Pathways of Political Narratives: Populist Rhetoric, the Supreme Court and the (Im)balance of Power

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Abstract: Using the January 2018 Press Conference by the four Supreme Court Justices as an entry point, the paper proposes that Parliamentary discourse, an oft-ignored pulse of the political narrative, is a relevant window into studying how the legislature perceives the judiciary, and the Supreme Court in particular. It attempts to analyse through various examples, how the institutions – the Supreme Court of India, and the Parliament of India, perceive themselves and therefore each other, assuming that in a rhetorical network of what constitutes a democracy, these intersubjective interactions between the institutions matter. Using the theoretical framework of discursive institutionalism, the paper attempts a discourse analysis of the symbolic and rhetorical relationship established between the Parliament as a symbolically representative institution and the Supreme Court of India, in order to decode whether the Supreme Court of India is (at all) in a crisis.

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A. Introduction

2018 has been marked by unprecedented events in the history of the Supreme Court of India. At first, in January, four senior Supreme Court judges, in a rather unexpected move, publicly spoke out against the Chief Justice of India (CJI), casting doubts on his judicial impartiality. They went ahead and pled for the "nation (to) decide" on the impeachment of the CJI. Just as this was being considered as an issue that was slowly subduing, on 20 April 2018, seven opposition parties on the floor of the Rajya Sabha, the Upper House of the Parliament of India, issued a notice to move an impeachment motion against the CJI, Justice Deepak Mishra. Given the quickly-changing nature of current news, the future developments on this issue could have hardly been predicted. However, the fact that the narrative simply receded into silence, and the way the narratives travelled, could have two different interpretations. It could be seen as a moment of crisis for the Supreme Court, or it could be seen, through an analysis of the institutions, as symptomatic of its rhetoric.

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The press conference sets a valuable foundation for some fundamental questions regarding the position of the Supreme Court of India in times of populism, which this paper attempts to raise. This move came hot in the heels of the verdict on the 'Judge Loya' case,[2] where the petition was dismissed by the Supreme Court as frivolous and seen as an attempt to "malign" the judiciary. Using the incident cited above as an entry point of sorts, the paper proposes that Parliamentary discourse, an oft-ignored pulse of the political narrative, is a relevant window into the way the Supreme Court as an institution is viewed – *not within the judiciary, but outside it, through other structures*.

Political rhetoric, carefully constructed, can mould and generate powerful narratives that can travel beyond the ambits of their conception. Thus, premised upon an interdisciplinary approach using political theory and culture studies, this paper demonstrates how, in a rapidly digitalising democracy, discourses travel, as they get "performed" by the formal institutions in India's democracy. The paper tries to interpret this through the theoretical lens of discursive institutionalism. In times of rapid populism, it asks, what the dynamics, symbolic and/or tangible, of a press conference held by judges of the apex court, banking on the travelling speed of narratives within the purported "fourth pillar" of a liberal democracy are? Furthermore, the paper analyses in what ways and with what implications the voices within the Parliament pose as representative of the public opinion of the judiciary. Finally, through these ruminations, the paper explores (in the current state of political populism, where every branch of the government, including the judiciary, have become active participants in the formulations of populist rhetoric), in this strange intermingling of the fates and/or reputations of the executive, legislature and judiciary, where the theoretical balance of power now lay.

The paper is structured as follows: the following section elaborates on the theoretical framework. After that, the contribution provides some context on how the Parliament of India has rhetorically positioned itself vis-a-vis the Supreme Court. Then it focuses at length on the event of the press conference itself, and its different aspects. Finally, to conclude, it looks at what an analysis of all these rhetorical narratives through discursive institutionalism can tell, about possible crisis of the Supreme Court as an institution.

2 After the death of Justice Loya in 2014, allegations were made in a Public Interest Litigation to the Supreme Court suggesting foul play in the death. In 2018, the Court dismissed the litigation as being politically motivated, and maligning the judiciary. See Times of India, SC dismisses PIL seeking probe into judge Loya's death, http://timesofindia.indiatimes.com/articleshow/63826836.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last accessed on 26 November 2018).

B. What is Discursive Institutionalism?

In the past few decades, an interdisciplinary approach to political institutions has provided a renewed impetus to new approaches of institutionalism.[3] Antje Wiener, for example, observes with what she terms the "constructivist turn" in international relations,[4] an interdisciplinary give-and-take between constructivist political science and organizational sociology has emerged. This new turn looks specifically at how the analyses of institutions have been "undersocialised",[5] and how it is important to pay attention to the ways in which most political interactions are "socially constructed".[6] This has opened up approaches that look at institutions, interactions between institutions and how change or crisis occurs within these institutions.

