

Issues raised by l'affaire Dinakaran

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The public loses respect for the judiciary if there is one corrupt judge who can discredit the high institution.

I do not know Justice P.D. Dinakaran personally and have nothing for or against him. I use his name based on a detailed letter of complaint against him written by several members of the Madras Bar and a representation to the President and the Prime Minister by the great advocate, F.S. Nariman, and other illustrious names.

No civilised society can command the people's confidence if the judiciary's verdict is privately purchased at a competitive price. The functional fundamental of the judicial instrumentality is indubitable. The court controls, corrects or quashes the executive, however high it is, and even sets aside acts of the legislature if it acts contra-constitutionally. But when judges turn obliquely friendly to graft, are addicted to delinquency, or are noxious in negotiating their judgments, violating the basic structure and values of the Constitution, the system suffers a syndrome of administrative chaos or functional anarchy.

Therefore if the Constitution is not to seppuku quality, integrity, egalite, and commitment to the human rights of rich and poor alike, judges must undergo the most exacting public examination and investigation. They must be subject to invigilation into their character and antecedents, company, habits, economic class and social philosophy, and personal life.

If the Bench is powerful, sensitive, prompt, and probus, the system of government will be straight and just. Beyond doubt, the appointment of judges, especially to the higher courts, is of great concern to the public. The bar is the professional nidus for recruitment to the Bench. The administration of justice will be functionally fair if the cadres are selected with a sharp eye on integrity, social philosophy, legal acumen, jurisprudential grounding, and are sound and good as an instrument to implement our Republic's values of socialist, secular, democratic, egalitarian administration.

This demands a scientific approach to the selection process. A peon or Class IV servant or security guard is selected on the basis of specific criteria and settled principles. But a strange phenomenon has crept into our system by an extraordinary eccentricity of a large bench of the Supreme Court in an ambition to snatch power. It is as if the higher courts are to be the creation of favourites, relations, and other extraneous factors without reference to the public or scrutiny by known standards of merit, integrity, and absence of class bias.

Oliver Wendell Holmes, Jr., put it felicitously: "The judges have other motives for decision, outside their own arbitrary will, beside the commands of their sovereign. And whether those other motives are, or are not, equally compulsory, is immaterial, if they are sufficiently likely to prevail to afford a ground for prediction. The only question for the lawyer is, how will the judges act? These motives may consist of, 'institutions of public policy,' 'inarticulate instincts,' 'a preponderance of feeling' arising out of previous antecedents of the judge, or 'even the prejudices which judges share with their fellowmen.'"

The collegium is a creature of a judicial precedent. It has no constitutional foundation; indeed it is opposed to what Dr. B.R. Ambedkar laid out in the Constituent Assembly. The whole process of the collegium is arbitrary in structure. There is no way of correcting its operation except by a constitutional amendment or assertion of the Franklin Roosevelt type. It is a pity that Parliament has not chosen to amend the Constitution or prescribe a constitutional Code of Conduct for Judges to behave themselves other than through the impractical process of impeachment.

The consequence is that doubtful candidates creep into the Bench and make pronouncements that become the law for the land — not because they are infallible but because they are final. Communalism has corrupted judicial appointments; caste and community contaminate judicial appointments.

The first and foremost requirement, if we really desire a straightforward justice system with ability and integrity and investigation into character and social philosophy, is to have a Commission for the appointment of judges of high stature. There have been complaints, aggravated from time to time, suggesting corruption such as excessive acquisition of assets by the judge either in his or her name, or in the name of close relations and other benamis.

There is urgency therefore about a Commission for the appointment of judges. The names under consideration must be revealed and public criticism received and examined. Secrecy leads to suspicion. Judges before appointment should be, like Caesar's wife, above suspicion. In the U.S., the public has a voice. Even in the U.K, the system of appointment of judges is no longer with the Chancellor. Why should India not have a public system of transparency and accountability in the matter of appointments?

In the case of Justice Dinakaran, I find from the letter written by Mr. Nariman and other respected lawyers much that is disturbing. A latifundist doing justice to landless tellers indeed.

I have no doubt that a Commission for investigating and reporting on the assets and liabilities of candidates and their benamidars is a condition precedent for appointing judges. The collegium can be overruled by the President and the Prime Minister ordering such a Commission. In that event, dubious candidates will not offer themselves.

To sum up. Parliament, exercising its constituent power, must amend the Constitution and create a well-thought-out system of three Commissions: for appointments of judges, for assessing the performance of judges, and for independent enquiry into the assets and liabilities of judges periodically.

Why do I, long retired from the Bench, take up the case of one judge? Because the public loses respect for the judicature if there is one corrupt judge who can discredit the high institution. After all, as Felix Frankfurter put it: "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."

Not one bad robe should be allowed to tarnish a great institution.

(The author is a retired judge of the Supreme Court of India and a regular contributor to this newspaper.)