

What Checks and Balances? Explaining the Supreme Court's Complacency in Modi's India

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ABSTRACT

Across many democracies experiencing institutional decline, the judiciary has often been a primary target. While some courts have resisted authoritarian pressures, others have enabled them. Typically, a judiciary's ability to resist depends on its structural independence and the institutional safeguards surrounding it. The Supreme Court of India presents a puzzling case. Despite formal independence—particularly in judicial appointments—it has failed to uphold the rule of law during the Modi government's tenure. This paper examines the role of the Supreme Court in India's democratic backsliding from 2014 to 2025. Through a close study of the tenure of all Chief Justices during this period, we trace the erosion of judicial autonomy. We highlight patterns of executive influence, ideological convergence between the judiciary and the government, and inconsistent jurisprudence on fundamental rights. Special attention is given to the longest-serving Chief Justice, whose mixed doctrinal and public positions reveal deeper structural tensions within the Court. We also examine the crucial judicial opinions authored by judges appointed in this period, offering insight into how courts have aided consolidation of authoritarian politics. This analysis contributes to a broader understanding of how courts may become complicit in democratic decline, even when formal independence remains intact.

Keywords: Supreme Court of India; Chief Justice of India; Judiciary in India; Judicial Independence in India; Authoritarianism; Indian democracy and the Judiciary

¿Qué controles y equilibrios? Explicando la complacencia del Tribunal Supremo en la India de Modi

RESUMEN

En muchas democracias que experimentan un declive institucional, el poder judicial ha sido a menudo un blanco principal. Si bien algunos tribunales han resistido presiones autoritarias, otros las han facilitado. Normalmente, la capacidad de resistencia de un poder judicial depende de su independencia estructural y de las garantías institucionales que lo rodean. El Tribunal Supremo de la India presenta un caso desconcertante. A pesar de su independencia formal, en particular en los nombramientos judiciales, no ha logrado defender el Estado de derecho durante el mandato del gobierno de Modi. Este artículo examina el papel del Tribunal Supremo en el retroceso democrático de la India entre 2014 y 2024. A través de un estudio detallado de la gestión de todos los presidentes de Tribunales Supremos durante este período, rastreamos la erosión de la autonomía judicial. Destacamos patrones de influencia ejecutiva, convergencia ideológica entre el poder judicial y el gobierno, y jurisprudencia inconsistente sobre derechos fundamentales. Se presta especial atención al presidente de Tribunal Supremo con mayor antigüedad, cuyas posturas doctrinales y públicas mixtas revelan tensiones estructurales más profundas dentro del Tribunal. También examinamos las opiniones judiciales cruciales de los jueces nombrados durante este período, lo que ofrece una perspectiva sobre cómo los tribunales han contribuido a la consolidación de las políticas autoritarias. Este análisis contribuye a una comprensión más amplia de cómo los tribunales pueden ser cómplices del declive democrático, incluso cuando la independencia formal se mantiene intacta.

Palabras clave: Tribunal Supremo de la India; Presidente del Tribunal Supremo de la India; Poder Judicial en la India; Independencia Judicial en la India; Autoritarismo; Democracia india y Poder Judicial

什么制衡？解析莫迪治下自满的印度最高法院

摘要

在许多经历制度衰落的民主国家中，司法机构往往成为首要攻击目标。一些法院抵制了专制压力，而另一些法院则助长了这种压力。通常，司法机构的抵抗能力取决于其结构独立

性及其周围的制度保障。印度最高法院的情况令人费解。尽管在形式上独立——尤其是在司法任命方面——但在莫迪政府任期内，最高法院未能维护法治。本文分析了最高法院在2014年至2024年印度民主倒退中扮演的角色。通过仔细研究这一时期所有首席大法官的任期，我们追溯了司法自治的侵蚀。我们强调了行政影响的模式、司法机构与政府之间的意识形态趋同、以及关于基本权利的法理学不一致。特别聚焦于任职时间最长的首席大法官，其混合的理论立场和公共立场揭示了法院内部更深层次的结构紧张关系。我们还分析了这一时期任命的法官所撰写的重要司法意见，以深入了解法院如何助长威权政治的巩固。本篇分析有助于更广泛地理解法院如何在形式独立性依然完好的情况下也可能成为民主衰落的帮凶。

关键词：印度最高法院，印度首席大法官，印度司法机构，印度司法独立，威权主义，印度民主与司法机构

Introduction

In the context of the present global wave of de-democratization, due largely to the rise of populist leaders turning authoritarian,¹ scholars have observed that in several countries affected by this evolution, the judiciary has been the institution most systematically targeted. In some cases, they resisted rather effectively, but in others, they accompanied the autocratization process.² The capacity to resist is often a function of the degree of independence of the judiciary *vis-à-vis* the executive and the complex institutional framework in which the judiciary operates. The Supreme Court of India is, to some extent, an enigmatic exception to the rule that independent judiciaries have greater capacity to resist.³ In spite of being (on paper at least) independent of the government (which is not supposed to select its members), it has failed to defend the rule of law under Modi's rule.

Through an analysis of the tenure of all the Chief Justices of India (CJI) during 2014–2025, we attempt to explain this failure. We outline the creeping ascendance of executive power, attempts at court packing, ideological affinities between judiciary and the government, and the ambivalent jurisprudence on fundamental rights to present a decadal review of institutional independence. We lay a special emphasis on the CJI with the longest tenure, and present the ambivalence between his doctrinal and discursive interventions.

More than twenty years ago, in 1980, senior lawyer and scholar Rajeev Dhavan wrote that the Supreme Court of India was “the most powerful court in the world.”⁴ For decades, the Supreme Court of India has been admired across the globe because of its ability to resist and even oppose the executive power, as evident from its “judicial activism” in the 1990s.⁵ The remarkable trajectory

of the apex body of the Indian judiciary was largely due to its independence which resulted not only from specific provisions of the 1950 Constitution, but also from the judicially-created collegium system⁶—according to which, to say it simply, judges select judges.⁷

According to Art. 124 (2) and Art. 217 (1) of the Indian Constitution, judges in the Supreme Court were to be appointed by the President of the Republic after consultation with the existing members of the Supreme Court as well as the High Court judges. This principle was intended as a safeguard against political pressure, along with the rule that judges could not be dismissed, in case of misdemeanor or incapacity, except by the Parliament. Even the Parliament had to follow a very cumbersome impeachment procedure requiring the vote of no less than two-thirds of members present and voting in the lower and upper houses. Pratap Bhanu Mehta⁸ convincingly argues, “[T]hese procedures were aimed at making judicial appointments on the basis of a consensus between the executive and the judiciary.” In the course of time, however, two cases changed the modus operandi to “give the judiciary almost complete control over judicial appointments.” The 1993 *Second Judges case*⁹ “reinstated the chief justice’s veto power over appointments; and the [1998] *Third Judges case* clarified that the chief justice should act as part of a collegium that consists of the four seniormost judges of the Supreme Court.” Mehta concludes that this evolution “has given the judiciary more power than was contemplated by the [Con-

stituent] Assembly.”¹⁰ This conclusion does not mean that the executive has not tried to interfere with the appointment of judges. However, most of the time, it applied the seniority principle, except “in a handful of instances.” This trajectory shows that “the degree of independence, especially in democratic societies, that a judiciary has, is itself a creation of judicial power.”¹¹ This is precisely what is at stake today.

