Judicial safe zones

Deposition centres will help create a conducive atmosphere for child witnesses

It has long been recognised that children testifying as witnesses find the courtroom experience intimidating. In many cases, they are victims themselves, and may be deterred from deposing fully and confidently in the formal atmosphere. The Supreme Court's direction that within three months there should be at least two special deposition centres under every high court's jurisdiction is a positive step towards ensuring a conducive and protective atmosphere for vulnerable witnesses. This takes forward the principle already contained in laws relating to children. For instance, the Protection of Children from Sexual Offences Act provides for child-friendly procedures during a trial. Under this law, the officer recording a child's statement should not be in uniform; also, during court proceedings steps must be taken to ensure that the child is not exposed to the accused. The court is allowed to record a child's statement through video conferencing, or using one-way mirrors or curtains. At present, Delhi has four such deposition centres, backed by guidelines framed by the Delhi High Court. The *amicus curiae* in a criminal appeal before the Supreme Court had suggested that such special centres are needed in criminal cases that involve vulnerable witnesses. The Bench, setting aside a high court's acquittal of a man accused of raping a hearing and speech impaired girl and restoring the trial court's conviction, agreed such centres are needed with safeguards.

The Delhi High Court's guidelines are inspired by the UN Model Law on Justice in Matters involving Child Victims and Witnesses of Crime. The main objectives include eliciting complete, accurate and reliable testimony from child witnesses, minimising harm, and preventing 'secondary victimisation'. Secondary victimisation, or the harm that occurs not due to a criminal act but through the insensitive response of institutions, systems and individuals, is something that vulnerable witnesses often experience in cases of sexual violence. The creation of special centres would have to imply much more than a safe space for recording the testimony of vulnerable witnesses. It should also mean that multiple depositions and hearings at which they have to be present are avoided. In particular, they should not have to needlessly wait for their turn or be subjected to procedural delays. For now, the term 'vulnerable witnesses' is limited to children, but the principle may have to be expanded to include adults who may be equally vulnerable to threats and an atmosphere of fear and intimidation. Victims of sexual violence and whistle-blowers whose testimony against powerful adversaries may endanger their lives require a conducive atmosphere to depose. Ideally, every district in the country would need a special deposition centre. The infrastructural and financial burden may be huge, but the state will have to provide for it to abide by the overarching principle of protecting vulnerable witnesses.

The Burundi way

As it becomes the first country to leave the ICC, questions of UN jurisdiction remain

Burundi's decision to quit the International Criminal Court is likely to resonate in other African states whose leaders have long complained that they are targeted for investigation by the UN institution. But the obstacles faced by the court in The Hague to hold big global powers to account for human rights violations does not detract from the complicity of the region's many dictators in subverting democratic institutions to keep their grip on power. Burundi is the first member-country to leave the ICC. In September, a UN commission investigating violence for over two years under President Pierre Nkurunziza recommended a criminal investigation by the court. The panel corroborated the evidence collected by fact-finding missions, which have reported large-scale incidents of sexual abuse, torture, forced disappearances, and summary executions of over 500 people. The flight of refugees to neighbouring countries is said to have exceeded 400,000. All these atrocities were triggered by legitimate and often heroic protests in this small central African state against one man's lust for power. Mr. Nkurunziza won a third term in 2015, in contravention of a provision in the 2003 peace agreement and despite an opposition boycott. He rejected the two-term limit in his renewal bid, contending that his first tenure should not be counted as he was elected by parliament rather than through a popular vote. His pursuit of power became all the more savage since an aborted coup prior to the elections, and the military and intelligence services seem to have rallied behind his authoritarian agenda.