In application of these theories of institutionalism to political institutions, a substantial amount of work has been done on the debates around European integration[7] for example. There has been a marked lack of work in this direction in institutional studies on South Asia. However, applied as well as theoretical work done on this in the context of European institutions provides a useful inroad.

These approaches (described later in this article) provide useful inroads into understanding political institutions, but within academics, the fundamental disagreements have remained, regarding what ultimately counts as an "institution". This paper adheres to what would be the original and most commonly agreed understanding of "institutions" within sociology – that there are certain unsaid rules, norms and patterns of practices at work, through which collective political behaviour occurs.[8] Political institutions, thus, are "taken-for-granted conditioners of political behavior",[9] operating at different levels of society "from the coffee corner to international regimes".[10]

While it is quite beyond the scope of this paper to delve further into the different approaches and debates within institutionalism(s), it is useful at this juncture to focus on an academic exchange between two approaches, from which this paper derives its theoretical framework of discursive institutionalism. What can be derived as the most crucial contribution of discursive or constructivist institutionalism to the field as well as this paper can be surmised as the idea that political institutions also have a distinctive communicative role;

3 *Arjen Boin*, Review: Mapping Trends in the Study of Political Institutions Reviewed Work(s): The Oxford Handbook of Political Institutions by Rod Rhodes, Sarah Binder and Bert Rockman, International Studies Review 10 (2008), pp. 87-92.

4 *Antje Wiener*, Constructivism and Sociological Institutionalism, in: Michelle Cini / Angela Bourne (eds.), Palgrave Advances in European Union Studies, Basingstoke 2006, p. 35.

5 *Wiener*, note 4, p. 35.

6 *Alexander Wendt*, Social Theory of International Politics, Cambridge 1999, p. 4.

7 *Boin*, note 3, p. 89.

8 *Boin*, note 3, p. 89.

9 *Boin*, note 3, p. 91.

10 *Boin*, note 3, p. 91.

i.e., these unsaid rules and practices (often socially constructed) do not simply uphold individual institutions, but also ensure conversations between institutions. Using discourse as a focal term, as it "spans the divide between the substantive content of ideas and the interactive processes of discourse through its embodiment of both",[11] Vivien Schmidt proposes an understanding of a new kind of institutionalism, that she has termed "discursive institutionalism", whose core argument, as pertinent to this contribution, can be found in the following lines:

"Background ideational abilities and foreground discursive abilities operate in tandem, *with discourse working at both the everyday level of people living in continuing institutions (as both structures and constructs) and at a meta-level that involves people's second-order critical communication about what goes on in their institutions*. This meta-level refers to individuals' ability to think outside the institutions in which they continue to act, to talk about such institutions in a critical way, to communicate and deliberate about them, to persuade one another to change their minds about their institutions, and then to take collective action to change them."[12] (emphasis added)

Schmidt bases her theory on the premise that all institutional structures are foundationally based on ideas and thus there are no "objective interests" of political institutions, that we can simply take as "facts", when looking at the discourses within which these institutions operate. This, as is important to lay the premise for this contribution, and as Schmidt herself makes rather clear in her theorisation, is not to confuse this with the politically "post-truth" world in which a lot of current systems of political rhetoric seems to operate.

Apart from the fact that discursive institutionalism as a theoretical approach is still a comparatively new field, it is interesting that it has not yet been applied sufficiently in the Indian context. This contribution looks at the intersubjectivity between Indian institutional systems, primarily the Judiciary (through the institution of the Supreme Court of India), and the Parliament of India. This intersubjectivity, using out case in point, has played out in the network of rhetoric empowered by the media – which brings this paper later to the idea of a digital democracy, and how such discursive intersubjectivities can travel, narrativize themselves, and perform themselves within these networks of meaning-making. Most academic literature on the Supreme Court as well as the Parliament look primarily inwards – this paper tries to look at the opposite dynamic of these institutions – of who or what the institution of the Supreme Court believes it is and its projection thereby of itself into public discourse, and how that affects its interactions with the Parliament.

This contribution uses certain texts to look at these projections of the Supreme Court of India as a guardian of justice and the country's Constitution, in relation to the Parliament's projection of itself as a house of "representatives" of the elected democratic voice. The theory of discursive institutionalism, as well as this paper based on it, views the active politics

11 *Vivien A. Schmidt*, Theorizing Ideas and Discourse in Political Science: Intersubjectivity, Neo-institutionalisms, and the Power of Ideas, Critical Review 29 (2017), p. 5.

