Talking over a law: the need for public conversation on the judiciary

As the consequences of the historic press conference of the four seniormost judges of the Supreme Court play out, a constant refrain that has been heard is of the need to resolve differences internally. This was always going to be the stock response of dominant sections of a legal and judicial fraternity that constantly speaks truth to government but is uncomfortable when the same standards are applied to them. Such a refrain, at first glance, is curious, as it appears to be an attempt to close the stable doors after the horse has bolted. But in reality it is the carefully calculated response of an entrenched mindset that seeks to maintain public confidence in the judiciary by keeping it insulated from public spotlight, discussion and criticism. It is this mindset that was challenged, in cause and effect, by the press conference.

The immediate trigger for the press conference was the apparent arbitrariness of the Chief Justice of India (CJI) in allocating benches for disposal of cases. Whether indeed there was arbitrariness, and whether such arbitrariness, if any, was purely whimsical or motivated, is impossible for members of the public to ascertain. But if the four seniormost judges, despite their internal meetings with the CJI, resorted to the extreme measure of appealing to the public, their grievances are entitled to a certain degree of credence. Assuming such credence, the question that any well-wisher of the judiciary, whether inside or outside it, must ask is this: What is the institutional design that facilitated such seemingly arbitrary decision-making?

Restoring order in the court

One possible answer lies in the opaque internal structure of the judiciary founded on a combination of unquestioning trust in the office of the CJI along with an instinctive distaste for any interference by Parliament or government in judicial functioning. So sacrosanct are both these premises today that anything to the contrary appears blasphemous. However, their sanctity is neither natural nor long-held.

At the time of the formulation of the Constitution, B.R. Ambedkar warned that no matter how upright the CJI might be, like any other mortal he too would have frailties. Thus no absolute power should be vested in him. Admittedly, Ambedkar was speaking about not giving the CJI a veto power in appointing judges; but the same sentiment rings true in case of the convention of allocating benches as well. After all, England, from where the convention of the Chief Justice as the master of the roster emanates, has been witness to several Lord Chancellors constituting partisan benches on matters of great political moment. Consequently, the principle that one should trust one's Chief Justice, while admittedly a sound principle, cannot be an absolute one. That it has become so is testament to the legal fraternity closing ranks under the ruse of convention.

The Hindu Explains: 'master of the roster'

The second premise justifying complete judicial insulation that makes arbitrary decision-making in the judiciary possible is the fear of politicisation. This is undoubtedly legitimate — a politicised judiciary might well suffer from a lack of public confidence. But the implementation of this principle is both over-broad and misdirected. In public discourse there is a false conflation of any parliamentary action relating to the judiciary as *ipso facto* affecting its independence. Whenever any move towards reforming the judiciary is made by politicians, commentators are quick to hark back to the Emergency and the supersession of three judges for the CJI that preceded it. But there is some distance, logically and factually, between superseding the CJI and proposing an accountability law for judges, revising the opaque process of appointment and looking to institute credible alternatives to a broken system of tribunals, as stillborn reform initiatives in the last decade have sought to do. Unfortunately, so deep is judicial memory of the Emergency that it has

clouded in distrust many well-meaning attempts at judicial reform by governments and Parliament.

Equally critically, this fear of politicisation is misdirected, being based on a naïve view that overt parliamentary law is the sole method of interference with the judiciary. What it fails to countenance is that more nefarious methods of political interference in the judiciary exist, and have always done so; moreover, that such methods thrive in opacity, subjectivity and a lack of norms. As Bentham said, a view the Supreme Court itself has endorsed in *Mirajkar*, “in the darkness of secrecy, sinister interest and evil in every shape, have full swing.” It is this darkness that the press conference of judges has shone a light on. To shut the light out and resolve the matter in darkness through an internal resolution would be exactly contrary to what the situation demands.

While internal resolution might be a palliative to tell the world that all is well with the Indian judiciary, it will, at best, be a band-aid solution. Were such a solution genuinely possible, one can safely trust that the four judges would not have resorted to a press conference to make their views clear. The press conference should make it clear to all that the ship of internal resolution has sailed. Instead, what is needed now is a Supreme Court Act to be passed by Parliament after an open public discussion involving all stakeholders — civil society, the judiciary, the Bar and members of all shades of political opinion.

As a precursor to such reform, it is important to clarify that the Constitution envisages the powers and jurisdiction of the Supreme Court to be the possible subject matter of a parliamentary law. This is clear from Entry 77 of List I of the Seventh Schedule which makes the aforementioned a legitimate subject of law-making. Passage of such a law is critical to rectify the discourse of any parliamentary law relating to the judiciary being anathema.

The substance of a proposed Supreme Court Act must be the restructuring of the Supreme Court itself. It is vital that a court of 31 judges, if it is to function as an apex court, must develop some degree of institutional coherence. Such coherence is impossible when the court sits in benches of two judges each. Further this structure allows the CJI to become the master of the roster, vested with the absolute discretion of allocating judges to particular cases, leading to crises like the present one. An antidote to both the aforementioned problems is a restructuring of the Supreme Court into three divisions: Admission, Appellate and Constitutional. All special leave petitions under Article 136 ought to be first considered by the Admission division. The division will comprise five randomly selected judges who for one quarter every year will deal only with admission cases.

Like the Supreme Court of the United States, making this process work by circulation and without oral hearing needs to be strongly considered. The Constitution Division should be a permanent Constitution Bench of the five senior-most justices of the Court. They will hear all matters of constitutional importance and authoritatively pronounce the Court’s views on it. The Appellate division should comprise the remaining 21 judges (on the basis of the sanctioned strength of 31) with seven three-judge benches. They will hear all matters admitted by the Admission Division and any other writs or appeals which lie as a matter of right to the Supreme Court.

Such restructuring will have three advantages. First, it will yield more coherent jurisprudence, particularly in constitutional matters, taking us closer to certainty and the rule of law. Second, it will allow for more careful contemplation of which matters actually deserve admission to India’s apex court. Third, it will reduce the discretion available to the CJI to select benches, since this will be limited to the appellate division alone. Needless to say, norms for such bench fixation and other matters relating to jurisdiction and powers of the Court may also be a part of the proposed law.

At this point of time, the proposed law is critical to start a frank public conversation around what the judiciary needs to restore public confidence. Such a public conversation is necessary to underline that the judiciary is part of a republican constitutional framework, not the preserve of

lawyers and judges alone. An internal resolution will be its antithesis, which might defuse the present crisis, but will exacerbate the deeper wound.

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