Meanwhile, international pressure to bring the situation in Burundi under control has proved ineffective. The African Union (AU) abandoned plans last year to authorise a peacekeeping mission, despite the commitment codified in the bloc's charter to intervene to prevent genocide. But that initial enthusiasm dissipated. Securing an extension of presidential terms is not unique to the Burundian leader. Burundi's example may well be emulated by other countries. Within weeks of a parliamentary vote last year to leave the ICC, South Africa announced its own decision, which has been deferred pending legislative approval. More worrying is the mood across the AU to defy the jurisdiction of the Rome Statute, the founding treaty of the ICC. The erroneous logic of the region's leaders is that since most of the ICC investigations involve African governments, the institution is somehow biased against the continent. Such arguments are unlikely to appeal to their people. In any case, Mr. Nkurunziza's regime may not be able to evade the international court; the UN Security Council is empowered, under the Rome Statute, to refer complaints against non-member nations. Having unanimously backed constructive engagement, the Council may exercise its authority if the situation remains dire.

Collegium and transparency

The initiative adds a veneer of respectability to a mechanism that has little constitutional basis

SUHRITH PARTHASARTHY

GETTY IMAGES/ISTOCKPHOTO

On October 3, the Supreme Court's collegium published a resolution promising to hereafter make public, on the court's website, its various decisions, including its verdicts on persons nominated for elevation as judges to the high courts, its choices of candidates for elevation to the Supreme Court, and its decisions on transfer of judges between different high courts. These results, the resolution added, will be accompanied by the reasons underpinning the collegium's choices.

At first blush, the move strikes us as both necessary and important, as bringing transparency into a system that has been notorious for its opacity. But when probed deeper, on even a bare reading of the first set of publications released by the collegium, it becomes clear that the initiative adds, at best, a veneer of respectability to a mechanism that lacks any constitutional basis.

Perplexing reasons

Consider some of the reasons professed thus far. In the cases of A. Zakir Hussain and Dr. K. Arul, candidates nominated for elevation to the Madras High Court, the collegium has *verbatim* published the following statement of rejection: "keeping in view the material on record, including the report of Intelligence Bureau [IB] he is not found suitable for elevation to the High Court Bench." The details of what the IB's reports might contain and the apparent materials on record remain concealed. Yet, threadbare as these reasons might sound, those offered for rebuffing the nomination of Vasudevan V.N., a judicial member of the Income Tax Appellate Tribunal, are particularly perplexing.

"While one of the two consultee-colleagues has offered no views about his suitability, the other colleague has not found him suitable for elevation," the report reads. "As per record, his name was also recommended by the Collegium of the Calcutta High Court on 28.11.2016 and the Government of West Bengal has expressed its disagreement. Record placed before us also shows that the proposal for his elevation initiated on a previous occasion by the Collegium of the Bombay High Court was rejected by the Supreme Court Collegium on 1st August 2013. A complaint pointing out this fact has also been received in the office of the Chief Justice of India. Keeping in view the views of the consultee judges and the material on record the Collegium is of the considered opinion that Shri Vasudevan V. Nadathur is not suitable for elevation to the High Court Bench."

More questions

The collegium, ever since its inception, following the Supreme Court's judgment in what is known as the *Second Judges Case* (1993) has been enveloped by a sense of the hugger-mugger. The present revelations, much opposed to their perceived objective, scarcely make the system more transparent. In Mr. Vasudevan's case, for example, we don't know which of the "consultee-judges (presumably one of the two senior-most Supreme Court judges, in this case, who have previously served at the Madras High Court) objected to his elevation, and why the judge interviewed found him unsuitable. Also peculiar is the collegium's express noting that Mr. Vasudevan had previously been recommended by two different high court collegia, which would mean that, in all, the chief justices of three high courts, at different points of time, found him worthy of selection. But, we're now left wondering how the view of one "consultee judge" – whose reasons aren't provided to us – can override the opinion of three chief justices of three different high courts.

These issues concerning the system employed to appoint judges to the Supreme Court and the high courts – even if they often involve matters of inscrutable procedure – are of particular salience. The judiciary, after all, was regarded by the Constitution's framers as central to the social revolution that the document was meant to herald. Indeed, as the historian Granville Austin recounted in his book, *The Indian Constitution: Cornerstone of a Nation*, the Constituent Assembly brought "to the framing of the Judicial provisions of the Constitution an idealism equalled only by that shown towards Fundamental Rights." It saw the judiciary as critical to "upholding the equality that Indians had longed for during colonial days, but had not gained".

