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# Perception of Judicial Independence and Impartiality at the Indian Supreme Court

December 2024

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Guernica 37 Group  
South Asia Justice Campaign

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JUSTICE  
CAMPAIGN**

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## ABOUT

**Guernica 37 Group** encompasses both Guernica 37 Chambers and the Guernica 37 Centre. **Guernica 37 Chambers** is a specialised Barristers' Chambers that brings together Barristers and international attorneys with expertise in international law. Guernica 37 Chambers transcends national borders and embraces legal cultures in an innovative approach to achieve justice and accountability for international crimes and human rights abuses on a national, regional, and international level. Guernica 37 provides legal assistance to individuals, civil society, and governmental institutions in designing and implementing strategies directed towards investigating the perpetration of international crimes and human right violations, ensuring accountability and redress for these crimes; and honouring the dignity of victims by generating opportunities for lasting reconciliation in conflict and post-conflict transitional states. **Guernica 37 Centre** is a not-for-profit organisation that aims to revitalise the use of accountability initiatives, to meaningfully impact the lives of the peoples and communities that demand justice for human rights violations and other egregious wrongdoing.

**South Asia Justice Campaign** is a collective working on raising awareness and seeking policy changes at various levels – national and multilateral – for communities in South Asia facing human rights violations. Shrinking civic space and the rise of authoritarianism in the region negatively affects South Asian societies. With the growth of majoritarianism, the affects are worst on the region's ethnic and religious minorities and their enjoyment of fundamental rights. We highlight the deteriorating state of human rights in South Asia through research, documentation and policy and legal interventions to address key concerns through targeted advocacy work.

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## EXECUTIVE SUMMARY

This report undertakes an audit of the perception of independence and impartiality of the Indian judiciary since 2014, with a focus on the Supreme Court of India. It sets out to analyse how and to what extent a reasonable observer may perceive judicial independence and impartiality based on emblematic cases before the Supreme Court as well as the conduct of judges inside and outside of the courtroom. The issue of institutional independence of the courts in India is discussed briefly as an important factor in how the judiciary is perceived.

This report relies on the appearance-of-bias standard which assesses judicial independence and impartiality on the basis of a reasonable observer, meaning a person able to hold rational and objective opinions based on observable facts.<sup>1</sup> Under this test, the question to be asked is whether such a reasonable observer would perceive the Supreme Court's actions as independent and impartial.

Based on publicly available documents, including official court documents and NGO reports among others, as well as interviews with experts and legal practitioners, the report identifies several indicators pertaining to the Indian judiciary that may give rise to the perception of lacking independence and impartiality:

- (1) Weaknesses in institutional independence reinforce the perception of selective justice:** As established by other reports, the institutional independence of judges in India is suffering from a range of shortcomings. The opaqueness of the process for judicial appointments, removals and transfers contributes to the appearance that judges who support the Government position or ideology are allowed to take up positions or are promoted. The problematic practice of offering political post-retirement positions to judges also gives the impression that judges who favour the Government are rewarded for their decisions. These institutional weaknesses feed into the appearance that the Supreme Court is promoting the interest of the government in specific cases.
- (2) Appearance of bias in listing, assigning and scheduling of cases:** We explored whether the reasonable observer may perceive external influence by the executive in the workings of the judiciary or internal influence between judges. The expansive discretion exercised by the Chief Justice in prioritizing, listing, and assigning of cases invite both external and internal interference. The delay of hearings in crucial cases cements a *status quo* that is in the interest of the government but detrimental to the rights of minorities and allows the Government to implement the laws that were challenged. This effectively treated the cases as if the Government had already won.
- (3) Conduct inside and outside the courtroom raise doubts about impartiality:** The conduct of some judges inside and outside the courtroom contribute to the impression that they are favouring the position or ideology of the Government or that suggested a pre-formed bias in favour of the Government position. These included disparaging comments against petitioners or victims, open support for the Government policies that were being contested and public engagements with high-ranking Government officials. In several emblematic cases that impacted the rights of minorities and human rights defenders, the Supreme Court in its judgements and in the manner of handling cases contributed to an appearance of partiality and lack of independence. This was particularly acute in cases of human rights defenders who were reprimanded and penalized through unjustified fines and arrests for exercising their right to seek an effective remedy.

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<sup>1</sup> United Nations Office on Drugs and Crime, *Commentary on The Bangalore Principles of Judicial Conduct*, September 2007, [https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry\\_on\\_the\\_Bangalore\\_principles\\_of\\_Judicial\\_Conduct.pdf](https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf) (hereinafter *Commentary on the Bangalore Principles*), para. 52.

These findings are confirmed by various commentators and legal practitioners who have expressed their view that the Supreme Court has morphed into an “executive court” as it seems to be catering to the demands of the Government in recent years and is failing to prioritize politically controversial cases which is described as a form of “judicial evasion”.

## INTRODUCTION

India is hailed as the largest democracy and fifth largest economy in the world, a rapidly growing powerhouse in Asia.<sup>2</sup> The country gained independence in 1947 and adopted one of the most comprehensive constitutions in the world in 1950 which includes many key human rights provisions.<sup>3</sup> The Constitution includes an extensive range of fundamental rights, including, *inter alia*, equality before the law,<sup>4</sup> prohibition of discrimination,<sup>5</sup> rights of freedom of speech, expression, assembly and association,<sup>6</sup> freedom of conscience and free profession of faith,<sup>7</sup> right to life,<sup>8</sup> the protection of minorities<sup>9</sup> and the right to Constitutional remedies.<sup>10</sup>

The Supreme Court of India has been dubbed “the most powerful Supreme Court in the world” and this reputation is exemplified by its remarkable substantive and procedural innovations such as the conception of public interest litigation.<sup>11</sup> Yet, changes in the political landscape can threaten these powers and more specifically, the Supreme Court’s ability to function as an independent and impartial branch of power. Following the election of the Hindu Nationalist Bharatiya Janata Party (BJP) in 2014, there have been reports of a systematic effort by the executive to undermine India’s democratic institutions.<sup>12</sup> Since the rise of the BJP, with the re-establishment of a single party majority and the promotion of a Hindu nationalist (*Hindutva*)

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<sup>2</sup> Atlantic Council, Tracking Global India’s growing influence, 2 May 2024, <https://www.atlanticcouncil.org/content-series/inflection-points/tracking-global-indias-growing-influence/>.

<sup>3</sup> Chatham House, *Democracy in India – Explaining the history, structure and challenges of democracy in the Republic of India*, 7 April 2022, <https://www.chathamhouse.org/2022/04/democracy-india>.

<sup>4</sup> Constitution, Article 14.

<sup>5</sup> Constitution, Article 15.

<sup>6</sup> Constitution, Article 19.

<sup>7</sup> Constitution, Article 25.

<sup>8</sup> Constitution, Article 21,

<sup>9</sup> Constitution, Article 29.

<sup>10</sup> Constitution, Article 32.

<sup>11</sup> Chandra, Hubbard, & Kalantry, *The Supreme Court of India: An Empirical Overview of the Institution*, Comparative Constitutional Law and Policy, pp. 43-76, 2019, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3154597](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3154597); Rehan Abeyratne, *Rethinking Judicial Independence in India and Sri Lanka*, in Asian Journal of Comparative Law Volume 10 Issue 1, 12 August 2015, <https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/abs/rethinking-judicial-independence-in-india-and-sri-lanka/D8B346060B89266E1B5AD5A09F675A7C>, p. 100.

<sup>12</sup> Christoph Jaffrelot, *Modi’s India: Hindu Nationalism and the Rise of Ethnic Democracy*, 2021, Chapter 8, ‘Deinstitutionalising India’, Princeton University Press, pp 276-297; International Institute for Democracy and Electoral Assistance, *The Global State of Democracy 2022: Forging Social Contracts in a Time of Discontent*, 2022, <https://idea.int/democracytracker/gso-d-report-2022>, p. 7; Freedom House, *Freedom in the World 2022 Country Report for India*, <https://freedomhouse.org/country/india/freedom-world/2022>; Asian Forum for Human Rights and Development, *Statement: India: End the systemic attack on Muslims*, 16 June 2022, <https://forum-asia.org/?p=37044>; Benjamin Adams, *The Rise of Despotic Majoritarianism*, in Democratic Theory Volume 81, 2022, <https://www.berghahnjournals.com/view/journals/democratic-theory/9/1/dt090105.xml>, p. 9; New York Times, *The New India: Aiding Democracy Abroad, Straining It at Home*, 25 September 2022, <https://www.nytimes.com/2022/09/24/world/asia/india-democracy.html>; Human Rights Watch, *UN Chief Admonishes India to Protect Rights of Minorities*, 21 October 2022, <https://www.hrw.org/news/2022/10/21/un-chief-admonishes-india-protect-rights-minorities>; Abdul Majid, *State of Human Rights in India: A Case Study of Muslim Minority Oppression*, in South Asian Studies Volume 31 No. 1, [http://pu.edu.pk/images/journal/csas/PDF/4\\_v32\\_1\\_17.pdf](http://pu.edu.pk/images/journal/csas/PDF/4_v32_1_17.pdf), p. 60.

policy, tensions between the executive and the Indian Supreme Court over the latter's independence have intensified.<sup>13</sup>

These developments have been particularly detrimental to religious and ethnic minorities in India, as noted by the United Nations (UN) Secretary General Antonio Guterres in a visit to India in 2022.<sup>14</sup> UN mandate holders have been consistently raising concerns about the situation of minorities in India.<sup>15</sup> Despite this, there has been little appetite among the international community to criticize this development, attributed to India's growing power and influence in key global issues, as well as challenges to democracy in the United States and Europe.

In recent years, Indian civil society and international bodies have expressed concerns over the violation of human rights of ethnic and religious minorities in India, particularly of Muslims among others, through extra-judicial killings, arbitrary detentions and other abuses, often committed by state officials.<sup>16</sup> Considering the role of the judiciary in providing an effective remedy under international law and domestic law in India, judicial independence and impartiality is key to safeguard minority communities against violations by the state. However, several non-governmental organisations (NGOs) have expressed concerns that a significant number of ethnic and religious minorities are unable to access a judicial remedy via domestic courts.<sup>17</sup>

## INTERNATIONAL STANDARDS

In order to accurately identify the international standards on judicial independence and impartiality, this report relies on the sources of international law as international conventions, international custom as evidence of a general principle accepted by law, and recognised general principles of law.<sup>18</sup> Furthermore, it defines judicial decisions and teachings of highly qualified academics as subsidiary means for determining rules of international law.<sup>19</sup> Therefore, when identifying the standards to apply to the Indian legal system, regard was given to both binding sources of international law and non-binding soft law.

The sources of international law adopted by India include the Universal Declaration of Human Rights (UDHR),<sup>20</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>21</sup> the Convention Against Corruption (CAC),<sup>22</sup> Convention on the Elimination of All Forms of Discrimination against Women

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<sup>13</sup> Christoph Jaffrelot, *Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy*, 2021, Chapter 8 'Deinstitutionalising India', Princeton University Press, pp 276-297.

Deutsche Welle, *Can India's judiciary maintain its independence?*, 2 October 2023, <https://www.dw.com/en/can-indias-judiciary-maintain-its-independence/a-64666835>; The Indian Express, *The spat between the executive and judiciary*, 23 December 2022, <https://www.newindianexpress.com/web-only/2022/dec/23/the-spat-between-the-executive-and-judiciary-2531117.html>.

<sup>14</sup> Times of India, *Antonio Guterres: India's credibility on a global stage can gain authority from a strong commitment to human rights at home*, 20 October 2022, <https://timesofindia.indiatimes.com/videos/toi-original/antonio-guterres-indias-credibility-on-global-stage-can-gain-authority-from-a-strong-commitment-to-inclusive-human-rights-at-home/videoshow/94980094.cms>.

<sup>15</sup> See United Nations Human Rights Office, AL IND 15/2020 (OHCHR), 9 October 2020, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25603>; Michelle Bachelet, *Global Update: Bachelet urges inclusion to combat "sharply escalating misery and fear"*, OHCHR, 7 March 2022, <https://www.ohchr.org/en/speeches/2022/03/global-update-bachelet-urges-inclusion-combat-sharply-escalating-misery-and-fear>.

<sup>16</sup> Sonja Biserko, Marzuki Darusman and Stephen Rapp, *Report of the Panel of Independent International Experts to Examine Information About Alleged Violations of International Law Committed Against Muslims in India since July 2019*, 2022, <https://piieindia.wordpress.com/> (hereinafter PIIE Report); Letter by Special Rapporteurs to the Indian Government, OL IND 7/2020, 6 May 2020, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25219>.

<sup>17</sup> Christoph Jaffrelot, *Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy*, 2021, Chapter 8 'Deinstitutionalising India', Princeton University Press, pp 276-297; PIIE Report, Annexure I, p. 140-145.

<sup>18</sup> Statute of the International Court of Justice, 1921, <https://www.icj-cij.org/en/statute>.

<sup>19</sup> Statute of the International Court of Justice, 1921, <https://www.icj-cij.org/en/statute>, Article 38.

<sup>20</sup> *Universal Declaration of Human Rights*, General Assembly Resolution 217A, 10 December 1948, <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf>.

<sup>21</sup> *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), 16 December 1966, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

<sup>22</sup> *United Nations Convention Against Corruption*, General Assembly Resolution 58/4, 31 October 2003, [https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

(CEDAW),<sup>23</sup> International Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>24</sup> International Covenant on Economic, Social and Cultural Rights (CESCR),<sup>25</sup> and Convention on the Rights of Child (CRC).<sup>26</sup> The non-binding sources of law, or soft law, identified include the widely accepted UN Basic Principles on the Independence of the Judiciary (Basic Principles).<sup>27</sup> The Basic Principles serve as a starting point as they provide guidelines for the implementation of judicial independence. In addition, the Bangalore Principles of Judicial Conduct (Bangalore Principles) elaborate on the Basic Principles and provide a code of conduct for judiciaries.<sup>28</sup> General Comment 32 by the United Nations Human Rights Committee offers a valuable framework to analyse the right to equality before courts and tribunals.<sup>29</sup>

Other relevant instruments include the [Montreal \(Universal\) Declaration on the Independence of Justice](#) and the [Criminal Justice Assessment Toolkit on the Independence, Impartiality and Integrity of the Judiciary](#) created by the UN Office on Drugs and Crime (UNODC). Finally, analysis of regional practice in Europe, Africa and the Americas was used to provide further interpretation and examples of best practice.

## I. Judicial Independence

The principle of judicial independence is found in Article 14 ICCPR and in Article 11(1) CAC, which are binding on India and impose an obligation on the State to ensure that the judiciary is “established by law” and not subject to external interference by the Government of the State. As emphasised in the UN Human Rights Committee General Comment No. 32 on equality before courts and tribunals “*the requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.*”<sup>30</sup>

The principle is reiterated in the Basic Principles and the Bangalore Principles which provide further guidance that States can use to implement this obligation. The Basic Principles underline that the “*judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason*” and that “*there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision*”.<sup>31</sup>

Regional instruments and jurisprudence on the principle of judicial independence provide further elaboration on its interpretation and application. The requirement of an independent judiciary is reflected in regional treaties including Article 26 of the African Charter on Human and Peoples’ Rights (ACHPR),<sup>32</sup> Article 8(1) of

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<sup>23</sup> *United Nations Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>.

<sup>24</sup> *United Nations International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>.

<sup>25</sup> *United Nations International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

<sup>26</sup> *United Nations Convention on the Rights of the Child*, 20 November 1989, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

<sup>27</sup> *Basic Principles on the Independence of the Judiciary*, 13 December 1985, <https://previous.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> (hereinafter Basic Principles).

<sup>28</sup> UN Economic and Social Council, *Bangalore Principles of Judicial Conduct*, ECOSOC 2006/23, July 2006, [https://www.unodc.org/res/ji/import/international\\_standards/bangalore\\_principles/bangaloreprinciples.pdf](https://www.unodc.org/res/ji/import/international_standards/bangalore_principles/bangaloreprinciples.pdf) (hereinafter Bangalore Principles).

<sup>29</sup> UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, <https://www.refworld.org/docid/478b2b2f2.html> (hereinafter General Comment 32)

<sup>30</sup> *Ibid*, para. 19.

<sup>31</sup> Basic Principles, Principle 2 and 4.

<sup>32</sup> *African Charter on Human Rights and Peoples’ Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 21 October 1986, [https://achpr.org/public/Document/file/English/banjul\\_charter.pdf](https://achpr.org/public/Document/file/English/banjul_charter.pdf).

the American Convention on Human Rights (ACHR)<sup>33</sup> and Article 6(1) of the European Convention on Human Rights (ECHR).<sup>34</sup> The European Court on Human Rights has interpreted the independence requirement as demanding consideration of the manner of appointment, the term of office, the existence of guarantees against outside pressure and a requirement that the judiciary appear independent and impartial.<sup>35</sup> Although these instruments are not binding on India, the interpretations of these instruments by regional courts may function as persuasive indicators of how the state can uphold the requirement of an independent judiciary.

The principle of an independent judiciary contains several distinct elements, ranging from the appointment and selection of judges to their transfer and suspension, and from disciplinary measures to their decision-making process in their respective court cases.<sup>36</sup> While these sources of the independence of the judiciary are important, it has been noted that an analysis of judicial independence cannot stop at the study of *de jure* independence alone; instead, it must look at the independence of the judiciary in practice over time.<sup>37</sup>

The principle of judicial independence plays a fundamental role in ensuring two key human rights: the right to a fair trial and the right to an effective remedy. As expanded by General Comment No. 32, “*the notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive.*”<sup>38</sup> The Preamble to the Basic Principles also states that the principle of judicial independence is fundamental in ensuring the individuals’ right to fair trial. The Basic Principles further emphasize that the principle of the independence of the judiciary requires the judiciary to ensure that judicial proceedings are conducted fairly.<sup>39</sup> Similarly, Value 1 of the Bangalore Principles notes that judicial independence is a “*prerequisite to the rule of law and a fundamental guarantee of a fair trial*”. An effective remedy which is guaranteed under Article 2(3) ICCPR and Article 6 of the CERD can only be ensured if there is an independent judiciary. The General Comment No. 32 further underlines that right to equality guaranteed under Article 14 of ICCPR also implies that State is obliged to provide legal assistance to ensure the right to effective remedy.<sup>40</sup>

## II. Judicial Impartiality

Under Article 14(1) ICCPR all persons are entitled to have any criminal charges determined by an “*impartial tribunal set by law*”. This means that the judge must not “*harbour preconceptions about the matter put before them and that they must not act in ways that promote the interests of one of the parties.*”<sup>41</sup> Thus, the

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<sup>33</sup> American Convention on Human Rights, 22 November 1969,

<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

<sup>34</sup> European Convention on Human Rights, as amended by Protocol No. 15 (CETS No. 213), 1 August 2021,

[https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>35</sup> European Court of Human Rights, *Campbell and Fell v. the United Kingdom*, Judgement (Merits and Just Satisfaction, Application no. 781977 and 7878/77, 28 June 1984,

<https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Campbell%20and%20Fell%20v.%20the%20United%20Kingdom%22%5D,%22itemid%22:%5B%22001-57456%22%5D%7D>], para. 78.

<sup>36</sup> See International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – Practitioners Guide No. 1*, 2007, <https://www.icj.org/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners-Guide-2009-Eng.pdf> (hereinafter ICJ Practitioners Guide).

<sup>37</sup> Vineeta Yadav and Bumba Mukerjee, *Democracy, Electoral Systems and Judicial Empowerment in Developing Countries*, 2017, p. 4, [https://www.press.umich.edu/5037026/democracy\\_electoral\\_systems\\_and\\_judicial\\_empowerment\\_in\\_developing\\_countries](https://www.press.umich.edu/5037026/democracy_electoral_systems_and_judicial_empowerment_in_developing_countries).

<sup>38</sup> General Comment 32, para 25.

<sup>39</sup> Principle 6, Basic Principles.

<sup>40</sup> General Comment 32, para 10.

<sup>41</sup> Human Rights Committee, *Arvo O. Kuitunen v Finland*, Communication No. 387/1989, 23 October 1992, [http://www.worldcourts.com/hrc/eng/decisions/1992.10.23\\_Karttunen\\_v\\_Finland.htm](http://www.worldcourts.com/hrc/eng/decisions/1992.10.23_Karttunen_v_Finland.htm), p. 120, para. 7.2.

impartiality of the judiciary under international law refers to the state of mind of the judge determining a case in a court or tribunal and assesses their ability to make decisions without bias or prejudice.<sup>42</sup>

The General Comment further explains that the requirement of impartiality has two aspects: “*First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other; Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.*”<sup>43</sup>

This obligation is also reflected in the Basic Principles and Value 2 of the Bangalore Principles which require that the judge perform his or her duties without “bias or prejudice” and in a way that maintains the “impartiality of the judiciary”. Where the partiality of the judiciary is in question, the Commentary on the Bangalore Principles of Judicial Conduct (Commentary on the Bangalore Principles) indicates that this issue must be assessed from the viewpoint of a “*reasonable observer*” representing society.<sup>44</sup> The obligation of an impartial judiciary therefore places an obligation on the judge to recuse themselves from the proceedings where the judge has actual bias or where “*it may appear to a reasonable observer that the judge is unable to decide the matter impartially concerning the proceedings*”.<sup>45</sup>

The impartiality of the judiciary is a principle reiterated in regional human rights instruments including Article 7(1) ACHPR, Article 8(1) ACHR, and Article 6(1) ECHR. The Commentary on the Bangalore Principles specifically refers to the approach taken by the European Court of Human Rights to explain the aspects of the requirement of impartiality.<sup>46</sup> Therefore, the jurisprudence of the European Court of Human Rights can function as persuasive indicators as to whether the judiciary in India lack partiality under the Bangalore Principles of Judicial Conduct.

Both the European Court of Human Rights and the Inter-American Courts of Human Rights have conceptualised impartiality in their respective instruments as requiring both “objective” and “subjective impartiality”.<sup>47</sup> According to the subjective approach, impartiality is assessed by ascertaining the personal conviction of the judge, whereas using the objective approach, impartiality is determined by assessing whether the judge offered guarantees sufficient to rule out doubts about any bias.<sup>48</sup>

It is a logical consequence that judicial impartiality is intrinsically connected to the independence of the judiciary since being free from external influence and interference prevents judges from adopting bias in favour of the persons or groups who exert their influence.<sup>49</sup> It has been argued that especially the systems for appointment of judges and allocation of cases can have an impact on impartiality and the perception of impartiality.<sup>50</sup> In addition, ensuring diverse backgrounds among judges through the appointment process is

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<sup>42</sup> ICJ Practitioners Guide, p. 28.

<sup>43</sup> General Comment, para 21.

<sup>44</sup> Commentary on the Bangalore Principles, para. 52 and 54.

<sup>45</sup> Bangalore Principles, Value 2.5.

<sup>46</sup> Commentary on the Bangalore Principles, para. 53.

<sup>47</sup> ICJ Practitioners Guide, p. 28.

<sup>48</sup> ICJ Practitioners Guide, p. 28.

<sup>49</sup> See McIntyre, *Structural Threats to Impartiality*, in: The Judicial Function, 17 September 2019, p. 168-170, who argues that judicial independence is a necessary means to promote impartiality.

<sup>50</sup> Malleon, *Safeguarding Judicial Impartiality*, Legal Studies, Volume 22, Issue 1, March 2022, p. 63; reiterated in Kotby, *Judicial Independence versus Judicial Impartiality - a comparative approach*, July 2022, p. 94 ff., <https://repository.mdx.ac.uk/download/cb2cdc09061e1f7a66129e65b1150ea67820dcd22ec293ffc1715159ed7c7bed/2701705/MAMKotby%20thesis.pdf>.

argued to bolster the public perception of impartiality as the community served would see themselves represented, even if there is no evidence to show that a more diverse judiciary affects decision-making.<sup>51</sup>

## WEAKNESSES IN INSTITUTIONAL INDEPENDENCE

The independence of the judiciary as an institution is an essential element of judicial independence. As set out [above](#), this includes the process of appointments, removals and transfers of judges, among others. Shortcomings in institutional independence can reinforce the perception of partiality and external influence. For these reasons, the question of institutional independence merits brief discussion although it is not a focus of this report.

