

FROM LODHA TO RAMANA: THE CHIEF JUSTICES OF THE MODI ERA

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

Television journalists are seen outside the premises of the Supreme Court in New Delhi. | Photo Credit: Reuters

In its most essential form, the [Indian Supreme Court](#) is the custodian of the Constitution of India. In this role, its primary responsibility is to ensure that the fundamental rights of citizens guaranteed under the Constitution are not diluted, eroded, or otherwise impinged upon by the state. It might have begun its existence as a passive court, but over the decades, it has become what I believe to be the most powerful court among its peers in the world.

This superior status manifests itself in at least three ways. Firstly, through its decision in *Keshavananda Bharati*, the Court assumed the power of judicial review over constitutional amendments. Secondly, through multiple decisions, it assumed the power of judicial appointments to itself and High Courts. And thirdly, it expanded the fundamental right to life and liberty under Article 21 of the Constitution through guaranteeing citizens unique and wide ranging protections, and ensuring the right to approach courts through public interest litigation.

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At its helm sits [the Chief Justice of India](#), or the CJI. The duties and responsibilities that come with the office of the CJI are unmatched by any other role in the country. In theory, at least, the CJI must exhibit judicial and administrative talent of an unusually high order. A sample of the responsibilities of the office include selecting judges for appointment to the higher judiciary, deciding the number and composition of benches to adjudicate on different kinds of cases, besides performing normal judicial duties. As George H. Gadbois puts it, the Chief Justice should be 'a competent administrator, a shrewd judge of men and personalities, and a towering personality himself'.

But, by dint of circumstance, and to some degree by choice, the Indian judiciary evolved to follow the seniority convention in appointing the Chief Justice of India. As a result, while the persons who eventually become Chief Justice may not have been appointed for exhibiting certain qualities, they are compelled to develop these skills on the job, and some have done so with aplomb, e.g., Justice Subba Rao, Justice Venkatchaliah, and Justice J.S. Verma. However, an unfortunate fallout of the seniority convention is that Chief Justices tend to have very short tenures in office. Over 75 years, the Indian Supreme Court has already had 49 Chief Justices. Justice Y.V. Chandrachud, in the 1980s, had an exceptionally long tenure of over seven years, while at the other extreme, Justice K.N. Singh occupied the office for a mere 17 days.

This large number of Chief Justices provides for an interesting data set to study the evolution of the office, and the relationship of the judiciary with the executive, which can be roughly classified into the following eras. From 1950 to 1971, the Chief Justice had complete authority over judicial appointments, and the recommendation of the Chief Justice would always be followed, even to the extent of powers of a veto.

Between 1971 and 1993, strong single party governments occupied the Centre, and the

executive insisted on appointing 'committed judges' to the Supreme Court, in a clear attempt at court packing. Multiple supersessions took place, with the executive exercising prerogative in appointing Chief Justices, and the seniority convention was openly flouted. The shocker came with the decision in the first judges' case in 1981 (*SP Gupta*), where it was held that the opinion of the Chief Justice of India would not be binding on the government.

With the second judge's case in 1993, and around when Justice M.N. Venkatachaliah took over as the CJI, the trend reversed and the judiciary practically wrested the power of appointments back from the executive. Judicial primacy and the collegium's creation happened in this period, and while the collegium has since acquired considerable notoriety for being arbitrary and undemocratic, it still occupies the field today.

When we examine the evolution of the Indian Supreme Court and the office of the CJI, it is a classic example of a constant shifting and rebalancing of power between the judiciary and the executive. When the executive was powerful, usually through a single party majority, as with the Indira Gandhi and Rajiv Gandhi-led governments, the judiciary practically succumbed to the executive's control. However, when relatively weaker coalition governments were elected, the judiciary restored powers to itself.

This rebalancing is playing out again now. Since 2014, the executive is once again a single party majority under the Narendra Modi-led BJP government. Consequently, the judiciary's powers are weaker than before, and the executive is back in control. We see a rise in autocratic tendencies of the executive, through the slow destruction of democratic institutions, the misuse of investigating agencies, communal polarisation, and a gradual chipping away at constitutional protections available to citizens, all of which a weak judiciary is unable or disinclined to tackle.

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From 2014 to 2022, the eight years the Modi government has been in power, eight individuals have occupied the office of the CJI, from Justice R.M. Lodha as the 41st Chief Justice to Justice N.V. Ramana as the 48th. This article attempts to examine how their tenures have contributed to the evolution of the Court and the office of the CJI.