Interpreting consultation

To this end, to ensure that judges would be insulated from political influence, the assembly agreed on a consultative process of appointing judges, a "middle course," as B.R. Ambedkar described it. The Constitution avoided the cumbersome process of legislative interference and the undemocratic provision of a veto to the Chief Justice, and vested in the President the power to both make appointments and transfer judges between high courts. The President, who would act on the advice of the council of ministers, was, however, required to compulsorily consult certain authorities, including the Chief Justice of India (CJI), and, when making appointments to a high court, the chief justice of that court.

Originally, in 1977, in *Sankalchand Sheth*'s case, when interpreting the word "consultation," the Supreme Court ruled that the term can never mean "concurrence". Hence, the CJI's opinion, the court ruled, was not binding on the executive. But nonetheless the executive could depart from his opinion only in exceptional circumstances, and, in such cases, its decision could well be subject to the rigours of judicial review. This seemed like a perfectly sound balance.

And indeed, in 1981, in the *First Judges Case*, the court once again endorsed this interpretation, albeit partly. But twelve years later, in the *Second Judges Case*, the court overruled its earlier decisions. It now held that "consultation" really meant "concurrence", and that the CJI's view enjoys primacy, since he is "best equipped to know and assess the worth" of candidates. But, the CJI, in turn, was to formulate his opinion through a body of senior judges that the court described as the collegium.

In 1998, in the *Third Judges Case*, the court clarified its position further. The collegium, it said, will comprise, in the case of appointments to the Supreme Court, the CJI and his four senior-most colleagues – and, in the case of appointments to the high courts, the CJI and his two senior-most colleagues. Additionally, for appointments to the high courts, the collegium must consult such other senior judges serving in the Supreme Court who had previously served as judges of the high court concerned. (On whether these views of the consultee-judges are binding on the collegium or not, the judgments are silent.)

What's clear, though, is that these dizzying requirements maintain no fidelity whatsoever to the Constitution's text. Yet the court has been keen to hold on to this power. Indeed, when the Constitution was altered, through the 99th constitutional amendment, and when the collegium was sought to be replaced by the National Judicial Appointments Commission – a body comprising members of the judiciary, the executive and the general public – the court swiftly struck it down. It ruled, in what we might now call the *Fourth Judges* Case (2015), that the primacy of the collegium was a part of the Constitution's basic structure, and this power could not, therefore, be removed even through a constitutional amendment.

But perhaps mindful of some of the hostility that the system was facing, the judgment also promised to "consider introduction of appropriate measures", to improve the "collegium system". The new resolution, it might well seem, is an effort towards this end. Unfortunately, though, the publications only serve to further underscore the deficiencies in the appointment process, which remains, as Justice P.N. Bhagwati once described it, "a sacred ritual whose mystery is confined only to a handful of high priests".

Suhrith Parthasarthy is an advocate practising in the Madras High Court

Solving the autonomy puzzle

The Central government needs to consult Kashmiris and revisit developments since 1947

KARAN THAPAR

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Have you noticed how sometimes politicians prefer to quarrel with what their opponents have said – even if in the process they misunderstand and misrepresent – rather than comprehend an important point made by an adversary? The Bharatiya Janata Party's (BJP) response to former Union Minister and Congress leader P. Chidambaram's recent comment on Kashmiri demands is a striking example.

Reading down 'azaadi'

Both Prime Minister Narendra Modi and Finance Minister Arun Jaitley have claimed Mr. Chidambaram was advocating azaadi and criticised him for it. But he wasn't. In fact, he said something subtly but significantly different. When Kashmiris call for azaadi, he claimed, they in fact mean autonomy. Perhaps the Prime Minister and the Finance Minister missed the point?

