

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

An opaque 'master of the roster' system and a certain kind of judge are sufficient to destroy judicial independence

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.

The Bhushan case

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.

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.

A judge in the limelight

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.

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.

Executive’s chipping away

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.

The European example

There is enough evidence that the “master of the roster” system does not work anymore. 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.

Malaise within

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.

Meanings of Difficult Words:

- ❖ **drift** (noun) – an unwelcome movement or development.
- ❖ **a chink in someone’s armour** (phrase) – a weak point/fault in someone’s character, arguments & etc., which can be used to attack/criticize them easily.
- ❖ **judiciary** (noun) – a branch of government in which judicial power is vested.
- ❖ **opaque** (noun) – non-transparent, murky, muddled, ambiguous, cryptic.
- ❖ **Master of the Roster** (noun) – it refers to the privilege (right) of the Chief Justice to constitute Benches to hear cases. In November, 2017, when a Constitution Bench, led by the Chief Justice of India Dipak Misra, declared that “the Chief Justice is the master of the roster and he alone has the prerogative (privilege/right) to constitute the Benches of the Court and allocate cases to the Benches so constituted. **roster** (noun) – a list of the people of a team/organisation.
- ❖ **fortnight** (noun) – a period of two weeks/fourteen days continuously.
- ❖ **contempt** (noun) – it refers to the offence of showing disrespect to the dignity or authority of a court (& its officers).
- ❖ **in one’s own way** (phrase) – if considered/looked at from a specific viewpoint suitable to that person/thing.
- ❖ **magnify** (verb) – increase, heighten, intensify.
- ❖ **in the first instance** (phrase) – in the first place.
- ❖ **self-proclaimed** (adjective) – self-confessed, declared, acknowledged, admitted.
- ❖ **magnanimity** (noun) – big-heartedness, generosity, humanity, liberality.
- ❖ **let off** (phrasal verb) – punish someone lightly.
- ❖ **imprisonment** (noun) – incarceration, custody, confinement.
- ❖ **debarment** (noun) – (temporary) suspension, exclusion, removal, elimination.
- ❖ **chastise** (verb) – punish, discipline.
- ❖ **conduct** (noun) – behaviour, way of behaving, performance.
- ❖ **reflect** (verb) – indicate, show, reveal, exhibit.
- ❖ **adamance** (noun) – not willing to change one’s opinion/mind; firmness and determination.
- ❖ **ego** (noun) – self-esteem, self-importance, self-respect.
- ❖ **noble** (adjective) – righteous, honest, upright, reputable, unselfish.
- ❖ **remorse** (noun) – deep regret, penitence, sorrow/feelings of guilt.
- ❖ **belong** (verb) – be a member of, be included in, be affiliated to, be associated with, be connected to (a particular group or organization).
- ❖ **trite** (adjective) – hackneyed, clichéd, common/ordinary (remark/idea).
- ❖ **ring hollow** (phrase) – to seem false, insincere or not genuine.
- ❖ **relentlessly** (adverb) – continuously, firmly, persistently, determinedly, continuously in an intense way.
- ❖ **pursue** (verb) – engage in, conduct, follow.
- ❖ **petty** (adjective) – small/trivial, unimportant, insignificant.

