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COURT'S DRIFT AND CHINKS IN THE JUDICIARY'S ARMOUR

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

This past fortnight has seen two significant developments in connection with the Indian judiciary: the first was the decision of the Supreme Court of India in the matter of Prashant Bhushan's contempt case, and the second was the retirement of Justice Arun Mishra. These events, in their own way, magnify the chinks in the armour of the Supreme Court.

In the first instance, the Supreme Court, in a display of self-proclaimed "magnanimity", let off Mr. Bhushan with a fine of one rupee in the contempt case against him over two tweets. In the alternative, the top court ordered for a three-month imprisonment term and three years' debarment from practice. The Court chastised him for his "conduct", which, according to the Court, "reflects adamance and ego, which has no place to exist in the system of administration of justice and in noble profession, and no remorse is shown for the harm done to the institution to which he belongs". It would be trite to say that these words ring hollow coming from a Court that chose to relentlessly pursue Mr. Bhushan in a petty exhibition of arrogance itself. Over the course of the hearing, the Court repeatedly tried to coerce the contemnor, i.e., Mr. Bhushan, to proffer an apology, and kept granting him additional time (a few days, a few hours, etc.) for this purpose. It was arguably strange behaviour on the part of the Court, and it also appeared embarrassing, for it came across as petulant bargaining more than anything else. Mr. Bhushan, with appropriate decorum and honesty, admitted that any apology from him in the circumstances would be insincere.

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The jurisprudential contribution of this decision to the law of contempt will be studied for years to come, surely, but maybe not for the reasons that the Court intended. Hopefully, a wiser judicial and legislative community will realise one day how utterly self-defeating this law is for a healthy democracy, and eventually change the law around.

This was among Justice Mishra's last few decisions as a member of the Supreme Court, before he retired on September 2. As a result, considerable attention has been paid to his decisions during his tenure which lasted from 2014 to 2020. One consistent feature has revealed itself throughout, which is the kinds of cases that were assigned to the Benches he was on, and the kinds of decisions he issued. In the judges' press conference two years ago, the primary grouse was with the "master of the roster" system, and the specific concern that politically sensitive cases (i.e., dealing with the executive) were being allocated to Benches involving Justice Arun Mishra (even if not mentioned by name, his role was clearly insinuated, notably with reference to the judge Loya case). Commentators (e.g., Aparna Chandra, Anup Surendranath, V. Venkatesan) have also conducted detailed analyses of Justice Arun Mishra's decisions, and studies have found that these were predictably in favour of the executive.

In recent times, many columnists, leading scholars, and legal luminaries have speculated on the marked drift of the Supreme Court away from rights-based court to an executive court. Of course, to keep such a court going, a judge who is ever ready to step up to handle politically sensitive matters, and who can be relied upon to issue decisions that are in favour of the executive, is always useful. However, even as the limelight is on a judge such as Justice Mishra in circumstances like this, the role of the office of the Chief Justice of India (CJI) in facilitating the

creation of an executive court cannot be ignored.

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Allegations and suspicions have been voiced from within as well, with Justice Kurian Joseph suggesting that the assignment of work in the Court during Justice Dipak Misra's tenure was "remote controlled". During his time, two judgments were delivered by the CJI's Bench in matters to which he himself was a party. Through these judgments, the CJI defended the "master of the roster" system, indicating that the CJI was entitled to have unrestricted and untrammelled power in matters of case allocation. After the press conference, one hoped there would be rethinking on this, but nothing has really happened, and things have continued in the same way since. The "master of the roster" system was designed for a different era, and indeed, may have worked well in the past even, when we had very tall judges, and judicial independence was rarely doubted. But things have changed now.

Recall that the National Judicial Appointments Commission (NJAC) Act was struck down by the Court on grounds of excessive executive interference in the selection of judges. But surely, this judgment is of no use if executive interference is anyway possible in more subtle ways.

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Theoretically, it is very easy for an all-powerful executive that is looking to seize control over the other arms of the state, and especially an independent judiciary. There is no need to expend energy in packing the Supreme Court with pro-government judges. Finding over 30 judges who think alike would anyway be difficult, if not impossible. All that is needed is to ensure that certain "favourable" conditions exist in the Court: these include a CJI who is on your side, and a handful of other judges on the Bench who are "reliable". Unfortunate precedents in the recent past where CJIs have, without compunction, accepted politically-coloured post-retirement opportunities, have not really helped. The competence of judges becomes irrelevant in this scheme of things. The combination of opaque systems like the "master of the roster", and a certain kind of CJI are sufficient to destroy all that is considered precious by an independent judiciary. Of course, this is far from being a hypothetical scenario, and is, in fact, playing out in India right now. The truly independent and competent judges in the Court have been relegated to adjudicating private disputes, and are considered inconsequential. Many commentators have already pointed out how the last three CJIs all used the powers anointed upon themselves via the "master of the roster" to entrust sensitive and important matters to Benches involving Justice Arun Mishra.

The other thing to note is that these "reliable" judges not only ensure that the pro-executive nature of the Court is sustained, but also serve to protect the CJI in times of crises. Again, this is not mere theory or speculation. As an example, the medical admissions scam case during Justice Dipak Misra's tenure as CJI was handed over to Justice Arun Mishra's Bench. Similarly, the infamous hearing of Justice Gogoi's sexual harassment case included Justice Arun Mishra.

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There is enough evidence that the "master of the roster" system does not work any more. What we need today is legal certainty, and a rules-based mechanism for allocation of cases (e.g., as followed by the European Court of Justice and the European Court of Human Rights, among many other jurisdictions where cases are decided not by full courts but by benches). This rule can be that cases are allocated randomly. But any kind of rule can be implemented only if judges themselves take a stand and decide. There should be agreement that no discretion can

be allowed, for that is the root cause of so many of our troubles. A case allocation system that is neutral and rules-based will prevent bench packing, and demonstrate neutrality, impartiality, and transparency. All this, in turn, ensures that courts are protected from outside interference; improves public confidence in the impartiality and independence of the judiciary; assures litigants of equality and fairness; and protects basic rights and freedoms by not compromising on them.

There is a tendency to view the threat to judicial independence in India as emerging from the executive branch, and occasionally the legislature. But when persons within the judiciary become pliable to the other branches, it is a different story altogether. Today, we have a situation which was foreseen many decades ago, by CJI Y.V. Chandrachud, when, in 1985, he observed, “There is greater threat to the independence of the judiciary from within than without ....” All the sermonising in the world (of the sort offered in the Bhushan judgment) will be of no consequence without any real changes in the way things work. And indeed, it is important to note that Justice Arun Mishra’s retirement is not likely to impact the situation; he was anyway merely a manifestation of the deeper malaise in the system. Surely, this is as good a time as any for the judges of the Supreme Court to unite and seriously consider whether self-preservation trumps institutional independence, or whether they truly want to protect the judiciary from outside influence, and hold their own against an overbearing executive.

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