Until recently, the Supreme Court’s career had only been really tainted by one episode: the Emergency.¹² The “*habeas corpus* case” remains a historical stigma. In this case, which kept a five-judge bench busy for 37 working days between December 1975 and February 1976, the Supreme Court had to decide whether personal liberties needed to be upheld in the face of the executive in the context of the Emergency. All the judges wrote separate judgements, but the result was that the court upheld the executive’s power to detain people, thereby denying citizens the right to move a *habeas corpus* petition in a High Court under Article 226 during Emergency rule. Chief Justice A.N. Ray (1973–1977) went as far as to declare that “the rule of law must differ in shades of meaning and emphasis from time to time and country to country.”¹³ The only dissenting judge, Justice H.R. Khanna argued that “even in the absence of Article 21 [which guaranteed the right to life and personal liberty] in the Constitution, the state has no power to deprive a person of his life or liberty without the authority of law.”¹⁴ Justice Y.V. Chandrachud, father of former CJI D.Y. Chandrachud, became

the longest serving CJI. Two months after the Janata Party controversially swore him in as Chief Justice—large sections of the judiciary protested his appointment because of his *habeas corpus* ruling. In a speech to FICCI on 22 April 1978, he said: “I regret that I did not have the courage to lay down my office [*sic*] and tell the people: well, this is the law.”¹⁵

Why did the Supreme Court of India—except Justice Khanna—betray their office during the Emergency? One explanatory factor is fear. In 1975–76, Mrs Gandhi’s government transferred the dissenting judges and appointed only judges who were sympathetic to the new regime.¹⁶ Does the same explanation apply today, while the Supreme Court is back to the complacency of the dark hours of the Emergency? Certainly, this change largely results from the attacks that the Modi government initiated as early as 2014 in a typically populist way against the Supreme Court. However, the attitude of some of the judges also reflect years of entryism by the Hindu nationalist movement, the individual frailties of certain justices and even ideological affinities with the Hindu nationalist forces.

From Resistance to Obedience

National-populist authoritarian politicians do not resign themselves easily to the independence of the judiciary, as evident from the strategy of Kaczynski in Poland, Orban in Hungary, Netanyahu in Israel, and others: after all, they claim that they embody the people’s will and that such

legitimacy prevails over any institution. Narendra Modi is no exception.

Three years of arms wrestling: A war of nerves that the Executive won

Appointments of judges to the Supreme Court became a bone of contention as early as June 2014—a few weeks after Modi’s elevation to the office of Prime Minister. While the Collegium had selected four judges for filling four vacancies in the Supreme Court, the Modi government appointed all of them except Gopal Subramaniam. The government’s opposition to Subramaniam was probably due to his role in several cases dated back to the Gujarat years of Modi and his entourage—including the fact that it was “on Subramaniam’s suggestion” that the Supreme Court “barred [Amit] Shah [Modi’s right hand man] from entering Gujarat in 2010”¹⁷ till the completion of some investigation regarding extra-constitutional killings known as “fake encounters” in India. The many troubles with the law that Narendra Modi and Amit Shah had had in Gujarat because of the 2002 pogrom and the “fake encounters” which had taken place subsequently was one of the reasons why they wanted to limit the independence of the judiciary.¹⁸

However, they were not the only ones who wanted to clip the wings of the Supreme Court: other politicians argued that the Collegium system was opaque, suspected of generating corruption and lacked accountability.¹⁹ In fact, the Indian National Congress (INC)-led United Progressive Alliance (UPA) government had already prepared a bill for reforming this system.

The Modi government introduced as early as July its own constitutional amendment project in order to create a National Judicial Appointments Commission (NJAC). This Commission—responsible for appointing and transferring the judicial officers, including the judges to the Supreme Court—would consist of the Chief Justice of India, two senior judges, the Minister of Law and Justice and two “eminent personalities.” A committee comprising the CJI, the Prime Minister and the Leader of the Opposition in the Lok Sabha would select these two personalities. This constitutional reform was passed with the support of Congress in Parliament, but the Supreme Court quashed it in October 2015 because it would affect the independence of the judiciary.²⁰ The key issue in the litigation pertained to the fact that if the two “eminent persons” went with the government’s views, the commission would be deadlocked.

The Modi government reacted to this verdict like any populist by criticizing, in the name of the sovereignty of the people who had brought the Bharatiya Janata Party (BJP)-led National Democratic Alliance (NDA) to power, what Arun Jaitley, the law minister and a lawyer himself, called “the tyranny of the unelected”²¹ after the NJAC. In retaliation, the government refused to appoint judges. In 2015, the government for at least eight months appointed no new judge,²² whereas in January 2015, 35 percent of the High Court judges’ posts were vacant,²³ almost 42 percent²⁴ in December of the same year and 45 percent in July 2016.²⁵ Addressing the annual Conference of Chief Justices

and Chief Ministers in the presence of Prime Minister Narendra Modi, Chief Justice T.S. Thakur broke down, saying that the Indian judiciary was too understaffed to fulfill its obligation.²⁶ In August 2016, while hearing a Public Interest Litigation petition on the shortage of judges, he told Attorney General Mukul Rohatgi:

Don’t try to bring this institution to a grinding halt. We won’t tolerate a logjam in judges’ appointments. It is stifling judicial work. We will fasten accountability now. Why is there mistrust?²⁷

In October, the Chief Justice asked a different question:

You cannot scuttle the working of the institution like this. Are you waiting for some revolutionary changes in the system?²⁸

That was indeed what Narendra Modi was keen to achieve by other ways than the defunct NJAC. In November 2016, the government returned 43 out of 77 names recommended by the Collegium for the appointment of judges in high courts. The Supreme Court Collegium immediately reiterated these 43 names—in vain.²⁹

Four lawyers, Harnaresh Singh Gill, Basharat Ali Khan, Mohammad Mansoor and Mohammad Nizamuddin, who had been selected by the Supreme Court Collegium to become High Court judges in 2016, waited two years for the government’s decision.³⁰ Finally, in June 2018, the Centre rejected the names of Khan and Mansoor in

spite of the fact that the Collegium had already reiterated them.³¹ Such an arbitrary attitude was unprecedented, as the recommendation of the Collegium is binding on the government if it has been reiterated.³²

In some other cases, a pattern of causality was obvious. Justices Jayant Patel, K.M. Joseph and Kureshi are cases in point. They have all been sidelined and/or transferred for their past deeds. Justice Patel, as the Acting Chief Justice of the Gujarat High Court, had ordered the Central Bureau of Investigation (CBI) to investigate the murder of Ishrat Jahan in 2004, one of the fake encounters cases in which Amit Shah had been an accused. He “should have become Gujarat Chief Justice,” as senior-most lawyer Rajeev Dhavan pointed out,³³ but was transferred to Karnataka in 2016 and, again, in 2017, to the Allahabad High Court—snatching away the opportunity for him to become Chief Justice of the Karnataka High Court when the senior-most judge retired a few weeks later. Instead of accepting this transfer, he preferred to resign. The Karnataka State Bar Association and the Gujarat lawyers abstained from work for one day in protest.³⁴ However, the Supreme Court did not intervene, even though the Chief Justice of India had not been consulted, as he should have been according to Art. 222 of the Constitution. Dhavan concluded, “If the collegiums cannot stand up to the government, the rule of law is at peril.”³⁵

Justice K.M. Joseph earned the ire of the Union Government with his

order restoring the opposition-led state government in Uttarakhand while annulling the effect of defections and the illegal orders passed by the BJP-appointed Governor.³⁶ When the Collegium recommended his name for elevation to the Supreme Court, the government sent back the recommendation.³⁷ Another candidate who was recommended by the same collegium resolution was appointed promptly. Even though the members of the legal fraternity challenged the return of his recommendation as arbitrary, the Supreme Court refused to judicially intervene.³⁸

Justice Kureshi, as a member of the Gujarat High Court, had remitted Amit Shah to police custody in 2010 for two days in the Sohrabuddin fake encounter case. The Collegium recommended him for the post of Chief Justice of the Gujarat High Court, but the Centre preferred to transfer him to the Bombay High Court. The Collegium then recommended him for the post of Chief Justice of Madhya Pradesh. The Law Minister objected that he was “unfit” to be appointed Chief Justice of any high court because of his past “communal” records.³⁹ When the Ministry said that it would have no objection if Justice Kureshi were appointed to a smaller court, the Collegium, instead of reiterating its recommendation, modified it and suggested that he be appointed Chief Justice of the Tripura High Court.

