

# The Indian Judiciary and Civil Society

Review article on “Justice for the Judge: An Autobiography” by Ranjan Gogoi

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Justice Ranjan Gogoi’s book “Justice for the Judge: An Autobiography” (Rupa, New Delhi, 2021 (pp. 249+xiii) is a fascinating read. It raises a number of thought-provoking issues, which call for serious introspection by society at large. The reception of Justice Gogoi’s book has been along expected lines, showing how highly polarized is not only the polity but also the media.

## Most Powerful Judiciary

India’s judiciary is acclaimed to be among the world’s most powerful; surprisingly, then, Gogoi considers it ‘*the weakest of the three branches of government*’. (p. 102) In fact, the Indian judiciary has emerged as the third (and at times the only) House of Parliament. To cite just two decisions in this regard: enunciation of the concept of the basic structure of the Constitution, and mandating major electoral reforms. With its activist role in the public interest litigation, it is often seen as running the government. Unlike in several other countries, it has not shied away from addressing even purely political issues. It is the only judiciary in the world where Supreme Court judges appoint judges of the higher judiciary.

## Conventional Adversaries

Inevitable, the judiciary faces a number of adversaries. The prime adversary has been the executive, as seen from the time of the Emergency. Prime Minister Indira Gandhi wanted to bring the judiciary fully under the control of the executive by, among other actions, transfers of high court judges and even supersessions of Supreme Court judges for appointment as the Chief Justice of India.

It was always recognized that the judiciary faced as much danger from within as from outside sources.<sup>1</sup> Justice Gogoi has written: ‘*Some of my colleagues, while putting up a façade of support and sympathy which I did not seek, actually worked against me behind my back.*’ (p. 142) He has also lamented: *I wish there was more camaraderie and brotherhood amongst the judges.* (p. 207)

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## Emergence of civil society as adversary

Civil society is considered to be a strong ally of the judiciary. But, for the first time, Justice Gogoi has brought out how an articulate and active section of the civil society can undermine the authority and the credibility of the higher judiciary by a persistent crusade, with the silent majority of the civil society remaining disinterested as if the issues are of no concern to it. Its effect is magnified by fake news, motivated and deliberate misreporting, and part-reporting of facts. As a result, the integrity of the institution comes to be questioned in public perception.

Justice Gogoi has quoted a number of instances in support of this contention. He has lamented: 'Of late, ...it has become a convenient slogan that is being used very selectively by a group of activist lawyers and academics to judge the judges. This development, in my opinion, does not augur well for the institution.' (p. 115) Gogoi has written: 'Report cards are prepared at the end of the tenure of judge. The message is clear: a good report will come at a cost; if you are not prepared to confirm to a particular way of thinking and act accordingly, you will earn the dubious reputation of having compromised and surrendered the independence of the judiciary.' (p. 116) He has brought out that 'sealed cover procedure' had been in vogue in the Supreme Court for a long time but he was criticized for innovating it. (p. 121) Justice Gogoi has also explained that the in-house procedure laid down to inquire into allegations or complaints against the high court and Supreme Court judges was well-established and clearly provided that advocates were not to be permitted etc. In total disregard, unjustified criticism was made against him in the case of allegations of sexual misconduct levelled against him. (pp. 132-140)

The very title of his autobiography, *Justice for the Judge*, says it all. (pp. 142-3) Throughout his chief justiceship, there was a tirade against him. He has brought out how an inquiry by Justice A.K. Patnaik, a retired judge of the Supreme Court, had held that "*the existence of a conspiracy [against Gogoi] cannot be completely ruled out*" but he was not able to obtain various records including electronic records of WhatsApp, telegram, etc. The Director of Intelligence Bureau had told Justice Patnaik that the conspiracy could have been hatched due to tough decisions taken by the Chief Justice in the case relating to the National Register of Citizens, and tough decisions taken in some administrative matters. (p. 153) The report was considered by a three-member bench and the matter was closed as "*two years having passed and the possibility of recovery of electronic records at this distance of time is remote, ...no useful purpose will be served by continuing these proceedings.*"

Justice Gogoi has referred to a number of highly controversial cases in which the Supreme Court's decisions have been questioned. But, he has rightly emphasized that these were decisions of division benches.