### I. The Indian Court System

The Indian legal system is comprised of the Supreme Court of India at its apex, a High Court for each of the 25 States, and a District Court in every district that exercises both original and appellate jurisdiction in civil and criminal law cases.<sup>52</sup> While the High Court and Supreme Court exercise appellate jurisdiction on cases decided by subordinate district courts, they can also exercise original jurisdiction in certain cases, including in cases concerning fundamental rights guaranteed by the Indian Constitution.<sup>53</sup>

The Supreme Court bench is comprised of 34 judges, including the Chief Justice and at the time of writing this report, the position is held by Justice D.Y. Chandrachud.<sup>54</sup> Each High Court also has a Chief Justice, with the number of judges varying from state to state.<sup>55</sup> Both Supreme Court judges and High Court judges are appointed by the President of India, in consultation with the Chief Justice of India and, in relation to the High Courts, the Governor of the State.<sup>56</sup>

The Indian Supreme Court is widely considered to be one of the most powerful courts in the world.<sup>57</sup> Equally, compared with the political executive and legislature, the judiciary has traditionally enjoyed greater public confidence, dubbed a “people’s court” and the “last resort for the oppressed and bewildered”.<sup>58</sup> Articles 124-147 of the Indian Constitution detail the powers of the Supreme Court. Notably, it has the power to strike down laws that violate fundamental rights of citizens, giving the Supreme Court an implicit power of judicial review.<sup>59</sup>

These remedies give the Supreme Court a large degree of power, including an individual right to petition the Supreme Court for appropriate proceedings for the enforcement of constitutional rights and the power to issue orders of *habeas corpus* (an order to present a detainee before the court and the reasons for their detention),

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<sup>51</sup> Malleon, *Safeguarding Judicial Impartiality*, Legal Studies, Volume 22, Issue 1, March 2022, p. 65-66.

<sup>52</sup> Constitution of India, as on May 2022, [https://legislative.gov.in/sites/default/files/COI\\_English.pdf](https://legislative.gov.in/sites/default/files/COI_English.pdf) (hereinafter Constitution), Chapter VII; Tony George Puthucherril, ‘Belling the cat’: judicial discipline in India, in *Disciplining Judges: Contemporary Challenges and Controversies*, 21 March 2021, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3808952](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3808952), p. 159.

<sup>53</sup> Constitution, Article 32 and 226.

<sup>54</sup> Supreme Court of India, Chief Justice & Judges, <https://main.sci.gov.in/chief-justice-judges>.

<sup>55</sup> See Indian High Courts Act, 1861; also see Afreen Alam, *The emergence and evolution of High Courts in India*, The Leaflet, 9 October 2021, <https://theleaflet.in/the-emergence-and-evolution-of-high-courts-in-india/>.

<sup>56</sup> Constitution, Article 217.

<sup>57</sup> Rehan Abeyratne, *Rethinking Judicial Independence in India and Sri Lanka*, in *Asian Journal of Comparative Law* Volume 10 Issue 1, 12 August 2015, <https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/abs/rethinking-judicial-independence-in-india-and-sri-lanka/D8B346060B89266E1B5AD5A09F675A7C>, p. 100.

<sup>58</sup> Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Court*, in *American Journal of Comparative Law* Volume 61 Issue 1, 1 January 2013, <https://academic.oup.com/ajcl/article-abstract/61/1/173/2572000?redirectedFrom=fulltext&login=true>, p. 173-208; Shivaraj Huchhanavar, *Judicial Conduct Regulation; do in-house mechanisms in India uphold judicial Independence and effectively enforce judicial accountability?*, in *India Law Review* Volume 6 Issue 3, 2022, <https://www.tandfonline.com/doi/full/10.1080/24730580.2022.2068887>, p. 354.

<sup>59</sup> Constitution, Article 13.

*mandamus* (command to perform a statutory duty), prohibition, *quo warranto* (an order to show authority for exercising a certain power) and *certiorari* (order to transfer a case from subordinate court to itself).<sup>60</sup> Article 144 of the Constitution also provides that the Supreme Court has the power to hold any authority in contempt if they disregard or disobey the order of the Supreme Court.<sup>61</sup>

## II. Independence of the Indian Judiciary

Although the Indian Constitution does not expressly provide for the independence of judges, the independence of the judiciary, the rule of law and separation of powers are recognised as unamendable basic structure of the Constitution as observed by the Indian Supreme Court in *S.P Gupta v Union of India*.<sup>62</sup> Despite a long history of judicial activism and protecting the rights of individuals under the Indian constitution,<sup>63</sup> following BJP's election in 2014, legal scholars and civil society organizations have shared their disappointment that the Indian Supreme Court is no longer functioning completely independently from the government and in some cases carries an appearance of impartiality, which affects the ability for victims of crimes to access justice.<sup>64</sup>

### (i) Appointment of Judges

The process of judicial appointments in India requires names of judges to be recommended by the Supreme Court to the Executive, which then issues the order for appointment.<sup>65</sup> Concerns have been raised that this selection and appointment process set out in the Constitution and the Memorandum of Procedure<sup>66</sup> does not sufficiently guarantee judicial independence: First, the process of selection of judges by the Collegium is critiqued as being arbitrary, without following any objective or predetermined criteria, and also being opaque.<sup>67</sup> Second, once names of judges are selected by the Collegium and recommended to the Union Government, the latter retains the power to reject or indefinitely delay appointments, giving the executive branch of the government an effective veto power and control over judicial appointments.<sup>68</sup>

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<sup>60</sup> Constitution, Article 32(2).

<sup>61</sup> Constitution, Article 144.

<sup>62</sup> Supreme Court of India, *S.P. Gupta vs Union of India (UOI) and Ors*, AIR 1982 SC 149, 30 December 1981, <https://indianlawportal.co.in/s-p-gupta-v-uoi/>.

<sup>63</sup> Medha Srivastava, *The complacency of constitutional courts: India's Supreme Court and the Citizenship Amendment Act*, in Volkerrechtsblog, 12 August 2020, <https://voelkerrechtsblog.org/the-complacency-of-constitutional-courts-indias-supreme-court-and-the-citizenship-amendment-act/>.

<sup>64</sup> The Wire, *Full Text | Indian Judiciary Has Become an Instrument of the Executive: Jaffrelot*, 7 July 2022, <https://thewire.in/rights/full-text-christophe-jaffrelot-sidharth-bhatia-india-hindutva>; Scroll.in, *The crisis of legitimacy plaguing the Supreme Court in Modi era is now hidden in plain sight*, 1 December 2020, <https://scroll.in/article/979818/the-crisis-of-legitimacy-plaguing-the-supreme-court-in-modi-era-is-now-hidden-in-plain-sight>.

<sup>65</sup> Arghya Sengupta, *Independence and Accountability of the Indian Higher Judiciary*, Cambridge University Press, 2019; Vijay Hansaria, *Appointment of Supreme Court and High Court Judges: Need for a Fresh Look*, 26 October 2022, <https://www.sconline.com/blog/post/2022/10/26/appointment-of-supreme-court-and-high-court-judges-need-for-a-fresh-look/>.

<sup>66</sup> *Memorandum of procedure of appointment of Supreme Court Judges*, 11 August 2021, <https://doj.gov.in/memorandum-of-procedure-of-appointment-of-supreme-court-judges/>.

<sup>67</sup> Sen, *India's Democracy at 70: the Disputed Role of the Courts*, in Journal of Democracy Volume 28 Issue 3, July 2017, <https://www.journalofdemocracy.org/articles/indias-democracy-at-70-the-disputed-role-of-the-courts/>, p. 99; Times of India, *Rijju: Many memos received that say collegium is opaque*, 23 December 2022; Arvind, Datar, *Eight Fatal Flaws: The Failings of the National Judicial Appointments Commission*, in Arghya Sengupta, and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence*, 2018, online edn, Oxford Academic, 22 August 2019, <https://doi.org/10.1093/oso/9780199485079.003.0010>; C. Raj Kumar, *Future of Collegium System: Transforming Judicial Appointments for Transparency*, 50 Economic and Political Weekly. 48 (2015): 31–34, <http://www.jstor.org/stable/44002895>; Indira Jaisingh, *National Judicial Appointments Commission: A Critique*, 49 Economic and Political Weekly 35 (2014): 16–19, <http://www.jstor.org/stable/24480485>.

<sup>68</sup> Scroll.In, *'Why have collegium at all?': What Kureshi's rejection says about SC independence in the Modi era*, 31 August 2021, <https://scroll.in/article/1004168/why-have-collegium-at-all-what-kureshis-rejection-says-about-sc-independence-in-the-modi-era>; Supreme Court Observer, *Justice Akil Kureshi Retires Without Elevation to the Supreme Court*, 10 March 2022, <https://www.scoobserver.in/journal/justice-akil-kureshi-retires-without-elevation-to-the-supreme-court/>.

An illustrative example of the arbitrariness within the Collegium is the refusal to appoint as a judge of the Supreme Court Justice Muralidhar, then a High Court Chief Justice, despite his outstanding achievements in the past, a failure criticised by eminent jurists and former judges.<sup>69</sup> Another example is the appointment of L. Victoria Gowri as judge at the Madras High Court. She has had a record of making public hate speeches against religious minorities. Despite that she was appointed as High Court judge in February 2023.<sup>70</sup> When lawyers approached the Supreme Court to challenge her appointment, the Supreme Court noted that her “suitability” for the post is a matter of consultation by the Collegium and is beyond their scope of review.<sup>71</sup>

While the Supreme Court Collegium is vested with the power to recommend names of judges, as a way of ensuring judicial independence, this power is often undermined by the Executive when it refuses to accept the names recommended by the collegium or delays to issue actual orders for appointment. The reasons for rejections of Collegium recommendations are not made public but an exceptional disclosure by the Collegium in January 2023 showed that many objections were based on political grounds.<sup>72</sup> This shows that the refusal or inaction by the executive is intentional. The Collegium is often forced to modify their recommendations for appointments, which again is done without transparency, making it impossible to determine whether it has been done at the behest of the executive or not.<sup>73</sup>

One example on point is the case of erstwhile Supreme Court Chief Justice Bobde, where there were reports of a standoff between the Chief Justice and the Collegium concerning the elevation of Akil Kureshi, one of the most senior high court judges, to the Supreme Court in 2022.<sup>74</sup> Chief Justice Bobde’s reluctance was attributed to Akil Kureshi having previously remanded Gujarat State Home Minister (and then, India’s Home Minister) Amit Shah to police custody in 2010 over a case of alleged extra-judicial killing by the police.<sup>75</sup> Members of the legal community termed it as “voluntary surrender” of the judiciary to the Executive.<sup>76</sup>

Delays in issuing appointment orders by the Executive is considered to be a significant cause for vacancies in the High Courts and the Supreme Court. The same exercised the Supreme Court in 2021, which issued directions regarding timelines to be followed for appointments.<sup>77</sup> According to this order, the Central Government is expected to make appointments within 3-4 weeks after the Supreme Court Collegium issuing its final recommendations.<sup>78</sup> Despite these instruction, the Supreme Court has repeatedly taken note of delays and reprimanded the Executive for delaying appointments in 2023.<sup>79</sup>

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<sup>69</sup> Indian Express, *A question for the collegium: Why was Justice S Muralidhar not brought to the Supreme Court?*, 19 August 2023, <https://indianexpress.com/article/opinion/columns/a-question-for-supreme-court-8894242/>.

<sup>70</sup> LiveLaw, *Supreme Court Agrees to Hear Plea Challenging Appointment of Victoria Gowri As Madras HC Judge*, 6 February 2023, <https://www.livelaw.in/top-stories/supreme-court-agrees-to-hear-plea-challenging-appointment-of-victoria-gowri-as-madras-hc-judge-220827>.

<sup>71</sup> Supreme Court of India, *Anna Mathews v. Supreme Court Of India*, Writ Petition (Civil) No. 147 of 2023, 10 February 2023, [https://main.sci.gov.in/supremecourt/2023/5306/5306\\_2023\\_7\\_1501\\_41750\\_Judgement\\_10-Feb-2023.pdf](https://main.sci.gov.in/supremecourt/2023/5306/5306_2023_7_1501_41750_Judgement_10-Feb-2023.pdf).

<sup>72</sup> The Leaflet, *As SC Collegium modifies two HC chief justice recommendations, questions of transparency return*, 18 September 2024, <https://theleaflet.in/as-sc-collegium-modifies-two-hc-chief-justice-recommendations-questions-of-transparency-return/>.

<sup>73</sup> Ibid.

<sup>74</sup> Supreme Court Observer, *Justice Akil Kureshi Retires Without Elevation to the Supreme Court*, 10 March 2022, <https://www.scobserver.in/journal/justice-akil-kureshi-retires-without-elevation-to-the-supreme-court/>.

<sup>75</sup> High Court of Gujarat, *Central Bureau of Investigation v Amit Sha*, Special Criminal Application No. 1497 of 2010, Judgement, <https://www.casemine.com/judgement/in/56091a80e4b01497111a0ae6>.

<sup>76</sup> Scroll.in, *‘Why have collegium at all?’: What Kureshi’s rejection says about SC independence in the Modi era*, 31 August 2021, <https://scroll.in/article/1004168/why-have-collegium-at-all-what-kureshis-rejection-says-about-sc-independence-in-the-modi-era>.

<sup>77</sup> Supreme Court of India, *PLR Projects Pvt. Ltd. v. Mahandi Coalfields Ltd. & Ors.*, Transfer Petition (Civil) No. 2419 of 2019, 20 April 2021, [https://www.livelaw.in/pdf\\_upload/time-line-for-judicial-appointments-supreme-court-collegium-392163.pdf](https://www.livelaw.in/pdf_upload/time-line-for-judicial-appointments-supreme-court-collegium-392163.pdf).

<sup>78</sup> Ibid, para. 11.

<sup>79</sup> Supreme Court Observer, *Judicial Appointments in Limbo: Supreme Court Expresses Concerns Over Delayed Collegium Recommendations*, 20 November 2023, <https://www.scobserver.in/journal/judicial-appointments-in-limbo-supreme-court-expresses-concerns-over-delayed-collegium-recommendations/>; LiveLaw, *‘70 Collegium Resolutions Pending’: Supreme Court Again Raises Issue of Delaying Judges’ Appointments, Says It Will ‘Monitor Closely*, 26 September 2023, <https://www.livelaw.in/top-stories/70->

The government does not release information on the dates of recommendations made by the Collegium and the dates of rejections of these. The online news outlet SCC Online Times tracks judicial appointments every month<sup>80</sup> and shows that from January to July 2024, the Collegium recommended a total of 111 judges to be appointed to High Courts, whereas only 87 were appointed by the Executive.<sup>81</sup> These figures do not capture how long appointments took but indicate an overall trend of delays after recommendations are issued.

An example where a delay effectively led to the blockage of an appointment to the High Court is the case of Aditya Sondhi who was recommended by the Collegium to serve as a judge at the Karnataka High Court in February 2021.<sup>82</sup> While two other candidates from the same batch were appointed by the government, Mr Sondhi's name was returned to the Collegium, possibly because of his criticism of the Citizenship Amendment Act (a controversial law that the government had passed shortly before).<sup>83</sup> When the Collegium re-approved Mr Sondhi's candidature, the government did not take any action for over a year, even though the Memorandum of Procedure prescribes that the government has the obligation to appoint a nominee in such a situation. In the event Mr Sondhi eventually withdrew his consent to the appointment.<sup>84</sup>

## (ii) Transfer of Judges

Arbitrary transfer of judges often works as disguised sanction or punitive action against a judge.<sup>85</sup> A number of factors result in these arbitrary transfers, such as a lack of objective, predetermined criteria and lack of transparency and publication of reasons.<sup>86</sup> A 2022 study surveyed the views of judges, advocates and legal academics on in-house disciplinary proceedings and its effect on judicial independence.<sup>87</sup> Regarding the removal and in-house procedure for Supreme Court and High Court judges, 78% of the respondents considered the constitutional removal procedure ineffective in dealing with judicial corruption, while 61%

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[collegium-resolutions-pending-supreme-court-again-raises-issue-of-centre-delaying-judges-appointments-says-it-will-monitor-closely-238721](https://www.scconline.com/blog/post/category/news/appointments/).

<sup>80</sup> SCC Online Times, *Appointments & Transfers*, <https://www.scconline.com/blog/post/category/news/appointments/> (accessed on 8 November 2024).

<sup>81</sup> SCC Online Times, *January 2024 Judges Tracker*, 3 February 2024, <https://www.scconline.com/blog/post/2024/02/03/january-2024-judges-appointment-tracker-supreme-court-hc-legal-news/>; SCC Online Times, *February 2024 Judicial Appointments Tracker*, 5 March 2024, <https://www.scconline.com/blog/post/2024/03/05/judicial-appointment-tracker-feb-2024-high-court-appointments-collegium-recommendations-legal-news/>; SCC Online Times, *March 2024 Judicial Appointment Tracker*, 3 April 2024, <https://www.scconline.com/blog/post/2024/04/03/judicial-monthly-appointment-tracker-hc-appointments-sc-collegium-recommendations-legal-news/>; SCC Online Times, *April 2024 Judicial Appointment Tracker*, 3 May 2024, <https://www.scconline.com/blog/post/2024/05/03/judicial-appointment-tracker-april-2024-appointment-judges-hc-sc-collegium-legal-news/>; SCC Online Times, *May 2024 Judicial Appointment Tracker*, 5 June 2024, <https://www.scconline.com/blog/post/2024/06/05/may-2024-judicial-appointment-transfer-retirements-tracking-legal-news/>; SCC Online Times, *June 2024 Judicial Appointment Tracker*, 7 July 2024, <https://www.scconline.com/blog/post/2024/07/07/judicial-appointment-tracker-june-2024-supreme-court-hc-legal-news/>; SCC Online Times, *July 2024 Judicial Appointment Tracker*, 5 August 2024, <https://www.scconline.com/blog/post/2024/08/05/judicial-appointment-tracker-july-2024-collegium-recommendation-retirement-transfer-scc-times-legal-news/>.

<sup>82</sup> The Print, *Don't deserve to be strung along, says Bengaluru lawyer who rejected HC judgeship after impasse*, 25 February 2022, <https://theprint.in/judiciary/dont-deserve-to-be-strung-along-says-bengaluru-lawyer-who-rejected-hc-judgeship-after-impasse/845770/>.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Arghya Sengupta, *Independence and Accountability of the Indian Higher Judiciary*, Cambridge University Press, Chapter 3, 'In Tenure Questions: Mechanisms for Judicial Discipline', 2019.

<sup>86</sup> Ibid.

<sup>87</sup> Huchanavar, *Judicial conduct regulation: do in-house mechanisms in India uphold judicial Independence and effectively enforce judicial accountability?*, in *Indian Law Review* Volume 6, 2022 – Issue 3, <https://www.tandfonline.com/doi/full/10.1080/24730580.2022.2068887>, p. 354; Bar and Bench, *Last 3 CJIs have violated principle of no man being a judge in his own case: Justice AP Shah call for judicial accountability*, 29 July 2019, <https://www.barandbench.com/news/justice-ap-shah-calls-for-judicial-accountability>.

considered it ineffective in tackling judicial misconduct. Additionally, almost 80% of the legal academics were dissatisfied with the degree of transparency of in-house proceeding.<sup>88</sup>

Many respondents also argued there was a lack of independence and impartiality in the proceedings, as they are controlled exclusively by senior judges.<sup>89</sup> A former High Court judge even pointed to “politics of caste, regional bias” as affecting the decisions of members of the in-house committee to “wantonly put an honest judge in trouble”.<sup>90</sup> The respondents also pointed out the lack of institutionalisation of the in-house procedure for higher courts, as it consists of a three-member committee constituted by the Chief Justice of India on an ad-hoc basis, when a complaint is filed.<sup>91</sup>

Due to the lack of public information, large-scale transfers of judges across High Courts all over the country are often perceived as punitive. For example, during Chief Justice Thakur’s mandate in 2022, he attempted to transfer 20 High Court judges, and Chief Justice Venkatachaliah and S.H. Kapadia before him also made similar attempts.<sup>92</sup> Such transfers are often followed by an outcry by legal scholars and former judges, who expressed concern for the effects of the measures on the independence of the judiciary.<sup>93</sup>

In November 2022 the Supreme Court Collegium announced another set of High Court judges’ transfers.<sup>94</sup> Later, the Collegium resolved to transfer two more judges out of Telangana High Court, and two more judges from the Andhra Pradesh High Court.<sup>95</sup> The justification behind these transfers was explained as “administrative reasons”.<sup>96</sup> This wave of transfers sparked protests from advocates’ associations in Hyderabad, Telangana and Gujarat, the latter even going on indefinite strike as they thought there were no reasonable grounds to transfer such honest and professional judges.<sup>97</sup> Arguably, as a result of the protests, Gujarat High Court’s judge Kariel was absent from the definitive list of transfers released by the collegium on 25 November 2022, which finally included seven High Court judges from different states.<sup>98</sup>

A specific case in point where the transfer appeared punitive is that of Justice Muralidhar of the Delhi High Court who was suddenly transferred by order of the Government in a petition to investigate hate speech which precipitated mass violence in Delhi in 2020, when Murlidhar directed the Delhi Police to take action against ruling party politicians accused of hate speech, to watch recordings of the speeches whose content they

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<sup>88</sup> Ibid p. 370.

<sup>89</sup> Ibid p. 376.

<sup>90</sup> Ibid p. 374.

<sup>91</sup> Ibid p. 377.

<sup>92</sup> The Hindu, *From Lodha to Ramana: The Chief Justices of the Modi era*, 20 September 2022, [www.thehindu.com/opinion/op-ed/from-lodha-to-ramana-the-chief-justices-of-the-modi-era/article65909662.ece](http://www.thehindu.com/opinion/op-ed/from-lodha-to-ramana-the-chief-justices-of-the-modi-era/article65909662.ece).

<sup>93</sup> See e.g. Times of India, *Transfer of Gujarat, Telangana HC judges sparks lawyer protests*, 18 November 2022, <https://timesofindia.indiatimes.com/india/transfer-of-gujarat-telangana-hc-judges-sparks-lawyer-protests/articleshow/95589567.cms>.

<sup>94</sup> Times of India, *SC collegium transfers 3 high court judges on administrative grounds*, 17 November 2022, <https://timesofindia.indiatimes.com/india/sc-collegium-transfers-3-high-court-judges-on-administrative-grounds/articleshow/95570855.cms>.

<sup>95</sup> Deccan Chronicle, *Supreme Court Collegium decides to transfer two more Telangana HC judges*, 25 November 2022, [www.deccanchronicle.com/nation/in-other-news/241122/three-hc-judges-to-be-transferred-out.html](http://www.deccanchronicle.com/nation/in-other-news/241122/three-hc-judges-to-be-transferred-out.html).

<sup>96</sup> Times of India, *SC collegium transfers 3 high court judges on administrative grounds*, 17 November 2022, <https://timesofindia.indiatimes.com/india/sc-collegium-transfers-3-high-court-judges-on-administrative-grounds/articleshow/95570855.cms>.

<sup>97</sup> Times of India, *Transfer of Gujarat, Telangana HC judges sparks lawyer protests*, 18 November 2022, <https://timesofindia.indiatimes.com/india/transfer-of-gujarat-telangana-hc-judges-sparks-lawyer-protests/articleshow/95589567.cms>.

<sup>98</sup> Indian Express, *SC Collegium recommends transfer of seven High Court judges; Justice Nikhil S Kariel not on list*, 25 November 2022, <https://indianexpress.com/article/india/sc-collegium-transfer-of-judges-nikhil-kariel-8288115/>.

claimed not to know of.<sup>99</sup> The lack of transparency surrounding his transfer was regarded as leading to “unfortunate speculation within the legal community”.<sup>100</sup>

### (iii) Post-Retirement Positions

One study suggests that, between 1999 and 2020, 70% of retired Supreme Court judges — 73 out of 103 — settled into a variety of government jobs, among those 4 were appointed to political positions (1 a state governor, 1 member of parliament, 2 Parliamentary Ombudsmen), 50 to statutory bodies or tribunals and 8 to ad hoc commissions set up by the government.<sup>101</sup> These appointments, which are made by the Executive, rarely follow a transparent process and are thought to be influenced by lobbying by judges themselves.<sup>102</sup> Such pattern, according to scholarship, suggests that the lure of retirement government jobs has made the court vulnerable to state influence.<sup>103</sup>

A 2021 study found that in India, “judges respond to pandering incentives by ruling in favour of the government”, and additionally, “judges who author favourable judgments in important cases are more likely to receive prestigious government jobs”.<sup>104</sup> The study concluded that “the prospect of being appointed to government positions after retirement could be a way in which the executive exercises control over an otherwise independent judiciary in countries with judicial term limits”.<sup>105</sup>

The category of appointments to political positions are viewed with much criticism. An example of this practice can be observed in the 2020 appointment of the former Chief Justice Ranjan Gogoi as member of the upper House of Parliament (*Rajya Sabha*) only four months after his retirement from the Supreme Court.<sup>106</sup> The move was questioned by many jurists and the opposition who claimed that Gogoi’s appointments came as a reward for favourable judgements delivered during his tenure in the Supreme Court.<sup>107</sup> Notably, he led the bench in the National Register of Citizens case in Assam (see [below](#)) which garnered criticism on many accounts such as procedural irregularities and excessive overreach by the judiciary in driving what was essentially a bureaucratic process.<sup>108</sup> In the land dispute concerning the Babri Masjid mosque (see [below](#)), as Chief Justice, he re-assigned the case to a bench headed by himself which eventually issued a decision in favour of the government position.<sup>109</sup> During his term as Chief Justice, the petitions against the Citizenship

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<sup>99</sup> PIIE Report , p. 273; see also LiveLaw, *Delhi Riots : Delhi HC Directs Police to Decide On Registering FIR Against Politicians For Hate Speech [Read Order]*, 26 February 2020, <https://www.livelaw.in/top-stories/delhi-riots-delhi-hc-directs-police-to-decide-on-registering-fir-against-politicians-for-hate-speech-153170>.

