

## **HISTORIC REBELLION BY SUPREME COURT JUDGES: DEMOCRACY IN DANGER \***

### **Abstract**

Justice Jasti Chelameswar, who along with Justices Ranjan Gogoi — tipped to be the chief justice after CJI Dipak Misra retires in October — MB Lokur and Kurian Joseph called the conference, said they had been “compelled to call” the conference. “This is an extraordinary event in the history of the nation, more particularly this nation... The administration of the Supreme Court is not in order and many things which are less than desirable have happened in the last few months,” he added.

### **Introduction**

Turmoil in Supreme Court was seen as four judges speak out against Chief Justice Dipak Misra, Supreme Court judges J Chelameswar, Ranjan Gogoi, MB Lokur and Kurian Joseph release letter raising questions over the justice delivery system and allocation of cases.

Simmering differences in the Supreme Court of India bloomed on Friday-12<sup>th</sup> January, 2018, with four senior judges publicly criticising the Chief Justice of India (CJI) for his style of administration and over the allocation of cases.

The unexpected press conference, and the not entirely surprising revelations in the statement issued by the judges, resulted in lawyers, politicians, and analysts taking sides, with some insisting that the judges should not have gone public and others countering that they had no other option.

Justice Jasti Chelameswar, who along with Justices Ranjan Gogoi — tipped to be the chief justice after CJI Dipak Misra retires in October — MB Lokur and Kurian Joseph called the conference, said they had been “compelled to call” the conference. “This is an extraordinary event in the history of the nation, more particularly this nation... The administration of the Supreme Court is not in order and many things which are less than desirable have happened in the last few months,” he added<sup>1</sup>.

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All the four judges, the four senior most in the apex court after the CJI, are part of the collegium that selects judges to the apex court and high courts.

The judges said they were forced to speak in public, breaking the settled principle of judicial restraint, because the CJI did not take steps to redress their grievances, which were first raised two months ago. “We wrote a letter to him and tried to persuade the CJI to take steps but failed.

A request was made to do a particular thing in a particular manner but it was done in such a way that it left further doubt on the integrity of the institution. Unless the institution of Supreme Court is preserved, democracy won’t survive in this country,” they said.

People close to the CJI refuted the allegations. “All judges in the top court are equal. Work is allocated fairly. A particular judge cannot say he should be given a specific case for hearing. Judicial work is assigned as per the settled procedure,” the person said.

Friday’s events could have a huge impact on the functioning of the higher judiciary, particularly the constitution of benches, appointments to the high courts — most of which are understaffed — and also erode the credibility of the top court.

The tipping point for the four judges seems to be the case of Judge Brijgopal Loya. Two petitions demanding a fair probe into his mysterious death were listed before a bench that is headed by a

judge who is 10th in terms of seniority. They believed a matter as serious as this should have been heard by someone more senior.

“Four of us went to the CJI today with a request that a particular thing is not in order and it should be rectified. Despite our request, he did not do anything,” Justice Chelameswar said, without mentioning the Loya case. When asked whether this request was in connection with the Loya case, Justice Gogoi admitted that it was.<sup>2</sup>

Judge Loya, who died under mysterious circumstances in November 2014, was hearing the Sohrabuddin Sheikh fake encounter case dating back to 2004, in which various police officers and Bharatiya Janata Party president Amit Shah were named. Shah was discharged in December 2014.

That may have been the tipping point, but trouble in the court has been brewing for some time. Chelameswar has had run-ins with three CJIs — Justice Misra, Justice TS Thakur and Justice JS Khehar. He stayed away from meetings of the collegium for some time in 2016 and 2017 because he felt this was not the best way to appoint judges.

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<sup>1</sup> <https://www.hindustantimes.com/india-news/4-senior-supreme-court-judges-speak-out-against-cji-dipak-misra-say-need-to-preserve-institution-for-survival-of-democracy/story>

<sup>2</sup> <https://www.theguardian.com/world/2018/jan/12/india-supreme-court-judges-integrity-dipak-misra>

Jurists and legal experts see the development as a black day in the history of Indian judiciary, and advised that disputes should be resolved amicably. “People come to the Supreme Court with an expectation of resolving their problems. But today’s development has given an impression that the judiciary cannot sort out its own differences. This gives a wrong impression to the public,” former Chief Justice TS Thakur said.

Justice RM Lodha, who retired as CJI in 2014, said: “It was disappointing to see such senior judges airing their differences in public. CJI, as the leader of the show, must show his statesmanship and ensure no further damage is caused to the institution. If there are any grievances, he should address them.”

Former attorney general of India Soli Sorabjee said he was very upset: “The judges of the Supreme Court are not shareholders in a public limited company,” he said. “The chief justice has the prerogative of allocating and assigning cases to different benches and assuming the judges had a grievance ... they should have sorted it out... and not by calling a press conference which is utterly unbecoming of the Supreme Court of India,” he added. <sup>2</sup>

However, former Supreme Court Bar Association president and senior counsel Dushyant Dave lauded the action of the four judges. “There was no other way to handle the situation. The country should know something is ailing the system,” Dave said.

“We were left with no choice except to communicate it to the nation that please take care of the institution...Don’t want wise men saying 20 years from now that we sold our souls,” Justice Chelameswar said during the conference.

“There have been instances where a case having far-reaching consequences for the nation and the institution had been assigned by Chief Justice of this court selectively to benches without rationale basis. This must be guarded against at all costs,” read the judges’ letter to the CJI. “We are not mentioning details only to avoid embarrassing the institution but note that such departures have already damaged the image of this institution to some extent.”<sup>3</sup>

All the judges dismissed questions on whether they have broken ranks. Justice Gogoi said, “It’s a discharge of debt to the nation which we have done.” Asked whether the four wanted the CJI to be impeached, Justice Chelameswar said: “Don’t try to put words in my mouth.”

