

The Ways of the Judiciary*

Prabhat Patnaik

Last month the Supreme Court made two important pronouncements in the space of just a few days. One was on the question of who had ownership rights over the land at the Babri Masjid site; the other was on the location of bars or liquor shops within five hundred metres of highways. On the first of these the Supreme Court made only an oral observation: it suggested an out-of-court settlement, with the Chief Justice himself offering to act as an intermediary in the negotiations. On the second the Supreme Court passed an order that no bars or liquor shops could be located within this five-hundred-metre limit.

The irony here was quite striking. The Babri Masjid issue was specifically entrusted to the Supreme Court for adjudication; the whole country was waiting with bated breath for what the highest judiciary would say on the matter. But it chose not to say anything. On the other hand the location of liquor shops and bars is not a judicial matter at all; it is for the executive to take a decision on it, but the Supreme Court had no hesitation in wading into it. It was a case of judicial under-reach on a matter falling squarely within the domain of the judiciary, but of judicial over-reach on a matter that did not fall within the judiciary's domain at all.

Had this over-reach and under-reach been just random occurrences, they would not merit any comment. But there is a disturbing common pattern underlying both, namely, that the proverbial blindness of justice appears to be absent in both cases. In fact in the Babri Masjid case, this was explicitly stated by the judges themselves, namely that in matters that arouse public passion, it is best to have negotiated settlements. This is an unfortunate position for the highest judiciary in the country to take, since it is precisely in matters that arouse public passion that the judiciary can act as a bulwark against such passion and ensure that justice is done. Indeed those who are at the receiving end of such passion, namely the minority community (since in all such conflicts, greater weight is naturally carried by those who generate passions among the majority), look up to the judiciary for justice, since they know that they cannot get it on the streets. For the judiciary therefore to turn its back on the matter because passions are involved, is an evasion of Constitutional responsibility, a taking off of the blindfold that should be covering its eyes.

The Supreme Court in this case did not just refrain from doing its Constitutional duty. It was actually unfair to the minority community in suggesting that the matter should be settled through negotiations. The outcome of all negotiations is determined by the relative bargaining strengths of the negotiating parties, and the one with the greater bargaining strength, the Hindutva elements in this case, need not have justice on its side. The ends of justice and the outcome of bargaining are two entirely different things, and a substitution of one for the other is not only an evasion of responsibility on the part of the highest body entrusted with the task of ensuring justice in the country, but also unfair to the party whose bargaining strength is weaker. It is ironic, but entirely unsurprising, that the new Chief Minister of Uttar Pradesh, a strong Hindutva partisan in the Babri Masjid dispute, has offered his "services" for effecting the proposed negotiations; what fairness can be expected by the minority community from such negotiations?

The unfairness is particularly acute in the present instance because the legal case of the Muslim bodies is very strong. This is so, as Justice Rajinder Sachar has pointed out, for at least three reasons: first, nobody can possibly prove that Ram's birthplace was at that particular site, and faith, no matter how ardent, is no substitute here for evidence. Second, even if a Ram temple had existed there (on this again there is no evidence) on which the Babri Masjid was constructed five hundred years ago, that land, going by legal precedent, cannot be given back to today's Rambhakts (even if they are the authentic legal heirs of the temple authorities of five hundred years ago). This legal precedent relates to the Shahidganj Mosque in Lahore, on whose site, allegedly, a Sikh gurdwara had been constructed two centuries ago; and the Privy Council in pre-independence India had ruled that the earlier existence of a mosque could not be an argument for dispossessing the Sikhs. And, third, in analogy with the common law provision that even a rightful heir forfeits inheritance if he has killed his ancestor, the Hindutva parties cannot get possession of that land as they had destroyed the mosque standing upon it (in defiance of a Supreme Court order).

It may of course be suggested that a Supreme Court verdict that gives rise to street unrest is best avoided. But that is a dangerous argument, for it amounts to saying that street unrest should be allowed to over-ride the Constitutional order of the country. If this order is to be upheld, which is essential for keeping this country together, then the prospects of street unrest must not be allowed to come in its way. There is of course a "practical" argument for not provoking street unrest; but if that is considered weighty enough, then the Supreme Court judgement in this case could have been kept in abeyance until passions had cooled sufficiently. Substituting the task of "accommodating" the Hindutva elements for that of upholding the Constitutional order, which is also what the Allahabad High Court had sought to do some years earlier, sets a dangerous precedent, which, one hopes, the Supreme Court would resile from in the coming days when its proposed negotiations prove to be still-born, as is likely.

As for the other pronouncement, there has long been a tendency on the part of the Indian judiciary to encroach upon the domains of the other two organs of the State, the executive and the legislature. In fact a former Chief Justice of India had even advanced the somewhat extravagant and dangerous thesis that the judiciary is superior to the other two organs, a thesis that strikes at the root of popular sovereignty. But even those in the judiciary who do not subscribe to this extravagant thesis have not been loath to encroach on the domains of the other organs of the State.

True, there may be occasions when clipping the wings of the other organs by the judiciary becomes necessary for the preservation of democracy, such as for instance when the Supreme Court had delivered the historic judgement for preserving the "basic structure" of the Constitution which was being trampled upon, albeit in an apparently Constitutional manner, during Mrs. Gandhi's Emergency. In fact in the current juncture when "communal-fascism" threatens the country, one would like the judiciary to maintain its independence and stand up to the other organs of the State to defend the "basic structure" of our Constitution which inter alia upholds a secular-democratic polity.

But the judiciary's standing firm on the defence of the Constitutional order is one thing; its giving specific instructions about the distance at which liquor shops should be located from highways is quite another. Indeed one cannot help feeling that in

giving this order, which, despite its far-reaching consequences for employment and state government revenues, does not appear to have been based on any proper study of the issue, the Court once again removed its blindfold and got persuaded by the prevailing anti-alcohol mood, of which Bihar presents the clearest manifestation.

There is however a basic problem with such judicial over-reach. When the executive issues an order, people have the freedom to protest against it in forms that range from lobbying, to petitions, to street demonstrations, to demanding parliamentary debates. But when the judiciary makes such an executive intervention there is no similar redress available to the people. Now, one does not want this state of affairs to change, that is, for judicial orders to be challenged in ways that are not judicial, since that would undermine the status of the judiciary, to the detriment of our democracy. It becomes necessary for the judiciary therefore, if it is to preserve its sanctity and dignity, to restrain itself, not to enter the domain of the other organs of the State, to ask the other organs to frame appropriate policy when it feels exercised over some matter (instead of itself doing their job). One hopes that in this case too, as in the Babri Masjid case, the highest court of the land would rectify its position to preserve its own dignity, and the Constitutional order for which such dignity is essential.

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