<sup>100</sup> Bar and Bench, *Are Judges’ Transfers Really Not Punitive?*, 24 February 2020, <https://www.barandbench.com/columns/are-judges-transfers-really-not-punitive>.

<sup>101</sup> The Print, *Ranjan Gogoi RS seat made big news in 2020. But he is among 70% SC judges with retirement gigs*, 4 January 2021, <https://theprint.in/judiciary/ranjan-gogoi-rs-seat-made-big-news-in-2020-but-he-is-among-70-sc-judges-with-retirement-gigs/576154/>.

<sup>102</sup> Aney, Dam and Ko, *Jobs for Justice(s): Corruption in the Supreme Court of India*, in *Journal of Law and Economics*, 2021, p. 486, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3087464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3087464).

<sup>103</sup> Shubhankar Dam, *Active After Sunset: The Politics of Judicial Retirements in India*, (2023) *Federal Law Review*, 0(0), <https://doi.org/10.1177/0067205X221146335>.

<sup>104</sup> Aney, Dam and Ko, *Jobs for Justice(s): Corruption in the Supreme Court of India*, in *Journal of Law and Economics*, 2021, p. 480-85, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3087464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3087464), p. 508.

<sup>105</sup> Aney, Dam and Ko, *Jobs for Justice(s): Corruption in the Supreme Court of India*, in *Journal of Law and Economics*, 2021, p. 480-85, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3087464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3087464), p. 509.

<sup>106</sup> The Print, *Former CJI Ranjan Gogoi nominated to Rajya Sabha, less than 6 months after retirement*, 16 March 2020, <https://theprint.in/india/former-cji-ranjan-gogoi-nominated-to-rajya-sabha-less-than-6-months-after-retirement/382089/>.

<sup>107</sup> The Caravan, *Sealed and Delivered: Ranjan Gogoi’s gifts to the government*, 1 February 2020, <https://caravanmagazine.in/reportage/ranjan-gogoi-gifts-government>; The Caravan, *Second Innings: How Post retirement ambitions imperils judges’ integrity*, 31 January 2021, <https://caravanmagazine.in/reportage/retired-judges-gogoi-integrity-corruption-supreme-court>.

<sup>108</sup> Gautam Bhatia, *The Nrc Case And The Parchment Barrier Of Article 21*, in *Indian Constitutional Law And Philosophy*, 26 April 2019, <https://indconlawphil.wordpress.com/2019/04/26/the-nrc-case-and-the-parchment-barrier-of-article-21/>.

<sup>109</sup> Supreme Court of India, Notice, 8 January 2019, [https://scoobserver-production.s3.amazonaws.com/uploads/case\\_document/document\\_upload/608/Ayodhya\\_-SC\\_Notice\\_Announcing\\_CB\\_-2019.01.08.pdf](https://scoobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/608/Ayodhya_-SC_Notice_Announcing_CB_-2019.01.08.pdf).

Amendment Act (see [below](#)) and the abrogation of Jammu and Kashmir's autonomous status (see [below](#)) were not prioritized despite their urgency and impact on a large section of the population. It is worth mentioning that Justice Gogoi was nominated as an MP, despite an in-house enquiry at the Supreme Court dealing with allegations of sexual harassment against him, which he chaired himself.<sup>110</sup>

Another example of problematic post-retirement political appointment occurred when in February 2023 the appointment of recently retired Supreme Court Justice S. Abdul Nazeer, as the Governor of Andhra Pradesh state, caused fresh controversy on the impact of such appointments on judicial independence.<sup>111</sup> Justice Nazeer, who had only retired a month before his new posting as Governor, was part of the five-judge Constitution bench (led by CJI Ranjan Gogoi) that delivered a unanimous decision in favour of the government's position in the case concerning the land dispute around the Babri Masjid mosque.

Similarly, Judge Yadav who acquitted all accused in the controversial Babri Masjid mosque demolition case (including senior BJP politicians) was made deputy Parliamentary Ombudsman (*Lokayukti*) by the government of Uttar Pradesh in February 2024.<sup>112</sup>

As the study cited above shows, former judges are also appointed to statutory bodies or tribunals which by law require members from the judiciary, or to ad hoc government commissions where the nature of the commission's task may require the profile of a judge. In these situations, while the appointment of a retired judge per se might not be problematic, in fact desired, the lack of predetermined criteria to ensure independence, as well as the opaqueness surrounding the reasons for choosing a specific candidate, have created the perception that in many instances such positions are dealt out as rewards for favouring the government or being a supporter.

For example, in 2021 Justice Arun Kumar Mishra who had retired from the Supreme Court the previous year, was appointed by the government as the chair of the National Human Rights Commission (NHRC).<sup>113</sup> He continues in that position. Justice Mishra is perceived by the public, as being deferential to Prime Minister Modi. During his tenure at Supreme Court, he was reported hailing Modi as "versatile genius, who thinks globally and acts locally".<sup>114</sup> Civil society groups have also accused the NHRC, particularly during Mishra's tenure, as becoming unresponsive to human rights violations. Notably, NHRC's accreditation by the Global Alliance of National Human Rights Institutions (GANHRI) was deferred two times in a row in 2023 and 2024.<sup>115</sup>

There are other examples too of problematic appointments. In 2024, a year and a half after Supreme Court Justice A.M. Khanwilkar retired, he was appointed chairperson of the *Lokpal*, the national anti-corruption watchdog.<sup>116</sup> During his tenure at the Supreme Court, in one of his most controversial judgments, Khanwilkar had upheld the constitutionality of the Prevention of Money Laundering Act (PMLA) and found that the

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<sup>110</sup> India Today, *Explained: Case of sexual harassment charge against Justice Ranjan Gogoi*, 18 February 2021, <https://www.indiatoday.in/india/story/explained-case-of-sexual-harassment-charge-against-justice-ranjan-gogoi-1770530-2021-02-18>.

<sup>111</sup> NewsClick, *Practice of Post-retirement Plum Postings Continues, Retired Justice Nazeer Appointed as Governor of Andhra Pradesh*, 12 February 2023, <https://www.newsclick.in/practice-post-retirement-plum-postings-continues-retired-justice-nazeer-appointed-governor-andhra>.

<sup>112</sup> Tweet by Omar Rashid, 28 February 2024, [https://x.com/omar7rashid/status/1762807832351834128?s=48&utm\\_source=substack&utm\\_medium=email](https://x.com/omar7rashid/status/1762807832351834128?s=48&utm_source=substack&utm_medium=email).

<sup>113</sup> The Telegraph online, *Justice Arun Kumar Mishra takes charge as chairperson of National Human Rights Commission*, 3 June 2021, <https://www.telegraphindia.com/india/justice-arun-kumar-mishra-takes-charge-as-chairperson-of-national-human-rights-commission/cid/1817583>.

<sup>114</sup> Ibid.

<sup>115</sup> The Wire, *UN-Linked Body Defers NHRC India's Accreditation for Second Year Running*, 14 May 2024, <https://thewire.in/rights/un-linked-body-defers-nhrc-indias-accreditation-for-second-year-running>.

<sup>116</sup> The Wire, *Justice Khanwilkar's Is the New Lokpal Chairperson: Here Are the Key Cases He Judged*, 28 February 2024, [https://thewire.in/law/justice-khanwilkar-lokpal-fcra-pmla-uapa-aadhaar-modi/?utm\\_source=substack&utm\\_medium=email](https://thewire.in/law/justice-khanwilkar-lokpal-fcra-pmla-uapa-aadhaar-modi/?utm_source=substack&utm_medium=email).

Enforcement Directorate did not have to mandatorily supply a copy of the Enforcement Case Information Report to accused persons. In another case, he “effectively made the grant of bail in UAPA [Unlawful Activities Prevention Act] cases, borderline impossible”.<sup>117</sup> Both PMLA and UAPA continue to be tolls of choice by authorities to target human rights defenders, dissidents, journalists and minorities. Khanwilkar was also the lead justice in the controversial judgement by the Supreme Court that closed the case to hold Prime Minister Modi responsible for the 2002 Gujarat killings, when he was state Chief Minister.<sup>118</sup> The same judgement also sought the prosecution of human rights activist Teesta Setalvad, among others, for having pursued justice for victims, and accountability for Modi and other alleged perpetrators, for two decades (see below).

At the level of the High Court judiciary, Judge A K Vishvesha - who in his ruling handed over a part of the basement of the Gyanvapi mosque in Varanasi to a Hindu plaintiff on his last day of work so that a Hindu worship ritual (*puja*) could immediately start - was appointed the *Lokpal* of a university in Lucknow.<sup>119</sup>

#### (iv) Representation of Minorities

The lack of representation of minorities has been put forward as a factor for the perception of partiality at the Supreme Court:

*“An overwhelming majority of its justices come from an entrenched elite — male, Hindu, and occupying the upper echelons of India’s caste system — a demographic that has traditionally been the bedrock of Hindu nationalism.”*<sup>120</sup>

Disaggregated data on religion, caste or gender of the justices are not made available. However, unofficial sources suggest that both at the level of the Supreme Court and High Courts, representation of minorities is falling short.<sup>121</sup> At the time of writing, the Supreme Court has 3 female judges and 3 judges from the Scheduled Class communities, among a total of 34 sitting justices.<sup>122</sup> One of the female justice’s tenure is ending on 1 September 2024.<sup>123</sup>

An analysis by the Supreme Court Observer (an online non-governmental platform) of the last names and family histories of the 33 sitting judges in 2023 indicated that 30 are Hindus with one Muslim, one Christian and one Parsi judge.<sup>124</sup> All three are minority groups in India. Even though Muslims constitute around 14% of the population (2011 Census),<sup>125</sup> their representation among justices only amounts to 3%. With regard to caste, the Supreme Court Observer estimates that in 2023 the largest majority of justices were from the top

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<sup>117</sup> Gautham Bhatia in Constitutional Law and Philosophy, *The Executive(s) Court: Notes on the Legacy of Justice A.M. Khanwilkar*, 29 July 2022, [https://indconlawphil.wordpress.com/2022/07/29/the-executives-court-notes-on-the-legacy-of-justice-a-m-khanwilkar/?utm\\_source=substack&utm\\_medium=email](https://indconlawphil.wordpress.com/2022/07/29/the-executives-court-notes-on-the-legacy-of-justice-a-m-khanwilkar/?utm_source=substack&utm_medium=email).

<sup>118</sup> Express News Service, *Aadhaar to UAPA to PMLA, he authored many crucial orders*, 27 February 2024, available in tweet by Saurav Das on 28 February 2024 at: [https://x.com/SauravDassss/status/1762685336012939566?utm\\_source=substack&utm\\_medium=email](https://x.com/SauravDassss/status/1762685336012939566?utm_source=substack&utm_medium=email).

<sup>119</sup> Tweet by Omar Rashid, 28 February 2024, [https://x.com/omar7rashid/status/1762807832351834128?s=48&utm\\_source=substack&utm\\_medium=email](https://x.com/omar7rashid/status/1762807832351834128?s=48&utm_source=substack&utm_medium=email)

<sup>120</sup> The Atlantic, *What Has Happened to the Rule of Law in India?*, 3 February 2024, <https://archive.ph/eONWF#selection-715.182-715.517>.

<sup>121</sup> The Leaflet, *How has the composition of the Supreme Court changed under CJI Chandrachud’s leadership?*, 16 July 2024, <https://theleaflet.in/how-has-the-composition-of-the-supreme-court-changed-under-cji-chandrachuds-leadership/>.

<sup>122</sup> The Leaflet, *Half-hearted constitutionalism: The Supreme Court’s self-created conundrums*, 17 May 2024, [https://theleaflet.in/half-hearted-constitutionalism-the-supreme-courts-self-created-conundrums/?utm\\_source=substack&utm\\_medium=email](https://theleaflet.in/half-hearted-constitutionalism-the-supreme-courts-self-created-conundrums/?utm_source=substack&utm_medium=email).

<sup>123</sup> Website of Supreme Court of India, Chief Justice & Judges, <https://www.sci.gov.in/chief-justice-judges/>, accessed 8 August 2024.

<sup>124</sup> Supreme Court Observer, *Supreme Court Review 2023: The diversity problem remained unaddressed*, 4 January 2024, <https://www.scoverver.in/journal/supreme-court-review-2023-the-diversity-problem-remained-unaddressed/#:~:text=Since%20the%201950s%2C%20the%20tradition,guaranteeing%20a%2012.5%20percent%20representation.>

<sup>125</sup> India Census 2011, <https://www.census2011.co.in/religion.php>.

Brahmin caste, with around 36 % (12 out of 33), even though they only constitute 5% of India's population.<sup>126</sup> The lack of representation of minorities has been put forward as a factor in creating the growing perception that the Supreme Court favours the position of the ruling Hindu-majoritarian party.<sup>127</sup>

In the High Courts, as of 22 July 2024, out of 661 high court judges appointed since 2018, 21 (3%) belonged to the Scheduled Caste (*dalit*) category, 12 (1.8%) to the Scheduled Tribe ('indigenous') category, 78 (11%) to the Other Backward Class category and 499 (75%) to the General category.<sup>128</sup> This latter includes Brahmin, and a few other groups seen as being 'upper' castes. As of 1 March 2024, 333 vacancies were reported.<sup>129</sup> Public data on representation of religious minorities, such as Muslims and Christians, at the High Courts, is not available. It is likely to be very similar to the picture at the Supreme Court level.

India has reservations for the scheduled caste and scheduled tribe communities in public service, but not in the judiciary.<sup>130</sup> The judiciary also does not provide for reservations for other marginalised communities, such as religious minorities. In 2022, the Ministry of Law and Justice issued a public statement that the mandate of reservation is not applicable to the judiciary: "*Appointment of Judges of the Supreme Court and High Courts is made under Articles 124, 217 and 224 of the Constitution of India, which do not provide reservation for any caste or class of persons.*" Constitutional provisions on appointment of judges have been interpreted to exclude and override the constitutional mandate to provide reservations.<sup>131</sup>

The government's position on representation of women in the judiciary follows a similar approach. Since 2023 the Government has maintained that its role is restricted to implementing recommendations made by the judiciary, and it cannot ensure selection of female judges. It has however said that "[...] *the Government has been requesting the Chief Justices of High Courts that while sending proposals for appointment of Judges, due consideration be given to suitable candidates belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes, Minorities and Women to ensure social diversity in appointment of Judges in High Courts. Government appoints only those persons as Judges of Supreme Court and High Courts who are recommended by SCC [Supreme Court Collegium].*"<sup>132</sup> These statements by the government indicate that there seems to be little interest to promote adequate representation of all sections, including minorities, in the judiciary – a hallmark of how national institutions are perceived by citizens.

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<sup>126</sup> Ibid.

<sup>127</sup> The Atlantic, *What Has Happened to the Rule of Law in India?*, 3 February 2024, <https://archive.ph/eONWF#selection-715.182-715.517>.

<sup>128</sup> The Telegraph online, *Skewed case ratio in HC judge numbers: Rajya Sabha member demands reservation in higher judiciary*, 26 July 2024, [https://www.telegraphindia.com/india/skewed-caste-ratio-in-hc-judge-numbers-rajya-sabha-member-demands-reservation-in-higher-judiciary/cid/2036299?utm\\_source=substack&utm\\_medium=email](https://www.telegraphindia.com/india/skewed-caste-ratio-in-hc-judge-numbers-rajya-sabha-member-demands-reservation-in-higher-judiciary/cid/2036299?utm_source=substack&utm_medium=email).

<sup>129</sup> The Leaflet, *Half-hearted constitutionalism: The Supreme Court's self-created conundrums*, 17 May 2024, [https://theleaflet.in/half-hearted-constitutionalism-the-supreme-courts-self-created-conundrums/?utm\\_source=substack&utm\\_medium=email](https://theleaflet.in/half-hearted-constitutionalism-the-supreme-courts-self-created-conundrums/?utm_source=substack&utm_medium=email); see also SCC Times online, *February 2024 Judicial Appointment Tracker I 8 High Court Appointments and 17 Supreme Court Collegium Recommendations*, 5 March 2024, <https://www.sconline.com/blog/post/2024/03/05/judicial-appointment-tracker-feb-2024-high-court-appointments-collegium-recommendations-legal-news/>.

<sup>130</sup> Ministry of Law and Justice, *Judges Belonging to SC, ST and OBC Communities*, Press Information Bureau, 31 March 2022, <https://pib.gov.in/PressReleasePage.aspx?PRID=1812040>; Website of Department of Personnel and Training, *Frequently Asked Questions (FAQs) on the Policy of Reservations to SCs, STs, and OBCs*, [https://dopt.gov.in/sites/default/files/FAQ\\_SCST.pdf](https://dopt.gov.in/sites/default/files/FAQ_SCST.pdf); Website of Department of Justice, Justice-I, <https://doj.gov.in/justice-i/> (accessed 23 July 2024).

<sup>131</sup> Website of Department of Personnel and Training, *Frequently Asked Questions (FAQs) on the Policy of Reservations to SCs, STs, and OBCs*, [https://dopt.gov.in/sites/default/files/FAQ\\_SCST.pdf](https://dopt.gov.in/sites/default/files/FAQ_SCST.pdf) (accessed on 16 August 2024).

<sup>132</sup> Ministry of Law and Justice, *Representation of Women in Courts*, Press Information Bureau, 3 February 2023, <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1896032>; Government of India, Ministry of Law and Justice, Department of Justice, *Appointment of judges belonging to OBC's, SC's and ST's*, Rajya Sabha, Unstarred Question no. 1390, 14 December 2023, <https://sansad.in/getFile/annex/262/AU1390.pdf?source=pqars>.

## WEAKNESSES OF PROCEDURE

Applying the standard of whether a reasonable observer may perceive external influence by the executive in the workings of the judiciary or internal influence between judges, weak procedures and protocols on the administration of cases can contribute to the perception of lacking impartiality and independence.

### I. Chief Justice's Power to List and Assign Cases

The Supreme Court hears cases in benches of two or three judges, or constitutional benches comprising five or more judges of an odd number.<sup>133</sup> When a case is filed in the Supreme Court, it is allocated or assigned to according to the Roster. The Roster is a pre-determined list of different subject-wise categories of cases along with the names of judges who will hear each category of case.<sup>134</sup> It is prepared by the Chief Justice of the Supreme Court who is considered the “Master of the Roster”<sup>135</sup> and while cases are assigned based on the roster, the Chief Justice retains a residual discretionary power to allocate cases in deviation of the roster, or to re-allocate cases once they have been assigned to a particular bench, again in deviation of the roster.<sup>136</sup>

Cases allocated to different benches are then listed for hearing before this bench by being added chronologically to a “cause list” of cases already being heard by that bench.<sup>137</sup> Listing is further determined based on the stage of hearing, whether a case has been freshly filed, whether notice has been issued to the opposite party, whether it is to be heard for an interim relief or for final arguments, among other criteria.<sup>138</sup> Typically, a bench hears a fresh case and directs that the case be listed after two weeks or after four weeks.<sup>139</sup> However, this direction is often not followed, delaying the hearings sometimes inordinately (see below).

The Chief Justice's power as Master of Roster essentially bestows a discretionary power and extends to both allocation and listing of cases. It is a power which can be exercised solely by him/her, and sometimes in an unfettered manner.<sup>140</sup> Notably, the applicable rules and procedures do not require the Chief Justice to provide any public rationale for any decisions in deviation of the rules.<sup>141</sup> A legal reporting platform in India has summed up the process as follows:

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<sup>133</sup> Website of Supreme Court of India, *About Us – History*, <https://www.sci.gov.in/about-department/history/#:~:text=Today%2C%20the%20Judges%20sit%20in.the%20interpretation%20of%20the%20Constitution> (accessed 29 October 2024).

<sup>134</sup> See *Supreme Court of India Rules 2013*, in force since 19 August 2014, <https://cdnbbsr.s3.waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024011691-1.pdf>, Order VI, para. 1; *Supreme Court of India Handbook on Practice and Procedure and Office Procedure*, 2017, [https://main.sci.gov.in/sites/default/files/practice.pdf\\_0.pdf](https://main.sci.gov.in/sites/default/files/practice.pdf_0.pdf) (hereinafter: SC Handbook), Chapter VI, I (i), p. 25, and Chapter VI, para. 1, p. 38.

<sup>135</sup> Supreme Court of India, *Campaign for Judicial Accountability and Reforms v Union of India*, Writ Petition (Crl.) No. 169/2017, 10 November 2017, <https://indiankanoon.org/doc/168661293/>.

<sup>136</sup> SC Handbook, Chapter XIII, Note 3, p. 113.

<sup>137</sup> SC Handbook, Chapter XIII, Cause List and Listing, para. 3, p. 102.

<sup>138</sup> SC Handbook, Chapter XIII, Cases, Coram and Listing, para. 1-3, p. 105-106.

<sup>139</sup> Supreme Court Observer, *The Listing Game*, 28 September 2024, <https://www.scoobserver.in/journal/the-listing-game-and-the-registry-at-the-supreme-court-of-india/#:~:text=The%20Supreme%20Court%20Registry%20is,assigns%20case%20and%20diary%20numbers>.

<sup>140</sup> Supreme Court Observer, *The 'disproportionate power of the Chief Justice of India*, 27 October 2023, <https://www.scoobserver.in/journal/the-disproportionate-power-of-the-chief-justice-of-india/#:~:text=As%20part%20of%20their%20function,the%20power%20to%20list%20cases>.

<sup>141</sup> Supreme Court Observer, *Master of the Roster: Securing Process Legitimacy of the Supreme Court*, 13 September 2024, <https://www.scoobserver.in/75-years-of-sc/master-of-the-roster-securing-process-legitimacy-of-the-supreme-court/>.

*“In practice, the degree of the Chief Justices’ involvement in the listing process is unclear and opaque, leading to a lack of consensus about the system even among practising advocates.”<sup>142</sup>*

The Chief Justice’s unfettered power to assign cases to specific benches has been pointed as a factor contributing to the perception of partiality:

*“Politically sensitive cases and cases revolving around the right to life and liberty as enshrined under Article 21 of the Constitution of India, still went to certain selective Benches, which invariably ruled in ‘favour’ of the State.”<sup>143</sup>*

In 2018 and again in 2023, sitting and former judges of the Supreme Court, lawyers and others have pointed to several instances where petitions filed before the Supreme Court with potential adverse implications for the government have been assigned to specific judges considered to be sympathetic to the government in contravention of practise of listing of cases.<sup>144</sup> Under the current Chief Justice Dr D.Y. Chandrachud, eight politically sensitive cases were re-assigned in 2023 to a bench which included Justice Bela M. Trivedi, the former Law Secretary in the state government led by then Chief Minister Narendra Modi in Gujarat.<sup>145</sup>

In January 2024, a retired Supreme Court Judge, Justice Madan Lokur reiterated concerns over the assigning of cases:

*“[...] the perception is that the cases that are sensitive are going only to a particular judge or a particular set of judges and not to others....that perception creates a problem, that why the master of the roster, i.e., the CJI, is doing this.”<sup>146</sup>*

## II. Delays in Hearing Politically Sensitive Cases

Cases are to be heard within a few days of being filed, particularly when they are urgent matters involving life and liberty, such as bail or protection against arrest.<sup>147</sup> After the first hearing, typically the bench hearing the case directs that the matter be listed within two weeks or within four weeks, usually no specific date is given by the Judges. The specific date is to be determined by the Registry of the Supreme Court, which functions under the control and on the directions of the Chief Justice.<sup>148</sup>

Instances of irregular listing primarily involve inordinate and unexplained delay in listing fresh cases, or for pending cases, not listing it on a date specified by the bench in its previous order. Inordinate delays in listing

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<sup>142</sup> Supreme Court Observer, *The Listing Game*, 28 September 2024, <https://www.scobserver.in/journal/the-listing-game-and-the-registry-at-the-supreme-court-of-india/#:~:text=The%20Supreme%20Court%20Registry%20is,assigns%20case%20and%20diary%20numbers>.

<sup>143</sup> The Leaflet, *Half-hearted constitutionalism: The Supreme Court’s self-created conundrums*, 17 May 2024, [https://theleaflet.in/half-hearted-constitutionalism-the-supreme-courts-self-created-conundrums/?utm\\_source=substack&utm\\_medium=email](https://theleaflet.in/half-hearted-constitutionalism-the-supreme-courts-self-created-conundrums/?utm_source=substack&utm_medium=email).

