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# A ONE-SIDED JUSTICE

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

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The writer retired as a justice of the Supreme Court of India in December 2018.

Eleanor Roosevelt said: “Justice cannot be for one side alone, but must be for both.” Was justice done to the Supreme Court staffer who made two allegations on affidavit — first of unwanted physical contact by the Chief Justice of India (CJI) and second, of victimisation? For the present purposes, I would only like to consider the allegation of victimisation. The allegation of victimisation relates to a departmental inquiry that continued despite the hospitalisation of the complainant; her dismissal from service for expressing dissatisfaction about her frequent transfers and not reporting for duty but taking unauthorised half-day casual leave; the dismissal of her brother-in-law from service in the Supreme Court; the suspension from service of her husband and another brother-in-law and her arrest in an unrelated case.

Institutional bias: Judges and lawyers are aware of institutional bias, that is to say a procedure influenced by decision-makers in an institution which casts a doubt on the judicial or administrative process. Among the first reactions to the publication of the allegations was an email sent by the Secretary-General of the Supreme Court to The Wire early morning on April 20. This was surely not an individual response but a response given by the Secretary-General in his capacity as a representative of the Supreme Court or the CJI or both, otherwise he could very well have denied any concern with the allegations while allowing the law to take its own course. But no, the Secretary-General wrote: “The allegations regarding 11 October 2018, as well as other allegations as can be discerned from your emails, are completely and absolutely false and scurrilous and are totally denied.” The denial clearly indicated that, officially, all the allegations were denied.

Unfortunately, the matter was reopened the same day (Saturday) at 10:30 am in Court No 1 of the Supreme Court on a mention having been made by the Solicitor General of India. It is not clear before whom he mentioned the matter, when and why was the mention entertained and what procedure was followed. In the normal course, it would be fair to assume that the Solicitor General mentioned the matter before the Secretary-General, who in turn brought it to the notice of the CJI, who gave an order to have the matter “touching upon independence of judiciary” listed in court. As per the notice brought out by the Supreme Court, the Bench was presided over by the CJI. The Bench would have been constituted by the CJI, being the Master of the Roster, and he nominated himself as the Presiding Judge.

On the Bench, the allegations were described by the CJI as unbelievable and that he would not stoop so low as to deny the allegations. He also stated that some bigger force wanted to deactivate the office of the CJI. In short, the CJI rubbished the allegations.

Though the sitting was unprecedented and extraordinary, what is even more unprecedented and extraordinary is that the record of proceedings did not indicate the presence of the CJI on the Bench. In other words, either the news reporters were seeing and hearing the equivalent of Banquo’s ghost in Court No 1 or the record of proceedings was incorrect — tampering with the record may be too strong a word. Either way, the misreporting of the proceedings by the journalists or by the Registry of the Supreme Court was something extremely serious. I say this

because earlier in the year two officials of the Registry of the Supreme Court had been dismissed from service for tampering with the record of proceedings in a case.

On April 22, the Supreme Court Employees Welfare Association, on behalf of all the employees, strongly condemned the allegations against the CJI as false, fabricated and baseless. Given these events, could it not be said that institutional bias had crept in, in the manner in which the allegations of the lady staffer were initially dealt with? To me, the trappings of institutional bias are clearly made out whichever way one looks at the events of April 20.

On April 22, the Supreme Court Advocates on Record Association (SCAORA) as well as the Supreme Court Bar Association (SCBA) were sufficiently perturbed by the events that had taken place and they passed independent resolutions. While SCAORA was unhappy with the procedural impropriety, it strongly disapproved the manner in which the staffer's complaint was dealt with. It also requested for the appointment of a committee by the Full Court to investigate and enquire into the allegations and give an independent finding. The SCBA did not approve the procedure adopted for conducting the court proceedings and requested the Full Court to take necessary steps required by law. In other words, according to the SCBA, the proceedings were not in conformity with the law and along with SCAORA, they were quite disturbed by what had transpired.

Mandate of the internal committee: Perhaps in view of the strange events and the resolutions passed by SCAORA and SCBA, a decision was taken to set up a committee to enquire into the allegations made by the staffer. According to a website, the CJI appointed Justice SA Bobde on April 23 to conduct an in-house inquiry into the allegations of sexual harassment levelled against him and Justice Bobde confirmed the development. From the confirmation, it appears that the decision to set up a committee was a decision taken by the CJI and not the Full Court. That apart, the so-called in-house inquiry is a complete misnomer. With respect to the alleged misconduct by the CJI, there is no in-house inquiry procedure or any other remedial procedure laid down at all. So, the decision by the CJI can only be understood as a decision to set up some kind of an ad hoc committee, which I would prefer to call an internal committee of sorts.

