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CONSTITUTIONAL ETHOS AND JUDGING

There is something in human nature which glories in the fact of being the first—the first to discover, the first to invent, the first to climb and so on.... Society fetes them and history records them. The persons who are the first to do anything therefore are, and should feel extremely proud of attaining that privileged place. All this is said to give you, My Lord the Acting Chief Justice, a sense of the extreme pleasure, privilege and honour that you have conferred on me today by asking me to deliver the first lecture at the inauguration of this Academy. The pleasure is in no way diminished by the fact that it is only a new building and that the Academy has in fact been functioning for sometime but it did so in “borrowed” premises. It has now come into its own.

This is not to say that the Academy has not been doing excellent work till now. That it has is reflected in the excellent District Judiciary that the State enjoys-keeping up a tradition of commitment and integrity of which at least I have often boasted whenever I have had the opportunity. I remember spending sometime as a guest at the Chandigarh Judicial Academy some years ago. The building was massive and had as far as I remember a swimming pool. I wished then that this State would have an equally beautiful Academy that other visiting judges would admire. That wish has been more than fulfilled

today thanks in large measure to all the Chief Justices of this High Court past and present.

I have been asked-more correctly-it was suggested -that I should speak on the Constitutional ethos and its relevance to judging. I have a habit of defining words before using them in a speech so that the hearers understand the sense in which I have understood them. Forgive me if I stick to that habit. The word "ethos" can mean "tradition" or "atmosphere" and the Constitutional ethos is perhaps summed up in its Preamble. I do not need to summarize the contents of the Preamble for this audience but only indicate that I have chosen a part of one of the objectives mentioned in the Preamble to consider as being apt for the occasion and that is "Fraternity assuring the dignity of the individual". For today I use the word "judging" not to mean an assessment of fact and decision making but "behaving like a judge". That I think is the basis of a good judge. Fraternity is relevant to behaving like a judge whether in relation to other judges wherever in the judicial hierarchy, or with lawyers and litigants "assuring the dignity of the individual". So the topic for today is-the relevance of tradition or an atmosphere of fraternity in behaving like a judge.

With colleagues

The fraternity of judges is a phrase which is often used. Judges refer to each other as "Brother" or "Sister" as the case maybe. Nevertheless the

relationship is not always a 'fraternal' one. The first time that ladies were appointed to the Bench in this High Court in 1977 the brother judges refused to constitute a Bench with them. The result was that contrary to tradition, newly appointed judges sat singly. Fortunately the initial reluctance was overcome by the time I was appointed a judge. Not that my presence did not create some confusion. When I presided over the Bench in the Supreme Court, the two others on the Bench were male. The Lawyers addressing the Court while addressing the Bench could not very well say "Your Lordships will come to page 9...". Probably because I was presiding they said "Ladyship". One of my "Brothers" took umbrage and turning a wrathful eye on the Counsel said "Are we not part of this Court?" Incidentally the word "judge" is defined gender neutrally as 'person appointed to decide dispute or contest'. And yet women appointed as judges are still referred to as 'women' or 'lady' judges meaning that they do not fall within the ordinary definition of judge. However none of my sister judges present will disagree, we have never objected when our presence has in that sense been ignored and the Bench addressed as "Lordships". The matter can be resolved by the simple expedient of using the phrase "The Court".

The fraternal feeling is in fact more followed in its breach than in its observance. Unexpressed fratricidal tendencies are perhaps uncontrollable but expressions of them are. Public denigration of brother judges or their decisions, apart from disclosing the petty conceit of the

utterer, affects public perceptions and therefore respect for the judges and consequently acceptance of judicial decisions.

It is a matter of judicial record that puisne judges have issued contempt notices against the Chief Justice of that High Court¹ and have cast aspersions in orders against colleagues. A refinement of this un-fraternal attitude is reflected when decisions of co-ordinate Benches are ignored. Several years ago the Supreme Court dealing with such a situation said: “We have noticed with some regret that when the earlier decision of two judges of the same High Court ... was cited before the learned judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring the question to a larger Bench. Judicial decorum no less than legal propriety forms the basis of judicial procedure.”² Also, I would dare add, “Constitutional ethos”.

Sometimes this disdain is expressed in infelicitous, covertly sarcastic if not outright abusive language in judgments particularly with regard to judgments under appeal whether from the District to the High Court, Intra-court appeals or in appeals from the High Court to the Supreme Court. Personal bias is also often patent against a particular judge in viewing all judgments by him/her with a view to upsetting it. As re-

¹ State of Rajasthan v. Prakash Chand, (1998) 1 SCC 1

² Mahadeolal Kanodia v. Administrator-General of W.B., (1960) 3 SCR 578

affirmed recently by the Supreme Court: “No greater damage can be caused to the administration of justice and to the confidence of people in judicial institutions when Judges of higher courts publicly express lack of faith in the subordinate Judges... What was said in relation to the Judges of the lower judiciary applies with equal force to the Judges of the superior judiciary”³.

