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Supreme court: How India handles the civil disobedience will determine its future

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A civil disobedience is underway in the supreme court of India. It’s unique: The custodians of power are disobeying, praying to the people’s court. It has flashed a rare spotlight on the court’s inner workings—for a dismayed people to see, study, and summate.

Ordinarily, judges shun the media, speak only in court, to lawyers and litigants, and through their decisions. Not this time. Four senior judges abandoned the honoured code; they went public. What they alleged reveals disquiet in the office of the chief justice.

This act will haunt India. It exposes divisions among judges, doubts the practice of impartial justice, and diminishes the court. Something is rotten; it needs a prompt incision. Else, the decay may infect the democratic way of life we take for granted.

**The letter: the said, the unsaid**

It all began with an undated letter. Jasti Chelameswar, Ranjan Gogoi, Madan Lokur, and Kurian Joseph, India’s four senior-most judges, wrote to the only person senior
to them: chief justice Dipak Misra. They conveyed two things: a grievance and an allegation.

_The grievance:_ The supreme court (formally) has 31 judges. Usually, they sit in pairs. The chief justice is empowered to design these benches and assign cases to them. That power is a limited one—conventions govern these allocations. He can’t act arbitrarily. But chief justices, occasionally, have done exactly that, the judges claimed. They posted selected cases to “preferred benches.” This must be guarded against, the letter underlined.

Once upon a time, lawyers used to hunt for sympathetic benches. If these judges are right, chief justices do it now. It’s a depressing prospect.

_The allegation:_ In October 2015, five judges declared the National Judicial Appointments Commission, an executive-led process of judicial appointments, invalid. So, India reverted to its judiciary-led collegium system of appointing judges. But some kinks needed ironing out. The collegium proposed a Memorandum of Procedure (MoP). The Modi government has sat on it for almost a year. Its silence should have meant acceptance, the judges reminded the chief justice. Instead, in October 2017, two judges held out a different impression: that the MoP remains a draft, and that the government may still propose alternative procedures. This went against what the larger five judges-bench had held, the letter pointed out.

Was the October 2017 order an indirect nod to the Modi government to smuggle in its preferences regarding the MoP? One is left to wonder.

Buried unsaid in this missive is a troubling idea: What do judges decide cases based upon—the law or something else? Bench hunting, the practice alleged here, makes sense only if judges are swayed by reasons other than the law. Why else have preferred benches, if the chief justice really does? Why else suggest, as the letter does, that preferred benches impair the court’s integrity?
Performing the letter

The supreme court is a polyvocal body. Benches of two, three, five, or more decide thousands of cases each year. They routinely disagree. Differences among them aren’t new or newsworthy.

But this wasn’t an ordinary disagreement. It spoke to a core issue: How should the court be run? Also, the protestors didn’t just object in writing; they went public. Why?

Nothing had changed, they said. Attempts to make the chief justice see light failed. Questions remained.

Justice Chelameswar spoke at the presser mostly. He stressed the need for equanimity and impartial judges, and obliquely turned to history.

“Twenty years hence wise men shouldn’t say we (the senior-most judges) sold our souls,” he said. “We don’t want this to be said. So, we place it before the people of this country. Please take care of the institution.”

The last time wise men said this about judges, India had an Emergency (a constitutional takeover by the executive). Has an undeclared Emergency gripped India?

A short Q&A with reporters followed. A few questions elicited cryptic replies. Others earned none.

“Should the chief justice be impeached?” “Let the nation decide”.

“Is the executive interfering with the judiciary?” “What if no remedial steps are taken?” Silence.
What the judges said, almost said, and didn’t say is nothing short of a coup—a public call to mutiny against the chief justice of India. The supreme court shall pay for this; India shall pay more.

**Institutional costs**

All systems face crises. But well-governed ones respond better. Settled norms help weather them. They project a stainless front; the scars stay closeted. It’s a mask—a handy one.

The court’s mask has slipped. Its underbelly is on ugly parade. And three things are clear.

One, the quartet felt forlorn. It had exhausted its options. Existing norms offered no further avenues. A public address was the only way out. Clearly, the court has fewer norms than it needs to fix discords. It needs a fatter rulebook.

Two, these judges had grave concerns, too grave to neglect. But they must have known: The unwritten code demands reticence. Pitching to the public is a breach. Still, they persisted. What was the issue? The letter and its recital point to partiality—in assigning cases, and deciding them.

Three, fairness induces faith in a judicial system. Courts must be fair, and appear so. Charges of partiality come and go. But this one is unique. Sitting senior judges have alleged unfairness. Can the people any longer trust what the court says?

And what of institutional balance? Consider this. The supreme court had a majestic run for nearly 35 years: unmatched authority, trust, and respect. But that was also the era of rickety governments. Now India has a tough executive—a first in 30 years. And (some) judges are reduced to pleading helplessness in public.
Just fortuity? Or a flavour of the timeless tussle between the executive and the judiciary? Is a simultaneously strong executive and a strong judiciary possible? Or are we forever locked into a see-saw battle: one must be down when the other is up? This matters.

The executive in India—the government—is the biggest litigant. Only impartial judges can hold it to account. A frail judiciary, a compromised one, can’t do it. A powerful government may muscle in laws and policies. Remedies against excesses will dry up. Can democracy still flourish?

Waiting for sunshine

What now?

One, in a bind. That’s how chief justice Misra must feel. Attending to the complaints, reneging on recent decisions, would paint the protesting judges in the right. It would cement the idea of a partial court. But inactivity risks more revelations. The letter, in closing, hints at that.

Two, the quartet must feel the heat, too. It made an unprecedented move. It has gambled its honour. What if nothing changes—if no remedial actions happen? Democracy is under threat, it had alleged. Can it carry on as if nothing happened?

Justice Gogoi, later, reportedly said: “There is no crisis.” Another member, Justice Joseph, said: “The matter has been settled.” How? When? By whom? The hasty reversal doesn’t bode well.

Reports tell a meeting of the full court (that brings all sitting judges together) may happen. What will it decide?
Perhaps something to both sides? The chief justice and his complainants can move on with honour. The court can pretend its mask is back on. But the truth will die. What of the performance? What of the issues?

Three, is this a precedent? Will discord play out in public again? Justice Joseph thinks not: “Such actions would not occur in future.” Why?

Remember: last time a sitting judge convened a media on his lawns, India laughed it off as the rantings of a mad man. Of course, the two aren’t the same. He was a high court judge, these are four senior supreme court judges. Still. We must ask: When is a breach of this scale justified? Other judges, high and low, deserve to know.

Four, should other bodies read a precedent in this? Former finance minister of India, Yashwant Sinha, has asked ministers in the Modi government to summon similar courage. “They must get rid of their fear and speak up”, he said. If they do, the prime minister will sack them. Cabinet form of government has an established protocol. What of agencies beyond political control? Should they speak up if dissent brews?

Discipline above all else is a foolish insistence. But consistency? This performance invites a deeper analysis. What is institutional loyalty? When is it owed? When not?

This civil disobedience—a rare statement of moral courage—is welcome. It has bared a practice many whispered but never articulated. Now some judges have. A few retired ones have joined in, too. An open letter to the chief justice urges a new, orderly system of case assignment. This reform must happen. The power to assign cases, effectively, is the power to decide them; it can’t rest in just one person.
A big break from tradition demands big changes. If things stay the same, the protesters, the court, and the system, will lose credibility. No one again will have reason to believe the supreme court and its idea of impartial justice. It mustn’t come to that.

We welcome your comments at ideas.india@qz.com.