In the first instance, Mr. Chidambaram was reading down the cry for azaadi. He was suggesting the word is a rhetorical flourish to attract attention. For most – if not the majority of – Kashmiris, it's a way of asking for autonomy. He was, therefore, indicating an escape route from the present impasse between the Kashmiri people, who demand azaadi, and a government determined not to concede it.

At a deeper level, Mr. Chidambaram was also alluding to the fact that the autonomy Kashmiris want is something they actually had in the early years after accession and which successive governments in Delhi whittled down. This is what he meant when he said, "The demand in the Kashmir Valley is to respect, in letter and spirit, Article 370." Sadly, last week he didn't make this point fully clear.

However, last year he did. In an interview to me in July 2016 on India Today TV, he said: "We have ignored the grand bargain under which Kashmir acceded to India. I think we broke faith, we broke promises." This was an explicit reference to the fact that in 1947, Jammu and Kashmir acceded only in terms of defence, foreign affairs and currency/communications and, unlike other States, never merged. It wanted to retain its identity within the Indian sovereignty it accepted, but over the decades that's been eroded as the jurisdiction of myriad institutions was enlarged to encompass the State.

Though last week Mr. Chidambaram did not speak about a solution, in the July interview he spelt one out: "What is necessary is to give the assurance that the grand bargain under which Kashmir acceded to India will be fully honoured." This meant: "Let them frame their own laws as long as it does not conflict with the Constitution. As much as possible we have to assure them that we will respect their identity, history, culture, religion...and [still] allow them to be part of India."

Mr. Chidambaram did not say how this should be taken forward. However, Communist Party of India (Marxist) general secretary Sitaram Yechury, in a separate interview to me in September last year, outlined one possibility. He said we need to sit with Kashmiris and revisit developments since 1947 with a willingness to roll back some. In essence, this is also the position of the National Conference. Its leaders aren't clear about what needs to be rolled back, though some want a reversal of the nomenclature changed in the 1960s and how the 'head of state' is chosen. More importantly, many are confident that institutions like the Supreme Court, the Election Commission and the Comptroller and Auditor General, which are respected in Kashmir, will be retained. The key is to let Kashmiris decide for themselves.

The core of the Chidambaram-Yechury proposal is the belief there are many ways of being Indian. If 12 States, including Himachal, Uttarakhand, Gujarat, Maharashtra and in the Northeast, can have special constitutional provisions, why not Jammu & Kashmir? This can only add to the rich texture of being Indian, not strain the national fabric. Indeed, this was the foundation on which the much admired Manmohan Singh-Pervez Musharraf back-channel agreements were built.

Different concept

Now, this is not azaadi. Far from it. But it is a very different concept of India to that of the BJP and the Rashtriya Swayamsevak Sangh. No doubt this is why the Prime Minister and the Finance Minister chose to attack rather than understand and explore it. But, then, what did Mr. Modi mean when he said the solution was to "embrace" Kashmiris? Surely, in practical terms, that means meeting them half-way. Or is he like Humpty Dumpty who famously said, "When I use a word it means just what I choose it to mean – neither more nor less"?

Karan Thapar is a television anchor

LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

Data and privacy

In its zeal to aggregate data in electronic form and target subsidies better, the government cannot ignore its responsibility to protect citizens from the perils of the cyber era ("Five-judge statute Bench to decide on Aadhaar validity", October 31). It is imperative that the Union government enact a privacy legislation that clearly defines the rights of citizens and one that is consistent with the provision of the Constitution. It should create institutional mechanisms such as a privacy commissioner to prevent unauthorised disclosure of or access to such data. Our national cyber cell should be made well capable of dealing with any cyber-attack. We need to educate people on the risks involved and highlight examples of ID theft and fraud. We need to take a level-headed approach and ensure ample safeguards.

K.M.K. MURTHY,
Secunderabad

A new image

The country has been waiting for long to see what Rahul Gandhi has to offer. He must understand that there is only so much that a PR team and senior party leaders can do and that he has to lead from there. Though it is commendable that he is trying very hard to get rid of his privileged, rich boy persona by toning down his comments and making them more suitable for the common man, he must show the country what he can do for his people, his ideology and how he deal with our many problems. The Congress cannot wait for the country to crumble and then step in (Editorial – "#Makeover", October 31).

