

The great Indian abdication

The judiciary alone cannot take forward the mission of deepening democracy and protecting social freedoms



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Unless... philosophers become kings in the cities... there can be no cessation of evils... for cities nor, I think, for the human race. – Plato, *The Republic*

After the slew of verdicts by the Supreme Court, on triple talaq, Section 377, adultery, and the Sabarimala temple, a prominent cartoonist adapted the famous “Road to Homo Sapiens” picture to depict the Supreme Court Justice as a barber who cleans up the barbarous Neanderthal to make him a modern human.

India, at present, is going through a deep crisis in which the mission of deepening democracy, and protecting and advancing social freedoms is placed solely upon the judiciary. On the one hand there is a complete abnegation of the role of the legislature, and on the other there is a dichotomy between social morality and judicial morality (itself an interpretation of constitutional morality).

Both are dangerous tendencies.

A divide

The Supreme Court verdicts have curiously become a spectator sport on primetime television with a great amount of anticipation about the judgments in pending cases. The same curiosity is missing about parliamentary bills/debates, which are absolutely vital to a parliamentary democracy.

One example would suffice. Earlier this year, the government

amended the Foreign Contribution Regulation Act to retrospectively legalise political donations from foreign companies and individuals since 1976. This move – with potentially catastrophic ramifications for Indian democracy – was pushed through without discussion in Parliament and hardly any debate in the public sphere.

If the judiciary has assumed the role of the single most important pillar of India’s parliamentary democracy, built on separation of powers, it is mainly because of the degradation and abuse of the roles of the legislature and the executive.

Parliament’s erosion

Parliament, the supreme venue representing the people, has become a shadow of what it should be (even when the representation of marginalised communities has gone up). The words, “A fraud on the Constitution, used by Justice D.Y. Chandrachud’s words (in a recent judgment), have ironically been used before by the Supreme Court to refer to executive and legislative actions.

The Prime Minister rarely attends parliamentary debates, affecting the sanctity of the forum. If the Lok Sabha met for an average of 127 days in the 1950s, in 2017 it met for a shocking 57. If 72 Bills were passed in a year in the first Lok Sabha, the number was 40 in the 15th Lok Sabha (2009-14).

The Budget session for this fiscal year saw a scarcely believable usage of 1% of its allotted time in the Lok Sabha, and the Budget, the most vital cog of a nation’s material basis, itself passed without discussion through the guillotine process. The basic minimum that could have been done amidst mounting allegations in the Rafale fighter aircraft deal was to institute a probe by a Joint Parliamentary

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Committee, but even that is not forthcoming. And what is the worth of Parliament when its convening could be held to ransom to the campaigning by the ruling party in the 2017 Gujarat elections?

Parliament, instead of representing the highest democratic ethos, panders to electoral majorities, leaving it incapable of challenging barbaric social/religious practices enforced by dominant interests. That is why it took 70 years for Section 377 to be partially struck down. Is it then surprising that the Supreme Court steps into this dangerous void left by the executive and the legislature?

But the task of democratising society cannot be left to the judiciary, an unelected body, the higher echelons of which self-appoint their members through the collegium system (itself a result of the executive trying to muzzle the independence of judiciary). Instead, it must be through social and political struggles from the bottom, and not through judicial diktats from above (even if the latter can be useful).

State of the judiciary

More importantly, the judiciary does not exist in a vacuum. Even when it attempts to correct regressive social practices, it is still a reflection of our society. Nothing could be more illustrative of this

than the serious lack of diversity and representation, especially in the higher judiciary.

In 1993, Justice S.R. Pandian estimated that less than 4% of judges in the higher judiciary were from Dalit and tribal communities, and less than 3% were women. This led former President K.R. Narayanan to recommend that candidates from marginalised communities be considered as Supreme Court judges. Since Independence, only four Dalits have become Supreme Court judges, including one Chief Justice of India.

Even in the lower judiciary, the story is not starkly different. Data from 11 States show that the representation of Other Backward Classes, Scheduled Castes and Scheduled Tribes judges ranged from 12% to 14%. It took 42 years for a woman judge to be appointed to the Supreme Court, and there have been only eight women judges in the Supreme Court so far.

While representation can become tokenistic and essentialist, democracy is absolutely hollow without it.

Case backlog

The abdication of responsibility by the legislature is even more damaging considering that the judiciary is groaning under the weight of a mammoth 3.3 crore pending cases. The backlog of cases in the High Courts and the Supreme Court is 43 lakh and 57,987, respectively.

What could be more unjust in a democracy than thousands of innocent undertrials languishing in jails for a lifetime awaiting justice? A staggering 67% of India’s prison population awaits trial; 55% of these undertrials are Dalits, tribals, and Muslims.

In this context, should the valuable time of the judiciary be spent in entertaining and deliver-

ing verdicts on Public Interest Litigations (PILs), seeking, to take a couple of instances, a ban on pornography or making the national anthem mandatory in cinema halls? The PIL, a unique and powerful tool to seek justice for the weakest sections, has now degenerated. Witness the recent example of one having been filed seeking segregated seats for vegetarian and non-vegetarian passengers in trains.

Overworked courts cannot become a one-stop solution for performing legislative/executive tasks such as banning fire crackers/loud speakers, enforcing seat belt/helmet wearing rules, or solving theological/civil society questions such as what the essence of Hinduism is or whether a mosque is integral for namaz (going beyond whether religious practices violate constitutional norms).

The process of abolishing religious or secular hierarchies/injustices cannot become deep-rooted if it is merely judicial or legal. Take the Supreme Court’s recent directive urging new legislation to curb lynchings. Politically-motivated lynchings targeting a community do not happen because of the absence of laws. They happen because of a wilful subversion of laws by the executive backed by mobs riding on electoral majorities. That is why the head of India’s most populous and politically crucial State can declare publicly that he is proud of the demolition of Babri Masjid.

Yet, the irony of democracy is such that the task of completing the world’s largest democracy’s political and social revolution cannot be laid only at the doorstep of the wise men and women in robes.

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