

Long road to reform

Pratap Bhanu Mehta Posted online: Friday , Aug 07, 2009 at 0336 hrs

The recent episode over the Judges (Declaration of Assets & Liabilities) Bill is a reminder of just how difficult genuine judicial reform is going to be. In some ways, the issue of declaring assets is the simplest item on judicial reform. Judges' legitimate concerns that their disclosures not be used as a tool of harassment can be easily handled without having to exempt them from public disclosure. But the judiciary's response to the issue has two fundamental mistakes. The first rule of any sound jurisprudence is that no one should be a judge in their own cause. The judiciary insists that only it can superintend itself. The second related mistake is to convert the claim of judicial independence into exemption from accountability. If Veerappa Moily is serious about judicial reform, accountability in so many different forms will be a central concern. The attitude of some sections of the judiciary to the asset bill is a warning about how independence will be used as a shield against accountability. And the delicious irony in the fact that politicians were teaching constitutional lessons to the judiciary in the parliamentary debate is a sign of how resistant they are perceived to be to serious reform.

In any reform story, entrenched actors within a sector are the hardest to move towards reform. Unfortunately, the judiciary is proving to be no exception. There are a number of indicators of this. We are all grateful to the courts for some splendid defences of our liberty and for holding government accountable. But if you scratch under the surface, it becomes apparent that there is a selection bias driving our perception of the judiciary. To just take one example, institutions like the Delhi high court have been at the forefront of rights and governance issues, sometimes excessively so. But if you look at the country as a whole, barring a couple of jurisdictions, the so-called rights revolution in our courts has not taken place. There is enormous variability in how courts are responding. In short, even the court's achievements are much more contingent and fragile than we suppose and seem to be driven largely by wonderful individual judges rather than systemic factors.

The mere fact that millions of plaintiffs are now suffering what is called the punishment of due process is an enormous blot on the credibility of the justice system. And there is growing evidence that many seeking justice are dropping out of the formal system all together. The factors behind this are complicated. But one of the most disquieting aspects is that many of the delays are a result of procedures and conventions directly under the control of judges. Individual judges are enormously hard working. But there is no rational basis for the way adjournments are granted, benches shifted and assigned, and the utter lack of control over lawyers. One of the big mysteries in political economy is why judges, with all their protection and security, do not intellectually, legally and procedurally take greater charge of their own courts. Even at the highest levels of the judiciary, the deference to lawyers is amazing. The test of the judiciary's willingness to reform will be first and foremost a serious and committed internal conversation about all the million small things it can do that are within its power. The lack of this open conversation suggests how muted the constituency for reform is.

The judiciary's position on appointments, especially to the Supreme Court, is constitutionally untenable. It is, not to put too fine a point on it, one of the most non-transparent processes in the world, not open to any form of scrutiny. There is no principled basis for the judiciary to sanction reservations for everyone else, but exempt itself from its ambit. In public perception the judicial response to charges of corruption is extremely tepid, mostly amounting to treating Sikkim and Assam as a backwater posting. Even in areas where the judiciary took on major governance roles, like the environment, the net results are mixed. The common thread running through all this is that independence has become a fig leaf to shield accountability. The concern for judicial independence is not a sufficient argument to shut out other branches of government from

participating in creating better systems of accountability. Indeed, the judiciary's claim to independence and its credibility will be enhanced if it is more transparent.

Molloy has an ambitious agenda for reform: timely disposal of cases, improving the quality of appointments, introducing a modicum of judicial accountability, initiating procedural innovations. But none of this is going to be possible without active cooperation and dialogue with the judiciary. The disquieting lesson of the Judges Bill is that it is a demonstration of just how difficult and adversarial this dialogue is going to be. And then you can throw into the mix the legal profession which has an odd relationship to the system.

Broadly, there are three groups. There is the growing group that does mostly backroom professional legal work, like contracts, etc. But in the frontline profession there are two groups. The upper echelons are great beneficiaries of both judicial deference and a lack of culture of accountability. Many of them are brilliant and upright. But the systemic culture of the profession needs a hard look. Forget more complicated ideas of conflict of interest, and what it means to be an officer of the court. There are a distressingly large number of instances where top lawyers, even after having taken advances, will not show up for hearing after hearing, and there is simply no redress. The top echelon has the ability to dominate an intellectually insecure judiciary and benefit from great under-professionalisation. Then there is a large mass of struggling lawyers at different levels: immensely resentful of the privileges of the few in the profession and convinced that justice is not about the law but manipulating existing protocols and conventions. They have also consistently blocked legal and judicial reform.

The executive also has more than its fair share of blame. But the importance of the Judges Bill was not simply that it would have brought judges under principles they themselves have enacted. It was that this was a test case for the possibility of a dialogue between the judiciary and other branches of government. If the debate on this is so entrenched on the simplest issue, think of what might happen on more complex issues like the Judicial Accountability Bill or the appointments of judges or the reform of the Bar. Now the rule of law is running into the political economy of the judiciary.

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