

Crisis of Credibility of the Supreme Court: A symptom of grave Constitutional instability

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Abstract

The people of our country apparently continue to have faith in our judges and the justice delivery system but credibility of the judiciary is at stake. The time is now ripe for reforming the process of judicial appointments to ensure that the judiciary is accountable to the public at large, while at the same time being free from any interference. Only then can the judiciary live up to its billing, in the words of Justice Krishna Iyer, of acting “as a bulwark against executive excesses and misuse of power by the executive.” A strong will can still take our judiciary out of the morass. , the situation is not wholly beyond repair.

Key words: Credibility, constitutional, Independence, judicial review, neutrality safeguard, Supreme court,

The objectives of the research paper is to emphasis the importance of the Supreme Court of India in our constitutional system as intended by the framers of the constitution, and evaluate its role as a guardian and protector of the constitution. In course of time people faith in its integrity and credibility has not been up to their expectations. Therefore several judgments have been subjected to criticism. This unhealthy trend is not conducive for our democratic and constitutional system.

We have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Courts independent of the influence of the executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence.¹ There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself And the question is how these two objects could be secured² An independent judiciary is necessary for a free society and a constitutional democracy. It ensures the rule of law and realization of human rights and also the prosperity and stability of a society.³

The independence of the judiciary is normally assured through the constitution but it may also be assured through legislation, conventions, and other suitable norms and practices. Following the Constitution of the United States, almost all constitutions lay down at least the foundations, if not the entire edifices, of an independent judiciary. The constitutions or the foundational laws on judiciary are, however, only the starting point in the process of securing judicial independence. Ultimately the independence of the judiciary depends on the favorable environment created and backed by all state organs, including the judiciary and the public opinion. The independence of the judiciary also needs to be constantly guarded against the unexpected events and changing social, political, and economic conditions.⁴ it is too fragile to be left unguarded.⁵

The people of our country apparently continue to have faith in our judges and the justice delivery system—and if they did not, there would be chaos. But unfortunately, the faith has been shaken by events of the last couple of years and unless we are rescued from the quicksand through very quick corrective measures, all of us will find ourselves in the sinkhole.⁶

The Supreme Court of India since the adoption of constitution undeniably has played a major role in protecting and sustaining democratic governance and the rule of law in India; and, second, its jurisprudence is so rich, so varied, and its institutional history so dramatic, that it can justly lay claim to being one of the most interesting and important constitutional courts in the world. The Supreme Court of India has, over the seventy years, played a central role in sustaining democratic institutions and the rule of law for almost a quarter of the world’s population.⁷ Against enormous odds, the Court has developed a coherent philosophy of textual interpretation,⁸ maintained, even enhanced, judicial independence in the areas of judicial appointments and transfers;⁹ preserved judicial review against sustained attack, even to the point of declaring several constitutional amendments unconstitutional;¹⁰ protected fundamental rights of speech, equality,

religious freedom, and personal liberty, although it has sustained India's repeated resort to preventive detention;¹¹ and initiated a dramatic experiment, known as Public Interest Litigation (PIL), in an effort to make the rule of law a reality for the weak.¹²

The Supreme Court of India grew considerably in power and stature during the two decades since 1990, earning the epithet "the most powerful court in the world". During this period, the Supreme Court conferred on itself the primacy in judicial appointments through the invented system of 'collegium', and substantially expanded its judicial review powers to intervene in several issues which were traditionally reserved for the executive. The weapon of "continuing mandamus" was sharpened by the Court, using which it passed orders and formulated guidelines on issues of social welfare, environment protection, electoral reforms etc.

The growth in power of the apex court was in tune with the corresponding decline in the assertiveness of central executive, which was mostly stitched together by hotchpotch alliances. The apex court emerged as the last bastion of hope in the eyes of public, who were disillusioned with political executive. The judiciary was seen as playing an activist role to compensate the inaction of the executive, which was perceived to be weak, compromised and corrupt.

Questionable verdicts in cases involving political stakes

The pre-2014 apex court was not hesitant in going against the Central executive in matters involving high political stakes. This was evident in the 2G licenses cancellation cases and coal scam cases. Though the coal-gate case verdict was delivered in September 2014 after the coming of NDA government, its hearings took place in the last leg of UPA-II, during which the court passed several oral remarks (including the now famous "CBI is caged parrot" remark), badly stinging the government. The interventions of the court drew a lot of cheers from the media and public, which hailed judiciary as a crusader against corruption and misgovernance. But post-2014, the SC presented a meeker version when it came to dealing with cases which could prick the political interests of the ruling party. The verdicts in politically charged cases such as Sahara-Birla, Loya, Bhima-Koregaon, Rafale, Aadhaar etc have invited a lot of criticism that when it comes to taking on the system, the Court acts hesitant.

