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SECTION: - **XVII**

IN THE SUPREME COURT OF INDIA
CIVIL/CRIMINAL/APPELLATE/ORIGINAL/ JURISDICTION

SUO MOTO CONTEMPT PETITION (Crl) No. 1 of 2020

IN RE:

VERSUS

PRASHANT BHUSHAN AND ANR. ....Respondent(s)

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S.N.	PARTICULARS	TRUE COPIES	COURT FEE
1.	Affidavit in Reply on behalf of Respondent No. 1	1	Nil
2.	Annexure C-1 to C-47	1	Nil
	Vakalatnama with Memo of Appearance		

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IN THE SUPREME COURT OF INDIA

(CRIMINAL ORIGINAL JURISDICTION)

SUO MOTU CONTEMPT (CRIMINAL) NO. 1 OF 2020

IN THE MATTER OF:

IN RE: PRASHANT BHUSHAN & ANR. ALLEGED CONTEMNORS

PAPER BOOK

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(AFFIDAVIT IN REPLY ON BEHALF OF RESPONDENT NO. 1)

COUNSEL FOR THE RESPONDENT NO. **1: KAMINI JAISWAL**

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IN THE SUPREME COURT OF INDIA

SUO MOTO CONTEMPT (CRL.) NO. 1 OF 2020

IN THE MATTER OF:

IN RE: PRASHANT BHUSHAN AND ANOTHER ....ALLEGED CONTEMNORS

AFFIDAVIT IN REPLY ON BEHALF OF RESPONDENT NO.1

I, Prashant Bhushan, S/o Shri Shanti Bhushan, R/o B-16, Sector 14, Noida, do hereby solemnly state and affirm as under:

1. That I am the first Respondent in this Contempt Petition and am fully acquainted with the facts of this case. I have read and understood the contents of the Contempt Petition notice issued to me and my reply to it is as under.

2. That the order of the court dated 22.07.2020, issuing notice to me refers to a contempt petition filed by one Mr. Mehak Maheshwari on the 21.07.2020, with an accompanying application for exemption from taking permission of the Attorney General. That petition appears to have been converted into a suo moto petition on which notice has been issued to me. However the notice did not contain the original contempt petition of Mr. Maheshwari. The order also mentions that the matter was placed before the bench on the administrative side and then directed by them to be placed on the judicial side. However, copies of those administrative orders are also not

annexed with the notice. Therefore, I had written on 28.07.2020 to Secretary General of the Supreme Court, seeking a copy of these documents, which have since not been provided to me. In the absence of that, I am somewhat handicapped in dealing with this contempt notice. However, without prejudice to the above, my preliminary reply to the notice issued to me is as under.

3. The notice is based on two tweets by me. One dated 27.06.2020 and the other 29.06.2020. The tweet regarding the CJI riding a motorcycle dated 29.06.2020 was made primarily to underline my anguish at the non physical functioning of the Supreme Court for the last more than three months, as a result of which fundamental rights of citizens, such as those in detention, those destitute and poor, and others facing serious and urgent grievances were not being addressed or taken up for redressal. The fact about the CJI being seen in the presence of many people without a mask was meant to highlight the incongruity of the situation where the CJI (being the administrative head of the Supreme Court) keeps the court virtually in lockdown due to COVID fears (with hardly any cases being heard and those heard also by a unsatisfactory process through video conferencing) is on the other hand seen in a public place with several people around him without a mask. The fact that he was on a motorcycle costing 50 lakhs owned by a BJP leader had been established by documentary evidence published on social media. The fact that it was in Raj Bhavan had also been reported in various sections of the media. My expressing

anguish by highlighting this incongruity and the attendant facts cannot be said to constitute contempt of court. If it were to be so regarded, it would stifle free speech and would constitute an unreasonable restriction on Article 19(1)(a) of the Constitution.

4. So far as the second tweet dates 27.06.2020 is concerned it has three distinct elements, each of which is my bonafide opinion about the state of affairs in the country in the past six years and the role of the Supreme Court and in particular the role of the last 4 CJIs. The first part of the tweet contains my considered opinion that democracy has been substantially destroyed in India during the last six years. The second part is my opinion that the Supreme Court has played a substantial role in allowing the destruction of our democracy and the third part is my opinion regarding the role of the last 4 Chief Justice's in particular in allowing it.

5. Such expression of opinion however outspoken, disagreeable or however unpalatable some, cannot constitute contempt of court. This proposition has been laid down by several judgments of this court and in foreign jurisdictions such as Britain, USA and Canada. It is the essence of a democracy that all institutions, including the judiciary function for the citizens and the people of this country, and they have every right to freely and fairly discuss the state of affairs of an institution and build public opinion in order to reform the institution. I submit that my criticism has been outspoken yet it has been carefully weighed and made with the highest sense of responsibility.

What I have tweeted is thus my bonafide impression about the manner and functioning of the Supreme Court in the past years and especially about the role of the last 4 Chief Justices have played vis a vis their role in being a check and balance on the powers of the executive, their role in ensuring that the Supreme Court functions in a transparent and accountable manner and was constrained to say that they, contributed to undermining democracy.

6. It is also submitted that the Chief Justice is not the court, and that raising issues of concern regarding the manner in which a CJI conducts himself during "*court vacations*", or raising issues of grave concern regarding the manner in which four CJIs have used, or failed to use, their powers as "*Master of the Roster*" to allow the spread of authoritarianism, majoritarianism, stifling of dissent, widespread political incarceration, and so on, cannot and does not amount to "*scandalising or lowering the authority of the court*". The court, in this case the Supreme Court, is an institution consisting of 31 Judges and its own long-standing and enduring traditions and practices, and the Court cannot be equated with a Chief Justice, or even a succession of four CJIs. To bona fide critique the actions of a CJI, or a succession of CJIs, cannot and does not scandalise the court, nor does it lower the authority of the court. To assume or suggest that '*the CJI is the SC, and the SC is the CJI*' is to undermine the institution of the Supreme Court of India.

7. The stifling of dissent under the watch of the Supreme Court has not only been adversely commented upon by retired Judges of this very Court, but even by sitting Judges who have been part of the SC during the tenure of the four CJIs. **Justice DY Chandrachud** while delivering the 15th P.D. Desai Memorial Lecture in the Gujarat High Court Auditorium on 15th February, 2020, expressed his anguish at the manner in which dissent was labeled as anti-national, thereby striking,

> "*at the heart of our commitment to protect constitutional values and the promotion of deliberative democracy*".

In the course of this speech, delivered at the height of the anti-CAA/NRC protests in Shaheen Bagh and around the country, he stated that,

> "*employment of state machinery to curb dissent instills fear and creates a chilling atmosphere on free speech which violates the rule of law and distracts from the constitutional vision of a plural society*".

Justice Chandrachud used strong words to denounce the "*suppression of intellect*", which he likened to "*the suppression on the conscience of the nation*". Yet, one week later, when the Delhi riots were unleashed, with daily videos emerging of mobs tearing down and burning mosques, the Police force systematically destroying public CCTVs, taking an active part in stone-throwing, massive firing and deaths, blockades of a

Hospital to prevent assistance to the severely wounded Muslims, etc. the Supreme Court remained a mute spectator while Delhi burnt. A copy of the 15th P.D. Desai Memorial Lecture delivered by Justice D.Y. Chandrachud is annexed hereto as **Annexure** C1 (135-140)

8. Similarly, **Justice Deepak Gupta**, while still a sitting Supeme Court Judge, on 24th February, 2020, delivered a speech on "*Democracy and Dissent*" hosted by the SCBA, in which he stated that the suppression of dissent has a chilling effect on democracy, and called for "*an impartial decision-making process in the judiciary*". A copy of the speech of Justice Deepak Gupta delivered on 24.02.2020 is annexed hereto as **Annexure** C2 (141-165).

9. The bonafides of my opinion can be judged from the fact that for the last thirty years in my practice at the Supreme Court and Delhi High Court, I have consistently taken up many issues of public interest concerning the health of our democracy and its institutions and in particular the functioning of our judiciary and especially it's accountability. Since 1991, I have been involved in the Campaign for Judicial Accountability. The focus of the campaign has been to generate public opinion for putting in place credible legal institutions and mechanisms that ensure that the judiciary functions in a more transparent and accountable manner. To build this public opinion, the Campaign has over the years organized discussions and

conferences on various aspects of reforms needed in the higher judiciary.

10. That signs of democracy being in danger have come from no less than judges of the Supreme Court itself when in an unprecedented press conference in January, 2018, the four senior most judges of this Hon'ble Court, **Justices Chelameshwar, Kurien Joesph, Madan Lokur, & Ranjan Gogoi** warned the citizens that,

> *"There are many things less than desirable that have happened in the last few months... As senior-most justices of the court, we have a responsibility to the nation and institution. We tried to persuade the CJI that some things are not in order and he needs to take remedial measures. Unfortunately, our efforts failed. We all believe that the SC must maintain its equanimity. Democracy will not survive without a free judiciary."*

So serious were the misgivings of the senior sitting judges that they felt compelled to disregard the Code of Judicial Conduct to call a press conference and warn citizens of danger to democracy because of danger to a free judiciary. Perhaps left with no other alternative, the judges felt compelled to exhort the citizens to protect democracy by saying that,

> *"We are discharging our duty to the nation by telling you what's what".*

In doing so, the judges were invoking a higher principle than the one governing the everyday Code of Judicial Conduct: when those who are to regulate everyone else fail to regulate themselves, then honest public criticism is the only remedy.

A copy of a news report in *The Wire* dated 12.01.2018 on the Press Conference by Supreme Court Judges is annexed hereto as **Annexure** C3 (166-170)

11. It was one of the four judges of the Supreme Court who alerted the citizens to the "external influences" on the Supreme Court. **Hon'ble Justice (Retd.) Kurian Joseph** on 03.12.2018 went to the extent of saying that,

> *"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."*

Asked to elaborate on the 'external influence', Justice Joseph said,

"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." .

Such a disclosure creates an obligation for every citizen to defend the independence of the Supreme Court.

A copy of the Times of India report, "*We felt then CJI was being remote controlled: Justice Kurian Joseph*", dated 3rd December 2018 is annexed as **Annexure** C4 (171-172)

12. The freedom of speech & expression guaranteed to every citizen under Article 19(1)(a) is the ultimate guardian of all the values that the constitution holds sacred: Rule of Law, Separation of Powers, Secularism, Free & Fair elections, etc. The relationship between Article 19(1)(a) and Article 129 is governed by Article 19(2) . Article 19(2) recognizes the fetters that can be placed on freedom of speech & expression under the Court's power to punish for contempt under Article 129. 'Reasonable restriction' being the operative word under Article 19(2), any exercise of contempt powers by the Supreme Court, must necessarily not be of a nature that goes beyond 'reasonable restrictions'.

13. To prevent a citizen from forming, holding, & expressing a 'bonafide opinion' in Public Interest on any institution that is a creature of the Constitution is not a reasonable restriction and violates the basic principles on which our democracy is

founded. To prevent a citizen from 'evaluating' in Public Interest the performance of any institution that is a creature of the constitution and putting it in the public domain to inform, generate a debate, build public opinion for reforms/change is violative of our right to free speech.

14. The power of contempt under Article 129 is to be utilized to aid in administration of justice and not to shut out voices that seek accountability from the Court for it's errors of omissions and commissions which have been detailed hereinafter. To curb constructive criticism from persons of knowledge and standing is not a 'reasonable restriction'. Preventing citizens from demanding accountability and reforms and advocating for the same by generating public opinion is not a 'reasonable restriction'. Article 129 cannot be pressed into service to stifle bonafide criticism from citizens who are well informed about the omissions and commissions of the Supreme Court.

15. Gajendragadkar, C.J. in Special Reference No. 1 of 1964 observed as follows:

> *"We ought never to forget that the power to punish for contempt, large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public*

at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct."

16. In ***Baradakanta Mishra v. Registrar of Orissa High Court, (1974) 1 SCC 374****, p. 403,* Justice Krishna Iyer observed,

"65. Before stating the principles of law bearing on the facets of contempt of court raised in this case we would like to underscore the need to draw the lines clear enough to create confidence in the people that this ancient and inherent power, intended to preserve the faith of the public in public justice, will not be so used as to provoke public hostility as overtook the Star Chamber. A vague and wandering jurisdiction with uncertain frontiers, a sensitive and suspect power to punish vested in the prosecutor, a law which makes it a crime to publish regardless of truth and public good and permits a process of brevi manu conviction, may unwittingly trench upon civil liberties and so the special jurisdiction and jurisprudence bearing on contempt power must be delineated with deliberation and operated with serious circumspection by the higher judicial echelons. So it is that as the palladium of our freedoms, the Supreme Court and the High Courts, must vigilantly protect free speech even against judicial umbrage — a delicate but sacred duty whose discharge demands tolerance and detachment of a high order."...."82. ... the

countervailing good, not merely of free speech but also of greater faith generated by exposure to the actinic light of bona fide, even if marginally overzealous, criticism cannot be overlooked. Justice is no cloistered virtue."

17. In ***Ambard v Att General of Trinidad and Tobago (1936) A.C. 322(P.C)*** Lord Atkin said :

> *"... no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.".*

Lord Atkin said that the case had been discussed at length because it concerned,

> *" ... the liberty of the press, which is no more than the liberty of any member of the public, to criticize*

temperately any fairly, but freely any episode in the administration of justice"

18. ***Ambard*** was relied upon in ***P.N. Duda v. P. Shiv Shanker, (1988) 3 SCC 167*** in which case it was the Law Minister who was arrayed for Contempt. It was observed as under:

> *14. It is well to remember the observations of Justice Brennan of U.S. Supreme Court (though made in the context of law of libel) in New York Times Company v. L.B. Sullivan that it is a prized privilege to speak one's mind, although not always with perfect good taste, on all public institutions and this opportunity should be afforded for vigorous advocacy no less than abstract discussion.*
>
> *15. Lord Denning in Regina v. Commissioner of Police of the Metropolis, ex parte Blackburn7 observed as follows:*
>
> *"Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.*
>
> *It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment,*

even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.

Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done."

18. .....It has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the court and in the majesty of law and that has been caused not so much by the scandalising remarks made by politicians or ministers but the inability of the courts of law to deliver quick and substantial justice to the needy. Many today suffer from remediless evils which courts of justice are incompetent to deal with. Justice cries in silence for long, far too long. The procedural wrangle is eroding the faith in our justice system. It is a criticism which the judges and

lawyers must make about themselves. We must turn the searchlight inward. At the same time we cannot be oblivious of the attempts made to decry or denigrate the judicial process, if it is seriously done. This question was examined in Rama Dayal Markarha v. State of Madhya Pradesh10 where it was held that fair and reasonable criticism of a judgment which is a public document or which is a public act of a judge concerned with administration of justice would not constitute contempt. In fact such fair and reasonable criticism must be encouraged because after all no one, much less judges, can claim infallibility..."

19. In Re: S. Mulgaokar (1978) 3 SCC 339, Justice V K Iyer, observed:

27. The first rule in this branch of contempt power is a wise economy of use by the Court of this branch of its jurisdiction. The Court will act with seriousness and severity where justice is jeopardized by a gross and/or unfounded attack on the judges, where the attack is calculated to obstruct or destroy the judicial process. The court is willing to ignore, by a majestic liberalism, trifling and venial offenses-the dogs may bark, the caravan will pass. The court will not be prompted to act as a result of an easy irritability. Much rather, it shall take notice look at the conspectus of features and be guided by a constellation of constitutional and other

considerations when it chooses to use, or desist from using, its power of contempt.

The second principle must be to harmonise the constitutional values of free criticism, the fourth estate included, and the need for a fearless curial process and its presiding functionary, the judge. A happy balance has to be struck, the benefit of the doubt being given generously against the judge, slurring over marginal deviations but severely proving the supremacy of the law over pugnacious, vicious, unrepentant and malignant contemners, be they the powerful press, gang-up of vested interests, veteran columnists or Olympian establishmentarians. Not because the judge, the human symbol of a high value, is personally armoured by a regal privilege but because 'be you-the condemner ever so high, the law-the People's expression of Justice-is above you. Curial courage overpowers arrogant might even as judicial benignity forgives errant or exaggerated critics. Indeed, to criticise the judge fairly, albeit fiercely, is no crime but a necessary right, twice blessed in a democracy. For, it blessed him that gives and him that takes. Where freedom of expression, fairly exercised, subserves public interest in reasonable measure, public justice cannot gag it or manacle it, constitutionally speaking. A free people are the ultimate guarantors of fearless justice. Such is the cornerstone of our Constitution; such is the touchstone of our Contempt

Power, oriented on the confluence of free speech and fair justice which is the scriptural essence of our Fundamental Law. Speaking of the social philosophy and philosophy of law in an integrated manner as applicable to contempt of court, there is no conceptual polarity but a delicate balance, and judicial 'sapience' draws the line. As it happens, our Constitution makers foresaw the need for balancing all these competing interests. Section 2(1)(c) of the Contempt of Courts Act, 1971 provides :

Criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which-

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court.

This is an extremely wide definition. But, it cannot be read apart from the conspectus of the constitutional provisions within which the Founding Fathers of the Constitution intended all past and future statutes to have meaning. All laws relating to contempt of court had, according to the provisions of Article 19(2), to be "reasonable restrictions" on the exercise of the right of free speech. The courts were given the power-and, indeed, the responsibility-to harmonize conflicting aims, interests and values. This is in sharp contrast to the Phillimore Committee Report on Contempt of Court in

the United Kingdom (1974) bund. 5794 prs. 143-5, pp. 61-2) which did not recommend the defence of public interest in contempt cases.

The third principle is to avoid confusion between personal protection of a libeled judge and prevention of obstruction of public justice and the community's confidence in that great process. The former is not contempt, the latter is, although overlapping spaces abound. Because the law of contempt exists to protect public confidence in the administration of justice, the offence will not be committed by attacks upon the personal reputation of individual judges as such. As Professor Goodhart has put it :

"Scandalising the court means any hostile criticism of the " judge as judge; any personal attack upon him, unconnected with the office he holds, is dealt with under the ordinary rules of slander and libel.
(See 'Newspapers and Contempt of Court' (1935) 48, Harv. L. Rule 885, 898.) Similarly, Griffith, C. J. has said in the Australian case of Nicholls (1911) 12 C.L.R. 280, 285 that
In one sense, no doubt, every defamatory publication concerning a judge may be said to bring him into contempt as that term is used in the law of libel, but it does not follow that everything said of a judge calculated

to bring him into contempt in that sense amounts to contempt of Court.

Thus In the matter of a Special Reference from the Bahama Island (1893) A.C. 138 the Privy Council advised that a contempt had not been committed through a publication in the Nassau Guardian concerning the resident Chief Justice, who had himself previously criticised local sanitary conditions. Though couched in highly sarcastic terms the publication did not refer to the Chief Justice in his official, as opposed to personal, capacity. Thus while it might have been a libel it was not a contempt.

20. That this Hon'ble Court has held that inspiring confidence in the sanctity and efficacy of judiciary cannot be demanded through power of contempt but rather should be built on trust and confidence of the people that judiciary is fearless and impartial. In ***C.S. Karnan, In re*, (2017) 7 SCC 1** a Constitutional Bench of seven judges observed:

63. *....The justification for the existence of that is not to afford protection to individual Judges ["14. ... the law of contempt is not made for the protection of Judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." [Douglas, J., Craig v. Harney, 1947 SCC OnLine US SC 79, para 14 : 91 L Ed 1546 : 331 US*

367 at p. 376 (1947)]] but to inspire confidence in the sanctity and efficacy of the judiciary ["... The object of the discipline enforced by the Court in case of contempt of court is not to vindicate the dignity of the court or the person of the Judge, but to prevent undue interference with the administration of justice." [Bowen, L.J. — Helmore v. Smith (2), (1886) 35 Ch D 449 at p. 455 (CA)]] , though they do not and should not flow from the power to punish for contempt. They should rest on more surer foundations. The foundations are—the trust and confidence of the people that the judiciary is fearless and impartial.

69.*The exercise of such a power has always been very infrequent and subjected to some discipline. Members of the judiciary have always been consciousof the fact that the power for contempt should be exercised with meticulous care and caution and only in absolutely compelling circumstances warranting its exercise.*

21. That at para 70 of the same judgment, it was observed that bonafide criticism of the judiciary should be protected and welcomed by the Judges and they should self-introspect as they are not infallible. It was further held that even conduct of judges or a group of judges may not amount to contempt if bonafide and in public interest as under:

70. *In a judgment rendered almost a decade back, one of us (Gogoi, J.) sitting in the Gauhati High Court held [Lalit Kalita, In re, (2008) 1 Gau LT 800] :*

"14. Judiciary is not oversensitive to criticism; in fact, bona fide criticism is welcome, perhaps, because it opens the doors to self-introspection. Judges are not infallible; they are humans and they often err, though, inadvertently and because of their individual perceptions. In such a situation, fair criticism of the viewpoint expressed in a judicial pronouncement or even of other forms of judicial conduct, is consistent with public interest and public good that Judges are committed to serve and uphold..... Such a realisation which would really enhance the majesty of the Rule of Law, will only be possible if the doors of self-assessment, in the light of the opinions of others, are kept open by Judges."

"16. But when should silence cease to remain an option? Where is the line to be drawn? A contemptuous action is punishable on the touchstone of being a wrong to the public as distinguished from the harm caused to the individual Judge. Public confidence in the judicial system is indispensable. Its erosion is fatal. Of course, Judges by their own conduct, action and performance of duties must earn and enjoy the public confidence and not by the application of the rule of contempt. Criticism could be of the underlying principle of a judicial verdict or its

rationale or reasoning and even its correctness. Criticism could be of the conduct of an individual Judge or a group of Judges...."

22. In this context, freedom of expression and the concomitant right to criticize, includes a fair and robust criticism of the judiciary. This cannot amount to contempt of court or lowering the dignity of the court in any manner. However, it has been recognized that this freedom must not be unqualified. As stated in the 2012 UK Law Commission report that recommended the abolition of the offense of 'scandalizing the court' in England,

> "*the purpose of the offense is not confined to preventing the public from getting the wrong idea about the judges, and that where there are shortcomings, it is equally important to prevent the public from getting the right idea.*"

The report goes on to state that preventing criticism contributes infact to the public perception that judges are engaged in a cover up and that must be something to hide. Conversely, open criticism and investigation into those few cases where something may have gone wrong will confirm public confidence that wrongs can be remedied and that in the generality of cases, the system operates correctly. A copy of the Law Commission Report on Abolishing Criminal Contempt dated 18th December 2012, is annexed as **Annexure** CS (173-247)

23. Further, many democracies have recognized the offence of scandalizing the court as unconstitutional and recommended the abolition of this offense as being inconsistent with any constitutional guarantee of freedom of speech and of fair trial since it gives judges, alone, among public wielders of power, a special immunity from criticism and a power where they sit as judges in their own cause, to punish their critics. Several responsible observers of the court including former judges have voiced their concern about the chilling effect of criminal contempt on the freedom of speech and expression.

24. **Justice A.P. Shah,** former Chief Justice of the Delhi High Court, has in a piece in the Hindu opined on the chilling effect of criminal contempt and that it is regrettable that judges believe that silencing criticism will harbor respect for the judiciary. A quote from his article is below:

> *For the Supreme Court of India, identifying priority cases to take up first (in a pandemic-constricted schedule) ought not to be very difficult: there are dozens of constitutional cases that need to be desperately addressed, such as the constitutionality of the Citizenship (Amendment) Act, the electoral bonds matter, or the issue of habeas corpus petitions from Jammu and Kashmir. It is disappointing that instead of taking up matters of absolute urgency in these peculiar times, the Supreme Court chose to take umbrage at two tweets. It said that these tweets "brought*

the administration of justice in disrepute and are capable of undermining the dignity and authority of the institution... and the office of the Chief Justice of India in particular...." Its response to these two tweets was to initiate suo motu proceedings for criminal contempt against the author of those tweets, the lawyer and social activist, Prashant Bhushan.

.....On the face of it, a law for criminal contempt is completely asynchronous with our democratic system which recognises freedom of speech and expression as a fundamental right.

An excessively loose use of the test of 'loss of public confidence', combined with a liberal exercise of suo motu powers, can be dangerous, for it can amount to the Court signalling that it will not suffer any kind of critical commentary about the institution at all, regardless of how evidently problematic its actions may be. In this manner, the judiciary could find itself at an uncanny parallel with the executive, in using laws for chilling effect.

A copy of Justice AP Shah's article in The Hindu on 27th July, 2020, titled *"The chilling effect of criminal contempt"* is annexed as **Annexure** C6(248-250

25. On the 27th of July, the editorial in **The Hindu** called for revisit of the idea of scandalising in the contempt law and the

need to usher in judicial accountability, especially in the context of the initiation of this suo moto contempt proceeding as under:

> *"The initiation of proceedings for criminal contempt of court against lawyer-activist Prashant Bhushan has once again brought under focus the necessity for retaining the law of contempt as it stands today. In an era in which social media are full of critics, commentators and observers who deem it necessary to air their views in many unrestrained and uninhibited ways, the higher judiciary should not really be expending its time and energy invoking its power to punish for contempt of itself. While it may not be reasonable to expect that the courts should ignore every allegation or innuendo, and every piece of scurrility, there is much wisdom in giving a wide latitude to publicly voiced criticism and strident questioning of the court's ways and decisions. Mr. Bhushan is no stranger to the art of testing the limits of the judiciary's tolerance of criticism. He has made allegations of corruption against judges in the past, and has been hauled up for it. The latest proceedings concern two tweets by him, one a general comment on the role of some Chief Justices of India in the last six years, and another targeting the current CJI based on a photograph. How sensitive should the country's highest court be to its outspoken critics? What would be more judicious — ignoring adverse remarks or seeking to make an example*

of some principal authors of such criticism to protect the institution? The origin of this dilemma lies in the part of contempt law that criminalises anything that "scandalises or tends to scandalise" the judiciary or "lowers the court's authority". It may be time to revisit this clause.

.... In contemporary times, it is more important that courts are seen to be concerned about accountability, that allegations are scotched by impartial probes rather than threats of contempt action, and processes are transparent. Unfortunately, in a system in which judges are not expected to disclose the reason for recusing themselves, and even charges of sexual harassment are not credibly investigated, it is only the fear of scandalising the judiciary that restrains much of the media and the public from a more rigorous examination of the functioning of the judiciary."

A copy of the editorial in *The Hindu* dated 27.07.2020 is annexed hereto as **Annexure** C7 (251-252)

26. An editorial in **The Indian Express** dated 23rd July, 2020, observed:

The initiation of contempt proceedings by the Supreme Court, suo motu, against lawyer-activist Prashant Bhushan for his tweets, is off-key and jarring, not least because of its timing. At a time when matters affecting

citizens' lives and livelihoods vie for its attention, when the pandemic has set off social and economic distress at an unprecedented scale, when questions persist about the effectiveness of the state's response, when crucial constitutional cases have continued to drag on for years — like the electoral bonds case — and when the court has shown little urgency in matters in which delay could render the case infructuous — as in habeas corpus petitions stemming from detentions in Jammu and Kashmir — two tweets have riled Their Lordships. For the court, in this moment, to invoke its contempt jurisdiction with alacrity against criticism of it is disappointing, and disturbing.

In fact, particularly in times such as these, the court needs to take the high road, show broader shoulders, instead of taking to task a public interest lawyer whose work has spurred legislation and made an invaluable difference in matters ranging from public corruption to pollution and displacement. Bhushan's comments on Twitter, the court has said in the notice issued to him on Wednesday, "have brought the administration of justice in disrepute and are capable of undermining the dignity and authority of the institution ... and the office of the Chief Justice of India in particular...". Social media is not exactly suited for nuance, for the on-the-one-hand and on-the-other argument. Five years ago, in Shreya Singhal, the apex court expanded the contours of freedom of speech and

Article 19 to this noisy space. The Supreme Court's contempt case against Bhushan shrinks that space — and itself.

A copy of the Indian Express editorial dated 23rd July, 2020 is annexed as **Annexure** C8 (253)

27. Many senior advocates also spoke to the media expressing their displeasure in the initiation of suo moto contempt on the respondents tweets as below:

*"It is tragic that some judges invoke the court's "dignity and authority" while acting in a way that undermines it, said **Navroze Seervai**. The shoulders of a court should be broad enough to withstand criticism, said **Raju Ramachandran**. The two tweets don't seem to have transgressed into contempt, said **Sanjay Hegde**. It would appear to be a case of shooting the messenger, said **Aspi Chinoy**. The four senior advocates spoke to Bloomberg Quint on a new contempt of court case that the Supreme Court has taken up suo moto or of its own accord."*

A copy of the Bloomberg Quint article dated 23rd July, 2020, is annexed as **Annexure** C9 (254-257)

28. The Restatement of Values of Judicial Life (as adopted by full bench of the Supreme Court on May 7, 1997, states:

"1. Justice must not merely be done, it must also be seen to be done. The behaviour and conduct of members of the higher judiciary must reform the people's faith in the impartiality of the judiciary. Accordingly, any act of the judge of the Supreme Court or a High Court, whether in official or personal capacity, which erodes the credibility of this perception has to be avoided."

A copy of the The Restatement of Values of Judicial Life is annexed hereto as **Annexure** C10 (258-259)

29. **H.M Seervai** in his book Constitutional Law of India has said at Page737,

"10.71 ....Scurrilous or abusive attacks on a judge would shake the public confidence, and would interfere with the administration of justice. But a judge who makes public pronouncements which throw a grave doubt on his impartiality, himself becomes an offender against the administration of justice. And since there is no way of setting such a judge right except by impeachment, a cumbrous procedure seldom resorted to, the interest of justice itself requires that there should be public criticism of the impropriety of marking such public pronouncement. A judge who makes extra judicial pronouncements which show that he lacks impartiality, departs from the line of conducted dictated by his office."

30. This extended discussion of the scope and limits of public criticism of the judges yields three principles for not curtailing such criticism. First, such a criticism must be *permissible* in any democracy; citizens must be able to exercise their right to freedom of speech. Second, it is *desirable* for healthy functioning of judiciary itself; citizens should be encouraged to perform this useful function. Thirdly, in special circumstances where the conduct of some judges might jeopardize independence of judiciary or its credibility in the eyes of the public, open criticism is *necessary* to safeguard the constitutional order; citizens who fail to speak up against such judicial conduct would be failing in their fundamental duty to defend the republic. It is my bona-fide belief, buttressed by the aforementioned opinions of the media, commentators, lawyers and indeed former and sitting judges of the Supreme Court, that we are going through such a phase in the history of our republic when keeping quiet would be dereliction of duty, especially for an officer of the court like myself. There are moments in history when higher principles must trump routine obligations, when saving the constitutional order must come before personal and professional niceties, when considerations of the present must not come in the way for discharging our responsibility towards the future. My tweets are nothing but a small attempt to discharge this duty at the present juncture in the history of our republic. In this context and without prejudice to the above, I would like to explain why I said what I did in these tweet. Anyone may disagree with my views but that would not render my bonafide opinion to be contempt of court.

Tweet dated 29th June 2020

31. The first tweet relied upon as the basis of the alleged contempt is dated 27th June 2020 and is as follows:

> *"CJI rides a 50 lakh motorcycle belonging to a BJP leader at Raj Bhavan Nagpur, without a mask or a helmet, at a time when he keeps the SC in Lockdown mode denying citizens their fundamental right to access justice!"*

32. At the outset I admit that I did not notice that the bike was on a stand and therefore wearing a helmet was not required. I therefore regret that part of my tweet. However, I stand by the remaining part of what I have stated in my tweet. I tweeted the above because I was increasingly anguished by the lack of regular physical functioning of the court that was leading to the hearing of very few matters and that too by the unsatisfactory mode of video conferencing. Due to the COVID pandemic, the subsequent lockdown and the humanitarian crisis it had created, with the Supreme Court not functioning regularly, access to justice was seriously imperiled.

33. Even before the lockdown was announced on the 24th of March, the Supreme Court had suspended its regular

functioning. Many urgent matters involving very urgent and serious issues such an habeas corpus petitions in the Kashmir context, petitions challenging the constitutionality of Citizenship Amendment Act, petitions challenging the abrogation of Article 370, bail petitions, electoral bonds matters etc, were not being heard because of this lack of regular functioning since the Supreme Court had restricted its hearing to urgent matter only. Many government offices and institutions in Delhi had resumed regular functioning. While the Chief Justice who has ultimate administrative authority over the Supreme Court was not allowing regular functioning for four months because of the COVID pandemic, he was seen on a motorcycle in a public place with several people around him, without a mask. This seemed incongruous to me. The part in my tweet about the bike costing 50 lakhs and belonging to a BJP leader is a fact which had been detailed by many people on social media. The tweet was in no way intended to undermine the dignity of the court or the office of the Chief Justice of India. Even before the national lockdown was announced on March 24th, the Supreme Court issued a circular dated 13th March, stating that the "*functioning of the Courts shall be restricted to urgent matters with such number of Benches as may be found appropriate.*" Further by circular dated 23rd March stated, "*The Hon'ble Benches may be constituted to hear only matters involving extreme urgency...*" A copy of the Circulars dated 13th March, 2020 and and 23rd March, 2020 are annexed as **Annexure** C11 (260-263) Screen shots of

tweets dated 29.07.2020 with details of the bike registration are annexed as **Annexure** C 12 (264-265)

34. At the best of times, the Supreme Court had a huge backlog of cases and with limited and difficult access for the poor. During a pandemic with the limited court functioning, redress for the hardship faced by the poor and marginalized, seemed even bleaker. The lockdown of the court was causing great distress to litigants and lawyers and a lot of people had taken a dim view of this. It was not just my opinion that the Supreme Courts limited functioning was hindering the fundamental right to access justice, but even various associations such as the Supreme Court Bar Association, the Bar Council of India, the Supreme Court Advocates on Record Association and legal observers and former judges and advocates had also passed resolutions and written articles questioning the lockdown of the Supreme Court and restricted hearing of selected urgent matters only.

35. In an interview to Karan Thapar for *The Wire*, **Justice AP Shah**, former Chief Justice of the Delhi and Madras High Courts said he was *"thoroughly disappointed"* with the Supreme Court. An excerpt from the article on the story is below:

Differing with Chief Justice S.A. Bobde's view that,

"this is not a situation where declaration of rights has much priority or as much importance as in other times",

Justice Shah said:

"This is not correct...(the) Court's duty is more onerous in times of crisis."

Justice Shah also questioned,

"why only a few judges are functioning and why aren't all judges working from their homes?"

A copy of the interview dated 5th May 2020 is Annexed as **Annexure** C13 (266)

36. On the 3rd of June, 2020, the **Supreme Court Bar Association** wrote to the Hon'ble Chief Justice of India with a proposal to resume normal working of the Supreme Court, since there was now no sign of the COVID pandemic going away. The letter stated:

"But the challenge of COVID 19 is far from over and there is no sign of it going away soon. It must therefore be faced in a sensible and safe manner. But at the same time, Court's normal functioning may begin, though in a gradual way. Supreme Court is not just the Highest Court of the Country, but is one of the most Respected Institution of the Country, perhaps the most respected if I may be permitted to say proudly. Its glory must remain for all times, including during crisis period that we are going through.....Now that even the Government of

India has allowed graded opening of the Country, I do hope and pray that Bar's just request will indeed receive a positive and immediate response."

A copy of the SCBA letter to the Chief Justice of India dated 3rd June 2020 is annexed as **Annexure** C14 (267-280)

37. On the 20th of July, 2020, the **Supreme Court Bar Association and Supreme Court Advocate-on-Record Association** held a joint meeting to discuss and examine the systems, methods and suggestions to reopen the Courts, and in particular, the Supreme Court of India, which has been working on limited basis under severely constrained "*virtual courts*" following the pandemic caused by the Corona virus. Excerpts from the joint resolution released after the meeting are as follows:

SCBA and SCAORA have, during the lockdown period passed various resolutions pertaining to the unsatisfactory functioning of the virtual hearings by the Hon'ble Supreme Court as also the issues cropping up during e-filing. SCBA and SCAORA have stated that a majority of the lawyers were not comfortable with the virtual Court hearings. The common feedback seems to be that the lawyers are unable to present their cases effectively on the virtual platform presently available..... The working of the Supreme Court lays down the parameters for the subordinate courts. The

limited functioning of the Supreme Court has adversely impacted the dispensation of justice. While litigants continue to suffer, the lawyers, who are the officers of the court, are also facing acute hardships. The Hon'ble Supreme Court has now decided to also hear regular matters and final hearing matters through the virtual medium. While it is undoubtedly the prerogative of the Hon'ble Court to list matters for hearing, it is the lawyers who have to argue those matters professionally. It is not possible for a lawyer to do justice to a case if called upon to argue on the virtual because of the infirmities in the working of those applications esp those involving voluminous record and/or the appearance of the aforesaid issues that makes the hearing illusionary. .....The resumption of court hearings of all class of matters is imperative."

A copy of the resolution dated 20th July 2020 is annexed as **Annexure** C15 (281-284)

38. In Suo Moto Writ Petition no. 8 of 2020, In Re: Financial aid for members of bar affected by pandemic, vide order dated 22nd July 2020, the Supreme Court has itself admitted that with the courts being closed, lawyers have been deprived of the sources of earning their livelihood. Hence, the fact that the courts are in "lockdown" is admitted by the Supreme Court itself, confirming what I had stated in my tweet. The order states:

"...We are conscious of the fact that the advocates are bound by Rules which restrict their income only to the profession. They are not permitted to earn a livelihood by any other means. In such a circumstance, the closure of the courts has deprived a sizable section of the legal profession of income and therefore livelihood. In these dire circumstance there is a constant demand to enable the resumption of the income from the profession by resuming the normal functioning of Courts in congregation..."

A copy of order dated 22nd July 2020 is annexed as **Annexure** C16 (285-288)

Tweet dated 27th June 2020

39. The second tweet relied upon as the basis for alleged contempt is as follows:

"When historians in future look back at the last 6 years to see how democracy has been destroyed in India even without a formal emergency, they will particularly mark the role of the Supreme Court in this destruction, & more particularly the role of the last 4 CJIs."

40. I stand by my opinion expressed in the tweet above and will in the succeeding paragraphs explain the basis for making such a statement by explaining why I strongly believe that:

a) democracy has been substantially destroyed during the last six years;

b) by its acts of commissions and omissions, the Supreme Court has allowed the emasculation of our democracy; and

c) the role played by the last four CJIs has been very critical in the above mentioned process.

I will deal with these issues in this order.

The undermining of democracy in the last six years

41. Various political scientists across the world have noted and opined that real democracy in any country or society can be destroyed while all the trappings and institutions and rituals of democracy like judiciary, election commissions, regulatory institutions, continue to exist on paper. However, these can be hollowed out while retaining the trappings and vestiges of these rights and institutions on paper. In ***How Democracies Die***, a recent scholarly book, **Professors of Government at Harvard University, Dr. Daniel Ziblatt and Dr. Steven Levitsky,** have documented how democracies can die a slow death as under:

> *Blatant dictatorship – in the form of fascism, communism, or military rule – has disappeared across much of the world. Military coups and other violent seizures of power are rare. Most countries hold regular elections. Democracies still die, but by different means.*

Since the end of the Cold War, most democratic breakdowns have been caused not by generals and soldiers but by elected governments themselves. Like Hugo Chávez in Venezuela, elected leaders have subverted democratic institutions in Georgia, Hungary, Nicaragua, Peru, the Philippines, Poland, Russia, Sri Lanka, Turkey and Ukraine.

Democratic backsliding today begins at the ballot box. The electoral road to breakdown is dangerously deceptive. With a classic coup d'état, as in Pinochet's Chile, the death of a democracy is immediate and evident to all. The presidential palace burns. The president is killed, imprisoned or shipped off into exile. The constitution is suspended or scrapped.

On the electoral road, none of these things happen. There are no tanks in the streets. Constitutions and other nominally democratic institutions remain in place. People still vote. Elected autocrats maintain a veneer of democracy while eviscerating its substance.

Many government efforts to subvert democracy are "legal", in the sense that they are approved by the legislature or accepted by the courts. They may even be portrayed as efforts to improve democracy – making the

judiciary more efficient, combating corruption or cleaning up the electoral process.

Newspapers still publish but are bought off or bullied into self-censorship. Citizens continue to criticize the government but often find themselves facing tax or other legal troubles. This sows public confusion. People do not immediately realize what is happening. Many continue to believe they are living under a democracy.

Because there is no single moment – no coup, declaration of martial law, or suspension of the constitution – in which the regime obviously "crosses the line" into dictatorship, nothing may set off society's alarm bells. Those who denounce government abuse may be dismissed as exaggerating or crying wolf. Democracy's erosion is, for many, almost imperceptible.

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Institutions alone are not enough to rein in elected autocrats. Constitutions must be defended – by political parties and organized citizens but also by democratic norms. Without robust norms, constitutional checks and balances do not serve as the bulwarks of democracy we imagine them to be. Institutions become political

weapons, wielded forcefully by those who control them against those who do not.

This is how elected autocrats subvert democracy – packing and "weaponizing" the courts and other neutral agencies, buying off the media and the private sector (or bullying them into silence) and rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox of the electoral route to authoritarianism is that democracy's assassins use the very institutions of democracy – gradually, subtly, and even legally – to kill it.

A copy of the article published by Dr. Daniel Ziblatt and Dr. Steven Levitsky in *The Guardian* dated 21.01.2018 is annexed hereto as **Annexure** C17 (289-292)

42. This picture of the death of democracy very much fits what we have witnessed in India. Over the last 6 years under the present government, our country has witnessed a systematic dismantling of democracy in favour of electoral authoritarianism. Democracy is not just a rule of elected majority. A rule by elected majority can be called democratic only when the majority is constrained by some basic rules of the game. These Constitution provisions prevent the majority from doing whatever it might wish to do through two devices. One, there are some inviolable rights of the citizens that a

government cannot take away. Two, the political majority must exercise its powers through well established procedures and institutions that cannot be bypassed. The last six years have witnessed dismantling of both the constitutional rights and the constitutionally mandated arrangement of autonomous institutions. As a result majority rule has become a majoritarian rule; electoral democracy has degenerated into electoral authoritarianism described by the authors of "How Democracies Die".

43. Though the Superior Courts especially the Supreme Court have been entrusted with the responsibility by our constitution to safeguard democracy and our fundamental rights and ensure proper functioning of regulatory institutions, it can be seen that in the last six years as the spirit of democracy was being extinguished in this country by throttling of fundamental rights and transgressions of delineated powers by the executive and legislature and subverting of our institutions, the Supreme Court largely failed in it's duty to protect these and thus failed to prevent the subversion of our democracy as we will see. However, before dealing with the action and inaction of the Supreme Court on these aspects, I will first advert to the systematic dismantling of democracy by the executive and legislature in the past six years.

Erosion of rights:

44. Freedom of speech and right to dissent - During these years we have seen an unprecedented assault on the freedom of speech and the right to dissent. Persons critical of the government have been assaulted on the streets by lynch mobs which are patronised by the government and a complicit police; in many cases they have been charged with sedition, despite the fact that the Supreme Court had injuncted the use of this law for a situation where there is no incitement to violence or public disorder. Those who escape the lynch mobs or sedition charges have had to face the wrath of an organised lynch mob on the social media. This abuse is also sometimes picked up and amplified by the sections of the mainstream media which have become mouthpieces of the government. Dalits and minorities have especially borne the brunt of lynch mobs who are confident that the government and police will not act against them. Documentation of cases of lynchings have shown three stark facts. Firstly, almost all of the hundreds of cases of mob lynching has been directed against muslims and dalits Secondly, that in almost all cases, the perpetrators are associated with assorted saffron groups who are connected with the BJP/RSS or at least enjoy their protection and that of the governments run by the BJP. Thirdly, that the police rarely act against the perpetrators unless compelled to by courts and often act against the victims themselves.

45. Minority rights are essential to any political system that calls itself democratic. Over the last six years, however, the constitutional rights of the religious minorities have been

systematically eroded, reducing them, especially the Muslims, to the de-facto status of second rate citizenship. Much of this erosion took place through informal practices of exclusion and discrimination by the state and a campaign of disinformation and hatred by theruling party and its affiliates. False information or fake news which is designed to generate hate against Muslims in particular, is being generated and spread on a mammoth scale by the social media organisation affiliated with the BJP and its assorted lapdog media. This has created a feeling of hopelessness and helplessness among large sections of minorities in particular, as well as dalits, especially when they see the administration including the judicial administration being reduced to bystanders. The use of draconian laws like UAPA and NSA particularly on hapless sections of minorities and Dalits has accentuated the injustice and the climate of fear among them. This lowering of the quality of citizenship was formalized by the Citizenship (Amendment) Act passed by the parliament in December 2019. By introducing religion as a category for consideration of citizenship and by excluding Muslims from neighboring countries from fast-track citizenship, this Act has dealt a body-blow to the principle of equal citizenship and non-discrimination against minorities.

46. Dismantling of rights is now being extended to the right to life itself. Recently, the Delhi Police in the guise of investigating riots which took place in Delhi after three months of exemplary peaceful protests against the Citizenship Amendment Act, has turned the investigation itself into a conspiracy to target

peaceful activists and protestors, in the guise of an investigation. This has been achieved by a) ignoring complaints against goons and police officers who are seen on video violently assaulting people; b) letting off leaders of the BJP who are seen on video clearly instigating mobs to violence; and c) arresting or charging innocent and peaceful protestors who can be seen on video calling for peace and non violence. The same police also entered the Jamia campus and brutally beat up students, even those who were in the library. They even smashed CCTV cameras to hide the evidence. No police officer has been brought to book for that brutal assault on Jamia. On the other hand, innocent and peaceful students have been charged under the draconian UAPA.

47. Violence against religious minorities and socially marginalized groups has been extended to ideological dissenters as well. On 5th January this year, a mob of armed goons were allowed to enter JNU under the gaze of the Delhi Police. They went on a rampage, beating up students and teachers inside the campus. Yet despite many of them being identified on video, no action has been taken against them or against the police officers who virtually escorted them in and out of the campus. Without any fear of the courts, the police has not been bothered to complete an inquiry into this incident.

48. For the citizens of Jammu and Kashmir, even the pretence of democracy has been given up. The parliament did away with the special status of the state of Jammu and Kashmir without

the constitutionally mandated consent from the Constituent Assembly of the state. Overnight, the state was split and converted into a union territory without any consultation with its people or their elected representatives. For one year now, the people of Jammu and Kashmir, especially those living in theKashmir valley, are forced to live without elementary democratic rights, while their former Chief Minister is imprisoned without trial.

49. There is a serious erosion in social and economic rights of the people. The condition of the poor and the marginalised has worsened with massive unemployment and job loss in the last six years and increasing agrarian distress. The economic distress has been hugely aggravated by the unplanned and brutal lockdown due to the Covid crisis. It has led to the loss of more than 10 crore jobs, sudden loss of livelihoods and decline in income.

Assault on institutions

50. A democracy constrains unbridled majority rule by mandating a procedurethrough which power must be exercised. Our constitution provides for an architecture of autonomous institutions that can keep the elected executive in check. The most serious assault over the last six years, an assault with long lasting effect on our Republic, has however been on our institutions. These include Constitutional bodies like the Election Commission, the CAG as well as statutory bodies like

the CVC, the CBI, Lokpal, and also universities and other educational institutions and bodies.

51. For the first time in more than three decades, fingers are being pointed at the independence of the Election Commission and the CAG. We have seen a sharp erosion of the independence of the Election Commission and now we find that important decisions of the Election Commission, especially the announcement of dates of elections and the enforcement of its model code of conduct are increasingly partisan and virtually decided by the government. Officers from Gujarat who are said to have been close to the Prime Minster and Home Minister, Amit Shah, have been appointed to the Election Commission. It is because of the erosion of public confidence in the independence of the Election Commission that people have become very nervous about the integrity of the electronic voting machines; and there is now therefore a persistent demand especially by the opposition to go back to paper ballots.

52. Elections in the last six years are being increasingly influenced by money power. This is partly because the Election Commission has failed to enforce the limits on spending by political parties. But also because parties and candidates have begun to get unlimited amounts of money from their corporate cronies. Apart from not fixing limits for spending by political parties and not making laws to ensure that parties and candidates receive and spend money only through banking

channels (cashless transactions which the PM wanted to impose on the country through demonetisation), three retrograde changes in the law of election funding have increased the role of money power and corporate hijacking of elections. The Foreign Contribution Regulation Act brought primarily to prevent parties, candidates and public servants from getting and being influenced by foreign funds, has now been amended to allow parties to receive foreign funds through subsidiaries of foreign companies. The limits on corporate donations to parties and candidates, which was earlier 7.5% of their profits, has been removed to allow unlimited corporate funding. Worst of all, a new anonymous instrument of political funding has been introduced through the instrument of electoral bonds, which are bearer bonds and which allow anonymous funding of political parties even through banking channels. Thus the path has been cleared for payment of bribes by corporations to the ruling parties through the device of electoral bonds which guarantee the anonymity of their donors. It is not surprising therefore that the BJP has received more than 90% of the thousands of crores of funding through electoral bonds in the last 3 years since they have been introduced.

53. All the above amendments of electoral funding which have been achieved by the dubious device of smuggling these amendments in through a Finance Bill which avoids the amendments being taken to and voted in the Rajya Sabha, where the ruling party didn't have a majority. The device of money Bill to bring about amendments to various laws which

have nothing to do with the Consolidated fund of India, has been increasingly resorted to by the present government, making a mockery of the Constitutional requirement of bills being passed by both Houses of parliament.

54. Parliament itself has seen a steady erosion in the quality of its deliberations. Critical laws and Constitutional amendments have been passed in a few hours, if not minutes. The institution of parliamentary committees has also been virtually done away with, with fewer and fewer proposed laws being referred to them, where healthy discussion and public consultation could take place. Thus, far from making democracy more participatory, even in terms of allowing prior disclosure of Bills proposed to be passed or allowing any public participation in the laws to be made, even the present nominal representative democracy has been steadily emasculated.

55. In the audit of the Rafale contract, the government predicted in a note given to the Supreme Court, three months before the CAG report was finalised, that the report would redact the details of pricing. This indeed happened three months later when the CAG report on the Rafale purchase was finalised and given to the PAC. The redaction of pricing details from a CAG report is not merely unprecedented, it is contrary to the CAG Act which requires the entire report to the sent to the PAC and tabled in Parliament. The fact that the government knew three months in advance that the CAG would bow to this illegal demand of the government to redact pricing details from its

report, demonstrates the extent to which the independence of the CAG has been compromised by the government.

56. Despite the Lokpal Act being passed, for many years the appointment of a lokpal had been steadily stonewalled and even the inclusion of the leader of opposition in the selection panel of the Lokpal had been obstructed by this government. It also amended the Lokpal Act with alacrity to exempt public servants from making their asset disclosures to the government. Thereafter, even when the government was forced to appoint a Lokpal, it has appointed people who have not taken up even a single case for investigation for over a year now. This has made the institution totally ineffective. Also, for more than six years, the Whistleblower Act has not been notified. Instead, an amendment has been brought to the Act which will completely stultify the law. The amendment says that any whistleblower who provides any more information about corruption in the government than what an ordinary citizen can obtain under the Right to Information Act, would lose his protection as a whistleblower and would be liable to be prosecuted under the Official Secrets Act. Instead of repealing this colonial Official Secrets Act, this government now threatens to use it against journalists who have published documents exposing the corruption, violation of rules and the interference of the PMO in the Rafale contract. Apart from using the Official Secrets Acts, this government and its officers have also sought to use Contempt of Court as a weapon to intimidate activists and silence criticism of the government.

57. There has been a decline in the independence of the CBI. When a CBI Director, whose tenure was protected, threatened to investigate the Rafale contract, he was outsed in a midnight coup by the government and one Nageshwar Rao was appointed as Acting Director, who affected 40 transfers in the CBI within a day, at the behest of the government. The Central Vigilance Commission was for years headed by an officer who played a key role in suppressing incriminating documents recovered in the raids on the Sahara and the Birla Group of Companies which showed the PM and other BJP Chief Ministers as recipients of large sums of unaccounted cash. Another gentleman appointed as Vigilance Commissioner had been indicted by the CVC itself for having fabricated the confidential report of his subordinate senior officer of a bank of which he was Chairman, with the object of destroying the career of that officer.

58. The National Investigation Agency has become a particularly favoured tool of the government for harassing and hounding activists who are critical of the government. The NIA has been used to frame some of the country's finest human rights activists. The political use of the NIA can be seen from the fact that the Bhima Koregaon case, in which some of our leading human rights activists have been targeted and which was earlier being handled by the Pune police, was transferred to the NIA by the Central government soon after a new non BJP government was formed in Maharashtra.

59. During the last six years, the Right to Information Act has been eroded by throttling the Information Commissions and not filling the vacancies in the Commission. Even when the vacancies are directed to be filled by court orders, pliable bureaucrats have been appointed without any transparency in the selection.

60. Decline in financial regulatory institutions has meant that crony capitalism has grown enormously, with policies being increasingly controlled by large crony capitalists who ensure that policies and government decisions are tailored for their economic benefit and to the detriment of the common people. Our banks and financial institutions have been plundered by these crony corporates who now owe lakhs of crores of unpaid debt to our banks. Many of them have been allowed or made to flee the country and have comfortably ensconced themselves in London or tax havens like Antigua or Bermuda, while our government makes a show of searching for them, or seeking to extradite them. The Reserve Bank's independence has also been greatly eroded. Raghuram Rajan was shunted out as the RBI Governor when he disagreed with the government on several critical aspects and in particular wrote to the government about investigating and taking action against many high networth individuals who had taken huge loans from banks and constituted a high flight risk. His successor Urijit Patel, was shunted out after he disagreed with the government's

desire to appropriate more than one lakh crores from the RBIs reserves.

61. Universities and educational institutions and regulatory bodies have particularly been in the cross hairs of this government. Virtually every appointment of Vice Chancellors in universities have been made of people who are associated with the RSS or have been close confidants of the present rulers. Thus many appointments of Vice Chancellors as well as other educational regulatory bodies have been of people who have no academic stature suitable for their jobs but have been placed there only due to their saffron links. Such persons have systematically not only crushed dissent but also dismantled the spirit of inquiry and critical thinking in these educational institutions. Suggestions have been made by these persons to put up tanks in the premises of their universities to instill "nationalism" among students. Some of our finest universities like JNU, BHU, Hyderabad University has especially borne the brunt of this assault.

62. The subversion of the independence of the mainstream media is near complete even in the absence of formal press censorship. More than 90% of the mainstream media has been reduced to becoming the propaganda arm of the government, going to absurd lengths to justify actions of the government which are otherwise totally unjustifiable. Some examples of this has been the coverage of the disastrous decision for demonetisation, the disastrous and brutal lockdown in the name of Covid, as well as

the government's response to China's incursions into Ladakh. Prime Time debates on most TV channels are not very subtle attempts to fan anti Muslim prejudice among people, in line with the ruling party's agenda and its social media campaign. Fake news has become the order of the day. So much so, that a new term, '*Whatsapp university*' has been coined to refer to people who derive their information from Whatsapp forwards, which propagate falsehoods and outright fabrications, particularly in aid of fanning anti-Muslim prejudice. The submission of much of the mainstream media to the government has been brought about by a combination of inducements, threats, as well as media capture through crony capitalists. Many media organisations have come to be owned by businessmen who have various corporate interests and can easily be brought to heel and do the governments bidding by means of government incentives and disincentives, by way of plum contracts and threats of being victimized by the government's investigative agencies like the CBI, ED, Income Tax Department, etc. Others are bought by being given 100s of crores of government advertisements as well as packets which are supposed to go regularly to influential anchors and editors. There are only a few in the mainstream media who have refused to succumb to such inducements and threats or corporate capture by crony capitalists. The government seeks to extend its control over social media and internet media as well by threatening individual journalists and editors with FIRs of sedition, threatening and putting pressure on those few independent trusts that fund some of these internet media

organizations, as well as by influencing and bringing to heel, major social media platforms like Facebook, Twitter, Instagram etc.

Role of the Supreme Court and the last four CJIs over the past six years

63. In our constitution, the judiciary has been assigned the pivotal role of being the guardian of the constitution and fundamental rights of the people. It has been bestowed with a great deal of independence and is expected to check the executive and the legislature when they transgress the bounds of their powers and in particular when their actions violate fundamental rights of the citizens. It is the judiciary which is also expected to play a critical role in ensuring the proper functioning of other regulatory institutions such as the Election Commission, CAG, CVC, CBI, RBI, etc. In fact, our Supreme Court has played a glorious role in safeguarding our democracy and our institutions and protecting and expanding the scope of fundamental rights over the last 70 years of it's existence.

64. That this Hon'ble Court has held that the edifice of our constitution envisages and promotes 'participative' democracy and such participation of the citizenry is essential to ensure the survival and promotion of democractic values in the country.

Freedom of speech & expression guaranteed to each citizen under Article 19(1)(a) is the most robust check on errors of omissions and commissions committed by various institutions that are creatures of the constitution; be it the Executive, the Legislature, or for that matter the Judiciary. The judiciary has been assigned the duty to ensure that no one institution transgresses its constitutional bounds or constitutional morality.

65. The role of the Supreme Court in allowing this suspension of democracy during the emergency is well documented. For the citizenry at large, *ADM Jabalpur*, continues to be a haunting reminder of how the Supreme Court meekly surrendered to the executive and failed to protect constitutional values and fundamental rights of the citizens (Justice Khanna's hon'ble dissent apart). It has been said that institutions are as strong as the people manning them and ADM Jabalpur is a stark reminder that in the face of pressure from the executive otherwise good judges also succumb to the power of the executive and abdicate their responsibilities to protect the rights of citizens. *ADM Jabalpur* reminds us how learned judges can justify the unjustifiable through convoluted reasoning and legalese. *ADM Jabalpur* reminds us how judges under pressure are capable through convoluted reasoning and legalese of replacing Rule *of* Law with Rule *by* Law. It is a matter of historical record that it was not the institutions and the erudite and learned people manning them that stood up for the Constitution and it's democratic values but ordinary citizens who fought for their democractic rights.

66. Once again over the last six years, we have seen a striking decline in the role of the Supreme Court as being the guardian of the constitution and rights of people. This of course is my bonafide opinion which people can and may disagree with. In any healthy democracy, there needs to be a free and frank discussion about the role of any and every institution, especially an institution as critical as the Supreme Court.

67. Particularly during the term period of last 4 CJIs, the country has seen abdication by the Supreme Court of its constitutional duty to protect basic constitutional values, fundamental rights of citizens and the Rule of Law. At a time when the country witnessed an assault on all democratic norms, liberty of citizens, and the secular fabric, the Supreme Court by various acts of omission and commission acted in a manner that allowed the majoritarian executive at the centre to trample upon the rights of citizens. It seems that basic judicial checks that must be in place before a powerful executive were completely missing. The court surrendered while tyranny and majoritarianism gained a deep foothold in the country. All these egregious assaults on civil rights and on institutions have been allowed to go through, without any accountability, under the benign gaze of the Supreme Court. It is in this political climate that most independent regulatory institutions have capsized and even the Supreme Court has not been able to stand up as a check on the excesses of the government.

68. There has been a concerted attempt by this government to erode the independence of the Judiciary. Even after the attempt to bring back the executive into the role of selecting judges through the Judicial Appointments Commission was scuttled by the Supreme Court, we have seen this government brazenly scuttling appointments of judges recommended by the collegium, by just sitting on those names that it finds inconvenient; in particular, recommendations of judges from amongst minority communities. Apart from sitting for years on hundreds of recommendations, they have even refused to appoint inconvenient judges whose appointments have been reiterated repeatedly by the SC collegiums, in gross violation of the law.

69. **Justice Madan Lokur**, former Judge of the Supreme Court, in an article in the Indian Express wrote on the manner in which the government was blocking appointments recommended by the collegiums:

> *"As recently as in late August, the Economic Times reported that the CJI had written to the law minister that 43 recommendations made by the collegium were pending with the government and the vacancies in the high courts were to the extent of about 37 per cent. Also, the collegium could not consider the appointment of 10 persons since some information was awaited from the*

government for varying periods. Who is calling the shots — the government?

Some more questions. On April 8, the collegium recommended the appointment of Justice Vikram Nath, the senior-most judge of the Allahabad High Court as the chief justice of the Andhra Pradesh High Court. Sometime later, the government referred back the recommendation for reconsideration. On August 22, the collegium reconsidered the recommendation "for the reasons indicated in the file" and recommended his appointment as the chief justice of the Gujarat High Court. The reasons indicated in the file are not known and it would certainly be in the interest of the institution if they are disclosed. If the judge was unfit or unsuitable for appointment as the chief justice of Andhra Pradesh, how did he become suitable for Gujarat?

On September 5, the collegium recommended that Justice Irshad Ali be made a permanent judge of the Allahabad High Court. The recommendation was made after considering (i) the opinion of judges of the SC conversant with the affairs of the Allahabad High Court, (ii) report of the committee of judges to evaluate his judgments, (iii) possible complaints against one of the judges under consideration (could also be Justice Ali),

(iv) additional information received from the chief justice of the Allahabad High Court and (v) observations of the Department of Justice and (vi) an overall assessment. What did the government do? It rejected the recommendation (without furnishing any reason or justification) and on September 20 extended his term as an additional judge by six months. Did anybody protest?

Justice Akil Kureshi, the senior-most judge of the Gujarat High Court, was recommended on May 10 to be the Chief Justice of the Madhya Pradesh High Court after considering all relevant factors and being found suitable in all respects. Guess what? The government sent two communications to the CJI on August 23 and 27 along with some material. On reconsideration of the communications and the material, the collegium modified its recommendation on September 5 and recommended his appointment as the Chief Justice of the Tripura High Court. Again, the contents of the communications and the accompanying material are not known. Is there something so terribly secret about them that it would not be in the interest of the institution to make a disclosure? As in the case of Justice Vikram Nath, it would be worth asking how Justice Kureshi is fit or suitable for appointment as the Chief Justice of the Tripura High Court and not of the Andhra Pradesh High Court. Have we not often heard the SC say that sunlight

is the best disinfectant? And then, electric light the most efficient policeman? More than a month has gone by and even this recommendation has not been acted upon by the government. Any protest?"

A copy of the article dated 16th October, 2019, titled, "*Collegium's actions show that the NJAC which was struck down four years ago is back, with a vengeance*" is annexed as **Annexure** C18 (293-295)

70. The assault on the judiciary has led to the Supreme Court having virtually collapsed and it has once again failed to act as the guardian of the Constitution and custodian of fundamental rights of the people. Thus even habeas corpus petitions and the challenge to the lockdown and denial of internet in Kashmir were not heard for months. Even when they were heard, they were frequently adjourned without any substantive relief. The Supreme Court also turned a deaf ear to the serious assault on Jamia and JNU. A new jurisprudence of sealed covers was evolved, to allow the court to accept and act upon unsigned notes handed over by the government to the court, without even being shown to the opposite party, in gross violation of natural justice. This sealed cover jurisprudence allowed the Supreme Court to put the lid on the case involving the mysterious death of Judge Loya, who was trying Shri Amit Shah for conspiracy to murder. It also allowed them to put the lid on the Rafale defence scam. It was used extensively in the case monitoring the creation of the National Register of Citizens in Assam.

71. The deference of the Supreme Court to the government could however be seen most starkly during the lockdown, when the cases involving the violation of rights of the migrant labour came up and the court just deferred to the governments wisdom without even seriously examining the violation of the rights of these people, leading to their destitution, starvation, and forcing them to walk back home, sometimes thousands of kilometres. In all these hearings, curiously, the Solicitor General Tushar Mehta, who has become the governments point-man for all such politically sensitive cases, was allowed to be present - even without a court notice to the government or the filing of a caveat by the government; all in violation of rules. Often, the court had copies of notes and a report handed over by the Solicitor General, without any other parties having access to it and which often formed the basis of the orders of the court in these cases.

72. Here is an example of a few cases, where either by omission or commission, the Supreme Court during the tenure of the last four CJIs allowed the Government to have its way in my opinion and other practitioners of law.

Tenure of (Retd.) Hon'ble Chief Justice Kehar

Sahara Birla case

73. In October 2013, the income tax (IT) department and the Central Bureau of Investigation conducted simultaneous raids

at various establishments of the Aditya Birla group of companies. In these raids, cash worth Rs 25 crore was recovered from their corporate office in Delhi along with a large number of documents, note-sheets, informal account books, emails, computer hard disks and the like. The CBI quickly handed all the papers over to the IT department, which did an investigation in this matter. The department questioned the DGM accounts, Anand Saxena, who was the custodian of the cash which was recovered. He said that the cash was received by the company from various hawala dealers, who used to come almost daily or sometimes on alternate days and give Rs 50 lakhs or 1 crore in cash. The IT department also questioned one such hawala dealer whom Anand Saxena had mentioned, and this dealer also admitted that he had been doing that.

74. Saxena also said that this cash would thereafter be delivered to certain persons, specified by the group president, Shubhendu Amitabh. And apart from himself, four other senior officer – whom he named – were deputed to deliver the cash. Saxena further said that he did not know the purpose behind the cash payments to those persons.

75. Some of the documents noting the cash received and payments made were in the handwriting of Anand Saxena, which indicated Rs 7.5 crores paid to the ministry of environment, with the noting of "(Project J)" scribbled next to the entry. The documents also showed various other payments for

environmental clearances of Birla projects. The dates of these payments could easily be correlated with the environmental clearances obtained for these projects.

76. The emails recovered from the computer of Shubhendu Amitabh revealed a number of messages which indicated payments to various DRI (Directorate of Revenue Intelligence) officials for the purpose of slowing down/dropping investigations, which the agency was conducting against the under-invoicing of coal exports and other irregularities by the Birla group of companies.

77. Amitabh's emails also contained one cryptic entry which said "*Gujarat CM 25 crores (12 paid rest ?)*".

78. The IT department then prepared a detailed appraisal report in which it concluded that the explanations given by Shubhendu Amitabh about the various payments etc. were not believable and that this matter needs to be further investigated. Unfortunately however, the department did not send the matter to the Central Bureau of Investigation for investigation under the Prevention of Corruption Act – even though the payments to DRI officials, the environment ministry and 'Gujarat CM' etc prima facie, all appeared to have been made to public servants, which constitute offences under the Prevention of Corruption Act. The CBI would have been the designated investigating agency for this investigation.

79. It is not surprising that the UPA government of Manmohan Singh – which was in power when the Birla raid and recoveries took place – did not have this matter pursued, because most of the payments mentioned in the diaries were for officials of the UPA government. However, even after coming to power, the present government, which obviously was in the know of this IT department investigation, did not pursue the matter. Prime Minister in his election rallies at several times mentioned the "*Jayanti tax*", which had to be paid by companies for environmental clearances to then environment minister, Jayanti Natarajan. And any investigation of the recovered papers from Birla would have substantiated that. The reason for present government's reluctance to probe the Birla papers can only be attributed to that one entry – of 'Gujarat CM' for 25 crores – which any reasonable person would assume referred to him, for he was the 'Gujarat CM' at the time the Birla people made their noting.

80. In November 2014, while the Modi government was in office, the IT department raided the Sahara group of companies. In this raid, Rs 137 crore in cash was recovered from the corporate office, along with several computer spreadsheets and note sheets. These recovered documents also showed payments made to public servants. One particular spreadsheet mentioned in detail the dates, amounts and sources from which a total of Rs 115 crore in cash was received during the year 2013 to 2014, with the transactions being on 40 to 50 different days. On the other side was the disbursement of this cash (Rs 113 crore

out of this 115 crore, to be precise) to various people. The disbursement details were consummate and exhaustive as they contained the dates, the amounts, the person who was paid the cash, the place where it was paid as well as the person who went and delivered the cash. In this spreadsheet, the largest recipient with nine entries against his name was 'Gujarat CM Modi Ji'. As per the entries, he was paid a total of Rs 40 crore in nine instalments. The second biggest recipient was the Madhya Pradesh chief minister Shivraj Singh Chouhan, with Rs 10 crore on two dates. There are also payments of Rs 4 crore to the Chhattisgarh chief minister and a payment of Rs 1 crore to the Delhi chief minister (who was Sheila Dixit at that time), among other people. Other recovered note sheets contain details of payments made in 2010 to various persons.

81. Each of these documents was seized and signed by the IT officials, two witnesses and an officer of Sahara. However, again, despite the highly incriminating nature of these documents, the IT department, shockingly, did not hand these over for investigation to the CBI under the Prevention of Corruption Act.

82. The Sahara company had moved the Settlement Commission for settling the case with the IT department under Section 245C of the Income Tax Act. One of the issues before the Settlement Commission was whether or not the payments mentioned in the spreadsheets should be added to the income of Sahara as undisclosed income. The IT department in its statement said

that these payments were clearly genuine since (a) these were accounts maintained over a period of time, (b) that the cash received shown in the spreadsheets matched with the ledger entries of MarCom – the Marketing Communication Company of Sahara. This meant that the dates on which cash was withdrawn from MarCom matched the dates and amounts on which the cash is seemed to be received on these spreadsheets from MarCom. And (c) that the explanations given by Sahara – which sought to question the validity of these documents – were contradictory and did not appear to be correct.

83. It was clear, therefore, that Sahara had not come with clean hands and yet the Settlement Commission absolved Sahara of all criminal liabilities under the Income Tax Act by asking the company to pay tax of a thousand odd crore rupees on their concealed income.

84. Even more interestingly, this case was decided by the Settlement Commission in record time – in virtually three hearings in less than three months, with the ruling coming on November 10, 2016. It was also settled by just two members of the commission since the third member had been transferred out by the government.

85. These documents showed prima facie offences under the Prevention Of Corruption Act, which needed a thorough investigation in accordance with the Supreme Court judgement of the Jain hawala case, where the recovery of cryptic entries in

a diary – which only mentioned initials and amounts paid – was held by the Supreme Court to be enough to merit a thorough court-monitored *investigation*. It is another matter that despite this ruling, the CBI in its investigation into the Jain diaries did not examine the assets of the public servants involved and filed the chargesheet only on the basis of the diaries recovered and thereafter this chargesheet was quashed by the Delhi high court on the grounds that diaries by themselves cannot be enough evidence for prosecuting anybody.

86. The person in charge of the income tax investigations was K. V. Chowdary, who, at the relevant period was holding the charge of member, investigations, in the IT department. In June 2015, he was appointed by the present government as the country's Chief Vigilance Commissioner (CVC). This appointment was challenged by Common Cause in the Supreme Court on various grounds – of scuttling tax investigations and also being involved in the "Stock Guru" scam, in which IT officials working under him were found to have taken crores in bribes from Stock Guru company in return for favours from the IT investigation department.

87. The Birla-Sahara papers issue was raised in the pending case challenging the appointment of Chowdary itself, since the IT department's decision to withhold these documents and not send them to the CBI for criminal investigation constituted a serious dereliction of duty on Chowdary's part.

88. This application was heard in the Supreme Court on November 26, 2016 by a bench of Justice J.S. Khehar and Justice Arun Mishra.

89. In the hearing Justice Khehar said that these documents do not constitute any evidence for investigation and asked us to come back with better evidence. Just before the next date of hearing, three volume Income Tax appraisal report was received by petitioners from the Birla case and on that date it was pleaded with the court that petitioners should be given more time to analyse the appraisal report and file it as additional evidence. The court was reluctant to grant additional time and put up the matter to be heard only two days thereafter. By this time, however, the appointment of a new Chief Justice was coming close. Justice Khehar was the next in line of seniority but the clearance of his name had still not been given by the government despite his name having been recommended by the outgoing Chief Justice. It was submitted by me in the hearing that it would not be appropriate for the bench to push through with the hearing of this matter at a time when Justice Khehar's appointment file is pending with the prime minister, since this case also involved investigations into the payments made to the prime minister as well. After showing some resentment and anger, the court reluctantly adjourned the matter to January 11, 2017.

90. Justice Khehar was sworn in as chief justice on January 4, 2017. On January 11, 2017, two senior judges who would

normally have headed benches in the Supreme Court were made to sit with even more senior judges and a new bench was created headed by Justice Arun Mishra (who would not otherwise be heading a bench), with Justice Amitava Roy as the puisne judge. The Birla-Sahara matter was sent to this bench. The judges heard the matter at some length, and finally dismissed the case saying that since these were not regular books of accounts, therefore, in accordance with the Supreme Court judgement in the Jain hawala case, these did not constitute evidence on the basis of which any investigation could be ordered. In particular, they said that high constitutional functionaries cannot be subject to investigation on the basis of such loose papers. They also used the order of the Settlement Commission to say that the Settlement Commission did not find any proof of these documents being genuine and hence they did not represent the true state of affairs.

91. Supreme Court Senior Advocate and **SCBA President Mr. Dushyant Dave** in his article, dated 14.02.2017, titled "*The Supreme Court Needs to Reconsider Its Judgment in the Sahara-Birla Case*", published by The Wire rightly stated as follows:

> *"Justice Mishra's judgment is based on two findings. First, that the Settlement Commission has called the Birla-Sahara documents "doubtful" and second, that they are of no evidentiary value either because they were*

contained as electronic records or not as regular books of accounts. On both counts, with greatest respect, the judgment suffers from serious legal infirmities by ignoring the fact that the contents of electronic records are admissible under the Evidence Act without further proof of the original and that Section 132(4) and (4A) of the Income Tax Act, read with Section 79 of the Evidence Act, create the legal presumption of such documents as "belonging to the person from whom they are seized" and "to be true" and make statements made in respect of such documents in investigation as evidence. The Supreme Court has itself – in Pooran Mal v. Director of Inspection and ITO v. Seth Bros. – confirmed this position. The Madras, Delhi and Rajasthan high courts have treated such documents as admissible.

A copy of the article, dated 14.02.2017, titled "*The Supreme Court Needs to Reconsider Its Judgment in the Sahara-Birla Case*", published by The Wire is annexed as **Annexure** C19(296-298)

92. A little later, it was discovered that while this case was being heard by Justice Arun Mishra along with Justice Khehar, Justice Misra had celebrated the wedding of his nephew from his official residence in Delhi as well as his residence in Gwalior. This has been mentioned also by Sh. Dushyant Dave, former president of the Supreme Court Bar Association, who had also attended the wedding reception. He stated that a large

number of BJP leaders were present at the event. A photograph of Shivraj Singh Chouhan, the chief minister of Madhya Pradesh, attending the reception at Gwalior also appeared in a newspaper. This is significant because Chouhan was one of the alleged recipients of money in the Sahara spreadsheets – the very matter Justice Mishra was considering in court.