<sup>144</sup> The Wire, *SC Registry Isn’t Listing Cases the Way it Is Supposed to: A Letter to the CJI*, 6 December 2023, <https://thewire.in/law/sc-registry-isnt-listing-cases-the-way-it-is-supposed-to-a-letter-to-the-cji>; Hindustan Times, *A year after landmark press conference, little has changed in Supreme Court’s ruling*, 12 January 2019, <https://www.hindustantimes.com/india-news/a-year-after-landmark-press-conference-littlehas-changed-in-supreme-court-s-running/story-ZtTyvwyFTCJLDxngRQQUL.html>.

<sup>145</sup> Article 14, *Contrary To SC’s Rules of Assignment, At Least 8 Politically Sensitive Cases Moved to One Judge In 4 Months*, 7 December 2023, <https://article-14.com/post/contrary-to-sc-s-rules-of-assignment-at-least-8-politically-sensitive-cases-moved-to-one-judge-in-4-months-65713ae124602>.

<sup>146</sup> LiveLaw, *If All Judges Are Equal, Why Should Certain Kind of Cases Go To A Particular Judge?*, Justice Madan B Lokur, 16 January 2024, <https://www.livelaw.in/top-stories/if-all-judges-are-equal-why-should-certain-kind-of-cases-go-to-a-particular-judge-justice-madan-b-lokur-246769>.

<sup>147</sup> See SC Handbook, Chapter XIII, Cases, Coram and Listing, para. 38, p. 110; Supreme Court of India, *An overview of the new scheme for automated listing of cases*, not dated, [https://main.sci.gov.in/pdf/LU/rationalisation%20of%20assignment\\_final.pdf](https://main.sci.gov.in/pdf/LU/rationalisation%20of%20assignment_final.pdf), para. 12.

<sup>148</sup> Supreme Court Observer, *The Listing Game*, 28 September 2024, <https://www.scobserver.in/journal/the-listing-game-and-the-registry-at-the-supreme-court-of-india/#:~:text=The%20Supreme%20Court%20Registry%20is,assigns%20case%20and%20diary%20numbers>.

matters or the non-listing of matters, have exposed the arbitrariness and lack of transparency in listing of matters by the registry.<sup>149</sup> The power of the Chief Justice to list a case for initial hearing combined with the power of any assigned bench of judges to determine the schedule for hearings have resulted in delays in adjudicating politically sensitive cases. This failure to prioritize politically sensitive cases which has been described as follows:

“Evasion has become a habit when cases are controversial”.<sup>150</sup>

The delay of hearings of crucial cases cements a *status quo* that is in the interest of the government but detrimental to the rights of minorities and allows the Government to implement the laws that were challenged.<sup>151</sup> This effectively treated the cases as if the Government had already won which feeds into the perception that such delays serve to strengthen the Government’s positions. To compound this factor, petitioners have no avenue to challenge such delays.

The following cases are illustrative examples of this practice.

### **Citizenship Amendment Act**

In December 2019, the Indian Parliament enacted the Citizenship (Amendment) Act 2019 (CAA). This legislation followed several earlier amendments to the Citizenship Act of 1955. It provides for fast-track asylum claims and citizenship for non-Muslim immigrants from the neighbouring Muslim-majority countries of Afghanistan, Bangladesh, and Pakistan.<sup>152</sup> The amendment was widely criticised for being discriminatory against Muslims, and has been condemned, both nationally and internationally, for being unconstitutional as it links citizenship to religion and thus is inconsistent with the guarantee of secularism.<sup>153</sup> The Indian government argues it protects religious minorities by protecting individuals who have fled religious persecution from neighbouring countries.<sup>154</sup>

Viewed in combination with the proposed all-India National Register of Citizens (see [NRC case below](#)), the CAA has the potential to deprive many Muslims residing in India of full citizenship. While non-Muslims who are excluded from the NRC will have the opportunity to regain citizenship via the CAA, this will not be the case for Muslims. Hence, the NRC in combination with the CAA may disproportionately exclude Muslim residents of India.<sup>155</sup>

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<sup>149</sup> Ibid.

<sup>150</sup> The Atlantic, *What Has Happened to the Rule of Law in India?*, 3 February 2024, <https://archive.ph/eONWF#selection-715.182-715.517>.

<sup>151</sup> Sundar, *The Supreme Court in Modi’s India*, Journal of Right-Wing Studies, Vol. 1, No. 1 (2023), p. 133, [https://escholarship.org/content/qt313700c7/qt313700c7\\_noSplash\\_6c1dd43cc12f9d6eef5223597b3b6055.pdf](https://escholarship.org/content/qt313700c7/qt313700c7_noSplash_6c1dd43cc12f9d6eef5223597b3b6055.pdf).

<sup>152</sup> Ministry of Law and Justice (Legislative Department), *The Citizenship (Amendment) Act, 2019*, No. 47 of 2019, 12 December 2019, <https://egazette.nic.in/WriteReadData/2019/214646.pdf>.

<sup>153</sup> International Commission of Jurists, *India: Citizenship Amendment Act violates international law*, 10 March 2020, <https://www.icj.org/hrc43indiaca/>; The Wire, *UN Human Rights Chief Moves to Intervene Over CAA in SC, India Objects*, 3 March 2020, <https://thewire.in/diplomacy/un-human-rights-chief-intervention-application-supreme-court-cao>.

<sup>154</sup> India Today, *Everything you wanted to know about the CAA and NRC*, 23 December 2019, [www.indiatoday.in/india-today-insight/story/everything-you-wanted-to-know-about-the-cao-and-nrc-1630771-2019-12-23](http://www.indiatoday.in/india-today-insight/story/everything-you-wanted-to-know-about-the-cao-and-nrc-1630771-2019-12-23); Deutsche Welle, *Indian parliament approves citizenship bill, sparking protests*, 11 December 2019, <https://p.dw.com/p/3Udfb>.

<sup>155</sup> Gary Hausman, *Citizenship Amendment Act (CAA) and National Register of Citizens (NRC)*, in Global Studies Blog Columbia University Library, 10 December 2020, <https://blogs.cul.columbia.edu/global-studies/2020/12/10/citizenship-amendment-act-cao-and-national-register-of-citizens-nrc/>; International Commission of Jurists, *India: Citizenship Amendment Act violates international law*, 10 March 2020, <https://www.icj.org/hrc43indiaca/>; UK Parliament, *Research Briefing: India’s Citizenship (Amendment) Act 2019*, February 2020, <https://lordslibrary.parliament.uk/research-briefings/ln-2020-0058/>.

The enactment of the CAA in 2019 was followed by severe protests against the legislation across the country.<sup>156</sup> Termed as the anti-CAA movement, it became the longest sustained people's movement since the BJP came to power in 2014.<sup>157</sup> The government responded to such protests with strict crackdowns, which resulted in police brutality that has been extensively reported.<sup>158</sup>

### Case Summary

The day after the Bill was passed, on 12 December 2019, the Indian Union Muslim League (IUML) filed a petition challenging the constitutionality of the CAA under Article 32 of the Constitution which provides original jurisdiction to the Supreme Court for cases involving violation of human rights.<sup>159</sup> Soon various other litigants followed and there are currently over 200 petitions tagged to the IUML petition.<sup>160</sup> These petitions primarily challenged the CAA for discriminating on the basis of religion. They also contend that it violates the fundamental rights to equality and dignity of illegal migrants under Articles 14 (equal protection under law) and Article 21 (right to life) of the Constitution.<sup>161</sup> In March 2020, the Office of High Commissioner for Human Rights (OHCHR) filed an intervention application in the Supreme Court of India against the CAA highlighting how the CAA is inconsistent with India's obligations under international human rights law.<sup>162</sup>

The Supreme Court took up the matter for hearing immediately after it was filed but has been giving successive extensions to the government since then. As a result, the case has been pending before the Supreme Court since 2019. In January 2023, the Union Ministry of Home Affairs requested another six-month extension to frame the rules under the controversial Citizenship (Amendment) Act (CAA) making this the seventh similar extension that court has granted the government.<sup>163</sup> A decision on the petition is still pending at the time of writing this report.<sup>164</sup>

### Analysis

While the petition challenging the constitutional validity of CAA is still pending there are factors that give rise to concerns about the appearance of the Supreme Court's impartiality on the matter. As mentioned above, impartiality requires that a court does not promote the interest of one of the parties.<sup>165</sup>

Despite requests by petitioners to order an interim stay of the implementation of the CAA, the Supreme Court refused to stay the implementation of the Act without hearing from the government.<sup>166</sup> This decision in

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<sup>156</sup> The Guardian, *India clamps down on citizenship law protests*, 18 December 2019, [www.theguardian.com/world/2019/dec/18/india-clamps-down-against-citizenship-law-protests](https://www.theguardian.com/world/2019/dec/18/india-clamps-down-against-citizenship-law-protests); India Today, *Assam CAA protest: 4 dead in police firing, 175 arrested, more than 1400 detained*, 16 December 2019, [www.indiatoday.in/india/story/assam-cao-protest-4-dead-in-police-firing-175-arrested-more-than-1400-detained-1628545-2019-12-16](https://www.indiatoday.in/india/story/assam-cao-protest-4-dead-in-police-firing-175-arrested-more-than-1400-detained-1628545-2019-12-16).

<sup>157</sup> Foreign Policy, *One Year After Mass Protests, India's Muslims Still Live in Fear*, 18 December 2020, <https://foreignpolicy.com/2020/12/18/one-year-mass-cao-protests-india-muslims-citizenship-amendment-act-modi/>.

<sup>158</sup> Amnesty International UK, *India: Crackdown on peaceful Citizenship Act protests must stop*, 19 December 2019, [www.amnesty.org.uk/press-releases/india-crackdown-peaceful-citizenship-act-protests-must-stop](https://www.amnesty.org.uk/press-releases/india-crackdown-peaceful-citizenship-act-protests-must-stop); International Commission of Jurists, *India: Citizenship Amendment Act violates international law*, 10 March 2020, <https://www.icj.org/hrc43indiaca/>; The Guardian, *India clamps down on citizenship law protests*, 18 December 2019, [www.theguardian.com/world/2019/dec/18/india-clamps-down-against-citizenship-law-protests](https://www.theguardian.com/world/2019/dec/18/india-clamps-down-against-citizenship-law-protests).

<sup>159</sup> Supreme Court Observer, *Case Description of Indian Union Muslim League v. Union of India*, WP (C) 1470/2019, 12 December 2019, <https://www.scobserver.in/cases/indian-union-muslim-league-citizenship-amendment-act-case-background/>.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> The Wire, *UN Human Rights Chief Moves to Intervene Over CAA in SC, India Objects*, 3 March 2020, <https://thewire.in/diplomacy/un-human-rights-chief-intervention-application-supreme-court-cao>.

<sup>163</sup> The Hindu, *Centre seeks six more months to frame Citizenship Amendment Act rules*, 7 January 2023, <https://www.thehindu.com/news/national/home-ministry-seeks-another-extension-of-six-months-to-frame-cao-rules/article66350317.ece>.

<sup>164</sup> Supreme Court Observer, webpage on Citizenship Amendment Act, <https://www.scobserver.in/cases/constitutionality-of-the-citizenship-amendment-act-2019-cao/> (accessed on 28 August 2024).

<sup>165</sup> See Human Rights Committee, *Arvo O. Kuitunen v Finland*, Communication No. 387/1989, 23 October 1992, [http://www.worldcourts.com/hrc/eng/decisions/1992.10.23\\_Karttunen\\_v\\_Finland.htm](http://www.worldcourts.com/hrc/eng/decisions/1992.10.23_Karttunen_v_Finland.htm), para. 7.2.

combination with the failure to prioritise the hearing of the petition challenging the CAA could appear to a reasonable observer as a way to promote the interest of the government because the CAA has been implemented since 2019 with long-term and possibly irrevocable consequences, in particular for Muslims.

Like the [case on the abrogation of Article 370 of the Constitution described below](#), the delays are setting a *status quo* in which certain minorities are stripped of or excluded from citizenship. Through de-prioritising the case and not staying the CAA's implementation, the Supreme Court is effectively treating the case as if the Government had already won. Considering the highly contested nature of the case with more than 200 petitions challenging the law's constitutionality, the Supreme Court's inaction appears even more to be benefiting one party.

This perception is confirmed by how the legal community and others view the Supreme Court's inaction as denial of justice to the petitioners.<sup>167</sup> The case is considered a clear example for "evasion" since de-prioritizing the case and not staying the CAA's implementation in 2020, the Supreme Court's inaction appeared to be benefiting the government.<sup>168</sup>

### ***Habeas Corpus Cases***

The different prioritization of *habeas corpus* petitions by the Supreme Court gives rise to the perception that the decisions were skewed. The illustrative cases described below show that while some cases are heard at very short notice, other cases of politically sensitive detainees are delayed significantly.

Siddique Kappan, a journalist, who was arrested on 6 October 2020 while he was on his way to report on a caste-based sexual violence case. His detention was challenged immediately before the Supreme Court but was not heard for six months.<sup>169</sup> Eventually, once the chargesheet was prepared, the *habeas corpus* petition became infructuous even before the Supreme Court decided to take up the matter.<sup>170</sup>

In contrast, at around the same time, Arnab Goswami, editor-in-chief of Republic TV, a news channel seen to be close to the government, which was fined by the UK media watchdog for engaging in hate speech, challenged the Bombay High Court's rejection of his interim bail application before the Supreme Court in November 2020.<sup>171</sup> His case was heard on the very next day of filing, disregarding the many formal defects in his application. Such selective treatment gives the impression that cases involving certain lawyers and certain clients get preferential treatment – and importantly those against dissidents, or HRDs and minority rights defenders, get a cold reception by the Supreme Court.<sup>172</sup>

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<sup>166</sup> Supreme Court of India, *Indian Union Of Muslim League vs Union Of India*, (CIVIL) NO. 1470 of 2019, Order, 22 January 2020, [https://main.sci.gov.in/supremecourt/2019/44931/44931\\_2019\\_1\\_4\\_19796\\_Order\\_22-Jan-2020.pdf](https://main.sci.gov.in/supremecourt/2019/44931/44931_2019_1_4_19796_Order_22-Jan-2020.pdf); NDTV, *Supreme Court Refuses To Stay Citizenship Act, Centre Has 4 Weeks to Respond*, 22 January 2020, <https://www.ndtv.com/india-news/citizenship-act-cao-case-no-stay-on-citizenship-act-for-now-supreme-court-says-interim-order-on-peti-2167814>.

<sup>167</sup> Al Jazeera, *India's Supreme Court refuses to strike down citizenship law*, 22 January 2020,

<https://www.aljazeera.com/news/2020/1/22/indias-supreme-court-refuses-to-strike-down-citizenship-law>.

<sup>168</sup> The Hindu, *A docket full of unresolved constitutional cases*, 6 July 2022, <https://www.thehindu.com/opinion/lead/a-docket-full-of-unresolved-constitutional-cases/article37874576.ece>.

<sup>169</sup> The Quint, *188 Days & Counting: Kappan's Habeas Corpus Plea Pending in SC*, 13 April 2021,

<https://www.thequint.com/news/india/siddique-kappan-habeas-corpus-plea-supreme-court-delayed#read-more#read-more>; LiveLaw, *Siddique Kappan's Release on Bail After 846 Days Is A Harsh Reminder Of What Can Happen To Our Precious Freedom*, 4 February 2023, <https://www.livelaw.in/columns/siddique-kappans-release-after-846-days-harsh-reminder-what-can-happen-to-our-precious-freedom-220755#:~:text=The%20Supreme%20Court%20made%20it,it%20from%20issuing%20the%20direction>.

<sup>170</sup> Ibid.

<sup>171</sup> The Guardian, *Indian news channel fined in UK for hate speech about Pakistan*, 23 December 2020,

<https://www.theguardian.com/media/2020/dec/23/indian-news-channel-fined-in-uk-for-hate-speech-about-pakistan>.

<sup>172</sup> The Wire, *Arnab Goswami Case: Dushyant Dave Writes To SC on 'Selective Listing of Matters'*, 10 November 2020,

<https://thewire.in/law/arnab-goswami-supreme-court-petition-selective-listing>; LiveLaw, *Supreme Court Orders Release of Arnab*

The cases of student activist Umar Khalid, who was arrested on 23 September 2020 for his involvement in anti-CAA protests,<sup>173</sup> and continues to be detained until today, along with several other student leaders peacefully protesting against the controversial Citizenship Amendment Act, are par for the course.<sup>174</sup> The tepid response of higher courts, including the Supreme Court, to list and hear their bail petitions,<sup>175</sup> has resulted in their prolonged detention.

In contrast, there have been instances where the Supreme Court has gone out of its way to speedily hear cases and pass orders, in favour of government position, including those concerning right to life and liberty of citizens. Emblematic is the case of GN Saibaba, a physically challenged academic, accused of UAPA offences, granted bail by the Bombay High Court, where the Supreme Court bench convened the very next day after the High Court's orders, on a public holiday, and reversed the bail order.<sup>176</sup> Experts have pointed to the significance of the incident, and as another sign that impartiality is being undermined.<sup>177</sup>

A similar pattern of delays can be observed in the disposing of *habeas corpus* petitions challenging mass detention in Kashmir after the Government's revocation of the semi-autonomous status for Kashmir (see below on [Abrogation of Special Status in Kashmir](#)), despite the timely hearings being integral to the remedy of *habeas corpus* and the Constitutional right to life and liberty.<sup>178</sup>

Overall, there is a perception that public confidence in the effectiveness of *habeas corpus* petitions has been eroded:

*"In recent years, we have witnessed an ebb in the confidence people vest in the judiciary. Petitioners in jail have chosen to withdraw their petitions for bail rather than have them heard by certain judges known for their proclivity to deny bail."*<sup>179</sup>

## CONDUCT OF JUDGES

As set out [above](#), judicial impartiality requires that judges act without actual or apparent bias or animosity towards one of the parties which can be ascertained by their personal conviction (subjective test) or by objective factors outside of the judge's mind (objective test). However, the conduct that is not based on fact or law, of some judges in India inside and outside the courtroom described hereinafter can contribute to the impression that they are favouring the position or ideology of the BJP government.

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*Goswami From Jail; Says 'Personal Liberty Must Be Upheld'*, 11 November 2020, <https://www.livelaw.in/top-stories/supreme-court-orders-release-of-arnab-goswami-from-jail-165776#:~:text=LIVELAW%20NEWS%20NETWORK&text=The%20Supreme%20Court%20on%20Wednesday,designer%20Anvay%20Naik%20in%202018>.

<sup>173</sup> BBC News, *Umar Khalid: Indian activist languishes in jail without bail or trial*, 23 January 2024, <https://www.bbc.co.uk/news/world-asia-india-67980484>; LiveLaw, *The Never-Ending Bail Hearing in Delhi Riots Conspiracy Case*, 14 July 2024, <https://www.livelaw.in/articles/the-never-ending-bail-hearing-in-delhi-riots-conspiracy-case-263297>.

<sup>174</sup> The Wire, *A Timeline of Umar Khalid's Bail Hearings: HC Seeks Police Response, Next Date August 29*, 24 July 2024, <https://thewire.in/law/a-timeline-of-umar-khalids-bail-hearings>.

<sup>175</sup> Supreme Court Observer, *Umar Khalid's Bail Application Tracker*, 14 February 2024, <https://www.scobserver.in/journal/umar-khalid-bail-application-tracker/>.

<sup>176</sup> The Indian Express, *Supreme Court suspends Bombay High Court discharge order in Saibaba Maoist link case*, 16 October 2022, <https://indianexpress.com/article/india/saibaba-acquittal-supreme-court-maharashtra-bombay-hc-8209802/>.

<sup>177</sup> The Leaflet, *Strange case of G.N. Saibaba and the Supreme Court, another new abnormal*, 31 October 2022, <https://theleaflet.in/strange-case-of-g-n-saibaba-and-the-supreme-court-another-new-abnormal/>.

<sup>178</sup> Scroll.in, *Analysis: Supreme Court orders in Kashmir petitions undermine the spirit of habeas corpus*, 28 August 2019, <https://scroll.in/article/935432/analysis-supreme-court-orders-in-kashmir-petitions-undermine-the-spirit-of-habeas-corpus>; see also at the level of the High Court: Indian Express, *J&K: Most habeas corpus cases dragged on as court slammed govt on due process*, 4 August 2020, <https://indianexpress.com/article/india/jammu-kashmir-article-370-habeas-corpus-detention-psa-6538085/>.

<sup>179</sup> The Leaflet, *Post a fractured political mandate, will the judiciary rise to meet challenges to Indian Constitution?*, 13 June 2024, [https://theleaflet.in/post-a-fractured-political-mandate-will-the-judiciary-rise-up-to-meet-challenges-to-indian-constitution/?utm\\_source=substack&utm\\_medium=email](https://theleaflet.in/post-a-fractured-political-mandate-will-the-judiciary-rise-up-to-meet-challenges-to-indian-constitution/?utm_source=substack&utm_medium=email).

Compared to before 2020, this perception appears to have shifted with a legal scholar noting in 2022:

*“[...] the perception of the higher judiciary, unlike say the police which is seen as being controlled by the government was that it was non-partisan, except for a brief period during the Emergency. The legally inexplicable manner in which some cases have been dealt with in recent years, however, raise a suspicion that the non-partisan character of the higher judiciary may be under pressure.”<sup>180</sup>*

This view is shared by several legal scholars and practitioners in India who expressed that the Supreme Court is consistently gaining ground as an “executive court”.<sup>181</sup> The phrase “executive court” in this regard implies that the Supreme Court, in its practice, appears to have dropped its formal commitment to the protection of rights of its citizens as its primary mandate and instead has become an institution that speaks the language of the executive, and in doing that, it has essentially become indistinguishable from the executive.<sup>182</sup>

This perception is similar to the colloquial phrase of “telephone justice” that has been used in other contexts to denote that executive can pick up the telephone to pressure the judiciary.<sup>183</sup> In many ways, such perceptions of an “executive court” and “telephone justice” denote inequality before the law, selectivity in law enforcement and the consequent gap between law and justice.

The institutional and procedural weaknesses set out above have an impact on the conduct of judges and the perception thereof. As one scholar noted:

*“Several factors affect the way the SC [Supreme Court] operates – what cases are brought to it and by whom; the speed with which cases travel through the judicial system; the composition of the court, which is currently under negotiation between the court and the government, the assignment of particular benches to a case; executive flak for “encroaching” into its domain, coupled with general right-wing flak whenever the Supreme Court rules against the government; media coverage of particular judgments or issues [...]; and, of course, the government’s unwillingness to implement any judgment with which it disagrees.”<sup>184</sup>*

In other words, where the executive is given a crucial role to veto the appointment of judges recommended by the Supreme Court collegium, often resulting in judges being appointed who align with the government; where the Government is known to be offering potential incentives through of post-retirement employment or postings; where cases are assigned to pro-Government benches without disclosing the rationale behind it; where politically sensitive cases that require urgent adjudication are extensively delayed, the conduct of judges is more likely to be perceived as tainted.

## **I. Problematic Statements**

In some situations, the judges of the Supreme Court and lower courts can be perceived to have failed to uphold the confidence of the public and litigants by making remarks during court hearings or outside the court

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<sup>180</sup> Scroll.in, *Why many in India’s legal world are expressing disappointment about the judiciary*, 8 July 2022, <https://scroll.in/article/1027674/why-many-in-the-legal-world-are-dismayed-by-the-indian-judiciary>.

<sup>181</sup> The Wire, *The Troubling Legacy of Chief Justice Ranjan Gogoi*, 16 March 2020, <https://thewire.in/law/chief-justice-ranjan-gogoi-legacy>.

<sup>182</sup> Ibid.

<sup>183</sup> Ledeneva, *‘Telephone Justice’ in the Global Age: from Commands to Signals*, in *Can Russia Modernise? Sistema, Power Networks and Informal Governance*, 5 February 2013, p. 150 – 178, <https://www.cambridge.org/core/books/abs/can-russia-modernise/telephone-justice-in-the-global-age-from-commands-to-signals/C9B9E9DD1D4BD837D8536DB4A38F5CCCC>.

<sup>184</sup> Sundar, *The Supreme Court in Modi’s India*, *Journal of Right-Wing Studies*, Vol. 1, No. 1 (2023), p. 117-118, [https://escholarship.org/content/qt313700c7/qt313700c7\\_noSplash\\_6c1dd43cc12f9d6cef5223597b3b6055.pdf](https://escholarship.org/content/qt313700c7/qt313700c7_noSplash_6c1dd43cc12f9d6cef5223597b3b6055.pdf).

that might lead a reasonable observer to harbour doubts about the objectivity of the judiciary vis-à-vis the executive.