Executive interference in judicial administration?

Another disturbing concern is that of the revelations by judges regarding executive interference in administrative matters of judiciary such as appointment and constitution of benches. This was hinted on January 12, 2018. Justice Chelameswar, he said that administration of justice was not in order and that "many things which are less than desirable have happened in the last three months".¹³ More clarity on this issue was provided by Justice Kurian Joseph, who in a post-retirement interview to *Times of India* said that there was "outside influence" in judiciary "Someone from outside was controlling the CJI (former CJI Dipak Misra)."¹⁴ Justice Chelameswar has also made similar comments, while calling for a full court meeting to discuss government interference in appointments.

The Supreme Court has witnessed some extraordinary developments over the handling of alleged corruption by a retired high court judge.

There have been open differences between its most senior judges over petitions seeking an independent investigation into corruption charges involving a blacklisted medical college. Federal investigators had accused retired judge Ishrat Masroor Qudusi - who was arrested last September and is now on bail - of trying to secure courts orders to reopen the college. The top court also saw stormy exchanges between one petitioner - Prashant Bhushan, himself a prominent lawyer - and Chief Justice Dipak Misra, after the former openly charged the senior judge with conflict of interest. It all brought into sharp relief judicial indiscipline and growing mistrust among India's top judges.

This is not good news for one of the world's most powerful courts. In an unprecedented chorus of criticism, commentators said last week's events revealed " deep distrust at the top " of the court, raised " very serious question about its future " and underlined the collective failure of judges and lawyers to "treat the faith of the people in the institution with the respect it deserves".

Pratap Bhanu Mehta, a leading academic and columnist, believes the top court is " fascinates worst crisis of credibility since the emergency", the darkest hour in independent India's history when civil liberties were suspended and the court buckled under pressure from then prime minister Indira Gandhi's government. "During the Emergency the judges were browbeaten and weakened by the government. What we are seeing now is an internal crisis," Alok Prasanna Kumar, a fellow of Vidhi Legal Policy, a Bangalore-based independent legal policy advisory group, told me. "Judges, who are supposed to be protecting the institution, don't seem to trust each other. This is the hollowing out of a great institution." India's Supreme Court is the final court of appeal, has constitutional powers and is a significant public institution. It is also one of the busiest: in 2015, it disposed off more than 47,000 cases, but still had a backlog of nearly 60,000 cases until February 2014

Fierce scrutiny

Many say the crisis in the top court mirrors the declining faith of the people in the justice system. Many Indians don't see judges as neutral and honest any more. Hearings can go on for years or even decades - there are some 30 million cases pending in district courts alone. The number of civil cases filed in all courts has steadily declined over the last decade even as India's population and economy have grown. More people appear to be settling their disputes through their elected lawmakers or local police.

Over the last decade, say experts, even the higher courts have begun to look flawed. "Lower courts were compromised, but the high courts and Supreme Court were seen to be above suspicion. No longer. That's the scary part," says Shylashri Shankar, a fellow with the Delhi-based Centre for Policy Research and author of a book on the Supreme Court. As the top court has come under fierce scrutiny by the media and independent legal reforms groups, the public backlash against some of its judgments has been rising. In the past year alone, the court has been in the news for all the wrong reasons.

Prestige of the judiciary is dependent on public trust and confidence.

This year has been an annus horribilis. A resolution of the Collegium taken last year was superseded without much ado; a complaint of sexual harassment was made by a staffer in the Supreme Court against the then Chief Justice of India who held a surprise sitting on a non-working day, slammed the staffer, protested his innocence (The chief doth protest too much, methinks) and yet the records of the Supreme Court do not show his presence in court that day! The credibility of the Supreme Court hit rock bottom on that day and it continued to scrape the gravel with the emergence of a sealed cover procedure completely unknown to our jurisprudence, whereby law officers of the government handed over 'secret' documents to the court in a sealed cover without claiming privilege under the Evidence Act.