If the NJAC has been a stillborn initiative, the Collegium has, de facto, lost some of its erstwhile power in terms of judges’ appointments and transfers. One of the most prescient commenta-

tors has called it the dilution of the collegium status to that of a “Search and Selection Committee.” Successive Chief Justices of India have failed to restrain the union government’s actions to violate the existing Memorandum of Procedure. The “uncomfortable” nominees have suffered “whisper campaigns” and those aligned to the politics of the union executive have secured speedy appointment.⁴⁰ Centre for Public Interest Litigation sought the Supreme Court’s judicial intervention against these unilateral and illegal vetoes by the government.⁴¹ A reading of the Supreme Court’s orders dated 22.11.2018, 22.02.2019, 20.04.2021, 11.11.2022, and 20.11.2023 in these cases demonstrate a willingness to seek accountability for not notifying Collegium recommendation but shows that the Supreme Court did not go far enough. Take for instance its April 2021 Order pointing out the “*crisis situation*” in the High Court, with many of the larger High Courts working under 50 percent of their sanctioned strength.⁴² The ruling limited the scope of government’s reservation regarding recommended candidates to their suitability or “public interest.” Further, it underlined that once reiterated, the appointment should be made within three to four weeks. Yet without going to the extent of issuing “directions,” the above stipulations were termed advisable. The court laid stress on the collaborative nature of the appointment exercise and “expected” promptness in the same. Its conclusion in November 2022 went slightly further to hold that the method of keeping duly recommended and reiterated

names pending was a device to compel such candidates from withdrawing their candidature.⁴³

Approve or abstain – never object!

When Chief Justice T.S. Thakur retired in January 2017, senior advocate Dushyant Dave hailed his “unwillingness to compromise.”⁴⁴ His successor, Chief Justice Khehar, did not resist the executive so adamantly, nor did the following Chief Justices, Dipak Mishra and Rajan Gogoi: the Modi government was now exerting dominant influence in judges’ appointments, and systematically sidelining those who were not of their liking.

The Supreme Court of India started to show a complacent attitude *vis-à-vis* the Modi government in 2017 after Chief Justice Khehar took over from T.S. Thakur. On January 13, 2017, the Court “refused to examine a petition alleging dilution in the Whistleblower Protection Act and seeking interim measures to protect whistleblowers who expose corruption in public administration and governance.” The bench headed by the Chief Justice Khehar explained that the law was discussed in parliament and that the petitioner should approach the Court after it was passed if he was still not satisfied. *The Hindu* emphasized, “[T]he tone of the court hearing was in complete contrast to the earlier hearing in January 2016, when the apex court had pressed the Centre to put in place a fool-proof interim mechanism to receive complaints and protect the lives of whistleblowers till the law was enacted.”⁴⁵

A similar scenario unfolded when the Finance Bill was introduced in March:

The bill made changes to 40 existing laws. It also made changes to a number of the country's tribunals—quasi-judicial bodies, such as the National Green Tribunal, that adjudicate cases requiring technical expertise and specialization. Jaitley axed eight tribunals, whose functions were absorbed by other tribunals, and empowered the government to set the rules regarding the appointment and removal of the judges and members of these tribunals.⁴⁶

All the amendments proposed by government were passed as a Money Bill,⁴⁷ in spite of the fact that they fell well outside the limits set by the Constitution for money bills which are not supposed to imply changes in public laws but concern solely taxation and government spending. That is why it was not examined by the upper house of parliament, something the Modi government found very convenient because the BJP was in a minority in the Rajya Sabha. Congress leader Jairam Ramesh filed a petition, but the Supreme Court reserved its verdict. That was to become its standard attitude in matters likely to result in conflicts with the government.

The attitude of the Court vis-à-vis Aadhaar, a system of biometric identification of 1.3 billion Indians, combined approval of the government and abstention. While the Supreme Court

had told the government in several interim orders, since 2013, to wait for its verdict before making Aadhaar more systematic because it was probably not sufficiently respectful of privacy, in July 2017, it validated the Aadhaar Act that the government had had passed the year before as a money bill. If the court reaffirmed the Indians' right to privacy, it declared Aadhaar legal in spite of the various links the government had set up with many other files at the expense of privacy and agreed to consider the Aadhaar Act a Money Bill.⁴⁸

Chief Justice Khehar's successor, Dipak Misra, also decided against confronting the government. His attitude was so submissive that the four senior-most members of the Supreme Court—after the CJI—Justices Kurian Joseph, Jasti Chelameswar, Madan Lokur and Ranjan Gogoi, held a press conference to denounce his *modus operandi* on January 12, 2018. This press conference, an unprecedented move, was intended to alert the public opinion on things that were “not in order” in the Supreme Court. Retrospectively, Justice (Retd.) Kurian Joseph explained the press conference in the following terms:

There were several instances of external influences on the working of the Supreme Court relating to allocation of cases to benches headed by select judges and appointment of judges to the Supreme Court and high courts (...) Someone from outside was controlling the CJI, that is what we felt. So we met him, asked

him, wrote to him to maintain independence and majesty of the Supreme Court. When all attempts failed, we decided to hold a press conference (...) starkly perceptible signs of influence with regard to allocation of cases to different benches selectively, to select judges who were perceived to be politically biased.⁴⁹

This bias was obvious in the Justice Loya case. This case was related to another one, the Sohrabuddin case,⁵⁰ in which the prime accused was Amit Shah, who was suspected of some implication in the murder of Sohrabuddin in a fake encounter.⁵¹ Shah was supposed to appear before the judge of the CBI court in charge of the trial, Justice Utpat, on June 6, 2014—but he did not show up. The judge reprimanded him and fixed a new date for his appearance. The judge before whom Shah was supposed to appear was transferred a day before Shah's day in court. This judge had been posted for less than one year, whereas the average duration of such tenure is three years. Justice Loya, who died in Nagpur on December 1, 2014, replaced him. While the hospital where he died attributed his demise to a heart attack, journalists from *The Caravan* who investigated the case persistently, discovered that the post-mortem had not been performed in accordance with standard practice⁵² and learned from interviews with one of Justice Loya's sisters that he had "confided to her that Mohit Shah, then the chief justice of the Bombay High Court, had offered him a bribe of Rs 100 crore in return for a

favorable judgment."⁵³ Lawyers immediately considered that "suspicious death" of Judge Loya needed to be investigated.⁵⁴ In January 2018, the Bombay Lawyers Association filed a petition with the Bombay High Court asking for an independent inquiry to probe the circumstances of Justice Loya's death.⁵⁵ The Supreme Court examined the issue in April 2018 to dismiss the petitions. Unexpectedly, Gautam Bhatia points out, the Court acted as "the Supreme Magistrate, the Supreme Investigating Officer, and the Supreme Additional Sessions Judge, the Court of First and Last Instance":