### Foreigners Tribunals Case

In a petition in 2020 which challenged the inhumane conditions of detention centres where those declared foreigners by the Foreigners' Tribunals were being held, former Chief Justice Ranjan Gogoi was member of the bench.<sup>185</sup> Due to the perception of bias that parties to the proceedings had, Justice Gogoi's impartiality was contested by seeking his recusal which cited observations made by Justice Gogoi in the course of earlier hearings, which the applicant claimed the judge had already made up his mind on the subject.<sup>186</sup>

Justice Gogoi not only refused to recuse himself from the case but also verbally reprimanded the Chief Secretary of the State of Assam during the proceedings, who in an affidavit had proposed to conditionally release and monitor person who had been detained for more than 5 years:

*“You have no right to continue in office after authoring such an affidavit [...] This court will not be party to such an unheard-of arrangement [...] You have 900 detainees when lakhs [hundred thousand] of illegal foreigners have already intermingled with the local population [...] All you have is 900 people kept in sub-human conditions in your detention centres[...] What other measures? That you will provide these detainees five-star facilities, or you will beg and plead with their countries to take them back?”<sup>187</sup>*

One observer whose report reproduces the recusal proceedings in more details noted that *“the anti-immigrant sentiment held by many of the state's dominant communities was reflected in the hearings Gogoi held in the NRC cases”*.<sup>188</sup>

According to the Bangalore Principles, judges should maintain and enhance the confidence of the public and litigants in their impartiality through their conduct inside the court.<sup>189</sup> This is even more important in a case such as this where the use of specific terms can be perceived as divisive. However, contrary to this principle, the reference to *“illegal foreigners who have already intermingled with the local population”* can be understood as derogatory remark against the Bengali-speaking minority who are often branded as *“illegal foreigners”* despite having been part of the Assam community for decades. In addition, the downplaying of the plight of people held under inhumane conditions appears from his expression *“All you have is 900 people kept in sub-human conditions in your detention centres”* suggesting that this is not a real concern to him.

### Chief Justice's Public Engagements

The current Chief Justice of India, D.Y. Chandrachud, has attended several public engagements which could contribute to the perception that his ties with the executive might taint his impartiality or that he favours a particular religion:

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<sup>185</sup> Supreme Court of India, *Harsh Mander v. Union of India*, Writ Petition (Civil) Diary No. 10801/2020, 21 April 2020, <https://indiankanoon.org/doc/195818183/>.

<sup>186</sup> The Wire, *Full Text: Why Harsh Mander Wanted CJI Gogoi to Recuse Himself From Assam Case*, 2 May 2019, <https://thewire.in/law/full-text-harsh-mander-cji-ranjan-gogoi-recuse-assam-detention-centres>

<sup>187</sup> Bar and Bench, *Bias and Recusal of Judges: The Harsh Mander case*, 7 May 2019, <https://www.barandbench.com/columns/bias-and-recusal-of-judges-the-harsh-mander-case>.

<sup>188</sup> Caravan, *Sealed and Delivered: Ranjan Gogoi's Gifts to the Government*, 1 February 2020,

<https://caravanmagazine.in/reportage/ranjan-gogoi-gifts-government>.

<sup>189</sup> Bangalore Principles, Value 2.2.

In September 2024, the current Chief Justice of India, D.Y. Chandrachud, celebrated a Hindu festival by conducting a religious ceremony (*puja*) at his home, along with the Prime Minister Narendra Modi.<sup>190</sup> The following day the media published photographs of the Chief Justice, his wife and the Prime Minister carrying out the Puja Ceremony.<sup>191</sup>

This encounter and public display of the Chief Justice's Hindu beliefs was criticised by observers for contributing to a perception of partiality and violating the principle of secularism:<sup>192</sup>

*“Public trust in the judiciary hinges not only on its actual independence but also on how that independence is perceived. Such meetings can lead to suspicions that personal relationships might influence judicial decisions, particularly in politically sensitive cases involving the government. [...] The principle that a judge must not only be impartial but also appear to be impartial is paramount. Hosting the Prime Minister in a personal capacity could be seen as compromising this standard, as it gives the impression of a potential conflict of interest.”*<sup>193</sup>

Critics have pointed to the fact that the Union government together with State governments is the largest litigant in court proceedings which makes it paramount to prevent any doubts on the objectivity of the Supreme Court.<sup>194</sup>

Chief Justice Chandrachud's public display of his religious beliefs had been critiqued before when a visit to a Hindu temple in Gujarat in January 2024 was criticised as “unorthodox display of faith”:

*“In remarks he gave during that trip, Chandrachud claimed inspiration from the saffron flags traditionally flown above Hindu temples, which he suggested were a unifying symbol for the nation's citizens. Modi endorsed the remarks on X (formerly Twitter) and praised the chief justice as if he were a junior functionary.”*<sup>195</sup>

He made a similar public visit to the controversial Ayodhya temple in July 2024.<sup>196</sup>

## Support for Hindu Nationalist Movement

In a decision on 25 July 2024, the Madhya Pradesh (MP) High Court expressed support for the Rashtriya Swayamsevak Sangh (RSS), a Hindu-nationalist movement that was banned several times since 1947 because it posed a threat to the existence of the Indian state, peace and amity.<sup>197</sup> Earlier, in September 2023, a retired

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<sup>190</sup> Hindustan Times, *PM Modi participates in Ganpati Puja at CJI Chandrachud's residence*, 12 September 2024, <https://www.hindustantimes.com/india-news/pm-modi-participates-in-ganpati-puja-at-cji-chandrachud-s-residence-video-101726070131639.html>.

<sup>191</sup> Business Today, *Opposition kicks off row over PM's visit to CJI's home during Ganpati Puja, BJP says 'visit part of culture'*, 12 September 2024, [https://www.businesstoday.in/india/story/opposition-kicks-off-row-over-pms-visit-to-cjis-home-during-ganpati-puja-bjp-says-visit-part-of-culture-445588-2024-09-12?utm\\_source=substack&utm\\_medium=email](https://www.businesstoday.in/india/story/opposition-kicks-off-row-over-pms-visit-to-cjis-home-during-ganpati-puja-bjp-says-visit-part-of-culture-445588-2024-09-12?utm_source=substack&utm_medium=email).

<sup>192</sup> Business Today, *Opposition kicks off row over PM's visit to CJI's home during Ganpati Puja, BJP says 'visit part of culture'*, 12 September 2024, [https://www.businesstoday.in/india/story/opposition-kicks-off-row-over-pms-visit-to-cjis-home-during-ganpati-puja-bjp-says-visit-part-of-culture-445588-2024-09-12?utm\\_source=substack&utm\\_medium=email](https://www.businesstoday.in/india/story/opposition-kicks-off-row-over-pms-visit-to-cjis-home-during-ganpati-puja-bjp-says-visit-part-of-culture-445588-2024-09-12?utm_source=substack&utm_medium=email).

<sup>193</sup> The Leaflet, *Even Ganapati cannot fix the breach of people's trust in the judiciary*, 18 September 2024, <https://theleaflet.in/even-ganapati-cannot-fix-the-breach-of-peoples-trust-in-the-judiciary/>.

<sup>194</sup> Campaign for Judicial Accountability and Reforms, *CJAR Statement on Judicial Propriety and Independence*, 12 September 2024, <https://www.mainstreamweekly.net/article15055.html>.

<sup>195</sup> The Atlantic, *What Has Happened to the Rule of Law in India?*, 3 February 2024, <https://archive.ph/eONWF#selection-715.182-715.517>.

<sup>196</sup> Deccan Herald, *CJI Chandrachud visits Ayodhya Ram temple*, 12 July 2024, <https://www.deccanherald.com/india/uttar-pradesh/cji-chandrachud-visits-ayodhya-ram-temple-3103783>.

<sup>197</sup> The Wire, *'RSS Was Wrongly Banned, Took Govt 5 Decades to Realise Mistake': MP High Court*, 26 July 2024, [https://thewire.in/law/rss-was-wrongly-banned-took-govt-5-decades-to-realise-mistake-mp-high-court/?utm\\_source=substack&utm\\_medium=email](https://thewire.in/law/rss-was-wrongly-banned-took-govt-5-decades-to-realise-mistake-mp-high-court/?utm_source=substack&utm_medium=email).

government employee had filed a petition with the MP High Court against the ban on government officials from joining RSS or participating in its activities.<sup>198</sup> When the ban was lifted by the MP government on 9 July 2024, the MP High Court dismissed the petition as moot.<sup>199</sup> However, the judges still decided to issue observations on the RSS which included hailing the group as “internationally renowned organisation” and questioning

*“[...] on what study or basis, activities of RSS organisation as a whole were treated in the decades of 1960s and 70s as communal or anti-secular; what was the empirical report, statistical survey or material, that led the then government of the day to arrive at an objective satisfaction that involvement of Central Government employees with the RSS”.*<sup>200</sup>

For a judge to make this point is problematic, to say the least. RSS has long been known for being an extremist anti-minority organisation, including being involved in anti-minority incitement as well as violence, such as being complicit in post partition violence and the assassination of Gandhi. At least six judicial commissions investigating mass violence over the past decades, have pointed to RSS’s role in them.<sup>201</sup> More recently the central government has also lifted the ban on government servants and judges joining the RSS, seen as the national government pandering to its Hindu nationalist base, after its less than stellar performance in recent parliamentary elections.<sup>202</sup>

Another instance where the association of members of the judiciary with Hindu-nationalist groups may enhance the perception of partiality towards the government ideology occurred in September 2024, when at least 30 retired judges of the High Courts and Supreme Court attended a meeting organised by the Vishwa Hindu Parishad (VHP).<sup>203</sup> VHP is part of the group of organisations headed by the RSS, and whose stated objective is to “organise, consolidate the Hindu society and to serve and protect the Hindu Dharma”.<sup>204</sup> Members of the VHP have played a crucial role inciting mobs and participating in violence, both during the razing of the Babri Masjid as well as during targeted violence against Muslims in Gujarat in 2002.<sup>205</sup>

The meeting discussed the legal aspects of religious conversion from Hinduism and recovery of Hindu places of worship from mosque sites, issues which have been used to claim Hindu persecution in India, some of which are being litigated currently before the Constitutional courts.<sup>206</sup> The meeting was also attended by the Union Law Minister, Arjun Ram Meghwal, and notable judges included retired Supreme Court Judge Justice Deepak Gupta, who during his tenure, upheld the prohibition on wearing the Hijab in educational institutions in Karnataka, and the denial of entry to student girls who wore the hijab.<sup>207</sup>

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<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> The Hindu, *Centre took five decades to realise mistake of banning government employees from joining RSS: M.P. High Court*, 26 July 2024, <https://www.thehindu.com/news/national/madhya-pradesh/centre-took-five-decades-to-realise-mistake-of-banning-government-employees-from-joining-rss-mp-high-court/article68446774.ece>.

<sup>201</sup> Frontline, *Sangh in service*, 3 November 2006, <https://frontline.thehindu.com/the-nation/article30211376.ece>.

<sup>202</sup> Hindustan Times, *Centre lifts ban on govt employees joining RSS activities; Opposition-BJP spar*, 22 July 2024, <https://www.hindustantimes.com/india-news/centre-lifts-ban-on-govt-employees-joining-rss-activities-opposition-bjp-spar-101721626991424.html>.

<sup>203</sup> Indian Express, *Kashi-Mathura dispute, Waqf Bill on table at VHP meet with former Judges*, 10 September 2024, <https://indianexpress.com/article/india/kashi-mathura-dispute-waqf-bill-on-table-at-vhp-meet-with-former-judges-9559072/>.

<sup>204</sup> See website of VHP: <https://vhp.org/vhp-at-glance/about-vhp/>.

<sup>205</sup> Human Rights Watch, *“We have no order to save you” – State Participation and Complicity in Communal Violence in Gujarat*, April 2002, p. 47-48, <https://www.hrw.org/reports/2002/india/gujarat.pdf>; BBC News, *Babri mosque: The build-up to a demolition that shook India*, 5 December 2017, <https://www.bbc.co.uk/news/world-asia-india-42106056>.

<sup>206</sup> Indian Express, *Kashi-Mathura dispute, Waqf Bill on table at VHP meet with former Judges*, 10 September 2024, <https://indianexpress.com/article/india/kashi-mathura-dispute-waqf-bill-on-table-at-vhp-meet-with-former-judges-9559072/>; Free Press Journal, *Legal Eagle: Retired Judges Attending VHP Meet Sends Out The Wrong Signal*, 19 September 2024, <https://www.freepressjournal.in/analysis/legal-eagle-retired-judges-attending-vhp-meet-sends-out-the-wrong-signals>.

<sup>207</sup> The News Minute, *Former SC judge who upheld Karnataka college hijab ban attends VHP event*, 12 September 2024, <https://www.thenewsminute.com/karnataka/former-sc-judge-who-upheld-karnataka-college-hijab-ban-attends-vhp-event>.

Even though the attending judges were retired and no longer adjudicating live cases, their association with a Hindu-nationalist group like VHP in this manner might contribute to the perception that the judiciary supports a specific political ideology which belittles the rights of minorities.<sup>208</sup>

### Cases In Relation to Kashmir

The Supreme Court has been regularly seized with cases in relation to Kashmir. Due to its long history of strife for independence and with a majority Muslim population, Kashmir is particularly sensitive in the eyes of the BJP Government.<sup>209</sup> In some of these cases, judges made statements that may contribute to the perception of bias, particularly when the statements are not related to questions of law that are before it.

In 2017, the Jammu and Kashmir High Court Bar Association filed a petition in the Supreme Court seeking prohibition on the use of pellet guns as a crowd control measure by security forces due to their indiscriminate use and the severe injuries these so-called non-lethal weapons can cause.<sup>210</sup> During the initial hearings, then Chief Justice JS Khehar heading the Supreme Court bench was reported to have told the Petitioner that they would grant this relief if the Petitioner ensured that stone pelting in Kashmir stopped: “*We can direct them (the government) to suspend use of pellet guns for two weeks, but you must assure that violence and stone pelting will stop.*”<sup>211</sup>

This expression was critiqued by civil society because “[r]ather than address the state violence that was at issue, the Supreme Court conditioned the exercise of its powers to stop atrocity crimes on a bar association’s ability to end mass civil disobedience protesting grave violations and atrocity crimes” in Kashmir.<sup>212</sup> Notably, the Petition was eventually in 2020 dismissed by the Jammu and Kashmir High Court without granting any relief.<sup>213</sup>

In 2019, when the semi-autonomous status of Jammu and Kashmir was revoked by the Union Government a swathe of politicians, activists and other citizens were detained and arrested (see below on [Abrogation of Special Status of Kashmir](#)). Based on a fact-finding report, child rights activists filed a Petition in the Supreme Court challenging the preventive detention of 79 children, on grounds that preventive detention of minors was prohibited by Indian law as well as international law.<sup>214</sup> During the hearings, one of the judges made the

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<sup>208</sup> See Hindustan Times, *Mahua Moitra’s sharp jibe at retired judges attending VHP event: ‘Who can stop Gods...?’*, 11 September 2024, <https://www.hindustantimes.com/india-news/mahua-moitra-sharp-jibe-at-retired-judges-attending-vhp-event-who-can-stop-gods-101726063323541.html>.

<sup>209</sup> See history of cases in Kashmir Law & Justice Project, *Complete Injustice – The Indian Supreme Court and the misrule of law in Kashmir*, November 2023, <https://kashmirawareness.org/wp-content/uploads/2024/01/complete-injustice.pdf>.

<sup>210</sup> Supreme Court of India, *Jammu And Kashmir High Court Bar v Union Of India*, (2016) (C) No(s). 33734/2016, 1 December 2016, <https://indiankanon.org/doc/132221593/>.

<sup>211</sup> Economic Times, *Supreme Court asks Jammu and Kashmir High Court Bar Association to come with peace plan*, 29 April 2017, <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-asks-jammu-and-kashmir-high-court-bar-association-to-come-with-peace-plan/articleshow/58424629.cms>; see also Business Standard, *Stone pelting must end in Kashmir, says Supreme Court*, 28 April 2017, [https://www.business-standard.com/article/current-affairs/stone-pelting-must-end-in-kashmir-says-supreme-court-117042800572\\_1.html](https://www.business-standard.com/article/current-affairs/stone-pelting-must-end-in-kashmir-says-supreme-court-117042800572_1.html).

<sup>212</sup> Kashmir Law & Justice Project, *Complete Injustice – The Indian Supreme Court and the misrule of law in Kashmir*, November 2023, <https://kashmirawareness.org/wp-content/uploads/2024/01/complete-injustice.pdf>, p. 71.

<sup>213</sup> High Court of Jammu and Kashmir, *Jammu and Kashmir High Court Bar Association v. Union of India and Ors*, Writ Petition (C) P.I.L No.14/2016, judgment dated 11<sup>th</sup> March 2020, [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-371161.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-371161.pdf).

<sup>214</sup> Scroll.in, *No minors illegally detained in Kashmir, satisfied with HC panel report, says SC*, 13 December 2019, <https://scroll.in/latest/946743/satisfied-with-jammu-and-kashmir-hc-panels-report-that-no-minors-are-illegally-detained-says-sc>.

following comment to the Petitioner: *"But they [the children] were released the same day. Are you aware what 15 year olds are capable of doing these days?"*<sup>215</sup>

Such a comment can contribute to the perception that the judges had a pre-formed opinion on the matter. First it seems to be justifying unlawful detention of children on grounds that they were not kept in detention overnight, normalising the arbitrary deprivation of liberty. Further, the Judges rhetorical question appears to suggest that young adults are by nature criminal offenders which deserve to be unlawfully arrested.

## II. Problematic Rulings

During the BJP's administration, a number of lawsuits were filed at the Supreme Court to challenge pieces of legislation or state actions that are detrimental to the rights of minorities, in particular Muslims. Among these, this report examines three high-profile constitutional or policy-related cases, which taken together have extensive implications for a large segment of the minority population and many aspects of their daily lives, impacting their right to freedom of religion or belief, freedom of expression and general daily life.

In addition, the Supreme Court is regularly seized with cases of human rights defenders or activists. This report analyses four emblematic cases where the Supreme Court in its judgements and in the manner of handling the cases expressed its animosity against one party.

An analysis of these cases sheds light on several indicators that fuel an appearance of partiality and lack of independence on the side of the Supreme Court. These factors contribute to an environment where the Supreme Court is seen as sliding towards an "executive court" driven by the interest of the Government.

### (i) Constitutional / Policy-Related Rulings

Commentators have expressed their perception that in recent years the Supreme Court appears to be catering to the demands of the government as evidenced by highly controversial judgments, in particular in the cases concerning the land dispute around the Babri Masjid mosque and the abrogation of Jammu and Kashmir's autonomous status.<sup>216</sup> In both, the Supreme Court ruled in favour of the government position despite rejecting all legal arguments put forward in support of that position:

*"The Central government was judged to have acted unconstitutionally [...] to abrogate Article 370 [which stipulated Jammu and Kashmir's autonomous status]. The Hindu side in the Babri Masjid dispute was said to be misguided in basing its claim on faith, erroneous in its contention that the mosque was built on the ruins of a demolished temple, and criminal in damaging the mosque [...] however, the government ended up on the winning side based on stances that it did not itself take and claims that it did not itself make."*<sup>217</sup>

Others has expressed similar perceptions by stating:

*"In November 2019, the Supreme Court issued a bizarre but unanimous decision that termed the destruction of the mosque by a Hindu-nationalist mob numbering in the tens of thousands "an egregious violation of the rule of law" — then proceeded to award the entirety of the ruined*

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<sup>215</sup> LiveLaw, *SC Accepts JK Juvenile Justice Committee Findings Against Allegations of Illegal Detention of Children*, 13 December 2020, <https://www.livelaw.in/top-stories/sc-accepts-jk-juvenile-justice-committees-findings-that-no-children-are-illegally-detained-in-kashmir-150774>.

<sup>216</sup> Scroll.in, *Punishing victims, rewarding perpetrators: The Supreme Court and its creative contortions*, 21 January 2024, <https://scroll.in/article/1062400/punishing-victims-rewarding-perpetrators-the-supreme-court-and-its-creative-contortions>.

<sup>217</sup> Ibid.

*structure's site to the Hindus. Much as the Kashmir verdict later would, the ruling rested on contradictory reasoning and ultimately aligned with the Hindu-nationalist agenda.*<sup>218</sup>

Other highly criticised rulings affecting the rights of minorities include the Supreme Court's refusal to strike down the Government's suspension of the internet in Kashmir in 2019,<sup>219</sup> refusal to strike down provisions reversing the presumption of innocence in money-laundering laws.<sup>220</sup>

This chapter will discuss three high-profile cases in more detail.

### **National Register of Citizens in Assam**

The National Register for Citizens (NRC) is a list of Indian citizens containing all necessary information for their identification. An NRC was first formulated following the 1951 national census. While the Central government has indicated its intent to extend the NRC across India,<sup>221</sup> Assam is the first and only state to have updated it, in July 2019. The Assam NRC was meant to produce a citizens' register, in the face of contestations about nationality in the region since before independence. From the 1970s onwards, locals in Assam widely protested the migration of Bengali speaking people into the state and this movement against migrants was led by the All-Assam Students Union and the All Assam Gana Sangram Parishad.<sup>222</sup>

In 1985, the Indian government and the representatives of the Assam Movement negotiated and drafted the Assam Accord in New Delhi.<sup>223</sup> The Accord created three categories of immigrants:

- Persons who came to Assam before 1 January 1966 (considered Indian citizens and were allowed to vote).
- Persons who came to Assam after 1 January 1966, but before 24 March 1971 (considered Indian citizens, but would not be allowed to vote for a period of 10 years following the date of their detection as Indian citizens).
- Persons who came to Assam on or after 25 March 1971 (persons were considered illegal immigrants and were to be expelled from India).

As a result, Section 6A was introduced to the Citizenship Act, 1955, to give effect to the Assam Accord. It provides the framework to recognise migrants in Assam as Indian citizens or to expel them based on the date of their migration. Apart from the existing provisions of "Doubtful (or D) voters" to identify those suspected by the state of being so-called foreigners and ordered to be detained in one of the six detention centres set up in the state of Assam,<sup>224</sup> the NRC up-dating process sought to create a fresh list of Indian citizens, to exclude those not making the grade.

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<sup>218</sup> The Atlantic, *What Has Happened to the Rule of Law in India?*, 3 February 2024, <https://archive.ph/eONWF#selection-715.182-715.517>.

<sup>219</sup> Indian Express, *SC Order on internet lockdown in J&K makes the right noises but leaves matters of relief to the future*, 11 January 2020, <https://indianexpress.com/article/opinion/columns/jammu-and-kashmir-internet-shutdown-supreme-court-article-370-6210489/>.

<sup>220</sup> Indian Express, *Supreme Court upholds PMLA, says presuming innocence can be reversed by law*, 28 July 2022 <https://indianexpress.com/article/india/supreme-court-pmla-validity-enforcement-directorate-8054053/>.

<sup>221</sup> Times of India, *NRC process to be carried out in entire country: Amit Shah in Rajya Sabha*, 20 November 2019, <https://timesofindia.indiatimes.com/india/nrc-process-will-be-carried-out-across-india-amit-shah/articleshow/72141265.cms>.

<sup>222</sup> Baruah, *Immigration, Ethnic Conflict, and Political Turmoil--Assam, 1979-1985*, in *Asian Survey* Volume 26 No. 11, 1986, p. 1184–206, <https://doi.org/10.2307/2644315>.

<sup>223</sup> *Accord between AASU, AAGSP and the Central Government on the Foreign Nationals Issue (Assam Accord)*, 15 August 1985, [https://peacemaker.un.org/sites/peacemaker.un.org/files/IN\\_850815\\_Assam%20Accord.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/IN_850815_Assam%20Accord.pdf).

<sup>224</sup> Scroll.in, *The dark side of humanity and legality: A glimpse inside Assam's detention centres for 'foreigner'*, 26 June 2018, <https://scroll.in/article/883936/assam-citizens-register-detention-centres-for-foreigners-offer-a-glimpse-of-the-looming-tragedy>.

## Case Summary

In 2009, a non-governmental organization, Assam Public Works, filed a public interest litigation before the Supreme Court seeking implementation of Section 6A of the Citizenship Act, i.e. identifying illegal immigrants from Assam and expelling them from India.<sup>225</sup> The case made little to no progress before the Supreme Court for four years until 8 May 2013, when a two-judge bench comprising Justices H.L. Gokhale and then Chief Justice of India Ranjan Gogoi started hearing the case and directed the State of Assam to update the list of persons included in the NRC. The process was closely monitored by another two-judge bench, Justice Rohinton Nariman and again former Chief Justice Ranjan Gogoi.