12 *Schmidt*, note 11, p. 5.

behind these performative projections only as far as through the lens of culture studies and discourse theory, in order to analyse if there is really a "crisis" of the judiciary, and if certain actions on parts of both institutions signal a break from the previous narrative in a fast-moving digital democracy.

C. How the Parliament talks about the Judiciary: some enlightening examples

The Constituent Assembly debates have been studied in great detail, as have some of the earlier Parliamentary debates, for their obvious contribution to the shaping of the polity of India.[13] However, the debates that take place on the Floor of the Houses, the Lok Sabha as well as the Rajya Sabha, on myriad issues every working day, seem to not be noted enough in the political analysis of representative democracy in India. This paper argues that these utterances inside the Houses of the Parliament of India can actually serve as evidence of a larger political discourse outside the traditional boundaries of the institutions. This is further helped by the fact that, often working at tandem with the *realpolitik* of many choices made by Parliamentarians as "career politicians", the debates they participate in within the Parliament, how they position themselves in these debates, and the texts they contribute to the discourse with, are largely constructed, strategic and performative of their assumed role as "representatives" of the people. Thus, that a parliamentary debate does not reflect a social phenomenon (or an institution) in its *reality* but is a conversation wherein political positions are assumed and executed. It is this quality, of the discourse as consciously constructed, that helps an analysis of selected Parliamentary discourse to shed a light on the Parliament's performed perception of the Judiciary, and especially the Supreme Court of India.

Here, it is interesting to note that unlike interpretations of case judgements or of bills and constructed speeches, a lot of enlightening elements for interpretation are made available when one looks at everyday debates from inside the Parliament, and the many utterances and slippages therein.

Worth taking note of is the fact that time and again, when the Supreme Court of India has been mentioned in the Lok Sabha,[14] it has mostly been to pose questions to the Ministry of Law and Justice regarding administrative issues, like the number of posts for Supreme Court candidate that remain vacant in Supreme Court staff, the salaries of Supreme Court Judges and so on. Another issue that comes up time and again in the Parliament, especially in the Lok Sabha, is the issue of use of Hindi being allowed in the Supreme Court for discussion, instead of only English being the language of operation within the Supreme Court. This is not notable here as an actual policy issue that needs reform per se, but for the purpose of this paper, this is perhaps a relevant observation as it points towards this intersubjective discursive dynamic between the two institutions, the representatives of the nation positioning themselves as rooted in the democratic voice of the people, and positioning the

13 See *Rajeev Bhargava* (ed.), Politics and Ethics of the Indian Constitution, New Delhi 2012.

14 The lower house of the Parliament of India.

Supreme Court, as a corollary, as not just the guardian of that democracy but also a very elite, unreachable guardian.[15] In just the (current) 16th Lok Sabha, this particular issue has been brought on to the floor of the House five times in the last four years: by Arjun Ram Meghwal under Matters Under Rule 377 of the Rules of Procedure of the Lok Sabha,[16] under a debate under Special Mentions signed by fifteen Members of Parliament,[17] wherein they put on record their willingness to support not just Hindi but other languages too, against the sole use of English by the Supreme Court. Abhinav Chandrachud in his observations notes that this has been a consistent complaint against the Supreme Court, and part of something that he terms the "democratic insulation"[18] of the institution.

Some enlightening tropes of performative role-understanding and delegation of meaning to one's own institution and to the Supreme Court, can be seen in the utterances of Members of Parliament in the Lok Sabha during the debates on the Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 (Insertion of New Articles 124A, 124B and 124C) and National Judicial Appointments Commission Bill 2014. Introducing the bill on the floor of the House, the then Minister of Law and Justice, Ravi Shankar Prasad, positioned the government as well as several Members of Parliament present in the House during his speech, as the saviour of the judiciary, not just with reference to the National Judicial Appointments Commission (NJAC) the need to bring reform into the judicial institution, but historically, through the reference to the Emergency. He stated, "I am referring to seventies when there was a strain and stress on independence of judiciary, when there was a strain and stress on individual freedom and also on the freedom of the Press. I am very assured to share with this House that many Members of the present Government including hon. the Prime Minister himself have been in the forefront of that struggle which was basically designed to ensure the independence of judiciary, the media freedom and the individual freedom."[19] Continuing with his speech, he referenced B R Ambedkar from the Constituent Assembly debates, in relation to the authority of the CJI in selecting judges, but this is a relevant utterance here also in purview of the focus of this particular paper. He stated,

15 The necessity of English as the language of operation in the Supreme Court has many reasons. This paper does not posit that this is an elite move, but that in professionalised politics practised within the Parliament, this has been a consistent discursive trope.

