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AN ILLUSTRATIVE CASE

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

Unlike Parliament, the Supreme Court lacks the conventional legitimacy derived from securing membership to its judges through elections. The court's command is derived from, and grounded in, a general acceptance of its status as an impartial referee of disputes and as an unbiased interpreter of the law. Predictably, its sense of esteem and its sense of moral authority, which together constitute its most important assets, are immanently fragile. Any degradation of the court's acceptance amongst the public of its reputation as an equitable body will, therefore, impair its authority irredeemably. And that today, as the Chief Justice of India (CJI) faces allegations of sexual harassment, is the explicit threat that the court faces.

The complainant, who joined work in the Supreme Court in May 2014 as a Junior Court Assistant, and who worked in the court of the present CJI, Ranjan Gogoi, from October 2016, alleges not only that she is a survivor of sexual harassment, but also that she was unfairly dismissed from service. What is more, on her dismissal, she claims that she and her family were foisted with a series of false criminal cases and were subjected to abuse at the hands of the police. She sent her complaint, in the form of a sworn affidavit, to 22 judges of the Supreme Court on Friday, and on the same day, four magazines, *Scroll, The Wire, Caravan* and *The Leaflet*, sent a questionnaire to the CJI. In response, the court's Secretary General denied the allegations, terming them "scurrilous", and claimed that it was "also very possible that there are mischievous forces behind all this, with an intention to malign the institution".

On the next day, minutes after the story was published online, the CJI convened an extraordinary hearing by a Bench comprising himself and two other judges to hear what was termed "In Re: Matter Of Great Public Importance Touching Upon The Independence Of Judiciary". These proceedings were initiated suo motu, i.e. on the court's own motion, without awaiting a formal prompting from a party. In a hearing which disregarded every ordinary precept of due process, not only was no notice given to the complainant, calling upon her to appear, but her allegations were effectively dismissed outright as a product of a larger conspiracy. In a brief order that was issued at the end of the hearing (which, bizarrely, wasn't signed by the CJI, despite his participation in the proceeding), the court said it was leaving it to the "wisdom of the media to show restraint", to decide what should or should not be published, since "wild and scandalous allegations undermine and irreparably damage" the judiciary's independence. It's easy to see, though, that if anything, it was the court's own conduct that was blighting its moral prerogative. Since then, the CJI withdrew himself from the case, but a new Bench that he assembled has now ordered a probe by a former Supreme Court judge, Justice A.K. Patnaik, to examine whether these allegations spring out of a plot to overthrow the judiciary.

Hark back to January 2018, when the four senior-most judges of the court, including the present CJI, called an unprecedented press conference to mark their disapproval of the then CJI, Dipak Misra's arbitrary choices as master of the roster. Despite those public expressions of dissent, nothing, it appears, has really changed. The CJI continues to enjoy unquestioned authority over allocation of judicial work and over selection of Benches, even in cases where a conflict of interest is to be presumed.

That justice should not only be done but should manifestly and undoubtedly be seen to be done is an aphorism often attributed to Lord Chief Justice Hewart of the King's Bench. But, as a former Australian judge, James Spigelman, has written, the maxim could scarcely have had "a less auspicious provenance". For, as Lord Devlin wrote in 1985, "Hewart… has been called the

worst Chief Justice since Scroggs and Jeffries in the seventeenth century. I do not think that this is quite fair. When one considers the enormous improvement in judicial standards between the seventeenth and twentieth centuries, I should say that, comparatively speaking, he was the worst Chief Justice ever."

James Spigelman records a litany of misconduct, which the Court of Appeal had found Hewart to have committed in one single defamation trial, where he had delivered a ruling against the plaintiff without hearing the plaintiff's counsel; where he had accused the plaintiff in front of the jury of fraudulently concealing documents and had refused to withdraw or apologise for the accusation even after it was pointed out that the document had been disclosed; and where he had received communications from the jury which were not disclosed to counsel.

Natural justice, therefore, has always stood on delicate ground. But as principles go, it is so axiomatic to the rule of law that courts around the world have repeatedly stressed on Hewart's dictum, notwithstanding the author's own indiscretions. That justice should be open has also been immortalised in Article 14 of the International Covenant on Civil and Political Rights, which states that "all persons shall be equal before the courts and tribunals," that everyone "shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". Not only is India a party to this treaty, but its Constitution also guarantees to every person equality before the law. But much as the Supreme Court has relied on these codes to invigorate its own sense of power, as it has repeatedly shown in recent times, it's just as capable of renouncing its grand declarations when one of its own is under the cosh.

Now, prompted perhaps by resolutions passed by various bar associations, a committee — comprising Justices S.A. Bobde (the senior most judge on the rest of the court), N.V. Ramana (who was replaced by Justice Indu Malhotra after he recused himself) and Indira Banerjee — with the apparent support of the full court, was formed to conduct an administrative probe into the charges made against the CJI. The committee's creation is, at the least, an acknowledgement of some kind that the complaint deserves an inquiry. But doubts persist over the committee's legality, over whether it can at all scrutinise allegations made against the CJI, and over whether its composition lacks a moral base in that no external members have been included. Besides, it's also difficult to countenance how the parallel proceeding, to be headed by Justice Pattnaik, can continue even before the administrative inquiry into the complaint has been completed.

These are no doubt extraordinary circumstances, but to advance the cause of justice, it's important that basic procedural norms are respected. Given the absence of a proper, institutional mechanism, it's likely that any mode adopted to judge the charges made will prove indiscriminate. But that's precisely why the Supreme Court needs to step up, to collectively show us that it can establish an ethical precedent. The assertions made may or may not be veracious, and they may impugn only the CJI. But ultimately the court's institutional integrity is at stake here. It's therefore imperative that the court articulates and espouses a commitment to the rule of law. It needs to show that the principles of due process that it holds applicable to all of us are just as applicable to one of its own. That due process isn't merely a poetic homily, to be discharged on convenience, but that is integral to the court's foundations and to the Constitution's guarantee of equal protection.

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