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How Judicial Inaction is Killing Constitutional Faith with a Thousand Cuts

By: Rohin Bhatt

The Supreme Court has forgotten that its primary duty is to protect the citizen from the excesses of the state and its instrumentalities. The time is ripe for the judges to get down to their actual job of administering justice.

Faith in the Constitution is central to the functioning of the legal system in India. That faith, just like the Constitution, has three arms to uphold it — the judicial, the executive, and the legislative. With Prime Minister Narendra Modi’s authoritarian government leading to a virtual redundancy of Parliament, the judiciary remained the last bastion of hope for those of us who believe that the Constitution of India is essential to holding together an otherwise diverse set of people who dress differently, speak different languages, eat different foods, and worship different gods (or even the same gods in different ways).

The Indian courts have prided themselves as the [custodians](#) of fundamental rights and the Constitution. However, in the past few years, the judiciary has become a stenographer for the state— a title I borrow from Gautam Bhatia’s [commentary](#) on the Umar Khalid bail order. The Supreme Court has increasingly failed at safeguarding fundamental rights, either by a virtual rejection of its constitutional duty until the matter at hand became infructuous or through wilful inaction. It has allowed the state to get away with unconscionable acts and led to an erosion of constitutional faith.

In using the term constitutional faith, I mean a faith that we, the people, repose in the Constitution, when each of us enter into a social contract when we gave unto ourselves this Constitution. Doing so implies that we believe that the Constitution will work and protect us from state excesses; that institutions will apply the Constitution in a way that safeguards core values and acknowledges its transformative nature. For those that wish for this faith to be eroded, though, it is the time of their lives.

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Let us consider two examples of the way in which the Supreme Court has acted in recent times. When the appeals from the Karnataka High Court judgement on the hijab ban were mentioned before a bench headed by the chief justice, he [urged](#) the lawyers to "not sensationalise the issue." The matter was then adjourned. A few days earlier, he had also [urged](#) the lawyers to not turn the issue into a “national issue.” What message does it stand to the rogue elements that fan the flames of communal discord? More importantly, what message does it stand to Muslims and other religious minorities whose rights were the subject matter of adjudication before the court?

Secondly, let us look at the case when the constitutional validity of the farm laws was challenged. After putting the laws in abeyance by [injunctioning](#) their enforcement, the Supreme Court appointed a [committee](#) to talk with the farmers. Never before, in the history of constitutional adjudication, had a matter been referred to a committee when the vires of a statute was challenged. This was perhaps the worst abdication of duties by the court in recent times. Subsequently the government withdrew the farm acts, making the matter infructuous.

But this was not the only case where the court appointed a committee, and the matter was lost in the hallowed halls of the registry of the court. When the government was accused of spying on multiple senior journalists, leaders of opposition parties, and a former judge of the Supreme Court itself, it chose to [appoint another committee](#) to file a report. Of course, judges cannot be expected to be experts in technology and may need the help of committees to guide judicial response on technical matters. But the question in this case was simple: did the government interfere with the right to privacy (and even judicial independence) by using Pegasus? The answer would be an unequivocal yes. A court would have usually hauled up the government and the law officers for this infraction. But in its immense wisdom, the Supreme Court did not.

The list of such matters, which I would call the list of sins by omissions of the court, is long: Article 370, electoral bonds, habeas corpus cases from Kashmir, UAPA, migrant workers, matters of appointment of judges like Justice Akil Qureshi, free speech cases, and the hijab ban case. That this is a non-exhaustive list should set alarm bells ringing in the minds of not only constitutional scholars but also citizens.

By its inaction, the Supreme Court has rendered fundamental rights and by extension, a faith in the Constitution a nullity.

In a recent piece on constitutional faith, Arun Thiruvengadam (2021) wrote: “One could argue that this constitutes a simplistic identity because that text, like all constitutions, contains contradictions galore. But the identity politics that populists play is crude, ahistorical, and based on myths and misinformation. Thus, even though it could very well be based in simplistic ideas, constitutional faith, may in fact provide some measure of a counterweight to populist politics.”

How does one juxtapose this notion of constitutional faith against a judiciary which seeks to not act? What implications does this have for constitutional faith, which is no doubt the proverbial hope that comes out of Pandora’s box after all the maladies, poverty, and other ills that populist politics wreck upon us?

Article 32 of the Constitution empower the Supreme Court to issue writs to the state in the case of infringements of fundamental rights. While speaking of the writ jurisdiction of Article 32, Ambedkar had said, “If I was asked to name any particular Article in this Constitution as the most important — an Article without which this Constitution would be a nullity — I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it...”

By its inaction, the court is increasingly rendering fundamental rights — and by extension, a faith in the Constitution — a nullity. The Indian constitutional framework runs on a system of checks and balances — every arm of the is supposed to keep check on other arms in order to maintain a balance of power. When an arm fails to do its duty, it leads to a breakdown of constitutional order. As Siddique Kapan languishes in jail, political prisoners are not released on bail despite flimsy cases against them, as calls for genocide and ethnic cleansing are given openly, the silence of the Supreme Court is deafening.

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“Tonight I write the saddest lines [...] I no longer love her, that's certain, but maybe I love her.” Thus wrote Pablo Neruda. I echo the sentiment. I have fallen out of love for the court, but maybe I still love it and believe in its capacity to reinstate its majesty and remind everyone that in India, the Constitution reigns supreme. I write this article not to demonise the court, or its judges. I truly believe that despite its failures, it is possible to usher the Supreme Court into an era where its former glory is restored and it becomes the most powerful constitutional court in a world where the judges are not guided by "fear or favour, affection or ill-will" and have only one goal: "to uphold the constitution and the laws". But to do that, the court, with the chief justice at its helm will have to enact fast, effective, and systemic changes. Only then will the eroding constitutional faith be restored.

What should such a reform manifesto for the chief justice, as the head of the collegium and the master of the roster look like? It should ideally start with listing of important cases — Pegasus, electoral bonds, abrogation of Article 370, and the like. Time is also ripe for the judiciary to be more inclusive by appointing women, queer, and Dalit judges not only in the constitutional courts, but also at the subordinate judiciary by ensuring horizontal reservations.

For long, the Supreme Court has forgotten that its primary duty is to protect the citizen from the excesses of the state and its instrumentalities. The time is ripe for the judges to give up on the sound bites for the media in memorial lectures and to get down to their actual job of administering justice.

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References:

Thiruvengadam, Arun. 2021. 'Constitutional Faith or Constitutional Idolatry? Insights from Recent Mass Protests in India.' *IACL-AIDC Blog*. 26 January 2021.