16 Lok Sabha, Need to permit arguments in High Court and Supreme Court by lawyers in Hindi, http://164.100.47.194/Loksabha/Debates/Result16.aspx?dbsl=2916 (last accessed on 26 November 2018).

17 Lok Sabha, Need to give permission to advocates for arguing their case in Hindi Language in High Courts and Supreme Court, http://164.100.47.194/Loksabha/Debates/DebateAdvSearch16.aspx (last accessed on 26 November 2018).

18 *Abhinav Chandrachud*, The Insulation of India's Constitutional Judiciary, Economic and Political Weekly 45 (2010), p. 39.

19 Lok Sabha, Discussion on the Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 (Insertion of New Articles 124A, 124B and 124C) and National Judicial Appointments Commission Bill, 2014, http://164.100.47.194/Loksabha/Debates/Result16.aspx?dbsl=1124 (last accessed on 26 November 2018).

"I would like to quote Dr. Ambedkar from the Constituent Assembly Debates. He said, 'With regard to the question of concurrence of the Chief Justice it seems to me that those who advocate the proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgement. I personally feel no doubt the Chief Justice is a very eminent person, but after all the Chief Justice is a man with all the failings, all the sentiments, and all the prejudices which we common people have. And I think to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that that is also a dangerous proposition.'"[20]

Instead of going into an elaborate summary of the arguments made during the Parliamentary debates, it is of interest to look at a few selected sections from speeches of Parliamentarians, which gives us a glance at the performative superiority over the judiciary that the Parliament assumes within its own institution, and how that relays into its understanding of its relationship with the Judiciary. Discussing the NJAC Bill, Veerappa Moily, one of the Members of Parliament (MPs) given the maximum Floor-time on this issue (given that he used to also be a Minister of Law and Justice) after the Minister, said on record, "We are not concerned with who is having an upper hand. We are not for upmanship. Ultimately, our concern is on the kind of appointment system which should prevail in the country which is good for the nation. That is why, I said that it should ultimately reflect the will of the nation and not merely the will of the judiciary and the political executive. It is the question which we have to put to ourselves."[21] Here, thus, is a deliberate positioning of the issue as one of *democratic institution building*, above the competitive tussle for authority between the Parliament and the Judiciary. On the corollary, Moily continued, and placed on record on the Floor of the House the informal practices between the Judiciary and the Government, that shed an interesting light on the power relations between the two institutions that exist precisely because of the informality of the relations. Moily said, "Earlier, I was also a Chief Minister. We used to be consulted by the High Court Chief Justices. We used to write a joint letter to the Governor and the Governor used to make a recommendation to the Law Ministry. Informally that has been followed. That was not done away with. We used to get such letters from the Chief Minister when I was the Law Minister in the Government of India. We used to give weightage, but at the same time it was not formalised. That is not quite mandatory. Chief Justices can write letters straightaway to the Law Ministry and get things done."[22] (sic)

Surendrajeet Singh Ahluwalia, in his contribution, followed a different tack, which sheds light on a different approach to the Parliament-Judiciary relationship. Connecting the power relations between the two institutions to a bigger spiritual ethos and purpose, almost mythologizing the relationship in defence of the Parliament not overriding the judiciary

20 Lok Sabha, note 19.

21 Lok Sabha, note 19.

22 Lok Sabha, note 19.

through the NJAC Bill, he stated, "Who says that we are ghettoing [the Supreme Court]? Who says that we are insulting the Judiciary? If you see in our country whether the Judiciary does any justice or not, we accept it. It is our dharma. That is why a judge is called *Nyaymurti*.[23] It is connected with dharma. *Nyay*[24] is also connected with *dharma*[25]– *nyayd-harm*. We explain and understand *nyay* as dharma and we accept it as the justice given by the *nyaymurti*."[26]

Thus, the Parliament, within the floor of the House, interprets its relationship with the Supreme Court and performs it differently, depending on context. Its performance of its own rhetoric is often amplified by the "intersubjectivity", as Vivien Schmidt's understanding of discursive institutional puts it, of the Supreme Court's projection of itself. This interpretation is operationalised by the paper further in the following section.

This is relevant when asking, as recent academic debates in India and the special issue of this journal have done in the wake of events such as the press conference, whether the Supreme Court is facing a moment of crisis. Since the question has arisen from a chain of events culminating in the press conference discussed below, it is useful, at this juncture, to situate the theoretical framework this contribution has chosen – discursive institutionalism.