A reference may be made to the warning Justice Gogoi has sounded: 'I think the time has come for the right-thinking majority to speak up. They can no longer enjoy the comfort of the non-confrontationist approach, staying clear of issues and being content that they have been spared the unfortunate. For, if unchecked, tomorrow the monster may devour them too.' (p. 150)

### **Ramjanmabhoomi-Babri Masjid case**

As it has been said, Supreme Court's decision is final not necessarily because it is correct but because there is no appeal over it! All decisions of the apex court must be looked at and accepted in this light.

A case in point is the Supreme Court decision in the Ramjanmabhoomi-Babri Masjid case. I have been highly critical of this decision and have brought out my reservations in a number of articles on the subject, including in a recent review of Salman Khurshid's book, *Sunrise Over Ayodhya*<sup>ii</sup>. But, it is a unanimous judgment of five judges. The process of decision-making brought out in Gogoi's book shows that each of the five judges had independently arrived at the same conclusion and, as a result, a unanimous judgment, without ascribing authorship to anyone of them, was delivered.<sup>iii</sup> Significantly, Gogoi has made no mention of the addenda to the judgment emphasizing the importance of '*faith and belief*', quite contrary to the emphasis in the main judgment on evidence adduced by the parties. It is unfair to ascribe any motives to anyone. Justice Gogoi deserves credit for disposal of the Ramjanmabhoomi-Babri case, in spite of all odds, and bringing a closure to this long festering, highly contentious, communally divisive and charged dispute.

### **National Register of Citizens case**

A considerable part of the book is devoted to the National Register of Citizens (NRC) case. The Assam agitation, from 1979 to 1985, was ostensibly a movement with three demands—detection, deletion (from the voters' lists) and deportation of foreigners. (p. 157) Apart from the Assam Accord signed on 15 August 1985, there was also the tripartite meeting between prime minister Manmohan Singh, chief minister of Assam, Tarun Gogoi, and the All Assam Students' Union in 2005, when a decision was taken to update the NRC. However, it was only half-heartedly implemented in 2010. Thus, whatever may be their present stance, the Congress Party and the United Progressive Alliance (UPA) government had given commitments in this behalf which had remained unfulfilled.

Finally, the Supreme Court had to step in in May 2013 to bring a finality. This shows once again the failure of the political parties, leaving such contentious issues to be settled by the apex court. This is hardly anything to be proud about for Indian democracy. Justice Gogoi is highly critical of the media, and particularly social media, regarding the manner in which the final report of NRC has been commented upon. (p. 175)

The question whether there should be a nationwide register of citizens is still open and needs to be debated widely and dispassionately. In doing so, it will have to be noted that the procedure for such a register will not have to be the same as for the Assam NRC, as the latter was dictated by the provisions of the Assam Accord.

### **Judicial Reforms**

Mention must be made of a disappointing aspect of the book. Though intermittent references have been made to the imperative need for judicial reforms, there is no focused discussion on the subject. Gogoi does "*not believe in Lok Adalats as a viable and judicious means of dispute resolution except in petty criminal cases...*" (p. 59). He bemoans the fact that in the Union Budget only about 0.2 - 0.4% of the

*allocation is for the judiciary and “shockingly, the average allocation of funds for the judiciary in the state budgets is again a negligible percentage of the total allocation.”* (pp. 60-61)

Two statements in Gogoi’s book are particularly striking. First: ‘Though numerically the pendency of cases is very high in each court, my understanding of the situation is that a large number of the pending cases can easily be put in the category of ‘non-essential’, ‘not contested’ or ‘infructuous’ matters. The truly contested cases or cases of substance would be perhaps not more than one-third of the total pending cases...One-third of the above pendency is still a considerable number.’ (p. 62) If this is so, I do not know why such an exercise of categorization has not been done by the Supreme Court so far.

In the third Ramnath Goenka Memorial Lecture, Justice Gogoi had mentioned that the judiciary in the country needed a thorough shakeup, a revolution and not mere reforms. (p. 104) He has not elaborated on what steps he took as the CJI in this direction. As a result, it remains mere rhetoric.