In a December 2014 judgment, the Supreme Court set a deadline for the NRC update to be completed and published by January 2016.<sup>226</sup> In this judgement, the Supreme Court also took on a monitoring and supervising role over the NRC updating process.<sup>227</sup> This included an order to the state coordinator of the NRC to submit reports on the process to the Supreme Court for review.<sup>228</sup>

The publication was delayed and on 30 July 2018, the final draft of the Assam NRC was released.<sup>229</sup> Around 4 million (out of approximately 33 million) applicants were excluded from the NRC list.<sup>230</sup> This created uncertainty about their citizenship status. On the very next day, the Supreme Court held that this was merely a *draft* NRC, and no action could be taken based on it.<sup>231</sup> Concerns have been raised suggesting that this was declared a draft because many of those included in the list were undocumented Hindus and that was not the intended outcome of this process.<sup>232</sup>

On 31 August 2019, the final NRC list was published. Of the 33 million applicants, 1.9 million persons, around 6% of the state's population, were excluded.<sup>233</sup> Disaggregated data is unavailable, but it is believed that those excluded were mostly Bengali-speakers – primarily Muslims – who have historically been the main targets of Assam's anti-migrant movement.<sup>234</sup> However, this list was not free of problems either. For instance, some of the excluded individuals were family members of the former President of India, Fakhruddin Ali Ahmed, as well as children whose parents were included in the final NRC list.<sup>235</sup>

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<sup>225</sup> Supreme Court of India, *Assam Public Works v. Union of India*, Writ Petition (Civil) No. 274 of 2009 (SC), 13 August 2019, <https://indiankanoon.org/doc/135202420/>.

<sup>226</sup> Supreme Court of India, *Assam Sanmilita Mahasangha & Ors v. Union of India & Ors.*, Writ Petition (Civil) No. 876 of 2014, 17 December 2014, [http://nrcassam.nic.in/pdf/17%20Dec%202014%20Record%20Of%20Proceedings\\_SUPREME%20COURT.pdf](http://nrcassam.nic.in/pdf/17%20Dec%202014%20Record%20Of%20Proceedings_SUPREME%20COURT.pdf), para. 48.

<sup>227</sup> Supreme Court of India, *Assam Sanmilita Mahasangha & Ors. v. Union of India*, Writ Petition (Civil) No. 562 of 2012, 17 December 2014, <https://main.sci.gov.in/jonew/judis/42194.pdf>; Scroll.in, *How the Supreme Court's hardline stance on citizenship deepened the Hardline Stance on Citizenship Deepened the Flaws in Assam's NRC*, 31 July 2019, <https://scroll.in/article/932176/how-the-supreme-court-s-hardline-stance-on-citizenship-deepened-the-flaws-in-assams-nrc>.

<sup>228</sup> Supreme Court of India, *Assam Sanmilita Mahasangha & Ors. v. Union of India*, Writ Petition (Civil) No. 562 of 2012, 17 December 2014, <https://main.sci.gov.in/jonew/judis/42194.pdf>; The Wire, *On the NRC, Even the Supreme Court is Helpless*, 7 January 2019, <https://thewire.in/law/nrc-supreme-court-crisis>.

<sup>229</sup> The Hindu, *30 July 2018: When final draft of NRC was released*, 4 August 2018, <https://www.thehindu.com/news/national/other-states/30-july-2018-when-final-draft-of-nrc-was-released/article24603815.ece>.

<sup>230</sup> Al Jazeera, *Assam: Some four million left out of final India NRC draft list*, 30 July 2018,

<https://www.aljazeera.com/news/2018/7/30/assam-some-four-million-left-out-of-final-india-nrc-draft-list>.

<sup>231</sup> Supreme Court of India, *Assam Public Works v Union of India & Ors*, Writ Petition (Civil) No. 274/2009, 31 July 2018, [https://main.sci.gov.in/supremecourt/2009/16113/16113\\_2009\\_Order\\_31-Jul-2018.pdf](https://main.sci.gov.in/supremecourt/2009/16113/16113_2009_Order_31-Jul-2018.pdf).

<sup>232</sup> Neerja Jayal, *Reinventing the Republic: Faith and Citizenship in India*, in *Studies in Indian Politics*, 10(1), 14–30, 20 April 2022, <https://doi.org/10.1177/23210230221082799>.

<sup>233</sup> Indian Express, *NRC final list: Family members of former president Fakhruddin Ali Ahmed again left out*, 1 September 2019, <https://indianexpress.com/article/india/nrc-final-list-released-family-members-of-former-president-fakhruddin-ali-ahmed-again-left-out-5956636/>.

<sup>234</sup> Talha Abdul Rahman, *Identifying the "Outsider": An Assessment of Foreigner Tribunals in the Indian State of Assam*, in *Statelessness & Citizenship Review* Volume 2 No. 1, 29 June 2020, <https://ssrn.com/abstract=3723694>.

<sup>235</sup> Indian Express, *NRC final list: Family members of former president Fakhruddin Ali Ahmed again left out*, 1 September 2019, <https://indianexpress.com/article/india/nrc-final-list-released-family-members-of-former-president-fakhruddin-ali-ahmed-again-left-out-5956636/>.

NRC rules allow those excluded from the list to appeal before Foreigners Tribunals, failing which applicants would be considered foreigners liable for detention and deportation.<sup>236</sup> A survey in 2022 counted 3,331 people, mainly Muslim, were living in sub-human conditions in six detention centres, after being declared foreigners. Of these, 335 had spent 3 years in camps, 30 persons declared foreigners had died in the detention camps, and an estimated 33 persons had been driven to suicide in fear of not possessing papers.<sup>237</sup>

In the aftermath of the NRC up-dating process in Assam, the constitutional validity of Section 6A of the Citizenship Act which formed the basis of NRC in Assam was challenged before the Supreme Court in August 2022. The matter is before the Supreme Court, and the final judgment is pending.<sup>238</sup>

## Analysis

The treatment of this case by the Supreme Court has garnered criticism on many fronts including procedural irregularities, excessive overreach by the judiciary in driving what was essentially a bureaucratic process, and for the inhumane conditions within which the doubtful voters have been detained at the detention centres.<sup>239</sup> This report will focus on the lack of impartiality and independence that would appear to a reasonable observer in this case. In line with the objective test (see [above](#)), the indicators set out below taken as whole demonstrate that a key judicial officer in this case failed to offer sufficient guarantees to exclude any legitimate doubt about his impartiality and independence.

### *(1) Appearance of pre-formed sympathy on the matter*

One of the key judges on the Supreme Court bench at the time of the 2013 and 2014 judgments, who initiated the Assam NRC update process, was Justice Ranjan Gogoi. He was later appointed as Chief Justice of India in October 2018 (while the case was still on-going).<sup>240</sup> Justice Gogoi is an ethnic Assamese himself and thus a member of the community whose fears of migrants from Bangladesh led to the Assam Accord.<sup>241</sup>

The Commentary on Bangalore Principles elaborates that that “*impartiality must exist both as a matter of fact and as a matter of reasonable perception. [...] The perception that a judge is not impartial may arise in a number of ways, for instance, by a perceived conflict of interest.*”<sup>242</sup> In light of the highly divisive nature of the case that led to confrontations between different communities in Assam, Justice Gogoi’s personal background and his long standing support to the NRC<sup>243</sup> would give a reasonable observer the impression that he might harbour a bias for one community over another.

This concern was expressed by legal practitioners: An Assam-based senior advocate, Pradip Dutta Roy, officially wrote to the then Chief Justice of India Dipak Mishra claiming that Justice Gogoi’s association with

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<sup>236</sup> Clause 8 of the Schedule under Rule 4A(4) of the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003, <https://www.nrcassam.nic.in/images/pdf/citizenship-rules.pdf>.

<sup>237</sup> Neerja Jayal, *Reinventing the Republic: Faith and Citizenship in India*, in *Studies in Indian Politics*, 10(1), 14–30, 20 April 2022, <https://doi.org/10.1177/23210230221082799>.

<sup>238</sup> Supreme Court of India, *Assam Sanmilita Mahasangha & Ors. v. Union of India*, Writ Petition (Civil) No. 562 of 2012, 17 December 2014, <https://main.sci.gov.in/jonew/judis/42194.pdf>.

<sup>239</sup> Gautam Bhatia, *The Nrc Case And The Parchment Barrier Of Article 21*, in *Indian Constitutional Law And Philosophy*, 26 April 2019, <https://indconlawphil.wordpress.com/2019/04/26/the-nrc-case-and-the-parchment-barrier-of-article-21/>.

<sup>240</sup> Website of National Legal Services Authority, *Hon'ble Mr. Justice Ranjan Gogoi*, <https://nalsa.gov.in/patron-in-chief/hon-ble-mr-justice-ranjan-gogoi>; The Hindu, *As Former CJI Ranjan Gogoi Takes Oath as Rajya Sabha Member, Opposition 'Walks Out'*, 19 March 2020, <https://www.thehindu.com/news/national/former-cji-ranjan-gogoi-takes-oath-as-rajya-sabha-member/article31106321.ece>.

<sup>241</sup> The Quint, *Ranjan Gogoi's Book Reveals Why He Should Have Recused Himself From NRC Case*, 28 December 2021, <https://www.thequint.com/news/law/does-ranjan-gogoi-book-prove-he-should-have-recused-nrc-matter#read-more>; Ranjan Gogoi, *Justice for the judge: An autobiography*, 8 December 2021.

<sup>242</sup> Commentary on the Bangalore Principles, para. 52.

<sup>243</sup> The Print, *Why CJI Gogoi is under fire for defending Assam's NRC while it's still sub judice*, 6 November 2019, <https://theprint.in/theprint-essential/why-cji-gogoi-is-under-fire-for-defending-assams-nrc-while-its-still-sub-judice/316032/>.

the case would “create ample doubt in the minds of other ethnicities about the delivery of the judgment”.<sup>244</sup> Another Supreme Court lawyer, Sumita Hazarika, is reported to have said: “Gogoi was a judge; he is supposed to rise above his personal interests and prejudices, But I don’t think he did that with the NRC. If he felt so strongly about it, if he couldn’t detach himself from the issue, more the reason for him to not do the case in the first place. Coming from Assam, he seems to have his own personal agenda, which he was trying to fulfil through the court and using his power as a judge. I think he should not have dealt with the matter at all.”<sup>245</sup> Similarly, it has been perceived by the applicants, lawyers, and human rights defenders that Justice Gogoi may be working with a “subconscious bias”.<sup>246</sup>

There is no explicit rule on potential appearance of bias due to the ethnicity of Justices. However, the practice on other issues underlines the importance of not appearing to act with a conflict of interest. It has been a long-standing practice at the Supreme Court that in serious issues, like inter-state water disputes, judges from the states concerned do not sit on the bench to adjudicate them.<sup>247</sup> In addition, the Restatement of Values of Judicial Life adopted by the Supreme Court of India in its full Court meeting on 7 May 1997 categorically states: “A Judge shall not hear and decide a matter in a company in which he holds shares is concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.”<sup>248</sup>

Neither the Supreme Court nor Justice Gogoi took initiatives to assuage the perception of partiality. On the contrary, Justice Gogoi’s actions inside and outside the courtroom described below reinforced the appearance of favouring the position of the Government to the detriment of minorities in Assam.

## ***(2) Appearance of inducement by executive branch***

Judicial independence requires that judges exercise their functions free from any external inducements.<sup>249</sup> As discussed [above](#), one element of the Indian system which appears to interfere with judicial independence of the Indian system is the practice of appointing retired judges from the Supreme Court to political positions which can be perceived as an incentive for judges to favour the position of the government. Justice Gogoi is a case in point where this particular risk to judicial independence seemed to have played out to the detriment of minorities in Assam.

In November 2019, Justice Gogoi retired from this position and since March 2020, he is a member of parliament in the *Rajya Sabha* (the upper house of the Parliament of India) with a term of six years.<sup>250</sup> His nomination by the BJP to the *Rajya Sabha* immediately after the end of his term was unusual for a Supreme Court judge and was seen as a reward for his rulings.<sup>251</sup> It was unprecedented because Gogoi was nominated within four months of his retirement, and this was the first time a government had used its power to nominate members to the *Rajya Sabha* in appointing a Supreme Court judge.<sup>252</sup>

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<sup>244</sup> The Print, *Guwahati advocate asks CJI Misra why Justice Gogoi, an Assamese, is hearing NRC case*, 8 August 2018, <https://theprint.in/india/governance/guwahati-advocate-asks-cji-misra-why-justice-gogoi-an-assamese-is-hearing-nrc-case/95509/>.

<sup>245</sup> Caravan, *Sealed and Delivered: Ranjan Gogoi’s Gifts to the Government*, 1 February 2020, <https://caravanmagazine.in/reportage/ranjan-gogoi-gifts-government>.

<sup>246</sup> The Print, *Why CJI Gogoi is under fire for defending Assam’s NRC while it’s still sub judice*, 6 November 2019, <https://theprint.in/theprint-essential/why-cji-gogoi-is-under-fire-for-defending-assams-nrc-while-its-still-sub-judice/316032/>.

<sup>247</sup> Bar and Bench, *Bias and Recusal of Judges: The Harsh Mander case*, 7 May 2019, <https://www.barandbench.com/columns/bias-and-recusal-of-judges-the-harsh-mander-case>.

<sup>248</sup> Ibid.

<sup>249</sup> Bangalore Principles, Value 1.1.

<sup>250</sup> Website of National Legal Services Authority, *Hon’ble Mr. Justice Ranjan Gogoi*, <https://nalsa.gov.in/patron-in-chief/hon-ble-mr-justice-ranjan-gogoi>; The Hindu, *As former CJI Ranjan Gogoi takes oath as Rajya Sabha member, Opposition walks out*, 19 March 2020, <https://www.thehindu.com/news/national/former-cji-ranjan-gogoi-takes-oath-as-rajya-sabha-member/article31106321.ece>.

<sup>251</sup> The Wire, *In Unprecedented Move, Modi Government Sends Former CJI Ranjan Gogoi To Rajya Sabha*, 16 March 2020, <https://thewire.in/law/cji-ranjan-gogoi-rajya-sabha-nomination>.

<sup>252</sup> Ibid.

Justice Gogoi's nomination could be perceived as a reward for favouring the government position during his tenure. For one, he was a sitting judge on the NRC case where the current government has vested interests until shortly before his nomination by the BJP. Moreover, he had considerable influence in the case by sitting on both benches that dealt with the case (one bench was assigned to rule on the petition, another bench was monitoring the NRC updating process).

## Ayodhya Land Title Dispute

Babri Masjid was a 16th century mosque located in Ayodhya in the north-western state of Uttar Pradesh.<sup>253</sup> The site of the mosque is also believed to be the birthplace of Lord Ram (*Shri Ram Janmabhoomi*) by many Hindus. This has repeatedly led to disputes about who possesses the land.<sup>254</sup> In a significant development, in December 1992 Babri Masjid was demolished by Hindu nationalist activists calling themselves *karsevaks* (literally "servers-in-action") affiliated with the *Vishwa Hindu Parishad* and other *Hindutva* organisations.<sup>255</sup>

The latest legal dispute arose out of a Faizabad District Court order from 1949. On the night of 22 December 1949, a set of Hindu idols were surreptitiously placed by Hindu activists under the Babri Masjid dome which flared up conflict between Hindu and Muslim communities. On 29 December 1949, a Faizabad District Court placed the site under the custodial responsibility of the state to control rising communal tensions.<sup>256</sup>

Following the 1949 order, three key title suits challenging it were filed:

- In 1959, the *Nirmohi Akhara* (a Hindu sect) filed a title suit claiming it is the rightful manager of the site.
- In 1961, the Uttar Pradesh Sunni Central Board of Waqfs (a Muslim organisations, hereafter 'Sunni Waqf Board') also filed a suit claiming possession of the mosque.<sup>257</sup>
- In 1989, senior advocate Deoki N Agarwal filed a suit on behalf of Lord Ram in the Allahabad High Court.<sup>258</sup> (Triloki Nath Pandey, a volunteer of the Hindutva network of *Rashtriya Swayam Sewak* (RSS) and functionary of the Hindutva group called *Vishwa Hindu Parishad* replaced Deoki N Agarwal after his death.)

All suits were joined at the Allahabad High Court. In September 2010, the Allahabad High Court delivered a judgment dividing the Ayodhya land title into three equal parts.<sup>259</sup> It awarded one of part to the each of the three petitioners, namely to the *Nirmohi Akhara*, to Lord Ram represented by Triloki Nath Pandey, and the Sunni Waqf Board. All the parties filed appeals, claiming various rights over the disputed land. In 2011, the Supreme Court stayed the Allahabad High Court judgment.

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<sup>253</sup> See history of Bari Masjid at website of Maidan Project, [https://madainproject.com/babri\\_masjid](https://madainproject.com/babri_masjid).

<sup>254</sup> Supreme Court Observer, *Timeline – Key Events in the Babri Masjid-Ram Mandir Controversy*, 22 October 2018, <https://www.scobserver.in/journal/timeline-key-events-in-the-babri-masjid-ram-mandir-controversy/>.

<sup>255</sup> IndiaTV, *BJP Leaders Made Provocative Speeches Before Babri Demolition, Says Former PSO*, 26 March 2010, <https://www.indiatvnews.com/news/india/advani-bjp-leaders-made-provocative-speeches-before-babri-demolition-says-former-pso-2241.html>.

<sup>256</sup> Supreme Court Observer, #1: *Ayodhya Title Dispute*, 16 February 2020, <https://www.scobserver.in/journal/1-ayodhya-title-dispute/>.

<sup>257</sup> Ibid.

<sup>258</sup> Times of India, *The man who was Ram Lalla's 'next friend'*, 2 October 2010, <https://timesofindia.indiatimes.com/india/The-man-who-was-Ram-Lallas-next-friend/articleshow/6668887.cms>.

<sup>259</sup> Allahabad High Court, *Decision of Hon'ble Special Full Bench hearing Ayodhya Matters*, 30 September 2010, <https://elegalix.allahabadhighcourt.in/elegalix/DisplayAyodhyaBenchLandingPage.do>.

## Case Summary

On 27 September 2018, a three-judge bench of the Supreme Court delivered its verdict on the question of whether the matter should be referred to a Constitution Bench comprising five judges who sit to decide any case “*involving a substantial question of law as to the interpretation*” of the Constitution.<sup>260</sup> It ruled that a three-judge bench could continue to hear the matter. It rejected referring it to a Constitution Bench on the ground that the existing precedent on whether mosques are an essential feature of Islam was clear and did not need revisiting, and hence, this would be treated by the Supreme Court as a property dispute and not as a case of freedom of religion where essential religious practices would be relevant.<sup>261</sup>

Overriding the judgment of the three-judge bench, on 8 January 2019, former Chief Justice Ranjan Gogoi reassigned the dispute to a five-judge Constitution Bench, without any justification or reasoning, using his administrative powers as Chief Justice, who can assign cases to the specific benches. The five-judge bench was headed by Justice Gogoi himself.<sup>262</sup>

The new Constitution Bench suggested that parties should attempt mediation to arrive at a compromise. After the mediations proved unsuccessful, the five-judge bench continued the hearings. On 9 November 2019, the court delivered its 1,045-page long judgement. It awarded the title of the land to the deity Lord Ram and directed the State to grant the Sunni Waqf Board an alternate site in Ayodhya for the construction of a mosque.<sup>263</sup>

## Analysis

The handling of this case raises concerns since it may appear to a reasonable observer that the judges were not completely free of external influence, which was to the detriment of the rights of Muslim communities.

### (I) *Arbitrary case re-assignment*

Then Chief Justice Gogoi used his administrative powers to change a decision by the three-judge bench.<sup>264</sup> It is questionable if his administrative powers as Chief Justice allowed him to do so since this particular question on whether it should be assigned to a five-judge bench had already been decided by the original three-judge bench, so that it was no longer a purely administrative matter of assignment of cases.<sup>265</sup> Moreover, Justice Gogoi presided over the new five-judge bench himself. It was also noted that although the Ayodhya case was politically sensitive in nature, it did not involve a substantive question of law regarding the interpretation of the Constitution, and so a Constitution Bench was not warranted.<sup>266</sup>

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<sup>260</sup> Supreme Court of India, *M. Siddiq (D) Thr. Lrs. V. Mahant Suresh Das and Others etc.*, Civil Appeal Nos. 10866-10867 of 2010, 27 September 2018, [https://api.sci.gov.in/supremecourt/2010/36350/36350\\_2010\\_Order\\_27-Sep-2018.pdf](https://api.sci.gov.in/supremecourt/2010/36350/36350_2010_Order_27-Sep-2018.pdf); The Hindu, *Explained 1 The Constitution Benches of the Supreme Court*, 14 October 2022, <https://www.thehindu.com/news/national/explained-the-constitution-bench-of-the-supreme-court/article65955010.ece#:~:text=Whenever%20a%20matter%20of%20law,Bench%20is%20called%20Constitution%20Bench.>

<sup>261</sup> Supreme Court of India, *Dr. M. Ismail Faruqui Etc, Mohd. V. Union Of India And Others*, AIR 1995 SC 605 A, 24 October 1994, <https://indiankanoon.org/doc/37494799/>.

<sup>262</sup> Supreme Court of India, Notice, 8 January 2019, [https://scobserver-production.s3.amazonaws.com/uploads/case\\_document/document\\_upload/608/Ayodhya\\_-SC\\_Notice\\_Announcing\\_CB\\_-2019.01.08.pdf](https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/608/Ayodhya_-SC_Notice_Announcing_CB_-2019.01.08.pdf).

<sup>263</sup> Supreme Court of India, *M Siddiq (D) Thr Lrs v. Mahant Suresh Das and Others etc.*, Civil Appeal Nos 10866-10867 of 2010, Final Judgment, 9 November 2019, [https://www.scobserver.in/wp-content/uploads/2021/10/Ayodhya\\_Final\\_Judgment3.pdf](https://www.scobserver.in/wp-content/uploads/2021/10/Ayodhya_Final_Judgment3.pdf).

<sup>264</sup> Supreme Court of India, *M. Siddiq (D) Thr. Lrs. V. Mahant Suresh Das and Others etc.*, Civil Appeal Nos. 10866-10867 of 2010, Order, 27 September 2018, [https://api.sci.gov.in/supremecourt/2010/36350/36350\\_2010\\_Order\\_27-Sep-2018.pdf](https://api.sci.gov.in/supremecourt/2010/36350/36350_2010_Order_27-Sep-2018.pdf).

<sup>265</sup> See The Economic Times, *CJI Ranjan Gogoi led 5 judge bench to hear Ayodhya case*, 9 January 2019, [https://economictimes.indiatimes.com/news/politics-and-nation/cji-ranjan-gogoi-led-5-judge-bench-to-hear-ayodhya-case/articleshow/67447215.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/politics-and-nation/cji-ranjan-gogoi-led-5-judge-bench-to-hear-ayodhya-case/articleshow/67447215.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

<sup>266</sup> The Hindu, *The absentee constitutional court*, 12 September 2019, <https://www.thehindu.com/opinion/lead/the-absentee-constitutional-court/article29394699.ece>.

This action created the perception that Justice Gogoi wished to have more influence over the decision in the case. Without justifications that might have explained why such a re-assignment despite the previous ruling by the original bench was necessary, a reasonable observer would be left to question the external factors that may have motivated Justice Gogoi, particularly because there was heightened ideological controversy underlying the case whereby the ruling party favoured the Hindu petitioners over the Muslim petitioners.<sup>267</sup>

This perception was enhanced by the ultimate outcome of the case that was decided in favour of the Hindu petitioners as the entire disputed land was allotted for the construction of a temple of Hindu deity Lord Ram. The decision of the Supreme Court was criticised for its contradictory reasoning that ultimately aligned with the Hindu-nationalist agenda (see [Public Perception](#) below).

## ***(2) Appearance of promoting the interests of one party***

As mentioned above, judicial impartiality requires that judges do not promote the interest of one of the parties. Contrary to this, the Supreme Court directed the central government to create a trust that would be in-charge of the “construction of a temple” on that land but did not make such provision for the construction of a mosque at an alternative, suitable land in Ayodhya.<sup>268</sup>

Another factor that contributes to the perception of promoting the interests of the Hindu-majoritarian government is the fact that the Supreme Court itself noted two unlawful events that potentially violated the rights of Muslims but the judgment did not attempt to redress either of them: one, the exclusion of the Muslims from worship and possession in 1949 when the mosque was desecrated by the installation of Hindu idols; and two, the demolition of Babri Masjid in December 1992 which according to the Court was “*in violation of the status quo orders of this Court*” and “*was an egregious violation of the rule of law*”.<sup>269</sup>

This perception was reinforced by public statements made by Justice D.Y. Chandrachud who was a member of the bench at the time in October 2024 where he claimed: “*Very often we have cases (to adjudicate) but don’t arrive at a solution. Something similar happened during the Ayodhya (Ram Janmabhoomi-Babri Masjid dispute) which was in front of me for three months. I sat before the deity and told him he needed to find a solution.*”<sup>270</sup> With the Hindu deity Lord Ram represented as one of the parties to the case in whose favor the judgment was rendered, Justice Chandrachud could appear to a reasonable observer as having been biased towards one party and as having resorted to factors outside of the law in making the ruling.<sup>271</sup>

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<sup>267</sup> For the connection between BJP and Ayodhya temple see Christophe Jaffrelot, *Ayodhya Issue*, in The Wiley Blackwell Encyclopaedia of Race, Ethnicity, and Nationalism, 7 December 2015, p. 1-3; Bharatiya Janata Party, *White Paper on Ayodhya and the Rama Temple Movement*, in Hindu Vivek Kendra (A Resource Center for the Promotion of Hindutva), 1993, <http://www.hvk.org>.