It delivered a 114-page long judgment that went into great factual detail, drew almost-definitive conclusions about what had happened, effectively closed the case for all time, and did it all on the basis of its interpretation of the documents before it, untethered from the existing rules of evidence. The judgment, therefore, reads less like a verdict on a plea for an investigation, and more like a criminal appeal that results in an acquittal, but without the benefit of a trial court judgement...⁵⁶

The attitude of Chief Justice Misra had become so problematic that the Congress (along with six other parties), initiated a procedure to impeach him in April 2018, one day after the Supreme Court decided to dismiss the petitions seeking an inquiry into the death of Special Judge Loya. That was a first in the history of India. The impeachment

notice that was handed over by 71 Rajya Sabha MPs to the Chairman of the Assembly, Vice President Venkaiah Naidu, mentioned five grounds of behavior—including corruption cases, which will be discussed below.⁵⁷ Naidu rejected this motion and the MPs therefore turned to the Supreme Court. Kapil Sibal, the Congress MP who appeared before the Court, asked who had constituted the bench he was addressing. He got no response and therefore withdrew the impeachment notice,⁵⁸ as he anticipated some bias.

Misra's successor, Chief Justice Ranjan Gogoi, confirmed that the Supreme Court had surrendered, as evident from the fate of few cases, including the one concerning the Electoral Bonds. These bonds, that had been introduced in February 2017 by the Modi government, allowed anonymous donations to be made to political parties—a mechanism that was to greatly help the BJP. The Election Commission had immediately criticized the opacity of this mechanism and told the government.⁵⁹ Petitions challenged the Electoral Bonds, but the Supreme Court sat on this highly sensitive issue until March 2019, by which time most of the electoral bonds had been purchased—in favor of the BJP. The three-judge bench headed by Chief Justice Gogoi contented itself to direct political parties to submit the details of donations received to the ECI in sealed envelopes by May 30, that is, after the elections:⁶⁰ Like the Aadhaar Act, the Electoral Bonds had, anyway, become a *fait accompli* due to lack of will on the part of the Supreme Court to control a highly controversial

policy of the Modi government. The use of sealed envelopes that added to the opacity had become a common practice of the Court.

Similarly, in July 2019, the Supreme Court judgement on the MLAs who had defected from Congress to BJP—enabling this party to form the government in Karnataka in spite of its recent electoral defeat—made a mockery of the Anti-Defection Law. According to this law that is enshrined in the 10th schedule of the Indian Constitution, MLAs who shift to another party face disqualification, unless two-thirds of their legislative party also breaks away.⁶¹

How Has the Supreme Court Been Neutralized?

The Supreme Court has been shaken by the offensives that the Modi government launched after 2014, from blitzkrieg to a long attrition war about judges' appointments. But did the Supreme Court surrender in 2017–18 simply because it could no longer resist or lacked courage like during the Emergency? Its growing complacency can be explained by other reasons.

Facets of corruption

In 2016, former Chief Minister of Arunachal Pradesh, Kalikho Pul, before committing suicide, had written in his diary that Supreme Court judges were asking him for money in exchange for a favorable verdict in a particular case: he had become chief minister thanks to the defection of Congress MLAs

that had caused the fall of the previous chief minister, Nabam Tuki—who had turned to the Supreme Court to be reinstated. Pul wrote:

I received phone calls asking for 86 crore to give a judgment in my favour. (...) The MLAs of Arunachal Pradesh can be bought. The Congress party is also up for sale. But I never thought that the judges of the Supreme Court can also be bought. They contacted my associates and I several times to discuss a judgment in my favour. (...) Virender Khehar, the younger son of Justice Khehar, contacted my associates and asked for 49 crore. And Aditya Misra, the brother of Justice Dipak Misra, asked me [for] 37 crore.⁶²

Pul did not pay; he committed suicide. On July 13, 2016, a five-judge bench headed by Justice Khehar restored Nabam Tuki's government. Pul's booklet was released six months after his death, but "the administration had it all the while. How much did Prime Minister Modi know of it when he signed the order appointing Justice Khehar as chief justice," asks Vijay Simha, suggesting that the government could now easily blackmail the new chief justice—and his successor too.

However, in the case of Dipak Misra, other cases have been mentioned as well, including the Prasad Education Trust case⁶³ and the accusation of acquisition of government land by fraudulent means.⁶⁴ The executive has exploited

this situation too. For Prashant Bhu-shan, "[t]he executive is blackmailing the chief justice [Misra] through a CBI investigation into the alleged bribing of judges by medical colleges."⁶⁵

Another facet of the corruption of the judiciary has to do with post-retirement jobs. Chief Justice Gogoi was nominated by the government to the Rajya Sabha, just four months after he retired. Dushyant Dave, the president of the Supreme Court Bar Association commented: "The semblance of independence of the judiciary is totally destroyed,"⁶⁶ suggesting that some of the decisions Gogoi made as chief justice were overdetermined by the possibility of a post-retirement post. Indeed, to ensure the judiciary's independence, such appointments were not supposed to take place so soon. That was the stand Arun Jaitley himself took in 2012 when he declared, "Pre-retirement judgements are influenced by a desire for a post-retirement job," and that a "cooling period" of two years should therefore be observed. He assumed that "clamour for post-retirement jobs is adversely affecting impartiality of the judiciary."⁶⁷

Entryism and infiltration

In 2020, retired Supreme Court Justice Kurian Joseph observed that the independence of the judiciary was "under threat" and added: "I have never seen the Supreme Court of India's Bar so politically and communally divided."⁶⁸ This state of things is partly due to the RSS strategy of entryism and infiltration of the lawyers' milieu.

The RSS has tried to infiltrate the

judiciary by recruiting students of the law school and by creating a lawyers' branch, the All India Adhivakta Parishad (AIAP) in 1992.⁶⁹ The career of A.K. Goel offers a good illustration of the role of the AIAP and the impact on the judiciary of the BJP's rise to power under A.B. Vajpayee in this entryism process. Atul Dev accounts for his trajectory in a remarkable piece of investigative journalism:

AK Goel [was appointed] as a judge of the Punjab and Haryana High Court, in 2001. A couple of years after the fact, it was reported that the Intelligence Bureau's background check on Goel had noted that he was the general secretary of the All India Adhivakta Parishad, the lawyers' wing of the RSS. Under a field titled 'Reputation/Integrity,' the report had noted, 'Corrupt person.' The law ministry, then headed by the BJP's Arun Jaitley, approved Goel's nomination anyway. The president, KR Narayanan, refused to sign Goel's warrant of appointment, and sent his file back to the ministry. Instead of then returning the file to the collegium, Jaitley defended Goel's nomination himself, and dismissed the IB's findings as a 'slur.' Goel's file was sent to the president again, this time with the signature of the Prime Minister, Atal Bihari Vajpayee, attached. Narayanan, now that Goel's file had come before him a second time, reluctantly signed the

warrant of appointment. 'I feel that a more desirable course of action would have been to follow the same procedure ... where the advice of the Chief Justice, which is integral to the selection process, was sought again and duly received,' Narayanan wrote to the ministry. 'I would also appreciate if my instant observations are shared with the Chief Justice of India along with my earlier observation.' Goel went on to serve as the chief justice of two high courts. Shortly after Modi became the prime minister, Goel was appointed to the Supreme Court. Last year, just before he retired, he headed a bench that diluted the provisions of the Scheduled Castes and Tribes (Prevention of Atrocities) Act, a long-standing irritant in Hindutva eyes. Goel was elevated to the Supreme Court alongside Arun Mishra.⁷⁰

