

Fostering an Independent Bar

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Even as debates rage over the threats to the independence of the judiciary, it is necessary to focus on the other institution keeping the judicial system going—the bar—specifically that part of the legal profession which largely practises in the courts. The bar being the source of appointments to judges at the high court and who then go on to become Supreme Court judges, concerns have recently emerged on its independence as well.

At a recent seminar on the Judicial Appointments and Reforms,¹ senior advocate Aditya Sondhi linked the independence of the judiciary to the independence of the bar. He said,

There is an increasing impression being created, and I can perceive it, that if a lawyer ... wants to be on the bench, they have to toe the line. If that is the *sine qua non* for elevation, then what is the independence? (Sharma 2023)

While not denying that lawyers have political affiliations, he lamented that the middle ground occupied by those without express political inclinations were shrinking and that the message seems to have gone out that unless one shared the political ideology of the ruling party, one cannot expect to become a judge of the high court no matter how competent or qualified.

In a different way, senior advocate Kapil Sibal echoed the same view in an interview with the *Bar and Bench* (Saluja 2023). While explaining his proposal for an *Insaaf ke Sipahi*—a platform for lawyers to help citizens get justice—he too lamented the politicisation of the bar, though he believed that the majority of lawyers are not necessarily politically affiliated.

The idea that floats through in both these interventions is that of the bar as an institution necessary to preserve and protect judicial independence, constitutional values, and ultimately justice. But what does an independent bar look like? Does it necessarily mean that, by and large, a major section of the bar avoids adherence to a political ideology? And what would it take to preserve this independence? These are some questions that naturally arise in this context and thus addressed in this column.

Legal Framework Governing the Bar

Section 29 of the Advocates Act, 1961 (the act henceforth) mandates that only those advocates enrolled under the act

would be entitled to practise law in the country. Theoretically, “the bar” therefore consists of all the advocates who are enrolled with the respective state bar councils (SBCs) under the act. The qualifications for being enrolled as an advocate, their conduct, and their removal from the profession are largely regulated by the Bar Council of India (BCI). The BCI is composed of the Attorney-General for India and the Solicitor General of India (in an *ex officio* capacity) along with one representative from each of the SBCs. The SBCs are constituted of members who are elected by the advocates on the rolls of the bar councils along with the advocate general for that state.²

Save for a few government nominees, the composition and manner of selection of the members of the bar councils suggest that there is little scope for governmental or any external interference in their functioning. The act has, on the surface at least, insulated the bar councils from the kinds of institutional capture that other institutions have been a victim of.

However, when “the bar” is being spoken of, it is not always all members of the legal profession who are being referred to. The imagination of “the bar” is usually that part of the legal profession which practises almost entirely in one court or the other across the country. The practice here relates to regular appearances in the courtroom as distinguished from those advocates who either undertake advisory practice in law firms or do not practise at all. The term “legal practice” has been defined in a very wide manner and while this definition brings within its scope a lot of activities, for the purposes of ensuring the independence of the judiciary and upholding the constitutional values, it is imagined to be the lawyers practising in the Supreme Court, high courts, trial courts, and tribunals.

This unstated definition of “the bar” does have some limitations—it leaves out academics and researchers who may have suspended practice and the lawyers working full time with companies and non-governmental organisations, and others mentioned above. Arguably, it should also include law students who

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are more likely than not going to be members of the bar. While one cannot doubt the contribution of this part of the bar to the growth and development of constitutionalism in India, these groups (as a whole) do not interact with the courts as regularly as lawyers practising in courts do and, more importantly, are not as well-organised yet. Though the bar councils are the statutory authorities regulating the legal profession, the true power of the bar comes from the many bar associations that comprise lawyers practising in a particular court.

An Active Bar and Its Interventions

Bar associations are, by far, the most active bodies of lawyers. While they may hit the news for strikes and boycotts, on a more day-to-day basis, they are the ones who are directly interfacing with the court and the registry and are perhaps most keenly aware of the threats to the independence of the judiciary.

