A question of probity

On November 10, a five-judge Constitution Bench of the Supreme Court led by the Chief Justice of India, in a case concerning corruption arising out of certain judicial proceedings, declared that the Chief Justice is the **master of the roster** with the sole prerogative to determine which Bench of judges gets to hear which cases. That the Chief Justice, as the head of the judiciary, determines the roster is a platitude that pales in public significance to the critical role of the Chief Justice as the embodiment of moral authority of the entire judicial system. This moral authority suffered a fatal blow when the Chief Justice chose to reassert his own administrative powers in the face of allegations concerning the possible lack of probity of senior public functionaries. The situation demanded statesmanship — unfortunately the Court engaged in whataboutery, raising the spectre of contempt of court, only to drop it finally.

A criminal conspiracy

The genesis of this episode lies in the filing of petitions by Prasad Education Trust before the Supreme Court and Allahabad High Court. The trust operated a medical college whose permission to run certain courses had been declined. Justices Dipak Misra, Amitava Roy, P.C. Pant, A.M. Khanwilkar and D.Y. Chandrachud heard the parties and passed several orders in the Supreme Court; Justices Narayan Shukla and Virendra Kumar-II passed an interim order in Allahabad High Court.

A simultaneous investigation by the Central Bureau of Investigation (CBI) indicated a possible criminal conspiracy to ensure a favourable judicial order in this matter. According to its FIR, two persons managing the affairs of the trust, approached a retired judge of Allahabad and Odisha High Courts, Justice I.M. Quddusi, through Sudhir Giri of the Venkateshwara Medical College (part of Venkateshwara University, in whose case another judgment had been passed by Justice Dipak Misra in the Supreme Court). Quddusi recommended the filing of a petition before the Allahabad High Court, in which partial relief was granted.

The tumult in Supreme Court over corruption: the story so far

Subsequently, when the matter again reached the Supreme Court, the FIR reveals that Quddusi and his associates assured the trust of getting the matter “settled” in the Supreme Court through “their contacts” and engaged Biswanath Agrawala, a resident of Bhubaneswar. Agrawala claimed “very close contact with senior relevant public functionaries” and demanded significant gratification for settling the case. Quddusi, Agrawala and four associates have now been arrested for offences under the Prevention of Corruption Act and the Indian Penal Code.

Since the FIR indicated an attempt to fix a judicial proceeding, the Campaign for Judicial Accountability and Reforms filed a writ petition in the Supreme Court requesting that a Special Investigation Team under a retired Chief Justice of India be set up. This request was made since it was apprehended that leaving the investigation to the CBI might mean allowing the government to influence judges who would be brought under investigation.

The merits of such a request are a distinct matter. However, propriety would plausibly demand that since the FIR pertained to a case where Justice Misra had been the presiding judge, as Chief Justice of India, he would not perform his default role of allocating Benches for determination of this case or exercise his prerogative of hearing the case himself. Doing so would imply that the Chief Justice would not be “like Caesar’s wife”, the puritanical standard of propriety the Court expects of public servants. The same principle would apply to any judge in the Supreme Court and Allahabad High Court who had earlier participated in the proceedings. Recusal would not be an

admission of complicity; instead it would be an affirmation of the principle that justice not only be done but be seen to be done.

Diminishing propriety

Unfortunately, by allocating the matter to a Division Bench, the Chief Justice gave this principle a go-by. It is moot whether the Bench entrusted by the Chief Justice would ensure justice or not — the critical point is that such a Bench chosen by the Chief Justice was congenitally defective. This impropriety set off a chain of improper actions — filing of a second petition in the same matter, hearing of the second petition by Justice J. Chelameswar, the second-most senior judge of the Supreme Court, and an order by his Bench that the matter should be heard by five senior-most judges of the Court.

Justice in tumult: on the turmoil in Supreme Court

To be certain, devoid of context, each of these actions is improper. But the impropriety in these actions is technical and not substantive. That it is the prerogative of the Chief Justice alone to list matters and constitute Benches is a convention based on long practice. However, when doing so would cast a shadow of doubt on the process of justice delivery itself, it is not only proper but also necessary that this task is performed by another judge. The Court cannot stand on formality and sacrifice substantive justice for a vacuous conception of prerogative power.

This episode of plausible administrative impropriety was unfortunately compounded by the Chief Justice constituting a five-judge Bench, including himself, to hear the matter on the judicial side. A resounding reiteration of the Chief Justice's own powers to determine the roster, annulling the order of Justice Chelameswar and hearing supportive bystanders in the Court, were signs of a Court ignoring the need for justice to be seen to be done. Again, whether the right decision was reached or not is moot — a decision was reached in which the Chief Justice was unarguably judge in his own cause. That itself suffices to make this judgment bad in law.

Glasnost and perestroika

To blame one individual or another, or attribute motives for this episode would be to miss the wood for the trees. Instead, there are two structural issues of consequence to anyone who cares about judicial integrity. First, the cardinal principle that the Chief Justice of India is the master of the roster must be re-examined. Although there can scarcely be any argument against it as a tenet of judicial discipline, it would be naive to consider it an absolute principle of justice delivery.

In the U.K., Lord Chancellors had, for long, used the prerogative of Bench selection to serve partisan ends. As scholar Diana Woodhouse writes, Lord Halsbury wanted the power of trade unions reduced and selected Benches accordingly; Lord Hailsham chose Benches to constrict his colleague Lord Atkin's ability to progressively interpret the law and Lord Loreburn's cherry-picking of judges to reach favourable conclusions is well-known. The history of such abuse of prerogative led the U.K. to statutorily establish two leadership positions in the new Supreme Court — that of the President and the Deputy President, together with a professional registry and a Chief Executive. The unchecked power of the Chief Justice of India to constitute Benches must be similarly circumscribed. Doing so does not amount to mistrusting the Chief Justice, but rather being cognisant of changing demands of accountability.

Second, much has been said of the indiscipline demonstrated by Justice Chelameswar's Bench in listing a case and determining the Bench that hears it. Discipline lies at the heart of judicial functioning — its complex rules on filing, unwritten conventions of seniority, expected decorum in courtroom seating are all critical components to ensure institutional discipline. But a single-minded

reiteration of such formal norms appear perverse when confronted with a case where the personal probity of individuals in the judiciary is in doubt. If only to conclusively dispel such doubt, an independent investigation was warranted. This might well have been the logical conclusion of the technically improper order passed by Justice Chelameswar's Bench listing the matter before the five senior-most judges.

For several senior members of the Bar to focus solely on this apparent impropriety while remaining blind to graver improprieties elsewhere and larger questions of probity is symptomatic of a legal fraternity that steadfastly refuses to practice the values it preaches to others. Closing ranks and taking refuge in hidebound norms of propriety is like playing the proverbial fiddle, while pretending that public confidence in the judiciary is a gift that will keep on giving.

Justice Kurian Joseph of the Supreme Court wrote in respect of judicial appointments that a 'glasnost' and 'perestroika' is required if the system is to regain public confidence. If the moral authority of the Chief Justice of India and the Supreme Court is to be restored, something similar is needed urgently. Otherwise the Supreme Court will soon be a far cry from the institution we all revere. Some might say, it already is.

Arghya Sengupta is Research Director, Vidhi Centre for Legal Policy. The views expressed are personal

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