Political pressures

There's also much chatter about "unwritten" regional and gender quotas in appointment of top judges, and an alleged "cozy relationship" between the judges and the lawyers of the court. Judges, say many, are also vulnerable to political pressures because many take up prestigious government jobs after retirement. One reason could be their relatively modest pay: salaries of judges have been hiked only four times in the past 67 years and even then at a lower rate than the salaries of lawmakers. At same time, there is little doubt that India's top judges are overworked. When Dr Shankar was researching her book on the Supreme Court, she found a single high court judge was hearing some 100 cases - including adjournments - every day. A serving high court judge told a colleague recently that he had heard 300 cases in a single day. A Supreme Court judge, during his tenure over four to six years, was hearing some 6,000 cases alone. Many feel that the relatively short tenures of the judges - less than four years on an average for a top court judge and about two years for the chief justice - means that they don't serve long enough or gain a "sense of ownership" of the court and provide robust leadership and continuity. "It is not possible," says Alok Prasanna Kumar, "to take charge of an institution so quickly and easily."

Divided court

The court's judgments have been a mix of the liberal and the conservative. It controversially outlawed gay sex, but also recognized transgender people as third gender. It whimsically ruled that national anthem should be played in cinema theatres, but, in a landmark judgment, also ruled that Citizens s' have a fundamental right to privacy. In the end, many say,

the recent developments point to a divided court and tension about the judiciary's role in a democracy where other institutions have become corroded. The challenge is to ensure that the judiciary remains accountable to the principles of democracy, Dr Shankar says. "Judiciary," she says, "cannot be above democracy."

Nov. 10, 2017, witnessed a gross and unconscionable abuse of power by the chief justice of India, justice Dipak Misra, unparalleled in the history of the supreme court of India. It is, one of the lowest points in the history of an institution that ordinary citizens of India look up to. The credibility of the institution, built up over several decades and already under stress in the last few years, crumbled in two hours of high drama. It is important to remember how we got here, why the chief justice of India's actions is so unpardonable, and why things may never be the same again. Let us see the background to understand it fully. The story really starts with the Central Bureau of Investigation's (CBI) arrest of a *hawala* operator who led them eventually to a retired judge of the Orissa high court, IM Qudusi, who, it was claimed, had taken money from a medical college with a promise to help them get a favourable judgment from the supreme court on the question of permissions to admit students for the 2017-18 academic year from the Medical Council of India.

The Campaign for Judicial Accountability and Reforms led by Prashant Bhushan and, later, Kamini Jaiswal, filed a petition asking for a Supreme Court monitored supervision of this ongoing investigation into possible judicial corruption. On Thursday, a bench led by justice J Chelameswar directed that a constitution bench be formed of five senior-most judges to deal with Jaiswal's petition. The order said that the bench should consist of the five senior-most judges of the Supreme Court. But this order was nullified by a fresh constitution bench led by Misra and a new bench set up by him. The medical college in question, run by Prasad Education Trust, had approached the Supreme Court earlier this year in a case which was heard by a bench of Misra, Justice Amitava Roy, and Justice AM Khanwilkar. It cannot be missed that both Justices Roy and Khanwilkar were also on the "constitution bench" that Misra set up earlier.

CJI Ranjan Gogoi's term in the Supreme Court has further declined the top court's credibility, said Alok Prasanna a senior resident fellow at Vidhi Centre for Legal Policy. He said, three significant examples illustrate this point. The first was the sexual harassment case against him by a Supreme Court staffer; the case was buried without following any proper procedure. The second major instance of his failure was in the context of the appointments made to the Supreme Court and the high courts where it seemed that the collegium was simply refusing to stand up to the central government and effectively giving the Modi government a veto over the appointments process. Controversies relating to the transfer of Justice Akil Kureshi of the Gujarat High Court and Justice V.K. Tahilramani of the Madras High Court only showed the CJI Gogoi-led Collegiums in poor light. The third instance relates to the impression created that all sensitive matters in the Supreme Court concerning the central government will only be heard by a bench involving Justice Arun Mishra. Ironically, this was precisely the reason why then-Supreme Court judge Gogoi and three of his colleagues had held a press conference in January 2018, and it has been most disappointing to see that CJI Gogoi continued to undertake the same practices that brought disrepute to the Supreme Court. The NRC and the Ayodhya verdicts and the extraordinary delays in hearing important cases such as the electoral bonds and Article 370 have all contributed to the loss of credibility of the Supreme Court.¹⁵

Justice Markandey Katju, a former judge of the Supreme Court alleged that three former Chief Instances (among several others): There were five Supreme Court justices on the Ayodhya bench. It was of course expected of Gogoi to have done as he was told by the Union government. But how could the other four justices have agreed to such an outrageous, scandalous and opprobrious verdict? Where were the inner voices and scruples of these four justices? Or had the justices handed them over to Gogoi. Why then did the other justices surrender their consciences to Gogoi?"

