



A docket full of unresolved constitutional cases

These involve crucial questions about state power, accountability and impunity, and cannot be left hanging by the court's

Justice delayed:

1. During the framing of the Indian Constitution, it was proposed that any petition alleging a breach of fundamental rights by the state ought to be judicially decided within one month.
2. While the proposal did not, ultimately, find its way into the text of the Constitution, it nonetheless articulated something of great importance: between the individual and the state, there exists a substantial asymmetry of power.
3. While the violation of rights — whether through executive or legislative action — is relatively costless for the state, it is the individual, or individuals, who pay the price, and who must then run from pillar to post to vindicate their constitutionally guaranteed rights.
4. Consequently, a constitution is entirely ineffective if a rights-violating status quo is allowed to exist and perpetuate for months, or even years, before it is finally resolved (and often, by the time resolution comes, it is too late in the day for it to have any practical significance).

Blow to accountability

1. This point, of course, is not limited to the violation of rights but extends to all significant constitutional questions that arise in the course of controversial state action.
2. Issues around the federal structure, elections, and many others, all involve questions of power and accountability, and the longer that courts take to resolve such cases, the more we move from a realm of accountability to a realm of impunity.
3. In this context, as 2021 draws to a close, a look at the Supreme Court of India's docket reveals a host of highly significant constitutional cases that were long-pending when the year began, and are now simply a year older without any sign of resolution around the corner.
4. All these cases involve crucial questions about state power, accountability, and impunity. Consequently, the longer they are left hanging without a decision, the greater the damage that is inflicted upon our constitutional democracy's commitment to the rule of law.



Kashmir Issue:

1. First, there is the constitutional challenge to the Presidential Orders of August 5, 2019, that effectively diluted Article 370 of the Indian Constitution, and bifurcated the State of Jammu and Kashmir into two Union Territories, controlled by the Centre.
2. First, it raises the question of whether the Centre can take advantage of an Article 356 situation in a State — a time when no elected government and Assembly is in existence — to make permanent and irreversible alterations in the very structure of the State itself.
3. Second, the case also raises the question of whether, under the Constitution, the Union Legislature has the authority not simply to alter State boundaries (a power granted to it by Article 3 of the Constitution), but degrade a State into a Union Territory (something that has never been done before August 5, 2019).
4. If it turned out that the Union Legislature does have this power, it would essentially mean that India's federal structure is entirely at the mercy of Parliament: Parliament could then, constitutionally, convert India from a union of States to a union of Union Territories, if it so wanted. Needless to say, this — as well — would signal a hugely significant shift in power to the Centre.

Electoral bonds

1. Another long-pending case is the constitutional challenge to the electoral bonds scheme, which has now crossed four years.
2. The electoral bonds scheme authorises limitless, anonymous corporate donations to political parties, making election funding both entirely opaque to the people, as well as being structurally biased towards the party that is in power at the Centre.
3. In numerous central and State election cycles in the last four years, thousands of crores of rupees have been spent in anonymous political donations, thus impacting not only the integrity of the election process but also the constitutional right of citizens to an informed vote.
4. It is important to note that in both these cases, the Supreme Court's inaction is not neutral, but rather, favours the beneficiaries of the status quo. In other words, by not deciding, the Court is in effect deciding — in favour of one party — but without a reasoned judgment that justifies its stance.



Other key cases

1. This is also true for a number of other cases pending before the Court. For example, as far back as 2013, the Gauhati High Court held that the Central Bureau of Investigation (CBI) was not established under any statutory authority.
2. This verdict was immediately stayed when it was appealed to the Supreme Court, but in the intervening years, it has never been heard. Thus, the CBI continues to function — often controversially — despite a judgment by a constitutional court that has found its very existence to be illegal.
3. More recently, constitutional challenges to the Citizenship (Amendment) Act (CAA), filed in the immediate aftermath of the legislation's enactment, remain unheard, as do the challenges to the much-criticised Section 43(D)(5) of the Unlawful Activities (Prevention) Act, which makes the grant of bail effectively impossible, and is responsible for the years-long incarceration of several people.
4. The challenge to Section 43(D)(5) is perhaps the case that most directly affects civil rights, as the section continues to be applied on a regular basis (most notoriously, in recent times, in the Bhima Koregaon case).

It wounds the judiciary

1. Apart from benefiting the party that profits from the status quo — which, as we have seen, is invariably the state — judicial evasion of this kind is also damaging for the accountability of the judiciary itself.
2. Once a court decides a case, its reasoning — which must, by definition be public — can be publicly scrutinised and, if need be, critiqued.
3. In the absence of a decision, however, while the Court's inaction plays as significant a role on the ground as does its action, there is no judgment — and no reasoning — that the public can engage with. For obvious reasons, this too has a serious impact on the rule of law.
4. It must be acknowledged that the responsibility for constituting benches and scheduling cases especially cases that are due to be heard by larger Benches rests solely with the Chief Justice of India (CJI).

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07.12.2021

Tuesday



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