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The syndrome of judicial arrears

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Having more competent judges, not more number of judges, is the solution to the persisting problem.

Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary.

— Reinhold Niebuhr

When justice is denied by any society, including a socialist, secular and democratic one as in India, expectations darken into depression. Then that depression turns into dread, dread transforms itself into despair and despair evolves into explosive terrorism. State violence as an instrument to suppress terrorism is futile: after a time the bitterness and revengefulness that is generated will seek to overthrow those very forces that control state power — call it fascism, naxalism, Maoism or whatever. This dangerous deterioration of democracy into bedlam terrorism is hastened when access to justice ceases to be a reality and the only alternative is violence. When the rule of the robes proves a mirage, the rule of robbery gets support and sanction.

The way to eliminate this ghastly syndrome is not more state force but making the system of justice, justices and justicing truly accessible to the have-nots by means of radical judicial reform that is decentralised and democratic. If this does not become possible, the suffering people may leave the courts and take to the streets. This social strategy and humanism are what we need if noxious, nocent violence is to surrender to truth, justice, equity and egalite, the majestic values of the Mahatma. Rowlatt or Chowri Chowra or Naokhali, or Gandhian courage — which do we need? Here is the critical issue. Is our justice system jejune, and have the robes been robbed of their reality?

How shall we transform our judicative process? The Executive has force at its command and the Legislature is incompetent to make meaningful laws but has the backing of the masses who voted for its members. The judiciary has the bench to sit on and the authority of the Constitution to back it. If its verdict is ignored, it has no means to enforce its rulings. Sans justice, judges are powerless power.

What is wrong with our courts that they have lost their credibility and prestige? Corruption has

crept in. Forensic morals have been jettisoned and no longer form their inviolable virtue. More than all else, delay of dockets and Himalayan arrears frustrate the hope of justice from the forensic process. While the system is accessible and open to the rich and those from the creamy layer, the under-privileged have no money and are priced out of the institution. The Bar, an indispensable factor in the adversarial system, is too expensive for the lowly and the forlorn. The fees and the formalities make the law too dear for the have-nots. The hierarchy adds to the cost, the delay and the uncertainty of the final verdict.

Appeals upon appeals make justice through litigation inordinately dilatory and costly, and the law becomes the last means for the aggrieved to get relief. One appeal is necessary, two is too much, but we have four or five decks to spiral up. The litigant has only one life but litigation has several lives to see its end. Judgments typically take years to pronounce and some judges do not pronounce any judgment at all. They would seem to be unaccountable since there is no Performance Commission in operation.

Another great deficiency is that a collegium that is untrained in the task, selects judges in secret and bizarre fashion. There could be room for nepotism, communalism and favouritism in the absence of guidelines. The selection process excludes the Executive. Nowhere in the world do we have judges alone selecting other judges. The collegium is a disaster: the P.D. Dinakaran episode is an example. A new code by a constitutional chapter has become an imperative. Appointment is a desideratum.

What we now have as weaknesses of the system is Parkinson's Law and Peter Principle. The first creates vacancies after mediocre judges cause arrears to mount. The second elevates officers to the highest level of their incompetence. Even if you have 10 times the present number of judges, so long as there is no accountability, the arrears will multiply, the judicial budget will escalate and the disgrace of the judiciary will grow. A revolution is necessary and a sense of scientific spirit and reason is needed if the judicature is not to become a caricature, or a torture of the right to justice.

If our Founding Fathers are not to be betrayed, we need at once a judicial-constitutional code including a scissoring of the hierarchical syndrome. Or be prepared for a revolution. The unknown collegium, judges expanding their own breed, creating arrears more than anywhere else in the world, and other pathologies promoting a self-operated system...

Is India so bereft of statesmanship that it cannot create a swadeshi-swaraj judicature? A spiritual-natural synthesis carrying out Bharat jurisprudence and justice system must be the operation of the next Parliament.

Did not Jawaharlal Nehru assert that the Supreme Court is no third chamber of the House? Did not Franklin D. Roosevelt tell the American Supreme Court that if it did not serve the nation's interest he will pack the court? Let us not therefore allow the Indian courts to refrain from the tryst with destiny or go back on the grand Preamble of the Constitution. We, the People of India, shall not allow the judges to produce a pathological syndrome of seppuku.

I am critical of the great institution of justice of which I was a member during the best part of my

life. But as Oliver Wendell Holmes, the great American judge, said while criticising his judicial system, it would be less than fair if I do not constructively and correctively criticise the system of which I was a part if I see some dark drawbacks therein. My purpose is only to improve the system, never to denigrate it.

The Berlin Wall has fallen. Leningrad and Stalingrad is no more on the map of the Soviet Union. Nelson Mandela and Mahatma Gandhi, prisoners under the empire, have become Fathers of the Nations. Why not the Indian judiciary, patterned after the British, change and become truly swadeshi and Indian?

Judges have a heavy responsibility in the matter of chronic docket arrears. Nowhere in the world except in India does litigation last up to half a century in some instances. The art of fast disposal of cases would seem to have become alien to the judges, who do not know the strategy of having a brief hearing and delivering the judgment in a few days. A leisurely, jocose and even bellicose style, a high-and-mighty bearing, and slow and endless arguments are hampering the competent performance of the judges. American judges allow half an hour and no more. Look at the discipline that this writer showed in the stay proceedings of the Indira Gandhi case. Originality, imagination and talent have become scarce commodities. These are mostly covered up by demands for 10 times more of incompetent judges and none to expose them for fear of being hauled up for contempt.

The Chief Justice of the Supreme Court has been repeatedly urging that we must have thousands more as members of the judiciary as the solution to the problem of arrears. But that will only be a remedy which could aggravate the malady. This is a mediocre recipe that could prove counter-productive.

This view is supported by two great Indian jurists. M.C. Setalvad commented in his autobiography *My Life* (1970) on the statement of Dr. K.N. Katju, when he was Home Minister, that the "greater the number of judges in court, the lesser the rate of disposal for each judge. Though one may regard this as an overstatement, it is undoubtedly true that a larger judicial personnel frequently makes the courts cumbrous and slow moving." He added: "What is needed is the appointment of really able persons who can rapidly and satisfactorily deal with the accumulation of work."

Likewise, M.C. Chagla observed in *Roses in December*: "To my mind the solution is simple. See that the men you appoint are proper ones. Find judges with an alert and active mind. What is more important, pay the judges better, give them a better pension, and enforce better conditions of service. The usual solution put forward is to increase the number of judges. But if the men selected are not really competent, Parkinsons' Law will come into play. The more the judges, the greater will be the load of work."

It is time we had an effective executive which will call the bluff when judges invent alibi to explain away their incompetence and absence of integrity. An investigation into the entire higher judiciary may well weaken our faith in the integrity and incorruptibility of their lordships.

