide if the desired goals are being achieved. Of course, he would come to know of it when it affects his pace and makes him wait for it. But, the better course would be to be alerted before the effect of the delay affects him. Indeed the collective activity would blend into a system only then.

Decentralization of the work has been achieved by creating departments for each activity. This is considered essential for generating and sustaining efficiency. But, there is one risk in such an organization. Each department may not know (or care to know) what the other department is doing, how it is doing, whatever it is doing and how, any deficiency in its work affects the entire system's output of results. All learning is related to action. Systems thinking are complex. People have been taught how to break up any daunting task into bits to tackle each one successfully. The work may get done, but the systems perspective is missing. A contact for the individual's contribution is not there. It is necessary to recapture it, if the system as a whole is to function properly. Fragmentation of a task results in our losing sight of the consequence of our action. If, for instance, there is delay, the consequences of such delay are not brought home to the individual workers. Hence, each department must see the system as a whole. Every employee, particularly the employee with tasks which leave a time-bound delivery schedule, should sensitize himself to the need for prompt compliance to keep the system as a whole functioning smoothly.

To achieve this sensitization, it is necessary to arrange for a feedback to the employee regularly. Such a feed back would bring home to him the adverse effect of delay at his level, how the end result of the system is held up. Such systemic view is essential.

A systemic view is not enough. A system vision is called for. The change has to go from them to the system. A new way of

thinking has to inform the employees, the ailing legal system is an example of a mismatch between the reality of absence of motivation over work and the objective of speedy delivery of justice. Just as you saw your work in the context of the system, the problem also has to be seen similarly. Departmental boundaries need not work as blinkers. For instance, at a workshop for training, the theme under study was "Identification and Examination of Causes for Delay in Courts". One of the employees from, say, the process department asks a question. "Why should I hasten my work. Anyhow the suit is going to take three years for disposal". Obviously, the answer is that your department is also contributing to that delay, maybe, not all the three years. You may be responsible for six months out of it. If everyone eliminates his contribution, that delay would be cut down. In other words, each employee has to look at the totality and ask himself, how much have I contributed to it. Otherwise, you would be putting the blame on others only.

The individual employee's insensitivity to the demands of the legal system on him is perhaps the major factor responsible for the malfunctioning of the system today. The cultivation of systems thinking by viewing his work and his problems in the context of the system may pave the way to a more responsible attitude on the part of the employee. This interconnectedness infuses life into the system. Management of the part under your care and concern, includes a fostering of this inter-relationship. This is necessary because, systems thinking enable the individual employee to realize how everybody is responsible for the ills of the system as whole.

The departments in government offices in general, have certain norms woven into the fabric of their functioning. All feedback has an element of delay in it. The feedback must alert the employee to the impending effect of delay. True, the delay is caused by your own act or inaction. There is no fore knowledge of the probable

effect of such inaction. The feedback if properly appreciated creates that awareness.

Today's employee in the legal system is cynical. He has no faith in hard work or rewards or recognitions. Employment may, perhaps, unlock the energy and enthusiasm that are locked up within him. Creativity will blossom at every level. For the employee to say that creativity and government employment do not match is to throw up the sponge even before entering the ring. Such an attitude would generate systemic forces which would block all empowerment of the individual and the system. Such a defeatist attitude is only a coping strategy. It reconciles you to continue to be where you are. On the contrary, individual enhancement is indispensable for organizational improvement. The courts are no exception.

We began by describing the legal system as a command obeys system. We have proceeded to look at it now as an empowerment-system. The latter involves a lot of learning. It is needed as a continuous process and not a one stage experience. Dialogue and discussion have to be used as tools to convert individual learning into team knowledge, which in turn, has to become the collective thinking of the organization. Does the present day employee of the legal system on its administrative wing feel equal to this task of analysis, exploration, clarification and a larger understanding? Today, the recruitment is at graduate or mostly at undergraduate level with no exposure to these challenges. Does it call for training? The real meaning of learning is "expanding the ability to produce results". The purpose of training is to generate and channelize it. This is more a skill-learning which can be acquired by training and practice.

How can information technology create and capture knowledge in the legal system?

Right knowledge at the right time makes all the difference in performance. Tacit knowledge is with the individual. When the individual works in the system, he enriches it with his skill and knowledge. Thus, explicit knowledge is with the organization. That is one of the benefits of the organizational form. Once it becomes organizational knowledge, it is capable of being perceived, expressed and passed on to those who later work in the organization. It involves different types of activities before it becomes fit for use by the individual - generating, gathering, codification, preserving, analyzing and then presenting it in a form that is easily accessible to the employee who may need it. Explicit knowledge of the organization is often available in its records, books, reports and other documents.

