

## WHEN JUDICIARY FORFEITS THE TRUST OF THE CITIZENRY

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Human beings are particularly social creatures. They desperately require socialisation and cannot prevent the inevitable frictions that stem out of it. The birth of these frictions gives rise to the need of individuals and institutions that can resolve these frictions. Due to the nature and role of these institutions, we tend to attach with them virtues of impartiality, fortitude, moral courage and features like stability, fairness, independence.

In India, the quantum of trust reposed in the judiciary and judges is exponentially higher than that which is reposed in any other institution. The immense credence that the judiciary has to its name, is manifestly visible in the Constitution of the country. A few examples of this would be Article 142<sup>3</sup> that vests the Supreme Court with the power “to pass such decree or make such order as is necessary for doing complete justice”, Article 13 (2)<sup>4</sup> read with Article 32<sup>5</sup> and 226<sup>6</sup> of the Indian Constitution that empowers the Supreme Court and High Courts to invalidate all the laws that are in contravention with the Fundamental Rights, the thirteen bench judgement rendered in *Keshavananda Bharati v. State of Kerala*<sup>7</sup> that empowered the judiciary to review laws passed by the legislature and also made this power of review immune from any alterations by the legislature. All these factors establish that the judges and the judiciary are entrusted with vital constitutional and public functions, due to which the degree of moral rectitude associated with them is extremely high.

However, the assumptions ingrained in the minds of the citizens, due to which they feel that the judges are replete with virtues and are immune from biases or political pressures, are fact-free. Such assumptions have been brutally debunked in various instances when judges of the Collegium have made appointments based on nepotism, when the collegium has made unfair transfers under political pressures, when judges have penned down politically motivated

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<sup>3</sup> Art.142, Constitution of India.

<sup>4</sup> Art.13(2), Constitution of India.

<sup>5</sup> Art.32, Constitution of India.

<sup>6</sup> Art.226, Constitution of India.

<sup>7</sup> *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

judgements and most notably when these individuals on the bench have accepted post-retirement appointments by the executive. The nomination of former Chief Justice of India, Justice Ranjan Gogoi has been the latest addition to the list of these judges.<sup>8</sup>

As has been argued<sup>9</sup> by many jurists and commentators, this appointment has threatened the very sanctity and efficacy of the doctrine of separation of powers which finds reference in Article 50<sup>10</sup> of the Constitution. The doctrine is indispensable for curbing the abuse of executive power, preserving the freedom of the judiciary and ensuring the efficient functioning of the three organs of the State.<sup>11</sup> The fear of inefficiency resulting from the blurring demarcations between the executive and the judiciary is only one side of the story.

Given that right to life and liberty entails dignified existence and not mere animal existence<sup>12</sup>, it becomes important to note the views of the citizens about the judiciary and whether in the current scenario the appointment of Justice Gogoi would blemish or embellish this viewpoint. How such actions on the part of judges negatively affect individual rights of life and liberty also needs to be considered.

With regard to the viewpoint held by the citizenry, as has been argued initially, a high degree of moral rectitude is expected of our judges. According to Justice Chandrachud, judges and their judgements are trusted for being impartial irrespective of their background because people generally view the judiciary as a bastion of justice and this perception leads to a transference of trust to all the members of the judiciary.<sup>13</sup> However, immediate appointments of judges after they retire casts a shadow of doubt on the justness of the judgements rendered by them. Irrespective of their merits, people presume these pre-retirement decisions to be politically coloured or aimed at securing favours from the executive. This happens because as per the judicially accepted test of

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<sup>8</sup> Govt. of India, Ministry of Home Affairs, F. No. 15/2/2018-M & G (March 16, 2020).

<sup>9</sup> *Kurian Joseph hits out at Ranjan Gogoi for taking Rajya Sabha route*, THE ECONOMIC TIMES, (March 18, 2020); [https://economictimes.indiatimes.com/news/politics-and-nation/kurian-joseph-hits-out-at-ranjan-gogoi-for-taking-rajya-sabha-route/articleshow/74684534.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/politics-and-nation/kurian-joseph-hits-out-at-ranjan-gogoi-for-taking-rajya-sabha-route/articleshow/74684534.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

<sup>10</sup> Art.50, Constitution of India.

<sup>11</sup> *Samanwaya Rautray, Kurian Joseph hits out at Ranjan Gogoi for taking Rajya Sabha route*, THE ECONOMIC TIMES (March 18, 2020).

<sup>12</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SCC 597.

<sup>13</sup> *Rangin Pallav Tripathi, Don't judges need the trust of the people more than people need to trust judges*, THE WIRE (October 7, 2019); <https://thewire.in/law/dont-judges-need-the-trust-of-people-more-than-people-need-to-trust-judges>.

bias which was laid down in the case of *Rattanlal Sharma v. Managing Committee and others*<sup>14</sup>, the presumption of bias is stronger in case of the judiciary. The existence of actual bias is not necessary and the mere presumption of bias, which is founded on grounds that are not very improbable or unreasonable, is enough to presume a bias.

Apart from the attack on the sanctity of judiciary and the resulting loss of public trust, the people who view the judiciary as a reliable adjudicator and custodian of their rights may now opt for extra-judicial means, which might not abide by the established Constitutional principles or ideals. Vesting adjudicatory powers with Khap panchayats that are known for not following principles of equality or secularism<sup>15</sup> and not following the due process prescribed in the Constitution, is one instance of such public behaviour which stems from lack of trust in the judiciary. Increased instances of people taking matters into their own hands, mobocracy, the public lynching of alleged kidnappers<sup>16</sup> or beef eaters<sup>17</sup> is another such instance. Thus, it can be concluded that such a situation where citizenry loses faith in the judiciary is extremely undesirable and can lead us to a state of utter lawlessness and instability.