At the centre of this purported crisis is thus not simply how judicial processes work, but a manifestation of it is political narratives. The crisis emerged as an interaction between these two institutions, the Supreme Court judges who presented their concerns, and the Parliamentarians who then attempted to move an impeachment motion. The contextual subjectivity of the Parliament's view on the Supreme Court in general has been noted above. The following section looks at the press conference itself, and its different dynamics. And a possible answer to whether the Supreme Court is indeed in a crisis or not, lay in the reading of it through interpretations that discursive institutionalism would suggest.

D. The Press Conference and its aftermath- a playground of power relations

I. The Conference Itself

The press conference held by the four justices of the Supreme Court on 11 January 2018 merits attention, at this juncture of the argument of this contribution. It is worth noting that the impact of the press conference and the contents of it, in the active news cycle of Indian media and active politics, was glaringly short lived. This lack of longevity of this narrative is important, as it sheds a light on the bigger question on the subjective performance of the judiciary, while positioning itself as an institution that guards the democracy.

The press conference, as underscored repeatedly by the justices, was made at 'individual' levels, that is, these four judges were not speaking for the institution as a whole. The

23 An idol/epitome of justice.

24 Justice.

25 The rules of living.

26 Lok Sabha, note 19.

contradiction, however, remains, for the rest of the nation, whose belief in an unbiased, independent Supreme Court was not only questioned by the senior-most judges of the institution themselves, but also because in the end, it was as if the "solution" to this problem was left in the hands of the "rest of the country", without any specifications.[27] What the press conference offered a playing ground for, in terms of rhetorical narrative, was the individual moral conflicts of the judges. The ways in which these moral conflicts, expressed in rather spiritual terms (for example, they stated that they do not want to appear as if they had "sold their spirits"), reflect on the Supreme Court as an institution and on the power dynamics between the government and the CJI can only be a matter of speculation. However, the rhetorical positioning of the justices and their narrative of exculpating themselves present one with the opportunity to look at the interesting politico-narrative turns of their statements.

Right at the outset, the press conference was shrouded in a lack of clarity. After stating that the motivation for the conference lay in the fact that the four judges had given a signed letter to the CJI for the execution of 'something', but the "thing was done in such a way that it left further doubts about the integrity of the institution."[28] Justice Chelameshwar then went on to state that this press conference, purportedly on the lack of independence and impartiality within the Supreme Court, was crucial because "the hallmark of a good democracy is an independent and impartial judge",[29] and then immediately clarified that "judge is symbolic here – it is the institution"[30] (sic). This was notably in contradiction to the judges' clarification, where Justice Chelameshwar again stated, in answer to a question, "we are not speaking for the rest of the court – we are speaking for ourselves."[31] Again, it is perhaps pertinent to reiterate, this paper is aware of the Realist institutional understanding of the positions of the judges, and that outside the court, they do not speak for the institution, only for themselves. The focal point, for a discursive analysis, by contrast, is not this Realist understanding of what the position or authority of the four individual justices is, but instead *on what they and their speeches and texts symbolically transmit as political narratives into the democratic arena of public discourse in India*. In that positioning, they cannot be simultaneously representative enough of the judiciary to warn the people of a malaise within, and also individual enough to not be confounded with the Supreme Court as an institution itself.

Another interesting narrative that repeated itself in the press conference was the distancing of the judges from the "political" people, who ostensibly are the professionally political members of society. Yet, for all the distancing, by entering a dialogue with the media and therefore with the people of the country, as it were, the judges did step into a conversa-

27 The media being a platform on which these discourses play out, it is intriguing that the judges have implied the existence of problems within their own institution while not suggesting any solutions.

28 ABP News, Full Press Conference: We don't want anyone to tell us that we sold off our spirit, https://www.youtube.com/watch?v=BcZAsRxPnJA, (last accessed on 26 November 2018).

29 ABP News, note 28.

30 ABP News, note 28.

31 ABP News, note 28.

tion that has very real, political consequences for the rest of the democracy. On being asked by the journalists about the details of certain statements, Justice Chelameshwar responded, "it is not a political meeting where we go into all this controversy."[32] When asked again by the media representatives present if this conference had anything to do with the case on the death of Justice Loya, the judges were non-committal and yet again, they stated, "we are not regulars, we are not running politics here."[33] Herein is a presupposition, which is also valid, that there are, in fact, the "regulars", the career politicians who would have otherwise had their everyday press conferences, where they do level insinuations, instead of which, the four justices were presenting the country with a warning, and an acquittal of themselves, from having had a role to play in the failure or impending crisis of the institution itself.