A better focus can be obtained on what these activities mean, if they are considered in brief, one by one. Now what does generating knowledge mean when it is said that the individual, working in an organization, generates knowledge. What is meant by knowledge in this context is the awareness as to what each activity yields as its resulting benefit to the organization. The final structure of the organization is made up of such individual contributions. After all, it is through such a structure that organizational goals are achieved. Hence the structure is the cutting edge of the organization. There has to be awareness on the part of each employee as to how he contributes to that cutting edge. How does the repetitive but essential work contribute? How does the innovative work contribute? The individual employee must know that his work has to be performed in contemplation of the larger context of the organization. This awareness of the individual employee that he should deliver his contribution in time, in good quality and in good measure is to be generated in him. It would be concretized by his work, its quality, its quantity in due time.

If the implementation throws up a snag, the implementing employee should have the capacity and power to alter the decision to the extent needed for correcting the snag. Thus, knowledge is generated that such and such a function, if so discharged, may not deliver the desired result and a correction may be made in this way. Let us take an example. There is nothing in the Evidence Act to distinguish the evidence that can be accepted by the court as credible and the evidence that has to be rejected. In other words, there is no guidance there for assessing the quality of evidence. The benchmark is evolved by the individual judge in the court of his experience. Now can this be looked upon as knowledge generated by the individual working in an organization? Can this be gathered for use on future occasions? The answer that appreciation of evidence is subjective, and hence, cannot be transmitted for future use does not help. How the intuitive perceptions are triggered may be identified and recorded. Once that is studied, it may yield an innovative strategy. If it is a typical approach to the problem of assessment of testimony, there is the seed of innovation in it. That it is a departure from existing norms goes without saying. It would not be innovative, otherwise. A readiness to accept new ideas is absolutely essential for using such innovations. Unless they are preserved as knowledge of the organization, they would not be available for analysis. Access is all important. What was intuitive in the individual becomes explicit knowledge of the organization.

The legal system, if it wants to benefit by such knowledge, may have a documentation cell, dedicated for this purpose. It may not be appropriate to go in to the details of how to organize knowledge at this stage. It is for IT experts to do. But a couple of instances may be cited to explain what is meant by organizing knowledge. Efficient performance has to be assessed by measuring it against a benchmark. Data bases have to be prepared for providing

such a bench mark. Measured thus, they have to be gathered as a collection of best practices.

The capacity to store data to retrieve it fast for which memory and random access to it are needed, and an ability to receive and act on instructions are the main characteristics of computerization. These are the very things that the judge, as the executive head of the court, has to target with a view to achieve speed and efficiency. If he is to deliver the goods, he has to be exposed to some training first. Executive skills are not generally assessed in the candidate's competency at the time of appointment. He needs to show management skills if he is to ensure speed from his staff. Thus, executive efficiency has to find a niche in the value structure of the legal system as a whole. Mere introduction of technology in the offices of the courts would not satisfy people. The suitors do not pay for technology. They pay for speed even today by way of additional incentive. Hence, they would certainly pay for what they get out of technology.

Viewed in a wider context, the legal system, as a whole can be assessed in terms of efficiency. For example, an attempt can be made to map each step of the suitor experience from presentation of the plaint to full satisfaction of the decree. With the help of standards so developed, the performance of each department may be worked out.

The profile of the functioning court may be developed by feeding the computer all the data regarding number of suits, their nature, the duration of their pendency, the time taken for disposal after it has been taken up for trial, the number of cases taken up to the appellate courts etc. and by making them available at the touch of a button. Such an analysis would enable an on-course correction, if there is a perception, that a particular branch of activity needs to be improved.

There is no need to multiply examples here. The object of this presentation is only to kindle an awareness of the present state of the legal system and trigger action in various directions to energize it, to modernize it, to expedite it and to sensitize it to match its performance to the expectations of the people it seeks to serve.

None of these can be achieved unless law has a policy in respect of functioning of the legal system. A perception of the aims and principles which should govern its function is the first requisite. An aimless drift or just a survival may not be conducive to emergence of the awareness. This must lead to a course of action which would yield these results. It has to be a long term policy. The Risk Management that is to be undertaken by the legal system would have far reaching effect on its mode of functioning. The style of management now established is management by control. Reports, returns, inspections etc. are the methods by which control is exercised. This generates a lot of internal pressure. The psychological effect of such pressure is to do one's best. But such a motivation is already there and has been found to be inadequate to notch up the efficiency. This is where innovation comes in.