Arun Mishra's profile is even more revealing of the way the judiciary has been infiltrated.⁷¹ He was appointed to the Supreme Court in spite of the fact that his name had been overlooked three times by the Collegium because of his background.⁷² His "proximity" with the Sangh Parivar⁷³ became clear in 2016 when he took part in the wedding receptions of his nephew along with Madhya Pradesh BJP Chief Minister Shivraj Singh Chouhan, Union Home Minister Rajnath Singh, Union Finance Minister Arun Jaitley and Rajasthan Chief Minister Vasundhara Raje.⁷⁴

Under Chief Justices Khehar, Misra and Gogoi, the three CJIs he worked with, Arun Mishra was the judge to whom the largest number of politically sensitive cases have been assigned, including the Haren Pandya case⁷⁵ and the case of the Sahara-Birla diaries where one of the entries suggested payment by the companies of Rs. 25 crore to Modi when he was Chief Minister etc.⁷⁶ And “the Centre always stood to gain in cases listed before him.”⁷⁷ In 2020, delivering the vote of thanks at the inaugural function of the International Judicial Conference, he “thank[ed] the versatile genius, who thinks globally and acts locally, Shri Narendra Modi, for his inspiring speech [...]”⁷⁸

The fact that Chief Justices Khehar, Misra and Gogoi selected Arun Mishra for politically sensitive cases justifies the way analysts associate so closely the Supreme Court to its successive Chiefs. It also explicates the enlarged role that the Supreme Court judgments have rendered to the office of the Chief Justice of India.⁷⁹ As Bhatia explains, Justices “hold very different views on a range of issues”—and the Chief Justice is aware of this diversity.” Now, “as Master of the Roster, [he] has absolute, opaque, and uncanalised power in assigning cases to specific benches”—made of Justices entertaining this or that view of the case he attributes them. As a result, “until the Master of the Roster system is reformed, there is one Supreme Court, and that is the Supreme Court of the Chief Justice of India.”⁸⁰

Ideological affinities

Affinities between judges and Hindu nationalism may not necessarily be due to connections with the Sangh Parivar and its members: judges may share aspects of the Hindutva worldview. Chief Justice Gogoi’s attitude is a case in point. Even before the BJP took over power, Justice Gogoi, as a Supreme Court judge, supported one of the party’s main objectives: to fight against illegal migrants coming from Bangladesh, in particular to Assam, his home state. In 2013, he asked the National Register of Citizens (NRC) to be updated in the state in order to identify illegal migrants and “directed Prateek Hajela, the state coordinator of the NRC in Assam, to file an undertaking on whether the update could be completed by December 2016.”⁸¹ For five years, until Ranjan Gogoi retired from the court, “Throughout the hearings, the court exerted incredible pressure on government officials, monitoring every detail of the operation.” The Court declared in 2014 that many more “foreigners’ tribunals” were necessary to ascertain the nationality of “doubtful citizens” and therefore half of the bureaucracy was mobilized in order to meet the deadline spelled out by Justice Gogoi, at the expense of other policies. Haleja had to show his progress by submitting reports—in sealed envelopes—to Justice Gogoi.⁸² In May 2019, a bench headed by the CJI ordered the creation of 200 more Foreigners Tribunals, a policy well in tune with the BJP’s plans. On the very same day, the Home Ministry amended the Foreigners (Tribunals) Order, 1964: while Foreigners Tribunals

had been limited to Assam until then, state governments and union territories were now authorized to create such tribunals anywhere in the country.⁸³ Soon after, in November, CJI Ranjan Gogoi defended the NRC by adopting the party's discourse:

The Assamese people have displayed great magnanimity and large heartedness in accepting various cut-off dates for the purposes of preparation of the NRC that are at a considerable distance from the time when the first onslaught of forced migration hit them or their ancestors.⁸⁴

Ideological affinities between Supreme Court judges and the Sangh Parivar have been even more obvious in the Ayodhya case. The way this case has been dealt with by the Indian judiciary over the last thirty years shows that the courts and judges have gradually shifted away from secularism. In December 1992, after the demolition of the Babri Masjid, the government had sought the opinion of the Supreme Court on the question of "Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram-Janma Bhumi-Babri Masjid...." The Supreme Court had replied that this question was "superfluous and unnecessary." Two decades later, the Court had an answer and in his 2020 verdict it gave to Hindus the land where the mosque used to stand to build a temple, Muslims being given five acres of land in a "suitable, prominent place in Ayodhya" to build a mosque elsewhere. Why?

First, for the Court, "The Hindus have established a clear case of a possessory title to the outside courtyard by virtue of long, continued and unimpeded worship at the Ramchabutra [that is located in the outer courtyard, not in the mosque]...."⁸⁵ The "proof" that Hindus worshipped on the premises of the mosque in the eighteenth century comes from cursive testimonies of European travelers—Joseph Tieffenthaler in particular.

Second, the Muslims are presented as unable to show exclusive possession of the site *only* between 1528 and 1857, when British documents show that the site was disputed. But, why would the Moghuls, and subsequently, the Nawab of Oudh, have let Hindus worship in the mosque before 1857?

Third, despite the fact that Hindus worshiped in the outer courtyard of the mosque, the verdict says that "there can be no manner of doubt that this was in furtherance of their belief that the birthplace of Lord Ram was within the precincts of and under the central dome of the mosque."⁸⁶ It disregards the longstanding bifurcation of the disputed site between an inner and outer courtyard that had been set up through the grill-brick wall in 1857. The court validated the argument of the Hindus that "the entire complex as a whole was of religious significance."⁸⁷

The court uses this logic to treat the entire disputed land as one unified territory—which it then proceeds to grant to the Hindu claimants. Again, this is a problematic deference to the belief of one community in disregard of

the factual matrix (wherein Hindu devotees had initially only staked claims to the Ram chabutra, located in the outer courtyard).⁸⁸

In addition, if Hindus believed that the Ramjanmabhoomi was below the central dome of the erstwhile Babri Masjid, this is where the Ram Mandir had to be built (*M. Siddiq v. Mahant Suresh Das*, 2019, p 165). In other words, the Ayodhya verdict of the Supreme Court of India is based on the Hindus' belief, a clear sign of its adherence to the ideology of majoritarianism.