The other statement is equally disconcerting: ‘After interacting with the members of the political branch on this issue [tenure of high court and Supreme Court judges], most informally, the impression I gather is that, by and large, the thinking is that Supreme Court judges should not have long tenures and the CJI [chief justice of India], in particular, should not remain in office for more than a year.’ (p. 64) This is shocking, to put it mildly, and will be the surest way of weakening the judiciary which has been assigned such an important role in India’s Constitution. The present revolving-door policy, as seen from the very short tenures of most CJIs, is hardly conducive to dealing with the challenges facing the judiciary.

Experience has shown that the future of Indian democracy will be greatly dependent on effective counter-check on the actions of the executive and even Parliament, to be exercised by the judiciary. As I had urged in my book, *The Judiciary and Governance in India* (2008), the question of tenure of the CJI needs to be debated nationally.<sup>iv</sup> Looking to the experience of arbitrary decision-making in selection of CJIs in 1973 and 1977, the criterion of seniority should continue to be supreme, but with the proviso that the person to be appointed as CJI must have minimum two years’ service left for retirement.

As brought out in my latest book, *India - A Federal Union of States: Fault Lines, Challenges and Opportunities* (2021), constitutional cases are being relegated to the back-burner, with appellate work swamping the Supreme Court. There is, therefore, need to create a separate Division of Constitutional Court consisting of nine full-time judges. If Justice Gogoi had dealt with this matter in the book, it would have helped immensely in taking the discussion further.

Successive chief justices of India have expressed concerns about judicial reforms while in office and after retirement. One of them, Justice T.S. Thakur, had even shed tears about it publicly. I had invited attention to the gravity of the subject in at least two of my articles, one in the *Economic and Political Weekly*<sup>v</sup> and the other in *First Post*.<sup>vi</sup>

## **Divine Force?**

It was on 13 September 2018, coinciding with Ganesh Chaturthi, that “*the warrant signed by the President of India appointing me as the CJI was brought to my residence*”, Gogoi has written. (p. 110)

The arguments in the Ayodhya case commenced on 6 August 2019, were heard for 40 days, and concluded on 16 October. Justice Gogoi was due to retire on 17 November.

Justice Gogoi has written: ‘Suddenly, without my knowledge, the [Ayodhya] case got listed on 4 January 2019. At that time, I had not even constituted the Bench that would hear it. Also, my assessment of the state of readiness of the case for hearing was yet to be completed. Neither the Secretary General nor any of the registrars could explain how the case got listed without my knowledge and permission.’ (p. 183) He continues: ‘...But the way things progressed and ended convinced me that there was a divine force which made the conclusion of the case, regardless of the way the judgment went, possible.’ (p. 190) This is further borne out by another fact. “A somewhat unusual feature of the three-month hearing was that no judge on the Bench availed of casual leave even for a day. No judge on the Bench suffered even from a common cold or fever that kept him away from the hearing. Equally inexplicable was another occurrence. One of the judges told me that he might have to take leave for a few days as a close relative was seriously ill and, in the ICU [intensive care unit] of a hospital. I told him that he might not require to do so as his relative would recover. This was in order to console and comfort him. The judge did not take any leave, and I too did not ask about his relative as presumably he had recovered.” (p. 190)

As compared to the other constitutional cases, this was a unanimous judgment of five judges, with “authorship undisclosed”. Thus, drew to a close “*one of the most protracted and fiercely contested cases.*” (p. 193)

In this background, I am reminded of the Bharatiya Janata Party’s white paper, *Ayodhya and the Ram Temple Movement*, which had us believe that ‘the idol of Ram has appeared on the night of 22<sup>nd</sup> and 23<sup>rd</sup> December 1949, inside the main building [of the Babri Masjid], which had remained locked since 1934.’ (para 3.1, p. 23)

In the extracts of the Liberhan Commission report compiled by A. G. Noorani (*Destruction of the Babri Masjid: A National Dishonour*, Tulika Books, 2014), the author refers to the autobiography of the District Judge of Faizabad, K. M. Pandey, who passed the orders to open the locks on the gates of the mosque. In it, he narrates the visit of a monkey to his home, then to the courtroom and then back to his house before, during and after the pronouncement of his judgment. The monkey, he said, did no harm. He made an attempt to convey that the monkey inspired or directed him to pass a judicial order in an appeal against the order declining postponement of the date by the subordinate judicial officer, that too on the application by a non-party to the suit. (Noorani 2014, p. 162)<sup>vii</sup>

### Some corrections

It is stated by the author: “*Article 370 of the Constitution which conferred a special status on the then state of Jammu and Kashmir was revoked*”. (p. 125) (Emphasis added.) As has been held by the Supreme Court itself, this Article was meant to extend, in consultation with the state government, the remaining provisions of the Constitution of India to J&K, as the President may deem fit. Further, if the Article was meant to grant special status, it would not have been a ‘temporary’ provision. There would also not have been an enabling provision in Article 370 (3) for President of India to declare that “this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify.”

