THE JUDICIARY: SOME PARADOXES AND PATHOLOGY

Is the Judiciary a functioning anarchy? Yes, to an extent, but less so than the Executive and the Legislature! The Judicature has a great stature and power structure under the Constitution. It enjoys independence, immunity and authority but its appointment is unscientific by an untrained "collegium" and its performance is sometimes criticized as disappointment. There are a few fundamental problems relating to the administration of justice where potential conflicts between the judicative, legislative and executive wings are likely to overlap creating imbroglionic situations of embarrassment and confrontation. One such situation is where parliamentary privileges which are large and undefined, may extend to the vast extent of challenging even judicial power. Once a Speaker of the former Madras Legislature, Hon. Mr. Hector, Pandian, cancelled an order of the High Court sentencing an accused to imprisonment, claiming that the House, of which he was the presiding head, stood high, as it represented the people and had wider powers than the court. Absurd! Luckily, next day the then Chief Minister sensibly and successfully moved the House to cancel this shocking order of the Speaker and saved the rule of law. Even now, sometimes, under cover of punishment of breach of privileges the House deprives members of the Legislature or of the media or of the public of their human rights. The law is vague and vagarious, absent a consolidated Code which the Legislature fails to enact. While the court intervenes under Articles 26 and 32 to defend the citizen's rights, extraordinary impasses and riddlesome deadlocks created by the directives from the Chair, make the law obscure and enigmatic until the powers, privileges and immunities of the

legislatures and legislators are clearly defined by appropriate statute. Currently, the jurisprudence of parliamentary privileges is abstruse, being what prevailed in the House of Commons in January 1950 when the Indian Constitution was bright into effect. However, our law-makers in the House have been evading this task very much to the disadvantage of the rights of the people.

The biggest issue, at which our political leaders have been blinking, is the obese, obtuse, cumbersome and exotic Code of Civil Procedure, 1908, which regulate the processes of the subordinate judiciary in many facets of justice administration. This fossil law is of British Indian vintage which no longer suits our people's genius, social milieu and economic realities. The numerous chapters account for half the litigative potential in the country, with archaic, arcane provisions and strained interpretations. Although for the common man access to justice at the trial and first appellate levels is important this is where unpardonable neglect in simplification of statutes and directness of drafting generates explosion of court cases. The sooner the CPC is replaced by a small, plain Code the better for justice.

Another illusion which confuses the common man's knowledge of law is the profusion of appeals, revisions and reviews which are a burden on the Public Exchequer and the thin purse of the little Indian hungry for final relief. Goondaism, terrorism, ubiquitous corruption, mafia operations, impotent police and indifferent MLAs and MPs leave no room for hope of settlement of disputes and drive people to court in despair. Everyone hates litigation and plural judicial gambles but there is no alternative left. Even lawyers have no settlement culture. No social justice transformation from the specious and vexations system of justice administration has yet been seriously attempted by the Bar, Bench and Parliament. Why? Because party

power politics is in the grip of Money and Power, not Justice and social security. Even today as in Adam's day, Cain is not the keeper of Abel. The rich rule the system, the poor being voiceless.

Judges themselves belong to a class with vested interest and authoritarian vanity. They need a new dynamic, democratic culture although, among the trinity, people rightly hold the judiciary in relatively high esteem despite their fossil philosophy, functional legalism executive minded bias, invasion into the Executive and Legislative domains. But to oppose judicial activism and power to direct the Executive to comply with human rights and constitutional values is to abdicate judicial functional fundamentalism.

True, many on the Bench manage to do well but that does not justify an unscientific methodology of appointment without democratic approach or principled investigation of the candidate's merits. The claim that more judges will mean more disposals is untenable and only proves Parkinson's Law as a daily experience. Work expands and judges create more idle work by multiplying cases, adjourning them and otherwise increasing the quantum of the overall load. Procrastination in performance, with due respect to the 'robed brethren', lazy tendency to precipitancy by summary disposal, giving an opportunity for coming to court again, is another habitual weakness with potential for future litigation. Peter Principle is another infirmity, not alien to judicial 'elevation' where lower court judges and influential but indolent lawyers find their way to higher tribunals, proving the verity of Peter Principle. This sarcastic process means that every functionary, on promotion, often rises to the highest level of his incompetence.

Malafide performance of judges, with no machinery to correct misconduct or combat misbehaviour, what with their "independence" giving

scope for insouciance and unconcern for effective dispute resolution, is another reason for escalation of docket accumulation and arbitrary observations. Division Bench decisions, one differing from another, lead to some sort of case-law chaos and 'lower courts' find it difficult to choose between conflicting rulings. This phenomenon adds to the pathology of arrears, waiting for a larger Bench resolution of the conflict, which never comes to pass. The non-compliance with to the jurisprudence of precedents is due to maverick individualism of judges, costing the litigant uncertainty and delay in finality.

Another aberration deserves mention. The court at times decides too legalistically, ignoring the purpose of the enactment. The easiest solution, then, is to amend the law promptly, statutorily clarifying the purpose. Otherwise, litigation will multiply and miscarriage of the Legislative object will continue. This happened in a case where Parliament did not undertake a clearer definition of a simple word 'industry' for years after courts rendered opposing constructions. Consequently, a large number of cases were kept pending, awaiting a larger Bench ruling or legislative clarification. There is no instrumentality in our system to communicate directives of court to the concerned department of the Executive or directly to the legislature. Justice Cardozo (U.S) once made a proposal for a courier between the legislature and the court. A short bill creating a forensic courier will meet the need, and eliminate avoidable litigation. Indeed, there are other similar points which, with quick constructive reforms, can reduce litigation. I recollect how once a benign rule made by the Madras Government (under the Malabar Tenancy Act) was struck down by the Madras High Court on technical grounds leading to a good tenancy legislation missing its objective. Finding the Government indifferent, I took action and, as an MLA of the Madras

legislature, I moved an amendment to the Malabar Tenancy Act and the confusion was resolved by the legislature accepting my amendment. But courts do not communicate with legislatures and the latter often slumber; leaving lawyers to argue at learned length and litigants suffer at great cost. Other instances can be cited to show how litigation can be reduced by prompt creative steps. All that I need say is that law-making instruments and law- interpreting authorities are merrily somnolescent and avoid resolution of minor hassles by timely steps. The victims, of course, are the baffled public which seek justice in vain from courts.

Himalayan inflow of litigation is defended by some judges and jurists, claiming that this deleterious menace is proof of greater faith in judicial justice. This is fallacious and superficial and misleading diagnosis.

A sociological analysis of the dialectical materialism of litigative anarchy leads to the conclusion that the law in court is perhaps a part of the 'superstructure' adapting itself to the changing necessities of economic forces and new class relations. The rule of law is only another mask for the rule of a class. Judges, like other ruling classes, regard as the interests of the whole society what is really but interest of the narrower class in power. The ultimate question is, are we a socialist, secular, democratic Republic? Are we, the People of India, the sovereign only in form or justly in fact? A deeper dynamic dialectic of the economics of India will alone explain the sociology of litigative pathology!

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