A change in the awareness of people that speedy delivery of justice is what they want and that the legal system, as it is, cannot deliver it, this is undoubtedly an area of innovative opportunity. The people who manage the legal system have to establish the credibility of the innovation by choosing an area where the results would be tangible. To begin with, they need not make anything new happen. What one needs to do is to chalk out its innovative strategy. Of course, the first step is the realization that the present practices are to be changed. For example, they are not delivering speech justice. What is aimed at, has to be speedier justice. The strategy has to be built on this assumption. Otherwise, there would not be

any motivation for shedding the prevailing practices. There is the risk of innovation becoming a mere slogan without it yielding something new and better. It is good strategy to choose an area where the change would be obvious. Patience is required at the initial stages when efforts do not yield results. The period of gestation is unavoidable. The chance of failure is the risk-factor-particularly so when we move to areas of values that need to be considered. It is always the case when there is any innovative effort. One's expectation must be clear. What is it that this technology driven office of the court is going to achieve? The risks of delay have to be identified and dealt with. One has to bear in mind that the justice delivery system is part of the government departments and so no scheme of change would succeed unless some immediate results are also shown as a consequence of the strategies adopted.

Thus, the policy has to encourage a change in the mindset and the benefits emerging from the steps taken have to be short term as well as long term. The risk of obsolescence is real for the legal system today.

Thus, the legal system, as a whole, with the judge at its head may have to develop this as a multiple value system. Today, the legal system is a single value system. Justice is that value. The developments in other fields have led people to expect speed and efficiency from the legal system also. It is not justice hurried. Justice perception is not sought to be hastened. Justice delivery has to be expeditious.

In conclusion, it has to be pointed out that though the legal system may not satisfy, strictly the definition of an organization, management is indispensable to its efficient functioning. True, it does not produce goods. It is a service organization. The results are thus intangible. They cannot be measured in the sense we measure physical goods.

The legal system is a government agency. Does it make any difference? Yes, the rewards do not depend on the quality of the results achieved. The employer pays them, irrespective of the quality of their work.

It is a monopoly service. Does it make any difference? The market competition is not there to serve as an incentive to better and yet better service. The people complain that the public service bureaucracy runs the legal system for their own convenience. There is a performance crisis in the legal system. The independence of the judiciary has to be transformed into managerial autonomy which is more conducive to efficiency.

The significant role for technology is to create a climate for efficiency. There has to be a fundamental change in the basic perception. It is no longer a monopoly service. People have other options.

A brief analysis may be helpful by way of summing up what has been discussed so far. It has not been our object to present readymade solutions. The main purpose of writing this has been to trigger thinking on the part of judicial trainees who visit the National Judicial Academy, Bhopal. They would have been churning most of these themes in their thinking and this would only prompt further thinking, hopefully. One need not necessarily agree with what has been said so far. Even differing will ensure their thinking.

We have already seen how the word "risk" is defined in many ways. Each meaning has been taken to examine the judicial process from a different angle. Even taking the general meaning of avoidance of an unwanted result, we have to identify what planned result is before we show how to avoid unwanted result. Amongst many such risks, the focus has been on:

- (a) **Miscarriage of Justice:** Strict observance of the Rules of Evidence and the Rules of Procedure would ensure elimination of the risk of miscarriage of justice. The judge has to be thoroughly familiar with the principles governing the relevancy of facts and their proof. The occasion, cause or effects of facts in issue are also relevant. It has already been noticed how facts which support or rebut an inference suggested by a fact in issue or relevant fact are also relevant. Some emphasis was also placed on this aspect as it forms part of the reasoning of the judge while discussing the acceptability of other facts. Reasoning is part of the judicial character of the conclusion. It impresses the stamp on the conclusion arrived at. It protects the conclusion from being arbitrary. There would be the risk of miscarriage of justice, if order is not based on logically sound reasoning. The risk is greater when the judge ignores or is ignorant of the rules of procedure and evidence.
- (b) **Biased Justice:** The risk of bias has been dealt with in different contexts. It has been noted how pre-conceived or stereotyping or prejudices can create a biased mind, vitiating the approach to the case and the conclusion arrived at by the Judge. Bias can be caused by some remote personal experience of the judge or his prejudices which are part of his mental equipment or his social standing or religious background. It is very difficult to leave this baggage behind when the judge comes to court. He has to do it.
- (c) **Failure to Appreciate Evidence:** The Law of Evidence as laid in the Indian Evidence Act, 1872, is exhaustive. To ignore its provisions would only imperil the conclusions. Of course, it has already been noted how the Evidence Act does not enlighten us as to how to appreciate the evidence adduced

in a case or how to assess its quality, except to say if it is relevant or not and if it is admissible or not. It has been suggested how the test of probability may be one of the reliable tests to accept or reject a piece of evidence. If it does not respond to this test a doubt arises and such a proof is not one beyond reasonable doubt in criminal cases. It cannot amount to a preponderance of probabilities in civil cases.