The words chosen by Justice Gogoi can be analysed here for equal measure of interest; he stated that this conference was simply to "communicate to the nation" to "take care of the institution and take care of the nation".[34] How a nation is to do that, given its "representatives" take it upon themselves to interpret this intervention by the judges as a signal to act upon the possibilities of impeaching the CJI, and how the judiciary is to then react to it, are matters that the subsequent sections deal with. However, when asked by the members of the press if the judges were suggesting that the CJI must indeed be impeached, they immediately replied, "we are not suggesting anything, let the nation decide."

Justice Gogoi further clarified that "it is a discharge of a debt to the nation that (had) brought (them there), and (they had) discharged that debt to the nation, by telling (the people), what is what"[35] (sic). They stated over and over again, as Justice Gogoi put it, "you may construe I as our responsibility on to the nation".[36]

Finally, one more statement to note, for our illustration in this paper on the performative politics of the judiciary as an institution, is that when asked how this conference affected the work or position of the justices themselves, and what they would do, as a next step, following from all the complaints they had levelled against the institution of the Supreme Court, that is, what the next step for them would be, they replied rather nonchalantly, "what is the next step? […] we will go to court on Monday",[37] to the tune of laughter from the audience. In light of the question of whether the Supreme Court of India is indeed in a crisis or not, this tendency of the judiciary to recede into a sense of "normalcy" at work, as both a sign of its resilience and its crisis.

The implication, thus, in the repeated utterance of the judges that they have paid their "debt to the nation", is that democracy, if it is to be saved, has to be done by the rest of the

32 ABP News, note 28.
33 ABP News, note 28.
34 ABP News, note 28.
35 ABP News, note 28.
36 ABP News, note 28.
37 ABP News, note 28.

nation, not by the judiciary, which will recede, post the press conference, as it actually has, into itself, and resume its function as an interpreter and guardian of the constitution. They stated in the press conference that they do not want to go down in history as judges that stayed silent and let the institution of the judiciary and the democracy crumble. This is a significant assertion that merits worry for individuals interested in the preservation of democracy, and legitimately makes one wonder if the Supreme Court as an institution is indeed in crisis.

II. The Media as a Playground

The implications of the press conference were substantial, and yet not that long-lasting in the news-cycle. The media, among other things, is also a representative of a market demand for what counts as news in the country. It would not be a legitimate assessment to call this entire intervention tokenistic, but at the same time, it does point towards something that this paper's theoretical approach of discursive institutionalism recognises as the judiciary's referencing of itself as an institution.

From the self-positioning of the four judges at the press conference, the implication is that the media plays the role of the conduit, between the Supreme Court as a closed off institution, and the "rest of the nation". This brings to the foreground the connected premise of how political narratives travel in a digitalised democracy. Assuming the different forms of media constitute the networks through which these narratives travel, it is pertinent to note that, speaking as "individuals" and not representatives of the Supreme Court, the judges, instead of taking their concerns about the possible crisis of the Supreme Court or the democracy to the other government institutions, chose to bring it to *the least institutionalised of the "pillars of democracy", the fourth one, that is, the press.*

III. The text and its aftermath

While this contribution delves into an attempted interpretation of the incidents that followed the press conference in a subsequent section, this section looks preliminarily at the text of the impeachment motion that, following from the complaints raised in the text of the four judges, the 64 MPs (all in the opposition) handed in to the Rajya Sabha, and the text following the above, in which the Speaker of the Upper House, Venkaiah Naidu, dismissed the motion. Both texts, read at tandem, provide yet another glimpse into the performed relationship between the institutions. On 20 April 2018, three months after the press conference, citing the lack of any action taken from within the judiciary on the complaints of the four judges, 64 MPs handed in a text moving for the impeachment of the CJI Deepak Mishra. Citing the alleged indiscretions of the CJI as mentioned by the four judges' statement, the impeachment motion by the MPs focused on the Parliament's responsibility to push this issue forward as the legitimate representatives of the people. They said, "When the judges of the Supreme Court themselves believe that the judiciary's independence is un-

der threat and democracy in peril, alluding to the functioning of the office of the Chief Justice of India, should the nation stand still and do nothing? Should the people of this country allow the institution to diminish and not protect it both from within and without? […] As representatives of the people, we are entitled to hold the Chief Justice accountable just as we are accountable to the people. The majesty of the law is more important than the majesty of any office."[38]