Immediately before the Modi government first came to power in 2014, the CJI was Justice P. Sathasivam, who, rather unfortunately, chose to accept the Governorship of Kerala almost immediately after he demitted office. This unusual and arguably irregular appointment was made without an appropriate cooling period, and went against the BJP government's own policy, with Arun Jaitley having openly proclaimed that giving jobs to judges upon retirement would help governments influence courts. This also set a dangerous precedent for future judges, that is seen even today.

What might have been perceived as a gauntlet thrown into the ring by the executive did not deter Justice Sathasivam's successor, Justice R.M. Lodha, from making bold and unconventional decisions of his own. Most notably, he revived the dormant trend of direct appointments from the Bar to the Bench in the Supreme Court, a practice which was permitted under the Constitution, but seldom attempted. His recommendations were mostly successful, but one was famously not, with the appointment of Gopal Subramaniam being refused by the government. This could have been the Modi government's first confrontation with the judiciary, and Justice Lodha even later said that he was open to pursuing Mr. Subramaniam's appointment, but the lawyer himself withdrew his candidature, due to which confrontation was sidestepped. Justice Lodha became a household name for his report on reforms in the Board of Control for Cricket in India. Ironically his report was subsequently completely diluted by the very Court that had appointed the committee to recommend reforms in the first place.

It was under Justice H.L. Dattu, who followed Justice Lodha as CJI, that the first major confrontation between the executive and the judiciary took place. The fourth judge's case, concerning the validity of the National Judicial Appointments Commission (NJAC) Act, had been referred to a five judge Bench, and heated arguments ensued. The judiciary stood its ground and eventually emerged victorious, and the NJAC Act, an undoubtedly flawed legislation, was struck down. While the collegium is an arbitrary, secretive and undemocratic process of judicial appointment, and communication and transparency in its operations are more than desirable, the design of the NJAC as proposed was not the appropriate solution. However, the Supreme Court could have fixed the flaws in the NJAC Act, perhaps by reading down the provisions to address its shortcomings, but chose not to do so.

After the NJAC judgment, matters were still not settled, and the memorandum of procedure for appointments to the higher judiciary became the centrepiece of the dispute between the executive and the judiciary. The tension continued when Justice T.S. Thakur took over as the CJI. He was the last CJI in the Modi era to have shown some spine in matters of judicial administration and appointments. Besides vociferously highlighting the plight of the overburdened Indian judiciary, in one instance even shedding tears in the Prime Minister's presence, Justice Thakur assiduously worked at mechanisms of filling up of vacancies, authoring an important judgment in this regard. He set the National Judicial Data Grid rolling, which today connects all levels of the judicial system and provides a surfeit of information to litigants.

But his reform efforts took a controversial turn when he attempted about 20 transfers of judges across High Courts. He was not the first judge to attempt such large-scale transfers; Justice Venkatachaliah and Justice S.H. Kapadia had tried this too, but their motivations for the transfers were not always unambiguous, and their experiments arguably failed, with many transferred judges being repatriated. Legal scholars and even former judges have lamented that such transfers are akin to treating judges like civil servants, and are a grave threat to the independence and overall integrity of the judiciary. Some of Justice Thakur's transfer orders were evidently bad calls, and were reversed soon enough.

Unfortunately, transfers continue till date, many being arbitrary and unjustified, and following no documented policy. Notwithstanding his swipes at controversy, Justice Thakur was also the last Chief Justice to really stand up to the government. Up until here, the Supreme Court had stood its ground while confronting the executive. After this, things changed completely.

India's first CJI from the Sikh community, Justice J.S. Khehar, had a short tenure of less than eight months, in which he was party to many landmark judgments, including the Right to Privacy and Triple Talaq judgments. Justice Khehar's term also revived debates on the lack of transparency and fairness in managing the roster in the Supreme Court, an issue that spanned the tenures of multiple CJIs thereafter.

Certain unproven allegations in a suicide note by Kalikho Pul, a former Chief Minister of Arunachal Pradesh, directed at multiple judges, including Justice Khehar himself, came to the Court's attention. Without dwelling on the veracity of the allegations, the procedure Justice Khehar followed was without precedent and also without propriety. The Supreme Court, in its own decision in *Veeraswami*, had said that criminal proceedings against someone in the higher judiciary could only be initiated in consultation with the CJI. Further, if allegations were made against the CJI directly, permission may have to be sought from other Supreme Court judges. Mr. Pul's wife wrote to Justice Khehar seeking permission to file an FIR against the judges mentioned in the note. Despite being named himself, the CJI, of his own accord, flouting all concerns of conflict of interest, chose to list the letter as a writ petition (converting an administrative question into a judicial one). Critically, this demonstrated a complete disregard of

basic principles of natural justice, and set an example for others to follow.