- (d) **Delayed Justice:** The risk of its becoming a denial of justice if it is not delivered in time has been touched upon. Illustrative cases such as the one involving serious charges like bribery and other offenses leveled against the former Prime Minister taking a decade and a half for final disposal have been mentioned to bring out the prejudice caused to them by inflicting an unappeasable sentence on them though they may be acquitted ultimately. Of course, care has to be taken to guard against hasty justice under the guise of avoiding delay. In fact, hasty justice may mean denial of a fair trial which is a fundamental right.
- (e) **Abuse of Process:** Legislations like the Vexatious Litigation Act specifically target the abuse of process of law when a party resorts to legal action with the mala-fide intention of annoying or harassing another. Apart from that, even in bonafide litigation, abuse of process may be used as a means of annoying or vexing another party. Flooding the court with frivolous petitions to hold up the trial or to tire out the opponent may be an instance of such abuse. That risk has to be guarded against by the presiding officer.
- (f) **Justice not According to Law:** This has been considered in the context of a session's trial. The accused was charged with the murder of his wife. His acquittal resulted from flawed

investigation which led to a total want of evidence to support a conviction. Any conviction in that case would not be justice according to law. Similarly, in a civil case, the judge went about explaining away the admission of the party in his pleadings with a view to make out a case for him. The presiding officer is expected to try the case brought by the parties before him and need not go about to find a new case for them. The rules of pleading laid down in the Code of Civil Procedure mandate this.

Any trial that is not according to the Rules of Procedure or Evidence or is based on bias or prejudice or is hastily conducted or is unduly delayed is not according to law. However, demanding it may be, the presiding officer has to be on track if justice is to be delivered according to law and not according to his fancy or caprice.

What is the criterion to be adopted in assessing the management of courts of law? Judging the delivered performance in terms of promised performance may be one of the ways of doing so. In ultimate analysis, only performance stands out as the test. For testing performance, the calibration has to be done at different levels. Are complaints presented taken on file promptly? Are the pleadings and issues settled without delay? Are trials taken up within reasonable time? Are the judgements pronounced without undue delay? Do the judgements satisfy the norms they are expected to conform to? These have been identified and taken up in the course of the discussion in the foregoing pages above. Some of it has been done in a discursive way with a view to take the reader along the familiar routes so that he may contextualize the risks that emerge. The breakup of the context of management of courts by the judge in his administrative capacity into various segments of non-judicial activity has been done to bring out the judgement of performance easy. The importance of statistics and

reports has been emphasized; but the risks posed by a reliance on them as the sole criteria for judging performance have also been shown. The way to assess a judge's management skills is to find out how he enables his staff to efficiently ensure that the courts function as a justice delivery system. That is the clue to managing the knowledge workers. The functions are clearly defined. The defaults will be betrayed by the pace being held up. Its echo would be felt in the slowing down of the judge's own performance. The functions down the line are interlinked. That itself is a check. The staff is sensitized to the risk of the judge being slowed down by their delay or default. The sensitization of the staff that their tasks also are a part of the judicial process is an important link in the management functions of the judge. Broken up into concrete bits, the judge needs to have computerized data as to how long it takes for his office to take a plaint on file, how promptly is the defendant served with the suit notice, how long the pendency is before it is taken up for trial, how much time is taken after closing the arguments to pronounce the judgement and how long it takes to grant a copy of the judgement to the party. Such computerization would enhance the transparency and accountability of the judicial system. How many of his decision have been modified or reversed by the appellate court? How often comments or strictures have been made on the work of the trial court may have a relevancy in assessing the quality of the judge's work. Though not infallible, these and other similar tests serve the purpose of keeping an eye on performance which alone is the ultimate measure of efficiency.

A word in conclusion. Why was this written? To identify the risk issues? To bring home the relevance of Risk Management? To clarify that civil judicial processes are prone to risks just like any other process? To keep the focus on performance requirements so that risk handling may be seen as part of judges tasked? All these and much more. The days when suitors received the services

from the lawyers and judges patronaged by the elite are over. The people are empowered. They know what to expect. They assess what is meted out of them in terms of such expectations. The daily grind may blind the judge to the realities. The foregoing pages have pictured realities obtaining in the civil judicial system in such a way that the process betrays their weakness also. Only, thus, can the risk of the civil judicial process be seen.

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