

Introduction: The World's Most Powerful Court on the Brink?

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The Indian Supreme Court stands at a crossroads. As the contributions to this timely blog symposium indicate, at a time when the country is facing serious prospects of democratic deconsolidation, its main constitutional watchdog faces an unprecedented existential crisis. The catalyst for the crisis is the pressure the Modi government has apparently been exerting on the judiciary ever since it took office in 2014. Such pressure has included: the abortive attempt to replace judicial primacy with executive primacy in the judicial appointments process; the refusal to act on some 140 nominations for appointments to High Courts (exacerbating an already grim understaffing problem in the higher judiciary); sending back politically/ideologically undesirable nominees for appointments to the Supreme Court; and allegedly blackmailing the Chief Justice to get him to assign politically sensitive cases to allegedly favourable benches. Despite an unprecedented press conference by four of the five most senior judges of the Supreme Court calling for greater transparency in the manner of bench allocation, these four judges continue to be excluded from benches hearing politically sensitive constitutional matters.

To make matters worse, an internal crisis has emerged about the powers of the office of the Chief Justice. He himself constituted and headed a bench that quashed investigative proceedings into a bribery scandal that implicated him, making an exception for the Chief Justice from conflict of interest rules. He also constituted and headed a bench dismissing a plea seeking investigation into the suspicious death of a lower court judge (Justice Loya) who was investigating the role of the president of the ruling party in a murder case—this despite suggestions by the 4 senior judges in the press conference that the handling of the Justice Loya’s case was one of the triggers for their public comment. The Chief Justice refused to recuse himself from both cases, and the petitioners were harshly castigated by the Court in each case for bringing the judiciary into disrepute. He allegedly constituted the bench to hear a petition seeking a review of the Vice-President’s decision to not allow an Opposition motion to impeach him to proceed (the petition was withdrawn after the bench refused to disclose the manner in which it was constituted).

Admittedly, some of these claims above are mere allegations. However, by forestalling investigations into these serious allegations, the Court has not done any favours to its own legitimacy. This crisis has brought to the fore the multiple paradoxes and structural weaknesses that have afflicted the Court for a long time. Celebrated for its expansive social rights jurisprudence, its civil liberties record has been mixed at best. Even the success of its social rights jurisprudence is being reassessed. The Court’s pursuit of an institutional legitimacy grounded in populist rather than counter-majoritarian terms has made it difficult for it to access a vocabulary to robustly counter a populist authoritarian government.

The Court’s polyvocality and doctrinal incoherence has facilitated the cavalier abandonment of long standing principles of institutional integrity (such as ‘no one shall be a judge in her own cause’) to suit particular individuals. Celebrated as an activist court, it continues to adopt one of the most deferential standards of judicial review. The vast proportion of its astonishingly large docket (comprising tens of thousands of cases every year) does not relate to any substantial questions of law or the Constitution. Instead, cases are entertained under its ‘special leave jurisdiction’, originally envisaged as a residual jurisdiction to be exercised under exceptional circumstances. The Court has consistently refused to deploy any case-management techniques, presumably because any such technique would impose constraints on its arbitrary and unlimited jurisdiction. Its radical anti-formalism—ostensibly adopted to help the poor—has allowed the Court to ignore rules of evidence, arbitrarily sideline or even castigate petitioners and ignore stare decisis. While shielding itself from political influence, the Court asserted judicial independence without putting any mechanism to ensure judicial accountability. Enormous power and little transparency are fertile grounds for institutional corruption—today, if there is any truth in the allegations, politicians are using the threat of a corruption investigation to get the judges to do their bidding. The absence of accountability mechanisms might ultimately destroy judicial independence in India.

A Court with a more disciplined and accountable demeanour would have been more robust when faced with attempts of institutional capture. In the final analysis, the Indian Supreme Court's serial rejection of every norm that constrained judicial behaviour is what has brought it perilously close to implosion.

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