93. The Supreme Court has laid down a code of conduct which says that judges should maintain a degree of aloofness, consistent with their status – which means that they should obviously not socialise with politicians whose cases are likely to come up for hearing before them. It also says that judges should not hear and decide cases involving their friends and relatives. Putting these two together, it is obvious that if a judge invites politicians for personal functions at his residence, a perception arises that these politicians are his personal friends and that the judge must not hear and decide cases involving them.

KAHIKO PUL'S SUICIDE NOTE

94. Shortly after the dismissal of Sahara Birla case, a 60-page suicide note of the late Arunachal Pradesh chief minister Kalikho Pul came in the public domain. Kalikho Pul committed suicide on August 9, 2016, barely three weeks after he was unseated by a judgment of a constitution bench of the Supreme Court headed by Justice Khehar and Justice Dipak Misra. In his suicide note, which was found with his hanging body, and signed and initialled on every page, Pul details the alleged

corruption of various politicians as well of persons closely related to senior members of the judiciary. In particular, the note shows that he is especially anguished at the corruption of the judiciary. He says that prior to the Supreme Court's judgment in the case, which quashed president's rule in Arunachal Pradesh and removed him from office, a demand of Rs 49 crore was made for a favourable judgement by the son of Justice Khehar. He also mentioned that another demand of Rs 37 crores was made by the brother of Justice Dipak Mishra.

95. This suicide note contained a number of very serious allegations of corruption which obviously needed investigation, for which Pul's eldest wife, Dangwimsai Pul, had been making requests to the government. However, the note remained uninvestigated and its copies were kept tightly under wraps and not made available to anybody.

96. The then governor of Arunachal Pradesh, J.P. Rajkhowa, himself went on record to say that he had recommended a CBI investigation into the very disturbing charges made in Pul's suicide note. However, it still remained uninvestigated. It was only in early February that a copy of this suicide note was obtained and published by The Wire, which published this note in the original Hindi and in an English translation, after redacting the name of the judges mentioned in the note. The unredacted note was thereafter published by the Campaign for Judicial Accountability and Reforms (CJAR) in the interest of

transparency and to prevent the spread of rumours about the identities of the redacted names.

97. It is a fundamental principle in law that even a reasonable apprehension of bias in the minds of the litigants constitutes a violation of natural justice and renders the judgment a nullity. The content of the documents recovered in the Birla-Sahara raids as well the contents of the Kalikho Pul suicide note are amongst the most lethal revelations of political corruption in the country and they raise questions about the highest constitutional positions in our country – the Prime Minister and the Chief Justice of India. In hardly any case does one obtain documentation which mentions in such detail, the payments made of large sums of money to political personalities and officials. The Kalikho Pul suicide note, in particular, is like a dying declaration and that too of a chief minister, which should have been treated very seriously in law because of the jurisprudential maxim 'nemo mariturus presumuntur mentri' i.e. a man will not meet his maker with a lie in his mouth.

98. Disturbingly, when a complaint was sent on the administrative side by the wife of Kahiko Pul to Justice Kehar for inquiry under the In House Procedure as regards the allegations in Mr. Pul's suicide note, it was listed on the Judicial side by Justice Kehar before Court No. 14 against the SC Rules and against the In House Procedure for inquiring into complaints. In fact Mrs. Pul had said in her complaint that the matter should be dealt

with by the judges next in seniority to the judges who were accused by Mr. Pul. The matter was withdrawn by Mrs. Pul.

A copy of the complaint of Mrs. Pul is annexed hereto as **Annexure** C 20 (299-301)

99. The people of India have known for a long time the pervasive and rampant corruption in the polity. The Kalikho Pul suicide note has shaken the faith of the people in the integrity of the highest levels of our judiciary. Burying the Birla-Sahara documents and the Kalikho Pul suicide note without investigation will not make the public suspicion go away. In fact, it would only strengthen those suspicions and irredeemably erode the fate of the people in the integrity of the judiciary. It was imperative, therefore, that the contents of these documents were subjected to thorough and credible investigation. Unfortunately, they were allowed to be buried by the Supreme Court.

Tenure of (Retd.) Hon'ble Chief Justice Deepak Mishra

100. The tenure of Justice Dipak Misra from 28-08-2017 to 1-10-2018 was controversial in many respects and had contributed to the decline in the reputation of the Supreme Court as under:

Medical College Bribery Case

101. The facts and circumstances relating to the Prasad Education Trust case, suggest that Chief Justice Dipak Misra may have been involved in the conspiracy of paying illegal gratification in the case. The Chief Justice of India, Justice Dipak Misra presided over every Bench that heard the matter of this medical college which was the subject matter of the investigation in the FIR registered by the CBI. The facts and circumstances which raised reasonable apprehension about the role of Justice Dipak Mishra in Prasad Education Trust matter were as follows:

102. By order dated 1.08.2017 the bench headed by Justice Dipak Misra in the Prasad Education Trust petition ordered that the government consider afresh the materials on record pertaining to the issue of confirmation or otherwise of the letter of permission granted to the petitioner colleges/institutions and that the Central Government would re-evaluate the recommendations of the MCI, Hearing Committee, DGHS and the Oversight Committee. This by itself was not extraordinary. A copy of the order dated 1.08.2017 is annexed as **Annexure** C21 (302-323)

103. On 24th August 2017, a Bench headed by Chief Justice Dipak Misra, granted leave to the Prasad Education Trust to withdraw the said writ petition and to approach the Allahabad High Court. This was certainly unusual, given the fact that Justice Dipak Misra was directly dealing with many other cases of similarly placed medical colleges to whom MCI had refused

recognition. A copy of the order dated 24.08.2017 is annexed as **Annexure** C22 (324-331)

104. Then on the 25th of August 2017 itself, the Allahabad High Court granted an interim order to the Prasad Education Trust, allowing them to proceed with counselling and directing the Medical Council of India not to encash their bank guarantee. Thereafter on 29th August 2017, in hearing the SLP filed by the Medical Council of India from the order of the Allahabad High Court granting relief to the Prasad Education Trust, the Bench headed by Chief Justice Dipak Misra, directed that while the writ petition before the High Court shall be deemed to have been disposed of, liberty is granted to the Prasad Education Trust to again approach the Supreme Court under Article 32 of the Constitution of India. The granting of liberty to the college to approach the Supreme Court again in such circumstances was very unusual. This is compounded by the fact that the interim order of the High Court allowing counselling to continue and thereby admissions to continue, was not expressly set aside by this order disposing of the writ in the medical college in the High Court. A copy of the Allahabad High Court order dated 25.08.2017 is annexed as **Annexure** C23 (332) A copy of the order in the SLP dated 29.08.2017 is annexed as **Annexure** C24 (333-334)

105. Thereafter on 4th September 2017, Justice Dipak Misra issued notice on the new writ petition filed by the Prasad Education Trust (writ petition no. 797/2017). It was surprising

that notice should have been issued on this fresh writ petition of the college if indeed the matter stood concluded by disposing of the writ petition of the college in the High Court on the basis of Mr. Mukul Rohtagi's statement that he does not seek any relief other than non encashment of the bank guarantee. It was even more unusual because on 1st September 2017, the same bench had already given a judgment in the matter of a similar medical college namely Shri Venkateshwara University (Writ petition no. 445/2017), by stating that,

> *"The renewal application that was submitted for the academic session 2017-2018 may be treated as the application for the academic session 2018-2019. The bank guarantee which has been deposited shall not be encashed and be kept alive".*

106. This indeed became the basis of the final order in the Prasad Education Trust writ petition which was shown to be dated 18th September 2017. If the matter had to be disposed off mechanically by following the judgment of 1st September 2017, in the other medical college case, where was the occasion for first giving liberty and then entertaining the fresh petition of the college on 4th September 2017 and keeping it alive till at least the 18th of September 2017?

107. It is also important to note that officials of Venkateshwara college are mentioned in the CBI FIR as under:

Information further revealed that Shri B P Yadav got in touch with Shri I M Quddusi, Retd. Justice of the High Court of Odisha and Smt. Bhawana Pandey r/o N-7, G.K. -1, New Delhi through Sh. Shudir Giri of Venkateshwara Medical College in Meerut and entered into criminal conspiracy for getting the matter settled.

A copy of order dated 1.09.2017 in Writ Petition No. 445/2017 is annexed as **Annexure** C25(335-336) A copy of the order dated 4.09.2017 in Writ Petition No. 797/2017 of Prasad Educational Trust is annexed as **Annexure** C26(337) A copy of the order dated 11.09.2017 in Writ Petition No. 797/2017 of Prasad Educational Trust is annexed as **Annexure** C-27(238) A copy of the order dated 18.09.2017 in Writ Petition No. 797/2017 of Prasad Educational Trust is annexed as **Annexure** C28(339-340) A copy of the CBI FIR is annexed hereto as **Annexure** C29(341-347)

108. The order dated 18th September 2017, was not uploaded on the Supreme Court website till the 21st of September evening as is clear from the date stamp on the 18th September 2017 order. The order was uploaded 2 days after the registration of FIR by the CBI. This puts a question mark on whether indeed the order was dictated in open court that day or whether it was kept pending and dictated after the registration of the FIR and the reporting of that in the media. Besides the order uploaded to the website has the date of 21st September 2017 stamped on it.

109. Finally the manner in which the Chief Justice of India tried to ensure that the writ petition filed by the Campaign for Judicial Accountability and Reforms (writ petition no. 169/2017) not heard along with the writ petition no. 176/2017 filed by Ms. Kamini Jaiswal by the senior most 5 judges of this court while hastily constituting a 7/5 judge bench, himself presiding over that Bench, not recusing himself from the Bench even after being requested to do so, countermanding the order passed by Court No. 2 in Ms. Kamini Jaiswal's petition to list the case before the 5 senior most judges and thereafter constituting a bench of 3 relatively junior judges which included one judge who had been party to the order in the Prasad Education Trust case, were further circumstances which raised serious doubt about his role in the Prasad Education Trust case, which was being investigated by the CBI. The writ petition was eventually dismissed by this Hon'ble Court.

Evidence available with the CBI

110. The CBI lodged an FIR on the 19th of September 2017, in the matters relating to criminal conspiracy and taking gratification by corrupt or illegal means to influence the outcome of a case pending before the Supreme Court. The FIR reveals a nexus between middlemen, hawala dealers and senior public functionaries including the judiciary. The case in which the FIR had been filed involves a medical college set up by the Prasad Education Trust in Lucknow. As it appeared from the FIR lodged by the CBI, an attempt was being made to corruptly

influence the outcome of the petition which was pending before the Supreme Court. The said petition was being heard by a bench headed by Justice Dipak Misra.

111. The evidence with the CBI, before it registered this FIR, included several tapped conversations between the middleman Biswanath Agarwala, Shri I.M. Quddussi, Retd. Judge of the Orissa High Court and the Medical College officers. The transcripts of some of these conversations dated 3.09.2017 and 4.09.2017, had been received by the Campaign from reliable sources and may be verified from the CBI. A copy of the transcript of conversation tapped by the CBI on the 3.09.2017 in Hindi original and translated into English is annexed as **Annexure** C30(348-351) A copy of the transcript of conversation tapped by the CBI on the 4.09.2017 in Hindi original and translated into English is annexed as **Annexure** C31(352-359)

112. It is important to note that the tapped conversation on 3.09.2017 between Shri Quddusi and Biswanath Agarawala (middleman), indicate that negotiations were on to get the matter of the Prasad Education Trust Medical College settled in the Apex Court. It is relevant to note that the writ petition no. 797/2017 of the Prasad Education Trust was admitted a day later, on the 4.09.2017 by a Bench headed by the Chief Justice Dipak Misra, that issued notice on the new writ petition filed by the Prasad Education Trust. Reference had been made in the

conversations to the "Captain" who would get the matter favourably settled on the payment of the bribes.

113. Further, the tapped conversation from 4.09.2017 between Biswanath Agarwala, Shri I.M. Quddussi and Mr. BP Yadav (of Prasad Education Trust), referred to the said petition under article 32 being filed on 4.09.2017 and that the next date for hearing given by the Court being "Monday". The Monday after 4.09.2017 is 11.09.2017 when the matter of Prasad Education Trust was indeed listed and again heard by a bench headed by the Chief Justice of India that directed the matter to be further listed on the 18.09.2017.

114. This evidence available with the CBI, of the tapped conversations between Shri Quddussi, middlemen and the medical college officials, revealed that a conspiracy, planning and preparation was underway to bribe the judge/judges who were dealing with the case of this medical college. It further revealed that negotiations regarding the amount of bribes to be paid were still on while the matter was listed before a Bench headed by Chief Justice Dipak Misra on 4.09.2017 and 11.09.2017. The references in the conversations between the middleman Biswanath Agarwala from Orissa and the officers of Prasad Education Trust to *"Captain... has all over India"* and to *"sir will sit for 10-15 months"* seem to be referring to the Chief Justice. In light of the convoluted course that the case followed and in light of these tapped telephonic conversations, this matter needed an independent investigation to ascertain the

veracity of the claims being made in the conversations, of the plans to allegedly pay bribes to procure favourable order in the case of the Prasad Education Trust in the Supreme Court and to also clear the doubt about the role of the then Chief Justice of India.

Denial of permission to the CBI to register an FIR against Justice Narayan Shukla of the Allahabad High Court

115. The most serious circumstance that emerged, which further strengthened the doubt regarding the role of the Chief Justice of India in the Prasad Education Trust matter, was his denial of permission to the CBI to register a regular FIR against Justice Shukla of the Allahabad High Court, who presided over the Bench that gave the interim order in favour of Prasad Education Trust. It was learnt from reliable sources that the CBI officers went to the Chief Justice of India on the 6th of September 2017, with the transcripts and other evidence recorded by them in the FIR and preliminary enquiry, showing almost conclusively the involvement of Justice Shukla in this conspiracy and his receiving gratification of at least one crore in the matter. The CBI Preliminary Enquiry report was registered on the 8th of September 2017 after the Chief Justice of India refused permission to register an FIR against Justice Shukla on the 6th of September 2017. Even after being made aware of this extremely important and virtually conclusive evidence against Justice Shukla in accepting gratification, the Chief Justice of India refused permission to the CBI for registering even a regular FIR against Justice Shukla, without

which further investigation against him could not be done and he could not be charge-sheeted. It was also reliably learnt that the officers of the CBI had made a record of this denial of permission by the CJI in a notesheet. By preventing the registration of an FIR against Justice Shukla and later by dismissing the CJAR petition seeking a SIT probe into the allegation in the CBI FIR by a bench constituted by the Chief Justice, all investigation into the conspiracy to bribe judges for obtaining a favourable order had been virtually stalled. Ensuring that no further investigation was undertaken, into this serious charge of alleged judicial corruption, amounted to a seriously problematic use of power by the Chief Justice of India.

116. It was however subsequently reported that Justice Dipak Misra had set up an in-house inquiry against Justice Narayan Shukla on the basis of some orders that he passed in another similar case of a Medical College. If this warranted an in-house inquiry, why was an in-house inquiry not ordered in the case of Prasad Education Trust where an identical interim order was passed by Justice Shukla and which came up before Chief Justice Dipak Misra well before this. Also if this was serious enough for in-house inquiry why was permission denied to CBI to register an FIR particularly when the CBI had presented documentary evidence in the case.

117. It was later reported that the In-house inquiry recommended removal of Justice Shukla on the basis of which a

recommendation was sent to the government to initiate impeachment proceedings against him. This recommendation was reiterated by the next Chief Justice Mr. Ranjan Gogoi as well. Nonetheless, the government failed to take action as per the recommendation and Justice Shukla was allowed to retire on 17th July, 2020, with all the benefits of retirement. This shows a serious lack of accountability.

Supreme Court Judges Press Conference:

118. In January 2018, four senior most judges of the Supreme Court after Chief Justice Dipak Misra, addressed a press conference. The judges formally informed the citizens of this country of a dangerous pattern which was becoming visible – of the Chief Justice abusing his power as the master of roster in selectively assigning important and politically sensitive cases to particular benches of junior judges of his choice, in an arbitrary manner, without any rational basis. This they indicated would have a serious long term impact on democracy and the future of our republic.

119. Though the senior judges did not mention it, but it was clear that the assignment of such cases to certain junior judges was for achieving a particular result, which in most cases was be seen to be in tune with the wishes of the government. This arbitrariness in use of his powers by the Justice Dipak Misra was destroying the image of the Court and subverting the

course of justice. Exposing this was, therefore, a necessary step to remedy the situation and retain public faith in the institution of the judiciary. Otherwise, as the judges said in the press conference, history would have judged them harshly for having failed in their duty to ring the alarm bells when the judiciary was being subverted.

120. The letter released to the media by the four senior most judges, **Justices J. Chelameshwar, Kurian Joseph, Madan Lokur, & Ranjan Gogoi** stated:

> *"..with great anguish and concern that we... highlight certain judicial orders passed by this court which has adversely affected the overall functioning of the justice delivery system and the independence of the high courts, besides impacting the administrative functioning of the office of Hon'ble the Chief Justice of India."*

and,

> *"There have been instances where case having far-reaching consequences for the Nation and the institution had been assigned by the Chief Justices of this Court selective to the benches "of their preference" without any rationale basis for such assignment. This must be guarded against at all costs."*

The judges went on to say that,

"we are not mentioning details only to avoid embarrassing the institution but note that such departures have already damaged the image of the institution to some extent."

121. Though the Chief Justice of India is the master of roster and has the authority to determine benches to hear cases, this does not mean that such power can be exercised in an arbitrary or malafide manner. The four judges in their letter stated:

"The convention of recognising the privilege of the Chief Justice to form the roster and assign cases to different members/benches of the Court is a convention devised for a disciplined and efficient transaction of business of the Court but not a recognition of any superior authority, legal or factual of the Chief Justice over his colleagues."

Master of Roster

122. The tenure of Justice Dipak Misra raised very serious issues regarding the functioning of the Registry of the Hon'ble Supreme Court of India and the powers exercised by the Chief Justice of India, inter-alia, in "*listing matters*" so as to list matters of general public importance and/or of political sensitivity before only certain Benches contrary to the Supreme Court Rules, Handbook of procedure and conventions. A

petition was filed by Shri Shanti Bhushan submitting that during Justice Dipak Misra's tenure as Chief Justice there were a number of instances in which such powers had been exercised with legal malice by abusing the administrative authority conferred under the Constitution, the Rules and the Handbook of Procedure and the convention on the Supreme Court. As a result, the matters were being listed in a completely arbitrary and unjust manner so as to defeat interests of justice thereby undermining the administration of justice.

123. The petition filed by Shri Shanti Bhushan submitted that the powers being exercised in that regard were purely administrative and it was well settled that administrative exercise of powers is subject to judicial review and if it was found that such exercise is vitiated on account of many extraneous factors like acting under dictation, abuse of discretion, taking into account irrelevant considerations and omitting relevant considerations, mala fides including malice in fact or malice in law, collateral purpose or colourable exercise of power, failure to observe principles of natural justice and take reasoned decisions and violation of doctrine of proportionality, together or separately vitiate the entire decision making process. These principles were clearly attracted in the case of Justice Dipak Misra as Chief Justice and master of roster.

124. In the aforesaid backdrop the listing of matters as demonstrated by the examples of the following matters

amongst others clearly reflected and establishes gross arbitrariness in use of powers and negation of the Rule of Law. These matters were as under:

a. In W.P. (Criminal) 169 of 2017, Campaign for Judicial Accountability and Reforms v UOI & Anr., on 8.11.2017 (**SIT into Medical Scam**) after the writ petition was numbered, this case was mentioned for urgent listing before court number 2 (since this was the court where mentionings for urgent listing were being taken up and also because it would not be appropriate for the Chief Justice to deal with this matter in his judicial and administrative capacity in view of the fact that he had dealt with the case of the medical college throughout on the judicial side). On mentioning, J. Chelameswar's bench ordered it to be listed before him on Friday, 10th November. However during lunch the petitioner's counsel was informed by the Registry that in light of an order by the Chief Justice this case was assigned to another bench and therefore would be coming up on Friday not before Court 2 but before the other bench. On 10.11.2017, the matter was heard by a bench headed by Justice Sikri. The same afternoon the matter was suddenly heard by a Constitution Bench headed by the Hon'ble Chief Justice of India and junior judges hand picked by him. This was then referred to a bench headed by Justice R. K. Agarwarl and the same was dismissed

vide Judgement of 1.12.2017, with a cost of 25 lakhs on the petitioner.

b. Writ Petition (Civil) No. 1088/2017 in the matter of Common Cause v Union of India. **(Involving a challenge to the appointment of the Special Director CBI)**: This matter was listed on 13.11.2017 when Hon'ble Justice Ranjan Gogoi and Hon'ble Justice Navin Sinha passed the following order: *"List the matter on Friday i.e. 17th November, 2017 before a Bench without Hon'ble Mr. Justice Navin Sinha."* On 17th November 2017, the matter was listed before Hon'ble Justice R. K Agrawal and Hon'ble Mr. Justice Abhay Manohar Sapre in complete contravention of Supreme Court Handbook on Practice and Procedure. On 17.11.2017 Hon'ble Justice Navin Sinha was not sitting with Hon'ble Justice Gogoi and accordingly matter ought to have been listed before the Bench presided by Hon'ble Justice Gogoi. The exercise by the concerned Registry officials in this regard was clearly an arbitrary discretion and suffered from malice in law.

c. Civil Appeal No.10660/2010 Centre for Public Interest Litigation v Union of India. (**The 2G case**): This matter came up before Court Number 2 on 01.11.2017 and was to come up on 06.11.2017 before the said Court. However it was deleted and upon mentioning ordered for listing before appropriate Bench as per roster. The matter

was thereafter listed before Court No. 1 on 13.11.2017 and upon recusal by Hon'ble Justice A. M Khanwilkar and Hon'ble Mr. D.Y. Chandrachud, the matter was placed before the Bench presided by Hon'ble Mr. Justice Arun Mishra on 17.11.2017, even though other Benches of senior Hon'ble Judges were available.

d. Writ Petition (Civil) 20/2018 Bandhuraj Sambhaji Lone Petitioner Versus Union of India with Writ Petition (Civil) 19 of 2018 Tehseen Poonawalla v Union of India **(The Judge Loya death investigation case)**: This matter upon being mentioned before the Chief Justice on 11.01.2018 was surprisingly ordered to be listed before Court No. 10 on 12.01.2018 and 16.01.2018. Subsequently the matter was mentioned perhaps without notice to the others on 19.01.2018 before the Hon'ble Chief Justice's Bench and it was ordered that the same be listed before "appropriate Bench as per roster." PILs were being heard by several courts. Yet, on 22nd January 2018 the matter was listed before Court No. 1 which heard the matter.

e. Special Leave to Appeal (Criminal) No 8937 of 2017 Dr. Subramanian Swamy v Delhi Police through Commissioner of Police (**Involving the M.P. Shashi Tharoor**): The matter was listed before Court No. 10 on 29.01.2018 and adjourned to satisfy on maintainability.

Subsequently on 23.02.2018 the Bench issued notice keeping the question of maintainability open.

f. Special Leave to Appeal (Criminal) No. 1836 of 2018 Rohini Singh v State of Gujarat: This matter involving Shri. **Jay Shah,** son of Shri. Amit Shah was also listed before Court No. 1 while several other courts had been authorized to hear criminal matters under the Roster.

g. Writ Petition (Civil) No. 494 of 2012 **(Aadhar case)**: The matter was heard initially by a Bench presided by Hon'ble Mr. Justice Chelameswar. Subsequently it was referred to a larger Bench which was constituted on 18.07.2017 by Hon'ble Chief Justice Khehar and which included Hon'ble Mr. Justice Chelameswar and Hon'ble Mr. Justice Bobde amongst others. The question whether privacy is a fundamental right arising out of the same was referred to a Bench of 9 Hon'ble Judge which included the above Hon'ble Judges. However subsequently the Bench came to be reconstituted and does not comprise of Hon'ble Justice Chelameswar, Hon'ble Justice Bobde and Hon'ble Justice Nazeer.

h. SLP(C) 28662-28663/2017 R.P. Luthra v. Union of India & Anr. (The petition which sought an explanation from the Centre for the delay in finalizing the **memorandum of procedure (MOP) for appointment of judges** to the Supreme Court and High Courts and which also

questioned continuing appointments even when the MOP had not been finalised): On 27.10.2017, the bench of Justices Goel and Lalit heard the matter and scheduled the next hearing for November 14. However, on 8.11.2017, the case was listed before a new Bench of CJI Misra, Justices A.K. Sikri and Amitava Roy. The three judges bench headed by CJI recalled the 27 October order.

i. The three Judge Bench of the Supreme Court in Pune Municipal Corp. v. Harakchand Misirimal Solanki 2014(3)SCC183 had held that unless the compensation amount is deposited in the concerned Court it would not be treated paid in terms of Section 24(1) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Act and therefore, non-deposit of such compensation would result in a lapse of acquisition proceeding under Section 24(2) of the Act. The correctness of this law was doubted by a two judge bench of the Supreme Court headed by Justice Arun Mishra vide dated 07.12.2017 in Civil Appeal No. 20982 of 2017, Indore Development Authority v. Shailendra (Dead) Through LRs, and therefore, the same was referred to the larger bench. In Indore Development Authority, a three judge bench headed by Justice Arun Mishra by a majority of 2:1 vide order dated 08.02.2018 held that the judgment in Pune Municipal Corporation was per incuriam. One of three

judges was of the view that a three judge bench cannot hold judgement of another three judge bench per incuriam. Meanwhile, a similar land acquisition matter came up for consideration before another three judge bench headed by Justice Madan B. Lokur on 21.02.2018. This three judge bench, while considering the submission made by the counsels appearing for the farmers, whether a bench of three Learned Judges could have held decision rendered by another bench of three Learned Judges as per incuriam, without referring it to a larger bench and therefore whether this matter should be referred to a larger bench, vide order dated 21.02.2018, made a request to the concerned benches of the Supreme Court dealing with the similar matters to defer the hearing until a decision is rendered one way or the other and listed the matter on 7.03.2018 to hear the State. On 22.02.2018 that is the very next day 2 similar matters were listed before two different two judge benches of the Supreme Court, headed by Justice Arun Mishra and Justice Goel respectively who were part of the judgement holding Pune Municipal per incuriam. Both the two judge benches of the Supreme Court instead of simply adjourning the matter referred their respective cases to the Chief Justice of India to list them before the appropriate bench. The Chief Justice of India without waiting for the hearing before Justice Lokur on 7.03.2018, listed the matters refereed by two other benches on 06.03.2018 before a 5 judge bench presided

by himself, when an Order was passed that this bench shall consider all the issues including the correctness of the decision rendered in Pune Municipal Corporation as well as the judgment rendered in Indore Development Authority.

125. However, despite these circumstances, Sh. Shanti Bhushan's petition was also dismissed by the Hon'ble Court holding that the Chief Justice was the master of the roster.

Impeachment

126. Justice Dipak Misra is the only CJI so far to have faced the threat of impeachment motion. Seventy one opposition MPs of Rajya Sabha moved an impeachment motion against him, over allegations of medical college bribery scam, misuse of 'master of roster' power, manipulation with orders issued on administrative side, and also an old case related to furnishing of false affidavit seeking land assignment from Orissa Government. The impeachment motion was rejected by Rajya Sabha Chairman at the threshold. The petition filed against the rejection motion was listed before a bench of five judges of SC. It was not clear who constituted the bench, and how a bench of five judges happened to be constituted at the first instance to hear a fresh petition. The petition was withdrawn after the petitioner's counsel Kapil Sibal declined to make submission before the five judges' bench without obtaining clarity as to how the bench happened to be constituted.

127. These are only some of the instances of clear arbitrariness in power of listing matters and/or re-constituting Benches and assigning matters to such Benches completely contrary to the Rules and the Handbook of Procedure. If these Rules and Procedure prescribed were to apply, such listings and re-allocation of matters could not and ought not to have taken place. The pattern also suggests that certain matters which were politically sensitive and involved either Ruling Party Leaders and/or Opposition Party Leaders were assigned only to certain Hon'ble Benches. Although appearing to be "routine", these listing and/or allocations were clearly designed in a particular direction so as to exclude other Hon'ble Benches from hearing such politically sensitive matters.

Judicial appointments

128. It is also widely felt that during his tenure CJI Misra was not standing up to the undue pressures exerted by the executive in the administrative affairs of judiciary. There was an instance where the Central Government was making interference with the appointment of a judge to the Karnataka High Court, bypassing the SC collegium. The issue got highlighted only when Justice Chelameswar wrote a letter condemning the government interference, and called for a full court meeting to discuss the issue. Repeated over-turnings of SC collegiums' re-recommendations by Central Government was a regular feature during his tenure. Though the re-recommendations are

binding on the Centre, many of them were ignored. Chief Justice Misra acted pliant, even in the face of such brazenness. When the recommendation of Justice K M Jospeh was returned by the Centre, through an unprecedented act of splitting up of Collegium recommendations, firm reactions were not forthcoming from the CJI Misra. With regard to Justice K M Joseph, CJI Misra did not act promptly to reiterate his name, and adjourned the resolution on several occasions. After high suspense, Justice Joseph's name was recommended in August, 2018, but along with two other judges, leading to his losing senority. An article by Manu Sebastian in *Livelaw* on the retirement of Justice Dipak Misra detailing various aspects of his tenure that were controversial is annexed as **Annexure** C32 (360-369)

Debatable judgements:

129. Judge Loya Matter: The grievance regarding allotment of the Judge Loya case to the bench of Justice Arun Mishra was one of the reasons which triggered the Judges' Press Conference. The Loya case was later withdrawn by Chief Justice Misra from the court of Justice Arun Mishra. The judgement in the Loya case, left many unanswered questions. The manner in which the statement of four judges (whose version of the circumstances surrounding Loya's death the Maharashtra government presented before the court) was

accepted by the court without affidavit and that the State of Maharastra was allowed to respond without filing affidavits. Despite counsel for the petitioners pointing out that under the Supreme Court's procedure, pleadings must be completed and documents must be submitted on oath and could not be handed over at the bar. Despite this, unsigned notes were handed over and the judgement was delivered based on these notes.

130. Bhima Koregaon Case: Senior human rights activists with stellar record of public service were arrested by Pune Police (when BJP was in power) in a shocking case of targeting of members of civil society. When petitions were filed seeking SIT probe (Romila Thapar & Ors. V Union of India &Ors. Writ Petition (Criminal) 260 of 2018) this Hon'ble Court's bench headed by former CJI Hon'ble Justice Mishra, vide judgment dated 28.09.2018, rejected the prayer seeking constitution of at SIT and refused to give any relief to the activists. Justice Chandrachud, however, in his minority judgment gave a strong dissent and critiqued the role played by Pune police and opined that the case was fit for appointment of an SIT. Later on, when BJP lost its government in Maharashtra after the 2019 election and after the new CM was sworn in, Central Government's NIA unilaterally took away the probe of 2018 Bhima-Koregaon casein the month January 2020 in a clearly mala fide manner. Subsequently, this Hon'ble Court SC refused to grant bail to activists (who were wrongly incarcerated due to State's vendetta) even when there was clearly no reasonable ground for such refusal, thus, proving

that citizens' liberty is no longer seen as a matter of priority or of grave concern by this Hon'ble Court. Unfortunately, this leads to development of a belief amongst the well wishers of Indian judiciary that this Hon'ble Court is increasingly becoming 'more executive-minded than the executive.'

HON'BLE CHIEF JUSTICE RANJAN GOGOI'S TENURE

131. That the Apex Court during the tenure of Justice Ranjan Gogoi as Chief Justice was characterized by a disturbing proximity to the executive and a disregard for fundamental rights of citizens. By compromising the independence of the judiciary and failing to discharge its duties as a constitutional court, the Apex Court under the Chief Justiceship of Justice Gogoi abetted the weakening of democracy in the country. The specific instances where Justice Ranjan Gogoi during his tenure as CJI compromised the independence of the judiciary and displayed disregard for fundamental rights are highlighted herein below.

132. That Justice Gogoi during his tenure as CJI routinely accepted evidence/information in the form of sealed covers from the Union Government in a number of high-profile cases like the Rafale case, CBI Director case, and Assam NRC case. The information contained in the sealed covers was not shared with the opposite parties in those cases and therefore, they had no way to rebut the said information provided to the Court and further the judgements contained information that was only

available to the courts in the sealed cover. This is against our adversarial legal system where the truth is arrived at through a process of assertion and rebuttal. Furthermore, the Court during the Chief Justiceship of Justice Gogoi displayed a surprising willingness to accept the unverified and unrebutted information/evidence provided by the Union Government and place reliance on the same for arriving at its decisions. These decisions themselves did not contain any reasons as they were based on 'classified' information, thereby departing once again from the traditional duty of courts to give reasons for their judgments. It is submitted that this sealed cover jurisprudence popularized by Justice Gogoi during his Chief Justiceship was ultimately adopted by the High Courts as well.

133. That for example, in the Rafale case, the Apex Court accepted the pricing details for the aircraft submitted to it in a sealed cover by the Union Government. However, subsequently, it was discovered that the Court's finding based on information contained in the sealed covers that the CAG had already tabled a report pertaining to the Rafale deal which had been accepted by the Public Accounts Committee ("PAC") was factually wrong since the CAG's report was tabled only two months after the judgment. Despite this, the Court refused to entertain an application for perjury against the government and dismissed the case of the petitioners.

134. That Justice (retd.) Madan Lokur deprecated the practice of accepting information from the government in sealed covers.

Justice Lokur alluded to the petition concerning the preventive detention of children in Kashmir which was disposed off by the Court on the basis of the report of the Juvenile Justice Committee that was submitted in a sealed cover without a copy of the same being made available to the petitioners therein. In the words of **Justice Lokur**:

> *"The right to know and the right to information are now passé – secrecy is the name of the game in which the state has been given the upper hand by the courts."*

A true copy of the article titled "*Judicial Independence: Three Developments that Tell Us Fair is Foul and Foul is Fair*" dated 23.03.2020 written by Justice (retd.) Madan Lokur published in the Wire is annexed herewith as **Annexure** C83(370-375)

ASSAM NRC CASE

135. That Justice Gogoi, even before he became CJI, while hearing a PIL, assumed supervision of the Assam NRC process. As CJI, Justice Gogoi gave deadlines for completion of various phases of the NRC process, and turned down requests for extensions made by the Union Government also. Furthermore, the criteria for inclusion in the NRC and every step of the process was monitored by the Court itself thereby obviating any possibility of judicial review. That owing to the fact that the Apex Court itself was supervising the NRC process, persons aggrieved with the modalities of the process

had no legal recourse. It is submitted that inclusion in the NRC was necessary for legitimizing one's citizenship with citizenship itself being the right to access other rights. The fact that such an important exercise was undertaken without the people having access to their constitutional remedies was a serious breach of the Supreme Court's traditional role.

PRIORITIZATION OF CASES

136. ELECTORAL BONDS MATTER: The petition filed by Association of Democratic Reforms and Common Cause (WPC 880/2017) was filed in September 2017 challenging the amendments brought in through Finance Commission of 2016 and 2017 allowing anonymous and limitless political funding (even by foreign companies) by way of Electoral Bonds. The case is especially important as the issue of Electoral Bonds is integrally connected to the issue of corruption and subversion of democracy through illicit and foreign funding of political parties and lack of transparency in accounts of all political parties. After the order issuing notice dated 03.10.2017, the petitioner also filed application for stay dated 06.03.2019 of the Electoral Bond Scheme, 2018. On12.04.2019an interim order was passed by this Hon'ble Court asking political parties to give details of particulars of donors in sealed cover to the Election Commission. The fact that the details of donors were to be handed to the ECI in "sealed cover" was ironic since the entire case is based on the need for transparency in political funding, especially when it is the right of the voting public to

know who is funding various political parties so as to know whether a political party would be inclined to serve the public or benefit the funders, who helped them win elections. That the matter was never given its due importance even as national elections were held as the matter was kept pending.

137. The petitioner again filed an application for stay dated 29.11.2019 after various important and explosive disclosures were made by a disclosure series done on Electoral Bonds based on documents received through RTIs. The said documents filed by the petitioner showed how RBI was also opposed to the introduction of anonymous donation by means of Electoral Bonds and how the present government bent the rules governing the Electoral Bond Scheme with impunity and asked state government to open illegal window for encashment of bonds before state assembly elections and how SBI was asked to accept expired bonds at the instance of Finance Ministry. That the matter which strikes at the very root of corruption in politics, continues to linger in this Hon'ble Court since 2018, while the electoral bond scheme continues largely benefitting the ruling party, which, as per news reports has received 95% of all Electoral Bonds purchased.

ARTICLE 370

138. In an unprecedented move, the entire Constitutional scheme relating to Jammu & Kashmir was subverted by the Government without any consultations, when the entire state was under president's rule. Government, acting by stealth and

deceit, put the entire state in curfew and passed executive orders without even a discussion in parliament. The state was trifurcated, converting Kashmir into a UT, and its statehood having been taken away. Till date, the case is pending and final hearings have not even started though the judgement on preliminary issues was rendered months ago. Thus, by delay, the government's actions have been made a fait accompli and difficult to reverse. The entire state continues to be in a lockdown for almost a year, but this Hon'ble Court does not find it as a problem worth addressing. Interestingly, the Government, in 4G case, has admitted that the situation is grave thus, refuting its own stand that abrogation of 370 would bring peace.

139. In his article, dated 06.08.2019, titled "*The story of Indian democracy written in blood and betrayal*", highly regarded political expert and academician **Mr. Pratap Bhanu Mehta** rightly wrote:

> "*Let us see what the Supreme Court does, but if its recent track record is anything to go by, it will be more executive minded than the executive. Kashmir is not just about Kashmir: In the context of the UAPA, NRC, communalisation, Ayodhya, it is one more node in a pattern hurtling the Indian state towards a denouement where all of us feel unsafe. Not just Kashmiris, not just minorities, but anyone standing up for constitutional liberty.*"

A copy of article, dated 06.08.2019, titled "*The story of Indian democracy written in blood and betrayal*" published in *The Indian Express* is annexed herewith as **Annexure** C34(376-378)

HABEUS CORPUS PETITIONS

140. That Justice Gogoi, during his tenure as Chief Justice, displayed a similar reluctance to decide habeas corpus petitions concerning detentions of several Kashmiris in the aftermath of the abrogation of Article 370 of the Constitution whereby the special status of Jammu & Kashmir was revoked. Considering the fact that the writ of habeas corpus is the only constitutional safeguard against exercise of arbitrary state power, this Hon'ble Court displayed an astonishing lack of urgency in dealing with these habeas corpus petitions. For example, in the case of the petition filed by Sitaram Yechury regarding detention of his party colleague J&K MLA Yusuf Tarigami, a bench headed by CJI Gogoi permitted Yechury to travel to Kashmir, meet Tarigami and report back to the Court without indulging in any political activities. Inexplicably, no reasons were sought from the Union Government for the detention of Tarigami. It was only in September that he was moved to AIIMS for medical treatment after an order of this Hon'ble Court and thereafter released. But their was substantial delay in hearing a Habeus Corpus petition which are to be dealt with urgently.

141. Former Union Ministers, Chief Ministers, MPs, State Ministers belonging to mainstream parties like Congress, NC, PDP and former IAS officer, HC Bar Association President, etc, have been put under indefinite detention, and this Hon'ble Court shockingly keeps on adjourning cases, even though all liberty cases are to be treated as most urgent. Thus, unfortunately, it seems that this Hon'ble Court has become an extended arm of the ruling party and the central government. It was reported in **The Print**, on 04.09.2019, in its report titled "*Supreme Court's handling of Kashmir habeas corpus more worrisome than Modi govt's clampdown*" as follows:

> *"It should be a cause for worry if the Supreme Court, which is often criticised for spending too much time on frivolous cases that don't necessarily involve a constitutional issue, takes five days to hear a writ of habeas corpus. And that too one, which involves the important question of citizens' life and liberty. What can be more important and urgent for the Supreme Court in a democracy than deciding whether a citizen's fundamental right to life and liberty as granted under Article 21 of the Constitution has been violated or not by the state? Even during an emergency-like situation, the state can't restrict people's freedoms without following the due process of law."*

A copy of the report dated 04.09.2019, titled "*Supreme Court's handling of Kashmir habeas corpus more worrisome than Modi govt's clampdown*", published by The Print is annexed as **Annexure** C35 (379-381)

CBI DIRECTORS TENURE CURTAILED

142. In an unprecedented move, Central Government suspended the CBI Director Alok Verma when he ordered investigation into cases involving persons close to the ruling party. The move was clearly illegal since as per DSPE Act, it required the concurrence of a high powered committee of PM, LoP and the Hon'ble CJI which was not taken. When he petitioned this Hon'ble Court [W.P. (C) No. 1309/2018], no interim stay was passed by this Hon'ble Court despite clear illegality and the matter was kept on adjourning. Thereafter, on 06.12.2018, judgment was reserved for a long time. Ultimately, on the verge of Verma's retirement, even though this Hon'ble Court held his suspension as illegal, vide its judgment dated 08.01.2019, it did not allow him to resume work but instead asked the HPC to decide on his suspension within a week from the date of the judgment. Thereafter, the HPC by majority (LoP dissenting) by the votes of PM and the Hon'ble CJI's nominee decided to suspend Verma.

AYODHYA

143. That the delay in hearing the aforesaid cases was contrasted with the alacrity shown by the ex-CJI in hearing the Ram

Mandir dispute. A Constitution Bench for hearing the case was set up by ex-CJI Gogoi and the matter was heard for a total of 40 days making it one of the longest hearings of a case in the history of this Hon'ble Court. In its final judgment, this Hon'ble Court decided that the site where the erstwhile Babri Masjid was located belonged to the Hindus and ordered the construction of a Hindu temple. It is pertinent to note that the construction of a Ram Mandir at the site in Ayodhya was an essential poll promise of the ruling party and the expeditious hearing of the case and the final outcome served to strengthen the poll prospects of the said ruling party.

144. Babri Masjid was illegally and unconstitutionally demolished on 06.12.1992. It was also demolished in contempt of the orders passed by this Hon'ble Court. Therefore, in the Ayodhya judgment dated 09.11.2019 (CA 10866-10867 of 2010),this Hon'ble Court rightly held that its destruction was illegal. And yet, it allowed the construction of Ram Mandir on the very site on which Masjid used to stand admittedly for centuries till 1992. The only way Mandir could be built on the site is by demolition of the mosque, and by this Hon'ble Court ordering the construction of the Mandir, it has become a judicially sanctioned demolition. This Court by it's final judgement allowed the construction of temple using the alleged faith of one community as a judicial reasoning to triumph over the rule of law.

145. Former Chief Justice of Delhi and Madras High Courts and former Chairperson of Law Commission of India Hon'ble **Justice. A.P. Shah** said inter alia the following on the Ayodhya case:

> *"The Court's judgment was unanimous, but anonymous. Contrary to judicial practice, the name of the judge who authored the unanimous opinion was absent. Even more peculiar was the 116 page anonymous "addendum" to the judgment, that sought to reinforce and reiterate the "faith, belief and trust of the Hindus" that the "disputed structure is the holy birthplace of Lord Ram". The need for this addendum is highly questionable given that the bench had already unanimously decided the case on constitutional principles, and the addendum was not serving the role of a concurring opinion. Instead, the addendum seems to reinforce the supremacy of Hindu theological considerations. A key issue that arose in this judgement was the issue of equity. The Supreme Court was of the view that the Allahabad High Court's decision to divide the property into three parts was not "feasible" in view of the need to maintain peace and tranquillity. However, whether the Supreme Court's judgment resulted in complete justice is questionable since it still seems like despite acknowledging the illegality committed by the Hindus, first in 1949, by clandestinely keeping Ram Lalla idols in the mosque, and second, by wantonly demolishing the mosque in 1992, the court*

effectively rewarded the wrongdoer. This goes against the doctrine of equity, which requires you to approach the Court with clean hands."

A copy of the lecture, dated 12.02.2020, published by Scroll.in, titled "*Justice AP Shah: 'Freedoms on unsteady ground, made to doubt whether SC able to protect our rights*'" is annexed as **Annexure** C36(382-396)

SEXUAL HARASSMENT CASE

146. That in April 2019, a young woman who worked at the Supreme Court as the Junior Court Assistant of ex-CJI Gogoi circulated an affidavit amongst the Supreme Court judges as well as the news media containing allegations of sexual harassment against the ex-CJI. In the said affidavit, she detailed the various sexual advances that were made by the ex-CJI while she was working with him and the tribulations that she was made to undergo in December 2018 when she rebuffed those advances, including being transferred thrice and ultimately suspended from service on charges of professional misconduct. She further alleged that her family was also targeted with her husband and brother-in-law who were both constables in the Delhi Police being suspended from service, and her second brother-in-law who was a disabled employee at the Supreme Court also being terminated from service. To further compound matters, both she and her husband were arrested by the Delhi Police on charges of bribery and extortion

in relation to allegedly helping a person secure a job at the Supreme Court. A copy of the affidavit sent by the lady is annexed hereto as **Annexure** C37 (397-425)

147. That after circulation of the affidavit, ex-CJI Gogoi convened a special sitting of the court on a Saturday morning, for examining the issue in a matter titled **"IN RE: A MATTER OF GREAT PUBLIC IMPORTANCE TOUCHING UPON THE INDEPENDENCE OF THE JUDICIARY"** wherein Justice Gogoi himself also sat on the Bench, thereby violating the cardinal principle of natural justice that no one can be a judge in his own cause. However, surprisingly, the order that was passed in the matter was not signed by the ex-CJI, even though he was part of the Bench, and only bore the signatures of the remaining two judges on the Bench.

148. That former Judge of the Supreme Court, **Justice. Santosh Hegde** opined,

> *"What the Chief Justice of India did was wholly wrong both in law and morality."*

> *".... the matter was being heard on a complaint filed by one of the parties... he (the CJI) presided over the bench, and look at the things he has done...he has nowhere in the records put that he is part of the bench,"*

"He (the CJI) has participated in the dialogue there, he has not signed the order, two other judges have signed the order. What's the meaning of this?"

"First of all, he could not have sat there.. what message is he sending? As Chief Justice of India can he sit in the bench and hear his own case? It's wholly wrong both legally and morally."

A copy of news article in *The Outlook* quoting Justice Hegde is annexed as **Annexure** C38 (426-427)

149. That the sexual harassment matter was assigned to a Committee comprising of Justices S.A. Bobde, Indu Malhotra and Indira Bannerjee. However, the complainant withdrew from the proceedings before the Committee since she was not allowed representation by a lawyer and she stated that the proceedings were not being conducted in a fair and open manner. Even Justice D.Y. Chandrachud expressed concern over the manner in which the proceedings were being conducted by the Committee and Attorney General K.K. Venugopal recommended that the Committee should also comprise of an external member. However, notwithstanding the deficiencies in the manner in which the proceedings were being conducted and the fact that the Complainant had already withdrawn from the proceedings, however, nevertheless, the Committee proceeded to examine the complaint *ex parte* and ultimately filed the complaint. However, the final report of the

Committee was not even published, thereby completely negating the concept of open justice. That subsequently the complainant was reinstated in service at the Supreme Court, and even her husband and brother-in-law were reinstated. The criminal case against her was closed after the police admitted in court that it had no evidence to back the charges. This itself shows that the orders suspending the complainant and her family members from service were wrongful and the criminal case was *mala fide*. Furthermore, it is also in the public domain that when the complainant filed an appeal for her reinstatement, she was advised to withdraw the same by a '*top government functionary*' who told her that everything would be sorted out.

150. That the entire episode pertaining to the sexual harassment case against the ex-CJI Gogoi continues to remain shrouded in mystery and raises the possibility of the Supreme Court and the Union Government working in coordination to victimize the complainant. It also raises questions on ex-CJI Gogoi's independence from the executive while deciding important cases. A true copy of the article written by journalist Sidharth Vardarajan for *The Wire* is annexed herewith as **Annexure** C39 (428-433)

Inexplicable transfers and appointments of judges

151. That during the Chief Justiceship of Justice Gogoi, Justice Akil Kureshi, who has delivered several important judgments against the present government, was transferred from Gujarat High Court to the Bombay High Court. This was followed by

passionate protests by the Gujarat High Court Bar Association. Subsequently, the Union Government sat for four months on a Collegium resolution to appoint Justice Kureshi as Chief Justice of MP High Court, and ultimately, the resolution was modified recommending Justice Kureshi's appointment as Chief Justice of the Tripura High Court where he finally took charge.

152. That the earlier collegium resolution for elevation of Justices Pradeep Nandrajog and Rajendra Menon to this Hon'ble Court was subsequently modified after the retirement of Justice Madan B. Lokur who had been part of the earlier collegium, and instead, Justice Sanjiv Khanna's appointment was recommended. Justice Lokur expressed surprise over the modification of the resolution after his retirement, and Justice S.K. Kaul wrote a letter to the ex-CJI objecting to the appointment of Justice Khanna by giving a go-by to principles of seniority.

QUID PRO QUO: RAJYA SABHA NOMINATION

153. That merely four months after his retirement, the ex-CJI Gogoi was nominated by the President of India for a seat in the RajyaSabha which nomination was accepted by the ex-CJI. The acceptance of the nomination soon after retirement was criticized by eminent lawyers like RakeshDwivedi and Dushyant Dave, as well as by former High Court and Supreme Court judges like Justice Madan B. Lokur, Justice Kurian Joseph, Justice A.P. Shah, Justice R.S. Sodhi, etc. It was stated

by these eminent personalities in the press that ex-CJI Gogoi's nomination to the RajyaSabha raised serious concerns of *quid pro quo* in relation to several important judgments delivered by the ex-CJI in favour of the Union Government.

154. That **Justice (retd.) Madan Lokur** in his article (already annexed herewith as Annexure R_____) condemned Justice Gogoi's acceptance of the RajyaSabha nomination in the following terms:

> *"His acceptance of the nomination, and the criticism this has naturally generated, has considerably diminished the moral stature of the judiciary and thereby collaterally impacted on its independence. Public perception is important and it has been rendered totally irrelevant, thereby taking away one of the strengths of the judiciary."*

That **Justice (retd.) Kurian Joseph** stated as follows:

> *"Acceptance of Rajya Sabha nomination by former Chief Justice of India Ranjan Gogoi has certainly shaken the confidence of the common man in the independence of the judiciary, which is also one of the basic structures of the Constitution of India."*

True copy of the news report dated 17.03.2020 titled "*'Sad day for judiciary': Two ex-SC judges, Opposition parties condemn*

Gogoi's Rajya Sabha nomination" published by the *Scroll* is annexed herewith as **Annexure** C40 (434-436)

155. That **Justice (Retd.) A.P. Shah** publicly stated that Justice Gogoi's acceptance of the RajyaSabha nomination sounded the,

> "*death knell for the separation of powers and independence of judiciary*".

A true copy of the news report dated 17.03.2020 titled "*Death Knell For Power Separation: Retired Judge On RanjanGogoi's New Role*" published by NDTV is annexed herewith as **Annexure** C41 (437-438)

156. That eminent lawyers of this Hon'ble Court also condemned Justice Gogoi's acceptance of the RajyaSabha nomination. **Dushyant Dave**, Senior Advocate and president of the Supreme Court Bar Association, said,

> "*This is totally disgusting, a clear reward in quid pro quo. The semblance of independence of the judiciary is totally destroyed.*"

Karuna Nundy, Advocate, Supreme Court tweeted

> "*It's just so sad, the brazenness of it. Destroying constitutional propriety for a measly Rajya Sabha seat.*".

True copy of the article dated 16.03.2020 titled "*In Unprecedented Move, Modi Government Sends Former CJI RanjanGogoi to RajyaSabha*" published by the Wire is annexed herewith as **Annexure** C42 (439-443)

157. That noted scholar and columnist **Pratap Bhanu Mehta** had this to say about Justice Gogoi's nomination to the Rajya Sabha:

> "*His actions will now cast doubt on the Court as a whole; every judgment will now be attributed to political motives. In an era where ordinary citizens are struggling to safeguard their citizenship rights and basic constitutional standing, Justice Gogoi's actions say to us: The Law will not protect you because it is compromised, the Court will not be a countervailing power to the executive because it is supine, and Judges will not empower you because they are diminished men.*"

A true copy of the article dated 20.03.2020 titled "*The Gogoi betrayal: Judges will not empower you, they are diminished men*" written by PratapBhanu Mehta published in the Indian Express is annexed herewith as **Annexure** C43 (444-446)

THE TENURE OF THE PRESENT HON'BLE CHIEF JUSTICE OF INDIA SH. SHARAD ARVIND BOBDE

CITIZENSHIP AMENDMENT ACT, 2019

158. Since independence, no other legislation has caused as much protests and anxieties as the Citizenship (Amendment) Act, 2019 ["CAA"] did. The introduction of the CAA resulted in unprecedented uprisings across the country and created deep fissures across the society.For the first time since in India, religion has been made as a basis for Citizenship, converting India from a secular republic to a country where religion is the basis of citizenship.Moreover, the combination of CAA with NRC was rightly seen as a move to take away citizenship of millions of Muslims, who would be rendered stateless. CAA had also become a major international issue and large number of continuous protests were happening across the country.

159. Over 60 petitions were filed before this Hon'ble Court by various reputed organisations and individuals challenging the CAA. This Court was pleased to issue notice on the same on 18.12.2019 in W.P.(C) No. 1470/2019. Thereafter, the provisions of CAA came into force on 10.01.2020 when it was notified in the Gazette of India.On 22.01.2020, when it was urged before this Hon'ble Court to put on hold operation of CAA and postpone exercise of the National Population Register (NPR) for the time being, this Hon'ble Court refused to grant any such stay and also directed that matters involving the same issues will not be taken up for decision in any of the High Courts. It is to be noted that exactly around one month after this, the National Capital burned because of communal riots, where helpless people belonging to minority community

were targeted in a pre-planned manner by those of majority community. CAA protests were at the heart of the communal riot.CAA protestors were being labeled as "anti-India" protestors. The instant was a fit case for this Hon'ble Court to grant a stay as even a cursory glance over its provisions makes it manifest that is has all the tendency of subverting the Constitution of India. However, several months have elapsed, the matter is yet to be taken up by this Hon'ble Court.

160. Sr. Advocate **Dushyant Dave** in his opinion piece dated 24.12.2019 stated:

> *"The Court cannot desert its duty to determine the constitutionality of an impugned statute. And so, the decision of the Supreme Court, led by the Chief Justice himself, to defer the examination of the challenge to the much talked about Citizenship (Amendment) Act, 2019 is, to say the least, disappointing. The Court should have put aside other matters and heard the group of writ petitions challenging the validity of this ex-facie unjust law. The winter vacation is hardly an excuse to defer such a challenge.Even if the judges wanted to enjoy their much deserved winter vacation, their refusal to stay the law is even more disturbing. Such an order would have immediately defused the tempers running high across the nation, and, "We, the People" could have breathed a sigh of relief.Instead, the judges have left us to fend for ourselves in the streets of our cities. The cost of this decision by the Court will only become clear with*

time.The granting of a stay order against the operation of this citizenship law would not have caused any prejudice to public interest whatsoever. On the contrary, it is my belief that it would have served the public interest well."

A copy of the article, dated 24.12.2019, titled CAA Protests: The Supreme Court has not acted with urgency to protect citizens from Executive excesses published in Bar and Bench Scroll is annexed as **Annexure** C44(443-449)

ATTACKS ON UNIVERSITIES

161. On 16.12.2019, when this Hon'ble Court was urged to take Suo Motu cognizance of reports of police violence against students of Jamia Milia University and Aligarh Muslim University in the wake of ongoing protests against the CAA, the Hon'ble CJI was reported to have said that: - *"the Court will hear the matter tomorrow, if the violence is stopped."* The Hon'ble CJI was further reported to have stated:- *"We know how the rioting takes place...we are aware of the rights and we will decide on the rights but not amidst all this rioting...The court cannot be forced to decide anything only because some people decide to throw stones outside...this court cannot be bullied...law cannot be taken into their hands just because they are students...we will hear and see what can be done only when things cool down, with a calm frame of mind..."* and the petitioners were asked to approach the High Courts instead.

DELHI RIOTS

162. Delhi witnessed its worst riots since 1984 wherein once again, just like 1984, a minority community was attacked and the police was a mute spectator or often a visible collaborator. Numerous video footages as well as images surfaced across the media showing police officials creating mayhem in complicity with the rioters and mercilessly beating up protestors and those of minority community.

163. Hon'ble Delhi HC bench headed by Hon'ble Justice Muralidhar was passing several orders trying to crack whip the and enforce accountability while the city was burning. During hearing on 26.02.2020, on being asked about the inflammatory speeches of BJP leaders, Ld. SG stated that he hadn't watched any of the said videos. On this the said videos were played in open court. Surprisingly, the Ld. SG continuously submitted that that time was not 'appropriate' or 'conducive' for FIRs to be registered in relation to these clips. However, Hon'ble Justice Muralidhar was pleased to direct the Delhi Police Commissioner to take conscious decision on registration of FIR in respect of inflammatory speeches made by the BJP leaders and the matter was listed for hearing on 27.02.2020. However, in the night of 26.02.2020 itself, Hon'ble Justice Muralidhar was transferred. After the case was transferred to the Hon'ble Chief Justice of the Hon'ble Delhi HC, the matter was simply adjourned on 27.02.2020, granting 4-weeks time to the government to file its Counter-Affidavit in response to the plea

seeking registration of FIRs against politicians for making incendiary statements which incited mob-violence in North East Delhi, despite the fact the city was burning and the case was urgent.

164. This Hon'ble Court, vide order dated 04.03.2020 passed in W.P.(Crl.) No. 103/2020, was pleased to direct that the said hearing may be advanced and be taken up by Hon'ble High Court on 06.03.2020. However, during the hearing on 04.03.2020, the Ld. SG read out excerpts from a speech stated to have been made by renowned social worker Mr. Harsh Mander, which allegedly included criticism about the Supreme Court of India. In response, the bench observed that an explanation was warranted in this regard. The Hon'ble CJI is reported to have remarked that, "*If this is what you feel about SC, then we have to decide what to do with you*". As a result of this, all other petitions (except Mander's plea) filed by riot victims, intervention applications and any other related petitions with the Delhi Riots cases were directed to be listed before the Delhi High Court on 06.03.2020 as stated above.

Nationwide Lockdown & Migrant Crisis

165. With the attempt to contain the spread of Covid-19, the central government, beginning March 24, passed a series of draconian orders including a long nationwide lockdown with complete suspension of all economic activity and also shutting down of all public & private transport. This was done with

mere 4-hour notice. Overnight, the police was unleashed on the millions of helpless citizens, many of whom did not have any avenue to have two square meals a day. Arbitrariness was writ large and yet this Hon'ble Court did not pass any orders either to stay the complete shut down or even to mitigate the resultant misery and hardship.

166. Various petitions with regard to the migrant crisis were filed before this Court. Some of these were the ones filed by Alakh Alok Srivastava *(Writ Petition (Civil) No. 468/2020)* on the issue of shelter homes, Harsh Mandar *(Writ Petition (Civil) Diary No. 10801/2020)* on issue of wages to be paid to migrant workers and Jagdeep Chhokar *(Writ Petition (Civil) Diary No. 10947/2020)* on the issue of return of migrant workers to their homes and villages. In one of the hearings in Alakh Alok Srivastava, the statement by the Learned Solicitor General, that "*no one is now on the road*" was accepted by this Court at face value, at a time when thousands of migrant workers along with their families were facing unprecedented hardship and ordeal trying to walk hundreds and thousands of kilometers trying to reach their homes and villages. The Court accepted the submissions made by the Central government whereby it was claimed that exodus of migrant labourers was triggered due to panic created by some fake/misleading news that lockdown would last for 3 months. The petition was disposed of relying solely on the status report of the government while ignoring the reports and surveys conducted by civil society groups. In other

cases also, no substantial relief was accorded by this Court to migrant workers at a time when crisis was underway.

167. The Hon'ble Delhi HC rightly observed the following about the lockdown in its order dated 12.06.2020 passed in *W.P. (C) No. 3449 of 2020*:

> *"11 This Court can take judicial notice of the fact that the lockdown has resulted in loss of jobs for several lakhs of people. Scores of people were forced to walk considerable distance during the lockdown and stand in long queues at Food distribution centers just to have two square meals a day. Several have gone hungry and were not able to get one meal. Many were left shelterless. Several lakhs of migrant labour had to walk on foot and go back to their native places. The economic situation of the country has taken a terrible hit due to the lockdown. In fact, many analysts have opined that the lockdown has caused more human suffering than COVID-19 itself. Economists have forecasted that Indian economy will shrink as a result of the steps taken to contain Corona virus pandemic. Indian economy virtually came to a standstill during nationwide lockdown. Production in the country came to a grinding halt during the lockdown period. Construction activities in the country have stopped. People have become unemployed which raises grave concerns regarding the law and order situation in the country."*

168. Despite Covid-19 affecting the entire world, India was the only country which witnessed a huge humanitarian crisis with millions of hungry and thirsty migrants walking on foot for hundreds of kilometers while the government was not bothered. This Hon'ble Court was just as insensitive as the government, putting all its faith in the government without proper adjudication of the PILs filed before it.

169. Till the Government did not issue guidelines allowing interstate travel for stranded migrants, tourists, students, this Hon'ble Court also did not pass any order. After huge public outcry, Government allowed travel and resumed limited train service, but this Hon'ble Court refused to pass order that migrants would not be charged even though such migrants had lost their jobs and savings.

170. After it was criticized by several prominent jurists as failing in its basic constitutional duty, this Hon'ble decided to take up the case Suo Motu [*SMW (C) No. 6 of 2020*] when the peak of the migrant crisis had already passed and thereafter, it ultimately passed an order that migrants would not be charged and that charges would be borne by the states, even as it allowed railways to make money from transporting migrants.

171. Former Supreme Court **Justice Hon'ble M.B. Lokur** in his article, dated 28.05.2020, titled "*Justice Madan Lokur: Supreme Court Deserves an 'F' Grade For Its Handling of*

Migrants" published by The Wire, severely criticized the handling of the migrant crisis by this Hon'ble Court as follows:

> *Additionally, the court recorded the statement of the solicitor general that "within 24 hours the Central government will ensure that trained counsellors and/or community group leaders belonging to all faiths will visit the relief camps/shelter homes and deal with any consternation that the migrants might be going through. This shall be done in all the relief camps/shelter homes wherever they are located in the country." Two features clearly stand out. First, the Supreme Court accepted what it was told – hook, line and sinker. True, there was nothing on March 31 to doubt the correctness of the statement that no person was walking on the roads at 11.00 am but is the court so naïve as to seriously believe such a statement? Is the court also naïve enough to believe that a circular issued by the Central government could work wonders and ensure that a few lakh persons (not thousands) actually stayed off the roads? If a statutory order issued by the National Disaster Management Authority and the Ministry of Home Affairs acting in exercise of powers conferred by the Disaster Management Act could not ensure the implementation of a complete lockdown, could a mere circular prevent migrants from hitting the road? Really? Subsequent hearings in the case on April 3 and 7 confirm that as on March 31, the Supreme Court did not even bother to*

question the statement made or hold the Central government to account, despite more than enough evidence available everywhere. Newspaper and media reports were ignored. Given the circumstances, was it not the constitutional obligation, not duty, of the Supreme Court – a court for the people of India and not a court of the people of India – to ascertain that a few lakhs (not thousands) of migrants are well taken care of, physically and emotionally? It is not that the court was expected to disbelieve or distrust the establishment represented by no less than the solicitor general, the court was only required to ensure through the principle of continuing mandamus that the solemn assurances given to it are faithfully carried out. Sorry, the court completely failed in this – forgot what public interest litigation is all about. If a grading is to be given, it deserves an F. True, the events were unprecedented as far as the government is concerned, but the events were also unprecedented as far as the migrants are concerned. Unfortunately, the lack of interest and compassion shown by the court was also unprecedented. Here was an opportunity handed over on a platter to the court to be more proactive and assertive keeping the interest and constitutional rights of the hapless people in mind. The initial failure of March 31 and in two subsequent hearings was compounded in the final hearing on April 27, when the Court passed a rather tepid order to the effect that the solicitor general had

agreed that the interim directions passed on March 31 would be continued [actually no interim directions had been passed] and the suggestions made would be examined and appropriate action taken. On this basis, the petition was disposed of. On that day, humanitarian law died a million deaths.....What could the court have done? Public interest litigation is all about public interest. Well-meaning persons approach the Supreme Court for the enforcement of constitutional and statutory rights of those who have no access to justice. This is precisely what the petitioner (and others) did. The Supreme Court was approached on behalf of migrant labourers on the road for a do-something direction. Sadly, the court let them down, badly. The court could have asked pointed questions to the state. It could have asked if the Central government had a plan of action for the "unforeseen development" (an expression used in the status report); it could have asked for the steps taken and proposed to be taken to mitigate the hardships that the migrants faced; it could have asked if the state governments were geared up for the massive influx of migrants whose presence "would aggravate the problem of spread of the virus." Issues of socio-economic justice and constitutional rights are vital and raise a whole host of questions, but not one was asked in a public interest litigation, and the issue buried ten fathoms deep. If any event ever shook the collective conscience of the nation, the travails of the migrant labourers did.....One thing is

clear – the migrant workers, women (some of them pregnant), children and infants will remember these dark days till the very end. Images that have haunted us for two months and the horrific struggles of millions will remain etched in our psyche and many will long remember that when it came to the crunch, the Supreme Court did not see those images or read those stories. Over the past few months, constitutional rights and remedies were overlooked and socio-economic justice, a cornerstone in the preamble of our constitution, was disregarded. Some eminent members of the legal fraternity have already expressed dissatisfaction with the present-day functioning of the Supreme Court. Isn't that tragic or is it farcical?"

A copy of the article, dated 28.05.2020, titled "*Justice Madan Lokur: Supreme Court Deserves an 'F' Grade For Its Handling of Migrants*" published by The Wire is annexed as **Annexure** C45 (450-456)

172. Former Chief Justice of Delhi and Madras High Courts and former Chairperson of Law Commission of India Hon'ble Justice. **A.P. Shah** too criticized the handling of migrant crisis by this Hon'ble Court in his article dated 25.05.2020, titled "*Failing to perform as a constitutional court*", published by The Hindu in the following words:

In this lockdown, enough and more evidence points to fundamental rights of citizens having been grossly violated, and especially those of vulnerable populations like migrant labourers. But instead of taking on petitions questioning the situation, the Supreme Court has remained ensconced in its ivory tower, refusing to admit these petitions or adjourning them. By effectively not granting any relief, the Court is denying citizens of the most fundamental right of access to justice, ensured under the Constitution. In doing so, it has let down millions of migrant workers, and failed to adequately perform as a constitutional court.....In rejecting or adjourning these petitions, the Court has made several questionable remarks: the condition of migrant labourers is a matter of policy and thus, does not behove judicial interference; or, governments already provide labourers with two square meals a day, so what more can they possibly need (surely, 'not wages'); or, incidents like the horrific accident where migrant labourers sleeping on railway tracks were killed cannot be avoided because 'how can such things be stopped'. Equally, lawyers have been castigated for approaching the Court 'merely' on the basis of reports. But the Court has rarely insisted on such formality: its epistolary jurisdiction (where petitions were entertained via mere letters) is the stuff of legend, so its reaction here, during an emergency, seems anomalous.....One is struck immediately by the lack of compassion or judicial

sensitivity in handling this situation, and it prompts two observations. First, the Court is not merely rejecting or adjourning these petitions; it is actively dissuading petitioners from approaching the courts for redress because the Court determines that it is the executive's responsibility. Ordinarily, the Court would have at least nudged petitioners towards the High Courts, but here, even that choice is not available — the Court is practically slamming the door shut. Second, there is the matter of how the Court is treating such public interest litigations. PILs are a specific instrument designed to ensure the protection of the rights of the poor, downtrodden and vulnerable, and "any member of the public" can seek appropriate directions on their behalf. This lies at the heart of the PIL. The concept of a PIL is to be non-adversarial, but the Court is treating these as adversarial matters against the government. PILs, in fact, ought to be a collaborative effort between the court and all the parties, where everyone comes together in seeking a resolution to the problem. Today, we find ourselves with a Supreme Court that has time for a billion-dollar cricket administration, or the grievances of a high-profile journalist, while studiously ignoring the real plight of millions of migrants, who do not have either the money or the profile to compete for precious judicial time with other litigants.

A copy of the article dated 25.05.2020, titled "*Failing to perform as a constitutional court*", published by The Hindu is annexed as **Annexure** C46 (457-459)

BLOCKADE OF 4G IN J&K

173. Between 04.08.2019 and 05.08.2019, internet services were discontinued in the valley. This Hon'ble Court, vide its judgment, dated 11.05.2020, passed in *Foundation for Media Professionals vs. Union Territory of Jammu & Kashmir & Anr.* [W.P. (C) Diary No. 10817 of 2020] upheld the Central government's refusal to restore 4G internet services in the UT of Jammu and Kashmir on the ground that security situation justifies the same. Surprisingly, this Hon'ble Court issued directions for the formation of a "*special committee*" comprising Secretaries at national, as well as at State, level "*to look into the prevailing circumstances and immediately determine the necessity of continuation of restrictions*". The Special Committee comprised of: - a. The Secretary, Ministry of Home Affairs (Home Secretary), Government of India; b. The Secretary, Department of Communications, Ministry of Communications, Government of India and c. The Chief Secretary, Union Territory of Jammu and Kashmir. Ironically, two of the three members of the said "*special committee*" were the very same officials who had directed imposition of the 4G ban in the first place. The formation of such a committee was in violation of the very basic tenet of natural justice, i.e. no one can be a judge in his/her own cause. In effect, this Hon'ble Court outsourced its constitutional role to executive, as a result

of which executive (violator of fundamental rights) is to decide whether the executive is correct in violating the fundamental rights of the citizens or not.

174. Supreme Court Senior Advocate Mr. **Arvind Datar**, in his article dated 07.06.2020, titled "*The Dangers of Outsourcing Justice*", published in Bar and Bench wrote as follows:

> *The role of the Supreme Court as a sentinel on the qui vive is to act as a dyke against unwarranted encroachment of our fundamental rights. The 4G decision has spread darkness over Jammu & Kashmir and made life indefinitely miserable for 1.3 crore people. The Review Committee, to be best of my knowledge, has not even met and, even if it does, is unlikely to retract from the harsh position the executive has taken. When the Solicitor General has vehemently justified the imposition of 2G, it is astonishing, if not shocking, for the Supreme Court to expect a Special Review Committee to grant any relief to Jammu & Kashmir. This judicial retreat and the increasing tendency to turn a Nelson's eye on the ritual incantation of national security and terror to justify violations of fundamental rights is a cause for serious concern.*
>
> *If benches of the Supreme Court choose to repeatedly put Article 32 in cold storage, it is a matter of time before*

Indians begin to lose faith in this institution. Let us not forget the chilling implication of what Dante said in Canto III of the Inferno - "All hope abandon ye who enter here".

A copy of the article, dated 07.06.2020, titled "The Dangers of Outsourcing Justice", published in Bar and Bench is annexed as **Annexure** C47 (460-463)

175. I could multiply these instances but I think the above cases and their decisions and the inaction of the courts in dealing with some of these critical cases are enough for me to form my opinion about the role played by this Hon'ble Supreme Court in last 6 years in undermining democracy which bonafide opinion I am entitled to form, hold, & express under Article 19(1)(a).

Prashant Bhushan
DEPONENT

VERIFICATION

I, the above named Deponent do hereby verify that the contents of the above Affidavit are true and correct to my knowledge, that no part of it is false, and nothing material has been concealed therefrom.

Verified at New Delhi on this 2nd day of August 2020

Prashant Bhushan
DEPONENT

ANNEXURE - C1

Dissent Not Anti-National excerpts/ Justice PD Desai Memorial Lecture 2020

Justice D.Y. Chandrachud, 15th Feb, 2020

13-16 minutes

On occasions such as this when a lecture series commemorates the memory of a distinguished personality, it is conventional to begin with words of tribute. But for me personally, the opportunity to speak on this occasion has a deep personal connect. For me, this is homage to the Master. Justice Prabodh Dinkarrao Desai had the unique distinction of being appointed as a Judge of the High Court of Gujarat when he was barely thirty-nine. Over a distinguished career, he functioned as the Chief Justice of three High Courts in succession, those of Himachal Pradesh, Calcutta and Bombay between December 1983 and December 1992.

That a person who was appointed as a Judge of the High Court so young and yet was overlooked by destiny or the powers that be (whichever way one looks at it), must remain in contemporary times as another aberration in the process of judicial appointments. When the call for higher judicial office came, Chief Justice PD Desai preferred to retire from the Bombay High Court: so fiercely was he protective of his own independence and integrity....India as a whole, boasts of significant diversity—heterogeneous along a number of intersecting dimensions, including race, class, religion, and culture. This diversity is further defined across several axes: cultural, social, and epistemic and outlays diverse values, opinions, and perspectives....In the plural mansion that is independent India, lies a population of over 1.3 billion people comprising several thousand communities.

At the framing of the Indian Constitution, questions arose on how independent India was to account for its heterogeneous polity. Uday Mehta eloquently elucidates the immense range of social realities that the founding members were called upon to address and how the document they gave birth to sought to unify a divergent India by accommodating all people who called India their home. For the founders, the Constitution was

premised on both a deep trust in the tolerant nature of its citizens and an unshakeable belief that our diversity would be a source of strength. As Mehta observes, where the population was largely illiterate, the Constitution conferred universal adult franchise. Where the population was diverse and assorted, the Constitution conferred citizenship without regard to race, caste, religion or creed. Where the people were deeply religious, the Constitution adopted the principle of secularism.

Where the Indian State stood united, the Constitution created a federal democracy with all the political instruments necessary for local self-governance. Diversity within the strands of the Constitution is a reflection of the diversity of her people. One cannot exist without the other....The Constitution enacted a complete ban on untouchability and its practice in any form. The Constitution also stipulates that no citizen is to be subject to any disability or condition with regard to access to public spaces and the use of public resources on the grounds of religion, race, caste, sex, or place of birth and that the state is empowered to legislate special provisions for the advancement of any socially and educationally backward class of citizens.... In elevating groups as distinct rights holders as well as empowering state intervention to address historical injustice and inequality perpetrated by group membership, the framers located liberalism within the pluralist reality of India and conceptualised every individual as located at an intersection between liberal individualism and plural belonging....The true test of a democracy is its ability to ensure the creation and protection of spaces where every individual can voice their opinion without the fear of retribution.