The unprecedented press conference by four judges on Friday exposing a rift within the Supreme Court collegium comes just a day after it recommended fresh appointments of judges to the Centre. Justices Jasti Chelameswar, Ranjan Gogoi, MB Lokur and Kurian Joseph criticised an alleged lack of transparency in the selection of judges to try cases, calling it a cause for “serious concern”.

The triggers for the unprecedented step lie in key cases in the recent past:

## **Loya PIL**

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<sup>3</sup> <https://www.theguardian.com/world/2018/jan/12/india-supreme-court-judges-integrity-dipak-misra>

The immediate flashpoint, according to one of the dissenting judges, was over who should hear pleas regarding the death of special CBI judge BH Loya. “This morning we went to the CJI with a specific request but unfortunately we were denied,” said Justice Jasti Chelameswar, without specifying the request. “So we were left with no choice but to take it to the nation,” he said. Asked whether the issue raised with the Chief Justice was about Loya, Justice Gogoi said, “Yes”, according to an ANI report.

### **Medical college bribery case, November 10, 2017**

A five-judge constitution bench headed by Chief Justice of India Dipak Misra in November ruled that it is the prerogative of the Chief Justice to decide which bench should hear a particular case. The current crisis, however, started with two petitions relating to corruption in the Medical Council of India that indirectly levelled allegations against the Chief Justice of India. On November 8, the CJI marked one of the petitions to a particular bench. On November 9, a counsel brought up the other petition and sought an urgent hearing from Justice Chelameswar, who referred it to a five-judge bench. High drama unfolded on November 10, with the CJI convening a special bench and virtually setting aside Justice Chelameswar’s order. The five-judge bench declared the CJI as “master of the roster”. The senior-most judge on the five judge bench after the CJI was Justice RK Agrawal, who is eighth in terms of seniority in the court in a matter alleging bribing of judges by medical colleges to obtain favourable orders.

### **Memorandum of Procedure, October 2017**

A petition questioning the delay in finalising the Memorandum of Procedure (MoP) for the appointment of judges to the higher judiciary was dealt by a bench of justices AK Goel and UU Lalit in October, 2017 last year. The bench had issued a notice to the attorney general on the issue. However, the matter was listed in front of a special bench of three judges headed by the CJI on November 8, which recalled the October 27 order of the two-judge bench. Such a matter, the four judges said in their letter written to the CJI two months ago, should have either been dealt by a constitution bench or taken up at the chief justice’s conference and the full court comprising all judges of the SC. The letter said the development must be viewed with “serious concern”.

On November 11, the SC issued an administrative order, saying that lawyers could only ask the CJI to list their cases for an early hearing, barring them from making such a request to any other judge. The usual practice in the court was for lawyers to approach the CJI’s bench for matters that required early intervention. But when the CJI was sitting in a Constitution bench, urgent cases could be mentioned before the judge next in seniority. Currently, this is Chelameswar.

The four have also taken strong exception to the way a case related to the so-called Memorandum of Procedure (between the government and the court to decide the way to appoint judges to the Supreme Court and the high courts) was dealt with and disposed.

The government viewed developments on this day cautiously and came up with a guarded response. “The judiciary is reputed the world over and independent. They will resolve it themselves,” said PP Chaudhary, Junior Law Minister.

The opposition lost no time in making it a political issue. Communist Party of India leader D Raja called on Justice Chelameswar at his house and the Congress asked for a bench of the seniormost judges in the Supreme Court to hear the Loya case. Congress president Rahul Gandhi said: “They (the judges) made a point about judge Loya’s case. I think that is also something that needs to be investigated properly. It needs to be looked at from the highest level of the Supreme Court.”

The country’s top law officer, Attorney General KK Venugopal, said the judges could have avoided going public. “As a result of this, the media is speaking only about this matter and it is being blown up out of proportion. The result is that the public may lose confidence in the institution itself. It is necessary that the judges show statesmanship, wisdom and experience. They should swiftly move to resolve the difference within the next two days so there is harmony and peace.

### **Rakesh Asthana’s appointment, November 2017**

In this case, the appointment of Aasthana as special director of the Central Bureau of Investigation was challenged by activist group Common Cause before the Supreme Court. After a few changes in the bench hearing it, the case was eventually heard by a bench comprising Justice RK Agrawal and Justice AM Sapre, and headed by the former, the 8th most senior judge in the apex court. The bench dismissed the challenge.

### **Aadhaar case**

In the Aadhaar case, a five-judge constitution bench of the Supreme Court led by CJI Misra from January 17 had to begin hearing petitions challenging the legality of the 12-digit bio-metric unique identification number.

Besides the CJI, the bench comprises justices AK Sikri, AM Khanwilkar, DY Chandrachud and Ashok Bhushan. No senior judge is part of the bench. The second senior-most judge on the bench is Justice Sikri who is sixth in seniority. Besides, the ‘original’ bench on Aadhaar matters was headed by Justice J Chelameswar and it was this bench that had referred the petitions for hearing before a five-judge bench, which wanted that Aadhaar be tested against the right to privacy, a fundamental right. The four senior judges may have also had an issue with this, the experts added.

‘Supreme Court judges vs CJI Dipak Misra highlights: Judges outburst ‘unfortunate, painful’, says former CJI Balakrishnan.

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