Master and the roster

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On Friday, four of the senior-most judges of the Supreme Court held a press conference at the residence of Justice Jasti Chelameswar. In the press conference — an unprecedented event in the annals of the judiciary — they expressed concern about the manner in which the Chief Justice of India was administering the Court, and released a letter that they had written to him. Unsurprisingly, the move has generated fierce debate. Friday's events, however, are not simply about the personalities involved. They represent the culmination of the gradual deepening of a number of faultlines in the Indian judicial system and highlight the urgency with which they need to be addressed.

At the heart of the controversy is the chief justice's power as the "Master of the Roster." All judges of the Supreme Court are equal when it comes to hearing and adjudicating cases. However, with respect to the administration of the Court, the chief justice is the "first among equals". The chief justice decides when a case may be listed for hearing, and she also decides which judges will hear it. In itself, this model is unexceptionable. It is followed by many constitutional courts across the world and facilitates smooth and efficient judicial functioning.

In India, however, there are three interconnected factors that have, over the years, put this model under severe strain. First, the Supreme Court now consists of 26 judges, who predominantly sit in benches of two. Compare this with the US Supreme Court, for example, where all its nine judges sit together (en banc) to hear cases, or the UK's Supreme Court, where 12 judges often sit in panels of five (or more). The Chief Justice of the US Supreme Court, therefore, has no choice in the question of which judges will hear a case, and in the UK, the choice is significantly constrained. By comparison, the Chief Justice of India has significantly more discretion in determining which judges will hear and decide a case.

Why does this matter, you may ask? If judges are meant to apply the law, wouldn't the outcome of a case remain unchanged, no matter which judge hears it? Not so. Legal texts are linguistic artefacts, and language is always open to interpretation. Nor can the discipline of law be segregated from the social, political and historical context in which it exists. Two judges who come from different contexts may even understand the same set of facts very differently. Now, to curtail these kinds of divergences, legal systems evolve homogenising tools, such as a system of precedent, and a commonly accepted interpretive approach towards legal texts. This, however, brings us to the second factor: In India, over the last 30 years, these constraining influences have been significantly weakened.

The rise of public interest litigation has diluted the practice of strict adherence to the legal text, and the Court's habit of sitting in multiple small benches has undermined the gravitational pull of precedents. This means that when a judge surveys the legal landscape before her, she finds that it gives her greater room to effectuate a personal interpretive philosophy than she might otherwise have. Multiple examples can be cited to demonstrate this. Perhaps the starkest is a brief period in the mid-2000s, where two Supreme Court benches were hearing cases involving the death penalty. One of these benches confirmed virtually every death sentence, while the other commuted most of the cases before it. The question of whether a person lived or died, then, depended upon the lottery of which bench his case came before or — in the Indian legal system — which bench the chief justice assigned it to.

And third, the Supreme Court is dealing with a massive backlog of cases. This means that "in the normal course of things", a petition will take many years to be heard and decided. The chief

justice, however, has the power to “list” cases for hearing. Given the huge backlog, this simple administrative function becomes a source of significant power. For example, the government’s demonetisation policy was challenged in the Supreme Court on multiple grounds, including the argument that the government could not legally deprive people of their property without passing a law. The Supreme Court is yet to hear this case. In the meantime, the policy has been implemented in its entirety, and any judgment the Court would now render would be purely academic. Backlog, therefore, allows the Court, through the office of the chief justice, to engage in the practice of judicial evasion — that is, effectively deciding a time-sensitive case in favour of one party by simply not hearing it.

In a legal system where a significant percentage of the judges of the Court sit on every case, where there is at least a surface consensus about the interpretive philosophy that judges use to decide cases, and where all cases are heard within a short time of being filed, the chief justice’s power as “Master of the Roster” would be purely administrative. However, in our system, where none of these three conditions obtain, this harmless administrative power has transformed itself into a significant ability to influence the outcomes of cases.

And unfortunately, this progressive centralisation of power within the office of the chief justice has not been accompanied by a parallel strengthening of the accountability of this office. The office of the chief justice remains answerable to none, a situation that was highlighted recently when, in a case that potentially involved the chief justice, the chief justice himself constituted a bench to hear it, and the Bench, while rendering its judgment, effectively held that the principle “no person shall be a judge in their own cause” simply didn’t apply to the office of the chief justice.

The upshot of all this is that the survival of the Court as an institution is dependent entirely upon the character of the individual occupying the station of the chief justice. However, history tells us that institutions that become over-reliant upon single individuals inevitably decay. The actions of the four judges on Friday, whatever their merits, precisely highlight the structural problems pointed out above and remind us that if we are to prevent that decay in one of the most vital institutions of our democracy, the only way out is meaningful reform that brings accountability and transparency to the office of the chief justice, without compromising on judicial independence.

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