Inherent in the liberal promise of the Constitution is a commitment to plurality of opinions. However, the litmus test of any claim of commitment to deliberation is assessed by the response of two key actors—the state and other individuals. If you wish to deliberate you must be willing to hear all sides to the story. A legitimate government committed to deliberate dialogue does not seek to restrict political contestation but welcomes it.

As early as the 19th century, Raja Ram Mohan Roy protested against the curtailing of the press and argued that a state must be responsive to individuals and make available to them the means by which they may safely communicate their views. This claim is of equal relevance today. The commitment to civil liberty flows directly from the manner in which the State treats dissent. A state committed to the rule of law ensures that the state

apparatus is not employed to curb legitimate and peaceful protest but to create spaces conducive for deliberation. Within the bounds of law, liberal democracies ensure that their citizens enjoy the right to express their views in every conceivable manner, including the right to protest and express dissent against prevailing laws.

The blanket labelling of such dissent as anti-national or anti-democratic strikes at the heart of our commitment to the protection of constitutional values and the promotion of a deliberative democracy. Protecting dissent is but a reminder that while democratically elected governments offer us a legitimate tool for development and social coordination, they can never claim a monopoly over the values and identities that define our plural society. The employment of state machinery to curb dissent instills fear and creates a chilling atmosphere for free speech which violates the rule of law and detracts from the constitutional vision of a pluralist society.

The destruction of spaces for questions and dissent destroys the basis of all growth—political, economic, cultural and social. In this sense, dissent is the safety valve of democracy. The silencing of dissent and the generation of fear in the minds of people go beyond the violation of personal liberty and a commitment to constitutional values—it strikes at the heart of a dialogue-based democratic society which accords to every individual equal respect and consideration. A commitment to pluralism requires positive action in the form of social arrangements where the goal is—to incorporate difference, coexist with it, allow it a share of social space. There is thus a positive obligation on the state to ensure the deployment of its machinery to protect the freedom of expression within the bounds of law and dismantle any attempt by individuals or other actors to instil fear or chill free speech. This includes not just protecting free speech, but actively welcoming and encouraging it.

An equal obligation to thwart attempts to curtail diverse opinions rests on every individual who may not agree with opposing views. Mutual respect and the protection of a space for divergent opinions is the process of viewing every individual as an equal member of a shared political community where membership is not premised on sharing a unanimous opinion.... Taking democracy seriously requires us to respond respectfully to the intelligence of others and participate vigorously—but as an equal—in determining how we should live together. Democracy then is judged not just by the institutions that formally exist but by the extent to which different

voices from diverse sections of the people can actually be heard, respected and accounted for. The great threat of pluralism is the suppression of difference and the silencing of popular and unpopular voices offering alternate or opposing views. Suppression of intellect is the suppression of the conscience of the nation.

This brings me to the second threat to pluralism—the belief that homogenisation presupposes the unity of the nation.... As I have stated before, the framers demonstrated a commitment for the protection of India's pluralist strands. For this reason, amendments to delete the right to propagate religion and to include a ban on dressing that identified with a religion were negatived in the Constituent Assembly.

By negating these amendments, the Constituent Assembly asserted the place of plural expression in the public sphere and signalled a clear departure from the singular unification model. Similarly, even though it was unanimously agreed that the freedom to propagate religion was included within the freedom of speech, the assembly found it necessary to include a specific provision in Article 25 also stating that a heavy responsibility would be cast on the majority to see that minorities feel secure.

A united India is not one characterised by a single identity devoid of its rich plurality, both of cultures and of values. National unity denotes a shared culture of values and a commitment to the fundamental ideals of the Constitution in which all individuals are guaranteed not just the fundamental rights but also conditions for their free and safe exercise. Pluralism depicts not merely a commitment to the preservation of diversity, but a commitment to the fundamental postulates of individual and equal dignity.

In the creation of the imagined political community' that is India, it must be remembered that the very concept of a nation state changed from hierarchical communities to networks consisting of free and equal individuals.

India, as a nation committed to pluralism, is not one language, one religion, one culture or one assimilated race. The defence for pluralism traverses beyond a commitment to the text and vision of the Constitution's immediate beneficiaries, the citizens. It underlines a commitment to protect the very idea of India as a refuge to people of various faiths, races, languages, and beliefs.

India finds itself in its defence of plural views and its multitude of cultures. In providing safe spaces for a multitude of cultures and the free expression of diversity and dissent, we reaffirm our commitment to the idea that the making of our nation is a continuous process of deliberation and belongs to every individual. No single individual or institution can claim a monopoly over the idea of India....

Finally, the commitment to pluralism lies in the constitutional trust expressed by the framers on every individual.... An example of this constitutional trust and obligation is evident in the divergent view of the relations between majorities and minorities upon India gaining her independence.

During the colonial rule, the Morley-Minto reforms recommended separate electorates for minorities. This recommendation for the first time introduced identity politics into the Indian regime by classifying groups as majority and minority.... When the Constituent Assembly was called to decide the fate of separate electorates in independent India, they decided that its inclusion was not essential to and even contrary to the requirements of a pluralistic society. They rejected separate electorates and dismissed the relevance of numerical disadvantage in a polity....

The framers of the Constitution rejected the notion of a Hindu India and a Muslim India. They recognised only the Republic of India. As one member of the Constituent Assembly said—we should proceed towards a compact nation, not divided into different compartments but one where every sign of separatism should go. As another member said—there will be no divisions amongst Indians. United we stand; divided we fall....What is of utmost relevance today, is our ability and commitment to preserve, conserve and build on the rich pluralist history we have inherited. Homogeneity is not the defining feature of Indians.

MA Kalam, a celebrated anthropologist wrote in a piece that: "a visible, discernible, lively and successful engagement with diversity is pluralism indeed. This definition calls upon us to look at each other and recognise that our differences are not our weakness." Our ability to transcend these differences in recognition of our shared humanity is the source of our strength. Pluralism should thrive not only because it inheres in the vision of the Constitution, but also because of its inherent value in nation building. Today I have attempted to share with you the vision and spirit of pluralism

that I believe has always defined India. India is a sub-continent of diversity unto itself. The mere mention of India evokes in every person a different idea which they associate with the nation.

Anybody truly conversant with Indian history will tell you that the single defining hallmark of ancient India was its divergent, scattered and fragmented nature. It has been for centuries a land of vibrant diversity of religion, language and culture. Pluralism has already achieved its greatest triumph—the existence of India.

The creation of a single nation out of these divergent and fragmented strands of culture in the face of colonial tyranny is a testament to the shared humanity that every Indian sees in every other Indian. The nation's continued survival shows us that our desire for a shared pursuit of happiness outweighs the differences in the colour of our skin, the languages we speak or the name we give the Almighty.

These are but the hues that make India and taking a step back we see how altogether they form a kaleidoscope of human compassion and love surpassing any singular, static vision of India. Pluralism is not the toleration of diversity; it is its celebration.

SOURCE: https://www.indialegallive.com/top-news-of-the-day/news/dissent-not-anti-national-says-justice-dy-chandrachud

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ANNEXURE - C2

INAUGURAL LECTURE DELIVERED BY HON'BLE MR. JUSTICE DEEPAK GUPTA, JUDGE, SUPREME COURT OF INDIA ON 'DEMOCRACY AND DISSENT' ORGANISED BY THE SUPREME COURT BAR ASSOCIATION ON 24.02.2020 AT THE MAIN AUDITORIUM, INDIAN SOCIETY OF INTERNATIONAL LAW, V.K. KRISHNA MENON BHAWAN, BHAGWANDAS ROAD, OPPOSITE, SUPREME COURT OF INDIA, NEW DELHI

I. INTRODUCTION

Talking to the Bar about dissent is like taking coal to Newcastle. The Bar room is the most unholy place where nothing is sacred, no reputation so unimpeachable that it cannot be blown to smithereens, no personality so towering that it cannot be brought crashing down, no character so pure that it cannot be torn to shreds, no idea so holy, that it cannot be disagreed with. That is the essence of dissent. If anything, the Bar is a shrine for dissent.

We all know how any contrarian opinion can be taken into Bar room and discussions can be fast and furious, heated and at times aggressive but always ending in a shared cup of coffee or tea.

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II. Dissent in Democracy

A. Article 19-Dissent

The Preamble to the Constitution of India promises liberty of thought, expression, belief, faith and worship. Clauses (a) to (c) of Article 19(1) promise:-

- freedom of speech and expression;
- Freedom to assemble peaceably and without arms;
- And the freedom to form associations or unions;

These three freedoms are vehicles through which dissent can be expressed. The right of freedom of opinion and the right of freedom of conscience by themselves include the extremely important right to disagree. The right to disagree, the right to dissent and the right to take another point of view would inhere inherently in each and every citizen of the country.

When we view all these together, it is more than obvious that the right to dissent is the biggest right and, in my opinion, the most important right granted by the Constitution.

Those of us who are married and have children see various expressions of this right day in and day out. More often than not I am on the losing end. Even so, I love dissent because even in families there must be discussion and exchange of views. Every decision should be of the family and not only of the patriarch.

I chose this topic because I am troubled with certain recent events especially concerning lawyers and Bar Associations where forgetting the duty cast upon the lawyers under the Advocates Act, 1961 and the right of every person to have free legal aid, some Bar Associations in different parts of the country are passing resolutions that none of their members will appear in certain causes. This is something which worries me immensely. The community of lawyers was at the forefront of freedom movement. It is the lawyers who led the movements for civil rights. For me it is very saddening that today lawyers have to be told about the importance of dissent. I may add that I am not talking about the lawyers who are members of this Bar Association but through you I want to address various lawyers' bodies that they cannot close their minds and they cannot refuse to appear in certain matters and they should not obstruct the justice delivery system.

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Every society has its own rules and over a period of time when people only stick to the age-old rules and conventions, society degenerates. New thinkers are born when they disagree with well accepted norms of society. If everybody follows the well-trodden path, no new paths will be created, no new explorations will be done and no new vistas will be found. If a person does not ask questions and does not raise doubts questioning age old systems, no new systems would develop and the horizons of the mind will not expand. Whether it be Buddha, Mahavira, Jesus Christ, Prophet Mohammad, Guru Nanak Dev, Martin Luther, Kabir, Raja Ram Mohan Roy, Swami Dayanand Saraswati, Karl Marx or Mahatma Gandhi, new thoughts and practices would not have been established, if they had quietly submitted to the views of their forefathers and had not questioned the existing practices, beliefs and rituals.

B. Importance of Dissent in a Democracy

Dissent is essential in a democracy. If a country has to grow in a holistic manner where not only the economic rights but also the civil rights of the citizen are to be protected, dissent and

disagreement have to be permitted, and in fact, should be encouraged. It is only if there is discussion, disagreement and dialogue that we can arrive at better ways to run the country.

There can be no democracy without dissent. Recently, my brother Justice D.Y. Chandrachud in his speech put the matter very succinctly. He said:

"The blanket labelling of dissent as anti-national or anti-democratic strikes at the heart of our commitment to protect constitutional values and the promotion of deliberative democracy".

C. Majoritarianism

Rule of majority is an integral part of democracy but majoritarianism is the antithesis of democracy. In a democracy like ours where we have elections based on the first past the post principle, the Government in most cases does not represent the majority of the population, and often not even the voting electorate. Therefore, when those in power claim that they represent the will of all the people that is more often than not a totally baseless claim. They may be the elected Government

voted on the first past the post system by a large number of voters, but it cannot be said that they represent the entire will of the people. Even assuming they represent more than 50% of the electorate, can it be said that the remaining 49% of the population has no voice in running the country? Can it be urged that the remaining 49% cannot speak for the next 5 years till next elections are held? Should these 49% be totally ignored if they oppose what is said by the Government? In my view, the answer has to be a big 'NO'.

D. Dissent-Rationalism-Respect

The right to dissent is one of the most important rights guaranteed by our Constitution. As long as a person does not break the law or encourage strife, he has a right to differ from every other citizen and those in power and propagate what he believes is his belief.

The superior courts as protectors of the rights of the people have a duty to ensure that the powers that be do not supress dissent because that will have, to use the words of brother Justice Nariman "a chilling effect" on the freedom of speech. I can

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do no better than to quote the following observations from **Shreya Singhal's case**[1]

> "In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total."

The very essence of democracy is that every citizen has a right to participate not only in the electoral process but also in the way in which our country is run. This right becomes meaningless if that person cannot criticize the actions of the Government. The citizen, is not only a participant in the democratic process, he is an integral part of the country and has a right express his views even if they be totally contrary to the views of those in power. No doubt, these views must be expressed in a peaceful manner but citizens have a right to get together and protest when they feel that actions taken by the

[1] Shreya Singhal vs. Union of India (UOI)[1]; (2015) 5 SCC 1.

Government are not proper. Their cause may not always be right. At the same time, the Government may also not be right. Merely because certain groups oppose those in power cannot take away their right to oppose what is proposed by the Government or to oppose any actions of the Government as long as the protest is peaceful. The Government has no right to stifle or quell protest as long as the protests are peaceful. Protest also means expressing dissent which is part of the legacy left by the father of the country in the form of Civil Disobedience Movement, following the path of *Ahimsa*.

Since a lot has been said on the importance of dissent in recent days, I do not want to add anything more to what has been said by brother Chandrachud, J. in his P.D. Desai Memorial Lecture. Since that left me with some time in hand, I thought I would talk about the role of dissent in the decision-making process of the Judiciary. This is the second part of my address.

In the opening portion, I had referred to the Bar Association as an unholy place. That was in the context of the manner in which the Bar Associations are totally irreverent to many issues but the one concept which binds all of us in the legal fraternity is

the Rule of Law. In my opinion, the Bar Associations are shrines to the concept of Rule of Law.

As a principle of governance, the rule of law, like democracy, and the separation of powers is an integral part of our body politic. It is the golden thread which runs through our Constitution. Anywhere, anytime, when ordinary people are given the chance to choose, the choice is the same: freedom, not tyranny; democracy, not dictatorship; the rule of law not the rule of men. The bedrock of our democracy is the rule of law and this necessitates that we must have an independent fearless judiciary. There can be rule of law only when we have judges who can take decisions independent of political influence, totally uninfluenced by media or any other extraneous considerations. A free country is one where there is freedom of expression and governance by the rule of law. When there is no sharing of power, no rule of law, no accountability, here is abuse, corruption, subjugation and indignation. When the rule of law disappears, we are ruled by the idiosyncrasies and whims of a few.

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III. Dissent in Judgments

It is a well-settled principle of jurisprudence that law should be certain, but in this fast-changing world can laws remain stagnant? In my view the **interpretation of the laws has to be dynamic** and change with times and therefore it is not necessary that all of us agree with each other. That is why dissent plays an important role in the decision-making process.

A. KNOWING WHEN TO DISSENT

Laws must be stable and certain. A litigant must have a reasonable expectation of the way which laws move. Frequent changes in views lead to many problems. Judicial discipline is extremely important. Merely because I do not agree with another view does not mean that I must either refer the judgment to larger bench or find ways and means to somehow get over the judgment. That in my view causes more problems. However, when important issues arise merely because the majority of the brethren are taking different view one should not feel stifled or in any way hesitate to take contrary view even if one is the sole voice. As Tagore said:

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"जोदी तोर डाक शुने केउ ना आशे

तोबे एकला चोलो रे"

Translation: Open Thy Mind, Walk Alone

We Are Not Afraid, Walk Alone

Dissent is a powerful tool in the hands of a judge and it must be used responsibly. Dissenting for the sake of dissent will make the dissent lose its value, and not dissenting when our oath to this office calls for it, only to 'manufacture' a majority opinion makes the opinion a dishonest one. Hence, where one does not agree with the majority view, a judge must be free to voice his dissent.

A dissenting judgment sows the seed, which develops a new thought, which may at a later stage develop into a totally new approach to the law.

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B. Plessy vs. **Ferguson**[2]

The issue in this case was whether there should be separate compartments for white persons and persons of coloured races in trains. The use of a compartment meant for another race could entail imposition of fine or punishment.

The majority upheld this policy of segregation.

Justice John Marshall Harlan dissented alone. He wrote:

"...in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. . .The arbitrary separation of citizens on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds."

This view of Justice Marshall was later upheld in **Brown** vs. **Board of Education**[3] by a unanimous 9–0 verdict.

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[2] 163 U.S. 537 (1896)

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C. Dred Scott vs. **John F. A. Sandford**[4]

Facts: In this case the question to be decided was whether a slave, who had lived in a territory where slavery had been abolished, on return to the territory where slavery still existed was a freeman or remained a slave?

Majority: By 7–2 the U.S. Supreme Court held that "a negro, whose ancestors were imported into this country and sold as slaves," whether enslaved or free, could not be an American citizen and therefore did not have standing to sue in federal court.

Justice McLean wrote the dissenting opinion and held:

"He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri, within the meaning of the act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicil in the State under

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[3] 347 U.S. 483 (1954)
[4] 60 U.S. 393(1856)

whose laws his rights are protected, and to which he owes allegiance.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is 'a freeman' Being a freeman, and having his domicil in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him."

D. Liversidge vs. **Anderson**[5]

While talking about dissenting judgments one has to start with Lord Atkin's opinion in **Liversidge** vs. **Anderson** where he said:-

> "**I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister**."

He was not scared to be alone a time when England was virtually on the losing side and was facing regular air raids from Germany. It is in this atmosphere that Lord Atkin had the courage to say:-

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[5] [1941] UKHL 1.

"**In England, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace**. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

This is one of the most powerful and courageous dissents

E. A.K. Gopalan vs. **The State of Madras**[6]

As far as India is concerned the 1st most important dissent was by Justice Fazal Ali in ***A.K. Gopalan's case.***

The question to be decided in this case is whether the Preventive Detention Act, 1950 (Act IV of 1950), is wholly or in part invalid and whether the petitioner who had been detained under that Act was entitled to a writ in the nature of habeas corpus on the ground that his detention is illegal.

Majority:- If the procedure mentioned in those articles is followed the arrest and detention contemplated by article 22(1) and (2),

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[6] [1950] 1 SCR 88.

although they infringe the personal liberty of the individual, will be legal, because that becomes the established legal procedure in respect of arrest and detention.

Fazl Ali, J.- Procedure must be **reasonable and fair.**

"The question is whether the principle that no person can be condemned without a hearing by an impartial tribunal which is well-recognized in all modern civilized systems of law and which Halsbury puts on a par with well-recognized fundamental rights cannot be regarded as part of the law of this country..... If that is so, then 'procedure established by law' must include this principle, whatever else it may or may not include"

This view was later ***accepted in R.C. Cooper's case (Bank Nationalisation Case).***[7]

For many in the audience who joined practice in the 80s or thereafter, these observations would seem almost redundant, however at the time when they were made, these were path-breaking.

[7] Rustom Cavasjee Cooper and Ors. vs. Union of India (UOI); (1970) 1 SCC 248.

F. Kharak Singh vs. **The State of U.P. and Ors.** [8]

Question:- Whether right to privacy is a fundamental right?

Majority:- Right to privacy is not a fundamental right.

"As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."

Subba Rao, J:- Right to Privacy is a fundamental right.

"It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty."

This view-that right to privacy is a fundamental right has been affirmed almost 55 years later by a 9 Judges Bench in **Justice K.S. Puttaswamy** vs. **Union of India (UOI)**[9].

[8] (1964) 1 SCR 332.
[9] (2017) 10 SCC 1.

G. Naresh Shridhar Mirajkar and Ors. vs. **State of Maharashtra and Ors.** [10]

Facts: The witness in a case had made a request to the presiding Judge (Mr. Justice Tarkunde) to withhold his evidence from newspaper reporters since publication of reports of his earlier deposition had caused loss to him in his business. Mr. Justice Tarkunde orally ordered that his deposition should not be reported in newspapers. Writ Petitions under Article 32 of the Constitution were filed to question the order on the ground that the fundamental rights under Art. 19(1)(a) of the Constitution of have been violated by the said order.

Hidayatullah J.,- "These provisions show that it cannot be claimed as a general proposition that no action of a Judge can ever be questioned on the ground of breach of fundamental rights. The Judge no doubt functions, most of the time, to decide controversies between the parties in which controversies the Judge does not figure but occasion may arise collaterally where the matter may be between the Judge and the fundamental rights

[10] AIR 1967 SC 1.

of any person by reason of the Judge's action. It is true that Judges, as the upholders of the Constitution and the laws, are least likely to err but the possibility of their acting contrary to the Constitution cannot be completely excluded. In the context of Arts. 14, 15(1)(b) and (19)(a) and (d) it is easy to visualize breaches by almost any one including a Judge... I am, therefore, of opinion that Judges cannot be said to be entirely out of the reach of fundamental rights."

This is still a dissenting view and time alone will tell whether this will one day become a majority view.

H. Zee Telefilms Ltd. and Ors. vs. **Union of India (UOI) and Ors.**[11]

Question: Whether BCCI is 'State' under Article 12?

Majority: BCCI cannot be held to be a State for the purpose of Article 12.

S.B. Sinha, J.: Board of Control for Cricket in India (Board) falls within "Other Authorities" within the meaning of Article 12 of the Constitution of India.

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[11] (2005) 4 SCC 649.

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Almost a decade later, in **BCCI** vs. **Cricket Association of Bihar & Ors.**[12] a Division Bench of the Supreme Court held that even though BCCI is not 'State' within the meaning of Article 12 of the Constitution, since it is discharging important public functions it is amenable to writ jurisdiction under Article 226.

I. Two Recent Dissents-

Justice Chandrachud in the Aadhar Judgment[13]- Aadhar Act Unconstitutional

"Our Constitution does not provide absolute power to any institution. It sets the limits for each institution. Our constitutional scheme envisages a system of checks and balances.

This dissent was relied upon by the Jamaican SC when they struck down the National Identification System which was to provide a "comprehensive and secure structure to enable the capture and storage of personal identity information for citizens and persons ordinarily resident in Jamaica."

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[12] 2015 (3) SCC 251.

[13] Justice K.S. Puttaswamy (Retd.) & Anr. vs. UOI & Ors; WP(C) 494/2012.

Justice Indu Malhotra in Sabarimala[14]- The limited restriction on the entry of women during the notified age-group does not fall within the purview of Article 17 of the Constitution."

J. Additional District Magistrate, Jabalpur vs. Shivakant Shukla[15]

The most shining example of a dissent is that courageous judgment of **Justice H.R. Khanna** when during the emergency he held in **ADM Jabalpur** vs. **Shivkant Shukla** that the fundamental rights of a citizen cannot be taken away. He knew that he was putting his future as Chief Justice of India at stake. Knowing the past history when 3 senior Judges have been overlooked to appoint Justice A.N. Ray as Chief Justice of the Supreme Court of India, he knew that in all probability he would meet the same fate. That did not deter him in doing his duty and delivering a judgment which even today has been acknowledged to be the correct position of law. Nine High Courts had the courage to hold that Fundamental Rights are not abrogated.

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[14] Indian Young Lawyers Association and Ors. vs. The State of Kerala and Ors.; 2018 (13) SCALE 75.

[15] (1976) 2 SCC 521.

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From his important dissent, I would like to quote the following paragraphs:

"Law of preventive detention, of detention without trial is an anathema to all those who love personal liberty. Such a law makes deep inroads into basic human freedoms which we all cherish and which occupy prime position among the higher values of life. It is, therefore, not surprising that those who have an abiding faith in the rule of law and sanctity of personal liberty do not easily reconcile themselves with a law under which persons can be detained for long periods without trial. The proper forum for bringing to book those alleged to be guilty of the infraction of law and commission of crime, according to them, is the court of law where the correctness of the allegations can be gone into in the light of the evidence adduced at the trial. The vesting of power of detention without trial in the Executive, they assert, has the effect of making the same authority both the prosecutor as well as the judge and is bound to result in arbitrariness."

"Before I part with the case, I may observe that the conscious ness that the view expressed by me is at variance with that of the

majority of my learned brethren has not stood in the way of my expressing the same. I am aware of the desirability of unanimity, if possible. Unanimity obtained without sacrifice of conviction commends the decision to public confidence. Unanimity which is merely formal and which is recorded at the expense of strong conflicting views is not desirable in a court of last resort. As observed by Chief Justice Hughes (Prophets with Honor by Alan Barth, 1974 Ed. pp. 3-6.) judges are not there simply to decide cases, but to decide them as they think they should be decided, and while if may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice, A dissent in a court of last resort to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."

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IV. CONCLUSION

The right to dissent includes the right to criticize. We all must be open to criticism. The judiciary is not above criticism. If Judges of the superior courts were to take note of all the contemptuous communications received by them, there would be no work other than the contempt proceedings. In fact, I welcome criticism of the judiciary because only if there is criticism, will there be improvement. Not only should there be criticism but there must be introspection. When we introspect, we will find that many decisions taken by us need to be corrected. Criticism of the executive, the judiciary, the bureaucracy or the Armed Forces cannot be termed 'anti-national'. In case we attempt to stifle criticism of the institutions whether it be the legislature, the executive or the judiciary or other bodies of the State, we shall become a police State instead of a democracy and this the founding fathers never expected this country to be.

To question, to challenge, to verify, to ask for accountability from the government is the right of every citizen under the Constitution. These rights should never be taken away otherwise

we will become an unquestioning moribund society, which will not be able to develop any further.

I end with a poem from my favourite poet Guru Rabindranath Tagore. This poem adorns my office and is close to my heart.

> Where the mind is without fear and the head is held high;
> Where knowledge is free;
> Where the world has not been broken up into fragments by narrow domestic walls;
> Where words come out from the depth of truth;
> Where tireless striving stretches its arms towards perfection;
> Where the clear stream of reason has not lost its way into the dreary desert sand of dead habit;
> Where the mind is led forward by thee into ever-widening thought and action
> Into that heaven of freedom, my Father, let my country awake.

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ANNEXURE-C3

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The Wire

Loya Case the Tipping Point, Four SC Judges Say Democracy Is in Danger

12th January, 2018

The Wire Staff

"Democracy won't survive without a free judiciary."

New Delhi: In an unprecedented move, four justices of the Supreme Court – the senior-most justices after the Chief Justice of India – decided to hold a press conference to talk about the issues plaguing the apex court, triggered by issues surrounding a case on the death of special CBI Judge B.H. Loya and the roster of justices at the Supreme Court.

This is the first time in the history of the Supreme Court that something of this kind has happened. The press conference was held at the residence of Justice J. Chelameswar, and also addressed by Justices Ranjan Gogoi, Madan B. Lokur and Kurian Joseph. The press conference was held while the Supreme Court was in session and the day after two important appointments to the apex court were made.

On being asked repeatedly, the Justice Gogoi told journalists that the press conference was prompted by issues surrounding the death of special CBI Judge B.H. Loya.

Justice Chelameswar addressed the proceeding, calling it an "extraordinary" event in the history of India and its judicial institutions. "Sometimes, the administration of the Supreme Court is not in order. There are many things less than desirable that have happened in the last few months... As senior-most justices of the court, we have a responsibility to the nation and institution. We tried to persuade the CJI that some things are not in order and he needs to take remedial measures. Unfortunately, our efforts failed. We all believe that the SC must maintain its equanimity. Democracy will not survive without a free judiciary."

"This morning we went to the CJI with a specific request but unfortunately we were denied," Chelameswar continued. "So we were left with no choice but to take it to the nation. We don't want it to be said that we don't care about the

institution or the nation. About four months ago, all of us gave a signed letter to the CJI. We wanted a particular thing to be done in a particular manner. It was done, but it raised even more questions on the integrity of the institution. Inspite of four senior-most colleagues of the CJI going to him, there was no change."

"We are discharging our duty to the nation by telling you what's what," Justice Gogoi added.

The justices also said that they were not engaging in politics.

The justices did not give any specifics on what they are seeking on what issues they raised. However, they said they would make the letter they submitted to the CJI available to the press at the event and said everything they wanted to say had been presented in that. "There have been instances where case having far-reaching consequences for the Nation and the institution had been assigned by the Chief Justice of this Court selectively to the benches "of their preference" without any rationale for this assignment. This must be guarded against at all costs (emphasis in original)."

"In that decision [on Karnan] (referred to in *R.P. Luthra*), two of us observed that there is a need to revisit the process of appointment of judges and to set up a mechanism for corrective measures other than impeachment. No observation was made by any of the seven learned judges with regard to the Memorandum of Procedure. Any issue with regard to the Memorandum of Procedure should be discussed in the Chief Justices' Conference and by the Full Court. Such a matter of grave importance, if at all required to be taken on the judicial side, should be dealt with by none other than a Constitution Bench," the letter continues.

Writing in the *Indian Express* on Friday, senior advocate and former president of the Supreme Court Bar Association Dushyant Dave raised many of the same issues. His article also gave a list of cases where he thought the bench formed by the CJI was questionable. Dave wrote:

> Even though empowered with the order of November 10, 2017, does the Chief Justice of India possess absolute and arbitrary powers to "constitute the Benches of the Court and allocate cases to the Benches so constituted"? Of course not. He is as much bound by the Rule of Law as anybody else. If there is one principle firmly rooted in our constitutionalism, it is: "Be you ever so high, law is above you."

> Yet, a little insight into the functioning of the Supreme Court today will reveal that the Chief Justice has been exercising his powers in an opaque manner. Several instances reflect that the Constitution Benches are constituted by including certain judges and excluding certain others. It is not my endeavour to criticise or attack any individual judge. But the fact remains that senior judges and even judges known for their proficiency in certain branches of law are excluded from such benches.

The four justices' entire letter is reproduced below:

Dear Chief Justice,

It is with great anguish and concern that we have thought it proper to address this letter to you so as to highlight certain judicial orders passed by this Court which has adversely affected the overall functioning of the justice delivery system and the independence of the High Courts besides impacting the administrative functioning of the Office of the Hon'ble Chief Justice of India.

From the date of establishment of the three chartered High Courts of Calcutta, Bombay, and Madras, certain traditions and conventions in the judicial administration have been well established. The traditions were embraced by this Court which came into existence almost a century after the above mentioned chartered High Courts. These traditions have their roots in the anglo saxon jurisprudence and practice.

One of the well settled principles is that the Chief Justice is the master of the roster with a privilege to determine the roster, necessity in multi-numbered courts for an orderly transaction of business and appropriate arrangements with respect to matters with which member/bench of this Court (as the case may be) is required to deal with which case or class of cases is to be made. The convention of recognising the privilege of the Chief Justice to form the roster and assign cases to different numbers/benches of the Court is a convention devised for a disciplined and efficient transaction of business of the Court but not a recognition of any superior authority, legal or factual of the Chief Justice over his colleagues. It is too well settled in the jurisprudence of the country that the Chief Justice is only the first amongst the equals – nothing more or nothing less. In the matter of the determination of the roster there are well-settled and time honoured conventions guiding the Chief Justice, be it the conventions dealing with the strength of the bench which is required to deal with a particular case or the composition thereof.

A necessary corollary to the above mentioned principle is the members of any multi-numbered judicial body, including this court, would not arrogate to themselves the authority to deal with and pronounce upon matters which ought to be heard by appropriate benches, both composition wise with due regard to the roster fixed.

Any departures from the above two rules would not only lead to unpleasant and undesirable consequences of creating doubt in the body politic about the integrity of the institution. Not to talk about the chaos that would result from such departure.

We are sorry to say that off late the twin rules mentioned above have not been strictly adhered to. There have been instances where case having far-reaching consequences for the Nation and the institution had been assigned by the Chief Justices of this court selectively to the benches "of their preference" without any rationale basis for such assignment. This must be guarded against at all costs.

We are not mentioning details only to avoid embarrassing the institution but note that such departures have already damaged the image of this institution to some extent.

In the above context, we deem it proper to address you presently with regard to the order dated 27 October, 2017 in R.P Luthra vs Union of India to the effect that there should be no further delay in finalising the Memorandum of Procedure in the larger public interest. When the Memorandum of Procedure was the subject matter of a decision of Constitution Bench this Court in Supreme Court Advocates-on-Record Association and Anr. Vs. Union of India [(2016) 5 SCC 1] it is difficult to understand as to how any other Bench could have dealt with the matter.

The above part, subsequent to the decision of Constitution Bench, detailed discussions were held by the Collegium of five judges (including yourself) and the Memorandum of Procedure was finalised and sent by the then Hon'ble the Chief Justice of India to the Government of India in March 2017. The Government of India has not responded to the communication and in view of this silence, it must be taken that the Memorandum of Procedure as finalised by the Collegium has been accepted by the Government of India on the basis of the order of this Court in Supreme Court Advocates-on-Record Association (Supra). There was, therefore, no occasion for the Bench to make any observation with

regard to the finalisation of the Memorandum of Procedure or that that issue cannot linger on for an indefinite period.

On 4 July, 2017, a Bench of seven Judges of this Court decided In Re. Hon'ble Shri Justice C.S. Karnan [(2017) 1 SCC 1]. In that decision (referred to in R.P.Luthra), two of us observed that there is a need to revisit the process of appointment of judges and to set up a mechanism for corrective measures other than impeachment. No observation was made by any of the seven learned judges with regard to the memorandum of procedure.

Any issue with regard to the Memorandum of Procedure should be discussed in the Chief Justices Conference and by the full court. Such a matter of grave importance if at all required to be taken on the judicial side should be dealt with by none other than a Constitution bench.

The above development must be viewed with serious concern. The Hon'ble Chief Justice of India is duty bound to rectify the situation and take appropriate remedial measures after a full discussion with the other members of the Collegium and at a later stage, if required, with other Hon'ble Judges of this court.

Once the order arising from the issue dated 27 October, 2017 in R.P. Luthra vs. Union of India mentioned above, is adequately addressed by you and if it becomes so unnecessary we will apprise you specifically of the other judicial orders passed by this Court which would require to be similarly dealt with.

With kind regards,

CHELAMESWAR
RANJAN GOGOI
MADAN B. LOKUR
KURIAN JOSEPH

Source:

https://thewire.in/law/sc-justices-hold-historic-press-conference-triggered-judge-loya-case

(TRUE COPY)

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ANNEXURE-C4

Times of India

We felt then-CJI was being remote-controlled: Justice Kurian Joseph

3rd December, 2018

Dhananjay Mahapatra

NEW DELHI: In a stunning claim, retired Supreme Court Judge, Kurian Joseph said he and three other most senior SC judges held their much-discussed press conference on January 12 as they felt that then CJI Dipak Misra was being controlled from outside and was allocating cases to judges with political bias.

In an exclusive interview to TOI, Justice Joseph narrated in detail the turbulent times in the apex court, leading to the unprecedented press conference by him with three most senior judges - Justices Jasti Chelameswar, Ranjan Gogoi and Madan B Lokur.

Asked what went wrong within four months of Justice Misra taking over as CJI, Justice Joseph said, "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."

Asked to elaborate on the "external-influence", Justice Joseph said, "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"

At the headline hogging press conference, the rebel judges questioned the functioning of the CJI Misra, Including allocation of hearing of a petition seeking probe into the alleged suspicious death of judicial officer B H Loya to a bench headed by Justice Arun Mishra, who later recused from the case after a showdown with Justice Chelameswar at the routine morning meeting of SC judges on January 13

Asked whether it was a unanimous decision to go for the press conference, he said, "Justice Chelameswar was the initiator of the idea of press conference. But we three agreed with him."

The presser and allegations of the then CJI getting cosy with the establishment were cited as grounds in the motion moved by Congress-led opposition parties in the Rajya Sabha seeking Justice Misra's removal. The notice for the motion was rejected by Rajya Sabha Chairman M Venkaiah Naidu for lack of any convincing grounds.

Born in a family with modest means, Justice Joseph persevered to rise in his profession, reaching the number three spot in the SC. His father was a clerk in the Kerala high court, where he started his practice in 1979 at the age of 26. He was appointed additional advocate general of Kerala in 1994 and was designated a senior advocate in 1996.

"It was a proud moment for me when I took oath as a judge of the Kerala HC in 2000, the HC where my father had worked as a clerk. His meagre income was insufficient to run a large household comprising seven children: I used to go to school barefoot and got my first slippers when I was in Class 7 But we never even thought of complaining as hardship was a part of life," he said.

A deeply spiritual person, Justice Joseph believes that dispensing justice is a constitutional duty where compassion holds the balance in his tenure of five years and eight months, he disposed of 8.612 cases and wrote over 1000 detailed judgments.

His prayer before deciding cases would humble the most knowledgeable, "I always had the same prayer on my lips when I heard a case: 'God, let justice not be denied to a deserving person only because of my lack of knowledge or inadequate preparation on my part. And give me wisdom to discern justice in the case! Justice Joseph said he read each and every case file and his law clerks were utilised only for research purposes.

Source:

https://timesofindia.indiatimes.com/india/we-felt-then-cji-was-being-remote-controlled-justice-kurian-joseph/articleshow/66912798.cms

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ANNEXURE-CS

The Law Commission

(LAW COM No 335)

CONTEMPT OF COURT: SCANDALISING THE COURT

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 18 December 2012

HC 839 London: The Stationery Office £xx.xx

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THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Lloyd Jones, *Chairman*
Professor Elizabeth Cooke
Mr David Hertzell
Professor David Ormerod
Miss Frances Patterson QC

The Chief Executive of the Law Commission is Mrs Elaine Lorimer.

The Law Commission is located at Steel House, 11 Tothill Street, London SW1H 9LJ.

The terms of this report were agreed on 12 December 2012.

The text of this report, including Appendices A and B, is available on the Law Commission's website at http://lawcommission.justice.gov.uk/areas/contempt.htm. The Appendices are not included in the printed copy.

THE LAW COMMISSION

CONTEMPT OF COURT: SCANDALISING THE COURT

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THE LAW COMMISSION

CONTEMPT OF COURT: SCANDALISING THE COURT

To the Right Honourable Chris Grayling MP, Lord Chancellor and Secretary of State for Justice

INTRODUCTION

1. Scandalising the court, also known as scandalising the judiciary or scandalising judges, is a form of contempt of court, consisting of the publication of statements attacking the judiciary and likely to impair the administration of justice.

2. On 10 August 2012 we published Consultation Paper No 207, Contempt of Court: Scandalising the Court.[1] In that paper we asked whether the offence of scandalising the court should be retained, abolished, replaced or modified. The consultation period was originally set to end on 5 October 2012, but was extended to 19 October 2012 at the request of some judicial consultees. In this report we consider the responses and state our recommendations.

3. Originally, our consideration of scandalising the court formed part of our wider project on contempt of court.[2] An amendment to the Crime and Courts Bill was proposed by Lord Lester and others,[3] designed to abolish the offence: this was withdrawn upon the Government giving an undertaking to consider the issue in time to be dealt with within the Bill. We accordingly brought our consideration forward in order to produce recommendations in time to be considered within this legislative process.

4. Following our consultation, a similar amendment was proposed again.[4] In an online summary of our conclusions[5] we expressed support for this amendment: this report sets out the arguments and our conclusions in more detail.

[1] In this paper, "CP".

[2] Contempt of Court (2012) Law Commission Consultation Paper No 209.

[3] http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0004/amend/ml004-v.htm (last visited 6 Dec 2012). For details of this amendment and the debates thereon, see *Hansard* (HL), 2 Jul 2012, vol 738, col 555 and following: http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120702-0002.htm#12070239000130 (last visited 6 Dec 2012).

[4] http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0049/amend/su049-ic.htm (last visited 6 Dec 2012).

[5] On Law Commission website at: http://lawcommission.justice.gov.uk/docs/cp207_Scandalising_the_Court_summary_of_conclusions.pdf.

THE CONSULTATION

5. In our consultation paper we asked three questions and made one provisional proposal, as follows.[6]

> 1. Consultees are asked whether they agree that the offence of scandalising the court should not be retained in its current form.[7]
>
> 2. We provisionally propose that the offence of scandalising the court should be abolished without replacement. Consultees are asked whether they agree.[8]
>
> 3. If consultees do not agree with our provisional proposal that the offence be abolished, they are asked whether they consider that the offence of scandalising the court should be retained or replaced in a modified form, and if so:
>
> (1) whether this should be done by retaining the offence as a form of contempt, but modifying it to include defences of truth, public interest or responsible journalism;
>
> (2) whether a new offence should be created separate from contempt, and if so how it should be defined;
>
> (3) in either case, what the mode of prosecution and trial for the offence should be.[9]

6. We received 46 responses, from sources including serving and retired members of the judiciary, professional and representative bodies, legal academics and members of the public. Of these, 32 agreed with the proposal that the offence of scandalising the court should be abolished without replacement. Nine expressed the view that an offence of this kind was needed, though most of these favoured a statutory offence, either as a form of contempt of court or as a separate offence. The rest expressed no decided view. A more detailed account of the responses is given in Appendix A to this report.[10]

7. We would like to thank all those who responded to our consultation paper, or who assisted us in the course of our consideration of scandalising the court.

BRIEF DESCRIPTION OF THE OFFENCE

8. Scandalising the court is a form of contempt of court. It generally takes the form of a publication, though it can include statements publicised by other means,

[6] CP p 33, Questions for Consultees.

[7] CP para 61.

[8] CP para 84.

[9] CP para 90.

[10] Appendix A may be viewed at http://lawcommission.justice.gov.uk/areas/contempt.htm. It is not included in the printed copy of this report.

such as holding banners outside a court[11] and letters to the judge.[12] Where one person makes a statement, whether orally or in writing, and another publishes it, both can be guilty of scandalising.[13] The statements must be derogatory of the judiciary: that is, either of individual judges or courts or of the judiciary in general or a section of it.

9. Unlike other forms of contempt by publication, scandalising contempt does not need to have the effect of prejudicing particular proceedings. For this reason, the conditions for this form of contempt are more restrictive than those for prejudicial statements about pending proceedings: there is more latitude for comment about cases that are concluded.[14] The test of liability is whether the statements are likely to undermine the administration of justice or public confidence therein.[15] This likelihood must be determined having regard to the circumstances,[16] though there is some authority for saying that allegations that a judge is partial or corrupt automatically amount to scandalising.[17]

10. As concerns the mental element, it is clear that the defendant must intend to publish something; what is less clear is whether there must be knowledge of the scandalous nature of what is published. In one case a person who innocently lent another a paper containing scandalising statements was held not to be in contempt.[18] It is not clear whether a professional publisher would be in contempt for publishing material which, unknown to him or her, contained scandalous statements.[19] It would seem that there is no requirement of an intention to undermine the administration of justice.[20]

11. It would seem that the offence only covers abuse of a fairly extreme and irresponsible kind.[21] Criticism in good faith, as part of a discussion of a question

[11] CP para 17; *Vidal, The Times*, 14 Oct 1922.

[12] *Freeman, The Times*, 18 Nov 1925.

[13] *A-G v O'Ryan and Boyd (1)* [1946] 1 IR 70.

[14] *Dunn v Bevan* [1922] 1 Ch 276; *Desmond v Glackin* [1993] 3 IR 1. The offence of scandalising can also be committed while proceedings are pending, with the same conduct constituting both forms of contempt: *Re Kennedy and McCann* [1976] IR 382.

[15] CP para 18; *Gray* [1900] 2 QB 36, 40.

[16] CP para 24(1).

[17] CP paras 24(2) and 25; Lord Atkin in *Ambard v A-G of Trinidad and Tobago* [1936] AC 322, 335: "provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice". Contrast *Solicitor General v Radio Avon Ltd* [1978] 1 NZLR 225, 231.

[18] *McLeod v St Aubyn* [1899] AC 549.

[19] D Eady and A T H Smith (eds), *Arlidge, Eady and Smith on Contempt* (4th ed 2011) ("Arlidge, Eady and Smith") para 5-252.

[20] CP para 37; *Borrie and Lowe: The Law of Contempt* (4th ed 2010) ("Borrie and Lowe") para 11.25; C J Miller, *Contempt of Court* (3rd ed 2000) ("Miller") para 12.28.

[21] CP paras 19 and 20; *R v Metropolitan Police Commissioner ex parte Blackburn (No 2)* [1968] 2 QB 150, 155 and 156.

of public interest, does not fall within the offence:[22] it is not clear whether this is a formal defence or simply an observation about the scope of the offence.[23] It is not clear whether the truth of the statements made, taken on its own, is a defence:[24] one suggestion is that, whatever the position may have been at common law, a court would now be bound to interpret the offence as including such a defence in order to comply with the Human Rights Act 1998.[25]

12. In England and Wales, the offence had almost fallen into disuse by the end of the nineteenth century, when it was revived in two cases.[26] Two further prosecutions occurred in 1930[27] and 1931,[28] the latter being the last successful prosecution for this offence. Lord Diplock described it as "virtually obsolescent" in 1985.[29]

13. Since 1900, most of the reported cases have been Commonwealth appeals to the Privy Council.[30] The offence is still sometimes prosecuted in Australia and some other Commonwealth countries.[31]

ARGUMENTS IN THE CONSULTATION PAPER

14. As mentioned before, the options in the consultation paper were to retain the offence, to abolish it or to replace it. In the paper we explored the arguments relating to each option.

15. The principal argument discussed in the paper for retaining the offence was that it aims to safeguard the authority of the judiciary, and that this aim is recognised as legitimate under the European Convention on Human Rights ("ECHR").[32] Further, if the object of the law of contempt as a whole is to discourage interference with the administration of justice, scandalising conduct falls within that object just as squarely as all other forms of contempt.[33] Some extreme cases, reported from

[22] CP paras 40 and 41; *Dallas v Ledger, Re Ledger* (1888) 4 TLR 432; *Ahnee v DPP* [1999] 2 AC 294; *Harris v Harris* [2001] 2 Family Law Reports 895, cited R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2008) ("Clayton and Tomlinson") para 15.100.

[23] CP para 42; see also Miller para 12.37.

[24] CP para 38; Arlidge, Eady and Smith para 5-257; Borrie and Lowe paras 11.22 and 11.23; Miller paras 12.32 and 12.33.

[25] Borrie and Lowe para 11.23.

[26] *McLeod v St Aubyn* [1899] AC 549; *Gray* [1900] 2 QB 36.

[27] *Wilkinson*, *The Times* 16 Jul 1930.

[28] CP para 5; *Colsey*, *The Times* 9 May 1931.

[29] *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 347.

[30] *Ambard v A-G for Trinidad and Tobago* [1936] AC 322; *Perera v R* [1951] AC 482; *Maharaj v A-G of Trinidad and Tobago (No 1)* [1977] 1 All ER 411; *Badry v DPP of Mauritius* [1983] 2 AC 297; *Ahnee v DPP* [1999] 2 AC 294.

[31] CP para 6. See also *Re A-G's Application* [2009] FJHC 9, [2009] 4 LRC 711 (Fiji); *R v Hinds, ex parte A-G* (1960) 3 WIR 13; *Re Major v Government of the United States of America*, (2008) 75 WIR 1 (West Indies).

[32] Art 10(2) ECHR.

[33] CP para 58.

other jurisdictions,[34] are clearly such as to deserve public sanction, and might not always be capable of being prosecuted as mainstream criminal offences, such as public order offences.[35]

16. The principal arguments discussed in the paper for abolishing the offence without replacement included the following: that it is not enforced at present and appears to be obsolescent, that prosecutions can have the effect of increasing the harm caused by the act complained of,[36] and that it is counter-productive in that it conveys the impression that the judges are protecting their own.[37] The offence has also been criticised on the ground of freedom of expression,[38] and it has been argued that judges do not need a special protection not given to any other public officials.[39] The old argument that judges need protection because they cannot answer back has less force than it did.[40]

17. Finally, we discussed various possibilities for a replacement offence, ranging from that recommended by the Law Commission in 1979[41] to some proposals of law reform bodies in Australia.[42] We left these possibilities open to consultation but on balance took the view that the offence was redundant and that its abolition would leave no gap in the law.[43]

ARGUMENTS FOR AND AGAINST ABOLISHING THE OFFENCE

18. The arguments advanced in the consultation paper, together with those in the responses, may be grouped under the following heads, which we shall treat in order.

    (1) Whether the offence is an undue restriction on freedom of expression.

    (2) Whether the offence may be impugned as incompatible with the ECHR, or otherwise criticised on human rights grounds.

    (3) Whether the boundaries of the offence are unacceptably uncertain.

    (4) Whether the offence should be regarded as obsolescent and, therefore, unnecessary.

[34] See, eg, *Wong Yeung Ng v Secretary of Justice* [1999] HKCA 382; discussed by T Hamlett, "Scandalising the Scumbags: The Secretary for Justice vs the Oriental Press Group" (2001) 11 *Asia Pacific Media Educator* 20.

[35] CP paras 70 to 73. We discuss whether this is the case at para 80 and following below.

[36] See para 65 below.

[37] CP paras 64 and 65; see para 63 below.

[38] See para 19 below.

[39] CP paras 66 and 67.

[40] CP paras 77 to 83. For further discussion of the former position under the Kilmuir Rules, see Lord Taylor, "Justice in the Media Age" (1996) 62 *Arbitration* 258.

[41] Criminal Law: Offences Relating to Interference with the Course of Justice (1979) Law Com No 96; see para 75 below.

[42] CP para 89.

[43] CP para 84.

(5) Whether the offence, even if not prosecuted, has symbolic value.

(6) Whether the offence is in danger of being perceived as self-serving on the part of the judiciary.

(7) Whether prosecution for the offence has undesirable effects.

(8) Whether changing attitudes to judicial and other authority affect the need or justification for the offence.

Freedom of expression

19. The most important arguments of principle advanced against the offence are based on freedom of expression.[44] In a sense, this issue underlies all the other arguments: freedom of expression should not be infringed unless there is a strong reason for doing so, and the purpose of the other arguments is to explore whether such a reason exists.

20. Freedom of expression is a basic right under the ECHR.[45] Among the reasons advanced in its support are the following.[46]

(1) It promotes the self-fulfilment and development of those who express ideas and those who receive them.

(2) Truth is likely to emerge from the free expression of conflicting views in the market place of ideas.[47]

(3) It ensures that opinion and information about those who govern us or wish to govern us is available to the citizenship, and exposes errors or shortcomings in the process of government, including the administration of justice.

21. Freedom of expression must include the right to criticise the courts, but cannot be unqualified. Arguments for this right may be considered under two heads: claims to freedom for criticisms that are possibly justified (mainly argued for on grounds (2) and (3)) and claims to freedom for all criticism, however wrongheaded (more likely to be argued for on ground (1)).

22. Sir Sydney Kentridge QC pointed out in his response that most of the argument in the consultation paper seemed to concern freedom of criticism.

[44] Responses of Society of Editors; Newspaper Society; Guardian Newspapers; see Appendix A paras A.26 to A.28.

[45] Art 10 ECHR.

[46] *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, 126, cited by Sir Sydney Kentridge QC in his response: see Appendix A para A.43. See also Clayton and Tomlinson para 15.01.

[47] The argument in John Stuart Mill's *On Liberty* (1859 ed) ch 2.

> My principal criticism of the Commission's use of these authorities is that it seems to draw little distinction between criticism, including "outspoken" (per Lord Atkin) and "vigorous" (per Salmon LJ in *Blackburn (No 2)*) criticism on the one hand, and scurrilous abuse and the imputation of impropriety or dishonesty on the other.
>
> In other contexts, in particular the law of defamation, judges are accustomed to draw distinctions between vulgar abuse, comment (whether fair or not) and defamatory allegations of fact.

23. In short, Sir Sydney Kentridge QC advocates that the line should be drawn between criticism (to be exempt from liability) on one side, and vulgar abuse and defamatory allegations (both to be forms of scandalising) on the other. We agree that the law of defamation is familiar with these distinctions, but would point out that the line is drawn in a different place: vulgar abuse is specifically excluded from the scope of defamation.[48] In other words, in defamation both criticism and vulgar abuse fall on the exempt side of the line; lying or unsubstantiated allegations of fact fall on the other, so as to constitute defamation.

24. If the offence of scandalising the court is to be retained or replaced, there would be a case for a similar distinction. However, views may vary as to where the line should be drawn and standards may change: as observed by Mr Justice Munby (now Lord Justice Munby) in *Harris v Harris*,[49] much of what would formerly have been considered to be scurrilous abuse has today to be recognised as amounting to no more than acceptable if trenchant criticism. We discuss below[50] the possibility of an offence confined to untrue allegations of judicial corruption or misconduct.

Possibly justified criticism

25. In *Almon*,[51] the court explained the original justification for the offence of scandalising as follows.

> But the principle upon which attachments issue for libels upon courts is of a more enlarged and important nature — it is to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eyes of the public.

Earlier in the same judgment the justification is given at greater length.

[48] P Milmo and others (eds), *Gatley on Libel and Slander* (11th ed, 2010) ("Gatley") para 3.35.

[49] [2001] 2 Family Law Reports 895 at [372], cited CP para 19.

[50] See para 75 and following below.

[51] (1765) Wilm 243, 270; 97 ER 94, 105.

> The arraignment of the justice of the judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. *To be impartial, and to be universally thought so, are both absolutely necessary* for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.[52]

This language suggests that "to be impartial" and "to be universally thought so" are two independent requirements, implying that the purpose of the offence is not confined to preventing the public from getting the wrong idea about the judges, and that where there are shortcomings, it is equally important to prevent the public from getting the *right* idea.

26. This may be thought a somewhat cynical interpretation of the reasoning in *Almon*, given the emphasis in that case on the importance of judges being impartial in fact. The judgment could be interpreted as relying on the more benign proposition that most judges are in fact impartial, so that to draw attention to the few exceptions risks undermining confidence in the innocent majority.

27. Even in this moderated form, this argument is unlikely to have much appeal today. Preventing criticism contributes to a public perception that judges are engaged in a cover-up and that there must be something to hide. Conversely, open criticism and investigation in those few cases where something may have gone wrong will confirm public confidence that wrongs can be remedied and that in the generality of cases the system operates correctly.

Unjustified criticism

IN PRINCIPLE

28. Sir Sydney Kentridge QC, after listing the three justifications for freedom of speech mentioned above in paragraph 20, observes:

> The question then is which of those purposes is served by abuse, scurrility or <u>false</u> allegations of conscious prejudice, corruption or other judicial misconduct. The obvious answer is none of them.

29. We are not certain that the three purposes given for freedom of expression should be regarded as exhaustive: there may be others, such as the avoidance of an atmosphere of fear and resentment.

[52] *Almon* (1765) Wilm 243, 256; 97 ER 94, 100 (our emphasis), cited CP para 10.

30. Another point is that these three purposes are served by the existence of freedom of expression in general. It should not be a question of considering each particular type of communication for which freedom is claimed, and asking whether *that communication* has these desirable effects. A great deal of material, falling within the ambit of the right to free expression, may be valueless or even deleterious. Its existence is simply the price to be paid for the existence of the freedom.

31. The adverse effects of measures for the suppression of complaints, even if limited to those that are wholly unjustified or abusive, appear to us to be as follows.

    (1) The measures may have a chilling effect, which also deters people from making complaints which are possibly justified.[53]

    (2) The suppression of unjustified criticism tends to fuel a suspicion that perhaps the criticism is not unjustified after all and that those in authority must have something to hide.

    (3) A society in which the expression of opinion is inhibited by fear is unpleasant to live in and will experience an accumulation of resentment, leading to instability in the long term.[54]

32. It is not clear whether the law of scandalising the court as it now stands has any of these effects.[55] If it does not, that may be because it is not enforced. More than one author cited in our consultation paper[56] has argued that in jurisdictions where the law of scandalising is enforced it does indeed have these effects.

IN PRACTICE

33. A more practical point is that, as several judges have pointed out, a great deal of extreme abuse of judges exists, much of it online, and does not appear to be doing any harm. The very extremity of the language prevents most readers from taking it seriously. As Lord Justice Elias observed in his response:

[53] The House of Lords referred to the "chilling effect" in connection with libel law in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 539, citing, amongst others, *City of Chicago v Tribune Co* (1923) 139 NE 87 and *New York Times Co v Sullivan* (1964) 376 US 254. For the use of this phrase in other jurisdictions, see *Iorfida v MacIntyre* (1994) 21 OR (3d) 186, 93 CCC (3d) 395 at [20] (Canada); F Schauer, "Fear, Risk and the First Amendment: Unravelling the 'Chilling Effect'" (1978) 58 *Boston University Law Review* 685 (United States).

[54] J Spigelman, "The Forgotten Freedom: Freedom from Fear" (2010) 59 *International and Comparative Law Quarterly* 543.

[55] Guardian Newspapers, in their response, express the view that it has a chilling effect on publications; see Appendix A para A.28.

[56] Robertson and Nicol, cited CP para 66; Iyer, cited CP para 71.

> In cases where allegations of corruption are made, public confidence is not placated by prosecuting the party making the allegations; that might be seen as seeking to conceal wrong doing. It is necessary to show that the allegations are false. Usually they are too silly for anyone to believe in their truth, and in those cases it is not necessary to have criminal sanctions to uphold the dignity of the judges.

In the few cases where harm may result, as in the case of language inciting others to violence, this will be covered by other offences.[57]

34. The assertion that this material does no harm cannot of course be taken literally, as it may do some harm by causing distress to the judges attacked. This harm, however, is equivalent to that done by material abusing members of society other than judges, and is in any case not the harm targeted by the offence of scandalising.[58] The question is whether the material is doing harm by undermining public confidence in the judicial system. Evidence on this is inherently hard to come by, but the opinion of those judges who have responded to our consultation paper appears to be that no such harm is occurring.

35. More than one consultee was concerned by the volume of abusive material in circulation but agreed that prosecution for scandalising the court was too blunt a mechanism for dealing with that problem.[59] Some consultees saw a need for more political support and strengthened codes of press conduct, or an increased role for the Judicial Communications Office.[60]

36. In the consultation paper we conceded that the existence of this material did have one adverse effect, namely to promote the impression that the law can be flouted with impunity.[61] Sir Sydney Kentridge QC argues that this is in itself sufficient harm to justify the offence.

37. This would be a very powerful argument if the existence of this material promoted the impression that it was safe to "flout the law" in the sense of flouting the authority of the legal system as a whole. However, the argument in the consultation paper is that the law that is being "flouted with impunity" is specifically that against scandalising. That is, the undesirable impression which should be removed is that which flows from the combined facts that a law against scandalising exists, that it is widely contravened and that it is not being enforced. This could equally be cured by enforcing the offence more effectively or by abolishing it.

[57] See para 80 and following below.

[58] It is targeted by the two offences under the Public Order Act 1996: see para 81 and following below.

[59] Response of Professor John R Spencer QC, and the views expressed in the seminar; see Appendix A para A.15.

[60] See Appendix A paras A.9 and A.11.

[61] CP para 63(2).

38. Sir Sydney further argues that the statement in the consultation paper that the existence of this material does not appear to be doing harm is not backed by evidence. One purpose of the consultation was to find out whether, in the experience of the consultees, harm is in fact being done. If, after an adequate consultation period, both judges and prosecutors report an impression that it is not, that is evidence on which it is appropriate to act.

False allegations of fact

39. In short, one type of material attacking judges is criticism, to be accepted or refuted in a spirit of public debate. Another type is vulgar abuse, to be ignored with a "wry smile",[62] or in more extreme cases prosecuted as harassment or encouragement of offences of violence.[63] The remaining category is that of false allegations of fact.

40. One alternative to abolishing scandalising the court without replacement would be to create an offence of publishing false allegations of corruption or misconduct on the part of judges. This would be similar to the Law Commission's recommendation in 1979. We discuss this possibility below.[64]

41. The question then becomes simply whether such an offence is necessary to fill the gap that would be left by the abolition of scandalising or whether the availability of a civil action for defamation, together with offences such as those under the Malicious Communications Act 1988, affords sufficient protection.[65]

Human rights

42. The likely application of the human rights jurisprudence to the offence of scandalising the court was analysed in detail in the consultation paper.[66] Briefly, we concluded that the European Court of Human Rights was unlikely to hold that the existence of the offence was inconsistent with the Convention but might well disapprove of particular prosecutions, in this way reducing the scope of the offence.[67] A domestic court would adopt the same approach, as it is bound under section 6 of the Human Rights Act 1998 to interpret the offence in a way compatible with the Convention: that very fact reduces the possibility that the offence as a whole would be found to be incompatible with the Convention. We have seen nothing in the responses to persuade us to take a different view.

[62] Simon Brown LJ (now Lord Brown of Eaton-under-Heywood) in *A-G v Scriven* 4 Feb 2000, unreported, cited in Lord Pannick's speech, *Hansard* (HL), 2 Jul 2012, vol 738, col 557.

[63] See para 80 and following below.

[64] See para 75 below.

[65] See para 86 and following below.

[66] CP paras 43 to 56.

[67] Cases cited in CP para 48; conclusion in CP para 55.

43. Some of the responses cited North American opinions to show that the offence is unacceptable from the human rights point of view.[68] Others have pointed out that the North American approach is significantly different from that of the ECHR and should not be used as a guide in European and Commonwealth jurisdictions where the culture is different.[69]

44. Sir Sydney Kentridge QC made the same point at greater length in his F A Mann lecture entitled "Freedom of Speech: Is It the Primary Right?".[70] United States law traditionally regards freedom of speech, as enshrined in the First Amendment, as the paramount right that prevails over all others in case of conflict, unless there is a "clear and present danger that [the words] will bring about the substantive evils that Congress has a right to prevent".[71] Other common law countries, such as England and Wales and Australia, by contrast, acknowledge the importance of freedom of speech, but regard it as one right among others, with any conflict being resolved by way of a balancing exercise.[72] In our consultation paper[73] we drew attention to the same contrast. The position in Canada remained uncertain until the court in *Kopyto*,[74] disapproving of the scandalising offence, appeared to adopt an approach near to that of the United States. New Zealand declined to follow *Kopyto*,[75] thus remaining in the Anglo-Australian camp.

45. The point about contrasting cultural expectations is a valid one, but could equally be used in reverse. The facts in *Žugić v Croatia*,[76] for example, which concerned a disrespectfully worded notice of appeal, would be unlikely to lead to prosecution in England and Wales. The fact that the prosecution was held to be compatible with the Convention indicates that the European Court of Human Rights was prepared to accept that Croatian legal and social norms demanded a greater degree of deference than some other countries. That is no guide to whether a similar offence is necessary in England and Wales.[77]

46. In summary, on a North American approach, the entire offence of scandalising may well be both unconstitutional and contrary to human rights, as it was held to be in *Garrison v Louisiana*[78] and in *Kopyto*. We are not contending for any such position here. Under the ECHR there is no doubt either that the offence of scandalising the court is in principle a restriction on freedom of speech or that it

[68] In particular Lord Pannick QC and Lord Lester of Herne Hill QC; see Appendix A paras A.13 and A.5.

[69] For example, Sir Sydney Kentridge QC; see Appendix A para A.43.

[70] (1996) 45 *International and Comparative Law Quarterly* 253.

[71] *Schenck v United States* (1919) 249 US 47, 51 to 52.

[72] Justice R Sackville, "How Fragile Are the Courts? Freedom of Speech and Criticism of the Judiciary" [2005] *Federal Judicial Scholarship* 11.

[73] CP para 46.

[74] (1987) 47 DLR (4th) 213 (Ont CA).

[75] *S-G v Radio New Zealand* [1993] NZHC 423, [1994] 1 NZLR 48.

[76] App No 3699/08.

[77] We discuss the question of necessity at para 52 and following below.

[78] (1964) 379 US 64.

can be justified if it is necessary to protect the authority and impartiality of the judiciary. The remaining questions are:

(1) the judgment of fact on whether the offence is either necessary or effective for that purpose;

(2) whether there are policy reasons, irrespective of human rights, for retaining or abolishing the offence.

Both these questions are discussed in the following paragraphs.

Uncertainty

47. There are uncertainties about the conditions for the offence,[79] in particular:

(1) whether allegations of partiality or corruption are always caught by the offence, without the need to show that, in the circumstances of the individual case, the undermining effect is likely to occur;[80]

(2) whether there needs to be any intention to undermine the administration of justice;[81]

(3) whether discussion on a matter of public interest is a formal defence, imposing a burden on the accused to adduce evidence;[82]

(4) whether the truth of the statements made is a defence independent of that of discussion on a matter of public interest.[83]

48. Uncertainty is a ground for challenging an offence from the point of view of human rights, as article 7 of the ECHR requires that the criminal law must be sufficiently accessible and precise to enable an individual to know in advance whether his or her proposed conduct is criminal.[84] In addition, article 10 requires any restriction on freedom of expression, whether taking the form of a criminal offence or not, to be "prescribed by law", again meaning that the law must be formulated with sufficient precision to enable citizens to regulate their conduct.[85] The two tests, while used for different purposes, are similar and may conveniently be considered together.

49. In some cases, an offence is so uncertain that it is held not to satisfy the requirement of being "prescribed by law". The reasoning here is that, quite apart from the effect of any actual prosecution, the uncertainty has a chilling effect on

[79] CP para 60; see the responses in Appendix A paras A.23 and A.31.

[80] See footnote 17 above.

[81] We believe not (see para 10 above), but there is disagreement among the authorities: CP para 32.

[82] See para 11 above.

[83] See para 11 above.

[84] *Korbely v Hungary* (2010) 50 EHRR 48 (App no 9174/02) (Grand Chamber decision) at [70], cited CP para 44; Clayton and Tomlinson para 11.511.

[85] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) ("Lester, Pannick and Herberg") para 4.10.30; Clayton and Tomlinson para 15.299.

expression in general, as a person cannot know in advance whether a proposed statement will fall within the offence.

50. We do not believe that the offence of scandalising is as uncertain as that. The doubts mentioned, though important, apply only in limited factual situations, and in many cases will be rendered irrelevant by the availability of the defence of discussion on a matter of public interest. As argued in the consultation paper, the likely response of the European Court of Human Rights would be to disapprove of prosecutions on facts involving these doubts, rather than to disapprove of the existence of the offence.[86]

51. On either view, uncertainty could be viewed as a reason for reform rather than abolition. If from the human rights point of view an offence is justifiable as being necessary for one of the defined purposes, but objectionable on the sole ground of uncertainty, the obvious solution is to redefine it so as to remove the uncertainty.

Obsolescence and necessity

52. The ECHR states that a restriction on freedom of expression is justified if necessary for any of a number of purposes, including the protection of the rights of others and the authority and impartiality of the judiciary.[87] The offence of scandalising the court is clearly aimed at protecting the authority and (perceived) impartiality of the judiciary: the question is whether it is *necessary* for this purpose.

53. As mentioned, the last successful prosecution in England and Wales was in 1931. The language used in the offending publication in that case[88] was, by present day standards, exceedingly moderate and would not now lead to prosecution. Professor David Feldman has argued that, even given the broad interpretation of necessity accepted by the European Court of Human Rights, the restriction constituted by the law of scandalising is not "necessary",[89] and this would seem to be supported by the fact that it has not been used successfully for 80 years.

[86] CP para 48 and cases there cited; discussed in CP paras 49 to 56.

[87] Art 10(2) ECHR; Lester, Pannick and Herberg para 4.10.40; Clayton and Tomlinson para 15.273 and following.

[88] "Lord Justice Slesser, who can hardly be altogether unbiased about legislation of this type, maintained that really it was a very nice provisional order or as good a one as can be expected in this vale of tears": CP para 5.

[89] D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed 2002) pp 970 to 971, cited in CP para 45; response of Chief Constable Andrew Trotter, see Appendix A para A.25.

54. In human rights jurisprudence, "necessary" does not mean indispensable, in the sense of there being no other existing or possible way of achieving the same protection. The meaning is rather broader: that there is a pressing social need,[90] that the restriction in question meets that need, and that it is not a disproportionate response.[91] The argument from obsolescence could, however, be adapted to that broader meaning. If *nothing* has been done in response to scandalous communications for the last 80 years, whether in the form of prosecutions for scandalising or for any other offence, despite the availability of scandalising, that indicates that there is no pressing social need.

55. As against that, one could advance the following arguments.

    (1) The reason for the absence of prosecutions for a given offence could well be that the conduct in question is rare, as the offence is an effective deterrent.[92] We do not believe that this is true of scandalising: conduct such as posting abusive blogs is frequent, but not prosecuted.

    (2) Another reason could be that the conduct in question falls within more than one offence: it may, therefore, have been prosecuted as another offence. There are several statutory offences covering some of the same conduct as scandalising the court, and we discuss them below.[93] However, there is little, if any, evidence about whether those responsible for abusive publications about the judiciary have in practice been prosecuted for these offences.

    (3) An offence, even if not necessary for practical prosecution purposes, can have value as a signal. We discuss this argument in the next few paragraphs.

56. In conclusion, we do not believe that the European Court of Human Rights would hold that the existence of the offence of scandalising is incompatible with the Convention, either on the ground of uncertainty or on the ground that it is not "necessary" for one of the approved purposes. It is more likely to object to particular prosecutions on one of these grounds.

Symbolic value

57. It is sometimes argued that, even if the offence is not prosecuted, its existence is a "signal" marking out the behaviour in question as undesirable.[94] As against that, it is argued that a signal is not effective unless it is enforced.[95]

[90] *Sunday Times v UK* (1979) 2 EHRR 245 (App no 6538/74) at [59]; Clayton and Tomlinson paras 15.239(ii) and 15.306.

[91] CP para 53; Lester, Pannick and Herberg para 4.10.28.

[92] Response of Sir Sydney Kentridge QC; see Appendix A para A.43. See also para 58 below.

[93] See para 80 and following below and Appendix B.

[94] See para 69 below.

[95] Response of Dr Findlay Stark; see Appendix A para A.16.

58. Sir Sydney Kentridge QC argued that in many cases, a law exists to stigmatise obviously undesirable behaviour, but there may be few prosecutions either because the behaviour is extreme and unusual or because the law is an effective deterrent. Were it shown for example that incest and bigamy were rarely prosecuted because they were rarely committed, the offences would remain important both as a deterrent and as a sign of social disapproval. In such cases, the symbolic effect of the law is important, regardless of the frequency of prosecution or indeed of offending.

59. We acknowledge the force of this argument, and could give further examples. The offence of genocide has never been prosecuted in an English court but no one could deny its importance as a statement of principle. It has been argued that the offence of high treason has fallen into disuse and should be abolished,[96] but against that it could be argued that it forms part of popular culture and has iconic value as part of a monarchical constitution. On a different but related point, Professor John Gardner has observed that a long-standing legal provision, even if not ideally drafted from a rational point of view, may have symbolic value by the fact of having entered popular culture.[97] He notes that the expressions "grievous bodily harm" and "actual bodily harm",

> and even their abbreviations "GBH" and "ABH", have entered the popular imagination, and now help to constitute the very moral significances which they quaintly but evocatively describe.[98]

60. However, we do not believe that the offence of scandalising the court falls into this iconic category. Most members of the public are unlikely to have heard of scandalising the court. If an offence, such as bigamy in the hypothetical example above, is rarely prosecuted because it rarely occurs, that is all to the good. The same cannot be said of an offence, such as scandalising, which covers a form of behaviour that occurs very frequently but is never prosecuted.

61. Once more, this is not an unequivocal argument for abolition without replacement. If the present offence of scandalising is lacking in symbolic value, because it is unknown to the public and never enforced, there are two possible cures. One is to abolish it. The other is to create an effective sanction and enforce it.

62. A further argument is that, whether or not the offence has value as a signal, its abolition would send a contrary signal, namely that abuse of judges is now to be regarded as acceptable.[99] This is an argument that the time is not right for abolition rather than that abolition is wrong in principle; on the other hand, following this reasoning, it is hard to know what time would be right. We also

[96] G McBain, "Abolishing the Crime of Treason" (2007) 81 *Australian Law Journal* 94.

[97] J Gardner, "Rationality and the Rule of Law in Offences Against the Person", in his *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007).

[98] J Gardner, "Rationality and the Rule of Law in Offences Against the Person", in his *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) p 50.

[99] See responses of: Barling J, Appendix A para A.36; Alec Samuels, Appendix A para A.37; and Sir Sydney Kentridge QC, Appendix A para A.43.

believe that the risk is slight: we are not aware of any sudden increase in offensive publications following the abolition of blasphemous[100] and seditious libel.[101]

Self-serving

63. It is customary to emphasise that the offence exists to safeguard the integrity of the judicial system rather than the personal dignity of judges.[102] Nevertheless, there is something inherently suspect about an offence both created and enforced by judges which targets offensive remarks about judges.[103]

64. This concern would be met to some extent if the offence were restated in statute, because it would not then be a judge-made offence, though it would still be seen as an offence enforced by judges. Even when one takes into account the fact that the offence is intended to protect the standing of the judiciary and not that of any individual judge, it still appears anomalous that judges have this protection when other prominent persons, such as members of Parliament, do not.[104] It is naturally akin to other offences, such as seditious libel[105] and *scandalum magnatum*;[106] after the abolition of these, and of criminal libel in general,[107] the offence of scandalising the court looks increasingly isolated.[108]

Effect of prosecution

65. Prosecutions for scandalising the court, and for any offence devised to replace it, are likely to have some undesirable effects, particularly if there is a defence of truth, as would seem to be required by article 10 of the ECHR.

(1) As argued above,[109] enforced silence is likely to create more ill-feeling than the original publication, not least the suspicion that judges are engaged in a cover-up and unfairly suppressing freedom of expression.

(2) A prosecution gives further publicity to the offending allegations by bringing them back to public attention after memory of them may have begun to fade.[110] A web post may be visited by some dozens of people.

[100] Criminal Justice and Immigration Act 2008, s 79.

[101] Coroners and Justice Act 2009, s 73(a).

[102] CP para 40; *R v Commissioner of Police of the Metropolis ex parte Blackburn (No 2)* [1968] 2 QB 150.

[103] Response of Bruce Houlder QC DL, Director of the Services Prosecution Authority; see Appendix A para A.24.

[104] Response of Bar Council; see Appendix A para A.20.

[105] Abolished by Coroners and Justice Act 2009, s 73(a).

[106] Abolished by Statute Law Revision Act 1887.

[107] Scandalising the court could formerly be tried on indictment as a form of criminal libel: *Hart and White* (1808) 30 State Trials 1131; *Castro* (1873) LR 9 QB 230.

[108] Response of Professor John R Spencer QC; see Appendix A para A.15.

[109] See para 31 above.

[110] Response of Anthony Edwards; see Appendix A para A.30.

A prosecution reported in the newspapers may bring it to the attention of some millions.

(3) Web posts frequently accuse judges of being involved in large scale conspiracies and promoting a hidden social agenda. Prosecuting the authors of such posts would give them a platform on which to vent these allegations further.

(4) Where the contemnor was an unsuccessful litigant, the contempt proceedings would be taken as an opportunity to re-litigate the issues in the original proceedings.

(5) In cases where an issue is raised as to whether the allegations are true, the proceedings are liable to turn into a trial of the behaviour of the judge in question. They might also result in the public revelation of personal details (for example, sexual orientation) which, though not discreditable, might be matters which the judge would prefer to keep private.