Speaking against the government, while acting (or abstaining) in its favor

CJIs Misra, Khehar and Gogoi have set a pattern that their successors, S.A. Bobde (18 Nov. 2019–23 April 2021), N.V. Ramana (24 April 2021–26 Aug 2022), U.U. Lalit (27 Aug. 2022–7 Nov. 2022) and D.Y. Chandrachud (8 Nov. 2022– 10 Nov. 2024) followed when they became the heads of the Supreme Court. Gautam Bhatia argues that “CJI Bobde’s tenure saw the further acceleration of trends begun under his predecessors: that of the Supreme Court, in effect, turning into an Executive Court.”⁸⁹ Certainly, Chief Justices often claimed that the judiciary needed to stand against the executive and protested that the government was not sufficiently respectful of the justice system. CJI N.V. Ramana, for instance, declared, “Government has started maligning the judges (...) Earlier we used to see private parties with this type of tactic.”⁹⁰ However, in practice, these Chief Justices bowed to the govern-

ment. CJI Chandrachud was even more vocal—and spoke even more often about the key role of the judiciary in the constitutional architecture of India—to preserve democracy,⁹¹ sometimes with some populist overtone.⁹² Defending freedom of expression—badly affected by the Indian government since 2014—CJI Chandrachud even said in March 2023: “*The press must remain free if a country is to remain a democracy.*”⁹³

None of the CJIs who have been at the helm of the Supreme Court in the first years of the present decade have opposed the executive. A major cause of disagreement remained the appointment of the judges selected by the Collegium. In 2021, there were up to ten vacancies represented almost one-third of the Supreme Court has sanctioned strength of 34. However, the Collegium resigned itself not to nominate lawyers the government disliked the most. Under CJI Gogoi, the Court had reiterated recommendations to elevate some High Court Justices to the Supreme Court after the Ministry of Law had sent back the files for reconsideration,⁹⁴ in vain. Under CJI Bobde, the Collegium could not either get appointed “even a single justice to the Supreme Court while vacancies piled up through his months in office.” Why? Because one of its members, Justice Nariman, insisted not to supersede one of the most respected judges in India, Justice Akil Kureshi—who was unacceptable to the Indian government as mentioned above. Finally, under CJI N.V. Ramana, after Justice Nariman retired on August 12th, 2021, the Collegium excluded Justice Kureshi from its list. Senior advocate Dushy-

ant Dave commented: “The collegium capitulated even before confrontation. It chose the easy path compromising their constitutional oath and ignoring the Constitution Bench judgement on appointments to High Courts and the Supreme Court.” Senior advocate Sanjay Hegde pointed out:

The Supreme Court as an institution probably did what Supreme Court lawyers often do: not advance a submission, which was likely to be rejected. They may have wanted to send at least one batch of recommendations where the government is less likely to have problems so that at least they would have a certain amount of judges in place – they were currently operating without almost a third of their strength.⁹⁵

Finally, the government cleared nine names, most of which it did not seriously oppose.⁹⁶ CJI N.V. Ramana explained that the ideas that “judges are themselves appointing judges” was “a myth,” given the role played by many actors, including the Union Law Ministry.⁹⁷

Not only the Supreme Court abandoned the power the Collegium had enjoyed so far, but also it became the “executive court” in two different ways: abstention and docility. Under CJI Bobde, the Court found refuge in what G. Bhatia calls “judicial evasion”—a tactic consisting in refusing to hear cases. This greatly helped the government: “by keeping a case pending, and delaying adjudication, the Court effectively

decides it in favour of one of the parties (most often, the party in a stronger position, i.e., the government), simply by allowing status quo to continue.”⁹⁸

When CJI Bobde’s tenure began in November 2019, six major constitutional cases were pending adjudication:

1. The constitutional challenge to the effective abrogation of Article 370, and the splitting of the erstwhile state of Jammu & Kashmir into two union territories
2. The constitutional challenge to Economic Weaker Sections reservations
3. The Constitutional challenge to the Aadhaar amendment ordinance (later the Act)
4. Judicial review over money bills
5. The constitutional challenge to the Citizenship Amendment Act.
6. The constitutional challenge to the Election Bonds

In 17 months, not even one of these six cases was heard or decided. As a result, these laws became *fait accompli*.

The situation remained almost the same, after April 2021, 24, the date of the elevation of Justice Ramana to the role of Chief Justice. The Supreme Court refused to list cases challenging the legality of the hijab ban that the BJP government had imposed on Muslim students in Karnataka, as well as a writ petition challenging the constitutional

validity of the Unlawful Activities (Prevention) Act, as amended under Modi in a draconian way. While there were 53 cases, which required constitutional benches during CJI Ramana's 16-month tenure, the Court formed only one, which decided a dispute between a Gujarat state electricity regulator and an electricity provider.⁹⁹ Fewer than 3 percent of CJI Ramana's judgments referred to constitutional matters. Constitutional cases were not the only ones that remained undecided. Under CJI Bobde, the number of pending cases had risen at the "alarming rate" of 14 percent; it continued to rise at the rate of 5 percent under CJI Ramana, to reach the record level of 71, 411.¹⁰⁰

If "judicial evasion" remained the Supreme Court's favorite strategy under CJI Bobde and CJI Ramana, when it made decisions, none of them went against the Modi government. For instance, the Court dismissed the plea to transfer the Prime Minister's Citizen Assistance and Relief in Emergency Situation (PM-CARES) Funds, that had received huge amounts of money during the COVID 19 crisis—and which were used by PM Modi at his discretion—to the National Disaster Relief Funds.¹⁰¹ The Supreme Court, as Nandini Sunder showed, even "personally helped Modi" in several cases.¹⁰² A couple of days after Justice Bobde was appointed CJI, the Court convicted 12 Muslims it held responsible for the murder of former Gujarat Home Minister, Haren Pandya, in spite of the fact that they had been acquitted by the Gujarat High Court, raising doubts about the identity of those who had organized this assassination.¹⁰³

Similarly, soon before the end of CJI Bobde's term, the Supreme Court gave an astonishing judgement in which it arraigned the 83 year-old Zakia Jafri and her co-petitioner, Teesta Setalvad for having the "gumption" and "audacity" to "keep the pot boiling" for 16 years by pursuing her legal struggle—while her husband, Ehsan Jafri and 68 other people had been killed in Gulberg Society during the anti-Muslim Gujarat pogrom in 2002, nobody had been held responsible for this massacre. The Supreme Court, therefore, helped Modi "to erase the stigma of his time as chief minister of Gujarat in 2002...."¹⁰⁴

Under CJI Ramana, the Supreme Court also endorsed the increasingly authoritarian governance of Modi by upholding the validity of the Prevention of Money Laundering Act (PMLA), including the investigative powers of the Enforcement Directorate (ED). Under Modi, the ED has been used by the government against political opponents and civil society activists accused of corrupt practices: it carried out 3,010 raids between 2014 and 2022, against 112 between 2004 and 2014—mostly against innocent people (as evident from the low number – 23 – of convictions), who were sent to jail under the draconian PMLA, a law under which (1) an accused person is presumed to be guilty, (2) there is no judicial oversight of the investigation and self-incrimination is permitted via statements given to the Enforcement Directorate.¹⁰⁵ Besides, the accused can intentionally be kept in the dark about his/her crimes, bail is nearly impossible and the ED can "attach properties of an accused person

even before charges have been filed, thus financially crippling them even before trial.¹⁰⁶

When U.U. Lalit became the new Chief Justice in August 2022, this trend continued and judgments in favor of the Modi government multiplied—but the new CJI started to hear constitutional cases again during his short term of 74 days. In November 2022, the Supreme Court upheld the 103rd Amendment to the Constitution, which in 2019 had resulted in the creation of a 10 percent quota for the Economically Weaker Sections, i.e., relatively poor members of high and dominant castes, whereas the socio-economic criterion had never been considered as legitimate before for positive discrimination program.¹⁰⁷ However, CJI Lalit supported the dissenting opinion of Justice Bhat, which “strongly stated that EWS reservations were discriminatory for excluding SCs, STs and OBCs and said it was ‘delusional’ to believe that those getting caste-based reservations were more fortunate than the forward caste poor.”¹⁰⁸

The most sensitive constitutional cases were reviewed under CJI Chandrachud, who took over from CJI Lalit on 8 November 2022, with two years before him before retirement. There was a sense that D.Y. Chandrachud’s moment would be a rather progressive one, particularly given his proclivity for taking on cases with important social causes during his time as an advocate. His outlook appeared to be modern in many senses of the word. This ranged from keeping a progressive mindset about perspectives on gender and sex-

uality, to embracing technological tools to deal with a plethora of issues faced by the judiciary.¹⁰⁹

