Unconventional wisdom

Living in the information age, when one writes on an event more than 24 hours in the past, nearly everything that could be said (and a lot that should not) is already done. We have had hourly conjecture on our news channels as to what the four judges said and meant, and several experts of every hue have been leaned on to offer an interpretation of the letter airing their reservations. As with many aspects of our constitutional life, much of which the judges engage with and translate on a daily basis, this event too highlights the problems of unwritten convention.

Thousands of litigants leave the Supreme Court (SC) every year with the feeling of defeat, and a cherished hope that if there were another rung of appeal, the outcome of their case might be different. It is precisely to address these concerns that review and curative mechanisms exist. Yet, the fact remains because of the clear terms of the Constitution, cases do achieve quietus at the SC, offering judicial closure to both parties.

However, not every action within government is available for such judicial scrutiny — not those of the president for calling the leader of the single-largest party to form the government, not of the Speaker for his actions in the House, nor that of the foreign ministry in not placing an international treaty before the House for ratification even if it involves a financial burden. In the judiciary, the discussions among judges as to how they arrive at a verdict or why someone is recommended by the collegium to high office is also beyond the pale of challenge. Much of this has nothing to do with statutory law or prescribed rules. As with most of the Commonwealth, this emerges from the delicious British practice known as “constitutional convention” — unwritten norms followed by constitutional authorities, which are born out of custom and followed out of expediency. If, in the implementation of any of these conventions, there would be doubts or reservations, no formal recourse is provided.

The discretion in allotting cases among the judges of the SC vests with the Chief Justice of India, and is yet another example of this convention. Ever since the misadventures of the 1970s, the very appointment of the senior-most judge of the SC as chief justice has also been a matter of constitutional convention. By being so appointed, he ex-officio heads the administrative side of the court and discharges tasks, most of which are entirely mundane and some of which are almost menial. In all of this, he is assisted by no less than 40 committees comprising various combinations of the other judges of the Court.

Most former chief justices I have interacted with have confessed that it was no happy task to try and make sense of the virtually labyrinthine registry or to entertain the service issues of its many employees, while also being prepared for hearing cases the following day. But on the flip side, the chief justice also has an untrammelled discretion with the listing of cases, as well as the constitution of benches. We need look no further than the year gone by when Chief Justice J.S. Khehar constituted a bench of the first seven judges to consider Justice C.S. Karnan’s fate, another five from different faiths for the triple talaq verdict and nine of varying constitutional hues for the privacy case. One would never know whether there were objections to the manner in which these benches were constituted, but as far as lawyers and laymen were concerned, they did send the message of representation and objectivity.

However, as in the present instance, when an overwhelming majority of the senior judges have expressed their disquiet with the allocation of cases, the same constitutional convention leads to the chief justice essentially being a judge in his own cause. If he chooses not to vary his decision, those aggrieved have no other recourse visibly apparent — a judicial cul-de-sac as it were. It is in these circumstances that we find the shortcomings of an unwritten convention.

If, as in the Memorandum of Procedure for the appointment and transfer of judges, a similar memorandum were to be evolved by the full court to act as a guide to the chief justice in listing cases and constituting benches, then it would achieve a twin objective: Any departure from the memorandum could be corrected by an internal mechanism; and it would impart a sense of participation and comity within the judicial cohort. In fact, it was precisely such circumstances in a different context that led in 1997 to the judges unanimously passing a resolution entitled “Restatement of Values of Judicial Life”. This was to act as an ethical code for judges with reference to relatives practising in the same court or sharing residence, and to avoid any perceived conflict of interest.

An alternative would be for the judges to ease the pressure of administrative duties and appoint a CEO for the Court — a career administrator who would explore business-like solutions for the efficient running of the institution. Such an entity would be both tenured and accountable, with selections being conducted by the UPSC or some similar body.

Whatever the options, and there are bound to be several, the way forward for the judges of the SC is to now put their wise domes together and to adopt some similar method to address the present situation. Future generations will thank them for having illuminated a path that is not always smooth.

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