Venkaiah Naidu, who subsequently dismissed the motion, cited three primary reasons: first, that the Parliamentarians seem to only allege misbehaviour, none of which was "proven", i.e, substantiated with evidence,[39] which makes their accusations unsubstantiated; second, that this consequently, if not dismissed, would shake the confidence of the people in the independence of the judiciary; and third, because in divulging the contents of the motion to the media, the Parliamentarians had broken rules of parliamentary conduct and rendered their own process faulty. Interestingly, (as this ties up with the argument on the self-referentiality of the Supreme Court), Naidu's statement, in talking about the need for the people to maintain their faith in the judiciary, refers to the Supreme Court's own statement in a judgement. Naidu cites the Case (2002) 3 SCC 343, In Re: Arundhati Roy, and quotes the judgement, where it says, "If such confidence is shaken or broken, the confidence of the common man in the institution of judiciary and democratic set-up is likely to be eroded which, if not checked, is sure to be disastrous for the society itself."[40] Finally, citing the conventions in the Handbook for Members of Rajya Sabha, Naidu argued that by conduction a press conference immediately after the notice of the motion had been submitted to him, the Parliamentary decorum had been violated. His statement stated, "Members addressed a press conference and shared the statements contained in the Notice which included some still unsubstantiated charges against the CJI. This act of Members of discussing the conduct of the CJI in the press is against propriety and parliamentary decorum as it denigrates the institution of CJI."[41] The rule he cites is actually the section 2.2 of the Handbook, titled "Parliamentary *Customs and Conventions*" (emphasis added), which, in part viii of the section states, "A notice for raising a matter in the House should not be given publicity by any Member or other person until it has been admitted by the Chairman and circulated to Members. A Member should not raise the issue of a notice given by him and pending con-

38 Firstpost, CJI impeachment motion: Full text of the statement issued by Congress and six other Opposition Parties, https://www.firstpost.com/india/cji-impeachment-motion-full-text-of-the-statement-issued-by-congress-and-six-other-opposition-parties-4439531.html (last accessed on 26 November 2018).

39 Firstpost, Full text: Venkaiah Naidu rejects impeachment motion against CJI Dipak Misra, says 'Parliamentary rules have been disregarded', https://www.firstpost.com/india/full-text-venkaiah-naidu-rejects-impeachment-motion-against-cji-dipak-misra-says-parliamentary-rules-have-been-disregarded-4442251.html (last accessed on 26 November 2018).

40 In Re: Arundhati Roy. case (2002) 3 SCC 343, can be found here: https://indiankanoon.org/doc/505614/ (last accessed on 26 November 2018), cf. Firstpost, note 38.

41 Firstpost, note 38.

sideration of the Chairman."[42] This paper attempts to interpret the discursive relevance of these statements in the following section.

IV. The Insulation of the Supreme Court: An Interpretation

Abhinav Chandrachud has looked at two kinds of insulations of the Supreme Court of India, the 'democratic', and the 'political'. The Supreme Court of India, as India's constitutional court, conducts abstract reviews that are in "public interest",[43] and issues guidelines on policy issues from time to time.[44] Chandrachud observes that the roles it takes on, and the heavy load of cases that the Supreme Court actually presides over, end up making it more of an appellate court than a supreme constitutional court in action,[45] and this is a crucial feature in the operationalizing of the democratic and political insulation of the Supreme Court as an institution from the rest of the branches of the government,[46] he suggests.

This institutional insulation of the Supreme Court is operationalized through various means, Chandrachud observes, primary among which is its "ability to chill or debilitate free speech".[47] One example of such insulation, as Chandrachud terms it, is visible, interestingly, in the judgement that Naidu's statement actually cites from. In the case against Arundhati Roy in 2002, even though later analysis have stated how the judgement itself was biased and erroneous on multiple counts,[48] Roy was convicted and charged a penalty, even though the Contempt of Courts Act 1971 states that such a verdict can arise only if the "contempt" can be seen as directly hampering the course of due justice, which was not proven in this case.[49] The contempt law is sometimes upheld by commentators who have argued that since the judiciary as in institution cannot defend itself or its decisions in a press conference, unlike other institutions that can, it requires this mechanism to hold its reputation.[50] In the end, though, all its insulation, even though it may provide the judiciary with the independence it needs to function in a democracy, unchecked, "threatens to render it a self-reinforcing institution".[51]

This is not to disregard the pivotal role played by the Supreme Court of India as an active political actor. Quite to the contrary, using the lens of discursive institutionalism as a

42 Rajya Sabha Secretariat, Handbook for Members of the Rajya Sabha, New Delhi 2010, p. 69.

43 *Chandrachud*, note 18, p. 39.

44 *Chandrachud*, note 18, p. 39.

45 *Chandrachud*, note 18, p. 39.

46 *Chandrachud*, note 18, p. 39.

47 *Chandrachud*, note 18, p. 39.

48 Legally India, A critical look at the 2002 Re: Arundhati Roy decision and modern-day contempt laws, https://www.legallyindia.com/views/entry/a-critical-look-at-re-arundhati-roy (last accessed on 26 November 2018).

