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THE INDIAN JUSTICE SYSTEM/CURRENT PROBLEMS AND CREATIVE PANACEAS

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The quintessence of justice, in the contemplation of the Constitution, is the liberation from socio-economic subjection and consists in the actualization of the goal of "full and free development of every individual", to use the words of Karl Marx in Das Capital. For the Indian Constitution the holistic conception of freedom is of supreme relevance. Indeed, The International Human Rights Conference in Teheran (1968) called by the General Assembly of the United Nations, one of the most significant of its kind to date, declared in a final proclamation:

"Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without enjoyment of economic, social and cultural rights, is impossible."

This integrality has been stressed again and again.

In the same strain Justice Gajendragadkar in *Workers* of Gold Mines case (AIR 1958 S.C. 923) summed up the response of an aware Court :

"Social and economic justice have been given a place of pride in our Constitution and one of the directive principles of State policy enshrined in Article 38 requires that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice- social, economic and political- shall inform all the institutions of national life. x x x The concept of social and economic justice is a living concept of revolutionary import, it gives sustenance to the rule of law and meaning and significance to the ideal of a welfare State."

The judges have a role in transforming people's frustrations into a revolution of expectations of a humane to-morrow.

The dialectic of the rule of law arises from the obvious contradiction of two forces :

The first, the colonial factor, drags the country back; the second, the swaraj urge, spells the need for a revolution forward. From the juxtaposition of these two paradoxical presences follows the third compulsion that if Justice is an inalienable right of the millions of Indian people, with their chronic social squalor, ubiquitous poverty and massive illiteracy, its meaningful fulfilment is a pledge to

our Future and necessitates many radical Changes in the system of law and justice, viewed as a larger undertaking. Lord Denning, looking at the Indian Court, has said in passing :

"Law does not stand still. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the need of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect-thinking of the structure as a whole-building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends."

[In the Foreword to the Book "The Supreme Court of India, by RAJEEV DHAVAN- Page vii]

Capelletti regards forensic access, in itself, as the foremost human right :

"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement- the most basic 'human right'-of a system which purports to guarantee legal rights."

Wigs and gowns and the cult of the robes are not substitute for a revolutionary theory of constitutional justice. Granville Austin, in his great work on the Constitution of India, asserts that the judiciary was considered by the founding fathers to be an instrument for engineering the constitutional revolution; but, having regard to the court pyramid's actual performance a pessimistic verdict that the judges have partially failed, is difficult to avoid.

The butcher, the baker, the candle-stick maker, the bonded labourer, the pavement dweller, the damsel in distress, the sweated worker, the starving child, the dalit, the tribal and the socio-economic pariah shall have a vested interest in the Republic, only if the Constitution has a vested interest in their survival, their human worth and personhood.

The unconscious assumptions, the inarticulate politics and the *status quo* thinking, learnt as young law students and hardened in the elite school of life, are not easy to overcome. Judges must, therefore, consent to a course on *Justice under the Constitution,* washing away many interpretive distortions imported by precedents laid down by the pride of great judicial lions who, at best, were liberal,

and, at worst, idolators of dated dogmas, and, hardly ever, iconoclasts with radical thought.

Jawaharlal Nehru, while inaugurating the Conference organised by the International Commission of Jurists (I.C.J.) in Delhi, urged that the rule of law must run close to the rule of life. The I.C.J., in its declaration of Delhi, at that Conference incorporated the same idea :

"The Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized." [ICJ Declaration of Delhi]

While interpreting law, judges must be dynamic. Justice Cardozo quoted President Theodore Roosevelt to emphasize that the :

"Decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy."

[The Nature of the Judicial Process, 1960 Edn.P. 171]

The perceptions of the Judges are partly shaped and conditioned by the lawyers. Firstly, it is the lawyer who is eventually elevated to the bench. Secondly, it is the lawyer who, day in and day out, argues in the Court and impalpable moulds the minds of the robed brethren. Therefore, it is important that for the success of the constitutional transformation contemplated in Article 38 (a social order in which justice social, economic and political shall inform all the institutions of the national life) the Bar must also re-orient itself and not cling to fossil forms, rigid rules, lexical technicalities and patrified meanings out of step with the nation's march. Law is the means, lawyer the tool, justice the end and judges the instruments. It follows that a new breed of lawyers must incarnate as the Bar of Free India so that the new frontiers of radical jurisprudence may be discovered. Mark Twain has an apt observation for broadening the lawyer's vision which I quote here :

> "There is always a strong tendency among lawyers to become interested in the law to the exclusion of everything else. The law is a fascinating study and its practice an absorbing occupation. But to

consider the law as an abstract system aside from its application to human life, is to see it as a skeleton only stripped of flesh and blood and the living realities. The lawyer who deals with dry bones of the law, and who lives, moves and has his being in rules and jurisprudence, soon becomes self-centred, narrow and provincial. He becomes a hermit of the law. He soon misses the real varieties of life. The growth and expansion of law mean nothing to him. He becomes an antiquarian and loses the broader aspect of legal relations. His values as a Legal Adviser diminish as his legal vision shrinks. No business or profession is as broad in its application as the law. No other, demands greater ability, greater industry or a broader grasp of human nature. Law deals with human conduct, and without a breath of human sympathy, no lawyer can know the law in its manifold applications to human problems. The lawyer, of all men, must have a broad mental horizon."