Change in public attitudes

66. The offence of scandalising the court arose in an era where deferential respect to authority figures was the norm. This is clearly no longer the case to nearly the same extent as it was.[111] Even if the change is one to be regretted, it is questionable how far it can be reversed by coercive measures. The very fact of the change implies that any such measures would be unpopular and, therefore, ineffective. As Lord Pannick observed in a lecture:[112]

> If confidence in the judiciary is so low that statements by critics would resonate with the public, such confidence is not going to be restored by a criminal prosecution in which judges find the comments to be scandalous or in which the defendant apologises.

67. The question of principle is whether it is either justifiable or effective to use the criminal law to stigmatise a form of behaviour which public opinion does not regard as wrong. This is not something on which there is general agreement. According to Professor Duff,[113] for example, the function of the criminal law is confined to declaring society's judgment on acts which are wrong or, at most, to drawing boundaries. For example, the law is justified in setting 70 mph as the speed limit, but only because it was already accepted that it was wrong to drive dangerously fast. The opposing argument is that, in some instances, such as drink driving, the legislature may legitimately use the criminal law in order to educate public opinion as well as to reflect it.

68. Whatever one's views on the theoretical argument, there is one prudential caution. If the moral framework used by the legislature is too far out of accord with that accepted by the public, there is a danger of distortions such as juries

[111] Munby LJ in *Harris v Harris* [2001] 2 Family Law Reports 895 at [372]; CP para 19. See also Lord Taylor, "Justice in the Media Age" (1996) 62(4) *Arbitration* 258.

[112] 26th Sultan Azlan Shah Law Lecture (5 Sep 2012); see Appendix A para A.13.

[113] R A Duff, "Rule-Violations and Wrongdoings" in S Shute and A P Simester, *Criminal Law Theory: Doctrines of the General Part* (2002) pp 47 to 74.

refusing to convict, or of unpopular legislation backfiring by creating further resentment. This last danger is the one affecting both scandalising and any proposed replacement offence. By seeming to show the judges as concerned with shielding their own, such an offence will only strengthen any existing distrust or disrespect.

69. It is argued that the existence of the offence lays down a marker for responsible journalism, which will influence journalistic behaviour.[114] Many who are responsible for publications in the print media, broadcasting or online will have a procedure for checking that proposed material does not offend against the law governing libel and prejudicial contempt and, so the argument goes, should be equally careful to avoid scandalising the judiciary. In this way, the offence serves a purpose even if no prosecutions are brought.

70. We consider that, even in the case of publishers which adopt these procedures to check on the legality of the content, the influence is at least equally likely to go the other way. The standard of what qualifies as a discussion in good faith of a matter of public interest is influenced by, rather than influencing, the accepted journalistic practice of the time.[115] For example, in 1987 the *Daily Mirror* published upside down photographs of three Law Lords concerned in the Spycatcher litigation, with the caption "YOU FOOLS".[116] This would certainly have been regarded as scandalising contempt if it had been published a century earlier; but it is the practice of journalism, and not the law, that has changed.

71. In any case, this argument is only relevant to a fraction of the total material published. Much amateur online posting knows no such inhibitions, and the same may be said of the paper correspondence that judges often receive from dissatisfied litigants in person. According to more than one of the judges we have consulted, there is a great deal of extremely abusive online material concerning judges, particularly those sitting in family cases. This does not appear to be at all influenced by the existence of the offence and it is hard to see that a revised offence would make much difference.

REPLACING SCANDALISING

Civil procedure

72. It was suggested by some consultees[117] that, in the long term, the solution might be to replace the offence of scandalising the court by a civil procedure on the lines of an injunction or restraining order. A person who was found to have published offensive material would first be ordered to desist from offensive publication following a private hearing in chambers; only if the order was

[114] Responses of: McCombe LJ, Appendix A para A.40; Attorney General for Northern Ireland, Appendix A para A.42; Sir Sydney Kentridge QC, Appendix A para A.43; Alec Samuels, Appendix A para A.37.

[115] Response of Bruce Houlder QC DL; see Appendix A para A.24.

[116] CP para 20.

[117] Responses of Barling J, Appendix A para A.36 and Council of Circuit Judges, Appendix A para A.39.

breached would there be a public prosecution for contempt of court. Such a procedure would need to be introduced by statute and contain a clear definition of the type of material concerned.

73. The procedure appears to be designed to address online publications. The scheme would be that at any time after a scandalous publication is made, an order can be made requiring it to be removed. It could, however, be a problem that, whether in relation to online or any other form of publication, the procedure would only allow the punishment of repeat offending. Judges would not be able to make a restraining order unless there had already been a scandalous publication. If publications of this kind have bad effects sufficient to justify criminalising them, those effects are just as likely to flow from the first publication as from any repetition.

74. There are some further problems which will have to be resolved if there is to be a solution along these lines.

(1) The fact that the order is made in private would reinforce the perception that judges are acting unaccountably in order to preserve their own dignity, and the proceedings for breach of the order would equally provide a platform for renewing the allegations.

(2) In some cases the publisher might have serious grounds for arguing that the publication ought to be allowed because the allegations are true.[118] It is unclear at what stage of the proceedings this issue would be determined, or whether the judge making the order would always be different from the judge about whom the allegations were made.

(3) In English law there is a general presumption against pre-censorship.[119] For this reason, in libel cases an interim injunction is not granted if the defendant shows that at the trial of the action he or she intends to prove that the statement in question is true.[120] A similar rule would presumably apply in the present context.

Offence of making false allegations

75. Another possibility would be a narrow targeted offence consisting of publishing false allegations of judicial corruption; this might possibly be extended to false allegations of other defined forms of misconduct.[121] This was mentioned in our consultation paper[122] as an alternative to abolition without replacement, but only

[118] Response of Elias LJ; see Appendix A para A.6.

[119] Clayton and Tomlinson para 15.25 and following.

[120] *Bonnard v Perryman* [1891] 2 Ch 269; Gatley para 27.6; Clayton and Tomlinson para 15.26.

[121] This would be similar to our recommendation in Criminal Law: Offences Relating to Interference with the Course of Justice (1979) Law Com No 96, for the creation of an offence of publishing or distributing a false statement alleging that a court or judge is or has been corrupt in the exercise of its or his or her functions. It did not specifically mention the abolition of scandalising the court: see CP para 57(2).

[122] CP paras 87 and 88.

one consultee[123] appears to favour this option. There would be significant problems with such an offence, principally the following.

76. By the nature of such an offence, there would have to be a defence of truth; this would probably also be necessary to ensure compliance with the ECHR. This would have the potentiality of turning the proceedings into a trial of the judge concerned. As Lord Carswell observed in his response:

> I am persuaded, however, that it would be better not to attempt to introduce such an offence into the law. If truth were to be a defence, a case which involved such a defence would generally require the judge concerned to give evidence, which could be used to make an opportunity for intrusive examination and give rise to unwelcome publicity in some of the media. Indeed, most prosecutions for the modified offence, whatever the basis of the offence and the defences, would provide a field day for anti-judicial commentators.

77. Although such an offence might work in relation to allegations against an individual judge, it is less clear that it would cover allegations against the judiciary collectively or a section of it. It is inherently harder to establish the truth or falsity of collective accusations. "Judge X accepts bribes" is a clear statement of fact which may in principle be shown to be true or false at a trial. "The judges of court Y are prejudiced against litigants in person" comes nearer to a statement of opinion which, even if wholly unfounded, could be regarded as simple criticism. For similar reasons, the law of defamation does not normally acknowledge the existence of libel against a group.[124]

78. One further decision that would need to be made is whether the new offence should impose strict liability for unverified statements, however honestly believed, as in the present law of defamation, or whether the offence should be restricted to deliberate lies.

    (1) Our impression, from the material shown to us by judges, is that, while the authors of much of the online material attacking judges appear to be disappointed litigants or conspiracy theorists, most of them honestly believe their allegations to be true. However much one might rationalise and modernise the offence, it would remain the case that prosecuting such individuals would create martyrs and provide a further platform for them to publicise their allegations.

    (2) Restricting the offence to deliberate lying would make its focus very narrow indeed. There may also be difficulty in proving the defendant's state of mind, though the legal system frequently has to confront similar issues, for example, in prosecutions for fraud.

79. In effect, this solution would amount to a revival of criminal libel, applicable only to libels against judges. The offence of criminal libel itself was obsolescent by the time it was abolished by section 73 of the Coroners and Justice Act 2009. It is

[123] Response of McCombe LJ; see Appendix A para A.40.

[124] Gatley para 7.9 and following.

hard to see that this limited form of it would have greater success. As Lord Justice Toulson observed in his response:

> I know of no case in which a judge would have wanted criminal proceedings, if possible, to be brought against somebody as a result of conduct to which the judge had been subjected in a judicial capacity, whether individually or as a member of a wider group, but such proceedings were impossible by reason of the non-existence of a suitable offence.
>
> ...
>
> If some new offence were created, I see no reason to suppose that it would be used any more than the offence of scandalising the court has been used in recent years.

OFFENCES ALTERNATIVE TO SCANDALISING

80. There are several criminal offences covering some of the same behaviour that can constitute scandalising the court, and these would continue to be available whether or not the offence of scandalising is abolished. They are described in detail in Appendix B. [125]

81. Section 5 of the Public Order Act 1986 provides that it is an offence to use threatening, abusive or insulting words or behaviour, or disorderly behaviour, or to display any writing, sign or other visible representation which is threatening, abusive or insulting within the hearing or sight of a person likely to be caused harassment, alarm or distress. According to section 6, the mental element for the offence is that the defendant intended his or her words or actions to be threatening, abusive or insulting or was aware that they may be.[126]

82. Section 4A of the same Act is similar. The major differences are:

    (1) the section 4A offence does not require the offence to occur "within the sight or hearing" of a person likely to be caused harassment, alarm or distress;

    (2) however, in the section 4A offence the defendant must intend to cause some person harassment, alarm or distress; and

    (3) that person, or another person, must in fact experience harassment, alarm or distress.

83. One or both of these offences could cover, for example, a protester who carries a placard outside a court making abusive comments about a judge of that court. However, they do not cover private correspondence, such as a letter posted to the judge.[127] Nor would they seem to cover print publications or online

[125] Appendix B may be viewed at http://lawcommission.justice.gov.uk/areas/contempt.htm. It is not included in the printed copy of this report.

[126] See Appendix B para B.28 and following.

[127] *Chappell v DPP* (1989) 89 Cr App R 82; see Appendix B para B.21.

publications visible to the public but not specifically brought to the attention of the judge concerned.[128]

84. Section 127(1) of the Communications Act 2003 provides that a person is guilty of an offence if he or she sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character. The test is the objective tendency of the material in question: there is no requirement that any person should in fact be caused distress by it.[129] The sending of messages has been held to include the posting of tweets on Twitter.[130] On the same principle, it would also include web posts, which resemble most tweets in being made available to a general or limited public rather than sent to a specific person. On this assumption, this offence is apt to cover malicious material posted online about judges.

85. It is also an offence, under section 127(2) of that Act, to send by means of a public electronic communications network a message that the sender knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another. The limits of this offence have not been tested in case law,[131] and it is less apt to cover scurrilous material about judges than the section 127(1) offence, as the main purpose of such material is likely to be to share imagined grievances with the public rather than to annoy the judge.

86. Section 1 of the Malicious Communications Act 1988 provides that it is an offence to send a letter, electronic communication or article of any description which conveys a message which is: indecent or grossly offensive; a threat; or information which the sender knows to be false. This offence would cover, for example, a threatening or offensive letter or email sent to a judge, including a letter inserted in a letter box rather than sent through the post.[132] However, it does not include a web post or similar material, as the offence only applies if the sender's purpose is to cause distress or anxiety to the recipient, and a web post has no specific recipient.[133] (One can imagine cases where a web post does have the purpose of causing distress or anxiety to a specific individual, for example, if it is worded in the form of an open letter to that individual. Even so, it would be straining language to describe that individual as the "recipient".)

87. The Protection from Harassment Act 1997 creates four offences of harassment, together with two procedures for restraining orders.

[128] See Appendix B para B.21.

[129] *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223; see Appendix B para B.45.

[130] *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1; see Appendix B para B.42.

[131] See Appendix B para B.53.

[132] *Chappell v DPP* [1989] 89 Cr App R 82; see Appendix B para B.7.

[133] See Appendix B para B.63.

(1) Section 1 of that Act forbids,[134] and section 2 criminalises,[135] harassment in its basic form. Harassment is defined as any course of conduct which is oppressive, unreasonable and calculated to cause harm and distress.[136] The offence is only committed if the defendant knew or ought to have known that the course of conduct amounts to harassment.[137] Acts which are pursued for the prevention or detection of crime or under legal authority and acts which are reasonable are excluded from the definition.[138] This offence could cover repeated and vexatious letters of complaint to a judge: it has been held in *DPP v Hardy*[139] that a course of conduct that initially takes the form of a legitimate inquiry or complaint may descend into harassment if unreasonably prolonged or persisted in.[140]

(2) Section 2A[141] creates an offence consisting of any course of conduct constituting harassment, by the above definition, which also amounts to stalking.[142] Section 2A(3) states that examples of acts or omissions which, in particular circumstances, amount to stalking include: following a person; contacting a person; publishing a statement or material relating to a person, and; watching or spying on a person.[143] This offence may cover, for example, blogs which repeatedly post aggressive and offensive material about judges.

(3) Section 4 creates an offence consisting of any course of conduct which causes another to fear that violence will be used against him or her.[144] The mental element of the offence[145] and the defences to it[146] are similar to those under section 1.

[134] See Appendix B para B.72.

[135] See Appendix B para B.73.

[136] See Appendix B para B.74 and following.

[137] See Appendix B para B.86 and following.

[138] See Appendix B para B.89 and following.

[139] [2008] EWHC 2874 (Admin), (2009) 173 Justice of the Peace Reports 10.

[140] See Appendix B para B.81.

[141] Inserted by Protection of Freedoms Act 2012, s 111(1); in force from 25 Nov 2012.

[142] See Appendix B para B.93.

[143] See Appendix B para B.95.

[144] See Appendix B para B.102.

[145] See Appendix B para B.109 and following.

[146] See Appendix B para B.111.

(4) A new section 4A, also inserted into the 1997 Act by the 2012 Act, provides that it is an offence to pursue a course of conduct which amounts to stalking and which causes the victim to fear violence or to suffer serious alarm or distress.[147] Again, the same mental element[148] and defences[149] apply.

(5) Sections 5 and 5A give the court power to make a restraining order respectively prohibiting a convicted or an acquitted defendant from doing specified acts amounting to harassment.[150]

88. Any of these offences could be committed against a judge, though those under sections 2 and 2A are more likely than those under sections 4 and 4A. These offences are wider than those under the Malicious Communications Act 1988 and the Communications Act 2003, in that they can cover publications in the print media[151] as well as letters addressed to an individual and electronic posts. However, they are not committed unless the conduct is persistent.[152]

89. Finally, in extreme cases the contents of a blog or similar communication may amount to an incitement to violence against the judge in question, and, therefore, constitute assisting and encouraging an offence under the Offences Against the Person Act 1861.[153]

90. It would seem that, between them, the listed offences cover most forms of scandalising by public demonstration, letter, email or online publication. The major omission is publication in the print media, including pamphlets distributed outside the court, which will only be covered if it amounts to harassment.[154]

91. One question is whether these offences are capable of covering publications making collective accusations against the judiciary or a section of it rather than an individual judge. If the material is sufficiently offensive or threatening, it could in principle be covered by the Public Order Act 1986 or the Communications Act 2003. It is unlikely to fall within the Malicious Communications Act 1988 or the Protection from Harassment Act 1997, which are mainly concerned with conduct aimed at individuals.

92. In addition to these criminal offences, there is the possibility of a civil action for defamation;[155] this will often be the only remedy (other than scandalising itself) for

[147] See Appendix B para B.116.

[148] See Appendix B para B.123 and following.

[149] See Appendix B para B.125.

[150] See Appendix B para B.126 and following.

[151] *Thomas v News Group Newspapers Ltd*, [2001] EWCA Civ 1223, [2002] Entertainment and Media Law Reports; see Appendix B para B.83.

[152] *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123, [2011] Industrial Relations Law Reports 428; see Appendix B para B.79.

[153] For assisting and encouraging, see part 2 of the Serious Crime Act 2007.

[154] Or under the Public Order Act 1986 if the writing is publicly displayed.

[155] Reponses of: Lord Pannick QC, Appendix A para A.13; Elias LJ, Appendix A para A.6; Bar Council, Appendix A para A.20.

material published in the print media. Insulting remarks to judges in court will continue to be covered by contempt in the face of the court, whether or not scandalising the court is retained as a form of contempt.

CONCLUSIONS

93. In summary, on considering the consultation responses we have arrived at the following conclusions.

(1) The offence of scandalising the court is in principle an infringement of freedom of expression that should not be retained without strong principled or practical justification.

(2) We do not believe that the existence of the offence is in itself contrary to the ECHR, but there is a risk of particular prosecutions being disapproved on this ground. There is some doubt whether the offence should be regarded in England and Wales as "necessary" within the Convention test, even if prosecutions in other countries have been held to be so.

(3) There are uncertainties about the conditions for the offence, which will need to be resolved if the offence is retained.

(4) The disuse of the offence is a possible, though not conclusive, sign that it is not "necessary" in Convention terms and that its abolition is unlikely to have significant effects in practice.

(5) The offence, being not well known to the public, has only a limited symbolic value. The longer the period that elapses without a prosecution the less of this symbolic value remains. Abolition would not amount to a significant signal the other way.

(6) The offence may be regarded as self-serving on the part of the judges; this risk would be reduced but not removed if the offence were restated in statute, as the offence would no longer be judge-made, though it would still be enforced by them.

(7) Prosecutions for this offence, or for any offence devised to replace it, are likely to have undesirable effects. These include re-publicising the allegations, giving a platform to the contemnor and leading to a trial of the conduct of the judge concerned.

(8) The offence is no longer in keeping with current social attitudes, and is unlikely to influence the behaviour of publishers.

(9) Replacing the offence with an injunction procedure would not be a significant improvement.

(10) There does not appear to be significant demand for a new offence along the lines of the Law Commission's 1979 recommendations.

(11) There are several statutory offences covering the more serious forms of behaviour covered by scandalising, and civil defamation proceedings are available in the case of false accusations of corruption or misconduct.

94. Accordingly, we see no reason to alter our first preference as expressed in the consultation paper, namely the abolition of scandalising the court without replacement.

CONSEQUENCES OF ABOLITION

95. The proposed amendment[156] has been carefully drafted to ensure that it only covers publications and does not affect either contempt in the face of the court or publications which may impede or prejudice specific legal proceedings.[157]

96. The amendment only extends to England and Wales. If it is passed, it will be for the devolved authorities in Scotland and Northern Ireland to decide whether to follow suit.

97. If they do not, a question will arise about the position of the Supreme Court. Almost certainly, the answer is that it is a Scottish court when and only when hearing an appeal from a Scottish court, and similarly for Northern Ireland.[158] In other words, in each case it hears it forms part of one of the three legal orders within the United Kingdom: there is no separate "federal" legal order. It follows that it will usually be clear whether the offence of murmuring judges (for Scotland) or scandalising the court (for Northern Ireland) applies or not. There may be an exception when a judge of the Supreme Court is targeted as an individual without reference to any particular case. The prosecuting authorities for Scotland and Northern Ireland would presumably decide to bring charges only if the person responsible for the publication, or the subject matter of the scandalous allegations, had a substantial connection with those jurisdictions.

98. The amendment would only abolish scandalising the court as an offence or form of contempt at common law. It would have no effect on statutory forms of contempt such as those under section 12 of the Contempt of Court Act 1981 (relating to magistrates' courts),[159] section 118 of the County Courts Act 1984 (relating to county courts) or section 309 of the Armed Forces Act 2006 (relating to service courts). These sections do not in any case address scandalising publications.

99. A partial exception to this is the procedure under section 311 of the Armed Forces Act 2006. This section provides that:

> (1) This section applies if, in relation to proceedings before a qualifying service court, a person within section 309(6)[160] does any act ("the offence") that would constitute contempt of court if the proceedings were before a court having power to commit for contempt.

[156] See para 4 above.

[157] CP para 62.

[158] Compare Constitutional Reform Act 2005, s 45(2). This section concerns the effect of decisions of the court and does not directly address contempt of court.

[159] For a discussion of the magistrates' courts provision, see Contempt of Court (2012), Law Commission Consultation Paper No 209 para 5.48 and following. The other two provisions are similar.

[160] That is, a person within the United Kingdom, or a person outside it who is subject to service law or discipline at the time.

(2) The qualifying service court, unless it has exercised any power conferred by section 309 in relation to the offence, may certify the offence—

(a) if it took place in a part of the United Kingdom, to any court of law in that part of the United Kingdom which has power to commit for contempt;

(b) if it took place outside the United Kingdom, to the High Court in England and Wales.

(3) The court to which the offence is certified may inquire into the matter, and after hearing—

(a) any witness who may be produced against or on behalf of the person, and

(b) any statement that may be offered in defence,

may deal with him in any way in which it could deal with him if the offence had taken place in relation to proceedings before that court.

This section is capable of applying to conduct that would amount to scandalising a service court, but would cease to do so once scandalising is abolished as a civilian offence.

OUR RECOMMENDATION

100. **We recommend that scandalising the court should cease to exist as an offence or as a form of contempt in the law of England and Wales. This recommendation does not affect contempt in the face of the court, or liability for publications that may interfere with proceedings before any court.**

(Signed) DAVID LLOYD JONES, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
DAVID ORMEROD
FRANCES PATTERSON

ELAINE LORIMER, *Chief Executive*
12 December 2012

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CONTEMPT OF COURT:
SCANDALISING THE COURT
Appendix A: Summary of Responses

THE LAW COMMISSION

APPENDIX A: SUMMARY OF RESPONSES

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APPENDIX A
SUMMARY OF RESPONSES

THE QUESTIONS

A.1 Consultation Paper No 207, Contempt of Court: Scandalising the Court asked three questions and made one provisional proposal, as follows.

> 1. Consultees are asked whether they agree that the offence of scandalising the court should not be retained in its current form.
>
> 2. We provisionally propose that the offence of scandalising the court should be abolished without replacement. Consultees are asked whether they agree.
>
> 3. If consultees do not agree with our provisional proposal that the offence be abolished, they are asked whether they consider that the offence of scandalising the court should be retained or replaced in a modified form, and if so:
>
> (1) whether this should be done by retaining the offence as a form of contempt, but modifying it to include defences of truth, public interest or responsible journalism;
>
> (2) whether a new offence should be created separate from contempt, and if so how it should be defined;
>
> (3) in either case, what the mode of prosecution and trial for the offence should be.

A.2 We received forty-six responses, excluding simple acknowledgments of receipt. The consultation period was originally set to end on 5 October 2012, but was extended to 19 October 2012 to allow for the long vacation.

A.3 Apart from the written responses listed below, a seminar involving fourteen High Court and Court of Appeal judges was held on the evening of 15 October 2012. There was general support for abolition of the offence: while some expressed concerns about the possible consequences of abolition none of them advanced a concrete alternative proposal. One judge, who was not able to attend the seminar, later proposed that the offence of scandalising the court should be considered in the course of the main contempt project.

THE RESPONSES

Favouring abolition without replacement

A.4 Lord Mackay of Clashfern supported the provisional conclusion, meaning the proposal for abolition without replacement. He made one correction of fact and mentioned one incident involving criticism of magistrates for which the offence would not have provided a remedy.

A.5 Lord Lester of Herne Hill QC supported the proposal for abolition and repeated some of the points in the consultation paper, quoting from the major textbooks.

A.6 Lord Justice Elias said that the offence was too broad and out of line with modern views. Where there is an allegation of dishonesty or corruption, that is addressed by the law of defamation, and in that case truth is a defence. In most cases the allegations are too silly to be believed and there is no need for a criminal offence. If, however, the offence is to remain, perhaps to deal with cases which might appear to have some basis, there would need to be a defence of truth otherwise the perception might be that the courts were seeking to gag the exposure of judicial wrongdoing. That would hardly be designed to secure public confidence in the judiciary.

A.7 Lord Justice Sullivan said that he was not in favour of retaining the offence.

A.8 Lord Justice Toulson supported abolition of the offence for the reasons given in the consultation paper.

A.9 Another judicial respondent said that he was not unsympathetic to the proposal for abolition and did not favour the introduction of a new offence. At the same time, he thought that there was the need for politicians to give more public support for the judiciary or a judge who has been attacked.

A.10 A further judicial respondent was in favour of the abolition of the offence, but expressed concern about criticism in the course of or at the conclusion of a hearing. Under our provisional proposals this would remain as a punishable contempt, as it falls under the head of contempt in the face of the court rather than of scandalising.

A.11 One tribunal judge expressed concern about various forms of vilification of the judiciary that had occurred in his experience, but agreed that prosecution was a blunt weapon. Scandalising can be regarded as unnecessary if other means of control, such as press codes of conduct, can be strengthened. He drew particular attention to the position of members of tribunals.

A.12 Lord Carswell referred to his speech in the House of Lords on 2 July. He agreed that the offence should not be retained in its present form, and should not be replaced by an offence of making untrue and scandalous allegations against a particular judge. The answers to the consultation questions were 1. yes 2. yes 3. does not arise.

A.13 Lord Pannick QC sent a copy of his Azlan Shah lecture dated 5 September 2012, in which he gave at greater length the arguments that he had used in the House of Lords.

A.14 Rt Hon Peter Hain MP supported our proposals for abolition, using some of the same arguments as Lord Pannick and enclosing the relevant passages from his book that had led to his attempted prosecution.

A.15 Professor John R Spencer QC of the University of Cambridge supported the abolition of scandalising, on the analogy of the other common law offences such as criminal libel that had already been abolished. He had some hesitation about press campaigns against individual judges, and thought that something should be done about these, though the existing offence was too antiquated to be a useful remedy.

A.16 Dr Findlay Stark of Jesus College Cambridge supported the proposal for abolition without replacement, pointing out that the law does not have value even as a "signal" unless it is enforced. He also considered what form a replacement offence might take, in case it should be decided (contrary to his view) that there should be one. He took the view that, should there be a replacement offence, it should continue to be a form of contempt, but be tried by the normal criminal procedure. He did not favour the introduction of a defence of responsible journalism.

A.17 Professor Clive Walker favoured abolition without replacement.

A.18 The Association of District Judges was concerned about the ability to combat online comment. However, having regard to the technical difficulties they agreed with the provisional proposal for abolition without replacement.

A.19 The Council of District Judges (Magistrates' Courts) agreed that scandalising the court should be abolished, and expressed the view that that offence does not apply to magistrates' courts.

A.20 The Bar Council supported the proposals, on the grounds that no other officials were protected in the same way and it was open to judges to bring libel proceedings.

A.21 The Law Society supported the proposals, repeating some of the arguments in the consultation paper.

A.22 The Justices' Clerks' Society agreed with the proposal for abolition without replacement.

A.23 The Crown Prosecution Service repeated the arguments about the uncertainty of the offence and the possible breach of article 10 and supported the abolition of the offence without replacement. It went on to say that, should the offence be retained, it should be modified to include defences of truth, public interest and responsible journalism.

A.24 Bruce Houlder QC DL, the Director of Service Prosecutions, agreed that the offence should be abolished and that it should not be replaced with a new offence. He commented in detail on the changed expectations on the press and on the perceived unfairness of judges being able to punish attacks on their own body.

A.25 Chief Constable Andrew Trotter of the British Transport Police supported the proposal to abolish the offence without replacement, and gave reasons including the fact that the offence had not been used for decades, that it appeared incompatible with the ECHR and that other remedies were available.

A.26 The Society of Editors supported the proposals, in the interests of freedom of expression.

A.27 The Newspaper Society supported abolition, arguing that there were many other legal constraints upon publication relating to legal proceedings.

A.28 Guardian Newspapers supported the abolition of the offence. They mentioned the uncertainties surrounding the offence and the importance of free speech.

A.29 6 King's Bench Walk submitted a response divided into two parts, a majority and a minority opinion. The majority opinion was in favour of abolition without replacement, giving detailed reasons on the same lines as those in the consultation paper.

A.30 Anthony Edwards agreed with the proposal to abolish the offence, saying that an allegation of scandalising is likely to receive more publicity than the original statement. If retained, it should be modified to include a defence of subjective belief in the truth of the statement. It should not be replaced by a statutory offence, as the difficulty of drafting this would be disproportionate to the need.

A.31 One consultee representing a local authority supported the abolition of the offence without replacement, citing its uncertainty, human rights concerns and the availability of other remedies. His answers to the consultation questions were therefore 1. yes 2. yes 3. does not arise.

A.32 David Iwi agreed with the proposal for abolition without replacement, and illustrated with a hypothetical series of events concerning an allegation of judicial bias.

A.33 Richard Jarman said "the existence of the offence is itself a scandal" and agreed with proposal 2 (abolition without replacement).

A.34 Vaughan Bruce said: "This offence should be abolished without being replaced since it is not required in any democratic society" without further comment.

A.35 An anonymous response described the abolition of the offence as a step in the right direction and proposed a series of further reforms to court procedure.

Favouring retention

A.36 Mr Justice Barling expressed the view that the time was not right for abolition. For the moment, the offence should be retained as a form of contempt at common law, and the various uncertainties should be clarified judicially. In the longer term, it could be replaced by a civil mechanism involving financial sanctions and the power to make an injunction.

A.37 Alec Samuels argued that abolition would be untimely and send the wrong signal. He did not advocate modification or replacement, though he said that defences should be spelled out in any new legislation.

A.38 Lord Gill wished the corresponding Scottish offence to be retained.

Favouring a replacement offence

A.39 The Council of Circuit Judges, in their collective response, agreed that scandalising the court was unacceptably uncertain in its current form, but did not want it either to be abolished without replacement or replaced by a normal criminal offence. They suggested that there should be a revised extension of the law of contempt, including the power to impose injunctions, or failing that a procedure modelled on the ASBO procedure.

A.40 Lord Justice McCombe favoured the abolition of the offence in the context of the overall review of contempt, and recommended replacing it "along the lines of the 1979 Commission suggestion"[1] or "what is suggested in 3(1)". Some websites went beyond intemperate criticism and contained incitement to violence: abolishing the offence without replacement would send the wrong message.

A.41 District Judge Ian Murdoch said that the offence should not be abolished, as even if not used it gives an added protection to the constitutional role of the courts which is unique. However, it should be made a separate criminal offence and not retained as contempt.

A.42 The Attorney General for Northern Ireland favoured codifying the existing offence, and incorporating a defence of honest and reasonable belief in the truth of the statement made.

A.43 Sir Sydney Kentridge QC argued that scandalising the court should be retained as a form of contempt, but modified to make clear that truth and public interest are defences and that criticism as such is not an offence.

A.44 The minority opinion from 6 King's Bench Walk[2] proposed a codified offence of strict liability contempt, subject to defences of truth and fair comment, and with a threshold requirement of substantial risk of serious harm.

A.45 Dr Findlay Stark,[3] while not favouring the introduction of a replacement offence, made some suggestions about what form such an offence might take if it were to be introduced. Professor John R Spencer[4] thought that something should be done about press campaigns against judges, but did not make any concrete suggestion.

SUMMARY

A.46 Out of forty-six responses, thirty-two are in favour of abolition without replacement (nineteen giving detailed reasons). Two favour retention, and another (the Lord President) may be interpreted as favouring retention, though confining itself to Scotland; two favour a replacement offence and four a revised form of contempt. The remaining responses express no decided preference.

1 The reference is to Criminal Law: Offences Relating to Interference with the Course of Justice (1979) Law Com No 96, which recommended the creation of an offence of publishing a false allegation of corruption.

2 For the majority opinion, see para A.29 above.

3 Para A.16 above.

4 Para A.15 above.

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CONTEMPT OF COURT:
SCANDALISING THE COURT
Appendix B: Offences Alternative to Scandalising

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APPENDIX B: OFFENCES ALTERNATIVE TO SCANDALISING

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APPENDIX B
OFFENCES ALTERNATIVE TO SCANDALISING

B.1 This Appendix sets out the various criminal offences which cover some of the same ground as scandalising. As there are no reported cases of these offences being applied to attacks on judges,[1] we draw on the existing case law to consider their suitability as offences alternative to scandalising.

PUBLIC ORDER ACT 1986

Public Order Act 1986 section 4A

B.2 Section 4A provides that:

> (1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he—
>
> (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
>
> (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
>
> thereby causing that or another person harassment, alarm or distress.

Type of conduct or words

B.3 The requirements that the conduct be "threatening, abusive or insulting" and the concepts of "harassment, alarm and distress" apply to both the section 4A and the section 5 offences.

B.4 Whether conduct is "threatening, abusive or insulting" seems to be an objective question of fact.[2] In *Hammond v DPP*[3] the Divisional Court held that in determining whether words or behaviour are insulting (or threatening or abusive), the traditional approach under *Brutus v Cozens*[4] is to be followed (that is, the words are to be given their ordinary meaning), but also full account must be taken of article 10 of the European Convention on Human Rights ("ECHR").[5] The House of Lords said in *Brutus* that "an ordinary sensible man knows an insult when he sees or hears it".[6] Words cannot be insulting (or, presumably, threatening or abusive) unless there is "a human target which they strike", and the defendant must be aware of that "human target", though it is not necessary

[1] We are not aware whether any of the offences have been used for this purpose without the case being reported.

[2] D Ormerod, *Smith and Hogan's Criminal Law* (13th ed 2011) ("Smith and Hogan") p 1097.

[3] [2004] EWHC 69 (Admin), (2004) 168 Justice of the Peace Reports 601.

[4] [1973] AC 854.

[5] Lord Justice Hooper and D Ormerod (eds), *Blackstone's Criminal Practice* (2013) ("Blackstone's") para B11.74.

[6] *Brutus v Cozens* [1973] AC 854, 862 by Lord Reid.

that he or she intended the conduct to be insulting.[7] "Disorderly behaviour" is a question of fact for the trial court to determine.[8]

B.5 Harassment, alarm and distress have not been defined. Until they, are they are assumed to have their ordinary English-language meaning.[9] In *R (R) v DPP*[10] the High Court described the terms "harassment", "alarm" and "distress" as relatively strong terms. "Distress" in this context requires emotional disturbance or upset.[11] However, when the defendant is accused of "harassment", there is no need to demonstrate that any person suffered real emotional disturbance or upset, but the harassment must be more than merely trivial.[12]

Where published and by what means

B.6 Both this offence and the offence under section 5 cover words and behaviour and the display of writing, signs or other visible representation. This covers posters,[13] sandwich boards[14] and flag-defacement.[15] "Writing" includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form.[16] This could, for example, cover carrying banners with abusive messages outside the court.

B.7 In *Chappell v DPP*[17] the Divisional Court held that the posting of an envelope, with writing containing abusive or insulting words concealed inside it, through the letter box of someone's home, could not amount to a "display". There is also an exception to the offences in sections 4A(2) and 5(2) of the 1986 Act where the defendant was inside a dwelling and the other person is also inside that or another dwelling. Such conduct would, however, be an offence under the Malicious Communications Act 1988, section 1.[18]

7 Smith and Hogan p 1098.

8 *Chambers v DPP* [1995] Crim LR 896.

9 Blackstone's para B11.63.

10 [2006] EWHC 1375 (Admin), (2006) 170 Justice of the Peace Reports 661 at [12].

11 Blackstone's para B11.76.

12 Smith and Hogan p 1101; *Southard v DPP* [2006] EWHC 3449 (Admin), [2007] Administrative Court Digest 53.

13 *Norwood v DPP* [2003] EWHC 1564 (Admin), [2003] Crim LR 888.

14 *Hammond v DPP* [2004] EWHC 69 (Admin), (2004) 168 Justice of the Peace Reports 601.

15 *Percy v DPP* [2001] EWCA Admin 1125, [2002] Crim LR 835.

16 Blackstone's para B11.56; Interpretation Act 1978, s 5 and sch 1.

17 [1988] 89 Cr App R 82.

18 Blackstone's paras B11.75 and B11.78.

B.8 In *S v DPP*[19] material on a website was assumed to be within the scope of the offence.[20] Abusive online material about a judge could therefore fall within the offence if the judge later saw it and experienced harassment, alarm or distress.

Impact on the victim

B.9 In contrast with the section 5 offence,[21] the victim of a section 4A offence must in fact experience harassment, alarm or distress.

B.10 There must be a causal connection between what the accused does and the victim's harassment, alarm or distress.[22]

B.11 The offence may be committed even if the material that eventually causes the harassment, alarm or distress is no longer in the public domain at the time it causes the reaction. In *S v DPP*[23] the police showed the victim an abusive photograph of him which had been put online but which had since been taken down. The offence was held to have been committed, as the chain of causation between the act of posting and the distress suffered was not broken.

Mental element

B.12 The offence requires proof of an intention to cause harassment, alarm or distress. The intention may be inferred from the words used,[24] although this is a matter for the tribunal of fact in each case.[25]

Defences

B.13 According to section 4A(3):

> (3) It is a defence for the accused to prove—
>
> (a) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling.
>
> (b) that his conduct was reasonable.

B.14 The equivalent defences to the offence under section 5 are discussed more fully below.[26] Conduct is "reasonable" if it is an exercise of ECHR rights in circumstances in which an interference with that exercise would not be justified under articles 10(2) and 9(2).[27] Cases which fall outside the scope of

[19] [2008] EWHC 438 (Admin), [2008] 1 WLR 2847.

[20] Blackstone's para B11.63.

[21] See para B.16 below.

[22] *Rogers v DPP* 22 Jul 1999, unreported; Blackstone's para B11.63.

[23] [2008] EWHC 438 (Admin), [2008] 1 WLR 2847.

[24] Blackstone's para B11.65.

[25] P Thornton and others, *The Law of Public Order and Protest* (2010) para 1.214.

[26] See para B.30 below.

[27] Blackstone's para B11.66.

scandalising, under the defence of discussion of matters of public interest, would for this reason also fall outside the section 5 offence.

B.15 In *Dehal v CPS*[28] the defendant, a practising Sikh, placed a poster on the notice board of his local temple. The poster accused the President of the temple of being a liar and a "hypocrite president". The defendant was convicted under section 4A. On appeal, Dehal claimed that his statements were reasonable because he believed that they were correct. He also asserted his right to freedom of expression under article 10. In allowing the appeal, Mr Justice Moses (now Lord Justice Moses) said:

> However insulting, however unjustified what the appellant said about the President of the Temple, a criminal prosecution was unlawful as a result of section 3 of the Human Rights Act and article 10 unless and until it could be established that such a prosecution was necessary in order to prevent public disorder.[29]

Public Order Act 1986 section 5

B.16 Section 5 of the Public Order Act 1986 provides that:

> (1) A person is guilty of an offence if he—
>
> (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
>
> (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
>
> within the hearing or sight of a person likely to be caused harassment, alarm or distress.

B.17 The section 5 offence is, essentially, the basic form of the offence of which the section 4A offence is an aggravated form.[30] Section 4A requires both an intention to cause harassment, alarm or distress and the actual causing of harassment, alarm or distress. Section 5 does not require either of these, but only that the conduct take place "within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby". A protestor or other person carrying an abusive message on a banner outside a court is more likely to commit the offence under section 5 than under section 4A, as the intention will generally be to spread the message to the public rather than to cause distress to the judge.

[28] [2005] EWHC 2154 (Admin), (2005) 169 Justice of the Peace Reports 581.

[29] [2005] EWHC 2154 (Admin), (2005) 169 Justice of the Peace Reports 581 at [12].

[30] P Thornton and others, *The Law of Public Order and Protest* (2010) para 1.206.

Type of conduct or words

B.18 There are two conditions governing the type of conduct or words. First, they must be "threatening, abusive or insulting".[31] Secondly, they must be likely to cause "harassment, alarm or distress". We noted above that the terms "harassment", "alarm" and "distress" are, according to the High Court, relatively strong terms, and that "distress" requires emotional disturbance or upset.[32] Whether a person was likely to be caused harassment, alarm or distress is a question of fact not law. It can, therefore, only be determined by the tribunal of fact in each particular case.[33]

B.19 For the purposes of sentencing, it is an aggravating factor that the victim is providing a public service.[34] This would clearly apply to abusive comments about judges.

B.20 Several cases where this provision has been used have involved abuse or insults directed at a group as a whole (although in each case there has been an individual or a number of individual victims who have been harassed, alarmed or distressed). In *Hammond v DPP*,[35] for example, an evangelical Christian preacher repeatedly carried a large double-sided sign with the words "Stop Immorality! Stop Homosexuality! Stop Lesbianism!" while preaching in a town centre. Some of the individuals who saw this placard found the words insulting or distressing, and the conviction was upheld. A sign making accusations against judges collectively is perhaps less likely to cause such a strong reaction, though examples could be devised.

Where published and by what means

B.21 As with section 4A, the section 5 offence covers words and behaviour and the display of writing, signs or other visible representation.

B.22 In the context of section 4A of the Public Order Act 1986, we noted above[36] that the Divisional Court in *S v DPP*[37] assumed that a photograph posted online could be a "visible representation" within the meaning of the 1986 Act. This might suggest that online postings could fall under section 5 as well as under section 4A. However, according to Lord Justice Kay:[38]

[31] For the meaning of this phrase see para B.4 above. On 12 December 2012 the House of Lords voted in favour of an amendment to remove the word "insulting": http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121212-0002.htm (last visited 13 Dec 2012).

[32] See para B.5 above.

[33] P Thornton and others, *The Law of Public Order and Protest* (2010) para 1.190.

[34] Blackstone's para B11.72.

[35] [2004] EWHC 69 (Admin), (2004) 168 Justice of the Peace Reports 601; Blackstone's para B11.81.

[36] See para B.11above.

[37] [2008] EWHC 438 (Admin), [2008] 1 WLR 2847.

[38] *S v DPP* [2008] EWHC 438, [2008] 1 WLR 2847 at [12].

> There is a significant difference between the two sections: section 5 requiring the display to be "within the hearing or sight" of a person likely to be caused harassment, alarm or distress thereby. It may well be that by the time the Public Order Act 1986 was amended in 1994 [to include section 4A], the omission of the "sight and sound" requirement was conditioned by an appreciation of the problems created by the posting of offensive material on websites, although both statutes contain similar provisions about display by a person inside a dwelling and the effect on a person inside that or another dwelling: see sections 4A(2) and 5(2).

Mr Justice Walker also stressed[39] the fact that section 5 requires that the relevant acts take place within the sight or hearing of a person likely to be caused harassment, alarm or distress. It is not clear whether material posted online satisfies this additional requirement of being within a person's sight or hearing. It therefore does not follow from the decision in *S v DPP* that such material falls within section 5.[40]

B.23 Even if section 5 does exclude online postings, these acts are likely to be covered by the offences in the Communications Act 2003[41] and the Malicious Communications Act 1988.[42]

Impact on the victim

B.24 As noted in *Ball*[43] the conduct in section 5 does not have to be directed towards another person; and unlike in section 4A there is no need to prove that any person actually experienced harassment, alarm or distress. For this reason, a public accusation against a group of judges, such as the judges of a particular court, can in principle fall within the offence.

B.25 According to *Taylor v DPP*[44] there must be evidence that there was someone able to hear or see the accused's conduct. The prosecution does not have to call evidence that he or she did actually hear the words spoken or see the behaviour.[45]

B.26 In *Lodge v DPP*[46] the Divisional Court held that whether a person was likely to be caused harassment, alarm or distress is a matter of fact to be determined by the magistrates. It is sufficient if the other person in question (in that case a police

[39] *S v DPP* [2008] EWHC 438, [2008] 1 WLR 2847 at [15].

[40] J Rowbottom, "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71(2) *Cambridge Law Journal* 355, 361. Rowbottom notes that Geach and Haralambous assume that s 5 does apply to internet postings: N Geach and N Haralambous, "Regulating Harassment: Is the Law Fit for the Social Networking Age?" (2009) 73(3) *Journal of Criminal Law* 241, 254.

[41] See para B.37 and following below.

[42] See para B.60 and following below.

[43] [1990] 90 Cr App R 378.

[44] [2006] EWHC 1202 (Admin), (2006) 170 Justice of the Peace Reports 485.

[45] Blackstone's para B11.76.

[46] [1989] Crown Office Digest 179, (1988) *The Times*, 26 Oct 1988.

officer) feels alarm, harassment or distress on behalf of someone else, for example, a child.[47]

B.27 There is a defence, under section 5(3)(a), that the defendant had no reason to believe that there was a potential victim within hearing or sight, who was likely to be caused harassment, alarm or distress.

Mental element

B.28 Section 6(4) of the 1986 Act reads:

> (4) A person is guilty of an offence under section 5 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly.

B.29 In *DPP v Clarke*[48] the Divisional Court held that the defendant's intention or awareness under section 6(4) is to be tested subjectively in light of the whole of the evidence.

Defences

B.30 The defences, which it is for the defendant to prove, are set out in section 5(3):

> (3) It is a defence for the accused to prove—
>
> (a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or
>
> (b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
>
> (c) that his conduct was reasonable.

B.31 In *DPP v Clarke*[49] the Divisional Court confirmed that the test in relation to the defence under section 5(3)(c) (that the defendant's conduct was "reasonable") is objective. The first two defences are to be tested subjectively.[50]

B.32 Conduct is reasonable if it is an exercise of ECHR rights in circumstances in which an interference with that exercise would not be justified under articles 10(2) (the qualifications to the right to freedom of expression) and 9(2) (the

[47] Blackstone's para B11.76.

[48] [1992] 94 Cr App R 359.

[49] [1992] 94 Cr App R 359.

[50] P Thornton et al, *The Law of Public Order and Protest* (2010) para 1.198.

qualifications to freedom of religion).[51] In this case, the applicant's reasonableness defence was rejected, having regard to the "legitimate aim" of protecting the rights of others and preventing crime and disorder. In the same way, in the case of abusive material about judges, the reasonableness defence could be rejected having regard to the aim of protecting the authority and impartiality of the judiciary.

B.33 In *Percy v DPP*[52] the Divisional Court, relying on the reasonableness defence in section 5(3)(c) and on article 10 of the ECHR, held that a protester's conviction under article 5 for defacing the flag of the USA at an American airbase was incompatible with her Convention rights. The court noted that "article 10(1) protects in substance and in form a right to freedom of expression which others may find insulting", and that "restrictions under article 10(2) must be narrowly construed".[53]

B.34 In *Hammond v DPP*,[54] concerning the preacher carrying the "stop homosexuality" sign, the Divisional Court held that his defence under articles 9 and 10 of the ECHR was not made out. His refusal to stop displaying the sign when it was clearly causing offence was held not to be reasonable, and the justices' decision – that there was a pressing social need to restrict the defendant's right to freedom of expression under article 10 in order to promote tolerance towards all sections of society – was not overturned.

B.35 It has been noted that these cases "provide no clear pattern or a definitive answer as to the precise limits of the defence of reasonable conduct".[55]

B.36 In *Abdul v DPP*,[56] the Divisional Court dismissed the defendants' appeals against their convictions under section 5. The defendants had attended a parade by a regiment which had been deployed to Afghanistan and Iraq. They had chanted slogans such as "rapists", "murderers" and "go to hell". The Divisional Court noted that there is not, and cannot be, any universal test for resolving when speech goes beyond legitimate protest. Here, the protest took the form of personal insults directed towards the soldiers. The prosecution was held to be proportionate to prevent public disorder and protect the soldiers' reputations.

COMMUNICATIONS ACT 2003

Communications Act 2003, section 127(1)

B.37 Section 127(1) of the Communications Act 2003 provides that a person is guilty of an offence if he or she sends by means of a public electronic communications

[51] *Norwood v DPP* [2003] EWHC 1564 (Admin), [2003] Crim LR 888; see Blackstone's para B11.80.

[52] [2001] EWCA Admin 1125, [2002] Crim LR 835.

[53] *Percy v DPP* [2001] EWCA Admin 1125, [2002] Crim LR 835 at [27].

[54] [2004] EWHC 69 (Admin), (2004) 168 Justice of the Peace Reports 601; see para B.20 above.

[55] C Newman and B Middleton, "Any Excuse for Certainty: English Perspectives on the Defence of 'Reasonable Excuse'" (2010) 74(5) *Journal of Criminal Law* 472, 482.

[56] [2011] EWHC 247 (Admin), [2011] Crim LR 553.

network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character.

Type of conduct or words

B.38 The test of whether the communication is grossly offensive or of an indecent, obscene or menacing character is an objective one. In *DPP v Collins*,[57] concerning racist telephone messages about asylum and immigration sent to an MP, Lord Bingham held that:

> It is for the justices to determine as a question of fact whether a message is grossly offensive, that in making this determination the justices must apply the standards of an open and just multiracial society, and that the words must be judged taking account of their context and all relevant circumstances.[58]

Lord Carswell said:

> The messages would be regarded as grossly offensive by reasonable persons in general, judged by the standards of an open and just multiracial society. The terms used were opprobrious and insulting, and not accidentally so. I am satisfied that reasonable citizens, not only members of the ethnic minorities referred to by the terms, would find them grossly offensive.[59]

B.39 In *Chambers v DPP*,[60] concerning a jocular threat on Twitter to blow up an airport if it closed, the court examined "menacing" communications.[61] It held that a message which did not create fear or apprehension in those to whom it was communicated, or who might reasonably be expected to see it, fell outside section 127(1)(a), "for the very simple reason that the message lacks menace".[62] The discussion concerned messages which are potentially menacing, if at all, to the public at large: as seen in *DPP v Collins*,[63] different considerations may apply to communications which appear to menace some individuals but not others.[64]

B.40 In his discussion on the interpretation of "grossly offensive" communications in *DPP v Collins*,[65] Professor Gillespie argues that the House of Lords' suggestion, that because one section of society finds something grossly offensive the "whole

[57] [2006] UKHL 40, [2006] 1 WLR 2223.

[58] *DPP v Collins*, [2006] UKHL 40, [2006] 1 WLR 2223 at [9].

[59] *DPP v Collins*, [2006] UKHL 40, [2006] 1 WLR 2223 at [22].

[60] [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1.

[61] *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [38].

[62] *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [30].

[63] [2006] UKHL 40, [2006] 1 WLR 2223.

[64] See para B.45 and following below.

[65] [2006] UKHL 40, [2006] 1 WLR 2223.

of society" will, is questionable. According to him, it could be argued that this is one difference between "offensive" and "grossly offensive".[66]

B.41 This point may perhaps be relevant for offensive communications made to or about the judiciary if there was a case, where, for example, the whole of society would not view the communication as "grossly offensive" and yet, for some reason, it is grossly offensive to the judiciary. The application of section 127 in such cases may depend on the view of the "whole of society".

Where published and by what means

B.42 A message or other matter is "sent" as soon as it is posted on any public electronic communications network.[67] This includes, for example, communications made by webcam,[68] telephone messages,[69] text messaging,[70] email,[71] Facebook[72] and Twitter.[73] It is irrelevant whether the communication is received or by whom it is received.[74]

B.43 According to *Chambers v DPP*[75] a "tweet" on Twitter was a message sent by an electronic communications service for the purposes of section 127(1): accordingly, Twitter fell within its ambit. The Divisional Court in *Chambers* observed that:

> Whether one reads the "tweet" at a time when it was read as "content" rather than "message", at the time when it was posted it was indeed "a message" sent by an electronic communications service for the purposes of section 127(1).[76]

On the same principle, a web post would fall within the ambit of the Act: both twitter posts and web posts are public postings, although Twitter does have a communicative function which web pages may not have.

B.44 Professor Gillespie supports the decision in *Chambers* to include Twitter within the scope of section 127. He notes that, "the Communications Act 2003 was always intended to cover modern information and communication technologies, indeed its passing was sought to update the law".[77] Some commentators have

[66] A Gillespie, "Offensive Communications and the Law" [2006] *Entertainment Law Review* 236, 237.

[67] Communications Act 2003, s 32.

[68] *I v Dunn* [2012] HCJAC 108, 2012 SLT 983.

[69] *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223.

[70] *Jude v HM Advocate* [2011] UKSC 55, 2012 SLT 75.

[71] *Jude v HM Advocate* [2011] UKSC 55, 2012 SLT 75. See also A Gillespie, "Offensive Communications and the Law" [2006] *Entertainment Law Review* 236.

[72] *R v Bland* [2012] EWCA Crim 664.

[73] *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [25].

[74] *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [8].

[75] [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1; see para B.39 above.

[76] [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [25].

[77] A Gillespie, "Twitter, Jokes and the Law", (2012) 76(5) *Journal of Criminal Law* 364, 365.

noted that the decision to extend the scope of public electronic communications network may have unintended implications, for example, leaving open the possibility that Twitter could be bound by certain regulatory requirements.[78] Rowbottom comments that section 127 "appears to be used as a general criminal control on digital communications".[79] He also raises concern as to whether the use of criminal sanctions for communications made via new media is always appropriate:

> The problem is that the existing laws dealing with such communications can be overly expansive and catch statements that might not warrant such serious treatment. Any such law should be tailored to deal with the most serious and deliberate cases of harassment or bullying.[80]

Impact on the victim

B.45 The offence is complete as soon as the message is sent: it is not necessary for receipt of the message to be demonstrated. It follows that liability for the offence cannot depend on any particular impact on the recipient.

B.46 The test is whether the message is "couched in terms liable to cause gross offence *to those to whom it relates*":[81] not necessarily to the recipient if any. Any liability of the defendant will arise "irrespective of whether the recipient was grossly offended/menaced/found it to be indecent or obscene".[82] On the contrary, an offence may be committed even where the communication was welcomed by the recipient, provided that it was liable to cause gross offence to those to whom it relates.[83]

B.47 In *DPP v Collins*,[84] Lord Brown of Eaton-under-Heywood contrasted section 127(1) with section 1 of the Malicious Communications Act 1988.[85] The latter requires the sender of a message to it to cause distress or anxiety to its immediate or eventual recipient. He added:

[78] C Watson, J Wheeler and B Ingram, "UK Twitter Judgment: The Law with Unintended Consequences?" (2012) 7(9) *World Communications Regulation Report* 37.

[79] J Rowbottom, "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71(2) *Cambridge Law Journal* 355, 364.

[80] J Rowbottom, "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71(2) *Cambridge Law Journal* 355, 375.

[81] *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [9] by Lord Bingham (emphasis ours).

[82] Smith and Hogan p 1082.

[83] Smith and Hogan p 1082; *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [26].

[84] [2006] UKHL 40, [2006] 1 WLR 2223.

[85] [2006] UKHL 40, [2006] 1 WLR 2223 at [25] to [27].

> Not so under section 127(1)(a): the very act of sending the message over the public communications network (ordinarily the public telephone system) constitutes the offence even if it was being communicated to someone who the sender knew would not be in any way offended or distressed by it. Take, for example, the case considered in argument before your Lordships, that of one racist talking on the telephone to another and both using the very language used in the present case. Plainly that would be no offence under the 1988 Act, and no offence, of course, if the conversation took place in the street. But it would constitute an offence under section 127(1)(a) because the speakers would certainly know that the grossly offensive terms used were insulting to those to whom they applied and would intend them to be understood in that sense.[86]

On the same reasoning, the offence could cover communications between two disappointed litigants including offensive remarks about judges.

Mental element

B.48 The mental element of the offence is one of basic intent.[87]

B.49 The offence is complete when the message is sent, provided the defendant is shown to have intended or been aware of the proscribed nature of his communication.[88]

B.50 Intention or awareness of the grossly offensive nature of the communication is required under section 127.[89] Lord Bingham in *DPP v Collins*[90] held:

> A culpable state of mind will ordinarily be found where a message is couched in terms showing an intention to insult those to whom the message relates or giving rise to the inference that a risk of doing so must have been recognised by the sender.[91]

B.51 In *Chambers*,[92] concerning "menacing" communications, the court held that where a message is intended as a joke it is unlikely that the mental element for the offence will be established.[93]

[86] [2006] UKHL 40, [2006] 1 WLR 2223 at [26].

[87] *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [36]. We define specific intent offences as those for which the required mental element is one of knowledge, intention or dishonesty, and basic intent offences as all those for which the required mental element is not intention, knowledge or dishonesty (this includes offences of recklessness, belief, negligence and strict liability).

[88] Smith and Hogan p 1081.

[89] Blackstone's para B18.28.

[90] [2006] UKHL 40, [2006] 1 WLR 2223.

[91] *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [11].

[92] [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1; see para B.39 above.

[93] *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [38].

Communications Act 2003, section 127(2)

B.52 It is an offence, under section 127(2), to send by means of a public electronic communications network a message that the sender knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another.

B.53 There are no reported cases specifically addressing section 127(2), but some guidance may be derived from *Collins*. The House of Lords in that case was concerned only with section 127(1) of the Act. However, many of their Lordships' observations were addressed to section 127 in general. They also stressed that many of their conclusions were based on the fact that section 127(1) is designed to protect the integrity of the public electronic communications network. Given that this is true also of section 127(2), it is reasonable to assume that the opinions expressed in relation to section 127(1) would apply also to section 127(2) except where precluded by the terms of subsection (2).

Type of conduct or words

B.54 It is an offence to send by means of a public electronic communications network a message that the sender knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another. The offence could in principle cover publications about judges that contain outright untruths, such as misrepresentation of the grounds of a judgment.

B.55 In addition, section 127(2)(c) makes it an offence persistently to use a public electronic communications network for the purpose of causing annoyance, inconvenience or needless anxiety to another. Section 127(2)(c) assesses the cumulative effect of the communications and so could be particularly useful where a member of the judiciary was persistently targeted by communications which, although not grossly offensive, indecent, obscene or menacing as required under section 127(1), are sent for the purpose of causing annoyance, inconvenience or needless anxiety.

B.56 Although section 127(2)(a) is concerned with "false" messages, Professor Walden points out that it is unclear whether this would include messages which are "true in terms of content but were sent under 'false pretences', to cause annoyance, inconvenience or anxiety".[94] This may be relevant when considering this offence as an alternative to scandalising, as it is not clear whether communications which are true but which are sent to members of the judiciary under false pretences to cause annoyance would be covered by section 127(2)(a).

Where published and by what means

B.57 The subsection covers any communication published by any public electronic communications network. This would be interpreted in the same way as for the purposes of subsection (1), to include telephone, Twitter, email and so on.[95]

[94] I Walden, *Computer Crimes and Digital Investigations* (2007) para 3.207.

[95] See paras B.42 and following above.

Impact on the victim

B.58 As with section 127(1),[96] it would appear following *DPP v Collins*[97] that the offence is complete as soon as the message is sent. The message must be sent with the purpose of causing annoyance, inconvenience or needless anxiety to another, but, again following *Collins*, there is no requirement that the other be the immediate recipient of the message. Also, there appears to be no requirement that annoyance, inconvenience or needless anxiety has in fact been caused.

Mental element

B.59 The offence under section 127(2) differs from that under section 127(1), in that the sender must intend to cause annoyance, inconvenience or needless anxiety to another. To that extent, it is an offence of specific intent. However, it may be hard to prove that the person responsible for the publication intended to cause annoyance, inconvenience or needless anxiety.

MALICIOUS COMMUNICATIONS ACT 1988

Malicious Communications Act 1988 section 1

Type of conduct or words

B.60 Section 1(1) of the Malicious Communications Act 1988 provides that:

> (1) Any person who sends to another person—
>
> (a) a letter, electronic communication[98] or article of any description which conveys—
>
> (i) a message which is indecent or grossly offensive;
>
> (ii) a threat; or
>
> (iii) information which is false and known or believed to be false by the sender; or
>
> (b) any article or electronic communication which is, in whole or part, of an indecent or grossly offensive nature,

[96] See paras B.45 and following above.

[97] [2006] UKHL 40, [2006] 1 WLR 2223.

[98] As inserted by the Criminal Justice and Police Act 2001, s 43(1)(a). Section 1(2A) of the Malicious Communications Act 1988 ("the 1988 Act") states that "electronic communication" includes "(a) any oral or other communication by means of an electronic communications network; and (b) any communication (however sent) that is in electronic form." Geach and Haralambous note that since the insertion of "electronic communication" in 2001 there has been a continuous rise in prosecutions under the 1988 Act: N Geach and N Haralambous, "Regulating Harassment: Is the Law Fit for the Social Networking Age?" (2009) 73(3) *Journal of Criminal Law* 241, 250.

> is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.[99]

B.61 This offence would cover, for example, a threatening email or grossly offensive letter sent to a judge.

B.62 In *Connolly v DPP*,[100] the court held that the words "indecent" and "grossly offensive" should be given their ordinary English meaning.[101] The fact that the defendant in that case had a political or educational motive for sending close-up photographs of aborted foetuses to pharmacists who supplied the "morning-after pill" did not preclude the communication from being indecent or grossly offensive.[102]

Where published and by what means

B.63 Section 1(1) of the Malicious Communications Act 1988 is broader in scope than section 127 of the Communications Act 2003, as it encompasses postal services and other "physical delivery mechanisms" as well as electronic communications.[103] It would not, however, cover a web post, which is not sent "to another person". Lord Bingham in *DPP v Collins*[104] noted that the object of the 1988 Act was "to protect people against receipt of unsolicited messages which they may find seriously objectionable".[105] The purpose of the 2003 Act, by contrast, was "to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society".[106]

B.64 The Divisional Court in *Chappell v DPP*[107] held that posting a letter containing threatening, abusive or insulting words through a letter box would fall within the

[99] The genesis of the 1988 Act lies in the Law Commission's Report on Poison Pen Letters (1985) No 147. The recommendations made in the report are largely reflected in the 1988 Act: see G Broadbent, "Malicious Communications Act 1988: Human Rights" (2007) 71(4) *Journal of Criminal Law* 288, 288.

[100] [2007] EWHC 237 (Admin), [2008] 1 WLR 276.

[101] [2007] EWHC 237 (Admin), [2008] 1 WLR 276 at [10]. On the definition of "grossly offensive", see *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [9] and [22].

[102] [2007] EWHC 237 (Admin), [2008] 1 WLR 276 at [9].

[103] I Walden, *Computer Crimes and Digital Investigations* (2007) para 3.198. For a discussion of other offences relating to behaviour which causes or which is likely to cause fear or alarm and an argument in favour of their reform, see P Alldridge, "Threats Offences – A Case for Reform" [1994] *Criminal Law Review* 176, 179 and 182 and following.

[104] [2006] UKHL 40, [2006] 1 WLR 2223.

[105] [2006] UKHL 40, [2006] 1 WLR 2223 at [7]. On *Collins*, see "Communications Act 2003: 'Grossly Offensive' Message" (2007) 71(4) *Journal of Criminal Law* 301, 303.

[106] [2006] UKHL 40, [2006] 1 WLR 2223 at [7]. Walden, however, questions the continued relevance of this distinction in light of "our modern liberalised and competitive communications industry": I Walden, *Computer Crimes and Digital Investigations* (2007) para 3.199.

[107] [1988] 89 Cr App R 82, 89.

ambit of section 1(1) of the Malicious Communications Act 1988 rather than section 5 of the Public Order Act 1986.[108]

Impact on the victim

B.65 The offence does not turn on the recipient's actual reaction, but rather on the intention of the sender.[109] The offence could, therefore, still be made out if a judge receives a message intended to cause distress or anxiety[110] which does not have this effect (for example, because the judge is "thick-skinned" by nature or accustomed to receiving such messages). Walden notes that the same would be true if the communication is never received.[111]

Mental element

B.66 The mental element of section 1(1) is specific intent: the sender of a message must act, at least in part, with the specific purpose of causing distress or anxiety to the immediate or eventual recipient of the message.[112] In *Connolly v DPP*,[113] Lord Justice Dyson (now Lord Dyson) noted that the nature of the communication may shed light on the defendant's state of mind.

Defences

B.67 Section 1(2) of the 1988 Act provides that:

> (2) A person is not guilty of an offence by virtue of subsection (1)(a)(ii) above if he shows—
>
> (a) that the threat was used to reinforce a demand made by him on reasonable grounds; and
>
> (b) that he believed, and had reasonable grounds for believing, that the use of the threat was a proper means of reinforcing the demand.

B.68 The defence contains both subjective and objective elements, to be considered in light of "all the circumstances".[114]

[108] See also *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [7].

[109] Smith and Hogan p 1081.

[110] The message must also be either a threat, of an indecent or grossly offensive nature or contain false information, following s 1(1) of the 1988 Act. Geach and Haralambous argue that the 1988 Act "may be commended" as a result because unlike other offences (such as the offence of harassment under the Protection from Harassment Act 1997), it sets a minimum bar for the nature of the proscribed conduct: N Geach and N Haralambous, "Regulating Harassment: Is the Law Fit for the Social Networking Age?" (2009) 73(3) *Journal of Criminal Law* 241, 251.

[111] I Walden, *Computer Crimes and Digital Investigations* (2007) para 3.200.

[112] *Connolly v DPP* [2007] EWHC 237 (Admin), [2008] 1 WLR 276 at [9] and [22]. See also *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [26].

[113] [2007] EWHC 237 (Admin), [2008] 1 WLR 276.

[114] *R (Trung) v Isleworth Crown Court* [2012] EWHC 1828 at [6].

ECHR implications

B.69 In *Connolly v DPP*[115] the court did not accept that prosecution under the 1988 Act infringed articles 9 and 10 of the ECHR.[116] Though those rights were engaged, their restriction was justified under articles 9(2) and 10(2) as being necessary for the protection of the "rights of others", namely the rights of the employees of the three pharmacies who were in receipt of the disturbing photographs.[117]

B.70 The court went on to note, however, that the "rights of others" are not to be given unlimited protection. Although freedom of expression did not encompass the right to cause distress or anxiety,[118] this would depend on the circumstances. The court considered two factors to be relevant: the offensiveness of the material[119] and the nature of the party requiring protection. For example, a doctor who routinely performs abortions and a Cabinet member who had spoken publicly on abortion "might well stand on a different footing" to the pharmacist's employees,[120] as they had more reason to expect that they would be exposed to such material and may be presumed to be to some extent prepared for it.

B.71 The court in *Connolly v DPP*[121] held further that the words "indecent or grossly offensive" could be interpreted compatibly with article 10 by reading into section 1 a provision to the effect that the Act had not enacted an offence which would be in breach of a person's Convention rights.[122]

PROTECTION FROM HARASSMENT ACT 1997

Protection from Harassment Act 1997 sections 1 and 2: harassment

B.72 Section 1 provides that:

[115] [2007] EWHC 237 (Admin), [2008] 1 WLR 276.

[116] On *Connolly*, see "Qualifications to Freedom of Expression" (2007) 12(2) *Communications Law* 72 and A Ashworth, "Malicious Communication: Defendant Anti-Abortionist – Sending Photographs of Aborted Foetuses" [2007] *Criminal Law Review* 729.

[117] See also *R (Trung) v Isleworth Crown Court* [2012] EWHC 1828 (Admin) at [10]: "Article 10 is a qualified article. A state is entitled by its law to circumscribe that right in the interests of public safety and of the rights of others, providing that it does so by law. The United Kingdom does so by law by the provisions of the Malicious Communications Act 1988 ... ." by Mitting J.

[118] [2007] EWHC 237 (Admin), [2008] 1 WLR 276 at [28].

[119] [2007] EWHC 237 (Admin), [2008] 1 WLR 276. Dyson LJ held at [28] that "the more offensive the material, the greater the likelihood that such persons have the right to be protected from receiving it".

[120] [2007] EWHC 237 (Admin), [2008] 1 WLR 276 at [28]. The court's differentiation on the basis of profession has been criticised by some commentators. Khan, for instance, argues that the fact that doctors have stronger constitutions does not necessarily mean they will be immune from suffering offence, and notes that the court's approach could extend widely by including other professions such as abattoir or mortuary workers: A Khan, "A 'Right Not To Be Offended' under Article 10(2) ECHR? Concerns in the Construction of the 'Rights of Others'" [2012] *European Human Rights Law Review* 191, 194.

[121] [2007] EWHC 237 (Admin), [2008] 1 WLR 276.

[122] [2007] EWHC 237 (Admin), [2008] 1 WLR 276 at [12]. On the use of s 3 of the Human Rights Act 1998 in *Connolly* and other cases, see Blackstone's para A7.25 and S Turenne, "The Compatibility of Criminal Liability with Freedom of Expression" [2007] *Criminal Law Review* 866, 870 and following.

(1) A person must not pursue a course of conduct—

(a) which amounts to harassment of another, and

(b) which he knows or ought to know amounts to harassment of the other.

(1A) A person must not pursue a course of conduct—

(a) which involves harassment of two or more persons, and

(b) which he knows or ought to know involves harassment of those persons, and

(c) by which he intends to persuade any person (whether or not one of those mentioned above)—

(i) not to do something that he is entitled or required to do, or

(ii) to do something that he is not under any obligation to do.[123]

B.73 A person who pursues a course of conduct in breach of section 1 is guilty of an offence.[124]

Type of conduct or words

B.74 The 1997 Act does not provide exhaustive definitions of the type of conduct that is proscribed,[125] but it does provide examples.[126] Below we consider the relevant case law and its potential application to attacks on judges.

HARASSMENT

B.75 According to Lord Phillips MR in *Thomas v News Group Newspapers Ltd*,[127] "harassment" entails improper "oppressive and unreasonable" conduct targeted at an individual and calculated to cause alarm or distress.[128] Though either alarm

[123] Subsection (1A) was inserted by Serious Organised Crime and Police Act 2005, s 125(2)(a).

[124] Protection from Harassment Act 1997, s 2. The Crime and Disorder Act 1998, s 32 creates a racially or religiously aggravated form of this offence.

[125] *DPP v Ramsdale* [2001] EWHC Admin 106, *Independent* 19 Mar 2001.

[126] Protection from Harassment Act 1997, s 7(2).

[127] [2001] EWCA Civ 1233, *The Times* 25 Jul 2001 at [30].

[128] Protection from Harassment Act 1997, s 7(2); see also *Majrowksi v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 AC 224. Merely unattractive or unreasonable conduct will not suffice: see Lord Nicholls in *Majrowski* at [30].

or distress in isolation will suffice,[129] there is a minimum level of alarm or distress which must be suffered.[130]

B.76 Section 1 has been held to cover "harassment of any sort".[131] Baroness Hale in *Majrowski v Guy's and St Thomas' NHS Trust*[132] noted that the definition of harassment had been left deliberately wide, and so "a great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour".[133] Context is clearly important: in *Conn v Sunderland City Council*,[134] Lord Justice Gage observed that "what might not be harassment on the factory floor or in the barrack room might be harassment in the hospital ward and vice versa".[135]

COURSE OF CONDUCT

B.77 According to section 7(3):[136]

> (3) A "course of conduct" must involve—
>
> (a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person, or
>
> (b) in the case of conduct in relation to two or more persons (see section 1(1A)), conduct on at least one occasion in relation to each of those persons.

B.78 "Conduct" encompasses speech,[137] actions and omissions.[138]

B.79 Establishing a course of conduct, as opposed to a series of "separate and isolated incidents",[139] is an essential element of the offence. A one-off attack on a judge, for instance by a disappointed litigant, would not, therefore, suffice. In *Iqbal v Dean Manson (Solicitors)*,[140] Lord Justice Rix stated that "it is the course of conduct which has to have the quality of amounting to harassment, rather than

[129] Protection from Harassment Act 1997, s 7(2). See S O'Doherty, "From Fan to Fanatic" (2003) 167 *Justice of the Peace* 564, 565.

[130] Blackstone's para B2.163.

[131] *DPP v Selvanayagam, The Times* 23 Jun 1999 by Collins J.

[132] *Majrowksi v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 AC 224.

[133] *Majrowksi v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 AC 224 at [66].

[134] [2007] EWCA Civ 1492, [2008] IRLR 324.

[135] [2007] EWCA Civ 1492, [2008] IRLR 324 at [12].

[136] As substituted by Serious Organised Crime and Police Act 2005, s 125.

[137] Protection from Harassment Act 1997, s 7(4).

[138] In *R (Taffurelli) v DPP* [2004] EWHC 2791 (Admin), [2004] All ER (D) 390 (Nov) the deliberate failure to control dogs following a number of complaints was held to constitute "conduct".

[139] *Hills* [2001] 1 Family Law Reports 580 at [15].

[140] [2011] EWCA Civ 123, [2011] IRLR 428.

individual instances of conduct".[141] The matters said to constitute the course of conduct amounting to harassment must be "so connected in type and in context as to justify the conclusion that they amount to a course of conduct".[142]

B.80 The court will consider all the circumstances in determining whether there has been a course of conduct.[143] The fewer and further apart the incidents proven, the less likely it is a course of conduct will be established, but in *Lau v DPP*[144] the court considered that incidents as far apart as a year could qualify.[145] There is no requirement that the individual acts are similar in kind.[146]

B.81 Following *DPP v Hardy*,[147] a course of conduct that initially takes the form of a legitimate inquiry or complaint may descend into harassment if unreasonably prolonged or persisted in.[148]

Where published and by what means

B.82 Applying *Baron v CPS*,[149] the sending of letters to a judge could constitute harassment.

B.83 Following *Thomas v News Group Newspapers Ltd*,[150] the publication of press articles about judges could amount to harassment, although in light of the importance given to freedom of expression by the courts, the circumstances in which this could happen will be rare.[151] Lord Phillips (then Master of the Rolls) in *Thomas* held that "in general, press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural meaning of

[141] [2011] EWCA Civ 123, [2011] IRLR 428 at [45].

[142] Blackstone's para B2.160, citing *Patel* [2004] EWCA Crim 3284, [2005] 1 Cr App R 27 and *Pratt v DPP* [2001] EWHC Admin 483, (2001) 165 Justice of the Peace Reports 800.

[143] *Sahin* [2009] EWCA Crim 2616 at [21]. In *Kelly v DPP* [2002] EWHC 1428 (Admin), [2003] Crim LR 45, three telephone calls made within a space of five minutes were held to amount to a course of conduct, taking into account the "separate and distinct" nature of the calls. In *Baron v CPS* 13 Jun 2000, unreported, two letters sent some four and a half months apart from each other amounted to a course of conduct.

[144] [2000] Crim LR 580.

[145] [2000] Crim LR 580 at [15]. This was followed by *Pratt v DPP* [2001] EWHC Admin 483, (2001) 165 Justice of the Peace Reports 800 in which only two incidents separated by three months were held to suffice.

[146] *Hills* [2001] 1 Family Law Reports 580. See also Smith and Hogan p 698. Since the offence of scandalising the court concerns the publication of statements attacking the judiciary, the acts in question would be of the same kind.

