

THE HINDU

Friday, Jan 23, 2009

Imperatives before the judiciary

V.R. Krishna Iyer

The enforcement of the provisions of the 'Restatement of Values of Judicial Life', and the appointment of a judicial appointments and performance commission, should wait no further.

I am unable to conceive ... that in a democracy, it can ever be unwise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions ... The best way to bring about the elimination of those shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts.

— Jerome Frank

The Indian Constitution has created a democratic republic and a trinity of instrumentalities to enforce its paramount provisions without fear or favour, affection or ill-will. The executive echelons, when they exceed their power as inscribed and circumscribed in the *suprema lex*, are subject to scan, scrutiny and correction by the higher judiciary. The legislature has vast law-making powers and is functionally competent to perform an inquest into the administration. But when it transgresses its constitutional bounds the court can quash its action by writs, or command fresh operation by means of appropriate directions.

However, Judges, vested with considerable power, are oath-bound by the Constitution to decide within the prescriptions and proscriptions of Law India, performing with exemplary good behaviour but without violating jurial parameters. Judicial bounds of dignity and propriety are real and noble. But when the 'robed brethren' break the code of correct conduct or rob the rule of law of its efficacy, sanctity and majesty, they too must be subject to severe discipline and punitive action in case of delinquency and aberration. There should be an agency to invigilate their performance, armed by sublime jurisprudence and majestic jurisdiction.

Even judicial appointments must be subject to public regulation, high-power invigilation and a code of conduct. There should be a selection commission appropriate to the lofty office. This desideratum, being currently absent in statutory form, requires a constitutional judicial code conforming to the principles of pragmatic dignity and viable discipline in public and private life and high moral ethos — individual and institutional. The proposition often slurred over is that Judges are *under* the law, not *over* it, that the robes are no alibi for aberrant, arbitrary, arrogant or authoritarian behaviour, on or off the Bench.

The great American Judge Felix Frankfort once said: "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."

Judicial power can possess guilty shades of weakness as in the case of other forms of power. Lord Acton famously remarked that "power tends to corrupt and absolute power corrupts absolutely." Power jurisprudence demands regulatory parameters because "power will intoxicate the best hearts, as wine the strongest heads. No man is wise enough nor good enough to be trusted with unlimited power." (from Charles Caleb Colton)

And, Chief Justice Justice Harlan F. Stone wrote: "While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self restraint."

Self-restraint not self-abnegation

Self-restraint is not self-abnegation. Daring to desist from the temptation of excess of exercise is not pusillanimous retreat from just action but of wisdom and responsibility — which many lack. A good Judge is a picture of moderation refined by firmness and compassion bed-rocked on uncompromising rectitude. To be too 'judgey' and logomachic is to be extravagant, irreverent, aggressive or submissive. Cautious measures of temperance make for a system of justice delivery liberated from unprincipled hunger for insatiable pleasure derived from sadistic power.

These thoughts apply a *fortiori* to the august exercise of judicial authority. Moreover, a tendency to misuse unaccountable authority is an inherent weakness. Consequently, there has been an urge among great Indian Judges to create a code of conduct for judges. After considerable discussion and deliberation, Chief Justice of India and the Chief Justices of the High Courts felt the need to formulate basic principles that will inhibit the abuse of heady judicialese and ensure good behaviour in the incumbents' public and private life, so becoming of the high office which carries vast powers over all citizens in matters of rights, duties and even disputes among citizens and States.

The Supreme Court is final not because it is infallible; it is infallible because it is final. This finality and pro-tem infallibility indubitably necessitate excellence of credentials. That is why the Chief Justices spelt out unanimously a set of paradigmatic prescriptions. A resolution passed at the Chief Justices' Conference in New Delhi on September 18-19, 1992 desired a restatement of the existing and universally accepted norms, guidelines and conventions reflecting the high values of judicial life to be followed by Judges. That resolution requested the Chief Justice of India to constitute a committee to prepare a draft to be circulated among the Chief Justices of the High Courts for discussion with their colleagues. It was thus circulated in November 1993. Suggestions were received from the Chief Justice of India on April 7, 1997, to finalise the 'Restatement of Values of Judicial Life' after taking note of the draft that took into consideration the views received from the High Courts. A Full Court meeting of the Supreme Court adopted it on May 7, 1997, to serve as a guide to be observed by Judges.

It was made clear that these prescriptions were not meant to be exhaustive but illustrative of what is expected of a Judge.

Good conduct

These basics of good conduct, minimal in character but not negotiable in observance, have yet to receive implementation by constitutional or legislative action. Although years have passed since, Justices have come and gone, certain acts of grave misconduct have been reported and brought disrepute to the judiciary, the Prime Minister and his Cabinet have not taken the matter seriously.

A Bench of the Supreme Court in a majority pronouncement has asserted that it wants a judiciary whose body and soul are beyond purchase, whose independence is beyond pressure, partiality and corruption, and whose performance is free, fearless and fair and offers democratic access to the forensic process. For this reason, the apex court has wrested the power to appoint judges. Today, the Indian judicature is in a crisis both regarding the appointment of judges and disappointments owing to unscientific choices, performance and objectionable pachydermy.

India's have-not humanity is unhappy that the justice system is declining in terms of its integrity, social philosophy and genius, even as the Judges have wrested the power, without constitutional justification, to appoint their brethren in the dubious guise of independence of the judiciary. They have now the fear of accountability because impeachment before Parliament is apt to be a political futility or fiasco.

Since courts are part of democracy they will vulgarise themselves if judges jettison reverence for their own brethren or despise the integrity and independence of other public agencies. To denigrate each other is display of indiscipline and deserves condemnation by a performance commission. Nocturnal behaviour or dereliction of duty is contempt of the high office they fill and cannot escape penalty for culpability by a high-level performance commission. However, as John F. Whicher wrote, "It is fair to insist that judicial responsibility includes the task of exposing bad precedents. Judges are, or should be, their brothers' keepers."

The collective Bar, which is a sacred partner in the administration of justice, has a professional obligation to invigilate, with due reverence, any acts of judicial delinquency, and after due investigation, to bring them before a performance commission for appropriate action.

<http://www.hindu.com/2009/01/23/stories/2009012355201000.htm>