Human Rights and Human Justice desiderate, as a *sine qua non* the independence of the Justice system. This vulnerable yet indispensable value of Independence of the Judiciary is not the pampered privilege of elite brethren but the people's dearest creed in societies where human freedoms still matter. The emphasis is on Justice, not Justices. The former is the common end, the latter but the constitutional tool. The universal fundamental is *fearless and fair justice*, and independent and humane justices are integral to the fulfilment of this imperative of the world legal order. If the right to justice is non-negotiable, so is the immunity of the judiciary from intimidation by the Executive, the socio-economic mafia, mass hysteria, media propaganda or terrorist forces. Insidious temptations, incurable vices and deep-rooted subjective prejudices of judges themselves may menace that conscientious impartiality which is the essence of independent justice. Equal justice beyond pressure of purchase is the product; easy access to the humblest and the hated, and early finality without expensive appellate procrastination, it the process; public hearing with intelligent application of the law and social sensitivity to facts is the dynamics, and judgments, with reasons recorded and copies thereof given readily, constitute the democracy of justice.

Justice can never be free where the Justices are not free. When Tun Salleh, the former Chief Justice and Lord President of Malaysia, was dismissed unjustly at the instance of the Prime Minister thro'a secret trial by a packed tribunal, the aggrieved Judge wrote a book (May Day For Justice) where he eloquently articulated some basic ideas relevant to the independence of judges as a sine qua non of freedom. Let me quote :

"Flags and anthems and marching uniforms, let us face it, will not make us free. No Fighter-Bomber squadron or naval patron fleet, no policeman on the beat or his secret Special Branch operation leading innocent men to Room 101 in Police Remand Centres.....is enough to preserve our freedoms. No, not even regular "democratic" General Elections and Parliamentary sessions, oath taking ceremonies and all, can guarantee it. The Constitution itself, and all the laws born of that Constitution, cannot make us free. And most certainly not orchestrated propaganda ditties drooled day and night in saccharine voices.

"As the old saying goes, only the truth can make us free, because all these institutions and their fine trappings can be, and often are, grossly abused and distorted.....

"Unless the truth is known at every turn, all those fine things can become mere Executive weapons for its own preservation and survival, not the armour to protect and preserve the freedom of the citizen which they are supposed to be.

"And the few institutions which can prevent such abuse and distortions are open courts of law with independent judges."

[MAY DAY FOR JUSTICE- Magnus Book, *Kuala Lumpur-at* P. 313]

Therefore, people the world over, consider a free judiciary a constitutional fundamental, absent which authoritarian forces and executive fiats may frustrate human rights, pollute or politicise court verdicts and fob off partisan pronouncements as the rule of law. The broad division of powers, as the guarantee of democratic justice, demands for the judicature a measure of functional autonomy. Montesquieu expressed this view in The Spirit of the Laws thus :

"Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

"There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals".

The core of the Montesquian doctrine is valid and his thrust is the necessity for an independent judicial authority to keep within bounds intimidatory or

excessive exercise of power by the executive and legislative wings imperiling the right to justice free from fear or favour.

How can adjudication ever be fair if it is not free from fear ? So the impregnable autonomy of the judicial process is inviolable. Where the judges are obliged to respond to other commands from beyond forensic walls or calls from within brain-washedbosoms justice is a casualty. It is thus axiomatic that for equal justice between unequal parties and for supervisory jurisdiction over the other organs of the State those who fill the office of judgeship must themselves be beyond pressure or terror, purchase or prejudice.

The Supreme Court of India has explained in emphatic terms, the superlative importance of judicial independence in a dynamic democracy :

> "The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary, and it is by exercising this power which constitutes one of the most potent weapons in the armoury of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive and therefore it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution makers by making elaborate provisions in the Constitution to which detailed reference has been made in the judgments in *Sankalchand Sheth's case* (AIR 1977 SC 2328) (supra). But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. If we may again quote the eloquent words of Justice Krishna Iyer :

"Independence of the judiciary is not genuflexion ; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure not Government's pleasure.

The tycoon, the communalist, the parochialist, the faddist, the extremist and radical reactionary lying coiled up and sub-consciously shaping judicial mentations are menaces to judicial independence when they are at variance with Parts III and IV of the Paramount Parchment."

Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says "Be you ever so high, the law is above you". [AIR 1982 SC 149 at pp 197-198]

The judicial office is no bed of roses but a crown of thorns and a cross in prospect if a conscientious functionary, by his diamond-hard impartiality, happens to anger or annoy the vanquished Executive or unwittingly tread on the toes of some vested interest waiting to avenge or willing to corrupt. In our feudatory or fuhrerist societies, during times when the mafia and the militants make no bones about use of violence and where 'deemed' democracies are dominated by quasi-Caesars with secret operations, a fair court faces hard days. In this world of material appetites, the tendency to fall for or seek or be bought thro' pleasures and pains is a common failing of 'ermined' echelons, and these pathological possibilities are so pervasive that an armour of protective principles, a code of 'hands-off courts' and a culture of immunities for judges have been found desirable for a world judicial order.

Lord Atkin in his powerful painful dissent (*Liversidge* V. *Anderson*) in words ring through the world of jurisprudence observes :

"I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded that the executive. Their function is to give words their natural meaning, not, perhaps, in wartime leaning towards liberty, but following the dictum of Pollock C.B. in *Bowditch* v. *Balchin* cited with approval by my noble and learned friend Lord Wright in *Barnard* v. *Gorman* :' In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute'. In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now

fighting, that the judges are not respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I." [1942 AC 206]

And these unhappy observations, whatever the boast of British Justice, led to a distressing estrangement and aloofness by other Judges and hastened the end of that high-minded judicial martyr. What a price to pay for forthright judicial outspokenness.

Justice Douglas of the U.S. Supreme Court once stayed, by an interim order, the bombing by U.S. of Cambodia on a petition by the American Civil Liberties Union. He phoned the Court his Order from a public telephone as he was concerned about the safety of life and property. Rare to find such independence and commitment for causes. However the administration in consternation moved Justice Marshall successfully to neutralise the Douglas Order. 'The Brethren inside the Supreme Court' relates this story and also states that in private Douglas referred to Marshall as 'spaghetti spine'.

Judges, as they approach the termination of their tenure, are apt to look for post-retiral bonanza. Many of them, even if the implacable calendar compels termination of office, look for 'fresh woods and pastures new'- Commissions galore. Special enquiries, LOK AYUKTS and other re-incarnations where age is no bar are available avenues if you do not antagonise governments or parties in power or keep in good humour important politicians, Big Business bosses and the like. Heavy fees for consultations and arbitrations allure many judges and so, their anxiety and anguish so to conduct themselves as not to cause a jar or jolt in the minds of those who may help future fortune. Of course, quite a number of judges resist these internal pressures and do not care to cultivate or share drinks with senior lawyers, executives and ministers. But alas, inflation of ambitions and pleasures of office are temptations which weaken impartiality and water down independence. You succumb to tomorrow's prospects by flexible behaviour to-day in a world of expensively materialist appetites, Realism and prudence and a careerist perspective soften the sterner stuff of judges as they advance in age. After all, human frailties do not spare robed brethren. As Thomas Jefferson long ago wrote : Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps.

Justice Venkataramaiah, a simple should who retired as Chief Justice of

India, spoke with naivete :

"Some judges are willing to be influenced by lavish [parties and whisky bottles. In every High Court there are at least 4 or 5 judges who are practically out every evening, wining and dining either at the lawyer's house or a foreign embassy". He estimated that there are at least 90 such judges in the country. He went on to add that all close relatives of judges were thriving as advocates in all the High Courts of the country. Referring to allegations that decisions of judges are influenced through practising relatives, he said that, "it is hard to disregard reports that every other son or son-in-law of a judge, whatever his merit or lack of it as a lawyer can be sure or earning an income of more than 10,000/- rupees per month."

(Indian Post dated 17-12-1989)

Judges of High Courts, in the evening of their tenure, have the tendency to chase prospects of becoming Chief Justices or elevation to the Supreme Court. Until recently the top political executive in Delhi had a decisive voice and so the unhealthy practice of cultivating contacts with appropriate political persons gained currency. The Chief Justice of India also had a key role and was,therefore, a worship worthy authority. The unfortunate spectacle of high judicial personages falling a prey to these infirmities has been commented upon adversely by senior, now retired, Judges like Justice Jagan Mohan Reddy.

Inevitably, favouritism, communalism, regionalism and allotropic modifications of these improprieties flourished not on a big scale but in mentionable measure. It is unpleasant to reveal these meretricious habituate instead of sweeping them under the carpet. But the darkness of secrecy never heals, while the sunshine of exposure may cure. Democracy thrives only where truth can be told, although high judicial office must be handled with care and irresponsibility must be punished.