Perhaps we need to be constantly reminded that it is the office which is invested with the power and not the individual. The individual’s capacity or competence does not increase or decrease with the office which is, in any event, held more often than not because of the accident of circumstances. One does not become wiser or more competent or erudite merely by being taken from the Districts to the High Court or from the High Court to the Supreme Court. Besides the task of judging at all levels is the same irrespective of the territorial or pecuniary jurisdiction or the impact and reach of the judgment. Judges are different layers of the same judicial cake and there can be no justification for lack of fraternal behavior between the levels.

Fortunately, for whatever reason, Judges in India are not as guilty, or at least do not have a record of judicial fratricidal behavior as some other countries. ‘At the US-Iran claims tribunal in the Hague in 1984, a Swedish judge was physically assaulted by two Iranian Judges. They claimed he was pro-American. “If [Judge] Mangard tries to enter this

³ State of Rajasthan v. Prakash Chand, (1998) 1 SCC 1

tribunal again”, threatened one of the Iranian judges, “either his body or mine will roll down the steps of the Court”⁴. Mr. Justice McCardie is reported to have written to Lord Hanworth, Master of the Rolls, requesting that no appeal from a decision of his should in future be heard by a Court of Appeal of which Lord Justice Scrutton was a member⁵. According to David Pannick in his book “Judges”, the situation was more farcical in the US Supreme Court in the mid 20th century. “Justice Roberts refused to speak to Justices Black, Douglas or Murphy. Douglas and Frankfurter were scarcely on speaking terms. Justice Jackson made a public statement...attacking Justice Black as a ‘stealthy assassin’ whose disregard of judicial proprieties threatened to bring the Court into disrepute’. There was an ‘increasing display of acrimony’ between Frankfurter and Chief Justice Warren. “It is surprising” says the author, “that the Court was able to distract itself sufficiently from these pre-occupations to get any work done”⁶.

With lawyers

Although a judge and a lawyer may not belong to the same fraternity yet the mandate of “assuring the dignity of the individual” requires courteous behaviour from the Bench. Courtesy is to be differentiated from familiarity. The first gives rise to respect and the second results in contempt. Also rudeness to a lawyer does not, as is sometimes

⁴ Pannick: Judges p. 18

⁵ Ibid p. 22

⁶ Pannick: Judges: p.25

erroneously thought, reflect a judge's intellectual superiority or competence. Far from assuring the dignity of appearing counsel in contravention of the Constitutional mandate it lowers the Court's own dignity. Equally wrong are frequent interruptions-riding rough-shod as it were- over, sometimes, a carefully prepared argument. The obituary reference of Mr. Justice Roxburgh (who was a judge in the Chancery Division of the High Court in England from 1946-1960) mentioned that 'his many interruptions and interlocutory observations often hampered and embarrassed counsel in the conduct of a case'⁷ ... We have many home grown Roxburghs but then we as a nation still tend towards hagiography in our Obituary References.

With litigants

Finally, Fraternity with litigants in judging is perhaps a topic which merits a separate speech and I do not wish to set a precedent today for interminability. Most judges have never been litigants. But perhaps it would have been better for them as judges if they could have got a taste of what it feels like to be at the receiving end of judicial behaviour. Would a judge ever want to subject himself/herself to the judicial process as an "ordinary" litigant? According to research conducted by Sakshi, when 105 High Court judges were asked whether they would go to court if a near relative were raped, 99 said No. The data is indicative of the kind of behavior that judges meet out to

⁷ Pannick: Judges: p. 83

litigants, behavior which they themselves were unwilling to be subjected to.

The Bible quotes Christ as saying “Do to others as you would have them do to you”⁸. Literature also contains characters such as Mrs. Doasyouwouldbedoneby⁹. This sums up what I would describe the principle of fraternity in judging as far as litigants are concerned.

The least that a litigant can expect from a court is fairness not only in decision but also in behavior. ‘The layman’s willingness to accept the result of his trial, civil or criminal, is a precondition for the survival of the rule of law. Such acceptance by the layman depends as much on the diligence, politeness and fairness he believes he has received from the judge as it does from the legal quality of the decision made by the judge in his case’¹⁰. Greatest disrespect is also shown to litigants by non-delivery of judgments and speaking in volumes in complex legalistic phrases more often than not filled with unnecessary displays of erudition and malapropisms. At the end of the day all a litigant really wants to know are the answers to two questions: Have I won or lost? and second Why? In other words –was it a fair decision?-- not whether it was said in fancy phrases.

⁸ Luke 6:31

⁹ Charles Kingsley: *The Water Babies*

¹⁰ Pannick (p. 99)

I must be forgiven if I have trodden on any judicial toes today. I took the liberty if I have done so because I spoke not as an officious bystander but because I knew I would be speaking to my own brethren. Thank you again for this unique privilege. I wish the Academy reaches even greater levels of success in helping produce judges worthy of fulfilling their constitutional mandate.