It is stated that after the entire mosque was brought down by a horde of kar sevaks, “This sparked communal violence in the country as well as in neighbouring Pakistan and Bangladesh, and led to the **fall** of the elected government in Uttar Pradesh.” (p. 180) (Emphasis added) The Uttar Pradesh government did not fall but was dismissed by the President of India.

### **Actions which could have increased credibility**

Justice Gogoi has accepted that, in retrospect, two of his decisions—presiding over the bench which held preliminary hearing in a complaint of sexual harassment against him, and accepting the nomination to the Rajya Sabha-- were wrong.

In the same category is Justice Gogoi’s participation in the press conference on 12 January 2018, which attracted considerable attention nationally and internationally, and at which actions of the then CJI, Dipak Misra, were publicly criticized by four Supreme Court judges. This was unprecedented and brought down the image of the judiciary. Surprisingly, Justice Gogoi sees nothing wrong in it and has stated, “I believe till today that, given the circumstance, it was the right thing to do...” (p. 101)

Equally difficult is his statement that “*despite the judiciary being the weakest of the three branches of government, it was the least dangerous for civil liberties*”. (p. 102) (emphasis added). Citizens look to the judiciary as a guardian of their rights and liberties. It will be a travesty if it takes credit for being the least dangerous for civil liberties.

### **In sum**

Justice Gogoi’s book raises a number of troubling questions. Should the civil society not have a right to scrutinize and comment on the work of the judiciary? What is wrong in preparing report cards on the work of the judges, when such cards are also being prepared to assess the work of the legislators? Should the ‘in-house’ procedure for inquiries in respect of complaints and allegations against judges, which is shrouded so much in secrecy, be reviewed? Should the roster system be made more open? As in the cases of other institutions, there must be public accountability and transparency in the functioning of the judiciary. Should the system of judges appointing judges be continued?

It was shocking to see that the then government was so demoralized that it did not question the decision of the Supreme Court on the subject by filing a revision application. The same was true when the Supreme Court struck down the National Judicial Accountability Act. The time has come to reopen these issues and arrive at a workable compromise, which will address the concerns of the people at large as also the judiciary.

In this light, Justice Gogoi’s book must be read widely by all sections of society. The ‘silent majority’ about which Justice Gogoi has repeatedly talked of despairingly has to wake up and join the debate which is of such vital concern for India’s democracy.

## Notes

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<sup>i</sup> Madhav Godbole, *The Judiciary and Governance in India*, Rupa, New Delhi, 2008, pp.445-50.

<sup>ii</sup> *Shadows of Babri*, The Citizen, January 10, 2022.

<https://www.thecitizen.in/index.php/en/NewsDetail/index/4/21322/Shadows-of-Babri>

<sup>iii</sup> Nilanjan Mukhopadhyay in his book, *The Demolition and the Verdict: Ayodhya and the Project to Reconfigure India* (2021) has stated: ...legal eagles, adept at decoding writing styles of judges fathomed that this [judgment] was penned by Justice D.Y. Chandrachud, Additionally, the judgment carried an addenda written by Justice Ashok Bhushan. (p. 226)

<sup>iv</sup> Madhav Godbole, Op. cit., pp. 512-20.

<sup>v</sup> Madhav Godbole, Report of constitution review commission: some reflections, *EPW*, 28 September 2002.

<sup>vi</sup> Madhav Godbole, Narendra Modi's legacy should be bringing down the arrears of court cases in India, *First Post*, 16 January 2017.

<sup>vii</sup> Madhav Godbole, *The Babri Masjid Ram Mandir Dilemma: An Acid Test for India's Constitution*, Konark Publishers, New Delhi, 2019, pp. 1-2.