Article 32 and 226 of the Constitution empower the Supreme Court and the High Courts to defend the fundamental rights of the individuals. Likewise, as per the ruling in *Sidheshwar Sahakari Sakharkarkhana Ltd. V. Union of India*,<sup>18</sup> the judiciary is vested with the power to review the administrative decisions of the government. All this indicates that the judiciary plays a significant role in adjudicating disputes between the State and the individual. This accounts for nearly 46% of the total litigation.<sup>19</sup> Thus, the only remedy available to an individual when they are wronged by an executive or an administrative action is the judiciary. But when the judiciary sheds its virtue of impartiality, the probability of reaching a pro-executive outcome increases and the

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<sup>14</sup> *Rattanlal Sharma v. Managing Committee and others*, AIR 1993 SCC 2155.

<sup>15</sup> *Illegal for khaps to stall marriages between adults: Supreme Court*, THE ECONOMIC TIMES, (March 18, 2018); <https://economictimes.indiatimes.com/news/politics-and-nation/khap-interference-in-marriages-absolutely-illegal-sc/articleshow/63477332.cms?from=mdr>.

<sup>16</sup> *India's Supreme Court warns of 'mobocracy', urges government to pass anti-lynching law after deadly attacks*, THE WASHINGTON POST, (July 17, 2018); [https://www.washingtonpost.com/world/asia\\_pacific/mobocracy-cannot-be-permitted-indias-supreme-court-cracks-down-on-social-media-fueled-lynchings/2018/07/17/f50d89a3-b198-4830-9f7f-4823f8127f0a\\_story.html](https://www.washingtonpost.com/world/asia_pacific/mobocracy-cannot-be-permitted-indias-supreme-court-cracks-down-on-social-media-fueled-lynchings/2018/07/17/f50d89a3-b198-4830-9f7f-4823f8127f0a_story.html).

<sup>17</sup> *Will Modi stop India's cow terrorists from killing Muslims?*, THE WASHINGTON POST, (July 25, 2018); <https://www.washingtonpost.com/news/global-opinions/wp/2018/07/24/will-modi-stop-indias-cow-terrorists-from-killing-muslims/>.

<sup>18</sup> *Sidheshwar Sahakari Sakharkarkhana Ltd. V. Union of India*, AIR 1999 SCC 5866.

<sup>19</sup> Department of Justice, *Active plan to reduce Government Litigation*, 2017, 2.

rights of individuals are detrimentally affected. The issue then becomes, which court can an individual approach apart from these pro-executive courts? This “pro-executivenss” of the judiciary and its impact on individual rights becomes quite apparent when Justice Gogoi, the then CJI under the PIL powers, took over the process of National Register of Citizens and thereafter, decided the deadlines, procedures and documents necessary for the NRC<sup>20</sup>. The question of the constitutionality of NRC is a separate issue, however, the very fact that the former CJI played an emphatic role in a purely administrative and executive action that had the potential to affect the substantive rights of individuals, speaks volumes about his pro-executive stance. Another such instance of probable collusion between the judiciary and the executive was seen when Justice Gogoi rejected Habeas Corpus petitions filed by politicians and students before the Supreme Court after the Kashmir lockdown. The unfortunate fact is that he is not the only one to accept such a political appointment, other eminent justices like P. Sathasivam J., Ranganath Mishra J., AK Goel J. and so on have also been guilty of the same in the past. This shows that the problem of post-retirement appointments is not an isolated one but is rather systematic.

Due to this, the executive’s decision to make such appointments and the judge’s decision to accept such positions should be revisited. The drafting Chairman of the Constituent Assembly, Dr.BR Ambedkar was sure that the judiciary will not have to adjudicate many disputes between the states and the citizens as he thought that the primary function of the judiciary would be to resolve disputes between private parties only<sup>21</sup>. This is why he rejected PK Sen’s proposal to include a constitutional provision imposing an embargo on sitting and retired judges from holding offices under the Government of India or a State. Ambedkar’s assumption has become archaic in current times when the State is a litigant in 46% of cases and the judiciary hears and adjudicates conflicts between the State and citizens for most of the time. The need to have a provision identical to the one proposed by Sen has arisen now more than ever before. Even if this idea seems too radical, there at least needs to be a cooling period of a few years, before a retired judge is offered some position by the executive.

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<sup>20</sup> Gautam Bhatia, *The troubling legacy of Chief Justice Ranjan Gogoi*, THE WIRE (March 16, 2019); <https://thewire.in/law/chief-justice-ranjan-gogoi-legacy>.

<sup>21</sup> Arghya Sengupta, *After the judges retire: time for a fresh look at sensitive judicial afternoons and evenings*, (May 8, 2019); <https://timesofindia.indiatimes.com/blogs/toi-edit-page/after-the-judges-retire-time-for-a-fresh-look-at-sensitive-judicial-afternoons-and-evenings/>.

All these measures are necessary for the trust and faith in the judiciary to revive, survive and thrive. They are also important to materialise ‘Restatement of Values of Judicial Life’<sup>22</sup> which was adopted by the Supreme Court on the 7<sup>th</sup> May 1997. This restatement encourages the members of the higher judiciary to conduct themselves in a way, such that people’s faith in the impartiality of the judiciary is affirmed. This cannot happen unless the issue of post-retirement appointments is addressed jointly by the judiciary and the executive.

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<sup>22</sup> Revathi Krishnan, *Supreme Court crisis: These are the 16 values of judicial life our judges swore to uphold*, THE PRINT (May 2, 2019); <https://theprint.in/judiciary/supreme-court-crisis-these-are-the-16-values-of-judicial-life-our-judges-swore-to-uphold/229845/>.