<sup>268</sup> Supreme Court of India, *M Siddiq (D) Thr Lrs v. Mahant Suresh Das & Ors*, Civil Appeal Nos 10866-10867 of 2010, Final Judgment, 9 November 2019, [https://www.scoobserver.in/wp-content/uploads/2021/10/Ayodhya\\_Final\\_Judgment3.pdf](https://www.scoobserver.in/wp-content/uploads/2021/10/Ayodhya_Final_Judgment3.pdf), para. 805.

<sup>269</sup> Supreme Court of India, *M Siddiq (D) Thr Lrs v. Mahant Suresh Das & Ors*, Civil Appeal Nos 10866-10867 of 2010, 9 November 2019, [https://www.scoobserver.in/wp-content/uploads/2021/10/Ayodhya\\_Final\\_Judgment3.pdf](https://www.scoobserver.in/wp-content/uploads/2021/10/Ayodhya_Final_Judgment3.pdf), para 561; Christoph Jaffrelot, *Modi’s India: Hindu Nationalism and the rise of ethnic democracy*, 2021, Chapter 11, Indian Muslims, p. 435.

<sup>270</sup> The Indian Express, *Prayed to God for a solution to Ayodhya dispute, says CJI Chandrachud*, 21 October 2024, <https://indianexpress.com/article/india/ayodhya-dispute-solution-cji-chandrachud-9630810/>; The Times of India, *‘Prayed to God for a solution’: CJI DY Chandrachud reflects on handling Ayodhya case*, 21 October 2024, <https://timesofindia.indiatimes.com/india/prayed-to-god-for-a-solution-cji-dy-chandrachud-reflects-on-handling-ayodhya-case/articleshow/114418870.cms>.

<sup>271</sup> The Wire, *Justice Chandrachud Should Not Blame God for His Own Awful Ayodhya Judgment*, 22 October 2024, <https://thewire.in/law/justice-chandrachud-should-not-blame-god-for-his-own-awful-ayodhya-judgment>.

## Abrogation of ‘Special Status of Kashmir’ under Article 370

On 5 August 2019, the Indian Parliament amended Article 370 of the Indian Constitution dismantling Jammu and Kashmir’s constitutionally mandated autonomy.<sup>272</sup> It simultaneously passed a law reorganising the Indian held part of the disputed region into two Union Territories ruled by Delhi.<sup>273</sup> This change was to bring into effect integration of Muslim-majority Kashmir to India which has been a long-standing political goal of the current government led by BJP and the Hindu nationalist movement of *Rashtriya Swayamsevak Sangh*.<sup>274</sup>

The day before, on 4 August 2019, mobile phone networks, internet connectivity and landlines were disabled in large parts of Jammu and Kashmir, in anticipation of possible public protests against the constitutional changes that would follow the next day.<sup>275</sup> This internet and communication shutdown was also accompanied by restrictions on physical movement, with several political leaders and over 13,000 individuals detained or placed under house arrest.<sup>276</sup>

### Case Summary

All three issues - the revocation of Article 370 of the Constitution, the communications shutdown, and the preventive detentions - were challenged before the Supreme Court through dozens of petitions filed in the weeks and months after 5 August 2019.<sup>277</sup> On the first issue, the Supreme Court upheld the abrogation of Article 370 of the Constitution in a ruling on 11 December 2023.<sup>278</sup>

### Analysis

As mentioned above, one of the fundamental elements of impartiality is the requirement for judiciary to not act in ways that promote the interest of one of the parties.<sup>279</sup> The Supreme Court’s handling of the Article 370 petition, however, gives the impression to the contrary.

The manner in which the Supreme Court treated the petitions, including the case on abrogation of Article 370 of the Constitution, has been referred as ”judicial evasion”.<sup>280</sup> The Supreme Court faced strong criticism for the discomfiting lack of urgency.<sup>281</sup> In response to the request for the Article 370 petition to be listed for regular hearings before a Constitution Bench (at least five judges of the court which sit to decide any case “involving a substantial question of law as to the interpretation” of the Constitution),<sup>282</sup> then Chief Justice of

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<sup>272</sup> Ministry of Law and Justice (Legislative Department), *Notification: The Constitution (Application to Jammu and Kashmir) Order, 2019*, 5 August 2019, <https://taxguru.in/corporate-law/constitution-application-jammu-kashmir-order-2019.html>.

<sup>273</sup> Ministry of Law and Justice (Legislative Department), *The Jammu and Kashmir Reorganization Act, 2019*, No. 34 of 2019, 5 August 2019, <https://egazette.nic.in/WriteReadData/2019/210407.pdf>.

<sup>274</sup> The Print, *How erasing Article 370 became an article of faith for RSS and BJP*, 5 August 2019, <https://theprint.in/india/how-erasing-article-370-became-an-article-of-faith-for-rss-and-bjp/272688/>.

<sup>275</sup> BBC, *Kashmir in Lockdown after Autonomy Scrapped*, 6 August 2019, <https://www.bbc.com/news/world-asia-india-49246434>; <https://www.pucl.org/sites/default/files/reports/Imprisoned%20Resistance-final%20for%20dissemination.pdf>.

<sup>276</sup> The Telegraph Online, *‘Iron fist’ in rural Kashmir*, 18 August 2019, <https://www.telegraphindia.com/india/iron-fist-in-rural-kashmir/cid/1698688>; PIIE Report, Annexure IV, p. 320-324.

<sup>277</sup> Economic Times, *Supreme Court to consider listing of pleas challenging abrogation of Article 370 giving special status to J-K*, 17 February 2023, <https://economictimes.indiatimes.com/news/india/supreme-court-to-consider-listing-of-pleas-challenging-abrogation-of-article-370-giving-special-status-to-j-k/articleshow/98002229.cms>.

<sup>278</sup> Supreme Court of India, *In Re: Article 370 of the Constitution*, Writ Petition (Civil) No. 1099 of 2019, 2023 INSC 1058, 11 December 2023, <https://www.scobserver.in/wp-content/uploads/2023/07/Judgement-Abrogation-of-Article-370.pdf>.

<sup>279</sup> See Human Rights Committee, *Arvo O. Kuitunen v Finland*, Communication No. 387/1989, 23 October 1992, [http://www.worldcourts.com/hrc/eng/decisions/1992.10.23\\_Karttunen\\_v\\_Finland.htm](http://www.worldcourts.com/hrc/eng/decisions/1992.10.23_Karttunen_v_Finland.htm), para. 7.2.

<sup>280</sup> The Hindu, *The absentee constitutional court*, 12 September 2019, <https://www.thehindu.com/opinion/lead/the-absentee-constitutional-court/article29394699.ece>.

<sup>281</sup> The Quint, *Deciding by NOT Deciding: Takeaways From SC’s Kashmir Hearings*, 1 October 2019, <https://www.thequint.com/news/law/deciding-by-not-deciding-supreme-court-kashmir-hearings-takeaways-fait-accompl>.

<sup>282</sup> The Hindu, *Explained I The Constitution Benches of the Supreme Court*, 14 October 2022, <https://www.thehindu.com/news/national/explained-the-constitution-bench-of-the-supreme-court/article65955010.ece>.

India Ranjan Gogoi remarked that the Court did not have the time to hear it because it was busy hearing a matter involving a disputed religious property (see [Ayodhya case](#) above).<sup>283</sup>

It should be noted, however, that it was Justice Gogoi himself who re-assigned the Ayodhya case from the ordinary three-judge bench to the Constitution Bench without any apparent justification and in contradiction to a decision made by the three-judge bench (see [Ayodhya case](#) above). The Ayodhya case, although a politically sensitive case, did not involve a substantial question of law regarding interpretation of the Constitution, whereas the Article 370 petition involved important constitutional questions.<sup>284</sup> Using the Ayodhya case as explanation for the delay in hearing the petition on the abrogation of Article 370 of the Constitution thus appears to be a cop-out tactic.

The de-prioritization of the Article 370 petition by the Supreme Court could be perceived by a reasonable observer as a way to promote the interest of the Government as the opposing party in the case because the delay in itself contributed to cementing the *status quo* in Jammu and Kashmir. The changes to its status had immediate consequences that would be difficult if not impossible to revoke. The local administration could no longer restrict settlement of outsiders in the state and acquire immovable property and the central Government issued an order allowing outsiders to buy land easily.<sup>285</sup> In addition, since the change in status the obligation to organise elections for the legislative assembly in Jammu and Kashmir lies with the central Government which were not held elections between 2018 and 2024.<sup>286</sup>

Another consequence of the delay in the case was that the central Government, with the new powers following the legislative changes, was successful in changing the electoral constituencies by increasing seats for areas with a Hindu-majority.<sup>287</sup> Since its inception, there have been apprehensions among sections of people in Jammu and Kashmir as well as domestic political parties<sup>288</sup> and international organizations<sup>289</sup> that the real intention behind the exercise was to alter the boundaries of the Legislative Assembly seats in a way that could benefit the BJP and its allies in future Assembly elections. In May 2022, six additional Assembly segments for the Hindu-majority Jammu region were created and only one for Muslim-majority Kashmir region, confirming the apprehensions.<sup>290</sup> On 13 February 2023, the Supreme Court played a crucial role by dismissing

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<sup>283</sup> The Wire, *The Troubling Legacy of Chief Justice Ranjan Gogoi*, 16 March 2020, <https://thewire.in/law/chief-justice-ranjan-gogoi-legacy>.

<sup>284</sup> The Hindu, *The Absentee Constitutional Court*, 12 September 2019,

<https://www.thehindu.com/opinion/lead/the-absentee-constitutional-court/article29394699.ece>.

<sup>285</sup> Member's Reference Service - Lok Sabha Secretariat, *Refence Note*, No. 43/RN/Ref/October/2017, <http://parliamentlibraryindia.nic.in/writereaddata/Library/Reference%20Notes/Article%2035A%20of%20the%20Constitution-%20An%20overview.pdf>.

<sup>286</sup> Outlook, *BJP Delaying Polls in Jammu & Kashmir, Not Election Commission: Ex-CM Omar Abdullah*, 18 January 2023, <https://www.outlookindia.com/national/bjp-delaying-polls-in-jammu-and-kashmir-not-election-commission-ex-cm-omar-abdullah-news-254672>.

<sup>287</sup> Outlook, *Amit Shah's Roadmap for Jammu & Kashmir: Delimitation, Elections, Statehood*, 24 October 2021, <https://www.outlookindia.com/website/story/india-news-amit-shahs-roadmap-for-jammu-kashmir-delimitation-elections-statehood/398572>.

<sup>288</sup> New Indian Express, *Jammu and Kashmir domicile rules: centre trying to change demography of UT, claim political parties*, 19 May 2020, <https://www.newindianexpress.com/nation/2020/may/19/jammu-and-kashmir-domicile-rules-centre-trying-to-change-demography-of-ut-claim-political-parties-2145386.html>.

<sup>289</sup> International Bar Association, *IBAHRI condemns India's attempt to re-define demographic outlook of Kashmir*, 18 June 2020, <https://www.ibanet.org/article/C6A22BC1-3A97-40BE-8802-E740153CC535>.

<sup>290</sup> The Leaflet, *SC confirms validity of J&K Delimitation Commission, apprehensions remain*, 15 February 2023, <https://theleaflet.in/sc-confirms-validity-of-jk-delimitation-commission-apprehensions-remain/>.

the pleas challenging the initiative by the central Government to redraw the electoral boundaries within the state.<sup>291</sup>

As one legal practitioner noted on this case:

*“[...] 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.”*<sup>292</sup>

The final decision issued after more than four years eventually upheld the abrogation but was perceived as an effort to please the Government:

*“All in all, the Supreme Court in this case seems to have completely capitulated to the Central Government by first deciding that the conclusions it wanted to reach was to endorse the Governments actions. It then invented some arguments to justify those conclusions.”*<sup>293</sup>

Others have expressed similar criticism of the Supreme Court for ruling in favour of the government position despite rejecting all legal arguments put forward in support of that position .

## **(ii) Cases of Human Rights Defenders**

In another category of cases concerning human rights defenders the Supreme Court appears to be penalising petitioners through unjustified fines and arrests for exercising their right to seek an effective remedy.

### **Zakia Jafri Judgment (2022)**

The burning of a train in Godhra on 27 February 2002, which caused the deaths of 58 Hindu pilgrims and Hindu nationalist activists, so-called *karsevaks* (literally “servers-in-action”), returning from Ayodhya is cited as having instigated a three-day period of inter-communal violence in the western Indian state of Gujarat.<sup>294</sup> This led to retaliation against and widespread outbreak of violence against the minority Muslim population of Gujarat. According to multiple sources, the death toll ranged from 1044 to 2000 with most victims from the Muslim community.<sup>295</sup> The riots also witnessed many cases of brutal killings and rapes of Muslim women as well as widespread looting and destruction of property belonging to the Muslims.<sup>296</sup>

Narendra Modi, then Chief Minister of Gujarat and now Prime Minister of India, was accused of condoning the violence and failing to prevent the violence, as were police and government officials who allegedly directed the rioters and gave lists of Muslim-owned properties to them.<sup>297</sup> Serious allegations that the violence

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<sup>291</sup> The Print, *SC dismisses plea against constitution of delimitation commission for redrawing constituencies in J-K*, 13 February 2023, <https://theprint.in/india/sc-dismisses-plea-against-constitution-of-delimitation-commission-for-redrawing-constituencies-in-j-k/1368675/>.

<sup>292</sup> The Hindu, *A docket full of unresolved constitutional cases*, 6 July 2022, <https://www.thehindu.com/opinion/lead/a-docket-full-of-unresolved-constitutional-cases/article37874576.ece>.

<sup>293</sup> Kashmir Times, *The Supreme Court’s Betrayal Of The Promise Made To Kashmir*, January 2024, <https://kashmirtimes.com/the-supreme-courts-betrayal-of-the-promise-made-to-kashmir/>.

<sup>294</sup> Indian Social Institute, *The Gujarat pogrom: compilation of various reports*, 2002; Hattiwala and Biggs, *The Political Logic of Ethnic Violence The Anti-Muslim Pogrom in Gujarat, 2002*, in *Politics and Society* 40 (4), 2012, [https://violent-interactions.org/images/PAS\\_RDhattiwala.pdf](https://violent-interactions.org/images/PAS_RDhattiwala.pdf), p. 485.

<sup>295</sup> BBC, *Gujarat riot death toll revealed*, 11 May 2005, [http://news.bbc.co.uk/1/hi/world/south\\_asia/4536199.stm](http://news.bbc.co.uk/1/hi/world/south_asia/4536199.stm); Concerned Citizens Tribunal – Gujarat 2022, *An inquiry into the carnage in Gujarat*, <https://www.sabrang.com/tribunal/>; Jaffrelot, *Communal Riots in Gujarat: The State at Risk?*, in *Heidelberg Papers in South Asian and Comparative Politics*, July 2003, <http://archiv.ub.uni-heidelberg.de/volltextserver/4127/1/hpsacp17.pdf>, p. 16.

<sup>296</sup> Concerned Citizens Tribunal – Gujarat 2022, *An inquiry into the carnage in Gujarat*, <https://www.sabrang.com/tribunal/>.

<sup>297</sup> BBC, *India: The Modi Question*, 17 January 2023, <https://www.bbc.co.uk/programmes/p0dkb144>; Jaffrelot, *Communal Riots in Gujarat: The State at Risk?*, in *Heidelberg Papers in South Asian and Comparative Politics*, July 2003, <http://archiv.ub.uni-heidelberg.de/volltextserver/4127/1/hpsacp17.pdf>, p. 16; Human Rights Watch, *“We have no order to save you” - State Participation*

was a result of a criminal conspiracy were levelled against the chief functionaries of the state government, including Chief Minister Modi, which were mainly built on statements and testimonies by officials of the state government of Gujarat itself, including then Additional Director General Police, R.B. Sreekumar.<sup>298</sup>

The Supreme Court formed a Special Investigation Team (SIT) upon the National Human Rights Commission's complaint that the Gujarat Police was not conducting a fair investigation.<sup>299</sup> The SIT was tasked with investigating nine police reports arising out of the riots.<sup>300</sup> In 2012, Chief Minister Modi was cleared of complicity in the violence and the SIT also rejected claims that the state government had not done enough to prevent the violence.<sup>301</sup>

### Case Summary

A former Member of Parliament of the Congress Party, Ehsan Jafri, was killed by a mob during the violence in February 2002, along with 68 others seeking shelter in his home in Gulberg Society, Ahmedabad. He was killed despite his repeated calls for help to various police and state officials, including the then Chief Minister, and a few minutes after he was visited by the Commissioner of Police, Ahmedabad, who had assured him protection. Since then, Zakia Jafri, his wife, has been seeking a fair investigation to bring to justice those who were allegedly complicit in the riots that led to her husband's death.<sup>302</sup>

On 24 June 2022, the Supreme Court dismissed Zakia Jafri's petition challenging the closure report filed by the SIT discarding the allegations of a larger conspiracy by state functionaries in the 2002 Gujarat riots.<sup>303</sup> The petitioners Zakia Jafri and Teesta Setalvad, a human rights activist, had argued that the Magistrate reviewing the SIT's report ignored crucial evidence of conspiracy while clearing those accused by Zakia Jafri. The petitioners had laid out the allegedly ignored evidence over 14 days of hearings before the Supreme Court in December 2021.<sup>304</sup>

While upholding the findings of the SIT, the Supreme Court stated in the judgement:

*“At the end of the day, it appears to us that a coalesced effort of the disgruntled officials of the State of Gujarat along with others was to create sensation by making revelations which were false to their own knowledge. The falsity of their claims had been fully exposed by the SIT after a thorough investigation. Intriguingly, the present proceedings have been pursued for last 16 years (from submission of complaint dated 8.6.2006 running into 67 pages and then by filing protest petition dated 15.4.2013 running into 514 pages) including with the audacity to question the integrity of every functionary involved in the process of exposing the devious stratagem adopted (to borrow the submission of learned counsel for the SIT), to keep the pot boiling, obviously, for ulterior design. As a*

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and Complicity in Communal Violence in Gujarat, Volume 14 No. 3 (C), April 2003, <https://www.hrw.org/reports/2002/india/gujarat.pdf>.

<sup>298</sup> Supreme Court Observer, *Case Description of Zakia Jafri Ahsan Jafri v State of Gujarat*, Diary No. 34207/2018 [SLP (Cr)], 8 June 2006, <https://www.scobserver.in/cases/protest-petition-against-gujarat-riots-sit-zakia-jafri-state-of-gujarat/>.

<sup>299</sup> Supreme Court of India, *National Human Rights Commission v State of Gujarat & Ors.*, Writ Petition (Cr.) No. 109 of 2003, Records of Proceeding, 26 March 2008, <https://www.scobserver.in/wp-content/uploads/2021/11/SC-Orders-Special-Investigation-Team-to-Investigate-Gujarat-Riots.pdf>.

<sup>300</sup> Ibid.

<sup>301</sup> SIT, *Report in Compliance to the Order DTD 12.09.2011 of the Hon'ble Supreme Court of India in the Complaint DTD, 08.06.2006 of SMT, Jakia Nasim Ahsan Jafri*, <https://www.scobserver.in/wp-content/uploads/2021/11/SIT-Report-Closing-the-Investigation-of-Mrs.-Zakia-Jafri-Complaint.pdf>.

<sup>302</sup> The Quint, *Zakia Jafri Case: Why 83-Year-Old Widow Won't Give Up Her Fights for Justice*, 24 June 2022, <https://www.thequint.com/news/india/zakia-jafri-gulbarg-society-massacre-case-explainer#read-more>.

<sup>303</sup> Supreme Court of India, *Zakia Ahsan Jafri v State of Gujarat & Anr.*, Diary No. 34207/2018, Judgment, 24 June 2022, [https://main.sci.gov.in/supremecourt/2018/34207/34207\\_2018\\_3\\_1502\\_36189\\_Judgement\\_24-Jun-2022.pdf](https://main.sci.gov.in/supremecourt/2018/34207/34207_2018_3_1502_36189_Judgement_24-Jun-2022.pdf).

<sup>304</sup> SIT, *Report in Compliance to the Order DTD 12.09.2011 of the Hon'ble Supreme Court of India in the Complaint DTD, 08.06.2006 of SMT, Jakia Nasim Ahsan Jafri*, <https://www.scobserver.in/wp-content/uploads/2021/11/SIT-Report-Closing-the-Investigation-of-Mrs.-Zakia-Jafri-Complaint.pdf>.

*matter of fact, all those involved in such abuse of process, need to be in the dock and proceeded with in accordance with law.*”<sup>305</sup> [emphasis added]

The day after the judgment, on 25 June 2022, the co-petitioner Teesta Setalvad and former DGP R.B. Sreekumar who had given testimony against the Gujarat state government were arrested on charges of fabricating evidence.<sup>306</sup> While trial against them continues both were granted bail in September 2022 after three months in detention.<sup>307</sup>

### Analysis

Under the subjective test (described [above](#)), judicial impartiality can be assessed by ascertaining the personal convictions of judges in a given case.<sup>308</sup> To be impartial, such personal conviction should not be tainted by animosity against one of the parties.<sup>309</sup> In this case, however, the wording the Supreme Court judgment clearly expressed a form of hostility with the intention to see the petitioners penalised for pursuing the case.

The judgment refers to the petitioner’s “audacity” in questioning the integrity of high government functionaries in the state of Gujarat, and claims that this petition is a form of “abuse of process”.<sup>310</sup> The use of such terms demonstrate resentment and annoyance against the petitioners, merely for following the only legal recourse available to challenge the report of the SIT. After the protest petition was dismissed by the lower court and the Gujarat High Court, the latter, in October 2017, allowed Zakia Jafri to demand further investigation before any appropriate forum, including the Supreme Court. Based on this High Court judgment, the petitioners seized the Supreme Court following due process. It appears there is no reasonable justification to suggest that the case being brought up in appeal to the Supreme Court was an “abuse of process”. These statements may be perceived as a reprisal against the petitioners.

Moreover, the Supreme Court expressly called for the arrest of the petitioners by stating that “all those involved in such abuse of process need to be in the dock” which was immediately obeyed by the local authorities. Legal practitioners have commented that the mere filing of the petition did not constitute any criminal offenses.<sup>311</sup> Such an unwarranted call for arrest can only be interpreted as an intention to punish the petitioners, even though they are merely exercising their right to an effective remedy.

As stated above, judicial impartiality is closely connected to the right to effective remedy.<sup>312</sup> Such expressions of animosity by the apex court which is vested with the power to defend fundamental rights can have serious deterrent effect on anyone seeking access to justice for human rights violations.

## Himanshu Kumar v State of Chhattisgarh (2022)

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<sup>305</sup> Supreme Court of India, *Zakia Ahsan Jafri v State of Gujarat & Anr.*, Diary No. 34207/2018, Judgment, 24 June 2022, [https://main.sci.gov.in/supremecourt/2018/34207/34207\\_2018\\_3\\_1502\\_36189\\_Judgement\\_24-Jun-2022.pdf](https://main.sci.gov.in/supremecourt/2018/34207/34207_2018_3_1502_36189_Judgement_24-Jun-2022.pdf), para. 88.

<sup>306</sup> Times of India, *Gujarat police detain Teesta Setalvad, arrest ex-DGP day after SC upholds SIT clan hit to Modi*, 25 June 2022, <https://timesofindia.indiatimes.com/india/teesta-setalvad-detained-by-gujarat-ats-team-in-mumbai/articleshow/92458316.cms>.

<sup>307</sup> BBC, *Teesta Setalvad: India activist gets bail in 2002 Gujarat riot case*, 2 September 2022, <https://www.bbc.com/news/world-asia-india-62722597>; Frontline, *R.B. Sreekumar gets bail in Gujarat riots evidence case*, 29 September 2022, <https://frontline.thehindu.com/news/rb-sreekumar-gets-bail-in-gujarat-riots-evidence-case/article65951005.ece>.

<sup>308</sup> European Court of Human Rights, *Piersack v. Belgium*, Application no. 8692/79, Judgment, 1 October 1982, <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Piersack%20v.%20Belgium%22%5D%22itemid%22:%5B%22001-57557%22%5D%7D>, para. 30.

<sup>309</sup> ICJ Practitioners Guide, p. 28.

<sup>310</sup> Supreme Court of India, *Zakia Ahsan Jafri v State of Gujarat & Anr.*, Diary No. 34207/2018, Judgment, 24 June 2022, [https://main.sci.gov.in/supremecourt/2018/34207/34207\\_2018\\_3\\_1502\\_36189\\_Judgement\\_24-Jun-2022.pdf](https://main.sci.gov.in/supremecourt/2018/34207/34207_2018_3_1502_36189_Judgement_24-Jun-2022.pdf), para. 88.

