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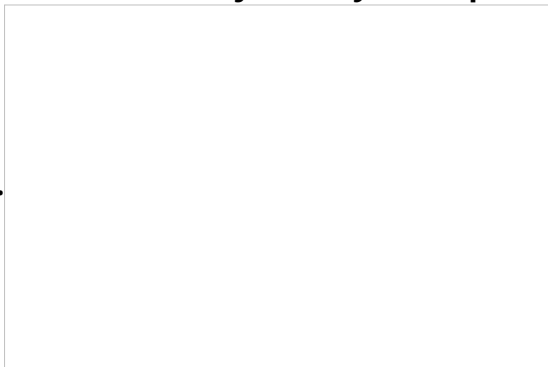
All is Still Not Well in Court

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(This editorial is based on the article “All is Still Not Well in Court” which appeared in The Indian Express for 12th February 2019. In this editorial, we’ll discuss concerns related to the Judiciary of India.)

A little over a year ago, four judges of the Supreme Court of India called an unprecedented press conference to tell the world that everything was not right with the judicial system. Their announcement posed troubling questions relating to the independence of the judiciary, transparency, and accountability in the institution and

so on.



A lot has happened in the year gone by for the Indian judiciary. Certain developments are of particular concern.

Five Major Concerns

- **The first major issue is the idea of the CJI as the “master of the roster”.**
 - This privilege was emphasized in November 2018, 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 to constitute the Benches of the Court and allocate cases to the Benches so constituted.”
 - There have been instances where cases having far-reaching consequences for the nation and the institution had been assigned by the Chief Justice of this Court selectively to the Benches “of their preferences” without any rational basis for such assignment.”
- **The second issue is of how appointments to and transfers within the higher judiciary continue to be made.**
 - Every time a new group of judges is announced for selection, a new set of problems emerges. It is almost as though the Supreme Court Collegium is showing the many paths to opacity that can exist in the appointments process. Two incidents over the past month have been particularly distressing.
 - One relates to a recent proposal to transfer a sitting judge of the Delhi High Court, whose decisions have been attacked by those within or close to the present Union government. While the transfer was not finally approved, it bodes ill for a judiciary that prides itself in being independent of influence and the other arms of the state.
 - Another case is the inexplicable reversal of a decision of the collegium to elevate two high court chief justices, both well-regarded as fine judges, to the Supreme Court. A “leak”, purportedly from an “official source”, in a leading news publication suggested that this reversal was apparently because certain “adverse material” against these judges had emerged. Ideally, any such material should have been put to these judges in a formal setting, and they ought to have been allowed to defend themselves.
 - Two judges, along with two others — all high up in the seniority list of high court judges — were bypassed, and relatively junior judges have pushed up the ladder. Unfortunately, such leaks and last-minute reversals can damage the morale of members of the judiciary. Equally problematic is the overwhelming silence of the government. On an earlier occasion, the government had defended the seniority convention in judicial appointments.

- **The third issue is the recent fascination of the Supreme Court for the “sealed cover” as a means of receiving information about cases, having used it in three highly-documented litigations in the past few months.**
 - This is completely against the idea of open, transparent justice. Unfortunately, our judiciary is not only opaque in its own workings but is also becoming partial to opacity in its public function, as an arbiter of public disputes.
 - Jurisprudence clearly shows that such secretive information should be resorted to only in exceptional cases. But here, it is being asked for in an ad hoc manner without any clear or rational reason. In the National Register of Citizens case, for example, the lives of lakhs of people hinge on sealed covers. Surely, we cannot allow our lives to be adjudicated upon in secrecy.
- **The fourth issue is about post-retirement appointments.**
 - Any pre-retirement judgments can be influenced by post-retirement assignments.
 - Therefore it is clear that such appointments really compromise the independence of the judiciary.
 - They raise potential conflicts of interest, if not in reality, certainly in matters of perception.
- **The fifth issue is that of the appeal made to the Supreme Court by itself against the order of the Delhi High Court on the applicability of the Right to Information Act, 2005, to the judiciary.**
 - The Delhi High Court judgment has stayed, and the case has been languishing in the court for a decade now.
 - Closure on this account is more urgently needed than ever, especially in the context of issues of transparency in the judiciary.

Way Forward

- In democratic countries around the world, notably in the UK, Canada, and Australia, **the allocation of work and the selection of benches is a consultative process, and necessarily involves a culture of trust.**
- Alternatively, there are clear and defined rules in this regard, as, for example, in the European Court of Human Rights and the European Court of Justice, it is not acceptable for the Chief Justice to have unbridled power.
- Even in High Courts in India, where a Chief Justice may have official roles such as presiding over administrative meetings, at no point is the Chief Justice considered or made to believe that he/she is superior to other judges in the court. **The sanctity of this principle cannot be overstated:** A former chief justice of the South Korean Supreme Court was recently arrested for having allegedly used his influence when he was in the office on behalf of conservative governments to delay trials in war-related compensation cases.

- **Not enough attention is being paid to the judiciary as an institution.** Ideally, in any democratic set-up, there is a need for the best individuals running the judiciary. Thus, one important criterion for selecting judges should be merit. But at present, many brilliant judges are overlooked. The appointments of judges on grounds other than merit can be self-perpetuating. Many such appointees will become members of the group that is the collegium and may make the same kinds of choices their seniors made. Short-term decisions to appoint certain individuals affect the long-term condition of the judiciary.
- **Ideally, there should be a policy decision to introduce a cooling-off period after retirement before taking up new appointments.** Or such appointments should be made by a neutral body which is free from executive influence. In any case, at the least, such offers of appointments should neither be made nor considered when a judge is still in office.