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Time for change

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The time has come for a democratic revolt against the judiciary and for the appointment of a performance commission for judges.

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The judiciary suffers from an unbecoming misbehaviour syndrome.

DELINQUENCY of judges must be rooted out. They should be socialist, secular and democratic by conviction, simple in life and straightforward in behaviour. Judges correct the executive's aberrations. When legislatures violate the Constitution by unconstitutional actions, courts quash such actions. But the egregious exaggeration that shocks the public is the terrible catastrophe of judicial corruption.

To quote Felix Frankfurter in *Bridges vs California*, 314 U.S. 252, 289 (1941):

“Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they

may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candour however blunt.”

Even High Court and Supreme Court judges are suspected of bribery and delinquency. Today, the judiciary suffers from an unbecoming misbehaviour syndrome. The most respected and sublime sector of public service, namely, the judiciary, is losing its credibility. I quote Winston Churchill and Lord Scrutton to prove the poor credentials of the judges.

The Secretary of State for the Home Department (W.S. Churchill) on the second reading of the Trade Unions (No.2) Bill, 1911 (26 H.C. Deb. col. 1922) said:

“The courts hold justly a high, and I think unequalled pre-eminence in the respect of the world in criminal cases, and in civil cases between man and man, no doubt, they deserve and command the respect and admiration of all classes of the community, but where class issues are involved, it is impossible to pretend that the courts command the same degree of general confidence. On the contrary, they do not, and a very large number of our population have been led to the opinion that they are, unconsciously, no doubt, biased.

(Honorary Members: ‘No, no’, ‘Withdraw’ and interruption.)

Lord Justice Scrutton in an address delivered to the University of Cambridge Law Society on November 18, 1920 (1 *Cambridge Law Journal*, page 8):

“The habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. This is one of the great difficulties at present with Labour. Labour says ‘Where are your impartial judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?’ It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.”

We require a performance commission to eliminate the robed brethren who are guilty of goofiness and gross culpability. We require a constitutional code of conduct and good behaviour for judges. When they are guilty, a commission of high integrity and critical incisiveness must investigate into charges against them, and if found guilty they shall be removed without impeachment.

David Pannick in his delightful book (*Judges*, 1987) has observed:

“Mr. Justice Jackson of the U.S. Supreme Court observed in 1952 that ‘men who make their way to the bench sometimes exhibit vanity,

irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir'. It would be surprising, indeed alarming, if some of the eminent legal minds that constitute the English judiciary did not, on their rare off days, act injudiciously. This was recently recognised by Lord Chancellor Hailsham. Those who sit in judgment occasionally become subject to what he called 'judges' disease', that is to say a condition of which the symptoms may be pomposity, irritability, talkativeness, proneness to *obiter dicta* [that is, statements not necessary for the decision in the case], a tendency to take short-cuts. A judge may grow unfit for his office in many ways. It is therefore important to consider what sanctions exist in relation to judges who are unable to act in a judicial manner."

In short, mountebanks, though few, creep into the Bench, and their judgments bind even though absurd. To secure sound balanced pronouncements, we may require a performance commission to eliminate such mountebanks after due inquiry. In the U.S. at the state level there are performance commissions. Even David Pannick has supported such an institution. We must have one in India too.



SATISH H.

THE STATUE OF Justice at the NALSAR campus in Hyderabad. Never in the 60 years of judicial history in India have such serious charges been made against judges as have been made in recent times by responsible persons.

It is no longer a mere case of taking bribes or one of deciding cases in favour of the wealthy class. Sharp practice, tricky strategies and cute conspiracy have become the methodology of some in the judiciary.

Luckily, they are yet few, but it is bad enough.

These developments make it necessary to see that judges are selected after due investigation into their antecedents and class bias. Once corruption is detected and established, errant judges should be shown no mercy. The judiciary is the salt of the earth and if the salt loses its savour wherewith shall it be salted. Severe punishment for judges is a deterrent for the sanitisation of the profession. Judges hold a sublime place in society. If they turn criminal there is no compassion for them.

There is no ground, no principle, no jurisprudence authorising the creation of a bizarre or bedlam institution called collegium. The sooner this institution is drowned five fathoms deep, the sooner the judiciary will be rid of one irrational irrelevance. Even in England, experiments for appointment commissions are going on, but ultimately the judiciary is an institution with a class bias. Prof. Griffith argues:

“The rules are what they are because of the nature of the society, because of its cultural and particularly its economic ordering. The government is the political manifestation of the economic forces and the judiciary also subserves those forces. In modern Marxist terms: ‘From this standpoint the law is, perhaps more clearly than any other cultural or institutional artefact, by definition a part of a ‘superstructure’ adapting itself to the necessities of an infrastructure of productive forces and productive relations. As such it is clearly an instrument of the *de facto* ruling class; it both defines these rulers’ claims upon resources and labour-power – it says what shall be property and what shall be crime – and it mediates class relations with a set of appropriate rules and sanctions, all of which, ultimately, confirm and consolidate class power.’”

Judges are qualitatively becoming illiterate and character wise dubious largely because the collegium has no investigative machinery or obligatory principles for selection. Consequently, favouritism, nepotism, casteism and other extraneous considerations spoil the selection. In the absence of a performance commission, corruption creeps into the process of judicial functionalism. Aghast, today corruption and mediocrity and favouritism and influence are frequently imputed to judges.

Never in the 60 years of judicial history in India have such serious charges been made against judges as have been made in recent times by a responsible person like Senior Advocate Shanti Bhushan against judges of the Supreme Court. Nowadays, high courts are not free from moral violations. Extraordinary defences by judges in hiding their wealth or in promoting to the Bench their close relations were not so common earlier as they are now. The people of our Republic have become a victim with such poor reputation. The robed brethren are accused of robbing wealth and yet no inquiry, no action by the Cabinet and no inquiry by Parliament into judicial jejuneness takes place.

The time has come for a democratic revolt against the judiciary and a demand for an appointment commission, a performance commission and an anti-corruption commission to keep a constant watch over judges and the respect they command. If judges fail in their moral fibre, the rule of law and the rule of life would collapse and open the route to military rule and

functional chaos.

Said Learned Hand (*The Spirit of Liberty, Papers and Addresses of Learned Hand*, collected by Irving Dillard, 2d, New York, Alfred Knopf, 1960, page 81):

“I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalisations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.”

The collegium has added to the qualitative disgrace of the brethren and calls for liquidation as the adjudicatory mechanism. Perhaps we are reaching a state where judges, for their corruption, are caught and prosecuted until they consent to quit or choose to sleep in all their conscience behind bars. Swaraj was made of sterner stuff. A national commission for the appointment of judges with transparency, similar to the one now in England, is also urgently needed.

Glasnost and perestroika are imperatives from which the robes have no escape.

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