[147] [2008] EWHC 2874 (Admin), (2009) 173 Justice of the Peace Reports 10.

[148] Blackstone's para B2.160.

[149] Unreported, 13 Jun 2000. See A Hudson, "Privacy: A Right by Any Other Name" [2003] *European Human Rights Law Review* 73, 81.

[150] [2001] EWCA Civ 1233, *The Times* 25 Jul 2001; see para B.75 above. On *Thomas*, see J Coad, "Harassment by the Media" [2002] *Entertainment Law Review* 18.

[151] [2001] EWCA Civ 1233, *The Times* 25 Jul 2001 at [35] by Lord Phillips MR: "Before press publications are capable of constituting harassment, they must be attended by some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve. It is also common ground that such circumstances will be rare". See also A Hudson, "Privacy: A Right By Any Other Name" [2003] *European Human Rights Law Review* 73, 82.

harassment".[152] Whether conduct is reasonable depends on the circumstances of the particular case.[153] An example of unreasonable conduct amounting to harassment which was agreed to by the parties to that case was the publication of press articles calculated to incite racial hatred of an individual.[154] Following *Trimingham v Associated Newspapers Ltd*,[155] the question of whether the subject of the publication is a "public figure" will be relevant to the reasonableness enquiry.[156]

Impact on the victim

B.84 The offence under section 1 requires the victim to be harassed in fact. This is implicit in the non-exhaustive definition of "harassment" in section 7(2), which includes alarming a person or causing the person distress.

B.85 Unlike section 4 of the Public Order Act 1986, the offence under section 1 of the 1997 Act could be made out even where the words are reported to a victim by a third party.[157]

Mental element

B.86 As provided in section 1(1)(b), the defendant must know or ought to know that the course of conduct amounts to harassment of another. Section 1(2) states that a defendant ought to know this "if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other".

B.87 This is an objective test; no concession can be made for conditions such as paranoid schizophrenia which may affect the defendant's perception.[158] In

[152] [2001] EWCA Civ 1233, *The Times* 25 Jul 2001 at [34]. At [24] Lord Phillips MR held that "harassment must not be given an interpretation which restricts the right to freedom of expression, save in so far as this is necessary in order to achieve a legitimate aim".

[153] *Thomas* at [249] to [250]. Lord Phillips MR held that the question of whether a series of publications constitutes harassment "requires a publisher to consider whether a proposed series of articles, which is likely to cause distress to an individual, will constitute an abuse of the freedom of the press which the pressing social needs of a democratic society require should be curbed": see [50]. In *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB), [2012] 4 All ER 717, Tugendhat J applied *Thomas*. His Lordship held that for a court to comply with s 3 of the Human Rights Act 1998, it must hold that journalistic speech is reasonable under s 1(3)(c) of the 1997 Act unless, "in the particular circumstances of the case, the course of conduct is so unreasonable that it is necessary (in the sense of a pressing social need) and proportionate to prohibit or sanction the speech in pursuit of one of the aims listed in art 10(2) ... .": See [53]. Bryden and Salter argue that this is a "high hurdle" for an individual to surmount: C Bryden and M Salter, "Harassment: A High Hurdle" (2012) 162 *New Law Journal* 1106.

[154] [2001] EWCA Civ 1233, *The Times* 25 July 2001 at [37].

[155] [2012] EWHC 1296 (QB), [2012] 4 All ER 717.

[156] *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB), [2012] 4 All ER 717 at [93] and following by Tugendhat J.

[157] In *Kellett v DPP* [2001] EWHC Admin 107, [2001] All ER (D) 124 (Feb), the defendant made two telephone calls to the victim's employer, falsely alleging that she was defrauding the employer. The court held that the offence was made out when the employer informed the victim of the calls, thereby occasioning her distress: see [16] by Penry-Davey J.

[158] Blackstone's 2013 para B2.165, citing *R v C* [2001] EWCA Crim 1251, [2001] 2 Family Law Reports 757.

Crawford v CPS,[159] the court held that in assessing the presence of the mental element, nothing involving "cultural or racial differences should be taken into account, unless it is relevant and supported by proper evidence".[160]

B.88 In practice, where the defendant intends to cause alarm and distress and succeeds in doing so, this is likely to satisfy the requirements of section 1(1)(b).[161]

Defences

B.89 Section 1(3) provides that:

> (3) Subsection (1) or (1A) does not apply to a course of conduct if the person who pursued it shows—
>
> (a) that it was pursued for the purpose of preventing or detecting crime,
>
> (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
>
> (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

B.90 A defendant may rely on section 1(3)(a) only if the sole purpose of the course of conduct is the prevention or detection of crime.[162] Section 1(3)(a) does not require the course of conduct to be a reasonable means of achieving the purpose of preventing or detecting crime. However, if the course of conduct is "irrational or lacking in any reasonable connection to the avowed purpose of preventing or detecting crime", the court may find that the defendant was acting with a different purpose.[163] In *Hayes v Willoughby*,[164] Lord Justice Moses noted that in practice it would be unlikely for anyone who is not a member of a law enforcement agency to succeed in establishing the defence under section 1(3)(a).[165]

B.91 Section 1(3)(b) protects, among other things, the right to free expression.[166] In one of the first cases in which the 1997 Act was considered, Mr Justice Eady noted that the legislation was not intended to be used to stifle discussion of public

[159] [2008] EWHC 148 (Admin).

[160] [2008] EWHC 148 (Admin) at [55].

[161] *Baron v* CPS 13 Jun 2000, unreported, by Kennedy LJ.

[162] *Hayes v Willoughby* [2011] EWCA Civ 1541, [2012] 1 WLR 1510 at [11] by Moses LJ. If the defendant acts with more than one purpose, s 1(3)(c) should be relied on instead: see [15] of *Hayes*.

[163] *Hayes v Willoughby* [2011] EWCA Civ 1541, [2012] 1 WLR 1510 at [18].

[164] [2011] EWCA Civ 1541, [2012] 1 WLR 1510.

[165] *Hayes v Willoughby* [2011] EWCA Civ 1541, [2012] 1 WLR 1510 at [21]. See also Eady J in *Howlett v Holding* [2006] EWHC 41 (QB), *The Times* 8 Feb 2006 at [33].

[166] Blackstone's para B2.166; *Huntington Life Sciences v Curtin, The Times* 11 Dec 1997.

interest in public demonstrations.[167] The right to free expression under the ECHR has also been held to be relevant in applying the defence of reasonableness under section 1(3)(c).[168]

B.92 Whether the conduct was reasonable for the purpose of section 1(3)(c) is judged objectively,[169] and not on the basis of the defendant's personal characteristics. Thus in *R v C*,[170] the defendant's paranoid schizophrenia was held not to be relevant to the defence,[171] with the Court of Appeal pointing to the strong policy grounds of protection underpinning the legislation:

> The conduct at which the Act is aimed, and from which it seeks to provide protection, is particularly likely to be conduct pursued by those of obsessive or unusual psychological make-up and very frequently by those suffering from an identifiable mental illness. Schizophrenia is only one such condition which is obviously very likely to give rise to conduct of this sort.[172]

Protection from Harassment Act 1997 section 2A: stalking

B.93 The Protection of Freedoms Act 2012 inserted a new section 2A into the 1997 Act which creates an offence of stalking.[173] Section 2A(1) provides that:

> (1) A person is guilty of an offence if—
>
> (a) the person pursues a course of conduct in breach of section 1(1), and
>
> (b) the course of conduct amounts to stalking.

Type of conduct or words

B.94 For an offence under section 2A to be made out, the course of conduct in breach of section 1(1)[174] must also amount to stalking. A person's course of conduct amounts to stalking of another person if: it amounts to harassment of that person; the acts or omissions involved are ones associated with stalking; and the person

[167] *Huntington Life Sciences v Curtin, The Times* 11 Dec 1997; see also p 702.

[168] *Trimingham v Associated Newspapers Ltd* [2012] EWCH 1296 (QB), [2012] 4 All ER 717.

[169] In *DPP v Mosely, The Times* 23 Jun 1999 it was held that it would not be a defence to engage in a course of conduct amounting to harassment in breach of a High Court injunction because the defendant believed his conduct to be reasonable. See "Harassment – Defence that Course of Conduct Reasonable in Circumstances" [1999] *Archbold News* 2.

[170] *R v C* [2001] EWCA Crim 1251, [2001] 2 Family Law Reports 757.

[171] The appellant in that case sought to draw an analogy with the law of provocation and the law of duress, in which the "reasonable man" is imbued with the subjective characteristics of the accused. For an analysis of the court's reasons for rejecting this analogy, see G M Carey, "Harassment and the Reasonable Man" (2001) 165 *Justice of the Peace* 675.

[172] *R v C* [2001] EWCA Crim 1251, [2001] 2 Family Law Reports 757 at [18] by Hughes J. See D Ormerod, "Trial: Direction to Jury – Reasonable Person – Reasonable Conduct – Defendant Suffering from Paranoid Schizophrenia" [2001] *Criminal Law Review* 845.

[173] In force from 25 Nov 2012.

[174] See para B.72 and following above.

whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.[175]

B.95 Section 2A(3) provides examples of acts or omissions which, in particular circumstances, amount to stalking. These include: following a person; contacting a person; publishing a statement or material relating to a person or purporting to originate from a person; monitoring the use by a person of the internet, email or any other form of electronic communication; loitering in any place; interfering with any property in the possession of a person; and watching or spying on a person.

B.96 The list of examples given in section 2A(3) is non-exhaustive. Therefore, new forms of behaviour, such as electronic tracking of an individual, are not excluded from the remit of this offence.[176]

Where published and by what means

B.97 Section 2A encompasses letters addressed to an individual,[177] publications in the print media and electronic posts.[178] For example, a blog which repeatedly posted aggressive and offensive material about a judge could amount to stalking.

Impact on the victim

B.98 As under section 1, section 2A requires the victim to be harassed in fact.[179]

B.99 MacEwan notes that where the defendant acts covertly, the "victim impact" element of the offence may be absent.[180] This may occur, for example, where victims are monitored without their knowledge.[181]

Mental element

B.100 The mental element is the same as for the section 1 offence: the defendant must know or ought to know that the course of conduct amounts to harassment of another.[182] This would not be the case if the defendant acts covertly and the conduct never comes to the attention of the victim.[183] There does not appear to be any requirement that the defendant knew that the course of conduct amounted to stalking.

[175] Protection from Harassment Act 1997, s 2A(2).

[176] Blackstone's para B2.171.

[177] Protection from Harassment Act 1997, s 2A(3)(b).

[178] Protection from Harassment Act 1997, s 2A(3)(c).

[179] Protection from Harassment Act 1997, s 2A(2)(a). See para B.84 above.

[180] N MacEwan "The New Stalking Offences in English law: Will They Provide Effective Protection from Cyberstalking?" [2012] *Criminal Law Review* 767, 776.

[181] However, as Gillespie notes, where a third party discovers the covert surveillance and informs the victim of it, harassment (and therefore stalking) could be made out: see the response to MacEwan by A Gillespie, "Cyberstalking and the Law: A Response to Neil MacEwan" [2013] *Criminal Law Review* 35, 38 and *Kellett v DPP* [2001] EWHC Admin 107, [2001] All ER (D) 124 (Feb) at [16] (discussed at footnote 157 above).

[182] See paras B.86 to B.88 above.

[183] N MacEwan "The New Stalking Offences in English law: Will They Provide Effective Protection from Cyberstalking?" [2012] *Criminal Law Review* 767, 776.

Defences

B.101 There are no defences specific to section 2A, equivalent to the exclusions set out in section 1(3).[184] However, section 2A operates without prejudice to the generality of section 2;[185] and, as the section 2A offence must consist of conduct in breach of section 1(1), it follows logically that the exclusions in section 1(3) apply to the offence of stalking in section 2A. There is, however, no case law on this point.

Protection from Harassment Act 1997 section 4: putting people in fear of violence

B.102 Section 4(1) of the 1997 Act reads:

> (1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

Type of conduct or words

COURSE OF CONDUCT

B.103 We discussed the phrase "course of conduct" above.[186] In determining whether there has been a "course of conduct", it is necessary to consider all the circumstances of the case. Relevant factors include the proximity in time and the degree of similarity and whether the defendant was intentionally waging a campaign against the victim. It is not necessarily the case that any two acts against the same victim which cause him or her to fear violence will always amount to a course of conduct.[187]

VIOLENCE

B.104 "Violence" is not defined in the Act. In the related context of public order offences, section 8 of the Public Order Act 1986 reads as follows:

> In this Part—
>
> ...
>
> "Violence" means any violent conduct, so that—
>
> (a) except in the context of affray, it includes violent conduct towards property as well as violent conduct towards persons, and

[184] Contrast sections 4(3) and 4A(4), which explicitly set out defences to the offences in sections 4 and 4A: see paras B.111 and B.125 below.

[185] Protection from Harassment Act 1997, s 2A(6).

[186] See para B.77 and following above.

[187] *R v H* [2001] 1 Family Law Reports 580; see D Ormerod, "Harassment: Separate Incidents Not Linked" [2001] *Criminal Law Review* 318, 319.

(b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).

Under the 1997 Act, by contrast, a fear of damage to property alone is insufficient – the fear in section 4 must be that violence will be used "against him".[188]

Where published and by what means

B.105 Following *Haque*,[189] the sending of threatening letters, emails and text messages to a judge would amount to a section 4 offence.

Impact on the victim

B.106 A fear of violence can be inferred from threats which are not directed specifically at the victim (for example, at his or her dog), but the victim must fear that violence will actually be used against him or her (that is, a fear of violence against others, even family members, is insufficient).[190] A threat to burn down the victim's house is sufficient.[191] There is no requirement in the Act that the violence which is feared must be immediate. This potentially creates a very broad offence.[192] The fear of violence must be experienced on at least two occasions; there is no scope for basing the offence on the cumulative effect of the defendant's actions.[193]

B.107 The defendant's conduct must actually cause the victim to fear that violence will be used against him or her – it is not sufficient for it to put the victim in fear of what *might* happen.[194] The effect it has on the victim can sometimes be inferred from the evidence, but if possible there should be direct evidence from the victim.[195]

B.108 The offence in section 4 has been interpreted as requiring proof of harassment. Thus, in *Curtis*,[196] Lord Justice Pill held that the prosecution must prove, in addition to the statutory requirements, the requirements identified by Lord Phillips

[188] See D Ormerod, "Harassment: Judge Wrongly Paraphrasing Language of the Act" [2000] *Criminal Law Review* 582, 584.

[189] [2011] EWCA Crim 1871, [2012] 1 Cr App R 5.

[190] Smith and Hogan p 704, citing *R v DPP* [2001] Crim L R 396; *Henley* [2000] Crim L R 582; *Caurti v DPP* [2002] Crim L R 131.

[191] *R (A) v DPP* [2004] EWHC 2454 (Admin), [2005] Administrative Court Digest 61.

[192] See D Ormerod, "Harassment: Judge Wrongly Paraphrasing Language of the Act" [2000] *Criminal Law Review* 582, 583.

[193] See D Ormerod, "Harassment: Whether Leaving Three Abusive and Threatening Phone Calls on the Victim's Voice Mail, Which Were Listened to at One Time, Capable of Constituting a Course of Conduct" [2003] *Criminal Law Review* 45, 47.

[194] Blackstone's para B2.177, citing *Henley* [2000] Crim L R 582 and *Caurti v DPP* [2002] Crim LR 131.

[195] *R v DPP* [2001] Crim L R 396.

[196] [2010] EWCA Crim 123, [2010] 1 WLR 2770; see D Ormerod, "*R v Curtis*: Harassment – Protection from Harassment Act 1997, s 4(1)" [2010] *Criminal Law Review* 638.

MR in *Thomas v News Group Newspapers Ltd*[197] (that the conduct was targeted at an individual, was calculated to alarm or cause him distress, and was oppressive and unreasonable). *Curtis* was followed in *Widdows*[198] and reluctantly in *Haque*.[199]

Mental element

B.109 Section 4(1) states that the defendant is guilty of the offence "if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions". In addition, section 4(2) reads as follows:

> (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

B.110 The effect of section 4(2) is that fear must have been caused on each occasion within the course of conduct.[200] The objective nature of the mental element ensures that the offence covers, for example, defendants with mental illnesses who do not appreciate the effect their actions are having.

Defences

B.111 Under section 4(3) of the 1997 Act:

> (3) It is a defence for a person charged with an offence under this section to show that—
>
> (a) his course of conduct was pursued for the purpose of preventing or detecting crime,
>
> (b) his course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
>
> (c) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.

B.112 The wording is similar to that in section 1(3).[201] However, the defence in section 4(3)(c) is narrower than that in section 1(3)(c),[202] as it is limited to

[197] [2001] EWCA Civ 1233, [2002] Entertainment and Media Law Reports; see para B.75 above.

[198] [2011] EWCA Crim 1500, [2011] Crim LR 959.

[199] [2011] EWCA Crim 1871, [2012] 1 Cr App R 5; see D Ormerod, "Putting a Person in Fear of Violence by Harassment: Defendant and Complainant Having Had Long, Close and Mainly Affectionate Relationship – Defendant Alleged to Have Been Violent to Complainant on Occasions During Relationship" [2011] *Criminal Law Review* 959.

[200] Blackstone's para B2.178.

[201] Para B.89 above.

[202] For the definition in section 1(3)(c), see para B.92 above.

pursuing a course of conduct that is reasonable for the protection of the defendant or another or their properties.[203] As in section 1(3)(c), it is the whole "course of conduct" which must be reasonable.[204]

B.113 There is one possible difficulty in relation to the defences. We noted above that a requirement of harassment has also been read into the section 4 offence.[205] It is therefore possible, following *Haque*,[206] that all the conditions applicable to section 1, including the exclusions in section 1(3), should be read in as well, thus making the narrower defences in section 4(3) redundant, though the position is far from clear and this would not seem to be the intended consequence of the way the offences were drafted.

B.114 Paragraphs (a) and (b) are identical in the two offences and would presumably be interpreted in the same way, for example, as protecting freedom of expression.[207] However, it is hard to envisage facts on which this last excuse will be relevant to the offence under section 4.

B.115 In addition, section 12 of the Act provides that:

> (1) If the Secretary of State certifies that in his opinion anything done by a specified person on a specified occasion related to—
>
> (a) national security,
>
> (b) the economic well-being of the United Kingdom, or
>
> (c) the prevention or detection of serious crime,
>
> and was done on behalf of the Crown, the certificate is conclusive evidence that this Act does not apply to any conduct of that person on that occasion.

Protection from Harassment Act 1997 section 4A: stalking which causes the victim to fear violence or to suffer serious alarm or distress

Type of conduct or words

B.116 Section 4A(1) of the 1997 Act[208] provides that:

> (1) A person ("A") whose course of conduct—
>
> (a) amounts to stalking, and
>
> (b) either—

[203] See case comment [2011] *Criminal Law Review* 959, 962.

[204] See case comment [2001] *Criminal Law Review* 396, 398.

[205] See para B.108 above.

[206] [2011] EWCA Crim 1871, [2012] 1 Cr App R 5 para [73], emphasis ours; see case comment at [2011] *Criminal Law Review* 962.

[207] See para B.91 above.

[208] Inserted by Protection of Freedoms Act 2012, s 111(2); in force from 25 Nov 2012.

(i) causes another ("B") to fear, on at least two occasions, that violence will be used against B, or

(ii) causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities,

is guilty of an offence if A knows or ought to know that A's course of conduct will cause B so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.

B.117 Again, "course of conduct" will have the meaning outlined above.[209] In defining "violence", the same considerations apply here as with the section 4 offence.[210]

B.118 As with the new section 2A offence, this new offence is based on the existing section 4 offence with the added requirement of stalking. However, section 4A(1)(b)(ii) is "new and significant", and may sometimes apply where the offence under section 4 does not.[211]

B.119 As Professor Finch notes, stalking is a nebulous concept that makes a precise legal definition difficult to formulate.[212]

Where published and by what means

B.120 Examples of conduct which can be associated with stalking are given in section 2A(3). One such action is "publishing any statement or other material relating or purporting to relate to a person".[213]

B.121 MacEwan notes that the new stalking offences (sections 2A and 4A) continue to cover internet-based communications with the victim, as well as the online publication of "information" about the victim.[214]

Impact on the victim

B.122 It is a central element of the offence, as outlined in section 4A(1), that the victim actually fears that violence will be used against him or her, or suffers serious alarm or distress which has a substantial adverse effect on the victim's usual day-to-day activities.

Mental element

B.123 The mental element, as outlined in section 4A(1), is that A knows or ought to know that A's course of conduct will cause B so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.

[209] See para B.77 and following above.

[210] See para B.104 above.

[211] Blackstone's para B2.184.

[212] E Finch, "Stalking the Perfect Stalking Law: An Evaluation of the Efficacy of the Protection from Harassment Act 1997" [2002] *Criminal Law Review* 703, 703 to 704.

[213] Protection from Harassment Act 1997, s 2A(3)(c)(i).

[214] N MacEwan, "The New Stalking Offences in English Law: Will They Provide Effective Protection from Cyberstalking?" [2012] *Criminal Law Review* 767, 777 to 778.

B.124 Section 4A(2) and (3) further provide that:

> (2) For the purposes of this section A ought to know that A's course of conduct will cause B to fear that violence will be used against B on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause B so to fear on that occasion.
>
> (3) For the purposes of this section A ought to know that A's course of conduct will cause B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities if a reasonable person in possession of the same information would think the course of conduct would cause B such alarm or distress.

Again, this offence has an objective mental element ("ought to know"), which ensures that defendants who do not appreciate the effect their conduct is having (for example, because of mental illness) are caught by the offence.

Defences

B.125 Section 4A(4) provides that:

> (4) It is a defence for A to show that—
>
> (a) A's course of conduct was pursued for the purpose of preventing or detecting crime,
>
> (b) A's course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
>
> (c) the pursuit of A's course of conduct was reasonable for the protection of A or another or for the protection of A's or another's property. [215]

The wording is identical to that in section 4(3).[216] The same question arises here as in section 4 about whether the conditions of section 1, including the exclusions in section 1(3), are to be read into the offence.[217]

Protection from Harassment Act 1997 sections 5 and 5A: restraining orders

B.126 Section 5 of the 1997 Act provides:

[215] Protection from Harassment Act 1997, s 4A(4).

[216] See para B.111 above.

[217] See paras B.113 and B.114 above.

(1) A court sentencing or otherwise dealing with a person ("the defendant") convicted of an offence may (as well as sentencing him or dealing with him in any other way) make an order under this section.

(2) The order may, for the purpose of protecting the victim or victims of the offence, or any other person mentioned in the order, from conduct which—

(a) amounts to harassment, or

(b) will cause a fear of violence,

prohibit the defendant from doing anything described in the order.

(3) The order may have effect for a specified period or until further order.

...

(5) If without reasonable excuse the defendant does anything which he is prohibited from doing by an order under this section, he is guilty of an offence.

B.127 Section 5A[218] of the 1997 Act provides:

(1) A court before which a person ("the defendant") is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.

(2) Subsections (3) to (7) of section 5 apply to an order under this section as they apply to an order under that one.

B.128 It is not the case that orders under section 5A can only be made where there is uncontested evidence. However, the court must always, in open court, state the factual basis for the order. The standard of proof for the making of the order is the civil standard (that is, on the balance of probabilities). It may therefore be the case, without contradiction, that the evidence is not enough for the jury to convict (beyond reasonable doubt) for the criminal offences in the 1997 Act, but that the same evidence is sufficient (on the balance of probabilities) for the imposition of a restraining order. In addition, the power to impose an order under section 5A focuses on preventing future harm – this is a separate consideration from whether the defendant has already harassed the victim.[219]

[218] Inserted by Domestic Violence, Crime and Victims Act 2004, s 12(5).

[219] *Major* [2010] EWCA Crim 3016, [2011] Crim LR 328; see also A Gillespie, "Post-acquittal Restraining Orders" (2011) 75(2) *Journal of Criminal Law* 94, 94 to 95.

OTHER PROCEEDINGS

B.129 In addition to these criminal offences there is, of course, the possibility of a civil action for defamation. Insulting remarks to judges in court will continue to be covered by contempt in the face of the court.

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ANNEXURE - C6

The Hindu

The chilling effect of criminal contempt

27th July, 2020
A.P. Shah

It is regrettable that judges believe that silencing criticism will harbour respect for the judiciary

These are strange times we are going through right now. The pandemic has brought all activities to a virtual standstill. Even as workplaces and institutions are slowly and tentatively getting back on their feet, the focus is on ensuring that the more important things get done first. Priorities are being identified accordingly. For the Supreme Court of India, identifying priority cases to take up first (in a pandemic-constricted schedule) ought not to be very difficult: there are dozens of constitutional cases that need to be desperately addressed, such as the constitutionality of the Citizenship (Amendment) Act, the electoral bonds matter, or the issue of *habeas corpus* petitions from Jammu and Kashmir. It is disappointing that instead of taking up matters of absolute urgency in these peculiar times, the Supreme Court chose to take umbrage at two tweets. It said that these tweets "brought the administration of justice in disrepute and are capable of undermining the dignity and authority of the institution... And the office of the Chief Justice of India in particular...." Its response to these two tweets was to initiate *suo motu* proceedings for criminal contempt against the author of those tweets, the lawyer and social activist, Prashant Bhushan.

This need to "respect the authority and dignity of the court" has monarchical origins from when the king of England delivered judgments himself. But over the centuries, with this adjudicatory role now having been handed over to judges, showing extreme deference to judges does not sit well with the idea of a democracy. The U.K. Law Commission in a 2012 report recommending the abolition of the law of contempt said that the law was originally intended to maintain a "blaze of glory" around courts. It said that the purpose of the offence was not "confined to preventing the public from getting the wrong idea about judges... But that where there are shortcomings, it is equally important to prevent the public from getting the right idea".

A wide field in India

The objective for contempt is stated to be to safeguard the interests of the public, if the authority of the court is denigrated and public confidence in the administration of justice is weakened or eroded. But the definition of criminal contempt in India is extremely wide, and can be easily invoked. Suo motu powers of the court to initiate such proceedings only serve to complicate matters. And truth and good faith were not recognised as valid defences until 2006, when the contempt of courts act was amended. Nevertheless, the Delhi High Court, despite truth and good

faith raised as defences, proceeded to sentence the employees of mid-day for contempt of court for portraying a retired Chief Justice of India in an unfavourable light.

It comes as no surprise that Justice V.R. Krishna Iyer famously termed the law of contempt as having a vague and wandering jurisdiction, with uncertain boundaries; contempt law, regardless of public good, may unwittingly trample upon civil liberties. It is for us to determine what is the extent of such trampling we are willing to bear. On the face of it, a law for criminal contempt is completely asynchronous with our democratic system which recognises freedom of speech and expression as a fundamental right.

An excessively loose use of the test of 'loss of public confidence', combined with a liberal exercise of suo motu powers, can be dangerous, for it can amount to the court signalling that it will not suffer any kind of critical commentary about the institution at all, regardless of how evidently problematic its actions may be. In this manner, the judiciary could find itself at an uncanny parallel with the executive, in using laws for chilling effect.

Besides needing to revisit the need for a law on criminal contempt, even the test for contempt needs to be evaluated. If such a test ought to exist at all, it should be whether the contemptuous remarks in question actually obstruct the court from functioning. It should not be allowed to be used as a means to prevent any and all criticism of an institution.

Obsolete abroad

Already, contempt has practically become obsolete in foreign democracies, with jurisdictions recognising that it is an archaic law, designed for use in a bygone era, whose utility and necessity has long vanished. Canada ties its test for contempt to real, substantial and immediate dangers to the administration, whereas American courts also no longer use the law of contempt in response to comments on judges or legal matters.

In England, too, from where we have inherited the unfortunate legacy of contempt law, the legal position has evolved. After the celebrated Spycatcher judgment was delivered in the late 1980s by the House of Lords, the British tabloid, the Daily Mirror, published an upside-down photograph of the Law Lords with the caption, "You Old Fools". Refusing to initiate contempt action against the newspaper, one judge on the Bench, Lord Templeton, reportedly said, "I cannot deny that I am Old; it's the truth. Whether I am a fool or not is a matter of perception of someone else.. There is no need to invoke the powers of contempt." Even when, in 2016, the Daily Mail ran a photo of the three judges who issued the Brexit ruling with the caption "Enemies of the People", which many considered excessive, the courts judiciously and sensibly ignored the story, and did not commence contempt proceedings.

But Indian courts have not been inclined — or at least, not always — to display the same maturity and unruffled spirit as their peers elsewhere. An exception lay in justice S.P. Bharucha's response to Arundhati roy's criticism of the supreme court for vacating the stay for

constructing a dam: although holding that Ms. Roy had brought disrepute to the court, nothing further was done, for "the court's shoulders [were] broad enough to shrug off [these] comments". But this magnanimity was sadly undone when contempt proceedings were initiated against the author for leading a demonstration outside the court, and filing an affidavit, where she said "it indicates a disquieting inclination on the part of the court to silence criticism and silence dissent, to harass and intimidate those who disagree with it. By entertaining a petition based on an FIR that even a local police station does not see fit to act upon, the supreme court is doing its own reputation and credibility considerable harm". For "scandalising its authority with mala fide intentions", she was punished for contempt of court, and sentenced to a day's imprisonment, with fine.

It is regrettable that judges believe that silencing criticism will harbour respect for the judiciary. On the contrary, surely, any efforts to artificially prevent free speech will only exacerbate the situation further. As was pointed out in the landmark U.S. case of Bridges v. California (1941), "an enforced silence would probably engender resentment, suspicion, and contempt for the bench, not the respect it seeks". Surely, this is not what the court might desire.

Two observations and a link

Simultaneous with the Indian supreme court's decision to commence contempt proceedings against Mr. Bhushan, the Pakistan supreme court hinted at banning YouTube and other social media platforms, for hosting what it termed '**objectionable content**' that 'incited hatred' for institutions such as the army, the judiciary, the executive, and so on. The eerie similarity between the two sets of observations raises concerns about which direction the Indian Supreme Court sees itself heading. One can only hope that these fears are unwarranted.

Justice A.P. Shah is retired chief justice, Delhi and Madras High Courts, and former Chairperson, Law Commission of India

Source:

https://www.thehindu.com/opinion/lead/the-chilling-effect-of-criminal contempt/article32198138.ece?homepage=true

ANNEXURE-C7

The Hindu

Scandalising as contempt: On proceedings against Prashant Bhushan

July 27, 2020

The Hindu

Time to revisit the idea of 'scandalising' in contempt law, usher in judicial accountability

The initiation of proceedings for criminal contempt of court against lawyer-activist Prashant Bhushan has once again brought under focus the necessity for retaining the law of contempt as it stands today. In an era in which social media are full of critics, commentators and observers who deem it necessary to air their views in many unrestrained and uninhibited ways, the higher judiciary should not really be expending its time and energy invoking its power to punish for contempt of itself. While it may not be reasonable to expect that the courts should ignore every allegation or innuendo, and every piece of scurrility, there is much wisdom in giving a wide latitude to publicly voiced criticism and strident questioning of the court's ways and decisions. Mr. Bhushan is no stranger to the art of testing the limits of the judiciary's tolerance of criticism. He has made allegations of corruption against judges in the past, and has been hauled up for it. The latest proceedings concern two tweets by him, one a general comment on the role of some Chief Justices of India in the last six years, and another targeting the current CJI based on a photograph. How sensitive should the country's highest court be to its outspoken critics? What would be more judicious — ignoring adverse remarks or seeking to make an example of some principal authors of such criticism to protect the institution? The origin of this dilemma lies in the part of contempt law that criminalises anything that "scandalises or tends to scandalise" the judiciary or "lowers the court's authority". It may be time to revisit this clause.

Few would disagree that contempt power is needed to punish wilful disobedience to court orders (civil contempt), as well as interference in the administration of justice and overt threats to judges. The reason why the concept of contempt exists is to insulate the institution from unfair attacks and prevent a sudden fall in the judiciary's reputation in the public eye. However, it has been recognised by jurists that each time the offence of 'scandalising' the court or lowering the court's authority is invoked, some tend to believe that the court has something to hide. It was believed in 18th century England that it was necessary "to be impartial and universally thought so", so that the "blaze of glory" around judges would stay undiminished. However, the contempt doctrine fell into disuse, and England abolished the offence of "scandalising the court" in 2013. In contemporary times, it is more important that courts are seen to be concerned about accountability, that allegations are scotched by impartial probes rather than threats of contempt

action, and processes are transparent. Unfortunately, in a system in which judges are not expected to disclose the reason for recusing themselves, and even charges of sexual harassment are not credibly investigated, it is only the fear of scandalising the judiciary that restrains much of the media and the public from a more rigorous examination of the functioning of the judiciary.

Source:

https://www.thehindu.com/opinion/editorial/scandalising-as-contempt-the-hindu-editorial-on-proceedings-against-prashant-bhushan/article32198126.ece

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ANNEXURE-C8

The Indian Express

Two tweets

July 23, 2020

The Indian Express

Contempt case against Prashant Bhushan shrinks the space Supreme Court has itself created — and hurts the court

The initiation of contempt proceedings by the Supreme Court, suo motu, against lawyer-activist Prashant Bhushan for his tweets, is off-key and jarring, not least because of its timing. At a time when matters affecting citizens' lives and livelihoods vie for its attention, when the pandemic has set off social and economic distress at an unprecedented scale, when questions persist about the effectiveness of the state's response, when crucial constitutional cases have continued to drag on for years — like the electoral bonds case — and when the court has shown little urgency in matters in which delay could render the case infructuous — as in habeas corpus petitions stemming from detentions in Jammu and Kashmir — two tweets have riled Their Lordships. For the court, in this moment, to invoke its contempt jurisdiction with alacrity against criticism of it is disappointing, and disturbing.

Contempt of court is more and more an anachronism in a democracy — it has been circumscribed and rejected in the US and UK. In India, it remains a sweeping and vaguely worded offence which is at odds with the Supreme Court's own record on expanding the scope and ambit of the fundamental right to freedom of speech. And yet while the courts have made some effort to narrow the remit of sedition — another outdated and controversial law which can be and is weaponised (by government) — by requiring a direct link with breach of public order or violence, they have not insisted on a similarly demonstrable link with obstruction of justice of the contemptuous act or speech. This failure to narrow it down is compounded by what the apex court has done on Wednesday. It sends a signal to courts across the country that the chilling power of contempt is here to stay. That is especially disquieting when there are apprehensions over a concentration of executive power and the spread of a political culture with a shrinking space for difference and dissent.

In fact, particularly in times such as these, the court needs to take the high road, show broader shoulders, instead of taking to task a public interest lawyer whose work has spurred legislation and made an invaluable difference in matters ranging from public corruption to pollution and displacement. Bhushan's comments on Twitter, the court has said in the notice issued to him on Wednesday, "have brought the administration of justice in disrepute and are capable of undermining the dignity and authority of the institution … and the office of the Chief Justice of India in particular…". Social media is not exactly suited for nuance, for the on-the-one-hand and on-the-other argument. Five years ago, in Shreya Singhal, the apex court expanded the contours of freedom of speech and Article 19 to this noisy space. The Supreme Court's contempt case against Bhushan shrinks that space — and itself.

Source:
https://indianexpress.com/article/opinion/editorials/prashant-bhushan-twitter-supreme-court-6518823/

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ANNEXURE-C9

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Bloomberg Quint

Prashant Bhushan's Tweets Don't Warrant Criminal Contempt Action, Top Lawyers Say

July 23, 2020
Arpan Chaturvedi

It is tragic that some judges invoke the court's "dignity and authority" while acting in a way that undermines it, said Navroze Seervai. The shoulders of a court should be broad enough to withstand criticism, said Raju Ramachandran. The two tweets don't seem to have transgressed into contempt, said Sanjay Hegde. It would appear to be a case of shooting the messenger, said Aspi Chinoy. The four senior advocates spoke to BloombergQuint on a new contempt of court case that the Supreme Court has taken up suo moto or of its own accord.

First, a quick word on contempt,contempt of court can be of two kinds, Civil, that is the willful disobedience of a court order or judgment or willful breach of an undertaking given to a court. Criminal, that is written or spoken words or any act that scandalises the court or lowers its authority or prejudices or interferes with the due course of a judicial proceeding or interferes/obstructs the administration of justice.

Noted lawyer and judicial activist Prashant Bhushan stands accused of the second type of contempt. Criminal contempt, Because of two comments on social media platform Twitter. One posted last month tagging an image of the Chief Justice of India Arvind Bobde sitting astride a Harley Davidson bike. In his tweet, Bhushan noted the judge was sans safety gear such as mask or helmet, the bike. expensive, belonged to a politician and that at the time the Supreme Court was barely functioning.

> "CJI rides a 50 Lakh motorcycle belonging to a BJP leader at Raj Bhavan Nagpur, without a mask or helmet, at a time when he keeps the SC in Lockdown mode denying citizens their fundamental right to access justice"- Full text of the tweet

Some days later, a poorly drafted petition was filed with the Supreme Court. The petitioner said the remarks in the tweets were "too inhuman" and hence contemptuous of court. The court, however, suo motu took cognisance and listed the matter for July 22.

During the hearing the bench highlighted another June 27 tweet of Bhushan published in the Times of India on the day the hearing. In that. Bhushan had shared his personal view on the state of the judiciary.

> "When historians in future look back at the last 6 years to see how democracy has been destroyed in India even without a formal Emergency, they will particularly mark the role

> of the Supreme Court in this destruction, & more particularly the role of the last 4 CJIs."- Full text of the tweet

Now the judiciary is offended. And it will examine if its prestige has been lowered by the tweets. "We are, prima facie, of the view that the aforesaid statements on Twitter have brought the administration of justice in disrepute and are capable of undermining the dignity and authority of the Institution of Supreme Court in general and the office of the Chief Justice of India in particular, in the eyes of public at large," the bench said.

The Supreme Court has issued notice to Bhushan, Twitter and the Attorney General of India who has been asked to assist in the case. The court will next take up the case for hearing on Aug. 5. That kicked off a debate if the top court's action was warranted, Bloombergquint reached out to senior lawyers for their view. Here's what they said.

"Contempt Jurisdiction Is Not ... A Remedy For Thin Skin'

Navroz Seervai, Senior Advocate, ***Bombay High Court***

The suo motu contempt proceedings initiated by a bench of the Supreme Court against Mr. Bhushan constitutes an abuse of the court's contempt jurisdiction, which-for good reason-is to be exercised sparingly and with circumspection. It is no more than an attempt to silence legitimate comment, and criticism as to the functioning of the court and it's judges, both inside and outside the judicial sphere, through the unjustified threat of contempt. It is tragic that some judges invoke the court's "dignity and authority", whilst acting in a way that undermines it. Contempt jurisdiction is not has never been, and ought never to be a remedy for thin skin.

> "Mr. Bhushan's tweets are an exercise of his fundamental right under Article 19 (1) (a) to freely express himself by way of comment and criticism on the conduct of the class private citizens, and on the well known fact of corruption in the higher judiciary fact adverted to, by (amongst others) [former] Chief Justice SP Bharucha."

Prima facie, in my opinion, there is nothing in Mr. Bhushan's tweets that qualify as contempt of Court. Historically, dictators silenced their critics; the spectacle of a Bench of the highest Court, entrusted by our Constitution to uphold the freedom of speech, doing just that, is deeply disquieting.

'Court's Shoulder Should Be Broad Enough To Face Criticism'

Raju Ramachandran, Senior Advocate, ***Supreme Court***

The shoulders of a court should be broad enough to withstand criticism, even what it thinks is unfair or distasteful criticism, keeping freedom of speech uppermost in mind. This is how courts

have cautioned themselves. And rightly so, because ultimately in contempt action, the judiciary as an institution becomes a judge in its own cause. Two tweets ought not to have made the court depart from its own norm.

'Tweets Are Bhushan's Perception, Don't Qualify As Contempt'

Sanjay Hegde, Senior Advocate, ***Supreme Court***

The two tweets in question appear to be in the realm of perception and comment and don't seem to have transgressed into contempt. The general principle on contempt is that one can criticize a judgment but you can't attribute motives to the judge.

> "Lord Atkin has summarised the normal standard related to contempt and criticism of court when he said that justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful ... comments of ordinary men."

In the tweet on four chief justices, it is a comment on the general functioning of the court. Is he [Bhushan] not entitled to perception? More so considering that one of the Chief Justices himself went out in a press conference against his predecessor. It is a matter of perception of the court's function. And on the other tweet, if there is a photograph and none of the facts are false then he can share his perception.

It Would Appear To Be A Case Of Shooting The Messenger'

Aspi Chinoy, Senior Advocate, ***Bombay High Court***

Mr Prashant Bhushan has over the years taken up numerous public causes/Public Interest Litigations dealing with important issues regarding the functioning of our institutions and the protection of the constitutional rights and liberties of citizens. Mr Bhushan's first tweet expresses his concern at the continuing lockdown of the Supreme Court for more than four months - video hearings clearly being an inadequate/poor substitute for real court hearings. Peculiarly while the Supreme Court and High Courts are refusing to conduct in-court hearings, the Bombay High Court and most others have directed the subordinate courts to resume in-court hearings.

Mr Bhushan's second tweet clearly expresses his anguish, that the Supreme Court has over the past six years , failed to adequately and expeditiously respond to and decide matters/issues that have sought to undermine and hollow out our constitutional institutions and the essence and substance of our constitutional democracy.

Mr Bhushan's comments would appear to be justified by the consistent failure of the Supreme Court over the last 5 to 6 years to expeditiously decide petitions which have challenged issues such as demonetisation, electoral bonds, the deletion of Art 370 , the Citizenship Amendment Act , diverse Habeas Corpus petitions as well as its virtual abdication of its constitutional duty in

matters such as the ban on internet/4G in J&K. It is extremely regrettable that the Supreme Court should have responded to Mr Bhushan's tweets [which in substance raise matters of grave public importance and concern] by initiating proceedings against him for contempt of court. It would appear to be a case of shooting the messenger.

The Supreme Court's contempt response to Mr Bhushan, in fact appears to support the lament expressed by him in his second tweet . Judicial introspection and corrective action might have been a more appropriate response.

An earlier version of this story was updated on Friday to include the comment of Aspi Chinoy.

On Friday Twitter took down the two tweets by Prashant Bhushan in India even though there has been no judicial order passed yet by the Supreme Court.

Source:

https://www.bloombergquint.com/law-and-policy/prashant-bhushans-tweets-dont-warrant-criminal-contempt-action-top-lawyers-say

ANNEXURE-C10

258

RESTATEMENT OF VALUES OF JUDICIAL LIFE
(AS ADOPTED BY FULL BENCH OF SUPREME COURT ON 7TH MAY 1997)

1. Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly any act of the judge of the Supreme Court or a High Court, whether in official or personal capacity, which erodes the credibility of this perception has to be avoided.

2. A judge should not contest the election to any office of a club, society or other association; further he shall not hold such elective office except in a society or association connected with the law.

3. Close association with individual members of the Bar, particularly those who practice in the same court, shall be eschewed.

4. A judge shall not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.

5. No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for processional work.

6. A Judge should practise a degree of aloofness consistent with the dignity of his office.

7. A Judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.

8. A Judge shall not enter into public debate or express his views in public on political matters that are pending or are likely to arise for judicial determination.

9. A Judge is expected to let his judgments speak for themselves. He shall not give interview to the media.

10. A Judge shall not accept gifts or hospitality except from his family, close relations and friends.

11. 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.

12. A Judge shall not speculate in shares, stocks or the like.

13. A Judge shall not engage directly or indirectly in trade or business, either by himself or in association with any other person. (Publication of a

legal treatise or any activity in the nature of a hobby shall not be construed as a trade or business).

14. A Judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund for any purpose.

15. A Judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available. Any doubt in this behalf must be got resolved and clarified through the Chief Justice.

16. Every Judge must at all times be conscious that he is under the public gauze and there should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which that office is held.

ANNEXURE-C11
260

SUPREME COURT OF INDIA

New Delhi, dated March 14, 2020

CIRCULAR

In view of the advisory issued by the Government of India cautioning against mass gathering(s) to avoid the spread of Novel Coronovirus (COVID-19) infection, following precautionary measures are being put in place:

1. All cafeterias, including the Departmental Canteen, are being advised to remain closed until further orders. All the staff members shall make their own arrangements in this regard.

2. All the staff members are advised to use alcohol based sanitizer in order to keep themselves sanitized from coming into contact with any virus.

3. All staff members may be required to subject themselves to thermal-screening and persons detected with high body temperature would be denied entry and further, they may be subject to the SOP prescribed by the Government of India, Ministry of Health from time to time.

4. All staff members who may have a travel history to the affected areas/countries, as may be notified from time to time by the Government(s), or who have symptoms of fever, sore-throat, cough, running nose or difficulty in breathing are advised to self-restrain themselves from attending their duties and may avail leave, if so advised.

5. All staff members are impressed upon not to crowd at any particular place in the Supreme Court premises, except where their presence is officially required.

This issues with the approval of the Competent Authority.

Sd/-
(Deepak Jain)
Registrar [Admn. I]

Copy to :-

All concerned.

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SUPREME COURT OF INDIA

New Delhi, dated March 23, 2020

CIRCULAR

In furtherance of the steps already taken to contain the spread of Coronavirus (COVID-19), considering the lockdown declared by the Government of National Capital Territory of Delhi and the suggestions of the Bar Associations, Hon'ble the Chief Justice of India has been pleased to direct, as follows :-

1. The entry into the High Security Zone be further regulated by suspending entry of Learned Advocates on the basis of their proximity cards, till further orders;

2. The Advocates having offices/chambers in the various Lawyers Chamber Blocks situated in the Supreme Court may be advised against attending their respective offices/chambers, as they would require to be closed due to lack of cleaning and conservancy services, in light of the steps taken pursuant to the Government notification, as aforesaid;

3. The Hon'ble Bench(es) may be constituted to hear only matters involving extreme urgency, to be decided by the Hon'ble Presiding Judge of such Bench(es) on the basis of prayer made by Advocate-on-Record/party-in-person by way of a signed and verified application containing a synopsis of extreme urgency not exceeding one page, similar to urgency affidavit filed during Court Vacation periods. The said application shall be submitted only by e-mail sent to **mention.sc@sci.nic.in** latest by 2:00 pm on the day preceding the day of the sitting of the Hon'ble Bench. The application must *inter-alia* clearly contain the case-details, contact-details of the AOR/party in-person including e-mail id, mobile number and alternate number(s), camp/office address with Pin Code and Police Station, together with a prayer for exemption from filing duly affirmed affidavit in the prevailing circumstances with an undertaking that deficit court fees will be paid subsequently. The application must also contain a separate paragraph giving consent that the matter may be taken up through the Video-Conferencing mode. In the application, the AOR/Party-in-Person must specify as to whether he would link through own desktop/mobile or would prefer to appear at such facility in the Supreme Court premises;

4. For the purpose of video-conferencing, the app 'Vidyo' may be downloaded on personal desktop/laptop/mobile device by clicking download link available on http://ecourtvc.nic.in. The "Vidyo" application can also be downloaded from Google Play Store for Android phone and from Apple Store for iOS phone. The AOR/Party-in-Person may refer to Standard Operating Procedure (SOP) uploaded on the website of the Supreme Court i.e. www.sci.gov.in, for assistance in this regard;

5. Upon approval of the urgency by the Hon'ble Presiding Judge of the Bench, the case(s) would be enlisted in the cause-list to be published on the website by evening hours on the day preceding the sitting of the Bench; in case the application praying for listing on grounds of extreme urgency is not allowed, the AOR would be permitted to make oral mentioning before the Hon'ble Presiding Judge, over the landline phone at His Lordship's residential office strictly between 10:30 am and 11:00 am on the day of the hearing; if upon such mentioning, the matter is allowed, the same would be listed as per directions of Hon'ble Judge. The list of telephone numbers of the Hon'ble Judges is available on the website of the Supreme Court of India i.e. www.sci.gov.in.

6. In all cases taken on the board, an intimation regarding time of sitting of the Hon'ble Bench and approximate time of the hearing of their case(s) shall be sent to the concerned AOR/Party-in-Person on the Mobile Number and e-mail as mentioned in the application. The concerned AOR/Party-in-Person would also be provided one-time link for such hearing, that would facilitate their participation in the hearing of the case as and when the same is conducted by the Hon'ble Bench. It is, therefore, desired that the AOR/Party-in-Person must keep his mobile free around the time indicated, as the Supreme Court Registry will call on the mobile number mentioned in their application when the matter is to be called for hearing through video-conferencing, as per cause-list;

7. If the Advocate/Party-in-Person is unable to connect through video-conferencing due to non-availability of hardware/network on any given date, the matter would be listed on the next date of the sitting of any Bench and the AOR/Party-in-Person may appear through Video-Conferencing facility being made available in the Supreme Court premises. The Advocate/Party-in-Person may avail the facility of video-conference by approaching the video-conference room by indicating in the application their desire to do so.

8. With a view to streamline the access to members of the Press, the Deputy Registrar(Public Relations Officer) may permit only 3 media persons to remain inside the Video-Conference Room, whenever the Hon'ble Bench may sit to take up extreme urgent matters, till further orders;

9. The President & the Secretary of the SCBA & SCAORA may authorise entry of any Advocate into the High Security Zone, by communication on their letter head, scanned and sent to the Registrar (AG) at admn.gen@sci.nic.in one day ahead of the requested time of entry, specifying the area of visit within High Security Zone and the purpose thereof;

10. The Registry would act only upon such e-mails as are sent to the mail-ids as specified above, and reply would be sent, as may be required, to the same email id from where the request would have come. Hence, AOR/Party-in-Person are requested not to send such e-mails to any other mail ids.

11. The Registry would keep only such offices open with skeletal staff as may be required to facilitate the holding of the Hon'ble Bench for extreme urgent cases or as directed from time to time, and for facilitating all matters that may be connected to smoothly holding of such Hon'ble Bench, by video-conferencing or otherwise;

Sd/-
[SANJEEV S. KALGAONKAR]
SECRETARY GENERAL

Copy to :

All concerned.

TRUE COPY

ANNEXURE-C12

Saket Gokhle

Search Twitter

Saket Gokhale
@SaketGokhale

Merely a coincidence:

The bike which Hon'ble Chief Justice is riding has registration number CG05BP0015.

The bike is registered to Rohit Sonbaji Musale, son of Sonba Musale who is a BJP leader from Nagpur & was their nominee in the 2014 Assembly polls from Saoner.

Small world.

Vehicle Details Showing in Registering Authority

1. Registering Authority: Durg RTO, Chhattisgarh

Registration No:

CG07BP0015

Registration Date:

25-Jul-2019

Chassis No:

5HD1KRPC4KB6****3

Engine No:

KRPK6****3

Owner Name:

ROHIT SONBAJI MUSALE

Vehicle Class:

M-Cycle/Scooter(2WN)

Fuel:

PETROL

Saket Gokhale @SaketGokhale · Jun 28
Merely a coincidence:

The bike which Hon'ble Chief Justice is riding has registration number CG05BP0015.

The bike is registered to Rohit Sonbaji Musale, son of Sonba Musale who is a BJP leader from Nagpur & was their nominee in the 2014 Assembly polls from Saoner.

Small world.

Utkarsh Anand @utkarsh_aanand · Jun 28
Chief Justice of India (#CJI) SA Bobde and his love for bikes:

396 4.4K 8.4K

Saket Gokhale @SaketGokhale · Jun 28
Pic from another angle where the registration number is clearly visible if you zoom in.

51 547 2.1K

Saket Gokhale
@SaketGokhale

Sorry it's CG07. I misspelt it as CG05 in my tweet text. The registration is correct though.

10:58 PM · Jun 28, 2020 · Twitter for iPhone

281 Retweets and comments **1.8K** Likes

ANNEXURE

ANNEXURE C 13

266

'Supreme Court Has Let Down Migrant Workers, Vulnerable,' Says Justice A.P. Shah

Karan Thapar, 05.05.2020, The Wire

1-1 minutes

In a strong attack on the functioning of the Supreme Court during the coronavirus crisis, Justice A.P. Shah, a former Chief Justice of the Delhi and Madras high courts and a former Chairman of the Law Commission, has said he is "thoroughly disappointed" with the top court.

Differing with Chief Justice S.A. Bobde's view that "this is not a situation where declaration of rights has much priority or as much importance as in other times," Justice Shah said:

"This is not correct...(the) Court's duty is more onerous in times of crisis."

Justice Shah also questioned "why only a few judges are functioning and why aren't all judges working from their homes?"

SOURCE: https://thewire.in/law/watch-karan-thapar-interview-justice-ap-shah

TRUE COPY

267 ANNEXURE-C14

SUPREME COURT BAR ASSOCIATION (Regd.)

SUPREME COURT OF INDIA, TILAK MARKG, NEW DELHI-110001 (INDIA)

SCBA/CJI.9/2020

June 3rd. 2020

To,

Hon'ble Mr Justice Sharad Arvind Bobde,
The Chief Justice of India,
Supreme Court of India,
Tilak Marg , New Delhi.

Subject: Proposal to resume normal working of the Supreme Court of India.

Respected Chief Justice,
Namaskar !

I write to you on behalf of the Supreme Court Bar Association, the Executive Committee and Myself. Supreme Court Bar Association, represents over 14,000 Members, young and old, junior and senior, AOR and arguing Counsels.

First and foremost, I must gratefully acknowledge the cautious approach taken by you, My Lord, and entire Court to steer the functioning of the highest Court keeping in mind the well being of all the stakeholders including the Members of our Bar. This has helped us keep all concerned healthy and safe.

I must also place on record our appreciation for working of the Court in last ten weeks. Despite technological challenges, work has gone on, though on moderate basis . But this was fine during this period. Supreme Court Bar Association acknowledges the work of the Registry of this Court and all the staff members under the guidance of the Registrar General and expresses its gratitude to them as well.

But the challenge of COVID 19 is far from over and there is no sign of it going away soon. It must therefore be faced in a sensible and safe manner. But at the same time, Court's normal functioning may begin, though in a gradual way. Supreme Court is not just the Highest Court of the Country but is the one of the most Respected Institution of the Country, perhaps the most respected if I may be permitted to say proudly. It's glory must remain for all times, including during crisis period that we are going through.

The Executive Committee has been deliberating on ways and means to move forward and a Sub-Committee under it headed by the Vice President Shri Kailash Vasdev has prepared a blueprint in this regard.

Phones: Off. : 23385903, 23384874 • Library-1 : 23385551, 82285552 • Library-2 : 23384150, 23381762
Library-4 : 23385615 • Ladies Bar : 23070443 • Lounge : 23070449 • Arbitration Room : 23072101 • Meeting Room : 23070264
• E-mail : scbaec@gmail.com • Website : www.scbaindia.org

SUPREME COURT BAR ASSOCIATION (Regd.)

SUPREME COURT OF INDIA, TILAK MARKG, NEW DELHI-110001 (INDIA)

I am happy to enclose the same for your kind consideration and consideration by Hon'ble Judges of the Supreme Court of India. Supreme Court Bar Association hopes and trusts that the same will receive due consideration by the Court.

My Lord, time has come to start an intensive interaction between the Bar and the Bench . I would sincerely urge you to call office bearers of the Supreme Court Bar Association and Supreme Court Advocates On-Record Association at the earliest convenience. The meeting may be arranged on Zoom or other platform, which we will be happy to arrange if so directed. Such a meeting will pave way for moving forward.

My Lord, if it is difficult for you to find time due to your extremely busy schedule, Your Lordship May direct meeting between the two associations representatives and Committee for Suggestions of Hon'ble Judges, presided by Hon'ble Mr Justice R.F. Nariman (Committee 33 if I am right), at an early date. My Lord, the Bar and the Litigants are extremely anxious to restart the regular functioning of the Supreme Court as early as possible. Members of the Bar, especially Young Members are facing grave difficulties on account of lack of work and their financial condition is worsening day by day. Though Supreme Court Bar Association as also Supreme Court Advocates On-Record Association are making strong efforts to extend financial help to them, but it cannot compensate them for loss of work even moderately. Equally, Litigants are getting impatient waiting to get Justice from this Hon'ble Court in their pending or future matters. Our Members are being pressurized by them on daily basis but they have nothing to pacify them.

My Lord, Bar has waited patiently since third week of March considering the times. Now that even Government of India has allowed graded opening of the Country, I do hope and pray that Bar's just request will indeed receive a positive and immediate response.

I must reassure, on behalf of the SCBA, that we will cooperate in any measures that may have to be taken to ensure well being and safety of all stakeholders towards this end.

With Respects.

Dushyant Dave
President, SCBA

Encl: A copy of report of Sub Committee of SCBA

CC :-

To Hon'ble Judges of the Supreme Court of India. (Through Registry of the Supreme Court)

REPORT OF THE SUB COMMITTEE OF THE SUPREME COURT BAR ASSOCAITION ON MEASURES FOR LISTING AND HEARING CASES ON THE REOPENING OF THE SUPREME COURT POST LOCK DOWN AND MATTERS CONNECTED THEREWITHAS APPROVED AND ACCEPTED BY THE EXECUTIVE COMMITTEE.

1. Mr. Kailash Vasdev (Sr.), Chairman
2. Mr. Rohit Pandey, Acting Hony. Secretary
3. Mr. Meenesh Kumar Dubey, Treasurer
4. Mr. Chander Uday Singh (Sr.)
5. Col. R. Balasubramanian (Sr.)
6. Mr. Anip Sachthey (Sr.)
7. Dr. Ritu Bhardwaj
8. Ms. K.V. Bharathi Upadhyaya
9. Mr. R. Anand Padmanabhan.

1. INTRODUCTION

1.1. The Supreme Court of India had suspended regular working in view of the pandemic caused following the spread of the COVID19/Corona virus from 16.03.2019. In the meantime a lockdown was announced by the Ministry of Home Affairs, Government of India on 24.03.2020 and extended vide order dated 14.04.2020 till 03.05.2020.This has continued since.

1.2. On 01.05.2020, The Ministry of Home Affairs issued an order under the Disaster management Act extending the lockdown upto 18.05.2020 with modifications. It provided guidelines for identification of the RED (hotspots), GREEN (corona free) and ORANGE Zones, depending on the severity of COVID-19 cases record in that zone. It specified permissible and prohibited activities in these zones. The lock down continues with or without relaxations depending on the zone. As presently advised it will be several weeks, if not months before decision makers canconfidently assess the risk of Covid-19 as negligible.

1.3. The continued lockdown is adversely impacting the administration of justice as courts are compelled to work in a curtailed manner. Courts have restricted entry into the court's premises and use of court halls to conform to the directions of the government to reduce and/or control the spread of this contagious virus. The pandemic has caused global panic. It has necessitated caution and prescribed precautionary steps to be followed. The continuance of this pandemic has to be accepted till such time as a cure is discovered.

1.4. The ensuing pandemic following the corona virus has exposed serious fractures in the existing systems warranting a relook at the current norms and for bringing about radical changes in all jurisdictions. The present situation manifest that a radically new multipronged approach to the working of this Institution is the order of the day. These reforms will have to be both immediate and long terms as the new systems have to be tried and tested

1.5. The skeletal working of the Courts cannot be indefinite. This has to change and the system has to accept that working norms have to be altered to ensure that recourse to the justice system is available to all. The functioning of a few court rooms cannot be a panacea for the many litigants who are waiting for their cases to be heard.

1.6. The present hearings of cases over the electronic systems and media i.e. through the virtual mode isfraught with technical short falls. A system with manifest imperfections cannot be a lasting solution in an all pervading system which is accessed by all – the have nots or the haves.

1.7. The Courts are presently adapting a cautionary approach to reduce foot falls in their premises which is the affecting the need to hear cases. There has been a virtual shut down of the Court since the first cases of swine flu were noticed in February followed by the present absolute lock down. For almost twelve weeks the Supreme Court has not functioned to its normal capacity. This has scuppered all working systems. The number of case being filed has reduced considerably. These figures will have alarming consequences with time drastic reduction in case volumes does not augur well for the judicial system.

1.8. Taking into account the latest order of Ministry of Home Affairs dated 01.05.2020 wherein regular functioning of all government offices has been ordered albeit on reduced scale of staff, it is imperative that the Supreme Court of India should commence functioning in full force. At the same time necessary precautions ought to be taken by all stake holders with working in the Supreme Court.

Towards this end it is necessary to formulate an action plan for resumption of working of the Court post lockdown. In order to suggest appropriate measures for early opening of the Court the Executive Committee of the SCBA constituted a Committee to study all aspects and suggest measures both for the present and the future working of this remarkable institution.

This Report has been prepared for the aforesaid purposes and is submitted for consideration.

2. MEASURES TO REGULATE ENTRY INTO SUPREME COURT.

It is needless to emphasise that first and foremost entry of all persons entering the Supreme Court has to be strictly regulated. Towards this, the following measures are recommended:

i. All stake holders be notified well in advance through public notices, audio/video announcement and social media including litigants and visitors about the importance and strict observance of social distancing, wearing mask, maintaining hygiene etc. The Supreme Court web sites, the SCBA web site and those of available public media can be used for this purpose.

ii. Only advocates/ court and their court clerks having cases listed for hearing should be permitted entry to the Court premises. Body temperature scanning of all individuals must be done by trained security / para medical staff at entry points before entry into of the core areas of Supreme Court i.e before entering the restricted zone. All scanning should be done as per guidelines issued by the Government of India.

iii. Entry of visitors and litigants into court halls to be temporarily suspended except in case of parties appearing in person or in cases where court has directed personal appearance of parties.

iv. All persons entering court premises must carry weekly self declaration that the individual does not suffer from cold or cough and has not had fever over the last fortnight. Entry into the Court premises must be permitted **ONLY** after a preliminary test for fever and coughs/colds by paramedics at the entry points i.e. the security gates points where the proximity cards are checked.

v. Such medical equipment (Mist tunnels/sanitising booths *et al*) as may be advised by the Health Departments must be installed at the entry points i.e. at the security gates both at the peripheral gates for entry to the Court premises and then at the security booths where the proximity cards/identification of persons takes place.

vi. Social distance marking at areas for parking areas, chamber blocks, bank, post office, registry, in court corridors should be ensured to aid social distancing. There should be markings in common areas also.

vii. Sanitisation at the Supreme Court premises. All areas including chamber blocks, ramps, fore court areas, court corridors and registry offices area including trollies used by staff, counters, security, screening areas, touch screens, lifts should be disinfected. All trolleys and lawyers bags must be sanitised by in disinfection tunnel before and after returning to their respective locations.

viii. Queue managers with social distance marking at all the areas should be stationed to avoid long queues at the gates, clustering of people at court and chamber areas. Strict and stringent SOP for entering court rooms to ensure safety, health and hygiene.

ix. Any person entering the court rooms must sanitise hands before entry. Sanitisers are being placed outside the Court halls. Fumigation of files being taken inside court room should be done strictly and without fail. Sanitisers for use by persons across various touch points in the court premises and chamber buildings must be kept at the entry doors of all court halls.

x. Wherever crowding is expected within the premises, alignment of queues to ensure social distance among the clerks/staff etc.

xi. Requisite Personal Protection Equipment [PPE] for security staff to be provided. Queue managers with social distance markings before security check to avoid crowding at entrance gates.

xii. Chauffer driven vehicles shall not be parked inside the premises as chauffeurs congregate in groups during their idle hours.

xiii. All person entering court premises must have the AarogyaSetu application installed on their smart phones.

xiv. Persons with any respiratory condition/fever or the like should voluntarily refrain from coming to court..

xv. Wearing of a mask be made compulsory for every person entering any area of the Supreme Court and chamber premises.

3. FILING INCLUDING E-FILING

The Court has already put in place an e-filing system for the present. It is now in its infancy and will take its own time to be used by all. Advocates will have to acquire the requisite equipment and software and train their staff to work in this system. This will take its own time. The system of filing paper-books must continue till such time the e-filing system stabilises and becomes user friendly.

3.1. On the reopening of the Court there will be voluminous filing which has been kept in abeyance has built up during this period. There will be a surge for filing at the filing counters. To avoid the breach of the social distancing norm, it is suggested that a large number of filing counters be set up where social distancing is to be maintained.

3.2. For the purposes of physical filing of cases several counters can be put up outside the Court premises e.g. in the lawns (where functions are held) or in the New Complex where each counter shall be at a social distance from the other. The Registry shall stamp the copy of the petition confirming receipt.

3.3. There must be at least four dedicated counters for accepting cases where urgent relief is sought. Cases in which urgent reliefs are sought must be scrutinised immediately and listed within twenty four hours and listed for hearing.

3.4. To avoid the rush for physical filing, an e-token system may be resorted to. On a case being filed, an email must be sent to the advocate on record in token of confirmation of the filing. This will be in addition to the acknowledgement to be given at the filing counter.

3.5. Limitation should not expire during the period that regular filing has remained suspended. Limitation should be computed by excluding the period of the lock outs.

3.6. To avoid teething problems once an AOR logs in for e-filing and commence the process of filing that day should be taken for the purposes of stopping the period of limitation with an outer limit of three days to complete the process of filing.

3.7. The Officers of the registry at the filing counters will receive the paper-books against valid receipts. These will be scrutinised in the order of their filing. Defects can be cured after scrutiny. There must be a relaxation in the 'defects' in filing so that the scrutiny of files is done with due dispatch and cases are listed at the earliest.

3.8. To reduce the usage of paper it has now been prescribed that A4 sheets shall be used. In order to ensure that minimal paper is used it is suggested that all pleadings/documents presented to the Court shall printed or reproduced on both sides preferably in font size 12 on non-gothic script - preferring to use true type fonts (Verdana/ Tahoma/Arial/Times Roman) and one and a half line spacing. All addresses, quotations, salutations should be in single line.

3.9. Till August, 2020 this stipulation of paper size be relaxed as old filing have been on legal size paper. These papers books may have been prepared before the lock down and/or lying in the defect in the Registry.

3.10. All affidavits in support can be attested at the place where the litigant resides with proof of identity. Scanned affidavits and Vakalatnamas should be acceptable. As and when required affidavits in print form can be produced. With the first filing of any pleading - special leave petitions; writs; or appeals a BRIEF synopsis of the case illuminating the issues and contentions be filed along with the dates and events in chronological sequence. Contentions of law can be detailed in the grounds of challenge. A list of key dates must be mentioned.

3.11. The introduction of the e-filing system is aimed at promoting paperless filing, cut time & bring about cost saving/ efficiency, and make provision to file from home locations by adopting technological solution to file cases in the Supreme Court. It will take time for all to acquaint themselves with this system as one will have to get equipment and train staff for this. In any event physical filing cannot be done away with.

3.12. To achieve this, detailed guidelines as approved by the Supreme Court Software Committee should be widely published in the form of user hand books and online material kept on its Website in order to provide all the necessary information regarding how to use online features of e-Software. The **Users Manual** should enable users to understand the step by step process involved in e-filing, facilitate use of the e-filing system and offer support to users. The e-filing system should be capable of being used by any AOR or his authorised advocate and/or his registered clerk in the Supreme Court. The user should be able to read the user manual carefully and follow by its terms and follow its step by step as guidance

3.13. The wi-fi/web accessing systems in the Court premises be improved and made available to all state holders within the Court's premises as a local area network. This will facilitate access to filing and enable advocates to respond to the Registry without any delay. The LAN should be available without any charges. Access to the LAN will be to all stake holders against identifications.

3.14. The software developed by Registry of the Supreme Court and demonstrated in the webinar held on 15.05.2020 is quite comprehensive and advanced both in terms of its contents and technology. It will be improved upon with time.

3.15. The SCBA suggests that apart from helping AORs to regulate and standardise e-filing, provision should also be made for Senior Advocates engaged in a particular case and Advocates to have access to the data on case to case basis so that it could be put to optimum use. In a given situation advocates/senior advocates engaged in the cause may find it necessary to access these documents electronically rather than in a physical form. It was demonstrated during the Webinar that Judges/Court Masters may refer to documents during the course of hearing digitally whereas advocates other than AORs if they don't have access to those in digital format it may present avoidable difficulty during hearing.

3.16. Advocates who settle or draft petitions often represent the clients and engage the services of advocates on record to file the case in the Supreme Court. The original case files are available with the instructing advocate who is the face of the client. Access to the files in the e-systems may be granted to the instructing or drafting advocates with the permission of the Advocate-on-record.

3.17. Similarly, having access to the dash board by advocates other than AORs may also enable them to have access to High Court and Trial court records and data available on the national grid during the hearing. The list of cases relied upon etc. can also be loaded on the dash board platform to facilitate the Court Masters/Readers to keep relevant judgements ready for the Hon'ble Judges.

3.18. The Registry should issue a detailed user manual of the software explaining aspects of the dash board system. Such manual should provide detailed instructions with pictorial examples. Importantly, it should provide for procedure for filing, getting started, user registration, filing procedure in respect of various petitions, respondent details, document upload procedure, petition preview, fee payment, receipt generation e-help desk details etc. on its part the SCBA is willing to extend its co-operation and organise practical training for developing soft skills for Members of the Bar on large scale in coordination with the e- team of the Registry.

3.19. A team of officials from the Registry who are well acquainted with the e-fling procedure should be available on telephone and or at the counters to held and guide advocates in meeting any difficulties being faced with advocates.

3.20. The Advocates on record and/or their nominated advocates are finding it very difficult to have their cases cleared for listing. Defect removal in fresh filings is indeed a very difficult task. Officers of the Registry are more often not contactable. Defects plague early and urgent hearings. They defeat the relief sought. It is a judicially accepted fact that technicalities in procedure defeat the very purpose of justice. The registry must simplify the procedures for remedying defects and have the cases listed without harassment to the advocate and in turn to the litigants.

4. LISTING AND HEARING OF CASES

4.1 The Registry shall issue a list of matters adjourned between the first day of closure and till the reopening of the Court indicating the proposed day of listing of each case. This list shall include all cases which were listed for hearing and not taken up for unforeseen circumstances. This list must be circulated preferably by afternoon to enable effective preparation and avoidance of deferment except for *bona fide* reasons.

4.2 The cause list must detail the Courts that will function and hear cases listed for that day. Advocates must be permitted admittance to their chambers on the lifting of the lock down to enable them to collect their files, inform the clients and take supportive steps. The cases will be listed in sequence with cases filed after the lock down in the ratio 60:40 to enable due hearing of all cases. The Benches hear and dispose of the adjourned cases with fresh filings to ensure that the litigant is not denied his priority in the hearing of the case. In order to enable Advocates to have access to their files kept in the chamber and or office, which is currently forbidden due to lock down and movement restrictions from NCR to Delhi, old cases should be listed after taking concurrence from AOR concerned like it is being done listing of regular cases during vacation period.

4.3 Matters which had been directed to be listed for hearing and final disposal in the last two years should be listed as per orders passed in each cause as they were found to be of an urgent nature and could be taken on non-miscellaneous days (NMD cases).

4.4. Hearing of old pending cases by the virtual made to begin with may be restricted only to those cases where the AOR consents. The reason being that sudden listing will result in problem of accessing of files, problems of travel from outside Delhi both in case of advocates and clients concerned, technical knowhow to take part in e- hearing, easy accessibility of technology etc. once the e-system hearing stabilises the old cases may be listed in normal manner. To achieve this it is suggested that e-hearing of old cases may be listed after taking consent of the AOR to begin with.

4.5. All Courts must function and hear cases. The cases listed for hearing must be taken up in two stages – half in the pre lunch session and the remaining post lunch.

4.6. Cases should be heard in batches of FIVE. To avoid crowding and to maintain the social distance norm ONLY the advocate on record, the instructing advocate and where engaged the arguing or senior advocates for each party shall be allowed to enter the court hall. Advocates must leave the court room on completing their address and order being recorded/pronounced. This will make room for the next set of advocates.

4.7. On the conclusion of the hearing of these five cases, the second set of Advocates will be allowed to enter the Court Room after the court has been disinfected.

4.8. Post the relaxation of the Covid lock down, only 10 Regular Hearing/ old matters could be taken up for hearing in a day, 5 in the morning session and 5 in afternoon session and Advocates appearing in the next 2 matters could be allowed inside the Court room at one point of time.

4.9. The hearing of other cases could be discharged if the Court opines that the matters are likely to take longer time then the slots allotted.

4.10. During the recess i.e. lunch recess the Court rooms will be disinfected. List of books must be circulated in advance for reference at the hearing.

4.11 *Till such time as regular sittings are not held an* ***alternate suggestion*** *has also been mooted as follows: The Benches could hold hearings in 2 shifts with alternate court rooms functioning on Mondays and Fridays and hear cases in batches of 10 matters to avoid crowding in courts. The number of courts hearing cases on this pattern on a trial basis could be in the configuration court rooms 1,3,5,7,9,11,13,15 first session and the remaining in the post lunch session.*

4.12. Advocates must carry their own books as the Bar library facilities will remain closed and will not be available immediately after the relaxation of the lock down.

4.13. In order to minimise time, at the final hearing, a Statement of Case as presently provided in the Rules should be prepared by all the contesting parties in consultation with each other setting out the arguments in brief referring to available supporting cases. It will narrow the contentions to the essentials of the case. Additional submissions can be made at the addressing of arguments.

4.14. The Court can specify the time frame for hearing of a case in consultation with the advocate(s) appearing in the cause. To save judicial time this can also be done before the Registrar.

4.15. During the period that there are restrictions on movement and social distancing is to be maintained, if the schedule for hearing cases is arrived at and notified in the cause list, entry passes to the Court halls for litigants can be issued on an electronic system fixing the time for entry for the concerned pass holder. This will avoid crowding and reduce foot falls.

4.16. Listing of appeals should be done year wise with advance notice of at least four weeks to the advocate on record. Cases aged over ten years must be given priority. In every cause list these cases must be listed in priority.

POST PANDEMIC LISTING OF APPEALS

4.17. A large number of cases have been referred to larger benches and are pending. In order to avoid crowding of the court without being obtrusive, larger benches should be constituted as the number of visitors to the Court will reduce when these benches are in session. Cases have been referred to benches of 9, 7 and 5 Judges.

4.18. A bench of 9 judges and two/three benches of 5 judges each could be constituted so that these references will be heard and disposed of – bringing uniformity in the law; enabling the Court to decide causes as a Constitutional Court [Article 143(5)]; which judgments in terms will reduce the cases pending in the High Courts and Subordinate Courts as there are differences in judicial opinions expressed in similar factual matrix.

4.19. While constituting larger benches an attempt must be made to ensure that the Judges constituting the bench have an existing term of at least six months so that judgments are not rushed. This will also avoid causes being left heard in part.