Even in the matter of appointments, bar associations have played an active role in challenging what has been perceived to be undue interference with the process, if not outright illegality. The Supreme Court Advocates on Record Association (along with other bar associations) were at the forefront of the case which eventually created the collegium system³ and, struck down the National Judicial Appointments Commission amendment to the Constitution.⁴ The Madras Bar Association has been instrumental in constitutional challenges to the tribunalisation of the judiciary, having successfully challenged the National Tax Tribunal Act, 2005 as an attempt to narrow the jurisdiction of the high courts in tax cases.⁵ The Supreme Court is currently hearing a contempt petition filed by the Advocates Association of Bangalore over the union government's delays in the appointment of judges.⁶

It was not just inside the courtrooms where the bar associations have played a role in raising issues of independence of the judiciary. In 1973, when three senior judges of the Supreme Court were superseded by the union government in appointing A N Ray as Chief Justice of India (CJI), the Supreme Court Bar Association (SCBA) went on a one-day strike

in protest (Kumar 2016). The Bombay Bar Association was instrumental in highlighting the serious improprieties in the actions of Chief Justice A M Bhat-tacharjee of the Bombay High Court prompting his resignation under a cloud (Ghose 2020). Most recently, a strong response by the Gujarat High Court Advocates' Association made the Supreme Court collegium reverse course over the proposed transfer of Justice Nikhil Kariel Menon (Vishwanath 2022).

That said though, the word of caution noted by Sondhi needs to be paid heed to. It cannot be taken for granted that the bar association of any court, even an independent one, will always find in its interest to hold either the executive or the judiciary accountable. Even as the bar councils and associations may remain institutionally independent from external interference, the threat to the individual independence of the lawyers cannot be ignored.

Sondhi's elevation to the Karnataka High Court, said to have been stalled by the union government as a result of the speech he gave questioning the constitutional validity of the Citizenship (Amendment) Act, 2019 (Sharma 2023), is not any speculation or one-off instance. Recent collegium resolutions confirm that the present union executive has used this approach to prevent the elevation of suitable candidates as high court judges. Somasekhar Sundaresan's proposed elevation to the Bombay High Court has been stalled citing his social media posts criticising government policies.⁷

As Sondhi pointed out, if the lawyers stop engaging with the important constitutional issues of the day or stop demanding accountability from the executive and the judiciary, it can hardly be expected that such lawyers, when elevated to the bench, will develop a spine and uphold constitutional values (Sharma 2023). Stalling nominations in partisan political considerations could make lawyers get more wary of stepping up for the law and the judiciary.

In Conclusion

While India has not seen the kind of lawyer-led street protests as was seen in Pakistan during the rule of Pervez

Musharraf, one cannot necessarily say that the bar is any less active. They seem to have found, so far, that constitutional methods of seeking redress (whether through petitions in court, the impeachment process, or even just harshly worded resolutions) have sufficed in holding the judiciary to account. While they may not always have had the intended effect, they at least signal that the bar is alive and kicking. One hopes it stays that way.

NOTES

- 1 Seminar on Judicial Appointments and Reforms organised by the Campaign for Judicial Accountability and Reform (CJAR) held in Delhi on 18 February 2023. Disclaimer: I am one of the Executive Members of the CJAR and played a role in organising this seminar.
- 2 See Sub-section (2) of Section 3 of the act. The sole exception to this is that an Additional Solicitor General of India is an *ex officio* member of the Delhi Bar Council.
- 3 *Supreme Court Advocates on Record Association v Union of India* (1993) 4 SCC 441.
- 4 *Supreme Court Advocates on Record Association v Union of India* (2016) 5 SCC 1.
- 5 *Madras Bar Association v Union of India* (2014) 10 SCC 1.
- 6 *Advocates Association of Bangalore v Barun Mitra Contempt Petition (Civil) 867 of 2011*.
- 7 <https://www.thehindu.com/news/national/supreme-court-collegium-backs-right-to-free-speech-of-lawyer-recommended-for-bombay-high-court-judgeship/article66409377.ece>.

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