The former SC judge goes on to list a number of cases in which Gogoi and his fellow justices repeatedly failed their essential duties as members of the highest court in the country and their responsibility to protect the constitution and the fundamental rights of citizens. Writing about the appointment of Justice Akil Kureshi and how the BJP government manipulated the SC to prevent the Muslim judge from becoming the chief justice of the Madhya Pradesh High Court, Katju asks: "Why did the four members of the Supreme Court Collegium go along with Gogoi and succumb before the BJP government, which did not want a Muslim chief justice in the larger Madhya Pradesh High Court, and instead sent him to the much smaller Tripura High Court? Gogoi was of course expected to toe the government's line, but what about the other four justices in the Collegium? Where were their consciences?"¹⁶ Asok Kumar Gogoi delivered a big big victory to Modi when he ruled on Babri Masjid, The court ended up awarding the land to a Hindu litigant. It was a judgment by Gogoi that also cleared the Modi government in allegations of corruption in a defense deal involving the purchase of Rafale fighter jets. The administration was accused of bypassing procedures and compromising national security to clear an arms deal that

benefited an Indian billionaire. Now Gogoi has been rewarded with a place in the Indian Parliament, putting a spotlight on the “unholy nexus between political power and the Indian judiciary”.¹⁷

It is clear India’s Supreme Court has been politicized and has become pliant toward the current administration. Recently, Justice Arun Mishra who has also ruled in favor of Modi, hailed the prime minister as a “genius, an internationally acclaimed visionary who thought globally and acted locally.”¹⁸ The comment was widely criticized, including by the Supreme Court Bar Association. The hall of shame of the Indian judiciary in recent times is sullied with brazen cases of human rights violations. In February, when Delhi saw horrifying communal carnage that led to the loss of innocent 53 lives, arson and hundreds injured, The judge who delivered the order was transferred overnight. The same Supreme Court once called Modi a modern-day Nero for looking the other way as innocent women and children were burning in the 2002 Gujarat riot.

Ganguly, another retired Supreme Court Judge said that the Ram Janamabhoomi-Babri Masjid judgment had created a doubt in his mind and said that he was very disturbed. He also stated that, “Most people are not going to say these things this clearly,” reported *Telegraph* “Minorities have seen for generations that there was a masjid there. It was demolished. On top of that, a temple is being built, according to the judgment of the Supreme Court. This has raised a doubt in my mind.... As a student of the Constitution, it is a little difficult for me to accept it,” said Justice Ganguly, “I am perplexed and disturbed. The constitution gives the right to everyone and justice has to be given to everyone but in this case the justice has not been done to minorities,”²⁰ Justice AK Ganguly said. On the nomination to the Upper House of the Parliament by the President, Justice Gogoi received the most shocking verbal assault from none other than the controversial former Supreme Court Judge Markandey Katju, who responded fiercely to the nomination as he referred the former Chief Justice as ‘shameless’, ‘disgraceful’ and a ‘sexual pervert’.²¹

Considering the serious allegations of sexual misconduct made recently against two retired Supreme Court judges, coupled with allegations made by Justice Katju, the very credibility of the judiciary is now at stake. The time is now ripe for reforming the process of judicial appointments to ensure that the judiciary is accountable to the public at large, while at the same time being free from any interference. Only then can the judiciary live up to its billing, in the words of Justice Krishna Iyer, of acting “as a bulwark against executive excesses and misuse of power by the executive.” A strong will can still take our judiciary out of the morass. Rip Van Winkleism has left a big question mark on the faith and public trust in the functioning and independence of the judiciary, but the situation is not wholly beyond repair. It takes one man and a few moments to destroy an institution—remember Samson and the temple of Dagon, but it takes several people several years to build an institution. Will they work together to rebuild the Supreme Court or restore the public confidence and trust enjoyed by the judiciary – the last bastion

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