49 Legally India, note 48.

50 *Chandrachud*, note 18, p. 40.

51 *Chandrachud*, note 18, p. 40.

complimentary approach to traditional institutionalism (wherein the Supreme Court operates a strong political actor), it is possible to recognize a traditionalist position and a more performative, discursive position of the institution. Thus, the contents of the press conference may have had implications of whether something within the institution needs reforms. But the actual having of the press conference itself worked as a positioning of a discourse and performed a communicative function for the Supreme Court as an institution. It allowed the judges to position themselves as unbiased, while at the same time distancing themselves from the more 'professional' politics of polemics.

E. Self Referentiality: A Conclusion – What is, after all, the crisis of the Supreme Court?

The final part of this paper would like to tie up the many arguments to understand if the Supreme Court of India is (at all) in a crisis. As a theory, discursive institutionalism tells us that a key to understanding how political institutions bring about change is to also focus on how institutions communicate about themselves. This lens helps us decode the rhetorical positioning and performance of an institution to render itself meaningful, by the judiciary, and by the Parliament, and through that, it helps us understand how the Parliament politically narrativizes the Supreme Court, not just in traditional but in *professionally strategic* ways. What this paper has also attempted to elucidate is the ways in which informal power relations between the two institutions have historically determined their reading of each other. With regard to this, this, it is not out of the ordinary that the impeachment motion was denied by Venkaiah Naidu. Once already in 1993, when the Indian National Congress' government was in power, another impeachment motion against Justice V. Ramaswamy, when 196 Opposition Members of the Parliament voted in favour of impeachment, and yet, the motion was denied, in spite of a report from the inquiry commission that concluded that Justice Ramaswamy was guilty of the charges of corruption.[52] Thus, in that case as well as the current one, the active politics of power relations between the Parliament and the Judiciary determined the outcome of the motion. Interestingly enough, Kapil Sibal, who was in the current motion one of the people advocating for the impeachment, the counsel for Justice Ramaswamy in the 1993 motion, and spoke eloquently on the floor of the House of the Lok Sabha, dismissing the merits of the impeachment motion.[53] In light of all above, what actually is notable is how quickly the entire issue of the press conference and all the concerns it raised about the state of the Supreme Court as an institution and the state of the democracy in general, simply receded to non-news.

Therefore, it is once again worth decoding the rhetorical insistence of the judges, that they are, unlike the "regulars", above "political controversies". Once one enters the political

52 Frontline, A historic non-impeachment An all-round system failure, http://bharatiyas.in/cjarold/files/cover_story_ramaswami.pdf (last accessed on 26 Novemver 2018).

53 Frontline, note 52.

rhetoric network in the manner that the press conference allowed, and thus inserted the Supreme Court into the active political conversation in the country, is it possible to remain "apolitical", as it were? The Supreme Court's ability to thus, raise issues regarding its institutional failure, not make any recommendations of reform, dismiss any attempt at reform as intents of maligning the institution, simultaneously, thus, raises fundamental questions regarding the possibilities of reforming an institution that has historically insulated itself through substantial self-referencing and receding into itself for rendering meaningfulness to its own institution.

Thus, in the context of the events that have unfolded in 2018, the contribution has investigated the two institutions, the Supreme Court and the Parliament of India, in order to understand if there indeed is an institutional crisis, and if there is, what it is. With a context provided to how the Parliament has, in performing its rhetoric, approached the Supreme Court as an institution, a reading of the events in 2018 has shown, thus, that the way in which the two institutions have acted and responded to each other, is logically consistent, through the lens of discursive institutionalism. The Supreme Court has maintained its exclusivity, and simultaneously its top-most members have arranged a press conference which one could construe as a dire declaration of fissures within the institution. Immediately after, the narrative has receded back into the institution, with the political attempt by "representatives" of the democracy to act on it, dismissed. The theoretical approach of discursive institutionalism would suggest two things here. First, that within the ambit of how these institutions perform their identities, this had been nothing out of the ordinary. Second, it points us towards the actual possible crisis within the institution, not of the surface problem performed within a digital democracy, quickly circulating information media, but a deeper issue: of its self-referentiality. In itself, this is also the strength of the Supreme Court, shielding it from the polarising political conversations of changing governments. However, in the context of recent larger, polarised political narrative-shifts in the country, it is symptomatic of a slower but consistent crisis within the Supreme Court as an institution. The study of the rhetoric of institutions, thus, is an important approach (and yet underused in India) to tap into deeper fissures that have the dangerous potential to culminate in a crisis, not just of the Supreme Court, but of the democracy itself.