5. COURT HEARINGS OVER ELECTRONIC APPS/SYSTEMS

As of date of hearing of cases by using the video conferencing facility 'VIDYO' is a time consuming and difficult task. This system is not free of glitches. Hearings are interrupted, counsel addressing the court is suddenly blanked out, the audio is inaudible *et all*. This causes dismay and defeats fair and open hearings. Our Registry and Court staff is not particularly well versed or savvy with the new technology now being used. This new technology is presently a challenge to the working of the Court. Other video conferencing facilities can be open to (computer) hackers and can be causes of serious security concerns. It is imperative that the programmes which regulate virtual hearings be developed to be used in the Courts and launched on the Supreme Court Server so that they can be regulated and managed by the in-house E-team of the Court. Such an application must be developed at the earliest to ensure fact and open hearings and system which will be vital in future. As far as possible hearings should be in open court to avoid miscarriage of justice.

5.1. The facility of hearing of cases over the Vidyo App is indeed becoming very difficult. The link is not available to more than a certain number of participants. During the hearing the link snaps and the arguments of Counsel cannot be heard. This is a traversity. Immediate remedial measures must be taken to ensure a full and fair hearing.

5.2. To achieve this and improve the procedure for hearing of cases the following steps be taken on urgent basis:

i. All misc. matters and fresh cases should be listed on all days and pending cases which are likely to take time should only be adjourned.

ii. The cause list for hearing Misc. old and fresh cases should be circulated preferably three days in advance. In addition supplementary listed cases should be notified at least 12 hours in advance. Similarly, for final hearing cases at least seven days notice may be given. Urgent cases may be listed as per current practice.

iii. Advocates may be given an option to attend hearings in virtual mode either from their place of work and where they do not have the facility from places designated for this purpose in the Supreme Court premises duly equipped with video link facilities for the use of advocates and parties in person who find it convenient to present cases by video link from the Court premises. For this purpose few rooms in the new circular building presently housing the offices of the Registry should be converted into studio rooms so that problem of link band width etc.do not becomes hindrances.

iv. All short disposal matters which were listed hitherto before on Tuesdays irrespective of the subject matter should be listed for hearing.

v. Hearing of old cases through virtual made to begin with may be restricted only to those cases where the AOR consents. The reason being that sudden listing will result in problem of accessibility of files, problems of travel from outside Delhi both in case of advocates and clients concerned, technical knowhow to take part in e- hearing, easy accessibility of technology etc. once the e-system hearing stabilises the old cases may be listed in normal manner. To achieve this it is suggested that e-hearing of old cases may be listed after taking consent of the AOR to begin with.

vi. The Registry with the help of its cyber technical team should regularly conduct on line classes for benefit of Advocates and support staff about the practice and procedure of e filing, conduct of court proceedings through virtual mode and subject to availability of resources practical classes may also be arranged.

6. SANITATION OF THE COURT PREMISES AND OTHER REKLATED AREAS

The Court has remained closed since 06.03.2020 barring few days functioning in third week of March 2020. The chamber blocks have also remained since then without being properly cleaned.

6.1. The buildings housing the chambers should be cleaned thoroughly and disinfected. All areas including wash room need to be cleaned and disinfected and soap dispenser be installed as far as possible. Regular cleaning and mopping of floors with disinfectants should be arranged.

6.2. All chambers be disinfected from inside and thoroughly sanitised. For the time being use of chambers beyond a notified hour should be avoided.On Sundays necessary disinfection maintenance work on regular basis till such time the situation improves.

6.3. At any given point of time the chambers will be not be used and occupied by more than three persons i.e. the advocate, the clerk and where necessary an advocate colleague. This will ensure social distancing.

6.4. All public areas including those occupied by photocopying machines, public stenographers, vendor *set al* must work on a regulated basis maintaining social distancing and cleanliness. Their hours should be regulated.

6.5. The canteens will continue to remain closed. To provide basic amenities like water, coffee, tea and biscuitskiosks/counters may be made available for take away services.

6.6. Libraries and consultation rooms under the control of the bar Association will not be available to members till resumption of regular working. They shall remain closed excepting for maintenance and being disinfected.

28th May 2020

(ROHIT PANDEY)
Acting Hony.Secretary

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ANNEXURE- C15

Supreme Court Advocates-On- Record Association
Golden Jubilee Bar Room, Supreme Court of India, New Delhi-110 001
Phone: 011-23072352, E-mail: scaora1@gmail.com, www.scaoraindia.com

20.07.2020

RESOLUTION OF THE JOINT MEETING OF SUPREME COURT BAR ASSOCIATION AND SUPREME COURT ADVOCATE-ON- RECORD ASSOCIATION

A joint online meeting of the Executive Committees of Supreme Court Bar Association (SCBA) and Supreme Court Advocate-On-Record Association (SCAORA) was held on the evening of 20.07.2020. The meeting was called to examine and discuss systems, methods and suggestions to reopen the Courts, and in particular the Supreme Court of India, which has been working on limited basis under severely constrained "virtual courts" following the pandemic caused by the corona virus (SARS-Cov-2). Various matters were debated, including the following, and the EC Members of both the Associations put forward the problems faced by their members and their clients, i.e. the litigants, and made the following suggestions:-

1. The spread of Novel Corona virus (COVID-19) led to a restrictive functioning of the Hon'ble Supreme Court since March, 2020.

2. SCBA and SCAORA have, during the lockdown period, passed various resolutions pertaining to the unsatisfactory functioning of the virtual hearings by the Hon'ble Supreme Court as also the issues cropping up during e-filing. SCBA and SCAORA have stated that a majority of the lawyers were not comfortable with the virtual Court hearings. The common feedback seems to be that the lawyers are unable to present their cases effectively on the virtual platform presently available. In matters involving appearances by many lawyers, several lawyers are not given an opportunity to speak and, at times, their mics are put on mute by the coordinator, and consequently, their matters have been dealt with by the Hon'ble Supreme Court in their absence. There are problems with audio and video quality of hearings, which often results in the lawyers not being able to present their arguments.

Supreme Court Advocates-On- Record Association
Golden Jubilee Bar Room, Supreme Court of India, New Delhi-110 001
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3. The Hon'ble High Courts and the Courts subordinate thereto inevitably follow the SOP's followed by the Hon'ble Supreme Court. The working of the Supreme Court lays down the parameters for the subordinate courts. The limited functioning of the Supreme Court has adversely impacted the dispensation of justice. While the litigants continue to suffer, the lawyers, who are the officers of the Court, are also facing acute hardships.

4. The Hon'ble Supreme Court has now decided to also hear regular matters and final hearing matters through the virtual medium. While it is undoubtedly the prerogative of the Hon'ble Court to list matters for hearing, it is the lawyers who have to argue those matters professionally. It is not possible for a lawyer to do justice to the case if called upon to argue on the virtual because of the infirmities in the working of these applications *esp.* those involving voluminous record and/or the appearance of a large number of lawyers, more so, in light of the aforesaid issues that makes the hearing illusionary.

5. Access to justice is an essential service; it is primarily the responsibility of the State, including the judiciary, to provide a safe working environment. In recognition of this position, the Bar has co-operated with the restrictive functioning of the Hon'ble Supreme Court.

6. The participating members were informed that both Associations had been in correspondence with the Supreme Court on these issues. However, there was no response to the entreaties and requests which had been made. This left the members dismayed because, being stake holders in the administration of justice, their view is that it is in the interest of the judiciary to physically re-open with precautions just likeall other work places including Parliament, airports, offices, shopping centers, police prickets, hospitals have resumed working.

After considering the aforesaid matter the members unanimously **RESOLVED**:-

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Supreme Court Advocates-On- Record Association

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A. That the resumption of court hearings of all class of matters is imperative. The hearings should be conducted inside court hall with Advocates presenting their case. Initially hearing can be hybrid i.e. both online and in the physical presence of the Judges and the Advocates.

B. Given that the country is in the process of emerging from a complete lockdown, it has become imperative to reopen/resume the physical functioning of the Hon'ble Supreme Court in a phased and regulated manner. The physical functioning of the Hon'ble Court be resumed for hearing Fresh, Admission, After Notice Matters, Part-heard Matters, Regular Matters, Final Disposal Matters, Batch Matters and such other matters which are voluminous in nature and/or involve the appearance of a large number of lawyers. Virtual hearing may be afforded only to Chamber Matters and Registrar Court Matters.

C. Proper guidelines and due precautions, after thorough consultation from a Committee of Doctors , can be formulated for restricted entry into the Supreme Court premises, wearing of masks and face shields, maintenance of highest sanitization standards, proper social distancing and so on so forth.

D. For hearing of cases where Advocate are present in person all notified norms like social distancing, use of masks and due sanitization will be strictly followed.

E. Entry to the Court can be restricted only to lawyers of the matters listed, at the entry point of high security zone itself. Litigants and Clerks may not be allowed to the high security zone but for exceptional reasons/occasions.

F. It was also RESOLVED that the Hon'ble Chief Justice of India be requested to meet the Presidents and other Office Bearers of the two Associations to work out the modalities on the suggestions made herein.

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Supreme Court Advocates-On- Record Association
Golden Jubilee Bar Room, Supreme Court of India, New Delhi-110 001
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G. It was also resolved to request the Hon'ble Chief Justice and concerned Committees of the Hon'ble Judges to start dialogues with the representatives of the two associations immediately on all issues affecting the functioning of the Court including its Registry and to upgrade the Virtual hearing system to better platform.

H. It was further RESOLVED that the resolutions passed today be sent to Hon'ble the Chief Justice of India requesting the Court to consider the matters raised and take steps in terms of the Resolutions which had the concurrence of all members of both the Associations.

I. The Committee RESOLVED to meet after one week to discuss the response from the Hon'ble Supreme Court and decide the further course of action.

The meeting ended with a Vote of Thanks

[Joseph Aristotle S]
Hony. Secretary
Supreme Court Advocates-On Record Association

[Rohit Pandey]
Acting Hony. Secretary,
Supreme Court Bar Association

TRUE COPY

ANNEXURE-C16

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ITEM NO.6, 6.1 COURT NO. 1 SECTION PIL-W
& Suo Moto WP© No.8/2020

(Hearing through video Conferencing)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(s)(Civil) No(s). 686/2020

BAR COUNCIL OF INDIA Petitioner(s)

VERSUS

UNION OF INDIA & ORS. Respondent(s)

(FOR ADMISSION and IA No.63294/2020-EXEMPTION FROM PAYING COURT FEE)

WITH
T.P.(C) No. 767-772/2020 (XVI-A)
(FOR ADMISSION and IA No.64316/2020-STAY APPLICATION and IA No.64326/2020-CLARIFICATION/DIRECTION)

AND

SUO MOTO WRIT PETITION © NO. 8 of 2020

IN RE : FINANCIAL AID FOR MEMBERS OF BAR AFFECTED BY PANDEMIC.

Date : 22-07-2020 These petitions were called on for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE A.S. BOPANNA
HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN

For Petitioner(s) Mr.Manan Kumar Mishra, Sr, Adv.
Mr.S.Prabhakaran, Sr. Adv.
Mr.Aprub Kumar Sharma, Sr. Adv.
Mr.S.N.Bhat, Adv.
Mr.Ved Prakash Sharma, Adv.
Mr.Vishwajeet Kumar Mishra, Adv.
Ms.Anjul Dwivedi, Adv.
Mr.Anirveda Sharma, Adv.

For Respondent(s) Mr. Tushar Mehta, Ld. S.G.
Mr. Kanu Agrawal, Adv.

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Mr. Rajat Nair, Adv.
Mr. B.V. Balram Das, Adv.

Mr. Chirag M. Shroff, Adv.
Ms. Sanjana Nangia, Adv.
Ms. Abhilasha Bharti, Adv.

UPON hearing the counsel the Court made the following

O R D E R

WP© No.686/2020

Issue notice.

T.P.(C) Nos. 767-772/2020

Issue notice.

Until further orders, further proceedings in W.P.(PIL) NO. 91/2020 pending before the High Court of Andhra Pradesh at Amaravathi, W.P. No. 6651/2020 pending before the High Court for the States of Telangana at Hyderabad, W.P. No. 7419/2020 pending before the High Court of Judicature at Madras and WP D. No. 501727/2020 pending before the High of Delhi at New Delhi, WP No. 3695/2020 pending before the High Court of Delhi at New Delhi and Public Interest Litigation (PIL) No. 569/2020 (Suo-moto proceedings initiated by the High Court) shall remain stayed.

SUO MOTO WRIT PETITION (C) NO 8 OF 2020

IN RE : FINANCIAL AID FOR MEMBERS OF BAR AFFECTED BY PANDEMIC

Taken on Board.

We are faced with an unprecedented crisis due to COVID-19 pandemic. This would demand an unprecedented action for resolving the said crisis.

In short, we find that the pandemic has taken

a heavy toll on the lives of citizens and, particularly, the legal fraternity. We are conscious of the fact that the advocates are bound by Rules which restrict their income only to the profession. They are not permitted to earn a livelihood by any other means. In such a circumstance, the closure of the courts has deprived a sizable section of the legal profession of income and therefore livelihood.

In these dire circumstance there is a constant demand to enable the resumption of the income from the profession by resuming the normal functioning of Courts in congregation. This demand poses its own difficulties in the sense that an unqualified resumption of normal Courts may jeopardize the health of all those who attend Courts in congregation, i.e., Judges, Lawyers and equally important, the Staff of the Courts.

Nonetheless, we find that it is not possible to ignore the problem of livelihood of advocates. We therefore consider it appropriate, in the interest of justice, to issue notice to the recognized Bar Associations of the Supreme Court and of all the High Courts to show cause why a fund for relief to eligible and deserving advocates should not be set up and donations for the same be invited

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from their own members or any other legitimate source. It would also be necessary to determine the norms for eligibility of such financial aid by the Bar Associations.

We consider it appropriate to issue notice to the Union of India, State Governments/Union Territories, Bar Council of India and all the State Bar Councils. Notice shall also be issued to the Registrars General of all the High Courts. Notice be made returnable in two weeks.

Mr. Tushar Mehta, learned Solicitor General and Mr. Manan Kumar Mishra, senior counsel waive service of notice on behalf of the Union of India and the Bar Council of India, respectively.

Let service of notice be effected through respective standing counsel. Service of notice be also effected through e-mail and FAX.

To be listed along with W.P.(C) No.686 of 2020 and T.P.(C) No.767-772 of 2020.

[CHARANJEET KAUR]
ASSTT.REGISTRAR-CUM-PS

[INDU KUMARI POKHRIYAL]
ASSTT. REGISTRAR

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ANNEXURE - C17

The Guardian

This is how democracies die

21 Jan 2018

Steven Levitsky and Daniel Ziblatt

Defending our constitution requires more than outrage

Blatant dictatorship – in the form of fascism, communism, or military rule – has disappeared across much of the world. Military coups and other violent seizures of power are rare. Most countries hold regular elections. Democracies still die, but by different means.

Since the end of the Cold War, most democratic breakdowns have been caused not by generals and soldiers but by elected governments themselves. Like Hugo Chávez in Venezuela, elected leaders have subverted democratic institutions in Georgia, Hungary, Nicaragua, Peru, the Philippines, Poland, Russia, Sri Lanka, Turkey and Ukraine.

Democratic backsliding today begins at the ballot box. The electoral road to breakdown is dangerously deceptive. With a classic coup d'état, as in Pinochet's Chile, the death of a democracy is immediate and evident to all. The presidential palace burns. The president is killed, imprisoned or shipped off into exile. The constitution is suspended or scrapped.

On the electoral road, none of these things happen. There are no tanks in the streets. Constitutions and other nominally democratic institutions remain in place. People still vote. Elected autocrats maintain a veneer of democracy while eviscerating its substance.

Many government efforts to subvert democracy are "legal", in the sense that they are approved by the legislature or accepted by the courts. They may even be portrayed as efforts to improve democracy – making the judiciary more efficient, combating corruption or cleaning up the electoral process.

Newspapers still publish but are bought off or bullied into self-censorship. Citizens continue to criticize the government but often find themselves facing tax or other legal troubles. This sows public confusion. People do not immediately realize what is happening. Many continue to believe they are living under a democracy.

Because there is no single moment – no coup, declaration of martial law, or suspension of the constitution – in which the regime obviously "crosses the line" into dictatorship, nothing may set

off society's alarm bells. Those who denounce government abuse may be dismissed as exaggerating or crying wolf. Democracy's erosion is, for many, almost imperceptible.

How vulnerable is American democracy to this form of backsliding? The foundations of our democracy are certainly stronger than those in Venezuela, Turkey or Hungary. But are they strong enough?

Answering such a question requires stepping back from daily headlines and breaking news alerts to widen our view, drawing lessons from the experiences of other democracies around the world and throughout history.

A comparative approach reveals how elected autocrats in different parts of the world employ remarkably similar strategies to subvert democratic institutions. As these patterns become visible, the steps toward breakdown grow less ambiguous –and easier to combat. Knowing how citizens in other democracies have successfully resisted elected autocrats, or why they tragically failed to do so, is essential to those seeking to defend American democracy today.

We know that extremist demagogues emerge from time to time in all societies, even in healthy democracies. The United States has had its share of them, including Henry Ford, Huey Long, Joseph McCarthy and George Wallace.

An essential test for democracies is not whether such figures emerge but whether political leaders, and especially political parties, work to prevent them from gaining power in the first place – by keeping them off mainstream party tickets, refusing to endorse or align with them and, when necessary, making common cause with rivals in support of democratic candidates.

Isolating popular extremists requires political courage. But when fear, opportunism or miscalculation leads established parties to bring extremists into the mainstream, democracy is imperiled.

Once a would-be authoritarian makes it to power, democracies face a second critical test: will the autocratic leader subvert democratic institutions or be constrained by them?

Institutions alone are not enough to rein in elected autocrats. Constitutions must be defended – by political parties and organized citizens but also by democratic norms. Without robust norms, constitutional checks and balances do not serve as the bulwarks of democracy we imagine them to be. Institutions become political weapons, wielded forcefully by those who control them against those who do not.

This is how elected autocrats subvert democracy – packing and "weaponizing" the courts and other neutral agencies, buying off the media and the private sector (or bullying them into silence) and rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox

of the electoral route to authoritarianism is that democracy's assassins use the very institutions of democracy – gradually, subtly, and even legally – to kill it.

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How serious is the threat now? Many observers take comfort in our constitution, which was designed precisely to thwart and contain demagogues like Trump. Our Madisonian system of checks and balances has endured for more than two centuries. It survived the civil war, the great depression, the Cold War and Watergate. Surely, then, it will be able to survive Trump.

We are less certain. Historically, our system of checks and balances has worked pretty well – but not, or not entirely, because of the constitutional system designed by the founders. Democracies work best – and survive longer – where constitutions are reinforced by unwritten democratic norms.

Two basic norms have preserved America's checks and balances in ways we have come to take for granted: mutual toleration, or the understanding that competing parties accept one another as legitimate rivals, and forbearance, or the idea that politicians should exercise restraint in deploying their institutional prerogatives.

These two norms undergirded American democracy for most of the 20th century. Leaders of the two major parties accepted one another as legitimate and resisted the temptation to use their temporary control of institutions to maximum partisan advantage. Norms of toleration and restraint served as the soft guardrails of American democracy, helping it avoid the kind of partisan fight to the death that has destroyed democracies elsewhere in the world, including Europe in the 1930s and South America in the 1960s and 1970s.

Today, however, the guardrails of American democracy are weakening. The erosion of our democratic norms began in the 1980s and 1990s and accelerated in the 2000s. By the time Barack Obama became president, many Republicans in particular questioned the legitimacy of their Democratic rivals and had abandoned forbearance for a strategy of winning by any means necessary.

Trump may have accelerated this process, but he didn't cause it. The challenges facing American democracy run deeper. The weakening of our democratic norms is rooted in extreme partisan polarization – one that extends beyond policy differences into an existential conflict over race and culture.

America's efforts to achieve racial equality as our society grows increasingly diverse have fueled an insidious reaction and intensifying polarization. And if one thing is clear from studying breakdowns throughout history, it's that extreme polarization can kill democracies.

There are, therefore, reasons for alarm. Not only did Americans elect a demagogue in 2016, but we did so at a time when the norms that once protected our democracy were already coming unmoored.

But if other countries' experiences teach us that that polarization can kill democracies, they also teach us that breakdown is neither inevitable nor irreversible.

Many Americans are justifiably frightened by what is happening to our country. But protecting our democracy requires more than just fright or outrage. We must be humble and bold. We must learn from other countries to see the warning signs – and recognize the false alarms. We must be aware of the fateful missteps that have wrecked other democracies. And we must see how citizens have risen to meet the great democratic crises of the past, overcoming their own deep-seated divisions to avert breakdown.

History doesn't repeat itself. But it rhymes. The promise of history is that we can find the rhymes before it is too late.

This is an extract from How Democracies Die by Steven Levitsky and Daniel Ziblatt, professors of government at Harvard University, published in the UK by Viking and in the US by Crown

Source:

https://www.theguardian.com/us-news/commentisfree/2018/jan/21/this-is-how-democracies-die

ANNEXURE-C18

The Indian Express

Collegium's actions show that the NJAC which was struck down four years ago is back, with a vengeance

October 16, 2019
Madan B Lokur

It seems to me that the unconstitutional NJAC is rearing its head and is now Frankenstein's monster. The advice of the two eminent persons postulated by the NJAC is no longer required.

Four years ago, on October 16, 2015, the Supreme Court (SC) struck down as unconstitutional an amendment to the Constitution establishing the National Judicial Appointments Commission (NJAC). The amendment and the corresponding law were challenged by the Supreme Court Advocates-on-Record Association (SCAORA) believing, rightly, that the amendment would violate the basic structure of the Constitution by depriving the judiciary of its independence. SCAORA engaged Fali S Nariman, a doyen of the Bar, to argue the case on its behalf. The SC agreed with his submissions and struck down the amendment. At law, the independence of the judiciary was preserved. But is it, in fact? Judge for yourself.

Try and remember, for instance, that barely a few months after the NJAC decision, a sobbing Chief Justice of India (CJI) sought outside help to resolve the institutional problem of getting the government to move on increasing the judge strength. Nothing happened. A few months later, the same CJI complained, in open court, that the government was not implementing the recommendations of the collegium for the transfer of some judges. Nothing happened, except a response given in November the same year by the Attorney General reminding the SC of its Lakshman Rekha and by the law minister of its historic failure during the Emergency. The seeds of the NJAC striking back were sown around that time and the judiciary is today reaping the harvest.

What was the proposed composition of the NJAC? The CJI was the chair, ex officio, and along with him were the next two senior judges. The Union Minister of Law and Justice was an ex officio member along with two eminent persons. They were to recommend persons for appointment as judges of the SC and high courts and the transfer of judges of the high courts (including chief justices). Notwithstanding the declaration of unconstitutionality of the NJAC, I believe its core functions are now being performed by a body minus the two eminent persons. So, the recommendation and appointment of judges has been taken over by a "new NJAC" and without any apparent protest. Why do I say this?

The collegium cut off its hands when it reversed a signed and sealed (but not delivered) resolution on January 11. To an outsider, it appeared that a resolution of the collegium lacked

sanctity — and this seems to have been exploited by the "new NJAC". Let me cite a few glaring instances. As recently as in late August, the Economic Times reported that the CJI had written to the law minister that 43 recommendations made by the collegium were pending with the government and the vacancies in the high courts were to the extent of about 37 per cent. Also, the collegium could not consider the appointment of 10 persons since some information was awaited from the government for varying periods. Who is calling the shots — the government?

Some more questions. On April 8, the collegium recommended the appointment of Justice Vikram Nath, the senior-most judge of the Allahabad High Court as the chief justice of the Andhra Pradesh High Court. Sometime later, the government referred back the recommendation for reconsideration. On August 22, the collegium reconsidered the recommendation "for the reasons indicated in the file" and recommended his appointment as the chief justice of the Gujarat High Court. The reasons indicated in the file are not known and it would certainly be in the interest of the institution if they are disclosed. If the judge was unfit or unsuitable for appointment as the chief justice of Andhra Pradesh, how did he become suitable for Gujarat?

On September 5, the collegium recommended that Justice Irshad Ali be made a permanent judge of the Allahabad High Court. The recommendation was made after considering (i) the opinion of judges of the SC conversant with the affairs of the Allahabad High Court, (ii) report of the committee of judges to evaluate his judgments, (iii) possible complaints against one of the judges under consideration (could also be Justice Ali), (iv) additional information received from the chief justice of the Allahabad High Court and (v) observations of the Department of Justice and (vi) an overall assessment. What did the government do? It rejected the recommendation (without furnishing any reason or justification) and on September 20 extended his term as an additional judge by six months. Did anybody protest?

Justice Akil Kureshi, the senior-most judge of the Gujarat High Court, was recommended on May 10 to be the Chief Justice of the Madhya Pradesh High Court after considering all relevant factors and being found suitable in all respects. Guess what? The government sent two communications to the CJI on August 23 and 27 along with some material. On reconsideration of the communications and the material, the collegium modified its recommendation on September 5 and recommended his appointment as the Chief Justice of the Tripura High Court. Again, the contents of the communications and the accompanying material are not known. Is there something so terribly secret about them that it would not be in the interest of the institution to make a disclosure? As in the case of Justice Vikram Nath, it would be worth asking how Justice Kureshi is fit or suitable for appointment as the Chief Justice of the Tripura High Court and not of the Andhra Pradesh High Court. Have we not often heard the SC say that sunlight is the best disinfectant? And then, electric light the most efficient policeman? More than a month has gone by and even this recommendation has not been acted upon by the government. Any protest?

Finally, the transfer of the Chief Justice from Madras High Court to the Meghalaya High Court — whether it should have taken place or not is not the question. It could have been achieved more gracefully, like the manner in which a former CJI dealt with a delinquent judge of the Delhi High Court. After a brief discussion with the CJI, the judge quietly resigned. But some other more important questions arise in the context of the independence of the judiciary. Was she spied upon by the Intelligence Bureau (IB)? The Times of India reported on September 30 that the CJI had asked the Central Bureau of Investigation to "take further action in accordance with law" on a five-page report of the IB on financial and other irregularities alleged against her. Should the IB be blindly believed — there is a well-known incident of a teetotaller being called a "boozer" by the IB? Was the CJI kept in the dark about her being kept under surveillance? How many other judges are being spied on? Isn't it somewhat unusual and frightening that judges, expected to render judgment without fear or favour, are subject to surveillance by the IB? Can their independence be guaranteed under these circumstances?

It seems to me that the unconstitutional NJAC is rearing its head and is now Frankenstein's monster. The advice of the two eminent persons postulated by the NJAC is no longer required. Actually, there is now no need to amend the Constitution to bring back the NJAC — it is already in existence with a vengeance. At the present moment, silence on crunch issues is not golden.

Source:

https://indianexpress.com/article/opinion/columns/govt-calling-the-supreme-court-shots-narendra-modi-6070659/

ANNEXURE

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ANNEXURE-C19

The Wire

The Supreme Court Needs to Reconsider Its Judgment in the Sahara-Birla Case

14 Februry, 2017

Dushyant Dave

Was the Supreme Court's judgement on January 11 in the Sahara-Birla papers case truly free from bias?

The first principle of natural justice consists of the rule against bias based on three maxims: First, 'no man shall be a judge in his own cause'; second, 'justice should not only be done but manifestly and undoubtedly be seen to be done'; and third, 'judges, like Caesar's wife, should be above suspicion'.

The Supreme Court of India can truly take pride in taking judicial review of administrative actions to great heights. But do judges themselves follow the law they declare? The answer appears to be in the negative, as seen in Sahara-Birla case decided on January 11, 2017.

Justices Arun Mishra and Amitava Roy dismissed applications made by an NGO seeking direction for criminal investigation into large-scale payments allegedly made to political leaders across party lines, which the investigating agencies had declined to do. Despite having noted the documents seized during the CBI and IT raids on the Aditya Birla and Sahara groups, the court felt obliged to be "on guard while ordering investigation against any important constitutional functionary, officer, or any person in the absence of some cogent legally cognisable material." The judgment records that, "The random log suggests that cash was transferred to several important public figures. Copies of the random pages have been filed as Annexure A-8. The pages Annexure A-9 and A-10 have been filed which contain the proposal and regarding the actual payments which were made to large number of top political leaders of the country". Among those named was Madhya Pradesh chief minister Shivraj Singh Chouhan.

On December 10, 2016, Justice Mishra organised the wedding of his nephew in Gwalior. Newspapers in Madhya Pradesh have reported that Chouhan attended the wedding. It is pertinent to mention that the case was being heard since November 2016 by another bench, of which Justice Mishra was a member.

Post January 3, Justice Mishra started presiding over the bench for the first time and the controversial Sahara-Birla case was listed before his bench. But not once did he disclose his

proximity to political leaders including Chouhan. Justice Mishra was therefore "automatically disqualified" from hearing the case without any investigation into whether there was a likelihood or suspicion of bias. This is because of the law declared by the Supreme Court in several cases. The constitution bench in *Rupa Ashok Hurra vs Ashok Hurra & Anr* (2002) created an extraordinary remedy – "curative petition" – to cure "irremedial injustice", holding that, "We are of the view that though judges of the highest court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of." Amongst the situations justifying such relief is, "where in the proceedings a learned judge failed to disclose his connection with the subject-matter or the parties, giving scope for an apprehension of bias, and the judgment adversely affects the petitioner."

The judgment on January 11 falls squarely within this parameter because Justice Mishra failed to disclose his connection with Chouhan and perhaps with other political leaders mentioned in the documents, 'giving scope for apprehension of bias'. The judgment affects not just the complainant but the larger public interest too.

On the issue of recusal, the Supreme Court has followed the 1998 House of Lords judgment in *In Re Pinochet.* In *In Re Pincohet*, the House of Lords recalled its previous judgment on the ground of apprehension of bias on account of one of the judges, Lord Hoffmann, and his wife having been connected with one of the parties to the case, Amnesty International, holding that, "The fundamental principle is that a man may not be a judge in his own cause... This principle as developed by the courts has two similar but not identical implications... The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party."

While separately dealing with the issue of recusal by the bench, the Supreme Court, in its judgment on October 16, 2015 in the *Supreme Court Advocates-on-Record Association* (NJAC) case, deeply dilated on the "impartial judge" being the hallmark of a democracy and approvingly referred to *Pinochet* and the automatic disqualification of a judge "interested in a cause". In 2001 in *Kumaon Mandal Vikas Nigam Ltd.*, the court had declared, "... a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge or any member of public involved in the case." In 2012, in *R.C. Chandel*, Justice R.M. Lodha cautioned that, "A judge must be a person of impeccable integrity and unimpeachable independence" for the survival of democracy and rule of law.

In its charter, 'The Restatement of Values of Judicial Life', the full court of the Supreme Court has laid emphasis, *inter alia,* on the following: "Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of members of the higher judiciary

must reaffirm the people's faith in the impartiality of the judiciary"; "A judge should practice a degree of aloofness consistent with the dignity of his office"; "A judge shall not hear and decide a matter in which a member of his family, close relation or a friend is concerned"; and "Every judge must at all times be conscious that he is under the public gaze..."

On December 18, 2016, Justice Mishra held a wedding reception for his nephew in Delhi. I was present at the reception along with a large number of lawyers, judges from Supreme Court and high courts of Delhi, Madhya Pradesh, and Rajasthan and registry officials. Also present were a large number of top political leaders from across party lines, including Union cabinet ministers unconnected to law, a far cry from the expected "degree of aloofness". What did this signify for the high court judges present? It is common nowadays to see high constitutional functionaries attending personal functions organised by Supreme Court and high court judges. What happens of the resolve to remain aloof?

Justice Mishra's judgment is based on two findings. First, that the Settlement Commission has called the Birla-Sahara documents "doubtful" and second, that they are of no evidentiary value either because they were contained as electronic records or not as regular books of accounts. On both counts, with greatest respect, the judgment suffers from serious legal infirmities by ignoring the fact that the contents of electronic records are admissible under the Evidence Act without further proof of the original and that Section 132(4) and (4A) of the Income Tax Act, read with Section 79 of the Evidence Act, create the legal presumption of such documents as "belonging to the person from whom they are seized" and "to be true" and make statements made in respect of such documents in investigation as evidence. The Supreme Court has itself – in *Pooran Mal v. Director of Inspection* and *ITO v. Seth Bros.* – confirmed this position. The Madras, Delhi and Rajasthan high courts have treated such documents as admissible.

Clearly, the Supreme Court's judgment on January 11 is vitiated by "bias" and deserves to be recalled by the apex court exercising, if necessary, *suo moto* powers. Then alone will the court have reaffirmed its commitment to democracy and rule of law.

Source:

https://thewire.in/law/supreme-court-judgement-in-sahara-birla-case-reveals-need-for-introspection-on-judicial-bias

ANNEXURE-C20

299

To,

The Secretary General,

Supreme Court of India

28th February 2017

Dear Sir,

I had addressed a letter to the Hon'ble Chief Justice of India on 17.02.2017 in connection with the suicide committed by my husband Mr. Kalikho Pul, former Chief Minister of Arunachal Pradesh on August 9, 2016 leaving behind a detailed suicide note of 8th August, 2016. In the said letter permission was sought from the Hon'ble Chief Justice of India for filing an F.I.R on the basis of the said suicide note against many including two senior most Judges of the Hon'ble Supreme Court of India. It was stated in that letter as under:

"I understand that in the judgment of K Veeraswami v Union of India a Constitution Bench of this court had directed that though judges of the higher judiciary are amenable for corruption investigation under the prevention of corruption act, but to safeguard their independence and to save them from harassment at the hands of the executive, any FIR and investigation of a judge at the higher judiciary would require prior permission of the Chief of India.

The judgment further says that if the allegations are against the Chief Justice then the permission required would be of other judges, which would obviously meant he next senior most judge available.

... I am sure that you will have the matter place before the appropriate judge in accordance with the judgment in Veeraswami case for consideration of my request."

Although I did not receive any written communication in that regard, a newspaper report had appeared in the Indian Express on 22.02.2017 to the effect that the Hon'ble Chief Justice had declined to grant necessary permission on administrative side instead of placing the matter before appropriate Judge.

However, suddenly the matter was converted into a Miscellaneous Criminal Writ Petition and was listed before the Hon'ble Bench of Justice A. K Goel and Justice U. U. Lalit on 23.02.2017. As you are aware, in view of the extraordinary developments which were likely to seriously impair my right to pursue the matter in accordance with the law and fearing that the dismissal of the Writ may cause incalculable harm, the letter was withdrawn.

During the hearing it was categorically pointed out that I had not sought any relief on the judicial side and that the letter sought permission strictly in light of the law declared by the Constitution Bench of Supreme Court in K. Veeraswami v. Union of India, (1991) 3 SCC 655

Reference is invited to Paragraph 60 thereof which is as under:

"We therefore, direct that no criminal case shall be registered under Section 154, CrPC against a Judge of the High Court, Chief Justice of High Court or Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter. Due regard must be given by the government to the opinion expressed by the Chief Justice. If the Chief Justice is of opinion that it is not a fit case for proceeding under the Act, the case shall not be registered. If the Chief Justice of India himself is the person against whom the allegations of criminal misconduct are received the government shall consult any other Judge or Judges of the Supreme Court. There shall be similar consultation at the stage of examining the question of granting sanction for prosecution and it shall be necessary and appropriate that the question of sanction be guided by and in accordance with the advice of the Chief Justice of India. Accordingly the directions shall go to the government. These directions, in our opinion, would allay the apprehension of all concerned that the Act is likely to be misused by the executive for collateral purpose."

Sir, under these circumstances, I request you to supply the following information forthwith:

1. Whether decision on the administrative side as reported in Indian Express was indeed taken and if so, a copy thereof be supplied.
2. If not, was any decision at all taken on the letter, on the administrative side? If not, notings on the same be supplied recording reasons for inaction on the same.

3. Whether attention of the Hon'ble Chief Justice was drawn to the judgment of Constitution Bench in Veeraswami's case?
4. Whether the Registry had requested the Hon'ble Chief Justice to place the letter before "appropriate judge" which would mean Hon'ble Justice Chelameswar being the senior most Judge available for action on the letter?
5. When and under what circumstances the Hon'ble Chief Justice took the decision to convert the letter to a Criminal Writ Petition and whether reasons for the same were recorded?

   You are requested to give a copy of the said decision which is already acknowledged in the judicial order passed by the bench of Justice A.K Goel and U. U Lalit on 23.02.2017
6. How was the matter placed before the Bench of Hon'ble Justices A K Goel and U. U Lalit when the issue pertained to such serious matter and even if the letter was to be referred to the judicial side (although no such prayer was made and it was impermissible to so) why was it not placed before the Bench presided by Hon'ble Justice Chelameswar, the senior most available Judge?

   Sir, the matter assumes great significance for the integrity of the institution and for larger public interest including Independence of Judiciary. I would therefore request you to give these details after consulting Hon'ble the senior most Judge without placing this letter before Hon'ble Chief Justice and Hon'ble Justice Dipak Mishra in view of the sensitivity of the matter.

   I do hope and trust that at least now the matter will receive absolutely objective, independent and judicial treatment from this great Institution.

Yours sincerely,
Dangwimsai Pul

TRUE COPY

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ANNEXURE - C21

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 411 OF 2017

GLOCAL MEDICAL COLLEGE AND SUPER SPECIALITY HOSPITAL & RESEARCH CENTRE **....PETITIONER**

VERSUS

UNION OF INDIA AND ANOTHER **....RESPONDENTS**

WITH

W.P. (C) NOS. 430, 432, 437, 436, 438, 441, 442, 445,448, 450, 468,477,511, 496, 511, 514, 515, 525 and 533 of 2017.

JUDGMENT

AMITAVA ROY,J.

In assailment is the order dated 31.05.2017 of the Government of India, Ministry of Health and Family Welfare (Department of Health and Family Welfare) whereby the conditional permission for the establishment of the medical colleges, involved herein with number of seats as mentioned, for the academic year 2016-17, granted on the basis of the approval of the Supreme Court Mandated Oversight Committee (for short, hereinafter to be referred to as "Oversight Committee")

has been cancelled and the colleges have been debarred from admitting students in the next two academic years i.e. 2017-18 and 2018-19. Thereby, the Medical Council of India, (for short, hereinafter to be referred to as "MCI'/Council") has also been authorised to encash the bank guarantees submitted by the colleges/institutions, as required for availing the conditional permission as above. The colleges/institutions have been directed not to admit students in the MBBS Course in the academic years 2017-18 and 2018-19.

2. We have heard M/s. Salman Khurshid, S.G. Hasnain, Gurukrishna Kumar, A. Sharan, P.S. Patwalia, Kapil Sibal, V. Giri, Nidhesh Gupta, R. Basant, Raju Ramachandran, Sanjay R. Hegde, Dr. Rajeev Dhawan, C.A. Sundaram, Vikas Singh, Maninder Singh, Ajit Kumar Sinha, Senior Advocates and Mr. Mishra Saurabh, learned counsel for the parties.

3. It is submitted across the Bar that the foundational facts, which constitute the essence of the dissension, are identical so much so that the sequence of events, if drawn from any of the petitions would suffice to comprehend the issues to be

addressed. Having regard to the striking likeness of the factual framework of the cases in hand, for the sake of brevity and convenience, facts in bare minimum as available in the pleadings of W.P. (C) No. 411 of 2017 – ***Glocal Medical College and Super Specialty Hospital and Research Centre vs. Union of India and Another*** and W.P.(C) No. 436 of 2017 – ***Gayatri Vidya Parishad Society & Another vs. Union of India and Another*** would be adverted to.

4. The colleges/institutions in this batch had, as required under Section 10A of the Indian Medical Council Act, 1956 (for short, hereinafter to be referred to as "the Act") and the Establishment of Medical College Regulations, 1999 (for short, hereinafter to be referred to as "Regulations") framed thereunder duly submitted schemes for grant of letter of permission to establish new medical college with annual intake of MBBS students, as mentioned in their individual applications, from the academic year 2016-17. As ordained in law, the Council caused an inspection of the colleges to be made by its Council of Assessors on 11th and 12th December, 2015, whereafter the

assessment report was laid before the Executive Committee of the MCI, which in its meeting dated 28.12.2015, on a consideration of the deficiencies pointed out, forwarded its recommendation to the Central Government disapproving the schemes for the academic year 2016-17 on 31.12.2015.

5. The Central Government in its turn, by letter dated 05.02.2016 consequently disapproved as well, the schemes of the petitioner colleges/institutions for the academic year 2016-17.

6. Shortly thereafter, this Court by its judgment and order dated 02.05.2016 rendered in ***Modern Dental College and Research Centre & Anr. vs. State of Madhya Pradesh & Ors.***[1] constituted the Oversight Committee, amongst others to oversee the functioning of the Council under the Act. As the records demonstrate, the Oversight Committee intervened in the process as reportedly many colleges/institutions did complain of denial of opportunity to submit their compliance write up, to the deficiencies pointed out by the assessors and by its communication dated 22.06.2016 permitted those

1 (2016)7SCC 353

colleges/institutions to submit their compliance inputs afresh to the Ministry of Health and Family Welfare and further directed the Council to conduct compliance verification inspection of those colleges/institutions and submit the inspection report to the Central Government.

7. Subsequent thereto, the Oversight Committee by its communication dated 11.8.2016 addressed to the Central Government, Ministry of Health and Family Welfare, for the reasons recorded, granted conditional approval to the colleges/institutions, as mentioned therein, subject to the following conditions:

> "(i) An affidavit from the Dean/Principal and Chairman of the Trust concerned, affirming fulfillment of all deficiencies and statements made in the respective compliance report submitted to MHFW by 22 June, 2016.
>
> (ii) A bank guarantee in the amount of Rs. 2 crore in favour of MCI, which will be valid for 1 year or until the first renewal assessment, whichever is later. Such bank guarantee will be in addition to the prescribed fee submitted along with the application.

3.2(a) OC may direct inspection to verify the compliance submitted by the college and considered by OC, anytime after 30 September, 2016.

(b) In default of the conditions (i) and (ii) in para 3.2 above and if the compliances are found incomplete in the inspection to be conducted after 30 September, 2016, such college will be debarred from fresh intake of students for 2 years commencing 2017-18."

8. Accordingly, the Central Government vide letter No. U-12011/13/2016-ME-I dated 20.8.2016, in deference to the above directions of the Oversight Committee, issued the letter of permission subject to the above conditions, initially for a period of one year and renewable on yearly basis also subject to the verification of the achievement of annual targets, as indicated in their schemes and re-validation of the performance bank guarantees. It was mentioned as well that the next batch of students of MBBS Course for the academic session 2017-18 would be admitted in the colleges only after obtaining permission from Central Government and on fulfilling the conditions laid down by the Oversight

Committee, as stipulated hereinabove.

9. The petitioners assert that on being intimated of the above order, they accordingly, through their authorised representatives, as directed submitted the affidavits of compliance affirming that they had rectified all the deficiencies pointed out in the inspection conducted by the Council on 11/12.12.2015 and also had furnished the bank guarantees, as required. The communications to this effect are on 30.8.2016 and 1.9.2016. The colleges/institutions, as have been mentioned in course of the arguments, have meanwhile, acting on this conditional letter of permission, admitted students to the academic year 2016-17.

10. The MCI caused another inspection of the colleges/institutions to be made by its Council of Assessors on 21/22.12.2016, whereafter on a consideration of the report submitted by its assessors, in its meeting held on 13.1.2017 did record, a number of persisting deficiencies. It was thus of the view that the colleges/institutions had failed to abide by the undertaking given by them to the Central

Government that there was no deficiency as per clause 3.2(1) of the communication dated 11.8.2016 of the Oversight Committee and as a consequence, recommended in terms of paragraph 3.2(b) of the above communication that the said colleges/institutions be debarred from admitting students in the MBBS Course for the two academic years i.e. 2017-18, 2018-19 and further that the bank guarantees furnished by them be encashed. As per the decision taken, a copy of the recommendations to the above effect was forwarded to the Central Government and the Oversight Committee.

11. The Central Government in turn, by its communication dated 2.2.2017, addressed to the petitioner colleges/institutions informed that an opportunity of personal hearing would be granted on 17.1.2017 and 8.2.2017 on the issue of the recommendation of the MCI for debarment of the colleges for two academic sessions, as above and for encashment of their bank guarantees. The colleges/institutions were instructed to depute their

authorised representatives to present their case vis-a-vis the recommendations of the MCI along with the requisite information in the prescribed format to be laid before the committee concerned.

12. In response, the petitioner colleges/institutions in time submitted their reply maintaining that almost all the deficiencies pointed out in the inspection carried on 11/12.12.2015 had been rectified and that the deficiencies noted in the subsequent inspection were not the same and further were at best minor in nature.

13. Item-wise replies with clarifications were furnished by the colleges vis-a-vis the deficiencies pointed out in the inspection held on 21st and 22nd December, 2016. The colleges/institutions claimed that in fact there was no deficiency and that they were making all efforts to overcome, if there be any, and prayed that the minor deficiencies be condoned and the conditional LOP (Letter of Permission) be confirmed.

14. A hearing was provided to the institutions/colleges

by a Hearing Committee of the Central Government on 17.1.2017 and 8.2.2017 and the comments of the Hearing Committee along with the recommendations/comments of the Director General of Health Services in respect of the colleges mentioned therein, were forwarded to the Central Government on 23.3.2017. As would be evident from this document, it contained four columns and the third and fourth thereof did set out the comments of the Hearing Committee and recommendations/comments of Director General of Health Services (for short "DGHS") respectively. It may be noted in the passing that whereas the comments of the Hearing Committee in respect of most of the colleges/institutions was "No satisfactory evidence available", the recommendations/comments of the DGHS disclosed that the said authority on noting the deficiencies highlighted did suggest some relaxation in the approach thereto, to be brought to the notice of the Oversight Committee and also recommended that the Oversight Committee may take necessary initiatives in this regard. As

this document would also reveal, the recommendations of the MCI and the comments of the Hearing Committee and the DGHS were forwarded to the Central Government be submitted for further directions/comments from the Oversight Committee.

15. A lull followed and it was only on 5.5.2017 that the Central Government forwarded the aforementioned recommendations dated 23.3.2017 to the Oversight Committee. As this communication would reveal, the Hearing Committee/DGHS had granted personal hearing to the colleges on 17.1.2017 and 8.2.2017. Noticeably, however though the contents of the proceedings dated 23.3.2017 of the Hearing Committee/DGHS were set out in that letter dated 5.5.2017, the column containing the recommendations/comments of the DGHS did not find place therein. In other words, as is patent, only a truncated version of the document dated 23.3.2017 was forwarded by the Central Government to the Oversight Committee. The letter mentioned that the observations of the Hearing

Committee constituted by the DGHS, be construed to be the views of the Ministry of Health and Family Welfare.

16. The letter No. OC/UG/2016-16 (Conditional Approvals) 258 dated 14.5.2017 of the Oversight Committee followed in response. As this letter would evince, the Oversight Committee on a detailed consideration of the factual backdrop and on an in-depth analysis of the deficiencies pointed out by the assessors of the MCI, the views of the Hearing Committee and of the Central Government, by recording reasons, dismissed the deficiencies enumerated and recommended confirmation of the conditional letter of permission earlier granted to the colleges/institutions concerned.

17. The impugned decision conveyed by the letter No. U.I2012/27/2016-ME-I [FTS.30844749] dated 31st May, 2017, as referred to hereinabove was thereafter issued. Thereby to reiterate, the decision of the Central Government to debar the petitioner colleges/institutions from admitting students in the next two academic years 2017-18 and 2018-

19 and also to authorise the MCI to encash the bank guarantees was communicated. Directions were also issued to the concerned colleges/institutions not to admit students in the MBBS course in the said academic years.

18. The quintessence of the contrasting contentions next needs to be outlined. It has been insistently urged on behalf of the petitioners that in the pronounced backdrop of facts outlining the march of events, the impugned decision is on the face of it, unsustainable being bereft of any reason or relevant consideration. It has been argued that the Oversight Committee having been constituted by this Court by its judgment and order dated 02.05.2016 in ***Modern Dental College Research Centre*** (supra) authorizing it to oversee all statutory functions under the Act and leaving it at liberty to issue appropriate remedial directions, the impugned order is in the teeth of the recommendations of the said Committee, as communicated in its letter dated 14.05.2017 overruling the deficiencies on the basis of which purportedly, the petitioner colleges/institutions are being

sought to be debarred from admitting students in the academic session for the years 2017-18 and 2018-19 and their bank guarantees are ordered to be encashed. It has been emphatically asserted that having regard to the status of the Oversight Committee and the role assigned to it by this Court, its recommendations/views, as conveyed by its letter dated 14.05.2017, by no means could have been disregarded. It has been stoutly canvassed that not only the Central Government in acting only on the recommendations of the MCI had proceeded in a manner which is grossly unfair and unreasonable vis-à-vis the petitioner institutions/colleges, the manner in which the impugned decision has been taken tantamounts to denial of hearing to them, as mandated by Section 10A(4) of the Act. It has been urged as well that the action of forwarding the incomplete proceedings of the Hearing Committee/DGHS to the Oversight Committee betrays inexplicable prejudice and a predetermined disposition against the petitioner colleges/institutions, rendering the impugned decision non

est in law.

19. As against this, it has been argued in emphatic refutation on behalf of the respondents that the Central Government being the final decision making authority under the Act on the issue of grant or refusal of permission/renewal of permission, there is no embargo on it to take a decision thereon, more so there being no mandate that it would be bound by the recommendations of the Oversight Committee. It has been contended that the views expressed by the Oversight Committee in its communication dated 14.05.2017 are contrary to its directives earlier issued in its letter dated 11.08.2016, recommending grant of conditional LOP to the petitioner institutions/colleges. It has been insisted that not only the petitioner institutions/colleges had failed to provide the minimum teaching, clinical, infrastructural and other facilities in the colleges as divulged in the successive inspections, they have been found to be non-compliant of the undertakings given by them to the Central Government as well. It has been argued

that the impugned decision, in the attendant facts and circumstances, is unassailable and does not merit any interference.

20. After hearing the learned counsel for the parties and on a consideration of the materials on record, to the extent essential, we are of the considered opinion that the impugned decision cannot be sustained in law as well as on facts. Significantly, the authenticity and correctness of the documents referred to by the parties are not disputed and form part of the records.

21. A bare perusal of the letter dated 31.05.2017 would demonstrate in clear terms that the same is de hors any reason in support thereof. It mentions only about the grant of conditional permission on the basis of the approval of the Oversight Committee, and an opportunity of hearing vis-à-vis the recommendations of the MCI in its letter dated 15.01.2017 highlighting the deficiencies detected in course of the inspection undertaken on 21st and 22nd December, 2016, but is conspicuously silent with regard to the outcome of the

proceedings of the Hearing Committee, the recommendations recorded therein both of the Committee and the DGHS and more importantly those of the Oversight Committee conveyed by its communication dated 14.05.2017, all earlier in point of time to the decision taken. This assumes importance in view of the unequivocal mandate contained in the proviso to Section 10A(4) of the Act, dealing with the issue, amongst others of establishment of a medical college. The relevant excerpt of sub-section 4 of Section 10A of the Act for ready reference is set out hereinbelow:

> "(4) The Central Government may, after considering the scheme and the recommendations of the Council under sub-section (3) and after obtaining, where necessary, such other particulars as may be considered necessary by it from the person or college concerned, and having regard to the factors referred to in sub-section (7), either approve (with such conditions, if any, as it may consider necessary) or disapprove the scheme and any such approval shall be a permission under sub-section (1);
>
> Provided that no scheme shall be disapproved by the Central Government except after giving the person or college concerned a reasonable opportunity of being heard:"

22. Though as the records testify, a hearing was provided to the petitioner colleges/institutions through the Hearing Committee constituted by the DGHS (as mentioned in the proceedings dated 23.3.2017) qua the recommendations of the MCI contained in its letter dated 15.01.2017, as noted hereinabove, the proceedings of the Hearing Committee do reflect varying views of the Hearing Committee and the DGHS, the latter recommending various aspects bearing on deficiency to be laid before the OC for an appropriate decision. The Central Government did forward, albeit a pruned version of the proceedings of the Hearing Committee to the Oversight Committee after a time lag of almost six weeks. The reason therefor is however not forthcoming. The Oversight Committee, to reiterate, though on a consideration of all the relevant facts as well as the views of the MCI and the proceedings of the Hearing Committee as laid before it, did cast aside the deficiencies minuted by the MCI and recommended confirmation of the letters of permission of the

petitioner colleges/institutions, the impugned decision has been taken by the Central Government which on the face of it does not contain any reference whatsoever of all these developments.

23. As a reasonable opportunity of hearing contained in the proviso to Section 10A(4) is an indispensable pre-condition for disapproval by the Central Government of any scheme for establishment of a medical college, we are of the convinced opinion that having regard to the progression of events and the divergent/irreconcilable views/recommendations of the MCI, the Hearing Committee, the DGHS and the Oversight Committee, the impugned order, if sustained in the singular facts and circumstances, would be in disaccord with the letter and spirit of the prescription of reasonable opportunity of hearing to the petitioner institutions/colleges, as enjoined under Section 10A(4) of the Act. This is more so in the face of the detrimental consequences with which they would be visited. It cannot be gainsaid that the reasonable opportunity of

hearing, as obligated by Section 10A(4) inheres fairness in action to meet the legislative edict. With the existing arrangement in place, the MCI, the Central Government and for that matter, the Hearing Committee, DGHS, as in the present case, the Oversight Committee and the concerned colleges/institutions are integral constituents of the hearing mechanism so much so that severance of any one or more of these, by any measure, would render the process undertaken to be mutilative of the letter and spirit of the mandate of Section 10A(4).

24. Having regard to the fact that the Oversight Committee has been constituted by this Court and is also empowered to oversee all statutory functions under the Act, and further all policy decisions of the MCI would require its approval, its recommendations, to state the least, on the issue of establishment of a medical college, as in this case, can by no means be disregarded or left out of consideration. Noticeably, this Court did also empower the Oversight Committee to issue appropriate remedial directions. In our

view, in the overall perspective, the materials on record bearing on the claim of the petitioner institutions/colleges for confirmation of the conditional letters of permission granted to them require a fresh consideration to obviate the possibility of any injustice in the process.

25. In the above persuasive premise, the Central Government is hereby ordered to consider afresh the materials on record pertaining to the issue of confirmation or otherwise of the letter of permission granted to the petitioner colleges/institutions. We make it clear that in undertaking this exercise, the Central Government would re-evaluate the recommendations/views of the MCI, Hearing Committee, DGHS and the Oversight Committee, as available on records. It would also afford an opportunity of hearing to the petitioner colleges/institutions to the extent necessary. The process of hearing and final reasoned decision thereon, as ordered, would be completed peremptorily within a period of 10 days from today. The parties would unfailingly co-operate in compliance of this

direction to meet the time frame fixed.

26. Let these matters be listed on 24.8.2017.

.....J.
[Dipak Misra]

.....J.
[Amitava Roy]

.....J.
[A.M. Khanwilkar]

New Delhi;
August 1, 2017.

ANNEXURE-C22
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WP(C) 411/17

ITEM NO.12 COURT NO.2 SECTION X

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition (Civil) No.411/2017

GLOCAL MEDICAL COLLEGE AND SUPER SPECIALITY HOSPITAL AND RESEARCH CENTRE — Petitioner(s)

VERSUS

UNION OF INDIA & ANR. — Respondent(s)

WITH W.P.(C) No. 438/2017 (X)
(With appln.(s) for ex-parte stay and clarification/direction)
W.P.(C) No. 437/2017 (X)
(With appln.(s) for ex-parte stay and clarification/direction)
W.P.(C) No. 432/2017 (X)
(With appln.(s) for clarification/direction and prayer for interim relief)
W.P.(C) No.430/2017
(With appln.(s) for appropriate orders/directions)
W.P.(C) No.436/2017 (X)
(With appln.(s) for appropriate orders/directions)
W.P.(C) No.442/2017 (X)
(With appln.(s) for appropriate orders/directions and clarification/direction)
W.P.(C) No.441/2017 (X)
(With appln.(s) for appropriate orders/directions)
W.P.(C) No.450/2017 (X)
(With appln.(s) for appropriate orders/directions)
W.P.(C) No.445/2017 (X)
(With appln.(s) for appropriate orders/directions and clarification/direction)
W.P.(C) No.448/2017 (X)
(With appln.(s) for appropriate orders/directions)
W.P.(C) No.468/2017 (X)
(With appln.(s) for stay and appropriate orders/directions)
W.P.(C) No.477/2017 (X)
(With appln.(s) for appropriate orders/directions)
W.P.(C) No.511/2017 (X)
(With appln.(s) for ex-parte stay and permission to file additional documents)
W.P.(C) No.496/2017 (X)
(With appln.(s) for stay)
W.P.(C) No.514/2017 (X)
(With appln.(s) for ex-parte stay and appropriate orders/directions)

W.P.(C) No.515/2017 (X)
(With appln.(s) for appropriate orders/directions)
W.P.(C) No.525/2017 (X)
(With appln.(s) for appropriate orders/directions)
W.P.(C) No.533/2017 (X)
(With appln.(s) for stay and clarification/direction)

Date : 24-08-2017 These matters were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE DIPAK MISRA
HON'BLE MR. JUSTICE AMITAVA ROY
HON'BLE MR. JUSTICE A.M. KHANWILKAR

For Petitioner(s) Mr. S.G. Hasnain, Sr. Adv.
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Mr. Amit Kumar, AOR
Mr. Avijit Mani Tripathi, Adv.
Mr. Atul Kumar, Adv.
Mr. Shaurya Sahay, Adv.
Ms. Rekha Bakshi, Adv.
Ms. Vidisha Kumar, Adv.
Mr. Abhishek Vashisht, Adv.
Mr. Ayush Chaurasia, Adv.

Mr. V.K. Vishwanathan, Sr. Adv.
Mr. Amit Kumar, AOR
Mr. Avijit Mani Tripathi, Adv.
Mr. Atul Kumar, Adv.
Mr. Shaurya Sahay, Adv.
Ms. Rekha Bakshi, Adv.
Ms. Vidisha Kumar, Adv.

Mr. R. Basant, Sr. Adv.
Mr. A. Ramesh, Adv.
Mr. Amit Kumar, AOR
Mr. Syed Ahmad Naqvi, Adv.
Mr. Shaurya Sahay, Adv.
Ms. Shilpi Gupta, Adv.

Mr. Mukesh Rohatgi, Sr. Adv.
Mr. G. Umapathy, Adv.
Mr. Rakesh K. Sharma, AOR
Mr. A. Leo G. Rozario, Adv.

Mr. Aditya Singh, Adv.

Mr. V. Giri, Sr. Adv.
Mr. G. Umapathy, Adv.
Mr. Rakesh K. Sharma, AOR
Mr. A. Leo G. Rozario, Adv.
Mr. Aditya Singh, Adv.

Mr. Kapil Sibal, Sr. Adv.
Mr. Gaurav Bhatia, AOR
Mr. Utkarsh Jaiswal, Adv.
Mr. Abhishek Singh, Adv.

Dr. Rajeev Dhawan, Sr. Adv.
Mr. Ranjan Kumar Pandey, AOR
Mr. K.P. Gautam, Adv.
Mr. Sandeep Bisht, Adv.
Mr. Anshuman Bhadur, Adv.

Mr. Raju Ramachandran, Sr. Adv.
Mr. Amitesh Kumar, Adv.
Mr. Shashank Shekhar Singh, Adv.
Ms. Priti Kumari, Adv.
Ms. Babita Kushwaha, Adv.
Mr. Mritunjay Kumar Sinha, AOR

Mr. C.A. Sundaram, Sr. Adv.
Mr. Amitesh Kumar, Adv.
Mr. Shashank Shekhar Singh, Adv.
Ms. Priti Kumari, Adv.
Mr. Mritunjay Kumar Sinha, AOR

Mr. Rohit Bhat, Adv.
Mr. V. Shyamohan, AOR
Mr. Surya Prakash, Adv.

For Respondent(s) Mr. Maninder Singh, ASG
Mr. Ajit Kumar Sinha, Sr. Adv.
Mr. R.K. Rathore, Adv
Mr. Vibhu Shanker Mishra, Adv.
Mr. Gurmeet Singh Makker, AOR

Mr. Vikas Singh, Sr. Adv.
Mr. Gaurav Sharma, AOR
Ms. Amandeep Kaur, Adv.
Mr. Prateek Bhatia, Adv
Mr. Dhawal Mohan, Adv.
Ms. Deepeika Kalia, Adv.
Mr. Himanshu, Adv.

UPON hearing the counsel the Court made the following

O R D E R

W.P.(C) No.411/2017

Let the matter be listed after three weeks.

In the meantime, the bank guarantee shall not be encashed. However, the same shall be kept alive.

W.P.(C) No.438/2017

Heard Mr. Mukul Rohatgi, learned senior counsel for the petitioner, Mr. Maninder Singh, learned Additional Solicitor General for the Union of India and Mr. Vikash Singh, learned senior counsel for the Medical Council of India.

Hearing concluded.

Judgment reserved.

In the meantime, the bank guarantee shall not be encashed. However, the same shall be kept alive.

W.P.(C) No.437/2017 & W.P.(C) No.441/2017

Mr. Maninder Singh, learned Additional Solicitor General shall file an affidavit/reply within two weeks hence. Needless to say, the Medical Council of India is at liberty to file the reply.

List the matter after two weeks.

In the meantime, the bank guarantee shall not be encashed. However, the same shall be kept alive.

W.P.(C) No.432/2017

Issue notice.

As Mr. Maninder Singh, learned Additional Solicitor General and Mr. Vikas Singh, learned senior counsel has entered appearance on behalf of the respondents, no further notice need be issued.

List the matter along with Writ Petition (C) No.450 of 2017.

In the meantime, the bank guarantee shall not be encashed. However, the same shall be kept alive.

W.P.(C) No.430/2017 & W.P.(C) No.436/2017

Learned counsel appearing for the petitioners submits that the Central Government has passed an order dated 10th August, 2017, in favour of the petitioner-Institution.

In view of the aforesaid, nothing survives to be adjudicated in these writ petitions. The same are, accordingly, disposed of.

Writ Petition (C) No.442/2017

Mr. Amit Kumar, learned counsel appearing for the petitioners seeks leave of this Court to withdraw the writ petition to approach the High Court. The writ petition is permitted to be withdrawn.

W.P.(C) No.450/2017

In the course of hearing, Mr. Mukul Rohatgi, learned senior counsel appearing for the petitioner has submitted

that the deficiencies that has been pointed out in the case of the petitioner-Institution is absolutely marginal and there was no justification not to accept the shifting of patients to Oncology department because of short circuit. Additionally, he has drawn our attention to the decision dated 31st May, 2017 of the Central Government in respect of Mayo Institute of Medical Sciences, Barabanki. He has also drawn our attention to the letter dated 7th July, 2017, which has been written by the Medical Council of India to the Secretary to the Government of India, Ministry of Health & Family Welfare. It is propounded by him that there has been deficit with regard to the occupancy and many other defects. The said institution had been extended the benefit of permission. It is also urged that similar benefit has been given to thirty other institutions.

Mr. Maninder Singh, learned Additional Solicitor General for the Union of India shall file an affidavit of the Secretary, Ministry of Health and Family Welfare, Government of India, within two weeks hence, stating as to how the Letter of Permission was granted, so that the basis on which the said benefit was extended to the said Institutions, shall also be extended to the petitioner-Institution herein.

List the matter after two weeks.

In the meantime, the bank guarantee shall not be encashed. However, the same shall be kept alive.

W.P.(C) No.448/2017

Heard Mr. P.S. Patwalia, learned senior counsel for the petitioner, Mr. Maninder Singh, learned Additional Solicitor General for the Union of India and Mr. Vikash Singh, learned senior counsel for the Medical Council of

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India.

Hearing concluded.

Judgment reserved.

In the meantime, the bank guarantee shall not be encashed. However, the same shall be kept alive.

W.P.(C) No.468/2017

Heard Dr. Rajeev Dhawan, learned senior counsel for the petitioner, Mr. Maninder Singh, learned Additional Solicitor General for the Union of India and Mr. Vikash Singh, learned senior counsel for the Medical Council of India.

Hearing concluded.

Judgment reserved.

In the meantime, the bank guarantee shall not be encashed. However, the same shall be kept alive.

Writ Petition (C) No.477/2017

Heard Mr. R. Basant, learned senior counsel for the petitioner.

Having heard learned counsel for the petitioner, we do not perceive any merit in this writ petition and the same is, accordingly, dismissed.

Writ Petition (C) No.511/2017

Learned counsel for the petitioner submits that the Central Government has already granted the permission to the petitioner-Institution.

In view of the aforesaid, nothing remains to be adjudicated in this writ petition. The writ petition is, accordingly, disposed of. There shall be no order as to costs.

The bank guarantee submitted to the Medical Council of India, if not enchased, shall be returned to the petitioner and in case it has been encashed, a bank draft of the same amount shall be refunded within two weeks hence.

Writ Petition (C) Nos.445/2017, 496/2017, 514/2017, 515/2017, 525/2017 & 533/2017

Let these matters be listed on 28th August, 2017.

(Chetan Kumar)
Court Master

(H.S. Parasher)
Assistant Registrar

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

ANNEXURE-C23

Court No. - 2

Case :- MISC. BENCH No. - 19870 of 2017

Petitioner :- Prasad Education Trust, Lucknow Thru. Its Chairman & Anr.
Respondent :- Union Of India Thru. Its Secretary,Min.Of Health & Family We
Counsel for Petitioner :- Rishabh Kapoor,Atul Dr. L.P. Mishra
Counsel for Respondent :- C.S.C.,A.S.G.,Gyanendra Kumar Srivastav,Sanjay Bhasin

Hon'ble Shri Narayan Shukla,J.
Hon'ble Virendra Kumar-II,J.

Heard Dr. L.P. Mishra, learned counsel for the petitioner, Mr. Gyanendra Kumar Srivastava, learned counsel for the respondent No.2 as well as Mr. S.B. Pandey, learned Assistant Solicitor General of India. The writ petition has been taken on Board on the request of Dr. L.P. Mishra, learned counsel for the petitioners being urgent one. It has been submitted that the last date of Mop-up counseling would be held on 27.08.2017, therefore, if this application is not taken up today it would become infructuous. The petitioners have assailed the order dated 10.08.2017 passed by the Ministry of Health and Family Welfare, whereby Government of India on the recommendations of the Hearing Committee has debarred the petitioners' College from admitting students for the period of two years i.e. from 2017-18 and 2018-19 and Medical Council of India to encash the Bank Guarantee of Rs.2 crores. The learned counsel for the petitioner, Dr. L.P. Mishra, has submitted that the Oversight Committee had examined the report submitted by the Medical Council of India and found that there was no discrepancy warranting disapproval, thus, confirmed LOP whereas by means of order impugned, the same very report has been made basis to debar the petitioner from admitting the students and the Medical Council of India has been permitted to encash the bank guarantee.

We are informed that the similar matters are engaging attention of the Hon'ble Supreme Court which are listed on 30 August 2017 before the Supreme Court. In the meanwhile the last date of popup counseling would be expiring on 27.08.2017. The learned counsel for the petitioner has submitted that if the petitioners' college is permitted to be delisted from the list of Colleges notified for counselling even after succession in the writ petition, he shall be no where to get the admission of students particularly for the current academic sessions."

Regard being had to the aforesaid submissions, we hereby direct to list this matter on 31.08.2017, in the meanwhile, the petitioners' college shall not be delisted from the list of colleges notified for counselling till the next date of listing i.e. 31 August 2017. Further the encashment of Bank Guarantee is also stayed till the next date of listing. It is clarified that on the basis of this order the petitioners shall have no right to claim any admission of the students.

List on 31.08.2017.
Order Date :- 25.8.2017
A.K. Singh
(Virendra Kumar-II, J.) (Shri Narayan Shukla,J.)

Let a certified copy of this order be provided to the learned counsel for the petitioners on payment of usual charges today itself.
Order Date :- 25.8.2017 A.K. Singh
(Virendra Kumar-II, J.) (Shri Narayan Shukla,J.)

TRUE COPY

ANNEXURE - C24
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SLP(C) 22427/17

ITEM NO.44 COURT NO.1 SECTION XI

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No.22427/2017

(Arising out of impugned final judgment and order dated 25-08-2017 in MB No. 19870/2017 passed by the High Court of Judicature at Allahabad, Lucknow Bench)

MEDICAL COUNCIL OF INDIA Petitioner(s)

VERSUS

PRASAD EDUCATION TRUST & ORS. Respondent(s)

Date : 29-08-2017 This petition was called on for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE PRAFULLA C. PANT
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD

For Petitioner(s) Mr. Gaurav Sharma, AOR
Ms. Amandeep Kaur, Adv.
Mr. Prateek Bhatia, Adv.
Mr. Dhawal Mohan, Adv.

For Respondent(s) Mr. Mukul Rohatgi, Sr. Adv.

UPON hearing the counsel the Court made the following
O R D E R

Heard Mr. Gaurav Sharma, learned counsel for the Medical Council of India and Mr. Mukul Rohatgi, learned senior counsel, who has entered caveat on behalf of the respondent-Trust.

It is submitted by Mr. Rohatgi that the respondent-Trust does not claim any benefit from the order passed by the High Court, except that the Medical Council of

India is not to encash the bank guarantee. We appreciate the fair submission of Mr. Rohatgi and direct that the bank guarantee shall not be encashed. As the present order is passed by us, the writ petition filed before the High Court shall be deemed to have been disposed of. Liberty is granted to the respondent to approach this Court under Article 32 of the Constitution of India.

The special leave petition is disposed of.

(Chetan Kumar)
Court Master

(H.S. Parasher)
Assistant Registrar

ANNEXURE-C25

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ITEM NO.1501 COURT NO.1 SECTION X
(For Judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition (Civil) No.445/2017

SHRI VENKATESHWARA UNIVERSITY & ANR. Petitioner(s)

VERSUS

UNION OF INDIA & ANR. Respondent(s)

Date : 01-09-2017 These matters were called on for pronouncement of Judgment today.

For Petitioner(s) Mr. Gaurav Bhatia, AOR
Mr. Utkarsh Jaiswal, Adv.
Mr. Abhishek Singh, Adv.

For Respondent(s) Mr. Maninder Singh, ASG
Mr. Ajit Kumar Singh, Sr. Adv.
Mr. Vipin Kumar, Adv.
Mr. G.S. Makker, Adv.

Mr. Gaurav Sharma, Adv.
Mr. Dhawal Mohan, Adv.
Mr. Prateek Bhatia, Adv.
Ms. Amandeep Kaur, Adv.

Hon'ble the Chief Justice pronounced the judgment of the Bench comprising His Lordship, Hon'ble Mr. Justice Amitava Roy and Hon'ble Mr. Justice A.M. Khanwilkar.

In terms of the signed reportable judgment, the following directions were passed:-

"Though we have so held, yet we think it appropriate that the students who have been admitted in the Institution for the academic

session 2016-2017, shall continue their studies. The MCI shall send the inspecting team to the Institution within a period of two months. After the report is filed, the MCI shall apprise the Institution with regard to the deficiencies and give a date for removal of the same so that the Institution would be in a position to do the needful. We may hasten to add that the inspection that will be carried out and the further follow up action shall be done for the academic session 2018-2019.

As we intend to appreciate the inspection report and the deficiencies and the action taken up thereon by the Institution, list the matter on 15th November, 2017. The renewal application that was submitted for the academic session 2017-2018 may be treated as the application for the academic session 2018-2019. The bank guarantee which has been deposited shall not be encashed and be kept alive.

(Chetan Kumar)
Court Master

(H.S. Parasher)
Assistant Registrar

(Signed reportable judgment is placed on the file)

ANNEXURE - C26

ITEM NO.107 COURT NO.1 SECTION X

337

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition (Civil) No.797/2017

PRASAD EDUCATION TRUST & ANR. Petitioner(s)

VERSUS

UNION OF INDIA & ANR. Respondent(s)

Date : 04-09-2017 This petition was called on for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE A.M. KHANWILKAR
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD

For Petitioner(s)
Mr. P.S. Patwalia, Sr. Adv.
Mr. Amit Kumar, AOR
Mr. Avijit Mani Tripathi, Adv.
Mr. Shaurya Sahay, Adv.
Ms. Rekha Bakshi, Adv.

For Respondent(s)
Mr. Maninder Singh, ASG
Mr. R. Balasubramanian, Adv.
Mr. Prabhas Bajaj, Adv.
Mr. Akshay Amritanshu, Adv.
Ms. Aarti Sharma, Adv.
Mr. Santosh Kr. Pandey, Adv.

Mr. Vikas Singh, Sr. Adv.
Mr. Gaurav Sharma, Adv.
Ms. Amandeep Kaur, Adv.
Mr. Prateek Bhatia, Adv.
Mr. Dhawal Mohan, Adv.
Ms. Deepeika Kalia, Adv.

UPON hearing the counsel the Court made the following

O R D E R

Let a copy of the petition be served on Mr. Gaurav Sharma, learned counsel for the Medical Council of India and Mr. R.K. Rathore, learned counsel for the Union of India.

List the matter on 11th September, 2017.

The bank guarantee shall not be encashed in the meantime.

(Chetan Kumar)
Court Master

(Shakti Parkash Sharma)
Assistant Registrar

ANNEXURE -C27
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ITEM NO.62 COURT NO.1 SECTION X

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(s)(Civil) No(s). 797/2017

PRASAD EDUCATION TRUST & ANR. Petitioner(s)

VERSUS

UNION OF INDIA & ANR. Respondent(s)

Date : 11-09-2017 This petition was called on for hearing today.

CORAM : HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE A.M. KHANWILKAR
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD

For Petitioner(s) Mr. P.s. Patwalia, Sr. Adv.
Mr. Amit Kumar, AOR
Mr. Avijit Mani Tripathi, Adv.
Mr. Kumar Abhishek, Adv.

For Respondent(s)

UPON hearing the counsel the Court made the following
O R D E R

Let the matter be listed on 18.9.2017.

(Gulshan Kumar Arora)
Court Master

(Shakti Parkash Sharma)
Assistant Registrar

Signature Not Verified
Digitally signed by GULSHAN KUMAR ARORA
Date: 2017.09.11 16:35:33 IST
Reason:

TRUE COPY

ANNEXURE - C28
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WP(C) 797/2017

ITEM NO.42 COURT NO.1 SECTION X

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition (Civil) No.797/2017

PRASAD EDUCATION TRUST & ANR. Petitioner(s)

VERSUS

UNION OF INDIA & ANR. Respondent(s)

Date : 18-09-2017 This petition was called on for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE A.M. KHANWILKAR
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD

For Petitioner(s) Mr. P.S. Patwalia, Sr. Adv.
Mr. Amit Kumar, AOR
Mr. Shaurya Sahay, Adv.