<sup>311</sup> Interview with legal practitioner on 1 February 2023, on file with authors.

<sup>312</sup> See above on [International Standards](#).

Mineral-rich topography of the state of Chhattisgarh has led to large scale land acquisition and corporate mining at great cost to its indigenous population. The region has also been a site of conflict between the indigenous community and the Indian state. As a result, some regions in Chhattisgarh have witnessed large scale human rights violations, including extrajudicial killings and sexualized violence, by police and security forces deployed by the state and central Indian governments for over three decades.<sup>313</sup>

### Case Summary

In 2009, Himanshu Kumar, a social activist, filed a public interest litigation petition with the Supreme Court against the state of Chhattisgarh. The case concerned the massacre of 16 *adivasis* (indigenous people or “tribals”) in three villages.<sup>314</sup> The petitioner alleged that state paramilitary and police forces, along with a state-sponsored vigilante group, the Salwa Judum, were responsible for the killings. He asked the Supreme Court to direct India’s Central Bureau of Investigation (CBI) to probe the case, and to award compensation to the victim’s relatives.<sup>315</sup>

Thirteen years later, in July 2022, the Supreme Court dismissed the petition. Before the Court decided the case, the defendant in 2022 filed an interlocutory application requesting the court to hold the petitioner guilty of “levelling false charges” against the security forces and giving “false and fabricated evidence” and “to direct the CBI to investigate” the individuals/organizations, who have been conspiring, abetting, and facilitating filing of petitions premised on false and fabricated evidence.”<sup>316</sup>

In response the Supreme Court imposed “exemplary costs” of 500,000 INR (app. 6000 USD) on the petitioner and noted the following in the judgment:

*“We leave it to the State of Chhattisgarh/CBI (Central Bureau of Investigation) to take appropriate steps in accordance with law as discussed above in reference to the assertions made in the interim application. We clarify that it shall not be limited only to the offence under Section 211 of the Indian Penal Code [bringing false charge of offence made with intent to injure]. A case of criminal conspiracy or any other offence under the Indian Penal Code may also surface.”*<sup>317</sup>

### Analysis

Like the Zakia Jafri case, the Supreme Court again expressed a subjective animosity against one of the parties by imposing extraordinary costs and calling for investigations which tainted the notion of judicial impartiality.

The use of the phrase “exemplary costs” is key here. Such costs are imposed by the Supreme Court to discourage “frivolous, vexatious and speculative” litigation.<sup>318</sup> The aim is to set an example that disincentivises such complaints. However, in this case, the court imposed exemplary costs for merely invoking the jurisdiction of the court to enforce their fundamental rights which is a guaranteed right under Article 32 of the Indian Constitution. There is nothing to suggest that this case was frivolous, vexatious or a speculative one. The petition sought remedy for serious violations of right to life of 16 individuals where the

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<sup>313</sup> European Center for Constitutional and Human Rights, *In the Name of Development – Indigenous Rights Violations and Shrinking Space in Chhattisgarh*, 14 October 2022, [https://www.ecchr.eu/fileadmin/user\\_upload/ECCHR\\_CHHAT\\_WEB\\_DS.pdf](https://www.ecchr.eu/fileadmin/user_upload/ECCHR_CHHAT_WEB_DS.pdf).

<sup>314</sup> Newslaundry, *Gompad massacre: A Chhattisgarh village waits for justice 13 years on*, 13 August 2022, <https://www.newslaundry.com/2022/08/13/gompad-massacre-a-chhattisgarh-village-waits-for-justice-13-years-on>.

<sup>315</sup> Gautam Bhatia, *Punished for Seeking Justice*, in Voelkerrechtsblog, 26 October 2022, <https://voelkerrechtsblog.org/punished-for-seeking-justice/>.

<sup>316</sup> Supreme Court of India, *Himanshu Kumar and others v State of Chattisgarh and others*, Writ Petition (Criminal) No. 103 of 2009, Judgment, 14 July 2022, <https://indiankanoon.org/doc/66796998/>.

<sup>317</sup> *Ibid.*, para. 95.

<sup>318</sup> *The Code of Criminal Procedure*, 1973, Section 35A, <https://www.indiacode.nic.in/bitstream/123456789/16225/1/A1974-02.pdf>; see Supreme Court of India, *Vinod Seth v. Devendra Bajaj*, Civil Appeal No. 4891 of 2010, Judgment, 5 July 2010, <https://indiankanoon.org/doc/1466398/>.

killings by the vigilante group were duly documented and not in dispute. Also, there is nothing to suggest that petitioner, who has a proven track record of human rights activism, stood to gain anything personally from a favourable judgment in this case.<sup>319</sup>

Moreover, to further penalise the petitioner, the Supreme Court also laid the groundwork for state prosecution against him without any evidence brought to the effect that would warrant the court to suggest that an offence of “criminal conspiracy may surface”. Also, it must be noted that the direction could have been just left at the discretion of the state of Chhattisgarh, but the Supreme Court also included the CBI, a national investigative agency, that is operated by Home Ministry India, a branch of the executive.

The combination of exemplary costs and formal encouragement to the executive/CBI is clearly setting an example and precedent that such petitions challenging state impunity will not only get dismissed but might also attract punishment and prosecution.<sup>320</sup> Such discouragement express signs of bias and could deter claims challenging the state and seeking enforcement of human rights.

### **Criminal investigation against Lawyers Collective (2019)**

The Foreign Contribution (Regulation) Act 2010 (FCRA) is an Indian legislation that restricts the acceptance and utilisation of foreign contribution by certain individuals or associations for any activities detrimental to the national interest.<sup>321</sup> The implications of this law (and its new restrictive amendment) NGOs have been well documented and criticised.<sup>322</sup>

On 31 May 2016, the Ministry of Home Affairs (MHA) suspended the FCRA registration of an NGO called Lawyers Collective.<sup>323</sup> The NGO, founded in 1981 by senior lawyers of the Supreme Court, Indira Jaisingh, and Anand Grover, has worked on many instrumental cases involving decriminalisation of homosexuality, access to medicine, women’s rights, etc. Indira Jaising is a former member of the UN Committee on the Elimination of Discrimination Against Women (CEDAW) and Anand Grover is a former UN Special Rapporteur on the Right to Health. In recent years, the organisation and its co-founders have been involved in bringing cases involving violations of religious minorities. For instance, Indira Jaisingh is representing the victims of hate crimes, including lynchings, against Muslims before the Supreme Court as well as the petition seeking enforcement of Muslims’ right to pray in public.<sup>324</sup>

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<sup>319</sup> The Wire, *Interview: When a Quest for Justice Was Treated Like a Crime*, 21 July 2022, <https://thewire.in/law/himanshu-kumar-chhattisgarh-supreme-court-adivasis-interview>; Ground Report, *Who is Activist Himanshu Kumar, fined for implicating security forces in Dantewada tribal killings?*, 15 July 2022 <https://groundreport.in/activist-himanshu-kumar-raised-matter-of-tribal-killings-is-dantewada/>.

<sup>320</sup> Gautam Bhatia, *Punished for Seeking Justice*, in Voelkerrechtsblog, 26 October 2022, <https://voelkerrechtsblog.org/punished-for-seeking-justice/>.

<sup>321</sup> *The Foreign Contribution (Regulation) Act, 2010*, <https://legislative.gov.in/sites/default/files/A2010-42.pdf>.

<sup>322</sup> Amnesty International, *Weaponizing Counterterrorism – India’s Exploitation of Terrorism Financing Assessments to Target Civil Society*, September 2023, p. 10-19, <https://www.amnesty.org/en/documents/asa20/7222/2023/en/>.

<sup>323</sup> OMCT, *Criminal case filed against Lawyers Collective and its representatives including Mr. Anand Grover*, 21 June 2019, <https://www.omct.org/en/resources/urgent-interventions/criminal-case-filed-against-lawyers-collective-and-its-representatives-including-mr-anand-grover>; LiveLaw, *Lawyers Collective Case: SC Refuses To Stay Interim Protection Granted To Jaising And Grover By Bombay HC*, 14 November 2019, <https://www.livelaw.in/top-stories/lawyers-collective-case-sc-refuses-to-stay-interim-protection-granted-to-jaising-and-grover-149754>.

<sup>324</sup> LiveLaw, *Lynching Of Muslims In India Has Become A “Badge Of Honour” For Perpetrators: Senior Advocate Indira Jaising to SC [Read Written Submissions]*, 11 July 2018, <https://www.livelaw.in/lynching-of-muslims-in-india-has-become-a-badge-of-honour-for-perpetrators-senior-advocate-indira-jaising-to-sc-read-written-submissions/>; The Leaflet, *Supreme Court seeks to know the status of cases challenging ‘love jihad’ laws in various high courts*, 2 January 2023, <https://theleaflet.in/supreme-court-seeks-to-know-the-status-of-cases-challenging-love-jihad-laws-in-various-high-courts/>; Indian Express, *Supreme Court to hear petition for contempt action against Haryana officials amid Gurugram ‘namaz’ row*, 1 February 2022,

The suspension of the FCRA registration was based on allegations that the Lawyers Collective, in particular Anand Grover and Indira Jaising, had violated FCRA regulations. The Lawyers Collective challenged the cancellation of their registration in 2017 in the High Court of Bombay, and this challenge is still pending before the high court.

In January 2017, the Bombay High Court passed an interim order unfreezing the domestic and non-FCRA bank accounts of Lawyers Collective. The Court ruled that while the Government of India had powers under the FCRA to “regulate or even prevent the acceptance of foreign funds by an association, the Act did not provide for a government to stifle the very functioning of individuals or associations”.<sup>325</sup>

### Case Summary

On 6 May 2019, an organization called Lawyers Voice petitioned the Supreme Court with a public interest litigation requesting the Court to direct the Government of India to initiate criminal proceedings against the Lawyers Collective, Anand Grover, and Indira Jaising, for the alleged misuse of foreign funding under the FCRA.<sup>326</sup>

Two days later, on 8 May 2019, a Supreme Court bench headed by Chief Justice of India Ranjan Gogoi issued an interim notice ordering the Indian Government to initiate criminal proceedings against the Lawyers Collective as the organization and Ms. Jaising and Mr. Grover individually. It must be noted that the petition did not provide any supporting information that would warrant the initiation of a criminal investigation and the cancellation of Lawyers Collective’s FCRA license was still being challenged by Lawyers Collective before the High Court of Bombay.<sup>327</sup>

### Analysis

Applying the objective test in this case (see [above](#)), there are several factors that suggest an appearance of animosity by one judge sitting on the Supreme Court bench against one of the parties, particularly Indira Jaising. On 6 May 2019, Ms. Jaising had criticised the procedure of the in-house enquiry at the Supreme Court dealing with allegations of sexual harassment against Chief Justice Ranjan Gogoi because he sat as a judge in his own case.<sup>328</sup> In 2019, a junior court assistant who worked at the Supreme Court, had alleged that she had been sexually harassed by Justice Ranjan Gogoi on two separate occasions. She submitted an affidavit stating her account to 22 of the Supreme Court judges and sought an inquiry against Justice Gogoi. In response, the Supreme Court took a *suo motu* cognizance of the matter and Justice Gogoi headed the bench that took strong exception to the reports where he also denied the allegations levelled by the woman. Finally, an in-house committee of inquiry was constituted which found that there was no substance to the allegations.<sup>329</sup>

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<https://indianexpress.com/article/cities/delhi/gurugram-namaz-row-sc-agrees-to-hear-plea-for-contempt-action-against-haryana-officials-7749593/>.

<sup>325</sup> OMCT, *Criminal case filed against Lawyers Collective and its representatives including Mr. Anand Grover*, 21 June 2019, <https://www.omct.org/en/resources/urgent-interventions/criminal-case-filed-against-lawyers-collective-and-its-representatives-including-mr-anand-grover>.

<sup>326</sup> The Wire, *Indira Jaising, Anand Grover Allege Victimisation for Speaking out Against CJI*, 8 May 2019, <https://thewire.in/law/indira-jaising-lawyers-collective-cji-sexual-harassment>.

<sup>327</sup> OMCT, *Criminal case filed against Lawyers Collective and its representatives including Mr. Anand Grover*, 21 June 2019, <https://www.omct.org/en/resources/urgent-interventions/criminal-case-filed-against-lawyers-collective-and-its-representatives-including-mr-anand-grover>.

<sup>328</sup> Indian Express, *Not in my name, SC citing 2003 order that was bad in law to bury report: Indira Jaising on CJI sexual harassment case*, 7 May 2019, <https://indianexpress.com/article/india/ranjan-gogoi-sexual-harassment-indira-jaising-supreme-court-2003-order-bad-in-law-5713943/>.

<sup>329</sup> India Today, *Explained: Case of sexual harassment charge against Justice Ranjan Gogoi*, 18 February 2021, <https://www.indiatoday.in/india/story/explained-case-of-sexual-harassment-charge-against-justice-ranjan-gogoi-1770530-2021-02-18>.

In the current case regarding the Lawyers Collective, Chief Justice Ranjan Gogoi was presiding over the decision of the Supreme Court to order criminal proceedings against Ms. Jaising which was issued two days after she expressed her critique. To a reasonable observer the short interval between the two actions and the relation to the same two key actors, Ms. Jaising and Chief Justice Ranjan, would appear as if the Supreme Court's interim notice was intended to penalise Ms. Jaising, her organisation, and her associates, for expressing her opinion, and thereby exercising her freedom of speech. Ms. Jaising<sup>330</sup> and other human rights activists<sup>331</sup> also shared this perception and argued that the initiation of criminal investigation by the Supreme Court was an act of reprisal against her for speaking up.

Moreover, the case filed by the Lawyers Voice was taken up immediately within 2 days which is in contravention of the court's internal circular and notification on chronological listing.<sup>332</sup> There seemed to have been no reason to warrant such an expedited decision since the case before the Bombay High Court which deals with the same question of foreign funding under the FCRA was still pending. Thus, the overriding of internal procedures could be perceived as a way to urgently deal with Ms. Jaising following her criticism in order to silence her from making future remarks.

Finally, it is noteworthy that the Supreme Court in issuing the interim order went beyond the relief sought by the petitioners since the petitioner's advocate did not orally seek any interim orders.<sup>333</sup> This contributes to the appearance that this case was used as a conduit to target Ms. Jaising for her criticism.

### **State of Maharashtra v Mahesh Kariman Tirki & Ors. (2022) [G.N. Saibaba Bail Case]**

Prof. G.N. Saibaba, was the Deputy Secretary of the Revolutionary Democratic Front, a federation of mass organisations in India, including organisations of workers, peasants, youth, students, women, and revolutionary cultural groups. In this position, Saibaba regularly spoke out about human rights abuses against indigenous *Adivasi* people in mineral-rich Chhattisgarh.<sup>334</sup>

In 2017, Saibaba, who is 90% disabled,<sup>335</sup> and five others had been convicted by a trial court for allegedly having links to the banned Communist Party of India (CPI Maoists) and a frontal organisation, the Revolutionary Democratic Front.<sup>336</sup> Further, the judgment of the Sessions Court at Gadchiroli in *State of Maharashtra v G.N. Saibaba*,<sup>337</sup> an enquiry under section 20 of the Unlawful Activities Prevention Act, 1967 (UAPA), held the accused guilty of being a member of the CPI Maoist and one of its frontal organisations. UAPA is India's principal anti-terror law. Laws such as the UAPA have been criticised by legal experts for

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<sup>330</sup> Scroll.in, *Lawyer Indira Jaising alleges she is being penalised for speaking up in CJI sexual harassment case*, 8 May 2019, <https://scroll.in/latest/922776/lawyer-indira-jaising-alleges-she-is-being-penalised-for-speaking-up-in-cji-sexual-harassment-case>.

<sup>331</sup> The Leaflet, *365 rights activists stand in solidarity with Indira Jaising and Anand Grover*, 10 May 2019, <https://theleaflet.in/365-rights-activists-stand-in-solidarity-with-indira-jaising-and-anand-grover/>; The Wire, *Activists, Civil Society Members Protest "Targeting" of Lawyers Indira Jaising, Anand Grover*, 10 May 2019, <https://thewire.in/rights/fcra-sc-indira-jaising-anand-grover-cji-gogoi>.

<sup>332</sup> Tweet by Indira Jaising (@IJaising), 8 May 2019, <https://twitter.com/IJaising/status/1126061424990535680/photo/1>.

<sup>333</sup> Scroll.in, *Lawyer Indira Jaising alleges she is being penalised for speaking up in CJI sexual harassment case*, 8 May 2019, <https://scroll.in/latest/922776/lawyer-indira-jaising-alleges-she-is-being-penalised-for-speaking-up-in-cji-sexual-harassment-case>.

<sup>334</sup> Tom Lantos Human Rights Commission – United States Congress, *Gokarakonda Naga Saibaba* (case profile), <https://humanrightscommission.house.gov/gokarakonda-naga-saibaba>.

<sup>335</sup> United States Commission on International Religious Freedom, *Gokarakonda Naga Saibaba* (case profile), <https://www.uscirf.gov/religious-prisoners-conscience/forb-victims-database/gokarakonda-naga-saibaba>.

<sup>336</sup> Scroll.in, *Why is GN Saibaba being denied adequate medical care and a life of dignity in prison?*, 2 June 2018, <https://scroll.in/article/880290/why-is-gn-saibaba-being-denied-adequate-medical-care-and-a-life-of-dignity-in-prison>.

<sup>337</sup> Court of Session Judge at Gadchiroli District, *State of Maharashtra v Mahesh Kariman Tirki, Pandu Pora Narote, Hem Keshavdatta Mishra, Prashant Rahi Narayan Sanglikar, Vijay Nan Tirki, Gokalkonda Naga Saibaba*, S.C.No.13/2014 & 130/201, Judgment, 7 May 2017, [https://drive.google.com/file/d/0BzXilfcxe7yuVDB1Sm9mM25LNms/view?resourcekey=0-0Y1ARkRIEP\\_a6X7VUIXdnA](https://drive.google.com/file/d/0BzXilfcxe7yuVDB1Sm9mM25LNms/view?resourcekey=0-0Y1ARkRIEP_a6X7VUIXdnA).

being unduly harsh and being used by governments to target critics.<sup>338</sup> Five of them were sentenced to life imprisonment, while one was sentenced to ten years imprisonment.

On 14 October 2020, the High Court of Bombay handed down a judgment acquitting G.N. Saibaba and five others of all charges under UAPA.<sup>339</sup> The basis of the High Court's judgment was that a vital procedural safeguard under the UAPA, the requirement of a sanction to prosecute, following an independent review of the evidence by the appropriate authority, had not been adhered to. Consequently, everything that came after, including the trial, was null and void. As a result, G.N. Saibaba and five others – who had spent more than five years in jail at the time of writing – were released.<sup>340</sup>

### Case Summary

On 14 October 2020, the same evening of the acquittal, the state appealed the High Court judgment before the Supreme Court. The case was listed by the Supreme Court for a hearing on the next day, i.e. on a Saturday morning (a non-working day for the Supreme Court). After the hearing, the Supreme Court “suspended” the Bombay High Court's order, on the basis that the offences were serious, and that the High Court had not considered the “merits” of the case (instead proceeding on the technicality of sanction). As a result, despite having a hundred-page reasoned order of a constitutional court sanctioning their liberty, the six individuals, including Prof. Saibaba, were condemned to stay in jail.<sup>341</sup> They continue to be in detention at the time of writing this report.

### Analysis

The manner the case was handled by the Supreme Court could create, to a reasonable observer, a perception of bias against the defendants who are human rights activists.

This decision of the Supreme Court has been termed as “deeply troubling”<sup>342</sup> for several reasons. It is extremely unusual for the Supreme Court to hold hearings on a non-working day and if they are held, it is to protect human rights rather than to re-detain defendants after an acquittal. This setting up of an urgent court to keep someone in jail was unprecedented for the Indian Supreme Court.<sup>343</sup> On this judgment, a former Supreme Court judge remarked: “Those who should not be in custody are denied release and some even die in jail. Those who should remain in custody are released on the flimsiest of reasons and sometimes without any reason.”<sup>344</sup>

It was also exceptional that the Supreme Court suspended a discharge order on the first hearing. The normal course of action in such a case would be to order a fresh investigation and trial.<sup>345</sup> A discharge, however,

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<sup>338</sup> Letter by Special Rapporteurs to the Indian Government, OL IND 7/2020, 6 May 2020,

<https://spcommreports.ohchr.org/TMRResultsBase/DownloadPublicCommunicationFile?gId=25219>.

<sup>339</sup> High Court of Judicature at Bombay, *Mahesh Kriman Tirki, Pandu Pora Narote, Hem Keshavdatta Mishra, Prashant Rahi Narayan Sanglikar, Vijay Nan Tirki, Gokalkonda Naga Saibaba v State of Mharasthra*, Criminal Appeal No. 136 of 2017 with Criminal Appeal No. 137 of 2017, Judgment, 29 September 2022, [https://www.livelaw.in/pdf\\_upload/23010000137201731-439359.pdf](https://www.livelaw.in/pdf_upload/23010000137201731-439359.pdf).

<sup>340</sup> *Ibid.*

<sup>341</sup> *Ibid.*

<sup>342</sup> Scroll.in, ‘Deeply troubling’: Why experts criticise SC order suspending Bombay’s HC acquittal of GN Saibaba, 17 October 2022, <https://scroll.in/article/1035163/deeply-troubling-why-experts-criticise-sc-order-suspending-bombay-hcs-acquittal-of-gn-saibaba>; The Wire, *Strange Case of G.N. Saibaba and the Supreme Court, Another New Abnormal*, 19 October 2022, <https://thewire.in/law/supreme-court-gn-saibaba-discharges-suspend-new-abnormal>.

<sup>343</sup> Interview with legal practitioner on 1 February 2023, on file with authors.

<sup>344</sup> The Wire, *Strange Case of G.N. Saibaba and the Supreme Court, Another New Abnormal*, 19 October 2022, <https://thewire.in/law/supreme-court-gn-saibaba-discharges-suspend-new-abnormal>.

<sup>345</sup> Singh and Gupta, *Interpreting Sanction for Prosecution under UAPA in the light of GN Saibaba verdict*, in The Criminal Law Blog, 7 December 2022, <https://criminallawstudiesnluj.wordpress.com/2022/12/07/interpreting-sanction-for-prosecution-under-uapa-in-the-light-of-gn-saibaba-verdict/>.

declares the trial including the evidence presented before the lower court, null and void. Consequently, the defendants who had been released would be re-detained immediately.

As described above, judicial impartiality is closely connected to the right to a fair trial. This intersection becomes apparent in this case. While the Solicitor General of India appeared on behalf of the government, only one of the accused persons, Prof. Saibaba, could be represented at the Supreme Court hearing.<sup>346</sup> The other five accused could not manage to secure legal representation before the Supreme Court in less than 24 hours.<sup>347</sup> The Supreme Court proceeded nevertheless which not only can be perceived as favouring one party, the government, over the defendants, but also has serious implications on the right to legal representation and the equality of arms in criminal proceedings.

## CONCLUSION

This report has found several indicators that demonstrate an appearance of partiality and lack of independence on the side of the Supreme Court in several cases which affect the rights of minorities and human rights defenders. Such a tendency is particularly visible in cases involving rights of minorities, giving rise to a perception of bias or “selective justice” to a reasonable onlooker. The structural issues pertaining to the Indian judiciary that point to a lack of institutional independence of the judicial branch create risks. These risks are seen particularly in the decision-making in specific cases that have significant implications for minorities as they enable an environment where the Supreme Court appears to be driven by the interest of the Government.

Overall, based on the analysis and cases presented above, it is fair to say the assumption that the Indian Supreme Court can be perceived to be a robust institution that delivers justice to its citizens free from influence of the state, stands to be challenged. This becomes particularly critical with respect to minorities that increasingly find themselves under threat from both non-state actors, as well as the state itself.

## RECOMMENDATIONS

The judiciary should make public:

- Reasons for appointment or refusal of appointment of judges; and reasons for transfers of judges.
- Whether any action is taken against judges who have made public statements outside the courtroom which undermine the perception of their and the judiciary’s impartiality and independence.
- Supreme Court and High Court procedure and protocol for prioritising, listing, and hearing cases, including assignment of cases to specific benches
- Supreme Court and High Court standards on timeframe for registering, listing, hearing and ‘disposing off’ cases.

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<sup>346</sup> Scroll.in, *‘Deeply troubling’: Why experts criticise SC order suspending Bombay’s HC acquittal of GN Saibaba*, 17 October 2022, <https://scroll.in/article/1035163/deeply-troubling-why-experts-criticise-sc-order-suspending-bombay-hcs-acquittal-of-gn-saibaba>.

<sup>347</sup> Ibid.

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