The other controversial development during Justice Khehar's tenure was the conviction and subsequent imprisonment of a High Court judge, Justice C.S. Karnan, for contempt of court. Besides criticising the Court's exercise of its disciplinary powers and contempt jurisdiction, many also deemed the decision unconstitutional for overlooking Parliament's exclusive privilege to remove a member of the higher judiciary in an act. The root problem of judicial appointments was ignored, as also the question of how certain judges could enter the higher judiciary without adequate scrutiny.

The next CJI was Justice Dipak Misra, whose tenure is remembered for the unprecedented press conference held by his four fellow judges, condemning the CJI's internal administrative decisions, specifically that court conventions of bench strength and bench composition in the allocation of cases were not being followed, and that the CJI had selectively assigned, without any rational basis, important cases to preferential benches. The trigger was the Brijgopal Harkishan Loya case, the conspiracy theories surrounding his death, and the decision to allocate the matter to a certain Bench contrary to roster and convention.

The issue of the master of roster and conflict of interest also emerged. A Bench led by Justice Misra was hearing a murky CBI case pertaining to bribery around admissions in a debarred medical college, which also involved allegations of attempts to bribe sitting High Court and Supreme Court judges. Separate petitions sought a court-regulated investigation in this case, with a request to list this matter before a Bench other than the CJI's Bench, for reasons of conflict of interest. Instead of sitting out the case, as propriety and common sense would have demanded, Justice Misra chose to hear these petitions himself, even adjudicating on the scope of the powers of the CJI himself. Ultimately, after lots of twists and turns, the petitions were dismissed with heavy fines, but the debate around conflict of interest within the judiciary was only getting more accentuated.

He was also the first CJI against whom an impeachment motion was proceeded against, although it was eventually quashed by the Rajya Sabha. Despite these controversies, Justice Misra managed to set up the maximum number of constitutional benches as CJI and strove constantly to achieve a balance between adjudication and disposal.

The next CJI, Justice Ranjan Gogoi, also had a controversial tenure. He had been a party to the press conference earlier, and had famously also encouraged "noisy judges" to be more questioning of the system. However, the absolute disregard of conflict of interest took its most prominent turn in his tenure, when Justice Gogoi sat in the hearing (although he did not sign the order) of a sexual harassment complaint made by an employee of the Supreme Court against himself. All principles of natural justice were broken in handling this complaint. Besides the CJI himself constituting a committee for examining the charges, the committee report exonerating the CJI was also not disclosed to the complainant, let alone the public at large. Her grievance was also about unfair dismissal and victimisation, which seems to have not been addressed by the committee. Much later, she was reinstated in service under the next CJI Bobde.

Justice Gogoi was also obsessed with secrecy, and routinely asked for information to be submitted to the court in 'sealed covers' (this has since been discontinued with Justice D.Y. Chandrachud's order denouncing the practice.) This was employed in cases such as the Assam's National Register of Citizens (NRC) matter, the Rafale dispute, the electoral bonds issue, and so on. In the NRC case, the manner in which the judiciary took over the executive's role, leaving the citizenship rights of millions under cloud, led commentators to term this as the rise of the 'executive court'. His treatment of *habeas corpus* petitions filed from Jammu & Kashmir in the wake of the abrogation of Article 370 prompted an eminent lawyer to say that the

“Gogoi Court has, at reckless speed, run a coach-and-four through the centuries-old established law on *habeas corpus*.” In his tenure, the practice of what some legal scholars describe as ‘judicial evasion’ also grew; the Supreme Court would avoid hearing certain cases altogether, especially those of utmost importance to the nation, such as the electoral bonds case, the Citizenship Amendment Act case, the abrogation of Article 370, etc., or would sit on such cases without passing any orders of consequence.

