

What constitutionalism calls for: the judges who called out the institutional breach are not mutineers

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A constitution can flourish only if there exists a culture of respect for constitutionalism, and not just constitutionality. Constitutionality means ensuring that one is legally on the right side of the constitution. Constitutionalism is a broader commitment to the idea that state power must always be limited, accountable and democratic. It is a commitment to the letter as well as the spirit of a democratic constitution ñ one that demands that state officials respect not only the law but also the customs and conventions that allow institutions to function properly.

The unprecedented press conference by the four seniormost justices of the Supreme Court is a desperate public appeal to defend constitutionalism. Since Indira Gandhi's authoritarian quest for a 'committed judiciary', this episode highlights the biggest threat to the Court's institutional integrity. The immediate provocation is the allegedly arbitrary use of the administrative powers of the Chief Justice of India to pre-determine the outcome of politically sensitive cases.

A resilient constitutional democracy will usually be able to correct an aberrant crisis within one of its institutions. But when constitutionalism is under assault from multiple directions, and a deep malaise infects various constitutional institutions, a crisis in a key constitutional watchdog can be devastating.



The present impasse arises amidst a sense of creeping authoritarianism, characterised by a callous disregard for constitutionalism. To be sure, constitutionality has been pushed to its limits too. But it is the extra-legal constraints embodied in constitutional conventions that rely on a sense of decency, decorum and shame for their observance, that are being especially disregarded.

Here are some signs of this subtle form of authoritarianism. There is no official leader of opposition in Lok Sabha, Lt Governors have made it nearly impossible for elected governments to function, cases previously dealt with by one set of judges are being reassigned to other judges, former judges and army commanders have been given politically sensitive posts, non-financial matters have been inserted into money bills to override Rajya Sabha's right to veto legislation, legislatures – especially in the states – are in session for ever fewer days, important bills are pushed through without scrutiny by parliamentary committees, vacancies in watchdog institutions like the Information Commission, high courts and the Lokpal remain unfilled, and Court decisions – even like the one ordered by the Supreme Court making Aadhaar non-mandatory – have been circumvented.

Although every government has breached conventions of institutional propriety in the past, the scale and the frequency of recent breaches is alarming. Authoritarianism in the 70s was in your face: hard to deny and harder still to ignore. Today's neo-authoritarianism is subtle, it creeps up on a democracy because it flaunts the mask of apparent constitutionality even as it undermines constitutionalism.

This is the context in which the four judges emphasised the “well-settled and time-honoured conventions guiding the chief justice” in their open letter. This outspokenness has precedent. Before the Emergency, outgoing Chief Justice Sikri publicly told his successor AN Ray that he would ‘rue the day he accepted the office’ by superseding more senior colleagues disliked by Indira Gandhi. In 2000, President Narayanan went beyond the brief of a ceremonial head of state to abort a governmental attempt to change our system of parliamentary democracy.

Judicial independence survived the Emergency because the Janata government refused to supersede ‘pro-Indira’ judges in retaliation. A similar sagacity is called for today.

The judges of the Supreme Court, acting as a full Court, must decide to subject the administrative powers of the Chief Justice of India to norms of transparency and accountability. Apart from calling for a constitutionally compliant resolution by the full court, Parliament and the government should stay out of the dispute.

Most importantly of all, what will save our democracy is a constitutional culture where key functionaries are willing to call out serious breaches of constitutional norms, whether legal or decorous. Sometimes this requires speaking out of turn – an act of unseemliness that is exceptionally justifiable when the stakes are as high as our commitment to constitutionalism. Rather than smearing them as ‘mutineers’, we must celebrate these four judges for their patriotic defence of our constitutional democratic republic.

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