In January 2023, the Supreme Court upheld the legality of Modi government’s 2016 demonetization move, a decision that consisted in removing 87 percent of India’s legal tender in the form of 500- and 1000-rupee notes and which badly affected the economy. In spite of the consequences of this move and the fact that the Reserve Bank of India had not approved it, the Supreme Court considered that this decision had been “undertaken for legitimate purposes, such as curbing black money.”¹¹⁰ In March 2023, the Court ruled that mere membership of a banned organization is an offence under the anti-terror law, the Unlawful Activities (Prevention) Act,¹¹¹ which the Modi government had amended in 2019 in order to make it even stricter.¹¹² In August 2019, the Modi government had passed amendments to the Constitution of India, which abolished Art. 370. The Art. 370 had until then given a special, autonomous, status to J&K, and its abolition transformed the state into two Union Territories, J&K and Ladakh. This decision was made while the President’s Rule had been imposed on J&K and its assembly dissolved—one of the many reasons why several petitions were filed, challenging the move before the Supreme Court. The Court upheld entirely the measures taken by the Modi government, which marked a clear “retreat from the Court’s known positions on federalism, democratic norms and the sanctity of legal processes.” One, this judgment meant that “Parliament,

while a State is under President's Rule, can do any act, legislative or otherwise, and even one with irreversible consequences, on behalf of the State legislature. Two, "promises made by constitutional functionaries can be blown away at the ruling dispensation's whim..." Three, while the downgrade of a state to the Union Territory status had never happened before, the "Court's failure to give its ruling on whether the Constitution permits the reorganization of J&K into two UTs is an astounding example of judicial evasion." However, this is a case of *active* judicial evasion, so to speak, because CJI Chandrachud's Supreme Court did make a decision after four years of eluding the case.¹¹³

Submission or Strategy?

The tenures of the incumbent and two previous Chief Justices of India indicate the emerging fault lines of judicial approach to Executive power.¹¹⁴ The analysis assumes greater pertinence in view of increased public attacks on the judiciary's appointment processes and judicial decisions.¹¹⁵

Both continuity and innovation regarding the judicial approach to the Executive mark the tenure of the retired Chief Justice of India, D.Y. Chandrachud. Critical jurisprudential interventions on electoral finance, affirmative action, gender equality and free speech marked the tenure. Not only did he author 612 judgements in his tenure at the Supreme Court, but he also wrote at least 90 judgements as the Chief Justice. Many of his judgements have moved the needle on jurisprudence in matters

concerning privacy, autonomy, federalism and constitutional interpretation.¹¹⁶ The judgments on recommendation of the Goods and Services Tax Council and the taxation of mineral rights and industrial alcohol carve out critical fiscal space for state governments. Yet the expansive articulation of the constitutional premise behind federalism were not met by judgments in critical political disputes.

First, the Court failed to intervene when the centre clashed with the Delhi government regarding the appointment and transfer of bureaucrats within the National Capital Territory of Delhi. Chandrachud CJ's judgment in May 2023 affirmed the state government's power but the Parliament overturned it. Despite multiple requests by the Delhi Government before Chandrachud CJ's bench, the Supreme Court failed to examine this ordinance. In another case concerning municipal governance in Delhi, the Supreme Court emboldened the Lieutenant Governor.¹¹⁷

Second, the Chandrachud CJ-led bench decided the controversial case of political crisis in Maharashtra, which was afflicted by party-splits and political defections. Although the court found the decisions of the Speaker of the State Assembly and the Governor arbitrary, it refused to "turn the clock back." Thus, the unfairly removed Chief Minister was denied effective relief and left worse off despite a legal vindication.¹¹⁸

Third, Chandrachud CJ-led bench dismissed the constitutional challenge to the de-operationalization of Article 370 of the Constitution. The

court dismissed the ground of asymmetric federalism and approved the dilution of the special status of Jammu and Kashmir.¹¹⁹

On another account, during his tenure, it was hard to miss a willing submission to the logic of *de facto* Executive primacy in judicial appointments. To be sure, the Chandrachud CJ-led collegium did resist Executive diktat to some extent. It re-iterated the recommendation of the openly gay Advocate as a judge of the Delhi High Court and explicitly rejected the union government's objections that pointed to his homosexual identity and foreign-origin partner.¹²⁰ The collegium also recommended the transfers of judges who were seen to be openly aligned to the ruling party.¹²¹ Yet per some accounts, he adopted the route of securing the government's "pre-approval" of candidates before the Collegium would meet to recommend candidates.¹²² In some of his public engagements, he pointed to the need for filling judicial vacancies for explaining the need for direct engagement with the government to resolve differences on judicial appointments.¹²³ By electing engagement over confrontation, Chandrachud CJ appeared to breach the constitutionally prescribed separation from power.¹²⁴

As per some estimates, of the 18 justices appointed to the Supreme Court with the cumulative tenure of 77 years, nine are considered to be collegium's own recommendations—with a cumulative tenure of over 54 years but nine are considered sensitive to the ruling regime—with a cumulative ten-

ure of 37 years. Much like other Chief Justices, he continued to assign cases in a manner that raised questions of procedural propriety. Indeed, the Supreme Court's own rulings did not keep the office of the Chief Justice beyond the pale of doubt when it came to administrative decision-making.¹²⁵ As the legal scholar Gautam Bhatia writes in his perceptive review of the tenure:

Over two years, CJI Chandrachud's Collegium had the opportunity to introduce some of that transparency in the Collegium's decision-making process, but other than a few Delphic lines in appointment Resolutions about the income or practice of candidates, it did not do so. What we are left with, then, is the worst of all worlds, where the Collegium's formal independence from the Executive precludes a frank and open discussion of the nature of the role that the Executive does – and should – have in judicial appointments, while the opacity and arbitrariness of its dealings fuels speculation and mistrust about that very issue. While this problem predated CJI Chandrachud's Collegium, it certainly did not improve during his tenure, and – arguably – grew worse.¹²⁶

Epstein and Knight provide a useful framework to analyze such judicial behavior. As per the "strategic" theory, judicial behavior is interdependent on judges' expectations about the actions of other relevant actors like the

judges' colleagues, elected officials, and the public.¹²⁷ While the actions and priorities of the BJP-led government remained the same, what remains interesting is Chandrachud CJ's strategic responses to the public's actions.