Justice Gogoi also accepted an appointment as a Member of Parliament (Rajya Sabha) soon after retirement, and fears expressed at the time of Justice Sathasivam’s post retirement appointment resurfaced of increased executive and legislative interference in matters of the judiciary. Already, there was a growing deferential attitude in the judiciary towards the executive. Disturbingly, at about the same time, there was also a tendency towards sycophancy that started among Supreme Court judges, with Justice Arun Mishra and Justice M.R. Shah showering praises on the Prime Minister publicly. Justice Gogoi’s Bench concluded the long-standing Ayodhya dispute, but there appears to be no end in sight to end communal strife, with Gyanvapi, and perhaps even Kashi and Mathura to follow.

Justice Gogoi was followed by Justice Sharad A. Bobde as CJI, who had the longest tenure in the Modi era, clocking in a little over one year and five months. While that gave an opportunity to boldly experiment with technology in the judiciary, it also led to greater subservience on the part of the judiciary towards the government. The practice of judicial evasion that began under Justice Gogoi continued in his term. This period also saw the Court give preferential treatment to certain matters, for example, in the bail matters of journalists Siddique Kappan versus Arnab Goswami.

CJI Bobde’s Bench, in an unprecedented order, also stayed the controversial farm laws, and appointed a committee to examine the issue comprising individuals who had already publicly supported the laws themselves. Justice Bobde will also be remembered for his vocal displeasure of the use of Article 32 petitions as a means of approaching the court, as also attempting to take away the right to adjudicate on COVID cases from High Courts. The sad plight of migrant labourers in India during the pandemic was a tragedy, and the Supreme Court’s attitude towards the situation reflected the ivory towers it had built for itself.

Despite these controversial decisions, Justice Bobde made an attempt at judicial reform by issuing guidelines on the appointment of ad-hoc judges to tackle judicial pendency. It is also notable that during his term, not a single appointment was made to the Supreme Court. Justice Bobde was reluctant to recommend Justice Akil Kureshi to the Supreme Court, a respected senior High Court Chief Justice, who had incidentally also issued an order against a high functionary of the government. On the other hand, Justice Nariman was insistent on recommending his name. This led to a standoff within the collegium, and speaks volumes about the so-called independence of the collegium.

The latest Chief Justice to have completed his term in office in this period is Justice N.V. Ramana. Justice Ramana has been the most publicly visible face of the Supreme Court in the modern era. Besides delivering speeches and engaging with the public at large across the country, Justice Ramana has also brought back some of the old glory of the Supreme Court. The institution seems to be the ‘sentinel on the qui vive’ once again. Public confidence in the judiciary has also improved with certain bail orders and stays (e.g., sedition), and the Pegasus inquiry.

That said, his tenure has also seen some judgments from his associate judges seriously undermining civil liberties. The decision on the Prevention of Money Laundering Act, which was in the same vein as the Court’s earlier decision in the Unlawful Activities (Prevention) Act (the

Watali case), had the effect of virtually detaining people for an indefinite period, comparable only to the *ADM Jabalpur* case. The Teesta Setalvad/Zakia Jafri and Himanshu Kumar cases also happened on his watch, seeming as though the Supreme Court was criminalising petitioners who dared to approach the Court on civil liberty matters

It is pertinent to note that Justice Ramana also filled up all posts in the Supreme Court and made a significantly large number of appointments in the higher judiciary, including appointing many women judges, in a direct move to improve the diversity in the system. Unfortunately, the practice of judicial evasion continued in Justice Ramana's term, and no constitutional Benches were formed, and neither were important matters taken up.

The Supreme Court today is headed by the 49th Chief Justice of India, Justice U.U. Lalit, who will have a tenure of less than three months. Although it is too early to make any substantial remarks on his tenure, in the short time that he has been in office, Justice Lalit has already shown that the registry can be reformed through improving processes of filing and listing of cases. He has also taken initiatives in the formation of benches and certain initial orders that he has given, e.g., in the Kappan and Setalvad cases, granting bail to individuals where the original indictment itself was without basis. All these developments hold promise for the judiciary, and there is hope that the Supreme Court will live up to its functions of being the true custodian of the Constitution and protector of fundamental rights that it was once meant to be.

In the coming decades, the Supreme Court will continue to face challenges from multiple fronts, particularly the executive. It will also have newer responsibilities of strengthening the Indian judiciary, especially the lower courts, which seem to have faltered in recent times in many respects. A dynamic and thoughtful leadership, supported by puisne judges, should be able to ensure that these challenges and responsibilities are met appropriately. The Supreme Court of India, as also the office of the CJI, will continue to evolve, but hopefully, they will do so in the right direction.

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