Please note, the internal committee was set up by a person charged of unwanted physical contact with a lady staffer and that person chose the judge to inquire into the allegation. Equally significantly, the mandate given to the internal committee was limited to the allegation of unwanted physical contact, itself difficult to prove. The mandate did not include the allegation of victimisation. Why was the mandate limited? If there was to be an inquiry by an internal committee, then it should have been in respect of both the allegations, particularly since the affidavit of the staffer does contain verifiable documentary evidence which could lead (if proved) to a conclusion of victimisation.

What is equally mysterious is the rejection of the sane advice given by the Attorney-General on April 22 to the CJI and the next four senior judges to constitute an outside committee of three retired judges of the Supreme Court. We have several eminent retired judges, including women judges. It would have been to the credit of the Supreme Court if the advice had been accepted, thereby negativing the belief of possible institutional bias. Moreover, the carefully thought out view expressed by SCAORA and SCBA would also have been accommodated if an outside committee had been set up. But it was not to be.

Report of the internal committee: Again, as reported on a website, the proceedings before the internal committee were informal and that is why the staffer was not permitted legal representation. However, given the enormous power imbalance between the CJI and the staffer, could not the internal committee have been a little charitable and conditionally permitted a support person? In matters of alleged sexual offences, judges try to protect the victim from re-

victimisation. It is for this reason that various protections have been provided to victims of alleged sexual offences. In this case, surely the internal committee could have been a little magnanimous and permitted the staffer the comfort of a support person, particularly in view of the power imbalance and since the internal committee proceedings were informal.

The report of the internal committee was submitted to the next most senior judge on or about May 6. The contents of the report have not been disclosed, but a notice issued by the Secretary-General stated that the in-house committee found no substance in the complaint made by the staffer. Obviously, given the mandate of the internal committee, this relates to the allegation of unwanted physical contact and not the allegations of victimisation. Now, what about the allegations of victimisation? Will another internal committee be set up or will these allegations be forgotten and not looked into, as not worthy of consideration? There is no way of knowing this.

The Secretary-General declined to give a copy of the report to the staffer by referring to a judgment in Indira Jaising v. Supreme Court of India. That decision is not at all relevant. First, the internal committee was not an in-house inquiry of the kind understood by the judges of the Supreme Court in 1999-2000, when the in-house procedure was adopted. Second, the decision was rendered in the context of a formal in-house inquiry and not in the context of informal in-house proceedings or internal committee proceedings. Moreover, the judgment of the Supreme Court does not say that the complainant is disentitled from getting a copy of the report of the so-called in-house committee. The procedure for conducting an in-house inquiry merely says that a copy of the report shall be furnished to the judge concerned. There is no prohibition in giving a copy of the report to the complainant — neither the in-house procedure refers to any prohibition nor does the judgment of the Supreme Court refer to any such prohibition. Besides, under what law can the report be denied to the complainant? A similar question came up in a case before the Supreme Court and the government claimed privilege under the Indian Evidence Act to deny a copy of the report to the complainant. The defence was rejected since a report on an allegation of sexual harassment does not (and cannot) concern the affairs of state. Accordingly, a direction was given to the government to hand over a copy of the report along with all other material to the complainant. Therefore, can a copy of the report on allegations of sexual harassment be denied to the complainant merely on the say-so of the Secretary-General? Under what law does he get the power to give a copy of the report to the person charged but at the same time deny a copy to the complainant, thereby making justice one-sided? In my opinion, the staffer must be given a copy of the report of the Committee so that she gets answers to the questions that she and others have raised.

Finally, has the report of the internal committee been accepted by the concerned judge? Is there an order to this effect? Can the concerned judge disagree with the report of the informal so-called in-house committee? In my view, the in-house procedure (assuming it applies) postulates a decision by the concerned judge to either accept the report or reject it or decide to take no substantive and follow up action on it. Either way, the concerned judge must apply his mind and take a decision on the report. It appears that no such decision has been taken and if it has been taken, it has not been made public.

On a consideration of the overall facts, it does appear that some injustice has been done to the staffer. Martin Luther King Jr. famously wrote: “Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly.” I am reminded of this because of my belief that the staffer has not been fairly treated. Many questions are left unanswered and actually many are trying to solve a riddle, wrapped in a mystery inside an enigma. Some transparency is needed. Can any member of the internal committee or somebody from the Supreme Court please help?

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