For Respondent(s) Mr. Maninder Singh, ASG

Mr. Vikas Singh, Sr. Adv.
Mr. Gaurav Sharma, Adv.
Mr. Dhawal Mohan, Adv.
Mr. Prateek Bhatia, Adv.
Ms. Amandeep Kaur, Adv.

UPON hearing the counsel the Court made the following
O R D E R

Heard Mr. P.S. Patwalia, learned counsel for the petitioners, Mr. Maninder Singh, learned Additional Solicitor General for the Union of India and Mr. Vikas Singh, learned senior counsel along with Mr. Gaurav Sharma, learned counsel for the Medical Council of India.

This Court on 1st September, 2017, in *Shri Venkateshwara University and Another* vs. *Union of India and*

Another in W.P.(C) No.445 of 2017, had passed the following directions:-

> "Though we have so held, yet we think it appropriate that the students who have been admitted in the Institution for the academic session 2016-2017, shall continue their studies. The MCI shall send the inspecting team to the Institution within a period of two months. After the report is filed, the MCI shall apprise the Institution with regard to the deficiencies and give a date for removal of the same so that the Institution would be in a position to do the needful. We may hasten to add that the inspection that will be carried out and the further follow up action shall be done for the academic session 2018-2019. The renewal application that was submitted for the academic session 2017-2018 may be treated as the application for the academic session 2018-2019. The bank guarantee which has been deposited shall not be encashed and be kept alive."

In view of the aforesaid, we direct that there shall be no renewal for academic session 2017-2018. That apart, it is necessary to mention that Medical Council of India shall send the inspecting team to the Institution as per the schedule for consideration of grant of LOP for the academic year 2018-2019. The bank guarantee which has been deposited shall not be encashed and be kept alive.

The writ petition is, accordingly, disposed of.

(Chetan Kumar)
Court Master

(Shakti Parkash Sharma)
Assistant Registrar

ANNEXURE-C29 341

FIRST INFORMATION REPORT
(Under Section 154 Cr. P.C.)

Sr.No.11

Book No.: 1064

1. District: New Delhi P.S.: AC.III. Year: 2017
   FIR No.: 10(A) Date: 19.09.2017.
2. (i) Act: IPC Sections:
   (ii) Act: P.C. Act.1988 Sections: 8.
   (iii) Act: IPC Sections: 120-B
   (iv) Other Acts and Sections:-
3. Occurrence of offence:-
   (a) Suspected Offence:- Gratification by corrupt or illegal means to influence a public servant
   (b) Day: Date Time
   (c) Information received at P.S.: Date Time
   Entry No. 5 Date: 19/09/2017, Time:5.0P.M. 4.Type of Information: Report, Type: Written/ Oral.
   Source.
5. Place of Occurrence: New Delhi.
   (a) Direction and Distance from the P. S.: N/A
   (b) Address: N/A.
   (c) In case, outside the limit of this P. S., then
   Name of PS. District.
6. Complainant/ Informant . Source
   (a) Name:
   (b) Father's / Husband Name:
   (c) Date of Birth:
   (d) Nationality:
   (e) Passport particulars: Date of Issue:
   Place of issue
   (f) Profession:
   (g) Address:

7. Details of known/ suspected/ unknown accused with full particulars:

(Attached separate sheet, if necessary)

(1) Shri I,M Quddusi, Retd. Justice of the High Court of Odisha.

(2) Smt. Bhawana Pandey r/o: N-7, G.K-1, New Delhi (Private Person).

(3) Shri B.P. Yadav (Private Person).

(4) Shri Palash Yadav (Private Person).

(5) Shri Sudhir Giri (Private Person).

(6) Shri Biswanath Agarwala R/o: HIG-136, Phase-1, Kanan Vihar, Chandrashakerpur, Bhubaneshwar, Odisha (Private Person).

(7) Other unknown public servants and private person.

8. Reason for delay in reporting by the Informant /Complainant: N/A.

9. Particulars of Properties Stolen(Attach separate sheet, if necessary).

10. Total value of Properties Stolen.

11. Inquest Report/U.D. Case No. if any:

12. First Information contents (Attach separate sheet, if required)

13. Action taken: Since the above information reveals commission of offence(s) u/s as mentioned at Item No.2

(1) Registered the case accordingly and the investigation or RC 10(A)/2017-AC.III registered.

(2) Directed (Name of IO): Smt Neelam Singh.

Rank No: Dy. Supdt. of Police.

(3) Refused investigation due to N/A.

(4) Transferred to PS District on point of jurisdiction.

FIR read over to the Complainant/ Informant , admitted to be correct, recorded and copy given to the Informant / Complainant free of cost.

R.O.A.C.

14. Signature /Thumb impression Of the Complaint/informant

Signature of Officer in -charge
Police Station
Name (R Gopala Krishna Rao)
Rank Superintendent Of Police
CBI,AC.III, New Delhi

15. Date & Time of despatch to the Court:

Signature & Seal of the Inspector of Police,
Police Station:

INFORMATION

A reliable information has been received that Shri B P Yadav and Shri Palash Yadav are managing the affairs of Prasad Education Trust Lucknow which runs the Prasad Institute of Medical Science, Sarai Shahzadi Banthara Kanpur Raod Lucknow .UP Information revealed that the aforesaid College is among 56 Colleges who have been barred by the Government from admitting Medical Students for the forthcoming 1 or 2 Year because of Substandard facilities and non fulfilment of the required criteria

Information further revealed that Shri B P Yadav have been pursuing this matter by having regular meetings in New Delhi and had challenged the debarment in the Apex Court in Writ Petition (c) 442/2017 The Apex Court in Writ Petition (C) NO: 411 of 2017 and connected writs vide its combined order dated)1st August 2017 had

directed the government to consider the materials on record afresh pertaining to the issue of confirmation or otherwise of the letter of permission granted to the petitioner colleges/institutions In compliance thereof .the Government afforded an opportunity Of hearing to the petitioner college and thereafter passed a reasoned decision dated 10th August 2017 to debar the college from admitting fresh students for the 2 Years 2017-2018 and 2018-2019 and also authorized MCI to encash the bank guarantee of Rs 2 Crores

Information further revealed that shri B P Yadav got in touch with shri I M Quddusi Retd. Justice Of the High Court Of Odisha and Smt. Bhawana Pandey r/o N-7 G.K - 1 New Delhi through Sh. Sudhir Giri Of Venkateshwara Medical College In Meerut and entered into criminal conspiracy for getting the matter settled Information Further revealed that the above mentioned order of the governments was initially challenged in the ongoing hearing in the aforesaid petition in the Apex Court by Prasad Education Trust.

Information further revealed that on the advice of Shri IM Quddusi the petition was withdrawn from the Apex Court And on 25.08.2017 Misc Bench 19870 of 2017 was filed

by Prasad Education Trust in Allahabad High Court The Allahabad High Court passed an order directing that the petitioners college shall not be delisted from the list of colleges notified for counselling till the next date of listing i e 31st August 2017 .Further the encashment of Bank Guarantee was also stayed till the next date of listing. it was further clarified that on the basis of the order, the petitioners shall have been right to claim any admission of the students.

information further revealed that the MCI approached the Hon'ble supreme court by way of SLP 22427 of 2017 against the aforesaid order which was disposed on 29th august, 2017 on the respondents submitting that the College does not claim any benefit from the order passed by the High Court. Further, as the current order was being passed by the Apex Court, the writ petition filed before the High Court shall be deemed to have been disposed of the respondent was granted liberty to approach the Apex Court further in this regard.

Information further revealed that Prasad Education Trust filed a Writ petition (Civil) No. 797/2017 in the Apex Court Shri B.P. Yadav in furtherance of the said conspiracy requested Shri I.M. Quddusi and Smt. Bhawana Pandey who assured to to get the matter settled in the Apex Court through their contacts and they further engaged Shri

Biswanath Agrawala a private person R/o HIG-136, Phase1, Kanan Vihar, Chandrashakerpur Bhubeneshwar, Odisha for getting the matter settled in the Apex Court Shri Biswanath Agrawal claimed very close contact with senior relevant public functionaries and assured that he would get the matter favourably settled. However, the demanded huge gratification for inducing the public servants by corrupt and illegal means in lieu of the aforesaid help.

Information further revealed that in pursuance of the aforesaid criminal conspiracy, Shri B.P. Yadav and Shri Palash Yadav along with Shri I.M. Quddusi Smt. Bhawana Pandey, Sh. Sudhir Giri are likely to meet Shri Biswanath Agrawala for delivering the agreed illegal gratification to Shri Biswanath Agrawala at Delhi shortly.

The above mentioned information discloses common of offences punishable under section 8 of the Prevention of Corruption Act, 1988 and section 12o-B of the IPC against Shri I.M. Quddusi, Smt. Bhawana Pandey, Shri B.P. Yadav, Shri Palash Yadav, shri Sudhir Giri, Shri Biswanath Agrawal and other unknown public servants and the private persons. Therefore, a Regular Case is registered against Shri I.M. Quddusi, Sbt bhawana Pandey, Shri B.P. Yadav, Shri Palash Yadav, Shri Sudhir Giri, Shri Biswanath Agrawala and other unknown public

servants and the private persons for the said offences and entrusted to Smt. Neelam Singh DSP, CBI, AC III, New Delhi for investigation.

sd/-(19.09.2017)

(R. Gopala Krishna rao)

Superintendent of Police

CBI/AC.III/New Delhi

Endst> No. 3/10(A)/2017-AC.III/4565

1. The Special Judge for CBI Case. Tis Hazari, Delhi
2. AD, CBI, New Delhi
3. HoZ/AC(HQ), CBI, New Delhi
4. Smt. Neelam Singh, DSP, CBI, ACIII, New Delhi

(TRUE COPY)

Q	हाँ हम कह रहे है कि वो तो बात छोड़ो, उसको तो अभी रहने दो, बताएँगे लेकिन main ये है कि उससे हमारी बात हुई थी जिसका तुम बता रहे थे दूसरा
V	हां जी
"	दुसरे वाले कि बात हुई थी हमारी
V	यादव वाला
Q	हाँ
V	हाँ उसमे, उनका कहा कौनसा मंदिर में है इलाहाबाद का मंदिर में है, दिल्ली का मंदिर में है
Q	नही नहीं मंदिर में किसी के नहीं है अभी तो होना है
V	हाँ हाँ हाँ ! तो उसका अब कर लीजिये बात वो तो कर देंगे, वो तो मेरा बात हुआ था वहाँ पर
Q	कहा है पक्का
V	हाँ हाँ उसमे आप एक काम अभी देखिये ना hundred percent ये तो, जो हमारा captain है captain का through में हो रहा है तो problem क्या है बोलिये
V	नहीं नही नहीं नहीं ! हम लोग कोई experiment लेंगे क्या आपके उमर, ये उमर में भी experiment लूँगा न, में लूँगा आपको तकलीफ़ में डालूगा, हमारा ऐसा नहीं है न न ! वो आप ले लीजिये सामान वो तुरंत करवा देंगे, उसमे जो भी कोई problem नहीं है
V	कोई प्रॉब्लम है भी तो वो खुद ही बोल रहे है कि, अभी कल वो ये जो इसका बात किये थे वो बोल रहे कि सौ आदमी दे देंगे रिव्यु allow कर देंगे, फिर बाकी का एक कंपनी का ढाई दे देंगे, तीन आप ले जायेगे, पचास आप लोग रखिये, ऐसा बोल रहे थे, जितना दो तीन कंपनी है कर देंगे
Q	ठीक है ठीक है
V	सौ आदमी पहले दे देंगे तो वो जो रिव्यु है allow हो जायेगा
V	इनका जो है दसरा वाला जो बोल रहे थे

Q	कितनी, कितनी books होगी करीब अंदाज़ा
V	कितना बेईमान है वो आप उनका अंदाज़ा , यहाँ पर सौ बही देंगे बाकि बही आपके पास रखेंगे , होने के बाद forward करेंगे
Q	अच्छा
V	ये आपका कितना बही में राज़ी हो रहे है देखिये पांच सौ बही , चार सौ बही
Q	आप बताये ना तो उसको बात करे फिर
V	उन्हें पता है वह हम लोग दो सौ बही बोलते है पांच सौ बही इनको बोल दीजिये , पांच सौ गमला ! हम लोग दो सौ गमला बोलगे वहाँ पर , सौ गमला देंगे सौ गमला बाद में देंगे
V	पांच सौ कहिये कीजिये वो जो काम है बहुत ही difficult है काम है हम लोगो को भी मिलना चाहिए , आपको हमको
Q	ठीक है ठीक है ठीक है
V	हाँ वो पक्का होगा पूरा बात हुआ है कोई प्रॉब्लम नहीं है
Q	ठीक है तो कल हमारी मुलाकात
V	अभी एक ही चीज़ पापा बोल रहे है एक ही चीज़ वो बोल रहे की अभी जो हमारा captain है ना उनका ..... all over India है जो भी काम है वो जो वो कर दे , करने के लिए तैयार है
V	हाँ हाँ हाँ पक्का करवाएंगे हम

Q = Quddussi

V= Vishwanath

Q	Yes I am saying, leave that bit aside, leave that right now, I will tell but the main thing is this that I spoke to him who you were referring to, that other
V	Yes
Q	We talked about the other one
V	The Yadav one
Q	Yes
V	Yes I think, in which is theirs, in which temple is it – Temple of Allahabad or Temple in Delhi
Q	No no it is not in any temple yet, now it needs to be
V	Yes yes yes! So now you can talk about it, he will do it. About that I have spoken about it there
Q	Has said for sure (pucca)
V	Yes yes. In that you see this one thing...100% this, our person who is our captain, it is being done through the captain, so what is the problem. Tell me?
V	No No No No! Will we experiment at your age, at this age also I will not experiment. If I do, I will put you in a problem. We don't have like this. No no. If you take the stuff, he will get it done immediately, there will be no problem in that.
V	Even if there is a problem he is himself saying, what he talked about yesterday, he said, 100 people will give...review will be allowed, then for the rest for one company they will give 2.5, 3 you will take, 50 you people keep, he was saying like this, whatever two or three companies are there, he will do
Q	Ok ok
V	If 100 people give first, then that review will be allowed
V	This other one of his...which he was saying...
Q	How many, about how many books will there be, around, approximately?
V	How dishonest he is, that you can guess, here he will give 100

	books,(bahi) the rest books(bahi) he will keep with you, after it is done, will forward it
Q	Alright
V	In how many books (bahi) is he becoming willing, see...500 books or 400 books (bahi)
Q	You tell then will speak to him again *[or]* you tell otherwise speak to him again
V	He knows that we people say 200 books (bahi). 500 books (bahi) you tell them, 500 gamla! We will say 200 gamla there, 100 gamla we will give, 100 we will give later
V	500 tell him to do. That work is very difficult work...we should also get, you and I
Q	Alright, alright, alright
V	Yes that will be done for sure. Have had a complete talk, there is no problem
Q	Ok so tomorrow we will meet
V	Now only one thing father is saying, one thing he is saying that, this captain of ours has ... all over India...whatever work there is, he is willing to do
V	Yes yes yes, for sure we will get it done

Q = Quddussi.

V = Vishwanath.

Q	हम कह रहे ह हमारे पास एक ह आए ह पहले से ह जान पहचान
Q	वो कह रहे ह उन्होंने अपना पिटीशन डाला था आज तो सोमवार की डेट लगाई है उन्होंने तो ये कह रहे है की कितना क्या होगा और कैसे होगा और दूसरी चीज की हमे कैसे विश्वास होगा की हाँ हमारा काम पक्का पक्का होगा ये भी बात है
V	ये मेडिकल वाले है क्या
Q	हाँ हाँ
V	हाँ तोह वो कमिंग मंडे को लगा है
V	हाँ तोह वो रिव्यु है ना
Q	न न, वो petition है article 32 का
V	हाँ हाँ हाँ! विश्वास तो मिलता नहीं है सामान देंगे तो काम तोह 100% हो जाएगा
Q	नहीं वो कह रहा है की पैसा हो तोह साथ जाये कि घर के नहर जाये कोई घर के अंदर जाये कोई घर के अंदर जाए कोई बात करे
V	नहीं वो सही बात ही लेकिन वो ठीक नै है वो जब आपको विश्वास नहीं कर रहा है हमको तो
Q	नहीं नहीं हमारा विश्वास तो कर रहे है लेकिन वो कह रहे है न कि दूसरा थर्ड पर्सन के पास मामला होगा तोह कैसे होगा क्यू कि वो कह रहे है कि अगर हम हमारा काम नहीं हुआ तो तब तो बिलकुल ही एक दम ही ख़राब हो जायेगी स्तिथि हमारी
V	नहीं नहीं काम तो होगा,नहीं.तो हम लोग क्या हम लोग को क्यू मने आग में कूदने के लिए इच्छा हो रहा है क्या बोलिये काम 100% होगा तभी तो इसको मदद कर रहा है
Q	हाँ देखिये देखलो आप ये बात हा हा हा
V	हाँ हाँ काम 100% हो जाएगा वहाँ पर हम लोग का अभी क्या बोलते है जो उनसे कुछ बात हुआ है तभी तो आपलोग को बोल रहे है नहीं तो क्यू बोलते हम लोग
Yadav	हाँ अच्छा भाई साहब वैरी वैरी सोरी मै उस दिन चला गया मै हाईकोर्ट चला गया था
V	हाँ जी जी जी
Yadav	मुझे पहचाना मै डी पी यादव बोल रहा हूँ
Yadav	तोह उस दिन हम हाईकोर्ट इस लिए गए थे कि भाई देखिये उस समय उसपे पैसे फसे थे नहीं मैंने क्लियर कट बात करी

Yadav	है ना तो इस लिए चले गए थे तो अब वहाँ से तो उन्होंने आदेश किया आप पे आके इनहोने खारिज कर दिया तो हम फिर से खारिज कर दिया इनहोने कहा फ्रेश पिटीशन डालो आर्टिकल 32 में फ्रेश पिटीशन डाला है उसकी डेट थी उसको उन्होंने बढ़ा के 11 तारीक कर दिया है तो हम का चाहते है कि कल हम आपका टिकट बनवा देते है और उस वार का सॉरी विस्वनाथ जी दूंगा मे आपको हूं अब ये काम हमारा करा दोगे आप
V	नहीं काम तो 100 क्या 500 % गारंटी है लेकिन सामान तो पहले देना होगा और वो मिलने को मना कर रहे है क्यू कि जो सरकार चल रहा चाय वाले का वो सबको नज़र कर रखा है वो प्रॉब्लम हो जायेगा
Yadav	हम मिलायेगे नहीं हम मिलना नहीं चाहते
V	हाँ मिलाने कि नहीं कि तो गर में जायेगे वो बोले कि वो सब दिखने का विश्वास नहीं कि काम तो 100 % कर देंगे तब बात हुआ था तो तभी तो हम दौड़ के गया था दौड़ के आया था जी
Yadav	नहीं नहीं ठीक है अग्रवाल जी तो हम आपकी टिकट भिजवा देते है कल आप आ जायेगे हाँ आप बताये तो कल हम आपको
Yadav	अरे में पहले से ही चाहता हो कन्फर्म हो जाए बहूत सारे लोग है तो तो मैं चाहता हो कि जज साहब से हमारे सम्बन्ध अच्छा है तो जज सबह कि बातों पे हम जयादा भरोसा करते है
V	नहीं नहीं हम तो कन्फर्म कर देंगे नहीं तो हम बोलते भी नहीं क्यू कि हम लोग यह काम रेस्टो जी देखिये ये मने कि ट्रेड के लिए जरूरत ही जरूरत है मेडिकल का आदमी कि जरूरत तो इसमें करने में कोई प्रॉब्लम नहीं है लेकिन कुछ क्या ही वहाँ पर कुछ वो लोग उनका वहा बिना प्रसाद लगाए कुछ नहीं होगा
Yadav	नहीं प्रसाद तो लेगेगा प्रसाद तो देंगे प्रसाद तो देना ही है
V	काम तो 100 % हो जायेगा लेकिन हम कल परसो बोलने नहीं जायेगे । वो आप सामान तैयार कीजिये .... दे देंगे तो हम लोग करवा देंगे ....100 % करवा देंगे .. कोई प्रोलेम नहीं है माल व तभी तो बोलेगे
Yadav	मतलब एडवांस रखना पड़ेगा
V	हाँ एडवांस उनको देना पड़ेगा । नहीं तो वो क्यू करेंगे आप बोलिये । इसमें तो कोई चीज़ कि लिखा पढ़ी नहीं होती । ये सब विशवास में चलता है दुनिया । वो करेंगे 100 %

Yadav	बताइये क्या देना पड़ेगा !! मेरा एक ही कॉलेज है मे दुसरे का भरोसा नहीं कर सकता हूं
V	एक का करवा दूंगा
Yadav	साफ़ से बता दो क्या दें पड़ेगा! हमारी ज्यादा कपैती तो नहीं है ! बात कराओ अब साहब हैं तो बात कराओ ! बात करते है साहब से
V	नहीं कोई प्रॉब्लम नहीं है ! हम करवा देंगे काम !
V	नहीं वो तो एक का बोले ! एक का तो हम बात किये थे वो तो बोले तीन ! 2.5 वहाँ देना है 50 अपना रखना है
Q	तोह एडवांस कितना देना है
V	एडवांस तो अब.... वो रिव्यु पिटीशन का उस समय बोले कि 100 आदमी दे दो ! रिव्यु अलो हो जाएगा तो आपको भी मालूम हो जाएगा ! फिर हम ...
Q	तो एक काम करलो न आप!! आप एक बात करलो इनका सोमवार का लगा है ! 3-4 दिन कि डेट आगे बढ़ा दो
V	तो कुछ आदमी भेज देंगे तो 3-4.... 2 आदमी दे दे तो 3-4 दिन का डेट बढ़ा देंगे
V	सोमवार को फाइनल ही करवा देंगे ! ये अपने को दे सामान कुछ ..2-2.5 ... प्रॉब्लम मैं है कुछ आर्डर करवा देंगे. पापा देखिये ना इधर का.. ना आपको प्रॉब्लम में डालेंगे ना मेरे को.. क्युकी वहाँ समा बात कर लेंगे नहीं पहोचेगा ना तो हमको बहुत प्रॉब्लम में फस जायेगा.... काम अगर नहीं कर पाएंगे तो इधर का सामान लौटा देंगे! काम नहीं करने का कोई चांस नहीं ! हमारा वहाँ क्लियर बात हुआ है कि अलो कर देंगे!
Q	लो बात करो इनसे
V	हाँ क्लियर बात हुआ है वो 3 का हिसाब से ! वो 3 से काम में करेंगे नहीं
Yadav	हेलो
V	हाँ जी वो हमलोग का लत टाइम भी बात हुआ था सर वो एक क लिए 3 मांग रहे थे! 3 देने से टोटल अलो कर देंगे जो प्रेयर मांगेंगे .... मे उनको बोले था वो 5 क उससे टाइम बात कर रहे थे क ईटो 15 क बात वो कर रहे थे लास्ट टाइम भी वही बात कर रहे थे
Yadav	तो पूरा पैसा एडवांस मैं जाएगा
V	सर मे वहाँ पे कोई रिस्क नहीं लेना चाहता हूं क्यू कि वो 100% गारंटी

	काम है आप वहाँ दे देंगे ना आपका काम 100% गारंटी हो जीएगा.. किन्तु परन्तु कुछ नै ही नै! क काम हो जाएगा तो उसके बाद मैं सर 10-15 महीने बैठेंगे 14-15 काम करवाइये आपको भी विश्वास हो जाएगा! वो 101% कर देंगे.
Yadav	तो कब मे दे दूँ ! बताओ
V	११ तारीक को है तो हम अभी ७-८ तारिक को पहुंच सकता हो करवा देंगे आपका ११ तारिक को काम ही ख़तम हो जायेगा
Yadav	२.५ तक करवा दो न यार २.५ तक मेरी कैपेसिटी है करवा दो
V	सर आपको हम झूठ नहीं बोलते ५ क १८ से से बात हुआ था फिर लास्ट में ३ के हिसाब से १५ से बात हुआ था वो हम उनको कन्विंस क करवा कि और चार आएंगे
Yadav	सुनिए आप हमसे २ अभी ले लीजिये और जैसे ही आर्डर मिल जायेगा एडमिशन कर लगे हम जज साहब के यहाँ १ करोड पहुंचा देंगे आपके यहाँ क़ुदसी साहब के यहाँ इस तरह से करवा दीजिये
V	सर में बात करके सुबह आपको कन्फर्म करता हो उनसे बात करके हम नहीं बोलोगे
Yadav	क्यू कि हमारे पास अभी पैसे क तकलीफ है २ हम अभी दे देंगे और १ रुपये ५ -७ दिन ८ दिन क समय दे दीजिये एडमिशन शहुरू हो जायेगा हम पंहुचा देंगे साहब के यहाँ साहब हमम् इतनी गारंटी ले लगे आप पॉच लीजिये
V	में उनसे बात कर लेता हो सुबह आपको कन्फर्म कर डोगा
Yadav	हाँ हेलो
V	हाँ पाप में उसको बोलै कि सुबह आपसे बात करता हो वह बोले कि २ अभी दे देंगे और एक कुछ नहीं तो हम बोलो कि

TRANSLATED TRANSCRIPT.

Date: 04.09.2017

Quddussi	I am saying that I have someone I know from before *or* I am saying that someone I know from before has approached me
Q	They say they filed their petition. Today they have given a date for Monday. They are asking when- how much will it be and how and secondly how can they believe their work will be done for sure.
Vishwanath	Are these those medical people?
Q	Yes yes
V	Yes, so the date is listed for the coming Monday?
V	Yes so that is review ?
Q	No no it'sa petition under art 32
V	Yes yes yes. There is no such assurance/guarantee. If they give the stuff work would be done 100%.
Q	No he's is saying that if money is there then someone should go inside the house, someone should talk.
V	No that is right, but it is not ok when he is not trusting us.
Q	No no they are trusting us, but they are saying if the matter is with a third person, then how will it be done. Because they are saying if our work is not done our situation would become very bad.
V	No no work will be done. Otherwise are we people who want to jump into fire. Tell them work will be done 100% that's why he/they are being helped.
Q	Yes, you see, you this thing. Hahaha
V	Yes, yes work would be done 100%. There we people spoke to them and that's why we are speaking to you, otherwise we wouldn't be saying this
Yadav	Yes, sir, very very sorry, I left that day. I had gone to the High Court
V	Ha, yes, yes, yes
Yadav	Recognize me? This is DP Yadav speaking.
Yadav	So that day I had gone to the High Court because, see brother, that time on/in it money was stuck. No I spoke/said very clearly.That's why we went. From there they/he gave an order. After coming here,

	they dismissed it. They/he said to file a fresh petition. Under article 32 a fresh petition has been filed. It had a date set, the date was pushed to the 11th by them/him. So what we want is that tomorrow we make your ticket and for that sorry. Vishvanath Ji I will give it to you, now you get our work done for us.
V	No, the work is not even 100% but 500% guarantee. But the luggage will have to be given before and he/they is/are saying no to meeting because the government that is going on - Tea seller's government. That is watching everyone, that is the problem
Yadav	I wont make him meet. I don't want to meet.
V.	Yes not for meeting. That they/he will go home, they/he said that they/he don't believe they will see everything/ does not believe everything he sees. That the work will be done 100%, the conversation happened then. So that's why I went running and came running.
Yadav.	No no its ok. Agrawal Ji so we will send send your ticket. Tomorrow you come. Okay you tell us tomorrow
Yadav	Arey, I wanted from first that confirmation happens. Every one is weird. So I want that we have good relations with the judge. So that we trust the judge's words more.
V	No no we/I will confirm it. Otherwise we/I wouldn't say it, because we are doing this work –(Resto ji?) It is very necessary for the trade. Medical people are necessary, there is no problem in that. But the people there, nothing will happen if Prasad is not give.
Yadav.	No Prasad will be needed. We will give the Prasad. We have to give the Prasad.
V	Work will be done 100%, but I wont go to speak tomorrow or day after. You keep the luggage/stuff ready… if given we people will get it done 100%
Yadav	Meaning advance will have to be given
V	Yes, advance has to be given to them/him. Otherwise why will they/he do it, you say. There is no written- reading in these matters. All this runs on belief in this world. They/he will do it 100%.
Yadav	Tell me what has to be given. I have only one college I can't trust another.

V	Will get it done for 1.
Yadav	Tell me clearly, what will I have to give. We don't have much capacity. Make us speak, if boss/sir is there then make us speak, I will talk to boss/sir.
V	No there's no problem. We/I will get the work done.
V	No they/he said for 1. I had spoken for 1, they/he said three. 2.5 has to given there, 50 will be kept with us.
Q	So how much advance has to be given
V	Advance now... They/he said at that time, for review petition give 100 people. If the review is allowed, then even you will get to know. Then we....
Q	Then you do one thing. You do one thing. His is listed for Monday, postpone the date by 3-4 days.
V	So we will send a few people. So 3-4...if you give 2 people then we will extend the date by 3-4 days.
V	On Monday we will finalize. They give us the luggage/stuff(saamaan) – some 2-2.5; no problem some order will be given. Papa see here. Neither will it put you in a problem nor will it put me. Because there the association will talk. Won't reach, othwerwise we will be stuck in a lot of problems. If we are not able to do the work, then we will return the luggage/stuff (saamaan) that is here. There is no chance that work will not be done. There we have spoken clearly, that it will be allowed.
Q	Here, talk to them/him.
V	Yes,conversation was clear. Calculated as per three. They/he wont do it for less than 3.
Yadav	Hello
V	Yes, we had spoken last time also. Sir for 1 they were asking for 3. If 3 is given total will be allowed to those ask for prayers. I told him, he was talking about 5 at the time. They/he were speaking of 15bricks, even last time they were speaking about that only.
Yadav	So all the money will go in advance.
V	Sir I don't want to take any risk there, because it'sa 100% guarantee job. If you give it there, your work will be done 100% guarantee. No ifs and buts. Once work Is done, sir will sit for 10-15 months. Get 14-

	15 jobs done, even you will believe it. He will do it 101%.
Yadav	So when should I give, tell me.
V	Date is 11th, so if it can reach us by 6-7th we will get it done. Your work will get done by the 11th.
Yadav	Do it within 2.5 yaar, my capacity is only till 2.5. get it done.
V	Sir I don't lie. First it was 5 for 18, then after talking, in the end it came to calculation 3 for 15. We convinced him that 4 more would come.
Yadav	Listen, you take 2 from us now and as the order is given. We will get the admission; we will send 1 crore to the judge. Your place, Quddussi sir's place, do it this way.
V	Sir I will talk and confirm it in the morning.
Yadav	Because even now we have a money problem. 2 we will give now and 1 rupee give me 5-6 or 7 days. When admission starts we will send it to sir's place. Sir we will take this guarantee, you take 5.
V	I will talk to him, confirm it to you in the morn.
Yadav	Yes hello
V	Yes, pap. I told him I will talk to you in the morning. He said they will give 2 now and 1 …. (end).

Q = Quddussi.

V = Vishwanath.

ANNEXURE C32
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Livelaw

Will The Real CJI Dipak Misra Stand Up?How Will History Judge Him?

Manu Sebastian

1 Oct 2018 12:27 PM

"A man has as many social selves as there are distinct groups of persons about whose opinion he cares. He generally shows a different side of himself to each of these different groups", William James, American Philosopher & Psychologist.

Chief Justice of India Dipak Misra is demitting office after a tumultuous tenure, leaving behind a mixed legacy. Over his judicial career, CJI Misra was seen stating different things at different times, often contradictory to each other, lending credence to the theory that an individual is a colony of different selves.

For example, this is what Justice Misra said in November 2016 in the national anthem case:

"Be it stated, a time has come, the citizens of the country must realize that they live in a nation and are duty bound to show respect to National Anthem which is the symbol of the Constitutional Patriotism and inherent national quality. It does not allow any different notion or the perception of individual rights, that have individually thought of have no space. The idea is constitutionally impermissible"(emphasis supplied).

While ordering compulsory playing of national anthem in cinema halls, Justice Misra said that individually perceived notion of rights are not permissible.

Cut to 2018, we see CJI Misra offering paeans to individual autonomy and uniqueness in *Navtej Singh Johar* case, in a turnaround from the original position that individually perceived notion of rights was not constitutionally permissible.

"Irreplaceability of individuality and identity is grant of respect to self. This realization is one's signature and self-determined design. One defines oneself. That is the glorious form of individuality. Autonomy is individualistic. It is expressive of self-determination".

In 2015, while holding that poetic license does not extend to maligning historically respected figures like Gandhi, Justice Misra observed :

"The question would be whether the dramatist can contend that he has used them as symbolic voices to echo the idea of human fallacy and it's a creation of his imagination; and creativity has no limitation and, therefore, there is no obscenity. But, there is a pregnant one, the author has chosen historically respected persons as medium to put into their mouth obscene words and, ergo, the creativity melts into insignificance and obscenity merges into surface even if he had chosen a "target domain". He in his approach has travelled into the field of perversity and moved away from the permissible "target domain", for in the context the historically respected personality matters".

Using similar arguments, his judgment in 2016 upheld the constitutionality of criminal defamation under Section 499/500 IPC.

But in 2018, we see a different self of CJI Misra, who extends maximum possible protection to creative liberties,urging those who felt offended by writings to elevate themselves as a co-author to appreciate the merit of the work. While declining to ban the book "Meesha", Justice Misra observed :

"A creative work has to be read with a matured spirit, catholicity of approach, objective tolerance and a sense of acceptability founded on reality that is differently projected but not with the obsessed idea of perversity that immediately connects one with the passion of didacticism or, for that matter, perception of puritanical attitude. A reader should have the sensibility to understand the situation and appreciate the character and not draw the conclusion that everything that is written is in bad taste and deliberately so done to pollute the young minds. On the contrary, he/she should elevate himself/herself as a co-walker with the author as if there is social link and intellectual connect"(emphasis supplied).

An evaluation of his judicial career will show Justice Misra de-constructing and reconstructing his dispositions to assume the role of a fierce protector of individualism and liberties, mostly during his tenure as the CJI. Certainly, it is a sign of robust intelligence that one is able to act freely as per demands of the situation, contradicting and varying one's own previously held views. That is why Oscar Wilde once famously said, "*Consistency is the last refuge of the unimaginative*".

Is this transformation a result of pure shift in thought or due to extrinsic factors? In this context, it is relevant to refer to the narrative that the liberal mantle adopted by the Supreme Court in mid-eighties was its atonement for the sins of emergency[1]. It is said that Justice P N Bhagwati's somersault as a liberal crusader of social justice was mostly impelled by his need to expunge the image as someone who succumbed to the executive will during emergency, particularly in the ADM Jabalpur case[2]. Are there similar parallels in the image makeover of Justice Misra?

Volatile Tenure

Justice Dipak Misra's tenure as CJI from August 28,2017 will be marked as one of the most volatile phases of the Supreme Court. He would wish to obliterate a lot of events during his tenure from pubic memory, as they are unsavoury to his image. The most damaging is the "medical college bribery scam", which surfaced following CBI arrest of Justice I M Quddusi, retired judge of Orissa HC, on the allegation that he accepted bribe to fix a case concerning medical college of Prasad Education Trust at the Supreme Court. The issue got aggravated when it was known that CJI Misra had headed the bench which dealt with the matter. Two petitions were filed in the Supreme Court – one by CJAR & other by Advocate Kamini Jaiswal- seeking an SIT probe into the allegations.

A division bench headed by Justice Chelameswar termed the allegations "grave and serious" and referred the matter to be decided by a bench constituted by five senior-most judges, excluding the CJI. On November 10, the very next day, this order passed by the two-member bench headed by Justice Chelameswar was annulled by a hurriedly formed Constitution Bench led by CJI in a raucous hearing session marred by unprecedented

drama. This was the fastest ever Constitution Bench constituted in the SC history, with notice about sitting at afternoon published only at noon. Initially, a bench of seven judges was supposed to hear the matter; later, the composition was reduced to five judges, for reasons inexplicable.

"Master of Roster" Controversy

This marked the beginning of "Master of Roster Controversy". The annulment order of November 10 was passed by the five judges bench headed by CJI on the ground that CJI was the "master of roster" and hence a division bench headed by the second senior judge could not have constituted a bench to hear the matter. The question whether CJI could constitute a bench to consider a matter concerning allegations against the CJI himself was conveniently left unanswered by the November 10 bench. The unusual order passed on November 10 led to debates on the role of CJI as the "master of roster".

Many in the legal field feel that these events acted as a catalyst for the extra ordinary press conference of Justice Chelameswar, Justice Gogoi, Justice Lokur and Justice Kurian Joseph on January 12. During the news conference, Justice Chelameswar said that the *administration of the Supreme Court is not in order and many things which are less than desirable have happened in the last few months.*" Justice Chelameswar said: "*We owe a responsibility to the institution and the nation. Our efforts have failed in convincing CJI to take steps to protect the institution.*"

The press conference highlighted before the general public for the first time the issues regarding arbitrariness in allocation of cases by CJI. In the letter by the four judges, it was stated as follows:

"There have been instances where cases having far-reaching consequences for the Nation and the institution had been assigned by the Chief Justice of this Court selectively to the benches "of their preference" without any rationale basis for such assignment. This must be guarded against at all costs".

Impeachment Motion

CJI Dipak Misra is the only CJI so far to have faced the threat of impeachment motion. Seventy one opposition MPs of Rajya Sabha moved

an impeachment motion against him, over allegations of medical college bribery scam, misuse of 'master of roster' power, manipulation with orders issued on administrative side, and also an old case related to furnishing of false affidavit seeking land assignment from Orissa Government. The impeachment motion was rejected by Rajya Sabha Chairman at the threshold. The petition filed against the rejection motion was listed before a bench of five judges of SC. It was not clear who constituted the bench, and how a bench of five judges happened to be constituted at the first instance to hear a fresh petition. The petition was withdrawn after the petitioner's counsel Kapil Sibal declined to make submission before the five judges' bench without obtaining clarity as to how the bench happened to be constituted.

Judicial Appointments.

It is also widely felt that during his tenure CJI Misra was not standing up to the undue pressures exerted by the executive in the administrative affairs of judiciary. There was an instance where the Central Government was making interference with the appointment of a judge to the Karnataka High Court, bypassing the SC collegium. The issue got highlighted only when Justice Chelameswar wrote a letter condemning the government interference, and called for a full court meeting to discuss the issue.

Repeated over-turnings of SC collegiums' re-recommendations by Central Government was a regular fare during his tenure. Though the re-recommendations are binding on the Centre, many of them were ignored. Chief Justice Misra acted pliant, even in the face of such brazenness. When the recommendation of Justice K M Jospeh was returned by the Centre, through an unprecedented act of splitting up of Collegium recommendations, firm reactions were not forthcoming from the CJI Misra. One may recall the strong stand taken by former CJI R M Lodha, when similar attempts were made by the Centre with respect to recommendation of Gopal Subramaniam. With regard to Justice K M Joseph, CJI Misra did not act promptly to reiterate his name, and adjourned the resolution on several occasions. After high suspense, Justice Joseph's name was

recommended in August 2018, but along with two other judges, leading to an avoidable fiasco over his seniority.

He also could not resolve the stalemate over finalisation of Memorandum of Procedure for appointment of judges.

While previous CJIs like Justice Lodha, Justice Thakur, and Justice Khehar have been very active in voicing concerns about delay and interferences in judicial appointments, CJI Misra cannot be perceived as someone who actively addressed exceeding executive interference. Under his tenure the SC Collegium has been biting the bullets of repeated executive snubs, sending disconcerting signals about judicial independence.

At the same time, CJI Misra will be remembered for his initiative for publicising collegium resolutions and. bringing in semblance of transparency in collegium meetings.

Liberal-Progressive Judgments

Chief Justice Misra will be certainly remembered for many of his progressive judgments on individual liberties and free speech. CJI Misra's judgments in Hadiya and Khap Panchayat cases unequivocally state that religious or societal forces do not have any say in an individual's choice of partner, emboldening an individual to love and marry a partner of his/her choice, defying societal and communal pressures. His judgment in *Navtej Singh Johar* struck down Section 377 of IPC to hold that love should not be circumscribed by gender. In the judgments declaring the right to die with dignity and also in the verdicts decriminalising homosexuality and adultery, he expounded the theme of "individual autonomy".

That constitutional morality should guide governance was held by him in the AAP vs Delhi LG case; and that constitutional morality will supersede cultural morality was held in the Sabarimala case.

His judgments in *Padmavat, Priya Warrier* and *Meesha* cases reaffirm the guarantee of constitutional protection to creative liberties from perceived offences felt by groups of people.

He should be credited for affirming the transformative nature of Constitution which seeks to transform societal mores in tune with constitutional morality.

CJI Misra's deep concern for the protection of rule of law can be gathered from his guidelines against mob lynching and public vandalism.

There is a consistent thread of jurisprudence rooted in Constitutional Morality running through all these decisions.

Institutional Reforms

Certain institutional reforms heralded by CJI Misra are noteworthy. He took the decision to publicise collegium resolutions, and to upload them in SC website, to change the opaque nature of collegium meetings. Also, he stopped the practise of 'mentioning' by Senior Advocates, and ordered that it should be done only by Advocates on Record, as per their turn in queue. These decisions show that he is open to change.

He also took the decision to permit carrying mobile phones by journalists for live reporting. The decision taken by the bench presided by him to allow video telecast of court proceedings is also a ground breaking reform.

In this context, it may also be noted that it was the bench presided by him which ordered that FIRs should be uploaded online by police.

Debatable Judgments In Politically Sensitive Cases.

While CJI Misra should be commended for his progressive judgments and institutional reforms, it is tough to say whether similar zeal was exhibited by him in cases involving political stakes of the ruling front. The major examples are the Loya and Bhima Koregaon cases.

The grievance regarding allotment of Loya case was one of the reasons which triggered the judges' press conference. The Loya case was later withdrawn by the CJI to his own bench from the bench headed by Justice Arun Mishra. The judgment in Loya case, authored by Justice D Y Chandrachud for the bench headed CJI Misra, left gaping holes of unanswered questions and will remain a low point in the Indian judicial history.

In the Bhima Koregaon case, CJI Misra concurred with the judgment authored by Justice Khanwilkar to turn down plea for SIT probe. However, the majority judgment has several blindspots as it fails to address many

relevant issues which were considered by the strongly worded dissent of Justice Chandrachud.

Both the Loya case and Bhima Koregaon case are the ADM Jabalpur moments of modern day SC.

CJI Misra, who is otherwise voluble and proactive in cases concerning civil liberties, chose to maintain inscrutable silence in these two cases.

Giving Room For Intra-Court Appeals

Some of CJI Misra's actions in interfering with orders passed by other Division Benches border on judicial impropriety.

On 27th October,2017, a Division Bench comprising Justice A.K Goel and Justice U.U Lalit sought the Government's response, in a petition filed by R.P. Luthra, regarding the steps being taken to finalize the MoP to appoint judges. R.P. Luthra's petition, later, did not get posted before the same Division Bench that heard the matter first; instead, it was posted before a three judge-bench presided by the CJI. Even the hearing date fixed by the earlier DB was advanced. The CJI-Bench dismissed the matter, recalling the order passed by the Division Bench on 27th October.

The manner in which the CJI's bench dealt with Section 498A matter is contrary to usual procedure. When a PIL seeking appointment of women members in the Family Welfare Committee proposed by the Division Bench in *Rajesh Sharma* case was mentioned before the bench of CJI Misra, he expressed disapproval of *Rajesh Sharma* guidelines, and sought to revisit them in a 2015 PIL filed for strict action under Section 498A IPC. The proceedings were in effect an intra-court appeal against *Rajesh Sharma* directions. Though the ultimate result of the process - annulment of directions in *Rajesh Shamra* constituting Family Welfare Committees to scrutinize domestic violence complaints- was widely lauded, the process in which the same was done fails to meet standards of propriety.

Strategic Image Makeover?

The results of the liberal-progressive narrative launched by CJI Misra through his vision of transformative constitution are certainly welcome. However, the controversial background of his judicial career makes one

wonder whether it was a strategy for an image makeover, as attempted by the likes of Justice Bhagwati.

A careful examination of the bench composition of the Constitution Bench makes one wonder whether the composition was contrived to force intended results. For example, the benches which dealt with Section 377, Section 497 and Sabarimala cases had Justice Nariman and Justice Chandrachud, who are known to have liberal views. The Aadhaar bench had Justice A.K Sikri and Justice Ashok Bhushan, who had upheld PAN-Aadaar linkage in Binoy Viswom case earlier. Justice A M Khanwilkar, who is known to be a passive supporter of CJI Misra, was a common presence in all these benches.

The reasons for omitting Justice Nariman, or Justice Bobde and Justice S K Kaul (who had shown a fine grasp of technical issues related to internet privacy and data protection in Puttuswamy case) from Aadhaar bench are not known. It is also mysterious why Justice Chelameswar, who was part of the original bench which heard the Aadhaar matter and also the privacy case, was not part of the bench which ultimately decided the issue.

Deep probe of these questions are blocked by the declaration made by the bench of CJI that CJI is an institution in himself, who has complete powers to constitute benches as the master of the roster.

So how will history remember CJI Misra?

As a CJI on whom no-confidence was expressed by an open rebellion of four senior judges?

Or, as a CJI who heralded a liberal-progressive narrative of constitutional morality and individual autonomy?

As a CJI who faced allegations of bribery, mismanagement of SC administration and arbitrary allocation of cases of political importance and threat of an impeachment motion?

Or, as a CJI who acted on the transformative vision of constitution to reform social mores and norms superseding conventional morality?

As a CJI who did not impinge on the interests of ruling front in politically sensitive issues, and gave elbow room for the executive to meddle with judicial appointments ?

Or, as an erudite CJI with deep knowledge in all branches of law who was worked round the clock industriously to pen several landmark judgments to protect free speech ,creative liberties and rule of law?

Since it is a tough call to make, one can only go by CJI Misra's quote of Goethe in Navtej Johar judgment : *"I am what I am, so take me as I am"*

https://www.livelaw.in/will-the-real-cji-dipak-misra-stand-up/?infinitescroll=1

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ANNEXURE-C33

The Wire

Judicial Independence: Three Developments that Tell Us Fair is Foul and Foul is Fair

23 March, 2020

Madan B. Lokur

It was unwise for a CJI whose controversial tenure strengthened the perception that the judiciary could not take on the government on crucial issues, to have accepted the offer of a Rajya Sabha seat.

I'd like to ask Bob Dylan a question for which the answer is not blowing in the wind: How many straws does it take to break a camel's back?

This question arises in the context of the independence of the judiciary which has been tested over the last couple of years as never before, except during the Emergency. There has been debate and discussion with regard to administrative matters such as listing of cases and other serious issues such as the appointment and transfer of judges. By and large, the Supreme Court has left quite a few wondering what's going on and quite a few making comments that are critical, bordering on the attribution of suspicion and accusations of bowing down to the wishes of those not necessarily supportive of an independent judiciary.

1. Sealed cover non-jurisprudence

We have seen three developments during this period, with each one of them requiring a rethink and each one giving rise to that suspicion.

First, we saw the emergence of what is now called 'sealed cover jurisprudence'. In this, the court is handed over some papers in a sealed cover, the contents of which are not to be disclosed to anybody except the judges. This is recognised by the Evidence Act but it requires a procedure to be followed – an affidavit to be filed by the head of the concerned department claiming privilege. But, on a perusal of the documents, the claim of privilege can be upheld or overruled by the court. Theoretically (and only theoretically – since no one has seen these documents) a claim for privilege *could* have been upheld on the Rafale documents and *could* have been rejected on the detention report of children in Kashmir. Unfortunately, our judiciary has adopted an unacceptable practice of complete non-disclosure and the provisions of the Evidence Act have gone with the wind. On no occasion has the sealed cover procedure been adopted with a supporting affidavit claiming privilege.

Sure, the courts have called for documents in the past and have not disclosed the contents, as for example investigation reports. But this has been only to ensure that the investigation is proceeding in the right direction and is not influenced by extraneous factors or considerations. But on no occasion

has the decision of the court been based on undisclosed documents. This has happened now, and is objectionable. For example, the final Juvenile Justice Committee report on the detention of children in Kashmir were not disclosed to the petitioners or their lawyers and the petition was disposed of by the court on their perusal. The right to know and the right to information are now passé – secrecy is the name of the game in which the state has been given the upper hand by the courts.

The secrecy has extended to important administrative issues as well. The report of an inquiry in a sexual harassment allegation against a former Chief Justice of India (CJI) is in a sealed cover and the contents of the report have not even been disclosed to the complainant. Should she not even know what the report says?

A follow up report by a retired judge of the Supreme Court on an alleged conspiracy has also been kept in a sealed cover and we will never know if there a conspiracy or not. Why is there so much secrecy in this? Is the court trying to hide something unpalatable? Maybe. The complainant was dismissed before the inquiry but reinstated with full back wages after the inquiry. This makes sense only if there was some truth in her allegations of sexual harassment.

On the conspiracy question, if there was a conspiracy, why is the court not acting against the conspirators? On the other hand, if there is no conspiracy, is there any harm in disclosing the conclusion and the reasons for the conclusion? How about taking action against the person who alleged a conspiracy in so serious a matter? The entire episode starting from the Saturday hearing presided over by the accused person himself now seems to be a charade. Perhaps one day, Deep Throat will tell us the truth.

While the Supreme Court keeps documents and information in a sealed cover close to its chest and bases its decision on it (as in the case of children detained in Kashmir) it has disapproved the high court for following suit. Information contained in a sealed cover was used by the Delhi high court to keep a former cabinet minister and present member of parliament in detention. The Supreme Court said:

"..... in present circumstance we were not very much inclined to open the sealed cover although the materials in sealed cover was received from the respondent. However, since the learned single judge of the high court had perused the documents in sealed cover and arrived at certain conclusion and since that order is under challenge, it had become imperative for us to also open the sealed cover and peruse the contents so as to satisfy ourselves to that extent. On perusal we have taken note that ..... Except for recording the same, we do not wish to advert to the documents any further since ultimately, these are allegations which would have to be established in the trial wherein the accused/co-accused would have the opportunity of putting forth their case, if any, and an ultimate conclusion would be reached. *Hence in our opinion, the finding recorded by the learned judge of the high court based on the material in sealed cover is not justified.*" (emphasis added)

The Ayodhya judgment is a watershed for a different kind of secrecy. Perhaps for the first time, the specific author(s) of a judgment has not been disclosed. This is truly amazing. Of course, the judgment was unanimous, but then, why was there an addendum? Who authored the addendum? Only five people know the truth – the same number of people apocryphally believed to know the secret formula of Coca Cola.

A trend has been set and we have to wait and watch how far it goes.

2. Prioritising hearings

The Supreme Court also set an avoidable precedent in the hearing and prioritising of cases, particularly PILs.

The twin requirements that a PIL litigant must cross are: (i) show that she or he is a bona fide public interest petitioner and (ii) the cause canvassed is in public interest. It is for the court to take a decision on these threshold requirements. If the threshold is crossed on both counts, the court takes over the conduct of the case till its logical end – no conditions can, should, or are attached. Of course, if the court finds that even one of the requirements is not met, it will dismiss the petition.

The PIL petitioner usually assists the court, but even if she/he does not or creates a hurdle, the PIL petitioner can be replaced. This is precisely what transpired in a public interest petition filed by Sheela Barse who did not want to assist the court after a particular stage, but petitioned for permission to withdraw her PIL. The court did not grant her prayer, but substituted her with a legal aid body. Similarly and more recently, Harsh Mander was replaced by an *amicus curiae* when the court disallowed him from canvassing the cause of detenus in the detention centres in Assam, a cause in public interest. In other words, the public interest cause is more important than the petitioner.

Contrast this with the view expressed by the Supreme Court in a PIL pertaining to police atrocities against students protesting against the Citizenship (Amendment) Act. The court 'declined' to hear it till the violence stops. What was the basis on which the court concluded that the petitioners or the victims of police atrocities were responsible for the violence, or that they were powerful enough to stop it? Is it not possible to assume, conversely, that the violence would have been halted, by whoever was unleashing it, if the state had issued a statement that it will not implement the law for a few months? Perhaps that possibility was not considered and instead the citizens were put on the mat. Assuming the PIL petitioners were guilty of the violence, they could have been immediately substituted, following past precedent, by an *amicus curiae* and the hearing in the petition – that was clearly filed in public interest – could have proceeded.

Placing pre-conditions on hearing matters involving public interest is clearly inappropriate, particularly since most of such cases relate to issues concerning the depressed, underprivileged or disadvantaged sections of society. Again, the cause and not the person is important.

In this context, we have witnessed a 'fresh' definition of urgency in hearing a case. PILs relating to the detention of children and the preventive detention of adults in Kashmir under the dreaded Public Safety Act were not taken up with due despatch, as one would expect while dealing with a writ of habeas corpus. With so many judges in the Supreme Court, it is difficult to accept that it could not prioritise the hearing of the cases keeping the urgency of the situation in mind. The result is that even now, after more than seven months, some of these cases are pending in the Supreme Court and the high court. Personal liberty has taken a severe hit due to this. It is true that it is for the bench to accord priority to a case for hearing it, but according no priority to a case raising a constitutional issue is rather strange. What is the impact of this?

The absence of any urgency shown by the courts in hearing cases concerning human rights has emboldened the executive, who now know that when such issues are raised, they can take it easy and even keep a person in custody on trumped up charges at least for a couple of days, if not longer. A few days in custody, I believe, is enough to shake up an innocent person. And so, cases of non-existent sedition are filed for keeping persons in detention till she or he learns the lesson that it is better to keep shut. The sedition case filed against a teacher and the mother of an 11-year-old girl for staging a play in Karnataka is a classic example of high-handedness in restricting personal liberty and getting away with it. A report published in the *Hindustan Times* in February notes that a total of 156 cases of sedition were filed between 2016 and 2018. Between December 11, 2019 and mid-February this year, at least 194 sedition cases have been filed – with many 'accused' perhaps not being granted bail. Such cases instil fear, and the courts being sentinels on the *qui vive* must give confidence to the people that they are always available to protect their right to freely express their view, even if it is anti-establishment.

Less said the better about the ruthlessness shown by the police in Delhi, Uttar Pradesh and some other states like Telangana and Karnataka (to name a few) and the impunity with which they operate. They have left the courts virtually 'speechless' or have 'compelled' them to defer to the powerful.

A recent example – the government of UP put up hoardings in Lucknow displaying the photographs, names and addresses of alleged rioters who had participated in damaging public property, like burning buses. On a challenge to the hoardings through a PIL, the Allahabad high court directed their removal forthwith. Rather than comply with the order, the state government preferred a petition in the Supreme Court. The petition was treated as an urgent matter and taken up for hearing the very next day. Additionally, the (incorrect) precedent of not hearing a litigant till a condition is met was not followed. The state government could very well have been told that the court will not give it a hearing until the order of the high court is complied with. Impunity extends to giving scant regard to the orders of the courts – the Supreme Court did not stay the direction of the high court and yet the state government has not complied with it – that's the respect for the court. But who will bell the cat?

3. Appointment of judges

The third unfortunate development is the successful flexing of muscles by the government in matters of transfer of judges and their appointment.

The 'transfer' of Justice Akil Kureshi from Madhya Pradesh, where he was recommended, for appointment as chief justice to Tripura is well known, though the reasons are not. Similarly, the 'transfer' of Justice Vikram Nath from Andhra Pradesh, where he was recommended for appointment as chief justice, to Gujarat is equally inexplicable.

Much has been written about the almost midnight transfer of Justice S. Muralidhar from the Delhi high court. Despite what anybody may say, it was anything but routine – nobody gets transferred at an unearthly hour and also without any 'joining time', least of all a constitutional authority. The Supreme Court has maintained a studied silence at this treatment, which by the way, has recently been repeated, making it perhaps a new normal.

The appointment of judges has been an equally tragic story. Recommendations are being processed at a snail's pace – no urgency, despite huge arrears. At last count, more than 200 recommendations were pending at various stages and levels. Worse, some recommendations approved by the Supreme Court collegium have been returned for reconsideration by the government without adequate reason. Some of these recommendations have been reiterated by the collegium, but no warrant of appointment has yet been issued – the fate of these potential judges hangs on a weighted balance. To make matters worse, there is at least one recommendation that has twice been reiterated, but not yet acted upon – with the courts doing nothing about it.

So, chief justice recommendees have been at the receiving end as well as judges and potential judges. Judges recommended for appointment to the Supreme Court have been at the receiving end, with a long wait for appointment. Two well-known instances are of Justice K.M. Joseph and Justice Indu Malhotra. Where will this stop?

These and similar instances have led to the feeling among many that over the last couple of years, the court has been 'executivised'. This is a polite suggestion that the independence of the judiciary is in danger, through self-inflicted wounds and some inflicted by the executive. And now suddenly comes the news that a recently retired CJI has been nominated to the Rajya Sabha by the president on the aid and advice of the council of ministers. How does the acceptance of the nomination impact on the independence of the judiciary? What is the message sent out, keeping in mind the events of the last couple years?

From Supreme Court to Rajya Sabha

For a CJI whose tenure was marred by and mired in controversies of all three categories mentioned above and whose tenure strengthened the perception (beginning with the tenure of his predecessor) that the judiciary could not take on the government on crucial issues, it was unwise to have accepted the offer. It is well known that the judiciary is the weakest of the three pillars of democracy for it

neither has influence over the sword or the purse. How then does it have its decisions and directions enforced – both judicial as well as administrative? If the judiciary commands moral authority, and has the trust and confidence of the people, then the power and strength generated by that perception is enough to pressure the executive to obey the orders and directions of the court.

By accepting an offer not commensurate with the dignity of the office held a few months earlier, the former CJI has led many to believe that he has been rewarded by the government, the biggest litigant, for doing their bidding when it mattered. This may or may not be true, but that is the perception.

It may also not be a quid pro quo (as some would have it) or a favour for favour for some decisions (not necessarily judgments). It could well be for staving off embarrassment in an administrative or judicial issue or playing ball through silence or failure to put one's foot down on an administrative issue or appointment or transfer of a judge(s) – who knows? His acceptance of the nomination, and the criticism this has naturally generated, has considerably diminished the moral stature of the judiciary and thereby collaterally impacted on its independence. Public perception is important and it has been rendered totally irrelevant, thereby taking away one of the strengths of the judiciary.

Whataboutery does not redeem the situation. No one has publicly applauded the earlier election to the Rajya Sabha of Justice Ranganath Misra or Justice Baharul Islam or the appointment of Justice Sathasivam as the governor of Kerala in 2014. How then can anyone make use of these precedents to justify the nomination of the recently retired CJI to the Rajya Sabha? If the precedents were wrong, the present nomination is wrong; if the precedents are acceptable, there is nothing to be disillusioned with the present nomination – and the independence of the judiciary be damned.

Source:

https://thewire.in/law/judicial-independence-three-developments-that-tell-us-fair-is-foul-and-foul-is-fair

ANNEXURE - C34

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The Indian Express

The story of Indian democracy written in blood and betrayal

August 6, 2019

Pratap Bhanu Mehta

BJP thinks it is going to Indianise Kashmir. Instead, we will see, potentially, the Kashmirisation of India.

There are times in the history of a republic when it reduces itself to jackboot. Nothing more and nothing less. We are witnessing that moment in Kashmir. But this moment is also a dry run for the political desecration that may follow in the rest of India. The manner in which the BJP government has changed the status of Jammu and Kashmir by rendering Article 370 ineffective and bifurcating the state is revealing its true character. This is a state for whom the only currency that matters is raw power. This is a state that recognises no constraints of law, liberty and morality. This is a state that will make a mockery of democracy and deliberation. This is a state whose psychological principle is fear. This is a state that will make ordinary citizens cannon fodder for its warped nationalist pretensions.

The narrative supporting a radical move on Kashmir is familiar. Article 35(a) was a discriminatory provision and had to go. Article 370 was not a mechanism for integration but a legal tool for separatism. The Indian state, despite the horrendous violence it has used in the past, has never had the guts to take a strong stand on Kashmir. The radicalisation within Kashmir warrants a crackdown. The treatment meted to Kashmiri Pandits has never been recompensed either through justice or retribution. The international climate is propitious. We can do what China is doing: Remake whole cultures, societies. We can take advantage of the fact that human rights is not even a hypocrisy left in the international system. We can show Pakistan and Taliban their place. Let us do away with our old pusillanimity. Now is the time to seize the moment. Settle this once and for all, if necessary with brute force.

There are kernels of truth to many of these arguments. The status quo was a double whammy: It did nothing to address the well-being of Kashmiris who have now endured two generations of what was effectively military occupation. And it increased the gulf between Kashmir and the rest of the nation. So some movement was inevitable. But the kernel of truth is being deployed with an armoury of evil. The solution being proposed is an annihilation of decency. The fact that these measures had to be done under stealth, with a tight security noose and informational blackout is a measure of the evil of the step taken. This is not the dawn of a new constitutional settlement, designed to elicit free allegiance. It is repression, plain and simple, reminiscent of the Reichstag or Chinese constitutional ideology that sees federalism as an obstacle to a strong state and homogenous culture.

Think of the proposal's broader ramifications. India has betrayed its own constitutional promises. India has many asymmetric federalism arrangements outside of Kashmir. This act potentially sets the precedent for invalidating all of them. How can we justify offering Nagaland asymmetric

federalism but deny it to Kashmir? Its implication is that the government can unilaterally declare any existing state to be a Union Territory. This is a constitutional first. We are simply a union of Union Territories that happen to be a state at the discretion of the Centre.

Let us also not put too fine a point on this. Even if Article 370 were to be scrapped, the proposal to alter Jammu and Kashmir's status to Union Territory, even if temporarily, is designed to humiliate an already subjugated population. How dare a Muslim dominated state exist in India? Kashmir can now not even be trusted to be a state. The optics of this measure is not integration, it is humiliation, of a piece with subtle and unsubtle reminders to minorities of their place in India.

Let's take the argument that this pain is worth the price, if it actually solves the problem. But will it? There will be a sullen peace, militarily secured, that we will mistake for victory. The very army, behind whom every patriot now hides, will now potentially be put in even more harm's way: To be used more and more as the sole basis for keeping India together. And even if we concede to the tragic necessity of force, that force can work only in the context of a larger political and institutional framework that inspires free allegiance, not fear. But even if Kashmir resigns to its fate, pummelled by military might, the prospect of radicalisation in the rest of the country cannot be ruled out. There are already incipient signs of that. The theatre of political violence will shift. In the context of the communally sensitive arc from UP to Bengal and in Kerala, India will seem more fragile.

For, fundamentally, what this change signals is that Indian democracy is failing. It is descending into majoritarianism, the brute power of the vote; it will no longer have the safety valves that allowed inclusion. The feckless abdication of the Opposition will only deepen the sense of alienation. There are no political avenues for protest left. Most of the so-called federal parties turned out to be more cowardly than anyone anticipated; the Congress can never stand for any convictions. Not a single one of us can take any constitutional protections for granted. Parliament is a notice board, not a debating forum.

Let us see what the Supreme Court does, but if its recent track record is anything to go by, it will be more executive minded than the executive. Kashmir is not just about Kashmir: In the context of the UAPA, NRC, communalisation, Ayodhya, it is one more node in a pattern hurtling the Indian state towards a denouement where all of us feel unsafe. Not just Kashmiris, not just minorities, but anyone standing up for constitutional liberty.

The larger worry is the fabric of our culture that is making this possible. There is a propaganda machinery unleashed with the media that builds up a crescendo baying for blood and calls it nationalism. There is the coarsening of human sentiments that makes empathy look worse than violence. There is the sheer political impatience with any alternative. The old Congress system of dealing with these issues appears so decrepit and corrupt that even a total carpet bombing of institutions and morality will be better. There is a kind of cruel aestheticism in our politics where audacious evil will be celebrated for its audacity, and mundane goods will invite contempt because they are mundane.

These proposals are not about solving a problem. What is playing out in Kashmir is the warped psyche of a great civilisation at its insecure worst. The BJP thinks it is going to Indianise Kashmir. But, instead, what we will see is potentially the Kashmirisation of India: The story of Indian democracy written in blood and betrayal.

Source:

https://indianexpress.com/article/opinion/columns/jammu-kashmir-article-370-scrapped-special-status-amit-shah-narendra-modi-bjp-5880797/

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ANNEXURE - C35

The Print

Supreme Court's handling of Kashmir habeas corpus more worrisome than Modi govt's clampdown

4 September, 2019

Maneesh Chhibber

By putting conditions on Sitaram Yechury's visit to meet his ailing CPI(M) colleague in Kashmir, wasn't the Supreme Court breaching its mandate?

A new and somewhat questionable kind of jurisprudence is being set by the Supreme Court of India for some time. The court of the last resort should be brazenly upholding citizens' fundamental rights and protecting them from unconstitutional actions of the state. But of late, the Supreme Court has been found wanting in its response. Not only has it opened itself to the charge of acting as an arm of the government, but it is also unwittingly sending out a wrong message to the lower judiciary.

The latest example of this is the manner in which the Supreme Court has heard writs of habeas corpus concerning the detention of political and non-political persons in Kashmir after Prime Minister Narendra Modi's government abrogated Article 370 that granted special status to J&K.

In dealing with the Communist Party of India (Marxist) general secretary Sitaram Yechury's habeas corpus petition challenging the illegal and unconstitutional detention of his party's J&K leader Mohammed Yousuf Tarigami, the Supreme Court bench headed by Chief Justice Ranjan Gogoi imposed conditions even while allowing the leader to visit Kashmir and meet his ailing colleague.

According to the order passed on 28 August, Yechury could only meet Tarigami and not indulge in any political activity. The court also asked Yechury to file a report on his return.

"We make it clear that if the petitioner is found to be indulging in any other act, omission or commission save and except what has been indicated above i.e. to meet his friend and colleague party member and to enquire about his welfare and health condition, it will be construed to be a violation of this Court's order," the bench, also comprising Justices S.A. Bobde and S. Abdul Nazeer, ordered.

Why not? Yechury heads an important, mainstream political party in the country and, unless the government shows cause that his intended actions could lead to law and order problems, there shouldn't be any condition on what he can or can't do.

This petition was earlier with the bench of Justices N.V. Ramana and Ajay Rastogi, which ordered on 23 August that the case be listed "before an appropriate Bench, as per roster".

It should be a cause for worry if the Supreme Court, which is often criticised for spending too much time on frivolous cases that don't necessarily involve a constitutional issue, takes five days to hear a writ of habeas corpus. And that too one, which involves the important question of citizens' life and liberty. What can be more important and urgent for the Supreme Court in a democracy than deciding whether a citizen's fundamental right to life and liberty as granted under Article 21 of the Constitution has been violated or not by the state? Even during an emergency-like situation, the state can't restrict people's freedoms without following the due process of law.

But even if the court were to be given the benefit of doubt with the usual riders like the security situation in Kashmir and sovereignty, the court should have assumed its constitutionally-mandated role as the protector and defender of the citizen's fundamental rights rather than leaving it to others. Failure to do so amounts to the court abdicating its duty under the Constitution.

A writ of habeas corpus involves determination of whether a detention is legal and if due process has been followed. The court isn't expected to go into the issue of the alleged crime of the detenue.

Thankfully, the Supreme Court didn't ask Yechury and others to prove their locus in filing the habeas corpus.

When freedom is conditional

In 1950, a Constitution bench hearing the case of *Chiranjit Lal Chowdhuri versus Union of India and Others* expanded the scope of who could approach the Supreme Court if somebody's rights were violated. The court held that not just individual citizens or groups but corporate entities too could do so. The bench also ruled that the Supreme Court, drawing its powers from Article 32, can issue directions or orders or writs like habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by this part.

The normal process in a habeas corpus case is for the court to order the production of the detenue, verify for itself if the detention is legal and, if found violative of the Constitution, quash the detention.

By asking Yechury to travel to Kashmir, meet his colleague but not indulge in any political activity and then return and file a report, wasn't the Supreme Court breaching its mandate?

Here's a hypothetical situation for the court to examine or ask itself: what if, in its report, Yechury had claimed that Tarigami was being tortured in detention? What would the court have done then?

More importantly, now that Yechury has purportedly informed the court that the situation in Kashmir is "contrary to (the Narendra Modi) govt's claims", what will the court's next course of action be?

In *Ram Manohar Lohia vs State of Bihar*, a Constitution bench ruled that even in a situation where an emergency may have been imposed or where law and order is cited to detain a person, detention orders can be challenged through a writ of habeas corpus – if the detention order was passed in a mala fide manner or was otherwise invalid.

In 1983, the Supreme Court noted in the case of *Rudul Sah vs State of Bihar*, while awarding compensation to an illegally detained citizen: "In the circumstances of the instant case the refusal to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated."

Setting another bad example

These are the examples that the Supreme Court bench led by CJI Gogoi should have followed and, if it deemed fit, expanded on as it heard Yechury's petition. Instead, the court chose to follow the case of Additional District Magistrate, Jabalpur vs S.S. Shukla.

The case is regarded as a blot on the Supreme Court of India's judicial history. The majority on the Constitution bench allowed itself to be completely swayed by the specious arguments of then-Indira Gandhi government in curtailing the liberty of citizens during the Emergency. Forty-three years later, another bench allowed itself to be convinced with the imperfect logic behind the state's actions to not side with the victims.

And the Supreme Court's treatment of the habeas corpus last week is certainly more worrisome than the Indian state's actions, because it sets the tone for the rest of the judiciary across the country.

Source:https://theprint.in/opinion/supreme-courts-handling-of-kashmir-habeas-corpus-more-worrisome-than-modi-govts-clampdown/286173/

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ANNEXURE-C36

Scroll
Justice AP Shah: 'Freedoms on unsteady ground, made to doubt whether SC able to protect our rights'

Feb 12, 2020 · 08:30 am

Justice AP Shah

The former chief justice of Delhi High Court delivered a scathing indictment of recent Supreme Court orders.

From Kashmir to Sabarimala, the Ayodhya dispute to the Citizenship Act, how has the Supreme Court fared in recent times in upholding the constitutional rights of the people of India? Not very well, said former Chief Justice of the Delhi High Court, Ajit Prakash Shah.

Delivering the LC Jain Memorial Lecture instituted in the memory of the Gandhian activist Laxmi Chand Jain on February 10 in Delhi, Justice Shah said: "There are instances where freedoms that we have taken for granted are on unsteady ground, and where we are being made to doubt whether the Supreme Court is actually able to protect our rights at all or not. It is disturbing and unfortunate that we should still be asking questions of this kind, but some recent judgements and orders prompt such reflection."

Here is the full text of the lecture.

Good evening to all of you. At the outset, I would like to thank the Jain family for having invited me to speak at this edition of the LC Jain Memorial Lecture. I did not have occasion to meet him personally, but I have read a great deal about him and his stellar work and contribution to Indian society.

He would have been a young man when Mahatma Gandhi passed away in 1948, but he embodied the spirit of Gandhian values in the best possible way. Indeed, he has been described as "an impassioned crusader of what Gandhi called the second freedom struggle for a just and equitable India".

Mr Jain's autobiography, titled *Civil Disobedience,* is a fascinating book, especially, and very revelatory. In that, he makes extensive observations on the Emergency years. Recall that he was among the few brave ones who mobilised people for an anti-Emergency movement. What he says in the book is relevant even now, and remembering him in today's times could not be more apposite.

What I found especially interesting was his view that, after independence, "State" and "Society" were separate spheres. He felt that Nehru and others associated with him were building the "State" and running the government, while Mr Jain himself and those around him were building and running "Society". This was based on the notion that freedom was now secure as there was a Constitution which laid down the ground rules. The Emergency came as a shock for people like him, who had spent the previous decades restoring peace and structure to a country that was recovering from a century and more of fighting for independence. Mr Jain said that the Emergency was a wake-up call, and freedoms could not be taken for granted.

This emotional upheaval that Mr Jain and his peers probably went through during the 1970s is not unique to India. In their recent book, appropriately titled, *How Democracies Die*, Steven Levitsky and Daniel Ziblatt, write of how "most democratic breakdowns have been caused not by generals and soldiers but by elected governments". They document the many instances of how "elected leaders have subverted democratic institutions" across the world.

This subversion is carried out by the constitutional sanction of the ballot box, and even with approval from the legislature and the judiciary. Throughout, there is always the assurance that the democractic wheels are still turning. Levitsky and Ziblatt call the leaders who thrive in such situations "elected autocrats".

Such elected autocracts weaponise institutions, to use them as political ammunition. They compel the media and the private sector into silence, and they redraft rules to suit their interests over those of their political opponents.

Critical voices still rise up in the backdrop of the chorus of the hoi polloi, but those who dare to question the powers that be end up at the receiving end of all kinds of trouble – they are charged with making seditious remarks, or evading taxes, or some such thing. In this way, they use "the very institutions of democracy...to kill it".

As for all of us, if we look closely enough, we can see such patterns in today's India too. Ever so often, we hear of the collapse of yet another institution that is central to the country's functioning – whether it is the Reserve Bank or the Election Commission. And then we see how agencies like the Central Bureau of Investigation or the police are used to intimidate political opponents, and harass political activists.

The country appears to be completely polarised because of the communal agenda followed by the ruling regime. Hate speech has become normal, with national-level politicians leading the charge. The government has taken upon itself the mantle of deciding who is entitled to protections and who is not, by othering entire segments of the people, with party leaders labelling Muslims variously as beef-eaters, infiltrators, traitors and potential terrorists. To any observer, this conversion of an entire community into an imagined enemy is clearly an expression of paranoia on the part of the ruling establishment.

There is also a divisive, jingoistic idea of nationalism that is being encouraged, centred on religion and cultural identity, which is deeply discomforting. Combined with this, we are in a situation where anyone who opposes or disagrees with government policies is branded as anti-national.

This is also the first time that there are serious issues with federalism in the country, marked especially by Centre-State disagreements on the Citizenship Amendment Act, the National Register of Citizens and the National Population Register. Even police investigations, Bhima Koregaon being one such, are representative of this federalism challenge. And all of this is happening in the backdrop of an economic slowdown which seems to have blindsided the government.

In the midst of all of this, there is a positive, heartening moment like the protests we are seeing today, against the Citizenship Amendment Act, and everything that it stands for. When students – from all over the country, including from institutions like Jawaharlal Nehru University, Jamia Milia, Aligarh Muslim University, St Stephens, who collectively embody the future of a nation – come together in a peaceful protest against an unjust and unconstitutional law, it is an act that citizens of any democracy should be proud of.