- ❖ **arrogance** (noun) – egotism, self-importance.
- ❖ **over/in the course of** (phrase) – during the specified activity.
- ❖ **coerce** (verb) – pressure, force, compel/influence.
- ❖ **contemnor** (noun) – a person who shows contempt on someone/something.
- ❖ **proffer** (verb) – offer, tender, give.
- ❖ **apology** (noun) – expression of regret.
- ❖ **arguably** (adverb) – possibly, conceivably, maybe, potentially.
- ❖ **strange** (adjective) – unusual, weird, abnormal, atypical.
- ❖ **embarrassing** (adjective) – humiliating, degrading, demeaning, disgracing.
- ❖ **come across** (phrasal verb) – seem, appear, look.
- ❖ **petulant** (adjective) – complaining, disagreeable, impatient, bad-tempered, in a bad mood.
- ❖ **bargaining** (adjective) – negotiating, haggling, dealing.
- ❖ **appropriate** (verb) – secure, acquire, take over.
- ❖ **decorum** (noun) – decency, correctness, propriety, customary behaviour.
- ❖ **circumstances** (noun) – situation, conditions, state of affairs.
- ❖ **insincere** (adjective) – false, fake, hollow, artificial.
- ❖ **jurisprudential** (adjective) – relating to the theory or philosophy of law.
- ❖ **wiser** comparative adjective of **wise** (adjective) – sensible, prudent, well thought out, well judged.
- ❖ **legislative** (adjective) – governmental, parliamentary, law-making, policy-making.
- ❖ **utterly** (adverb) – completely, totally, absolutely.
- ❖ **self-defeating** (adjective) – futile, pointless, useless.
- ❖ **eventually** (adverb) – in the end, in due course, after some time.
- ❖ **limelight** (noun) – the focus of attention, public attention, public notice.
- ❖ **considerable** (adjective) – much, a lot of; substantial.
- ❖ **pay attention** (phrase) – heed, attend, be attentive, concentrate on.
- ❖ **tenure** (noun) – incumbency, term of office, period in office.
- ❖ **consistent** (adjective) – steady, constant, regular, unchanging/unvarying.
- ❖ **throughout** (adjective) – all through, the whole time, all the time, from beginning to end.
- ❖ **grouse** (noun) – complaint, grumble, objection.
- ❖ **the executive** (noun) – a branch of government which enforces the law as written by the legislature and interpreted by the judiciary; government.
- ❖ **insinuate** (verb) – imply, suggest, hint.
- ❖ **notably** (adverb) – especially, particularly, strikingly, markedly.
- ❖ **in reference to** (phrase) – in relation to, with regard to, regarding, with respect to.
- ❖ **commentator** (noun) – critic, analyst, observer.
- ❖ **predictably** (adverb) – as expected, as anticipated.
- ❖ **in favour of** (phrase) – giving support to, approving of.
- ❖ **columnist** (noun) – writer, journalist, correspondent.
- ❖ **scholar** (noun) – academic, intellectual, expert/pundit, learned person.
- ❖ **luminary** (noun) – leader, expert/master, dignitary, VIP.
- ❖ **speculate** (verb) – guess/think, surmise, postulate.
- ❖ **marked** (adjective) – noticeable, palpable, considerable, striking/glaring.
- ❖ **of course** (phrase) – certainly, definitely, absolutely.
- ❖ **step up** (phrasal verb) – speed up, increase, accelerate, quicken.
- ❖ **rely upon** (phrasal verb) – depend on, count on, bank on.

- ❖ **executive court** (noun) – a court whose moral and political compass finds itself in alignment with the government of the day, and one that has no compunctions (misgivings/worries) in navigating only according to that compass. Instead of checking and limiting government power, an executive court finds itself marching in lockstep with the government, and being used to set the seal of its prestige upon more controversial parts of the government's agenda.
- ❖ **facilitate** (verb) – make easy, make possible; assist, help/aid.
- ❖ **allegation** (noun) – charge, accusation, indictment.
- ❖ **suspicion** (noun) – misgiving, doubt/qualm, distrust, scepticism.
- ❖ **voice** (verb) – express, make public, announce, mention, raise.
- ❖ **entitle** (verb) – allow, empower, authorize.
- ❖ **untrammelled** (adjective) – uncontrolled, unconstrained, unrestricted.
- ❖ **rethink** (noun) – review, reassess, re-evaluate.
- ❖ **indeed** (adverb) – in fact, actually.
- ❖ **National Judicial Appointments Commission** (NJAC) (noun) – The National Judicial Appointments Commission (NJAC) is a constitutional body proposed to replace the present Collegium system of appointing judges. They will be selected by the commission, whose members will be drawn from the judiciary, legislature and civil society.
- ❖ **collegium** (noun) – The collegium system is the one in which the Chief Justice of India and a forum of four senior most judges of the Supreme Court recommend appointments & transfers of judges. There is no mention of the collegium in the Constitution of India.
- ❖ **strike down** (phrasal verb) – abolish, annul, nullify (a law or regulation).
- ❖ **ground** (noun) – reason, factor, basis, rationale, premise.
- ❖ **interference** (noun) – intervention, involvement, meddling.
- ❖ **subtle** (adjective) – delicate, sensitive, clever, accurate, razor-sharp.
- ❖ **chip away** (phrasal verb) – make something weaker (gradually).
- ❖ **all-powerful** (adjective) – having total power; omnipotent, dictatorial, despotic, totalitarian, autocratic,
- ❖ **seize** (verb) – take hold of, snatch, grab, capture (suddenly).
- ❖ **arm** (noun) – branch, department, division.
- ❖ **pro-** (pre-fix) – favouring; supporting.
- ❖ **alike** (adverb) – equally.
- ❖ **handful** (adjective) – few, one or two, a small number.
- ❖ **reliable** (adjective) – trustworthy, dependable, good/safe, well built.
- ❖ **precedent** (noun) – model, exemplar, example, pattern; previous example/instance, prior instance.
- ❖ **compunction** (noun) – misgivings, doubts, worries/uneasiness, hesitation.
- ❖ **politically-coloured** (adjective) – politically biased.
- ❖ **competence** (noun) – authority, power, jurisdiction, ambit.
- ❖ **irrelevant** (adjective) – immaterial, unrelated, not germane, unimportant/insignificant.
- ❖ **the scheme of things** (phrase) – in the way things normally/generally happen or arranged to happen (when compared with/related to other things) in a particular situation; a general view of the situation as a whole.
- ❖ **far from** (phrase) – not, not at all, nowhere near.
- ❖ **hypothetical** (adjective) – theoretical, speculative, imagined.
- ❖ **scenario** (noun) – situation.
- ❖ **in fact** (phrase) – actually, indeed, undeniably.
- ❖ **play out** (phrasal verb) – happen, occur, take place.