While his public forum engagements—speeches and other outreach efforts—had a fair share of critics, they demonstrate a series of attempts to connect with the users of justice-delivery ecosystem.¹²⁸ He explicated his intent to establish this connect in a speech delivered in February 2023. He said that courts should take seriously their responsibility to communicate with the public and enhance public trust and legitimacy. Noting that separation of powers did not justify an aloofness from the public, he revealed his intent to directly respond to challenges of disinformation and truth decay.¹²⁹ From translating judgments into regional languages to making court infrastructure accessible, he spearheaded projects that brought the people closer to the courts.¹³⁰ In this regard, it is worth noting that his judicial actions have been attacked at remarkable levels, to the extent of being the top trending topic several weeks over since the start of his tenure. An empirical analysis of social media trends between 1 January – 20 April 2023 found that personalized trolling and targeted campaigns against Chandrachud CJ originated from “strongly tied to digital influencers who are highly polarized in favor of the BJP.”¹³¹ His decision to commemorate the golden jubilee of Supreme Court's historic basic structure doctrine deserves to be seen in the context of strident attacks from high-level executive

functionaries like the Vice President, the Law Minister, and Prime Minister's Economic Advisor.¹³²

Chief Justice Khanna's tenure marked a distinction from his predecessor in a limited sense. He did not pursue public forum engagements aggressively.¹³³ He earned praise for his transparency initiative, which revealed substantial information about little facets of judges' appointment trajectory, relationship-networks and personal wealth.¹³⁴ He was also praised by certain sections of the commentariat for granting status quo on the proceedings related to disputed places of worship until the question of constitutionality of the Places of Worship Act was *sub judice* before the Supreme Court. Furthermore, his bench judiciously scrutinized the Government's justifications for enacting the controversial Waqf (Amendment) Act, 2025.¹³⁵ Nevertheless, he cited his short tenure and denied the request for a judicial stay on the enactment until the case on interim relief could be heard at length by the next Chief Justice. What is more—he did not hear and adjudicate any of the pending constitutional challenges to controversial legislations such as the Chief Election Commissioners Act, 2023. As Gautam Bhatia records:

Once he (Justice Khanna) became Chief Justice, he then recused himself from the hearing (the challenge to the Chief Election Commissioners Act), on the basis that one of the questions in the case was whether or not the Chief Justice should be on the selection

panel for election commissioners (this is an odd reason, as in other circumstances, the Supreme Court has been quite aware of the distinction between the CJI acting judicially, and the CJI acting in other capacities), and sent the case to another bench – where it still awaits decisions, as elections come and go.¹³⁶

Another instance where Chief Justice Khanna left much to be desired was in his handling of Justice Shekhar Yadav's incendiary remarks against the religious minorities. The Collegium led by CJI Khanna did not ensure accountability or even a public reprimand for hate speech made by the serving member of the higher judiciary.

Chief Justice Gavai, in his ongoing tenure, has further deepened the crisis of legitimacy faced by the Supreme Court. In a stark distinction from the (half-hearted) “transparency initiatives” of his predecessors (Chief Justices Chandrachud and Khanna), the collegium led by him reverted to the practice of issuing cryptic and unreasoned “statements” pertaining to recommendation of judges for appointment to the Supreme Court and the High Courts.¹³⁷ The proposals for appointment of five Supreme Court justices appointed during the tenure of Chief Justice Gavai were cleared almost immediately. In case of the one of these judges, Justice Pancholi, a member of the collegium, Justice B.V. Nagarathna raised serious concerns. The most serious concern—deemed to bring the legitimacy of the collegium under a question—related to

reasons for Justice Pancholi's “stigmatic” transfer from Gujarat to Patna in 2023.¹³⁸

Chief Justice Gavai's judicial record did not live up to his rhetoric about judicial independence. By way of an interim order, he vacated the Calcutta High Court's stay upon West Bengal Government's new OBC reservation policy.¹³⁹ While he was lauded for his series of orders for the protection of forests, the unreasoned change of the bench in the Vantara case raised several eyebrows.¹⁴⁰ Even more controversial is his judgement refusing to stay several expropriatory and draconian provisions of the Waqf Amendment Act, 2025. First, the judgment refused to scrutinize the false meta-narrative about Waqf being employed as a “land-grabbing tool.” By extending excessive deference to the statute, the Supreme Court legitimized the fabricated lies about pre-existing management and control of waqf properties. Second, it failed to minutely examine the grave consequences that the amending provisions had on the usage and occupation of properties that had been deemed to be “Waqf by user.” Third, it uncritically validates the adequacy of “safeguards” in the Amendment.¹⁴¹ The amendment contained a proviso to definition of Waqf that limited of protection of the waqf by user to registered waqf. However, the judgment does not explain why the removal of critical safeguards is constitutionally kosher. The existence of “*as far as known to applicant*” exemption in the registration provision i.e. Section 36 of the Waqf Act, 1995 was of critical import. In other words,

an applicant of registration was allowed to seek registration under the previous regime if he was not aware of the mode of creation of Waqf or the creator of Waqf. The court has upheld this provision thereby disabling such applicants to register the Waqf properties.

Yet the last word on his tenure can only be written after the reserved decision in the presidential reference on the Supreme Court's previous decision imposing time limits on the Governors is pronounced.

Conclusion

Like other populist regimes, Modi's India has tried to control the judiciary immediately after its inception, opening a new phase in the history of the Supreme Court.¹⁴² This institution—the cornerstone of the rule of law, and even of democracy in the country, resisted for two years, and finally, indulged in a non-confrontationist attitude. This attitude is remarkably clear from post-retirement interviews of several judges.¹⁴³

Certainly, it was under pressure. But its complacency also resulted from its own weaknesses—like during the Emergency and ideological trajectory—a new development: not only has the infiltration of the judiciary by sympathizers of the RSS contributed to this state of things, but also growing ideological affinities and different forms of corruption making the blackmailing of judges easier.

The Supreme Court probably tried to buy peace by being so accom-

modating, bowing to the government in many different ways—including by compromising the independence of the Collegium. But the ruling party is not satisfied with these concessions and is still eager to change the procedure that is used for selecting the Supreme Court Justices. Presiding over the Rajya Sabha for the first time as the new Vice President of India in on 2 December 2022, Jagdeep Dhankar arraigned the 2015 Supreme Court judgment striking down the amendment to the Constitution that had just created the National Judicial Appointments Commission (NJAC). He criticised a “glaring instance” of “severe compromise” of parliamentary sovereignty and a disregard of the “mandate of the people.”¹⁴⁴ The Supreme Court replied that the Collegium system was the law of the nation and that it had to be adhered to. The Union Law Minister, Kiren Rijiju, retorted that the lawyers nominated by the Collegium did not fit in “the sentiments of the people”¹⁴⁵ and that until the procedure to select judges changes, the issue of vacancies in the higher judiciary will persist. Rijiju then wrote a letter to CJI Chandrachud “suggesting” the inclusion of a government nominee in the decision-making process for shortlisting of judges, the privilege of the Collegium today.¹⁴⁶

The next step is already for everyone to be seen: the Supreme Court is not systematically reacting when its decisions are not implemented. In spite of the fact that S.K. Mishra has been re-appointed Director of the Enforcement Directorate, ignoring a Supreme Court judgment disqualifying because

of his age, the government overruled this judgement—and the Supreme Court looked the other way...¹⁴⁷

The internal differences within the judiciary on the matter of elevation of judges of the Supreme Court shows a

failure to preserve the integrity of the judicial appointments process. It remains to be seen how the judiciary responds to the Executive's challenges when its own legitimacy has been put under cloud.

Acknowledgements

The authors are grateful to Dhruv Bannerjee for his help regarding the state of the Indian judiciary in 2023.

Notes

- 1 On the transition from populism to authoritarianism, see C. Jaffrelot, "Populism against Democracy or People against Democracy?" in A. Dieckhoff, C. Jaffrelot and E. Massicard (eds), *Contemporary populists in power*, New York, Palgrave, 2022, pp. 35-54.
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Mr. Rohatgi countered that the law provided for an MoP to be finalised before appointments are made.

“The MoP is your red herring. The Law Minister and the government has repeatedly told us that the process of finalisation of MoP will not stall judicial appointments process. Now are you saying that there is a deadlock on the MoP and you want it cleared first before appointing judges?” Justice Thakur asked (K. Rajagopal, “Centre is trying to decimate judiciary: SC,” *The Hindu*, Oct. 28, 2016 (<https://www.thehindu.com/news/national/Centre-is-trying-to-decimate-judiciary-SC/article16084597.ece> Last accessed August 14, 2020).

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