VRINDA RAJVANSHI,
New Delhi

■ Does Mr. Gandhi's makeover deserve an editorial in *The Hindu*? The Gandhi scion's sudden active presence on social media has not been without controversy.
The sudden and huge jump in the number of his followers is suspicious. While social media is a strong medium to connect with the online masses, a leader also requires potential or dynamism. He or she also needs vision, commitment and be hardworking – requisites which Mr. Gandhi lacks. The perception is that most of his thoughts and even speeches are based on inputs provided by the party think tank. He does not seem to have grasped the core principles of politics and ground realities in the country.

N. SADHASIVA REDDY,
Bengaluru

The Iron Man

Accommodation and respect for diversity were the planks on which the Indian National Congress was founded, but these roots are not as strong as they were before ("Sardar Patel, a shared inheritance", October 31). The Congress sidelined not only Sardar Patel but also other leaders who came later such as P.V. Narasimha Rao. If the party has to rise again, it has to acknowledge its mistakes and try to remember those great leaders who not only did yeoman work in terms of uniting the country (Sardar Patel) but also helped the economy (P.V. Narasimha Rao). There are many of us who are waiting to see the glory of lost Congress principles and its original ideology bloom again.

N. KRUPAKAR,
Kadapa, Andhra Pradesh

■ The article is an insightful analysis of understandable political rivalry for the Patel legacy. The writer's referring to Patel as a Congress patriot, conceding, unlike some others, room for non-Congress patriots gives us a lead. Therefore, I can see nothing wrong in other such patriots also celebrating the memory of Patel. Also the BJP, if execrable in the eyes of some, has every right to save its soul through such celebration. I believe that the Indian National Congress's insecurity stems from nothing other than its present irretrievable bankruptcy. Its men and women have little to show for themselves except some distant memories. They often forget that it was the Congress movement which won freedom for the country and not the Congress party. If Patel had lived longer he might have also been as disillusioned with the Congress party as Rajaji became. The writer is right in saying that Patel is a shared heritage. Let us allow that heritage to be shared alike by all, and liberally.

R. VENUGOPAL,
Chennai

Hadiya's case

Kerala offers very famous cases of Hindus who have converted to Islam ("Produce Hadiya on Nov.27: SC tells father", Oct. 31). What was so strange about Hadiya's conversion, when she herself appeared in court and said that her conversion was voluntary? What's interesting is that this case isn't even a classic example of so-called "love jihad". The woman converted much earlier and got married years later. When we have a Constitution which guarantees freedom of religion which includes the right to convert to any religion, why must she be prevented from marrying a man of her choice?

PADMINI RAGHAVENDRA,
Secunderabad

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CORRECTIONS & CLARIFICATIONS:

In the report headlined "Fewer TB deaths in India: WHO" (Oct. 31, 2017) the opening sentence said: "Death from tuberculosis in India saw a 12% decline from last year even as the number of *new cases saw a 5% increase*. It should have been: "Death from tuberculosis in India saw a 12% decline from last year and the number of *new cases, or incidence, saw a 1.7% decrease*."

The year of publication corresponding to entries in the "From The Hindu Archives" column (Oct. 31, 2017) should have been *1917* – and not *1017* as published.

In the Sports page article titled "IPL's influence cannot be quarantined: Gideon Haigh" (Oct. 31, 2017), the headline was erroneous and should have been "Twenty20's influence cannot be quarantined: Gideon Haigh". In the copy Haigh was wrongly quoted as saying "My main concern about the IPL or Twenty20 is not about the game itself..." It should have read: "My main concern about Twenty20 is not about the game itself..."

The Readers' Editor's office can be contacted by Telephone: +91-44-28418297/28576300; E-mail:readerseditor@thehindu.co.in