- ❖ **competent** (adjective) – capable, skilful, talented.
- ❖ **relegate** (verb) – downgrade, lower, lower in rank, lower in status.
- ❖ **adjudicate** (verb) – arbitrate, judge, decide, settle, resolve.
- ❖ **inconsequential** (adjective) – insignificant, unimportant, inessential.
- ❖ **point out** (phrasal verb) – identify, mention, indicate, draw attention to.
- ❖ **anoint** (verb) – nominate or choose (someone) as successor.
- ❖ **entrust** (verb) – give responsibility for, assign, confer on, vest in.
- ❖ **sustain** (verb) – maintain, keep going, carry on; support, validate.
- ❖ **speculation** (noun) – prediction, guesswork, opinion/thought.
- ❖ **infamous** (adjective) – notorious, disreputable, ill-famed.
- ❖ **harassment** (noun) – persecution, persistent annoyance, coercion/intimidation.
- ❖ **certainty** (noun) – sureness, assurance, fact, reliability.
- ❖ **rules-based** (adjective) – based on a predetermined set of principles.
- ❖ **mechanism** (noun) – procedure, process, method/technique.
- ❖ **jurisdiction** (noun) – territory, region, zone/area.
- ❖ **full court** (noun) – a full court (less formally, full bench) is a court of law with a greater than normal number of judges.
- ❖ **take a stand** (phrase) – to express a firm position/opinion about an issue.
- ❖ **discretion** (noun) – choice, option, preference, disposition.
- ❖ **root cause** (noun) – the basic reason of something.
- ❖ **bench packing** (noun) – an act of adding more judges to a particular bench.
- ❖ **impartiality** (noun) – fairness, equality, neutrality, probity.
- ❖ **transparency** (noun) – clarity, straightforwardness, openness, honesty, unambiguity.
- ❖ **litigant** (noun) – a person who is involved in a legal case; litigator, petitioner, complainant.
- ❖ **fairness** (noun) – impartiality, justness, neutrality, equal treatment.
- ❖ **compromise** (verb) – undermine, weaken, lessen.
- ❖ **malaise** (noun) – trouble, uneasiness, unhappiness, depression.
- ❖ **occasionally** (adverb) – sometimes, at times, now and then, once in a while.
- ❖ **legislature** (noun) – government/authority.
- ❖ **pliable** (adjective) – flexible, adaptable, easily influenced.
- ❖ **foresee** (verb) – anticipate, predict, envisage, envision.
- ❖ **decade** (noun) – a period of ten years.
- ❖ **sermonise** (verb) – pronounce, expound/lecture, express one's opinion.
- ❖ **consequence** (noun) – outcome, ramification, repercussion.
- ❖ **manifestation** (noun) – display, demonstration, appearance, indication.
- ❖ **as good a time as any** (phrase) – used to say that although a time etc is not suitable, there will likely not be a good one.
- ❖ **self-preservation** (noun) – protection (of oneself).
- ❖ **trump** (verb) – beat, be better than, outshine, outperform.
- ❖ **institutional** (adjective) – systematic, methodical, structured, regulated.
- ❖ **influence** (noun) – control, sway, hold/power.
- ❖ **hold one's own** (phrase) – stand firm, stand one's ground, keep/maintain one's position.
- ❖ **overbearing** (adjective) – dominating, oppressive, high-handed.