

## The judiciary needs a Ulysses pact

In the last few weeks, the moral and legal standards of the higher judiciary have taken a perceived turn for the worse. In this instance, it was brought about by the Central Bureau of Investigation (CBI) which highlighted the possibility of corruption and criminal conspiracy to gain some favourable orders. One of the orders in question was passed by a bench with Justice Dipak Misra, now Chief Justice of India (CJI), as the presiding judge.

Following CBI's reports on the matter, the Campaign for Judicial Accountability and Judicial Reforms filed a writ petition to set up a special investigation led by a retired CJI. Since the order in question was passed by Justice Misra, due process and common sense require that no aspect of whether the matter be investigated further (or not) should be determined by Justice Misra. However, a bench led by Chief Justice Misra declared that the chief justice alone has the prerogative to determine the composition of benches to hear cases. Even those unfamiliar with legal procedures can recognize the impropriety. This is a matter where Chief Justice Misra can potentially become a judge in his own case (by determining the bench), thus breaking one of the cardinal rules of due process.

The immediate case throws light once again on judicial impropriety and corruption, and raises a larger issue of dealing with matters of judicial propriety and abuse systematically and structurally. The higher judiciary can consider two available types of structural reform for the future.

The first option is to allow for a system of checks and balances by allowing external agencies—mainly controlled by the executive—to design and apply standards. In this context, there is the oft-repeated trade-off between judicial independence and scrutiny; and repeatedly India has erred in favour of judicial independence. Indian judiciary is especially cautious about executive interference since Indira Gandhi's attempts to have a "committed" judiciary in the 1970s. Post Emergency, the Indian judiciary has used every means to remove any input and interference from the executive. In fact, judicial independence is one of the reasons the Campaign for Judicial Accountability and Judicial Reforms requested an investigation led by a retired chief justice, and not the executive.

If the persistent stand of the judiciary and the larger legal community is against checks and protocols overseen by the executive, then there is only one other path the judiciary can walk—the members of the higher judiciary must set forth protocols and procedures akin to the Greek myth about Ulysses' pact with his men.

Ulysses wanted to hear the Sirens' song—which, he knew, would render him incapable of rational thought, and would tempt him to the Sirens, thereby placing his ships in danger. He put wax in his men's ears so that they could not hear. And then Ulysses had his men tie him to the mast so that he could not jump into the sea. He ordered them not to change course under any circumstances, and to keep their swords upon him and to attack him if he should break free of his bonds.

Ulysses was protecting himself from future temptations and distractions, caused by his own fallibility and imperfections, by binding his hands. Like Ulysses, the judiciary must create rules and protocols, emerging from within the institution, to bind the hands of future judges.

One issue pertinent to this case, but also to prior cases, is recusal. Often judges recuse themselves when they have, or might be perceived to have, an interest in the case and its outcome. Judges recuse themselves when one of the lawyers pleading a case is a family member, or if they own stock in the company that is pleading the case. The problem with very low thresholds for recusal is that litigants may manipulate the rule of recusal to eliminate an

unfavourable opinion from a tough judge. On the other hand, high thresholds may lead to situations where the judge may pass orders on matters that directly affect her. But the judiciary must walk this tightrope and create a system of rules and protocols for recusal, which is currently found by combining many different ideas from different judicial opinions.

In the present case, Chief Justice Misra declared that the CJI is the master of the court roster. Since the CJI is chosen by seniority, this is an excellent *ex ante* rule for every circumstance except one—when there is a question of the propriety of the individual chief justice in question. Since the CJI is also the head of the judiciary, a questionable action by the CJI with respect to the court roster can have terrible consequences for the moral standards required by judges of lower courts. The CJI must lead by example, and therefore we must tie the hands of the individual occupying the office. Members of the higher judiciary must formulate the course of action for when the CJI should not, and therefore cannot, assign judges to a case.

The judiciary must also lay down procedures to deal with external enquiries through the CBI. An option is to create a group within the judiciary that will cooperate with investigations, or as the petitioners suggested, the investigation could be led by retired members of the court.

The Indian judiciary has become all powerful, mostly by taking on enormous authority in policy areas, that are technically beyond its ambit. And so, it must go a lot further to bind its hands, so that judges do not abuse the authority granted to them. Without a Ulysses pact, the judiciary will rule by discretion, and lose its exalted standing with the people it serves.

*Shruti Rajagopalan is an assistant professor of economics at Purchase College, State University of New York, and a fellow at the Classical Liberal Institute, New York University School of Law.*

*Comments are welcome at [views@livemint.com](mailto:views@livemint.com)*

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