Such an act is not merely a protest. It shows that the young people know, understand and believe in the constitutional values that our founding fathers sought to embody, and that they will work to protect these values.

It is with this background that I will be speaking today. The focus of my speech will be on how the Supreme Court of India has evolved in the recent years, roughly in the last decade or so, in the context of the democratic upheavals that India has been facing, and the kinds of protections and freedoms we have won and lost as a result of this judicial evolution.

I will begin with a brief overview of what the vision for the Supreme Court of India was, to set the stage to examine whether it has fulfilled that vision, and to what degree. I will then discuss a few cases that reveal how the Court has functioned, and what it has meant for the various kinds of freedoms we have asked for, such as the freedom of identity, whether religious or sexual; the freedom to dissent; the freedom of movement and peaceful assembly; the freedom to ask questions and seek transparency in government; and the freedom of the press.

I will conclude with what I feel is the state of affairs with the Supreme Court, and where challenges and opportunities lie, in order for the institution to remain an integral part of the healthy democracy that India seeks to remain.

The role of the Supreme Court

We are marking 70 years of the coming into force of the Constitution, just as we are marking 70 years of the establishment of the Supreme Court too. In 1952 itself, in *State of Madras v VG Row,* the Supreme Court assumed for itself the role of the sentinel on the *qui vive* (meaning "on the alert" or "vigilant"), in defence of citizens' fundamental rights. Later, Justice Bhagwati observed in *State of Rajasthan v. Union of India* that the Supreme Court is the ultimate interpreter of the Constitution, and it is for the Supreme Court "to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of rule of law."

Unfortunately, in the initial period, the Supreme Court adopted a conservative approach, by reading only the literal text of the Constitution, treating each fundamental right as a separate chapter. In doing so, as it turned out, the Court essentially ended up working as the protector of the landed gentry, reaching a climactic conclusion with the infamous *ADM Jabalpur* case, in the aftermath of the Emergency.

Recall that a majority of the constitutional bench in that case, barring Justice HR Khanna, agreed with the government that there was no right to life and personal liberty during an Emergency.

After the Emergency was lifted, though, there was a sort of catharsis in the judiciary, between 1977 and 1979, when, as Prof. Upendra Baxi points out, the Supreme Court judges "apologised, in word and deed, to the people of India for judicial abdication during the... Emergency period". After that, the Court switched tack, and began focussing on what we now call "public interest litigation", where it sought to protect the rights of those who could not otherwise approach the court themselves, or as one judge famously put it, to become "the last resort of the oppressed and the bewildered".

This new-found fascination for judicial activism acquired an energy of its own, which some scholars have described as being "euphoric" even. In the process, the Supreme Court underlined the metamorphosis in its attitude towards Article 21. The 1980s and 1990s saw a dominance of PILs and social justice matters in court. (Do note that I do not intend to speak on the subject of PILs today, which, in my opinion, have become completely unrecognisable from their original purpose, and I have only mentioned it here for setting the context).

In recent times also, the Supreme Court, in some judgements, has interpreted the Constitution with deeper insights and analyses, going far beyond the literal word of the law, and examining legislative purpose more closely. As scholar Gautam Bhatia puts it, these judgements represent a radical transformation, with the Court breathing new life into the fundamental rights through these decisions. I can name a few Constitutional Bench judgements delivered in this spirit, some of which I discuss here.

At least two of these are judgements in matters that I am very much personally associated with. These are the judgements in *Navtej Singh Johar v. Union of India*, and *CPIO, Supreme Court of India vs. Subhash Chandra Aggarwal*.

In the former matter, I had delivered the original judgement in *Naz Foundation v. Govt of NCT of Delhi*, where we had read down Section 377 of the Indian Penal Code which had criminalisesd homosexuality. This was later reversed by the single stroke of a pen, leaving millions of people re-criminalised overnight.

I honestly never thought that such a colonial practice as contained in Section 377 would be sustained in modern India. Then, the Supreme Court decision in *Navtej Johar* happened, and finally, we can boast of an India where sodomy law has gone forever.

The second case, involving the applicability of the Right to Information Act on members of the judiciary, particularly the Chief Justice of India, was something I had decided during my time in the Delhi High Court as well. The outcome of the case was problematic and satisfying at the same time. First, it was decided after ten years, our judgement was stayed for ten years and it was decided only last year.

It was problematic because the majority judgement placed too many caveats and riders to the applicability of the RTI on the judiciary. In this context, I will talk about a very recent order passed by the PIO [Public Information Officer] of the Supreme Court. To continue, however, Justice Chandrachud's dissenting opinion counterbalanced this majority view, when he said that judges must be accountable to the people they serve, and more importantly, he explicitly wrote that "the basis for the selection and appointment of judges to the higher judiciary must be defined and placed in the public realm."

Just a few days back, an RTI information seeker asked for information on the formation of the panel which exonerated former Chief Justice Gogoi in the charge of sexual harassment made by a woman staffer. The PIO of the Supreme Court reportedly said this cannot be provided because it affects privacy rights. This is how the information – because the majority has put so many riders in the judgement – will not be shared. Even though the very dismissal of the woman who filed the complaint was set aside by the Supreme Court, we still cannot get the information pertaining to how the panel came to be formed to enquire into allegations against former Chief Justice Gogoi.

Then, we have the judgement that decriminalised adultery in India, which was also a dramatic turnaround from the position taken by the court previously. It was particularly unique because the earlier judgement was written by the senior Justice Chandrachud, and his son was on the bench that repealed that decision.

Another notable case is the privacy judgement in *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors*, where the judges have practically offered a treatise on privacy law, not seen since the judgement in *R Rajgopal v. State of Tamil Nadu*. This judgement was also unique, as one of the judges, Justice Chandrachud wrote that that the *ADM Jabalpur* case was an aberration in the constitutional jurisprudence of the country and that the majority opinion deserved to be buried "ten fathoms deep" with "no chance of resurrection".

The Supreme Court and our freedoms

But then there are instances where freedoms that we have taken for granted are on unsteady ground, and where we are being made to doubt whether the Supreme Court is actually able to protect our rights at all or not. It is disturbing and unfortunate that we should still be asking questions of this kind, but some recent judgements and orders prompt such reflection. These judgements beg us to ask if the sentinel remains on the *qui vive* after all. I will be discussing some of these judgements in this section.

Sabarimala

One area where the Court's decision making is coming under intense scrutiny is in the realm of personal liberty and religious freedoms. In 2018, the Supreme Court in a progressive judgment, permitted the entry of women into the Sabarimala Temple in Kerala. The judgment, however, became controversial, and faced some problems with implementation.

Notably, a senior Union Minister criticised the Kerala Government for implementing the Court's judgment, saying that in "Sabarimala, nation has seen a fight between dharma, belief and bhakti on the one side and an oppressive Kerala government on the other" and that the BJP stood firmly with the Ayyappa devotees. There should have been no controversy or doubt regarding the implementation of the Supreme Court's judgment, especially since no stay had been granted; but the Central Government's actions seemed to raise the spectre that the judgment was not final.

Immediately after the judgment was passed, review petitions were filed. However, in November 2019, while hearing these review petitions, the Supreme Court passed a curious order in *Kantaru Rajeevaru v Indian Young Lawyers Association*, directing that the Sabarimala review petition as well as other writ petitions – concerning the entry of Muslim women in a Durgah/Mosque, entry of Parsi women married to a non-Parsi into the holy Agyari, female genital mutilation in the Dawoodi Bohra community – remain pending until the determination of the questions (formulated by the majority) by a larger bench, to be constituted by the Chief Justice. Notably, the review petition itself was not referred to a larger bench and was only kept pending till the adjudication of the referred questions by the larger bench.

The majority's order in the Sabarimala review petitions seems to be beyond the scope of Article 137 of the Constitution. Review powers are used rarely, only when there is an error apparent on the face of the record, or a glaring omission or mistake. A review is not an appeal or a fresh consideration of a case. However, in *Kantaru Rajeevaru,* the Court directed a fresh hearing of the Sabarimala matter, by a larger Bench, without any reasons for the review, and without pointing out any grave errors in the judgment under review.

The order did not even endorse Justice Malhotra's dissent in the original Sabarimala judgment. Instead it tagged the Sabarimala matter with other pending cases that raised common issues regarding the interpretation of Article 25 and 26, even though those cases were not before the Court.Strong dissents were recorded by Justices Nariman and Chandrachud to this reference.

While passing the referral order, the majority did not pass any order staying the operation of the main judgment. Earlier, in November 2018 itself, the five judge bench had also refused to grant a stay.

In these circumstances, it is peculiar, and unfortunate, that in December 2019, the Supreme Court declined to pass any order on the petition by two women activists seeking a direction to ensure safe entry in the Sabarimala temple on the ground that the issue was "very emotive"; it did not want the situation to become "explosive"; and that despite there being no stay, the fact of the referral meant that the judgment was "not final".

The Supreme Court has often been characterised as supreme (in the sense of final), but not infallible. The Court's order in *Kantaru Rajeevaru* has now upended the assumptions about its judgments being final.

The aftermath of the Sabarimala judgment has given rise to various causes of concern, including the impunity of the Central Government in ignoring the judgment of the Supreme Court, the re-opening of the judgment through a referral in the guise of a review, and the implications for the rule of law.

Ayodhya

The issue of rule of law and finality arose once again in the Ayodhya judgment, where the Court tried to give legal quietus to an essentially political issue.

The Court's judgment was unanimous, but anonymous. Contrary to judicial practice, the name of the judge who authored the unanimous opinion was absent. Even more peculiar was the 116 page anonymous "addendum" to the judgment, that sought to reinforce and reiterate the "faith, belief and trust of the Hindus" that the "disputed structure is the holy birthplace of Lord Ram". The need for this addendum is highly questionable given that the bench had already unanimously decided the case on

constitutional principles, and the addendum was not serving the role of a concurring opinion. Instead, the addendum seems to reinforce the supremacy of Hindu theological considerations.

A key issue that arose in this judgement was the issue of equity. The Supreme Court was of the view that the Allahabad High Court's decision to divide the property into three parts was not "feasible" in view of the need to maintain peace and tranquillity.

However, whether the Supreme Court's judgment resulted in complete justice is questionable since it still seems like despite acknowledging the illegality committed by the Hindus, first in 1949, by clandestinely keeping Ram Lalla idols in the mosque, and second, by wantonly demolishing the mosque in 1992, the court effectively rewarded the wrongdoer. This goes against the doctrine of equity, which requires you to approach the Court with clean hands.

Given the Court's findings, one wonders if the mosque had not been demolished, would it still have been given to the Hindus?

Part of the problem lies in the fact that although the judgment is an unimaginable scholarship on Hindu law, the dispute was not ideally placed to be settled by courts; and should have been resolved politically. As Suhas Palshikar notes, "courts, when they broker peace, do not necessarily bring closure to disputes; they only give momentary space for disputes to reconfigure." Maybe a South African style Truth and Reconciliation Commission would have been a greater idea.

The issue of impunity, discussed in the context of (non)-implementation of the Sabarimala judgment and the failure of the Court to ensure safe passage of women devotees, comes up once again in Ayodhya.

Relying on the tenor of the Court's decision – which recognises the illegality of the demolition of the Babri Masjid, but does not act on it – the Hindu Mahasabha has begun pressing for the withdrawal of criminal cases against the kar sevaks involved in the demolition in 1992, and involved in the ensuing violence. Not only that, it is also demanding that the kar sevaks be given government pensions and their names be listed in the temple that will eventually be built on the site of Babri Masjid.

The Vishwa Hindu Parishad, not to be left behind, states that it will make similar claims in respect of 3,000 other mosques. Whether the Supreme Court's assurances that the Places of Worship Act imposes a non-derogable obligation towards enforcing India's constitutional commitment to secularism will amount to anything in practice or will the judgment only serve as a shot in the arm for the Hindus, will depend in part, on the Court's ability to ensure the proper enforcement of its judgment. More fundamentally, though, does this judgement actually strengthen or even sustain secularism at all?

Beyond this, is the question of actual implementation of the judgement. I am inclined to agree with Madhav Godbole, former Home Secretary in this regard. He asks whether giving five acres of alternate land to Muslims for constructing a mosque is the most appropriate or adequate compensation. He also asks, what happens to the psychological hurt caused to the Muslims by destroying this place of worship? In an ideal situation, he says, the Court should have asked the state and central governments to rebuild the mosque.

Indeed, PV Narasimha Rao, the prime minister when the mosque was demolished, had announced this in Parliament, and later wanted it fulfilled. The Gujarat High Court, too, has ordered compensation for wherever religious buildings – mainly mosques – were damaged during the riots. Instead of providing a simpler solution, the court has complicated the implementation and enforcement process.

Kashmir

The Supreme Court's orders on Kashmir represents a missed opportunity for the Court to come out strongly in favour of fundamental rights, and fulfil its role as the sentinel on the *qui vive*.

Three sets of petitions relating to Kashmir were filed before the Court. The first related to the communication shutdown and Section 144 orders (prohibiting public gatherings) that were imposed on August 5, 2019. The second set related to the habeas corpus petitions that were filed against the illegal arrests and detentions of individuals, including minors, under the draconian Public Safety Act. The third set relates to the constitutional challenge to the government's decision to amend Article 370 of the Constitution and breaking up the State of Jammu and Kashmir into Union Territories.

In all three cases, the Court has failed to give a satisfactory resolution, even after six months. For the purpose of this speech, I want to primarily focus on the internet shutdown case (*Anuradha Bhasin*), which was finally decided in January.

The Court's judgment is laudable in many respects – it directed the government to publish all orders, present, and future, authorising the suspension of the internet/landline services and prohibiting public gatherings. It rejected the government's argument that national security considerations precluded judicial review. It also gave constitutional protection to the freedom of speech and expression and the freedom to practice any profession or carry on any trade, business or occupation over the medium of internet. Though it did not go as far as to declare the right to access the internet a fundamental right. Most importantly, the Court made it clear that an indefinite suspension of internet services is patently unconstitutional.

Unfortunately, despite these observations, the Supreme Court failed to actually decide the matter. The purported reason seems to be that it did not have all the orders in front

of it, and the situation was changing on the ground daily. However, this reasoning seems tenuous, when we consider that a few sample shut down orders were placed before it (with detailed arguments being made about their unconstitutionality), and the Court could have easily directed the government to file the remaining orders.

While the reliance on Lon Fuller's famous statement that "there can be no greater legal monstrosity than a secret statute" is praiseworthy, it did not result in any practical benefit, given that the government was effectively allowed to take advantage of its own wrong of not publishing all the orders or submitting it before the Supreme Court.

After ruling that the suspension of communication services must adhere to the principles of necessity and proportionality, the Court failed to apply these principles to actually decide the legality of the communication shutdown in Kashmir.

Instead, it directed the fresh publication of all orders, with the Review Committee reviewing all these orders. The reliance on Lord Diplock's aphorism "you must not use a steam hammer to crack a nut, if a nutcracker would do", was, at least for the people of Kashmir, meaningless.

Judicial review involves more than a mere declaration of the law. It requires the application of law to the facts at hand. And the facts, quite simply, are that for more than 150 days, and even today, the people of Kashmir are without a proper functioning internet.

The impact of the communication shutdown has been severe. It has affected medical supplies, attendance in school, tourism, and resulted in a loss of business, of approximately Rs 15,000 crore between August 5 and December 5 2019, as per the Kashmir Chamber of Commerce and Industry. The loss of jobs in the handicrafts industry is said to be 50,000 and in the hospitality industry, is around 10,000. As per the data of the J&K Tourism Department, there is a drop of 86% of tourists visiting the state.

People, ordinary citizens, have been prevented from performing the simplest of tasks that we take for granted, whether it was filing GST tax returns, upgrading driving licenses, or applying for college admissions, and had to rely on the "Internet Express", as reported by *The Quint* – the train from Srinagar to a town called Banihal, where broadband facilities were functioning – to attempt to finish these tasks. This is apart from the fear that gripped the Valley, and the emotional and mental stress caused by not being able to get in touch with your loved ones.

To these people, the Supreme Court's judgment in *Anuradha Bhasin* has offered scant relief. We now have a situation where the government has "whitelisted" various websites and permitted the resumption of 2G services, although empirical analysis has

shown that of the 301 whitelisted websites and services, only 126 were usable to some degree. Social media websites and peer to peer communication apps are still prohibited. Deep questions remain about whether whitelisting is proportionate, and the least restrictive alternative available with the government, and the legality of these orders will probably have to be addressed by the High Court of Jammu & Kashmir in the foreseeable future.

Meanwhile, Kashmir continues to face the longest intentional internet shutdown ever recorded in a democratic country. As Aniket Aga and Chitrangada Choudhary note, "we seem to not care that in 'integrating' a people via an armed siege, in silencing their voices and dismissing their pain, we are also abrogating our own humanity."

Unfortunately, the lack of an effective remedy, and the trend of judicial evasion, is also visible in the Court's handling of other cases dealing with Kashmir. Dr Sameer Kaul, had filed a PIL before the Supreme Court seeking restoration of internet facilities in hospitals and other medical establishments in Jammu and Kashmir, highlighting how the internet shutdown was resulting in delays in accessing medical reports, delays in surgical and other medical procedures, and difficulties in accessing life saving drugs and baby food items that were mostly available online. He was told by the Supreme Court to approach the High Court to avail the appropriate legal remedy.

Similarly, another petition had been moved on behalf of the detained Communist Party of India (Marxist) leader, Mohammad Yusuf Tarigami challenging his illegal detention. The Supreme Court permitted Sitaram Yechury to visit his colleague, Mr Tarigami, only on the condition that he file an affidavit on his return and that he not engage in any political activity during the course of his visit. Subsequently, while allowing Tarigami to visit Delhi to avail of medical treatment, the Supreme Court held that the challenge to his allegedly illegal detention was not urgent, and would come up in due course.

The directions by the Court are surprising considering that a habeas corpus petition is meant to decide the legality of detention, and are not an occasion for the Court to impose conditions and place restrictions on the free movement to Kashmir. We must remember that there was no prohibition in place against visiting Kashmir, and the Court's order had the effect of putting in place such restrictions. In doing so, the Court seemed even more executive minded than the Executive itself.

Even the PIL against the alleged reported illegal detention of juveniles and police excesses in dealing with juveniles in the context of the aftermath of the Article 370 decision in Jammu and Kashmir was disposed off on the basis of the report of the Juvenile Justice Committee of the High Court of Jammu and Kashmir, despite media reports to the contrary. The Court directed that if there was any case of illegal detention, the Petitioners were at liberty to approach the appropriate legal forum (namely the High Court) for redressal of their grievances.

These cases represent instances where, despite the urgency of the matter and the increase in the sanctioned strength of the Supreme Court, it has failed to decide these matters expeditiously. Instead it has passed the buck to the High Court, which has reportedly received over 250 habeas corpus appeals since August 5, even though it is functioning with half its sanctioned strength of 17 judges.

As the senior advocates Raju Ramachandran and Chander Uday Singh have pertinently asked, "As the Court turns 70 in a few months, is the sentinel sufficiently alert, or is it in danger of losing the plot?"

Drifting towards an executive court

Moving on, several orders of the Supreme Court, including some orders in the Kashmir matter, suggest that the role of the Supreme Court as a counter-majoritarian institution, that is, as one that seeks to keep majoritarian impulses in check, is diminishing. On the other hand, as suggested by constitutional scholar Gautam Bhatia, the Court seems to be slowly taking on attributes of the executive itself. It seems to be drifting from a rights' court to an executive court, as Bhatia points out, behaving in a way that is indistinguishable from the government, often issuing important policy decisions through its judgements, prioritising cases in specific – and sometimes worrisome – ways, and undertaking actions that would ordinarily be considered the domain of the government.

Assam NRC

The most obvious example of this was the preparation of the National Register of Citizens, or the NRC, in Assam. The NRC was intended to tackle concerns of landlessness, migration and cultural issues in the state.

The Supreme Court had already, years ago, described the illegal immigration happening in Assam by Bangladeshi Muslims as an "external aggression" and an "invasion" of India. The Supreme Court decided to ask the persons claiming citizenship of India to prove their status, shifting the burden of proof away from requiring the state to show that the person was a foreigner. As it turns out, this migration theory has been proven to be completely incorrect. Out of the 1.9 million identified as foreigners, a majority are Hindus.

Inarguably, this was an administrative exercise, which the executive and the bureaucracy ought to have been responsible for.

Instead, we had a process that was "overseen" by the Supreme Court, and primarily under Chief Justice Gogoi, although many would argue that the Court "oversaw" it less, and "controlled" it more. As a result of this, we were faced with a situation where any concerns with the NRC became impossible to challenge judicially, for the judiciary itself was conducting the process.

The burden that has been caused to millions of people as a result of the NRC process is immense, and I can vouch for this personally based on my experience as part of the Peoples' Tribunal that studied some of the cases of those involved. These are mostly poor and illiterate people who are being made to prove that they are Indian citizens, based on documents such as of birth, schooling and land-ownership. These documents are not easy to find or put together. Even if they are put together, they are rejected for issues with the English-language spelling of Bengali names, or in ages and dates of birth. And the person is declared a foreigner.

The way the foreigner tribunal function is amazing – some official records were placed before us. These foreigner tribunals are manned by people who are appointed on yearly basis and the criteria for continuation of a foreigner tribunal member is in how many cases has he declared the person to be a foreigner. If the number is less, he will be discontinued.

Even in a hearing in the Supreme Court, former Chief Justice Gogoi asked the authorities how many people are there in a particular detention centre. They said 900. Chief Justice got furious – he said why just 900, they should be thousands in the detention centre.

This, coming from the Supreme Court of India, a rights court, do you still believe that it is a rights court? Activist Harsh Mander asked for the recusal of Chief Justice and ultimately he recused himself.

Sealed covers

And what may be travesty of the worst order, perhaps, is the Court's new found attraction for sealed covers. Secrecy can – in limited circumstances – be justified by the executive, but the distinguishing feature of a judicial institution is transparency, for only then, can the institution assure the people that it is giving everyone a fair and equal chance to be heard.

This has happened far too often to be brushed aside as a mere idiosyncrasy of one particular judge, or a bench. It has happened in the NRC case, the Rafale case, the CBI chief's case, and the electoral bonds case, to name but a few.

By shoving documents and facts that otherwise ought to be made public into sealed envelopes, the Court is signalling that it prefers the work ethic of the executive, believing truly that such secrecy is essential to deliver justice.

Prioritisation of cases

Another instance is the court's worrisome practice when it comes to the prioritisation of cases. The Court found it had no time to deal with the many civil rights-related cases that were lying before it pertaining to the situation in Kashmir.

Mr Gautam Bhatia tells us about the case pertaining to electoral bonds. Electoral bonds allow private individuals and corporate entities to make donations to political parties. Reports suggest that over Rs 6,000 crore have been collected by parties under this scheme, the majority by the ruling establishment. The Supreme Court refused to stay the issuance of such bonds, and instead asked for details of the contributors to be submitted in a sealed cover, which it would assess in due course. But that assessment never came, and many elections – central and state – have happened since then.

Inaction also sends out powerful signals, as we can see in this case. This inaction also spoke louder than words when the Court found it had no time to deal with the many civil rights-related cases that were lying before it. In the case of the CAA, too, the Chief Justice of India first says petitions will be heard only after people stop violence, as though good behaviour were a condition precedent for seeking protection of rights.

Scores of petitions were filed in the month of December 2019. The whole country was polarised, and there was even violence perpetrated against peaceful protesters by state authorities themselves. In this scenario, the Supreme Court proceeds to push the matter by four weeks, instead of commencing hearings immediately. This is deeply disappointing, to say the least.

Constitutional faith

As I was putting this talk together, I realised that even if I was critical of certain decisions of the Supreme Court, the fact remains that there is a high degree of "constitutional faith" in India today.

Professor Baxi uses this phrase "constitutional faith" to describe the belief in society that the judicial process is key to anchoring India back onto the path of democracy, or the "redemocratization of democratic polity", as he puts it. I agree with him. As a people, I think we still believe that one of the few things to be proud of in the Indian democratic setup is the free and fair judicial process that we are promised through the Constitution, which keeps the executive and the legislature in check, be they at the centre or the state.

The institution that is the judiciary is what we always turn to whenever the state abuses its power, or our fundamental freedoms are threatened. We truly believe that the courts can be our saviour.

Just playing saviour, though, is rarely enough. The value of a judiciary is measured by its fidelity to the constitutional scheme that birthed it. When George Grote used the term "constitutional morality" in his study of Athenian democracy titled, *A History of Greece*, he was referring to the commitment to the processes and structures of the constitution, as well as a commitment to freedom, embodied in things such as free speech, accountability, and transparency.

This resonated with Ambedkar too, when he recognised the role constitutional morality had played in the working of the Athenian democracy. But he also recognised that constitutional morality had to be cultivated, and it did not merely come into existence because the Constitution was written in a certain way, and that constitutional order was always vulnerable and at risk.

Our Supreme Court has used the phrase constitutional morality several times in its judgements, particularly in recent years. But instead of pointing outwards, I think the Court should be self-reflective, and should ask whether the institution itself is loyal to the spirit of constitutionalism, to this idea of constitutional morality?

Equally, I believe it is for the Supreme Court, as the custodian of the Constitution and the ultimate protector of our fundamental rights, to decide whether or not it deserves the constitutional faith that the people of India repose in it, and whether or not it lives up to those expectations. The right answers will lead to the Supreme Court retaining its status as one of the world's powerful democratic institutions. As an eternal optimist, I believe the Supreme Court of India will recognise the missteps it has taken, and correct course sooner than later.

Source:

https://scroll.in/article/952775/justice-ap-shah-freedoms-on-unsteady-ground-made-to-doubt-whether-sc-able-to-protect-our-rights

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ANNEXURE-C37

To,
The Hon'ble Justices of the Supreme Court
New Delhi – 110001

19th April 2019

Subject: Sexual harassment and consequent victimisation of me and my family at the hands of the Chief Justice of India

Dear Hon'ble Judges,

I was a junior court assistant in the Hon'ble Supreme Court from 1st May 2014 till 21st December 2018 when my services were unceremoniously terminated. With great regret and anguish I am having to address this letter to you, to narrate the sexual harassment and consequent victimisation that I and my family have had to go through and the facts and circumstances which disclose the reason why this happened. The extent of victimisation has been such that apart from my services being terminated in December 2018, in the same month my husband and his brother, both head constables with the Delhi Police have been suspended. My husbands other younger brother who was given a job in group D category in the Supreme Court under the Chief Justice's discretionary quota in October 2018, was also terminated without giving any reasons, in January 2019. Not only this, a false and frivolous FIR was registered against me on 3rd March 2019(alleging that I took an advance of 50000 from a certain Mr. Naveen from Jhajjar, in the Supreme Court premises for offering him a job in the Supreme Court in 2017) on the basis of which I was arrested late at night, shackled from my feet, my husband was beaten up in police custody and handcuffed (though he was not arrested). I was kept in police custody of one day and Judicial custody for one day. Consequently I was forced to obtain bail. There after an application has been made by the police for cancellation of my bail.

I have narrated the entire sequence of events in the attached affidavit which also contains the documents I have in my possession. As you will see from the facts narrated, my and my family's victimisation is a consequence of my not agreeing to the sexual advances made by the Chief Justice of India, Justice Ranjan Gogoi. I did not have the courage to make this complaint earlier because I was terrified of the consequences to me and to my family which I was threatened of and which have indeed come to pass subsequently. However as you can see from the unprecedented and relentless victimisation that I and my family have suffered, I am left with no option but to appeal to your Lordships to take cognisance of this matter.

By this letter I am requesting the Hon'ble Judges of the Supreme Court to constitute a special enquiry committee of senior retired judges of the Hon'ble Supreme Court to enquire into these charges of sexual harassment and consequent victimisation.

Kind regards,

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AFFIDAVIT

I, [redacted] aged about 35 years, W/o [redacted] R/o [redacted] presently at New Delhi, do hereby solemnly affirm and state on oath as under:

1. That I have been working in the Supreme Court of India since May 2014, when I was appointed as Junior Court Assistant. Subsequently in 2015, I enrolled for an LLB Degree in CCS University, Meerut, and began pursuing my degree simultaneously. I live in Tilak Nagar with my husband and our 7 year old daughter. My husband has been in Delhi Police since 2003 and has been Head Constable since 2013. In May 2014 as Junior Court Assistant under the Registry of the Supreme Court I was posted in the Legislation Section of the Library of the Supreme Court. In my role as Junior Court Assistant, I was required to do typing and documentation work in the Library and during Court hours I was sent to different Courts to provide support to the Court Masters by arranging for books/judgments that were required during Court proceedings from the library, answering the intercom phone calls etc. For around 8-10 months in 2015 I was assigned to work in the then Justice Vikramjit Sen's Court. A copy of the office order dated 02.05.2014 showing my appointment as Junior Court Assistant in Library is annexed and marked as **ANNEXURE A** at Pages 29 to 30).

2. In October 2016, Mr. Deepak Madan one of the regular Junior Court Assistants in the then Court of Justice Ranjan Gogoi had gone on leave for his marriage. During this period, I was sent to work in Justice Ranjan Gogoi's Court and continued to work there thereafter. During this period my role included providing necessary support to the Court Masters in getting the required books and citations from the library during court proceedings. I worked diligently and had an unblemished record. My Annual Confidential Report (ACR) for the period 2014-15 graded me as "Good" and for the year 2015-16 as "very good". (A copy of the Annual Confidential Reports for the year 2014-2015 & 2015-2016 are annexed as **Annexure B** at page 31 to 32).

That I continued to work in Justice Gogoi's Court. In January 2018 I had to give my LLB 5th Semester exams. Since working in the Court the entire day left me with no time to study I had requested my immediate boss Mr. B.A. Rao to allow me to work in the library where there was less workload and

not to send me to the Court. In January 2018 I worked in the library and also took leave for a few days to go and write my exams, and did not go to Justice Gogoi's Court for around 10 days. When I went back to his Court after my exams, I was told by one of the Court Masters, Ms. X that Justice Gogoi had enquired about where I was, and he also asked about what I keep writing, since I would diligently take notes during Court proceedings. She told me that she told Justice Gogoi that I had gone to take exams. She also told me that since he had noticed that I was not there, from next time I should also ask him before I take leave. After a few days of me re-joining Court work, Justice Gogoi called me into his chamber in Supreme Court for the first time to speak to me privately. He told me that I was very good and quick at getting citations, that he had come to know that I was pursuing law. He enquired about what my areas of interest were, he asked me what kind of work I did in the library, he asked whether I would be able to do research etc. I told him that I would like to do research, that I am very much keen to learn new things, and that I would try to do my level best at whatever work I was assigned. During this meeting Justice Gogoi also enquired about my family, I told him about my husband, daughter. He asked me how I manage my personal and professional life, and was it not difficult to manage it. I told him it was difficult but that I wanted to work. He asked me who looks after my young daughter, I told him that my mother-in-law who lives in our neighbourhood looks after her till 6:00 P.M but that I had to reach home by 6:00 P.M to look after my daughter. I was extremely honoured and happy that Justice Gogoi spoke to me in such a positive manner.

4. That after this meeting, either Justice Gogoi's staff, would call me, or he himself would summon me to his chamber to provide judgments/books. Sometimes the staff who used to work in Justice Gogoi's residence office would call me as early as 8 AM to tell me that Justice Gogoi needed a certain judgment and that I should keep it ready and give it in his Supreme Court Chamber by the time he arrives at 10:00 A.M. Justice Gogoi too would call me to his Supreme Court chamber to ask me to bring books/judgments that he needed. He would also ask me how my work was going, and how my studies were going, as well as how my family/daughter was. On one occasion Justice Gogoi told me that the xxxx matter was going on and he asked me to make a list of States in India with regard to the status of xxxx. After I had completed this work he gave me paper books (case files) and asked me to prepare briefs/summaries. Since this was above my role, I had no idea how to prepare briefs, I asked a Court Master Ma'am, she

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explained it to me, and when I showed Justice Gogoi my first brief he told me how to improve it.

5. On one occasion about 5:30- 6:00 P.M Justice Gogoi found out that I was still working and asked me why I hadn't left since I have to take care of my daughter. I told him that I was taking time to get used to the new work that was being assigned to me. The next day Justice Gogoi called me into his Supreme Court chamber and told me that there should not be any problem at home because of my work. He asked me who was looking after my young daughter, I told him that my mother-in-law looks after her when I wasn't there. To this, Justice Gogoi said, I should keep my mother-in-law happy. I told Justice Gogoi that I have a good relationship with my mother-in-law and also that she was very fond of my daughter as she is the only girl child in the entire family. During these conversations about my family, Justice Gogoi used to ask about other members of my family, and on one occasion I shared with him that my husband was conservative, and he felt that I shouldn't be working but that I was very keen to pursue my career. On another occasion I shared with him that the only concern of my family members and my mother-in-law was that my husband's younger brother who is disabled, was unable to find employment.

6. During these interactions, I was extremely scared and nervous as I did not know how to speak to a Judge, I had never directly interacted with any Judge prior to this and I did not know how to interact with him. I used to find it very difficult to speak or express anything. Justice Gogoi would keep saying I should speak and say what I was thinking and not worry.

7. That from January 2018 to around May 2018, Justice Gogoi would assign various tasks as described above and would call me into his chamber to assign work to me very frequently, almost every few days. Sometimes during lunch hours or after Court hours, he would call from his chamber directly on the intercom in the Court room, which it was my job to answer and ask me to come to the chamber to take instructions from him. That on another occasion when it was Justice Ranjan Gogoi's turn to host the Judges lunch, he instructed me to compile some hindi film songs to be played at the lunch. I was unsure about which songs I was expected to compile and with the help of others I did so and I handed it over.

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8. That before vacations started in May 2018 Justice Gogoi gave me some paper books on banking law and told me to read them and make briefs during the vacation. On the last working day of the Supreme Court he called

me to his chamber, and told me that he would be organising a lunch for all his staff on 19th May 2018 and told me that I should also come and that I should coordinate with other staff on how to reach his residence on 19th May. A few days later he got his staff to call on the library intercom to speak to me and again told me that I should definitely come for the lunch. I attended the lunch.

9. During the summer vacation I worked on the work that he had assigned to me and also studied for my final semester law exam which was to be held in June. During the summer holidays he again called me from his residence on the library landline number and told me that on 1st June 2018 there was a book launch of Mr. Kailash Satyarthi's book, and that I should attend it along with my husband. A few days later, he called me to his chamber and again told me that I must attend the book launch which was to be held in Constitution Club and that I should bring my husband since the event would finish late. I explained my difficulty in attending the book launch as I had to write my final semester exam on the same day in Ghaziabad. However, Justice Gogoi insisted that I attend the book launch event, he told me that there would be a lot of important people, that I should get out of my comfort zone of the Court and be a bit more social. He gave me and my husband passes for the Book launch event and on his insistence I could not refuse and so me and my husband attended the event after finishing giving my exam.

10. That in July 2018 when Supreme Court reopened, Justice Gogoi called all his staff to meet him. He asked me about the work assigned to me and I updated him and handed over the work I had completed. He asked me how my vacation was, how my daughter was etc. Subsequently our interactions continued in the same manner. On one occasion he assigned some work relating to the xxx xxxx case to me. On another occasion Justice Gogoi gave me some sweets that had been distributed on the occasion of Justice Banumathi's birthday and told me to give them to my daughter as he had nobody else to give the sweets to. Justice Gogoi would keep telling me that I should bring my husband to meet him, and finally he asked me to bring my husband to meet him on 31st July 2018, in his residence. When my husband and I went to meet Justice Gogoi in the drawing room of his residence on the evening of 31st July 2018, he was extremely warm, he kept praising me to my husband. He asked my husband about his work, they spoke about the police system for a while, Justice Gogoi told my husband, *"jis rank par kaam kar rahi hain, is level se bada upar hain"*, *"agar mehnat kare to bohot*

upar pahunch sakti hain" etc. He made me leave the room and spoke to my husband alone, and I was told by my husband that he again complimented and praised my work and my capabilities. He spent almost 2 hours with us. He told my husband and me that if we ever have any problem we should approach him.

11. In August 2018 Justice Gogoi enquired about my exam results, when I told him I had scored 63% he complimented me and told me even though the college was mediocre, it was a good score. He told me that I don't deserve to be in the Supreme Court, "pulling out books", "any illiterate person can also pull out books from the Court" He said I should be doing something better. I thanked him and felt extremely proud that someone of his stature should encourage me and compliment me. One morning Justice Gogoi called me into his chamber, he appeared very irritated and asked me why I didn't answer his calls, I told him that I did not receive any call from him, then he made me show him the call logs on my mobile phone. He kept insisting he called me, then I told him that I have a setting on my mobile phone which blocks calls from unknown numbers. On hearing this, he tried calling me again from his phone in front of him to check if what I was saying was true. On seeing that his call did not go through to my number, he finally believed me and told me to save his number. I thereafter saved his number and also changed the settings of my phone. Justice Gogoi told me that a lot of the work he wants to assign to me is very confidential and important and he would be contacting me on the phone for this but that I should not answer my phone in front of any family members since he may require to communicate confidential information to me. Justice Gogoi gave me a phone number (9667999424) and told me that it was his private number and only one of his trusted staff, Mr. Manmohan Rawat had it. Justice Gogoi also gave me another number 8826444122 and told me that this number is to be used for whatsapp communication.

12. That even after this Justice Gogoi would regularly call me into his chamber in the Supreme Court and assign various tasks to me. He would ask me to prepare briefs in various cases. I was extremely grateful and happy that I was getting to do work that was usually assigned to my superiors/law clerks and that I was getting an opportunity to learn legal skills alongside my work. During our interactions Justice Ranjan Gogoi told me that he considered me as an asset to his work as a Judge and hence took a keen interest in my work.

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He told me that if required he would arrange for a computer and desk to be installed inside his chamber and I could work there itself. Justice Gogoi would message me on whatsapp and call me several times during the day regarding work, during non-Court hours and even during the late evenings when I was at home. He would tell me that in the morning before I left for office I should call him and find out whether he needed anything, books/material and that I should then keep it ready by the time he reached the Supreme Court chamber.

13. In early August 2018 Justice Gogoi called me into his chamber, he told me that as he was going to become the Chief Justice of India, he needed staff that he would be able to trust and someone who was competent and efficient. He said that he had been observing me for the past two years, and that I had all these qualities. He explained to me that he expects certain quality of work, that he knew I was a junior employee but that he found these qualities in me and that I was very good at my work and was also able to keep things confidential. Justice Gogoi said he would need someone to work in his residence office and asked me who he would need to speak to in order to arrange for me to be transferred to his residence office. I told Justice Gogoi that Mr. B.A. Rao was my immediate boss. Mr. B.A.Rao was called to the chamber and informed by Justice Gogoi that I would be transferred to the residence office. Justice Gogoi then told me to speak to Mr. H.K. Juneja, the Private Personal Secretary to discuss the transfer. Mr. Juneja briefed me about my role, he told me the work would be of an extremely confidential nature, he gave me strict instructions that none of the work should be discussed with anybody, not even my husband. Mr. Juneja told me that I would be expected to do all and any work that I was asked to by Justice Gogoi. Mr. Juneja also told me I was the youngest employee to be appointed in this post and that I should be very happy to work with a person like Justice Gogoi. I expressed my gratitude at being assigned such an important and prestigious role so early in my career. I also told Mr. Juneja that I was concerned about my work timings, since I have a young school going daughter who needed my care at home. Mr. Juneja assured me that my office timings of 10 A.M to 5 P.M would not be disturbed and I would be able to go home in time.

14. From 11th August 2018 onwards, I was posted at the Residence Office of Hon'ble Justice Ranjan Gogoi, at 10, Tees January Marg, New Delhi. Just before I was posted at the residence of Justice Gogoi, Ms. Pooja ma'am, the

staff who was posted in the residence office, was transferred back to the registry/Supreme Court. I sensed that my transfer to such a prestigious position despite being a junior employee and specially the fact that I did not know shorthand which was a skill required by most of the staff, caused some resentment against me amongst the other staff. Justice Gogoi told me that since I was such a junior employee, the official transfer order would take some time to be issued. The transfer order was issued later the same month. (A copy of the office order dated 27.08.2018 is annexed as **Annexure C** at Page 33 to —).

15. During my posting in the residence office of Justice Gogoi, initially my timings were from 10 A.M to 5 P.M. However, gradually I was required to come earlier, even as early as 8:15 A.M. When I joined, Mr. Manmohan Rawat and Mr. Arjun were also posted in the residence office in the morning shift, however they would come alternate day. Both were shorthand staff. However, soon after I started coming to his residence in the morning, both Mr. Rawat and Mr. Arjun started coming later in the day after Justice Gagoi used to leave for the court. One Mr. P. Rao used to come in afternoon. He along with Mr. Arjun were soon thereafter shifted to the Court registry. In the mornings, myself and peons, Vijay Bhaiyya and Gopi ji would work in the residence office. Justice Gogoi would work in his residence office room from around 8:00 A.M to around 9:00 A.M or when he would leave for the Supreme Court. He would return at about 4:30-5:00 or sometimes even before that, whenever the Court rose on that day. One of the staffs in the Supreme Court, once when we were speaking on the phone regarding work, commented that now that I have been transferred to the residence office, Justice Gogoi was leaving his Supreme Court chamber early. In the mornings I would be required to check the letters received by Justice Gogoi, segregate them according to the issue and according to urgency. I would be required to take down dictation, do some research and manage the files. In the 1.5 to 2 hours in the morning, he would summon me to his office room at least 3-4 times.

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16. That on one occasion, Justice Gogoi called me into his office room and told me that I should send him a whatsapp wishing him "Good Morning" every morning, and that every evening I should whatsapp him after reaching home. On being told this I felt it was a bit strange. But I was very junior, I had never interacted with a Judge before this, and I told myself that maybe

this was normal. Until that point I had never had any direct interaction with a Judge. We were all told not to even look at a Judge while working in the Court. The way in which Justice Gogoi treated me and assigned important work to me felt like a privilege. He kept telling me to send him a message every morning wishing him Good Morning and so I used to message him by around 6:00- 6:30 each day wishing him Good Morning. Justice Gogoi would reply to these messages by wishing me Good Morning, or asking me how I was etc. A few times in the morning at the office he would tell me, "oh, you were on whatsapp till 12:00 in the night." He also told me to whatsapp him each day after reaching home. If I did not message him, he would send me a whatsapp with just a question mark "?", to which I was expected to reply that I had reached home, or the next day he would mention it and ask me why I did not message him.

17. When I reached the residence office by around 8:00- 9:00 A.M, Justice Gogoi would assign tasks to me, he would call me into his office room, make me show him my phone and make me delete the whatsapp messages between us. Since the whatsapp messages between us also included certain instructions he gave me about confidential work etc, I assumed that he did not want any messages to remain on my phone. Despite that, I found it strange but I felt I did not know enough and since he was extremely encouraging and supportive of my work, I told myself that there was nothing wrong with these things. Once when I was suffering from a gall bladder stone, Justice Gogoi he enquired about my health and suggested some Doctor I could visit.

18. On one occasion when Justice Gogoi had called me into his office room, he told me that I was one of his assets. He said that he had three assets, his wife, his daughter and me. He told me that for his Oath taking ceremony (as Chief Justice of India) after his wife and mother, "*you will be the third person I will be inviting*". Justice Gogoi told me that since he was due to become Chief Justice of India, it was very important for me to work diligently without taking any leave. In his residence office, I was often required to come to work very early even as early as 8:15 A.M and required to stay till after 5:00 P.M, since I had to be at home by a fixed time, Justice Gogoi made arrangements for me to be dropped to the closest metro station in one of the cars of National Legal Services Authority (NALSA) that would be stationed at his residence as he was the then Executive Chairman of

NALSA. One of the cars was black and another was white, and the name of the driver was Mr. Manoj.

19. That during the course of my work at the residence office of Justice Gogoi, he would repeatedly tell me that once he became the Chief Justice of India, he would be in a position to help me, and that I should tell him what I needed and he would see how he could help me. Since I had concerns about reaching home late, Justice Gogoi once offered to provide me and my family accommodation that was located closer to his residence, so that I could be readily available whenever required at office. I expressed my gratitude but politely told him that we were very comfortable with our present accommodation. I told him that my family was reasonably well off and comfortable, that my husband and his brothers had government jobs. During the course of this conversation I mentioned that only my younger brother-in-law was unable to find a job as he was disabled, Justice Gogoi then assured me that once he became the Chief Justice of India he would have the power to make appointments to the Supreme Court Registry staff through the Chief Justice's discretionary quota and he would see what he could do.

20. That in October 2018, before the Oath taking ceremony as Chief Justice of India, Justice Gogoi asked me to work on preparations for a party at his residence. He invited my husband too for this party, though he did not invite the spouses of any other staff except Mr. Manmohan Rawat, a senior staff. On 2nd October 2018 during the function at his residence, Justice Gogoi's daughter and her husband too were present. (A copy of the photograph taken at the party on the 2.10.2018 are annexed as **Annexure D** Page 34). I was also invited along with my husband for the swearing in ceremony of Justice Ranjan Gogoi when he was appointed Chief Justice of India. Again, while other staffs were invited, most of their spouses were not invited. (A copy of the invitation card for myself and my husband for the swearing in ceremony and the car parking for the Rashtrapati Bhawan are annexed as **Annexure E** at Page 35 to 36).

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That after Justice Gogoi took oath as CJI, on one occasion he made me conduct interviews for law clerks, I conducted the same and chose one Ms. Kruti, an advocate from Mumbai.

22. That soon after his appointment as CJI, he asked me for the resume of my brother-in-law Mr. Anil Kumar, he read the resume and pointed out some grammatical and other errors and kept it with him. A few days later, my brother-in-law was called for an interview and appointed as Court attendant

in group D category in the Supreme Court through the CJI's discretionary quota. (A copy of the appointment letter dated 9th October 2018 is annexed as **Annexure F** at page 37).

23. That on 10th October 2018 morning, the CJI called me into his office room, CJI told me that my brother-in-law, who suffered from 60% disability in his legs had been appointed, and that he had ensured it despite the fact that my brother-in-law was found to be medically unfit as traces of blood were detected in his urine test. While he was telling me this, I kept expressing to the CJI how grateful me and my family were that Lordship had arranged for a job for my brother-in-law.

24. Though I usually wear a uniform of black and white clothing, on that day since it was the first day of Navratri, I had worn an orange kurta and dupatta. The CJI referring to my clothes, told me, "You are looking pretty good today." The CJI asked me to come and stand next to him, he got up from his chair. The CJI then asked me, "What can you do for me?", I kept repeating that I was very grateful and that everybody in my family was very happy. The CJI then slid his hand from the back of my head, along my back to my hipline, till my lower back. I immediately froze and my body stiffened. I think the CJI sensed this, and so he immediately pulled both my cheeks, like one would do to a child. He told me that he is like this with his daughter too.

25. CJI again asked me what I could do for him, when I again said I was very grateful, he said "*No, No, I know you will not speak, so write it down and show it to me*". The CJI then went on to casually assign some daily tasks/work for me to do. I was stunned and shocked as I immediately realised that the CJI had touched me in an extremely inappropriate manner. However, I did not know how to respond immediately, I was extremely tensed, I told myself, "*bade log, maybe this is normal behaviour*". I suppressed my discomfort because I was stunned and shocked that man of his stature could do something like this. I went back and tried to continue doing my work.

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26. That on 11th October 2018 morning, the CJI again called me into his residence office. As I do often, I stood at the door to the room with my notepad and pencil, he instructed me to sit in the chair across the desk from him. He once again brought up the issue of my brother-in-law's appointment. CJI said your whole family must be very happy. He told me that "*If you put on some weight you will look good*", He offered me some

sweet/prasad that was in his room, saying you should be giving sweets since your brother-in-law has got a job. The CJI once again asked me, *"So, what can you do for me"*. He asked me whether I have written anything down, I showed him a note pad on which I had written how grateful I was, I do not remember my exact words, but I had written as follows, *"...Your Lordship is a blessing to me, words cannot describe how thankful I am... I will always be grateful for all that Your Lordship is doing for me... My entire family is grateful to you... I am so grateful for your support..."*. The CJI read the note. He then got up from his chair and walked across and came and stood to my left. Since he was standing I too stood up as I could not continue sitting when the CJI is standing. He took my notepad from my hands and put it aside on the desk, he then took my hands into his and told me that my hands smell nice, he then pinched my cheeks, he then put his arms around my waist from the front, he said, *"I want this from you"*. When I had stood up I had put my hands behind my back. He hugged me around the waist, and touched me all over my body with his arms and by pressing his body against mine, and did not let go. He told me *"hold me"*, he did not let go of me despite the fact that I froze and tried to get out of his embrace by stiffening and moving my body away. Since he did not stop forcibly hugging me, I was forced to push him away from me with my hands. When I pushed him away, he hit his head against a book shelf/cabinet on my left. My first thought was why would the CJI think he can do something like this to me. I immediately left the room and was in a state of complete shock and was unable to think clearly after this. I sat at my desk.

27. After about 10-15 minutes the CJI called me to his office again and told me *"Jo yahan hua hai, you will not share with anybody"*. He told me that if I disclosed anything to anybody, my family would be greatly disturbed. I understood what he meant. I was so upset and scared that I said, yes of course your Lordship. Then he told me, write down that you will not disclose. I had a piece of paper and pencil, in my hand, my hands were trembling, I wrote down what he dictated which was something like *"I will not harm your dignity. Can you hold me"*. I was extremely scared, I knew what he was dictating was wrong, and that he was making it appear that it was me who tried to hold him. However, I was so scared and shocked that I wrote whatever he dictated. Due to the incident I was extremely distressed, shocked, I was panicking and felt a bit dizzy, I was not able to work, I put my head down, and left at my usual time.

28. That evening after reaching home, to my surprise I received several phone calls from Mr. Badar, Admin Department, Supreme Court Registry, I did not answer most of the calls, finally when I spoke to him, he inquired about whether I had reached home ok and whether things were ok between my husband and myself. I told Mr. Badar that everything was fine and there was no problem with my husband. I then realised that the CJI had probably told Mr. Badar a concocted story and asked him to check up on me, since the other staff in the office had noticed that something had happened and that my behaviour was not normal on that day, and I had not done any work and left office. Moreover, I had never received calls from Mr. Badar earlier. Secy General of the Supreme Court Mr. Mathani also called me that evening and enquired about me in the same manner. (A copy of the call logs on the 11th of November 2018 are annexed as **Annexure G** at Page 38 to 39)

29. That same night when I regained my senses and was able to think clearly, I called the CJI on his phone because I wanted to tell him that I could not work with him any longer. He did not receive my call. Instead he made his Personal Secretary, H.K. Juneja call me to tell me not to disturb Justice Gogoi at night. Though till then it was normal for him to whatsapp and call me at odd times.

30. I later also got to know from neighbours, named Harvinder, and Mrs and Mr. Dwivedi and others, that the SHO, Tilak Marg called Yashpal, the Colony President where I live, to make enquiries about my family and whether things were stable between me and my husband.

31. The next day, 12th October when I went to office, the CJI's behaviour changed dramatically. After this incident he began calling Mr. Ajay Jain to his residence office in the morning shift. He stopped calling me inside his chamber as often. Now when he did call me inside his chamber, he would most of the time insist that one of the Peon's accompanied me, or he would tell me to leave the door to his office room open, unlike earlier. Once when he called me inside his office room he told me that I should continue to send him messages wishing him Good Morning and I should continue to behave and work like before.

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32. Though I had wanted to quit, I did not have the courage to take the step or communicate anything to him. I feared it would make him angry. I did not know how else I could behave or what else I could do, I simply did what he told me to do. A few days after this the CJI left to visit Guwahati and due to

Dussehra holidays the Supreme Court was closed. When he was in Guwahati the CJI called me on my mobile phone, however I did not answer. When he returned, he pretended as though everything was normal. He asked me why I didn't answer his call. At work I was extremely scared and nervous, I was unable to do my work properly. Mr. Manmohan Rawat noticed that I was constantly tensed and asked me whether everything is alright. I knew I could not speak about what happened to anybody, so I told him I was fine. I was unable to tell even my husband about what had happened as he anyway thought that I should not be working outside the house. I was not able to tell anybody else and tried to continue work and suppress the incident and forget about it. During this time my work was suffering.

33. Thereafter, my work life changed dramatically overnight. My victimisation and harassment began that led to my final dismissal on the basis of a departmental enquiry report that charge sheeted me on completely motivated and frivolous grounds. I was transferred arbitrarily three times to different departments within a short span of a few weeks.

34. On 22nd October 2018, I was transferred out of the residence office of the CJI and posted in the Centre for Research and Planning (CRP) in the Supreme Court. I was relieved that I would not have to work in the residence office anymore. When I began work in CRP, Mr. B.A. Rao my previous supervisor commented that I have been assigned work with great responsibility, I automatically responded and said something about how not everything is how it seems, "*jaisa dikhta hai waisa hot nahin hai*". (A copy of the office order dated 22.10.2018 is annexed as **Annexure H** at Page 410 to ___).

35. That around end October, the CJI visited the CRP with Hon'ble Justice Bobde and Hon'ble Justice Ramana. The CJI spoke to me and told the two Justices that I was a very good worker and very bright. A few days after this, on 26th October 2018, the CJI tried to call me on my mobile phone, I did not answer, then he sent the Secretary General to bring me to his chamber in the Supreme Court. CJI asked me whether I wanted to rejoin work in his Court. I was not able to look him in the eye, but firmly told him that I want to continue in the CRP in the Supreme Court.

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36. On 16th November 2018, my seat was changed to Admin Material Section. I applied for leave for the 17th of November which was a Saturday and hence half day since I had to attend my daughter's school function. My Supervisor

advised me to report to work after the function. However since the school function went on till 12:15 P.M. I could not report to work, it being a Saturday and hence half day. I however kept updating my supervisor regarding the delay at my child's school and inability to attend work on that day.

37. On 19.11.2018, I was issued a memorandum by Registrar Deepak Jain stating that I had rendered myself liable for action under the provisions of the Conduct Rules for questioning the decisions of senior officers regarding change of my posting/seat and for taking unauthorised leave. On these flimsy charges, I was asked to furnish an explanation as to why disciplinary proceedings should not be initiated against me. (A copy of the memorandum dated 19.11.2018 is annexed as **Annexure I** at Page 41 to —).

38. On 22.11.2018 I submitted my written reply stating that I did not approach anyone to seek a change of seat and had no intention to question my senior officers decision. I further stated that I had applied for casual leave for the 17.11.2018 and was asked to report to work for a few hours. However I was unable to come in to work since my daughter's school function continued till 12:15p.m. (A copy of the reply dated 22.11.2018 is annexed as **Annexure J** at page 42 to —).

39. On the very same day 22.11.2018, I was again transferred to the Library Division. This being my third transfer in one month. (A copy of the office order dated 22.11.2018 is annexed as **Annexure K** at page 43 to —).

40. On 26.11.2018, I received another memorandum that the explanation submitted by me was not found satisfactory at all and hence further action was being contemplated against me under the Rules. (A copy of the memorandum dated 26.11.2018 is annexed as **Annexure L** at page 44 to —).

NOTARY ★ ASHOK KUMAR ADVOCATE L. No. 4[illegible] ★ GOVT. OF INDIA

41. On 27.11.2018, I received a suspension order stating that since disciplinary proceedings were being contemplated against me, I was being placed under suspension until further orders. (A copy of the suspension order dated 27.11.2018 is annexed as **Annexure M** at page 45 to —).

42. That I received a memorandum that it is being proposed to hold an inquiry against me under Rule 13 of the Supreme Court Officers and Servants

(Conditions of Service and Conduct) Rules, 1961. The substance of the allegations were annexed in the "Article of Charges" along with a statement of imputations. The article of charges briefly can be summarised as follows:

Article no. 1: That on being shifted to the Admn Materials (Annexe) I had shown reluctance, felt dissatisfied with the sitting arrangement and not only questioned the decision of senior officers, thereby acting in a manner prejudicial to discipline.

Article no. 2: That on being shifted to Admin Material Sections, I immediately tried to bring influence and exert pressure from unaccept able quarters to have my seat changed. Thus, acting in a manner prejudicial to discipline.

Article 3: That I unauthorisedly absented herself from duty on the 17.11.2018, thereby showing insubordination, lack of devotion to duty and indiscipline.

Based on these charges the memorandum stated:

"All the above acts (named or otherwise) of commission and omission committed by you... show that you have acted in a manner unbecoming of a court servant prejudicial to discipline and good order and thus committed misconduct, violating the provisions of Rule 24(1) & (2) and Rule 25(1) of the Supreme Court Officers and Servants (Conditions of Service and Conduct) Rules, 1961 rendering yourself liable for disciplinary action."

(A copy of the memorandum dated 27.11.2018 along with the Article of Charges and Statement of Imputations is annexed as **Annexure N** at Page 46 to 52).

44. That by my reply dated 6.12.2018 I denied each and every charge. I raised the objections that there was no misconduct and the charges were completely false. My reply to the three charges above can be summarised as follows:

Reply to Article of Charge 1: That within a period of three weeks, I had been posted to three different places. Being extremely anxious and insecure, what I expressed to the Branch Officer, Admin Materials Section was not reluctance to perform duties assigned to me but only my anxiety at being allotted three posting in a short span of time.

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Reply to Article of Charge no 2: That I approached the President of the Supreme Court Employees Welfare Association with whom I had worked earlier. I only requested him to find out whether I had done something wrong for which my seat was being repeatedly changed. I deny asking him to speak on my behalf to anyone or to bring any influence to bear on anyone.

Reply to Article of Charge no. 3: That on the 17.11.2018, I attended my daughters school function. I had sought leave and was directed to attend office for sometime. However since the school function went on till 12:30, I was unable to attend to her duty on that day and report to work. I kept the branch officer informed about the delay at my daughters school.

45. On the 10.12.2018, I received a notice that a Departmental Inquiry is being conducted into the charges of misconduct and Shri Surya Pratap Singh, Registrar was being appointed as Inquiry Officer to conduct the Departmental Inquiry.

46. On 15th December 2018 I wrote to Mr. Surya Pratap Singh, the Enquiry Officer that I wished to appoint Mr. Laxman Singh, Sr. Section Assistant in Rajya Sabha as my defence assistant. However I was not given any opportunity to avail the assistance of Mr. Laxman at any of the enquiry hearings. (A copy of the petitioners letter dated 15.12.2018 is annexed as **Annexure O** at Page 53 to 54).

47. On 17th December I was asked to appear for my Defense Statement at 10:30 a.m. I reached the court and got a pass made at 10:19a.m. (A copy of the pass is annexed as **Annexure P** at Page 54A to —). By 10:25a.m. I was sitting outside the room of the enquiry officer and I sent word to him through the peon that I had arrived. I was very distraught and nervous and began crying and when I was waiting in the gallery, outside the enquiry office, a peon brought me some water. After that I fainted. I later learnt that I had been taken from the Supreme Court to Ram Manohar Lohia Hospital by some members of the staff of the court. My medical report at RML Hospital shows that I was brought there unconscious by the staff.

NOTARY ★ GOVT. OF INDIA ★ ASHOK KUMAR ADVOCATE L.No.

The medical report of Ram Manohar Lohia Hospital dt.17/12/18 records, *"Posted as Junior Court Assistant staff in Supreme Court. History as told by staff) → He is not knowing properly. Sudden onset of hyperventilation. H/o loss of consciousness. Patient was found lyeing on floor and not responding to any command with her eyes opened and staring on ceiling.*

Patient was brought in this condition to RML emergency"

(A copy of the medical report is annexed as **Annexure Q** at Page 55 to 64A)

49. On 18.12.2018, I received a communication from Mr. Deepak Jain, Registrar Admin I that a Departmental Enquiry was conducted against me and all the charges levelled against me had been found proved. It was further stated in the said communication that the Disciplinary Authority on consideration of the Report of the Inquiry Officer and record of the Inquiry, has recorded the following findings on the above charges on 18.12.2018:-

"Perused the record of inquiry and considered the Inquiry Report. As per the Inquiry Report, the two departmental witnesses were examined and their statements were recorded on 15.12.2018. The departmental witnesses were cross examined by the delinquent official. Thereafter, the delinquent had been given opportunity to lead evidence in support of her defence and the Inquiry officer fixed 17-12-2018 for defence evidence. However, the delinquent official neither appeared before the Inquiry Officer on 17-12-2018 not she moved any request for adjournment. Therefore, the Inquiry Officer decided to proceed with the inquiry ex parte against her.

...and you are called upon under Rule 13(10) (I) (b) of the Rules ibid to submit such representation as you may wish to make against the proposed action latest by 20-12-2018 and further to show cause why one of the major penalties including penalty of dismissal from service under such clause (iv) to (vii) of Rule 11 of the above Rules should not be imposed upon you for the aforementioned misconduct." (Emphasis added)

(A copy of the communication dated 18.12.2018 from Mr. Deepak Jain along with the Enquiry Report dated 18.12.2018 are annexed as **Annexure R** at Page 65 to 92).

NOTARY ★ ASHOK KUMAR ADVOCATE L. No. 41 ★ GOVT. OF INDIA

50. The Enquiry officer records in his Enquiry report at page 12 that I was given opportunity to lead defence evidence but I did not appear at the hearing on the 17 of December 2018 and therefore it was ordered that the enquiry would proceed ex-parte.

51. On 20.12.2018, my husband submitted a hand written note to the Registrar Mr. Deepak Jain stating that he was submitting along with his note, my Defence Statement. He also stated in his letter that I was called to the Supreme Court to present my defense before the enquiry officer on the 17th

of December 2018. However since I fell sick and fainted in the Court I was taken to the RML hospital by the staff. (A copy of the letter dated 20.12.2018 is annexed as **Annexure S** at Page 93 to 94).

52. My husband also submitted my Defence statement on the 20th of December wherein I completely denied all the charges against me. (A copy of the Defence statement is annexed as **Annexure T** at page 95 to 98).

53. However the very next day that is 21.12.2018, to my complete shock, I was dismissed from service without granting me any further opportunity. The Disciplinary Authority passed the following order:

"Having considered the representation dated 20-12-2018 given on behalf of Ms. Alka Rani, Junior Court Assistant (under suspension) in response to show cause notice dated 18-12-2018 issued to her and her Statement of defence dated 17-12-2018; in light of material on record and the Report of the Inquiry Officer dated 18-12-2018, it is decided to reject the representation of the delinquent official as it is without substance and to accept the findings recorded by the Inquiry Officer as the same are well founded and which are to be read with the tentative statement of Findings."

Based on this, the Order of dismissal states as follows:

"Now Therefore, in compliance of the above Order of the Disciplinary Authority, the delinquent employee, Ms. Alka Rani, Junior Court Assistant (under suspension), is hereby imposed a penalty of dismissal from service as provided in Rule 11(vii) of the Supreme Court Officers and Servants (Conditions of Service and Conduct) Rules, 1961 with effect from the date of Order dated 21-12-2018."

54. That after I was suspended, I finally told my husband about the incidents of 10th and 11th October 2018 when the CJI had made sexual advances towards me.

55. It is shocking that soon after my suspension on the 27.11.2018, my husband, Mr. Dharam Singh who has been a Head Constable with the Delhi Police since June 2013 was suddenly transferred from the Crime Branch division where he was working to the third battalion. From here began the victimisation and harassment of my husband and his brothers. (A copy of the Order dated 3.12.2018 is annexed as **Annexure U** at Page 99 to).

NOTARY ASHOK KUMAR ADV. DELHI L.No. 48 GOVT. OF INDIA

56. On 28.12.2018 my husband Mr. Dharam Singh received a call in the late evening that he along with his brother Mr. Pyare Lal (also a constable with the Delhi Police) have been suspended from service.

57. On 29.12.2018, Mr. Dharam Singh received a letter of suspension. The letter did not mention any reason for suspension apart from stating the suspension "pending enquiry into his conduct." (A copy of the order dated 29.12.2018 is annexed as **Annexure V** at Page 100 to —).

58. On the same day, my husband made calls to Mr. H.K. Juneja, the personal secretary to the Chief Justice of India, requesting him to arrange a meeting with the Chief Justice of India who alone would be able to help us in our situation as we had by then realised why all these things were being done to us, and why suddenly every member of my family was under attack . However Mr. Juneja denied any knowledge of our situation. (A copy of a voice recording between Mr. Juneja and Mr. Dharam Singh is annexed as **Annexure W** at page 137 to —)

(A copy of the screen shot of the message from Mr. Dharam Singh to the Mr. Juneja is annexed as **Annexure X** at Page 101 to —).

59. On 31.12.2018, my husband was informed that a complaint has been made against him for making unsolicited calls to the Personal Secretary of the Hon'ble Chief Justice of India.

60. On the 2.1.2019, to our great dismay and shock, my husband received orders from the Dy. Commissioner of Police Vikas Puri, stating that a departmental action has been initiated against him as he made unsolicited calls to the office of Hon'ble Chief Justice of India, amounting to official misconduct. (A copy of the order dated 2.01.2019 is annexed as **Annexure Y** at Page 102 to —).

61. On 9.01.2019, my husband received an order from the Dy. Commissioner of Police, Vikas Puri. The order stated that it was alleged that my husband had links with local gamblers and that he had approached the SHO Tilak Nagar to allow satta activities of one person against whom a criminal case for satta activities was already registered in PS Tilak Nagar. The order also mentioned the registration of a criminal case against my husband and his brother in the year 2012. On these charges, the order stated, departmental action would be initiated against my husband. (A copy of the order dated 9.01.2019 is annexed as **Annexure Z** at Page 103 to 104).

NOTARY ASHOK KUMAR ADVOCATE L. No. 488 GOVT. OF INDIA

62. It is important to mention here that in the FIR no. 86/2012, under S.323, 341, 34 IPC the matter got compounded between the complainant and my husband and his brother and on 12.01.2017. (A copy of the order dated 12.01.2017 is annexed as **Annexure AA** at Page 105 to —).

63. My husband's harassment continued as he was then transferred from the 3rd Bn DAP to the 2nd Bn DAP so that joint departmental enquiries could be carried out against him and his brother.

64. After dismissal from service on completely frivolous and baseless charges that do not warrant the severe penalty of termination of services, my harassment continued. On 10th January 2019, my husband was called by Mr. Naresh Solanki, the SHO, Tilak Marg, Police Station. My husband was told by the SHO that if I apologised to the Chief Justice of India, our problems would be sorted out and nothing further would happen. My husband and I could not understand what I had to apologise about, when we tried asking the SHO, he claimed he doesn't know anything but that I should just apologise.

65. On 11th of January 2019, the SHO again called my husband and informed him that we should be present at the Police Station by afternoon. We met the SHO at the Police Station. The SHO called Mr. Deepak Jain, Registrar Supreme Court of India, in our presence and coordinated with him as to how we should reach the residence of the Chief Justice. Then the SHO changed out of his uniform into civil clothes and took us in a white colour Maruti Swift car with license plate no. HR 10 W 4654 to the residence of the Chief Justice of India. There Mr. Deepak Jain, Registrar was already present. Mr. Deepak Jain took me to Mrs. Gogoi in the CJI's residence. In the presence of the SHO and Mr. Deepak Jain, Mrs. Gogoi told me "*naak ragad ke jao*". I do not know why Mrs. Gogoi was involved in this. But by this time I had realised that the CJI has concocted a false story about the sexual harassment incident. This was also the reason he had made me write a note to the effect that I wanted him to hold me, whereas he had made sexual and physical advances to me. However by this time the only thing I wanted was to save myself and my family. I fell at the feet of Mrs. Gogoi and rubbed my nose at Mrs. Gogoi's feet, and said *"sorry"*. And then we left. The CJI was not present there at this time.

NOTARY ★ ASHOK KUMAR ADVOCATE L. No. [illegible] ★ GOVT. OF INDIA

66. After that I was brought back by the SHO to the Tilak Marg Police Station. He changed back into his police uniform. Thereafter the SHO had a long conversation with me and my husband at the Police Station which I recorded

on my phone. The SHO told us that now that we had done the apology things would improve for us and that in a day or two he would try to meet Mr. Deepak Jain again regarding my case. He also told us that we need not get into why I was made to apologise to Mrs. Gogoi and told us not to share anything with any employees association, etc. The SHO further asked me to narrate to him what had exactly happened and that he would get an opportunity to meet the Chief Justice of India. I narrated to him the incidents of sexual harassment at the Chief Justice's residence. I also told the SHO on his asking that I did not know how this matter came to the notice of Mrs. Gogoi. The SHO also told me that he felt that all this happened with me because perhaps the staff got to know about the matter. I told him that I had not informed or spoken to anyone since I was instructed by the Hon'ble Chief Justice of India not to talk about it to anyone or else I would face consequences. (A copy of the video recording of our conservation with the SHO after returning from Hon'ble Chief Justice residence is annexed as **Annexure BB** at Page 137 to —) & (A copy of the relevant portions of the translated transcript of the video recorded conversation with the SHO is annexed as **Annexure CC** at Page 106 to 111).

67. That on 14th January 2019 my disabled brother-in-law Anil Kumar who had been appointed as Temporary Junior Court Attendant at the Supreme Court of India received an Order terminating his services with effect from the afternoon of 14th January 2019. This handicapped brother-in-law had been appointed in October 2018 from the discretionary quota of the CJI.

68. During the next two months I was in complete depression and would suffer from panic attacks. I received a call from my colleague that rumours were being spread in the Supreme Court that I had been suspended and dismissed from service because I had passed on work related information from the residence office of the CJI to my husband and had after that committed suicide. These false stories depressed and tortured me further. I was not able to understand why we were being so badly victimised even though I had remained silent as directed by the CJI and not disclosed the incidents of sexual harassment to anybody. I stopped taking calls and confined myself to my house. I consulted with psychiatrists and neurologists for lack of sleep and depression. (A copy of the OPD card, AIIMS, Delhi dated 16.01.2019 is annexed as **Annexure DD** at Page 112 to 114).

NOTARY ★ ASHOK KUMAR ADVOCATE L. No. 4448 ★ GOVT. OF INDIA

69. FIR no. 0021 - dated 03.03.2019, was registered at the instance of one Naveen Kumar, son of Satbir Singh (resident of Jhajjar, Haryana, Mobile

No. 9466675666) under various penal provisions of the Indian Penal Code, u/s 420/ 506 read with section 120 B of the IPC - at the Police Station – Tilak Marg against myself and my husband Dharam Singh (copy attached). The registration of the said FIR was not known to me until the police reached our village in Rajathan on 8/9.03.2019.

70. We were out of town at my husband's village & post office– Togra Kalan, Tehsil – Nawalgarh, District – Jhunjhunu, Rajasthan on 08.03.2019. At around 10 pm on 08.03.2019, a team of police officers including Inspector Parminder Singh, SI Dharmender Kumar, one lady constable, a constable and a driver arrived at the aforesaid address in a private car [HR-14L-3494]. That Inspector Parminder Singh asked me and my husband, Dharam Singh to accompany them to police station – Tilak Marg, as the SHO of Tilak Marg PS wanted to inquire regarding a complaint lodged against me and my husband. The police team threatened me and my family and asked us to accompany them in the night to Tilak Marg Police Station, Delhi. I requested Inspector Parminder Singh not to take me to Delhi during night and promised to accompany them to Tilak Marg Police Station, at Delhi in the morning of 9.03.2019 to which the police team agreed. We were unaware of the alleged incident regarding which I was being forced to come to Delhi at Tilak Marg Police Station but due to fear and shock could not protest against the same.

71. In the morning of 09.03.2019 when my husband asked the police team to give some notice to which the SI Dharmender Kumar, at around 9.45 am issued notice under section 41.1 of the Cr. PC requiring my attendance at the Tilak Marg PS at 2 pm on 09.03.2019 (A copy of this notice is annexed as **Annexure EE** at Page 115 to —). A video recording of us questioning the police team as to why they wanted to arrest us is annexed as **Annexure FF** at Page 137 to —). The police team took me and my husband to the police station Mukungarh, District – Jhunjhunu, Rajasthan and a copy of the daily diary recorded at 11.06 am; would show that the police team led by SI Dharmender Kumar accompanied me and my husband to PS- Tilak Marg, Delhi (A copy of Daily Diary entry of the PS: Mukungarh dated 8/9.03.2019 is Annexed as **Annexure GG** at Page 116 to 118).

NOTARY ASHOK KUMAR ADVOCATE L.No. 4 GOVT. OF INDIA

72. I returned to Delhi with my husband in my brother-in-law's car [DL 8 CAR 3871]. I went to Tilak Marg PS, Delhi with my husband at around 5.30 pm on 09.03.2019. My husband, Dharam Singh informed the Delhi Police

WhatsApp number at 9910641064 about our harassment by the police team. We met the SHO Tilak Marg PS, Delhi where I and my husband were asked to sit in Duty Officer Room. After sometime, the police team led by SI Dharmender Kumar reached Tilak Marg PS and asked if we met the SHO of Tilak Marg PS. I informed SI Dharmender Kumar that it is upon his instructions I have been sitting in Duty Officer room. I was extremely unwell, and the SHO, Tilak Marg asked me and my husband to keep sitting in the Duty Officer room. Upon request made by my husband, the SHO, Tilak Marg allowed me only to go out of the police station, to meet the doctor. I went to Deen Dayal Upadhyay Hospital, Delhi with my brother-in-law. (A copy of the medical report of my visit to Deen Dayal Upadyay Hospital dated 9.03.2019 is annexed as **Annexure HH** at Page ___to 119-)

73. I submit that the said FIR is complete false and baseless and the allegations levelled against me and my husband in the said FIR are false, malicious and premeditated to harass and terrorise me and my family. The complainant in the aforesaid FIR alleges having met me in the Supreme Court premises, twice, near bank, through a middleman, Mansa Ram for getting the complainant a job in the Supreme Court, in group D post, like process server/ pyade on the pretext that I am personal assistant of the highest sahib (officer) of the supreme court and my husband holds top post in police, all of which is completely false and baseless. I say that the complainant falsely stated that he paid an advance sum of Rs. 50,000/- for the total consideration of Rs. 10,00,000/- allegedly for getting him a job. I also say that I and my husband, Dharam Singh, never threatened the complainant as alleged in the FIR. I say that the manner in which the FIR is lodged, on the basis of false allegations, without verifying veracity thereof, raises suspicion on the registration of FIR, and suspicion over the manner in which police conducted itself in the arresting me and my husband.

NOTARY ★ ASHOK KUMAR ADVOCATE L. No. 4038 ★ GOVT. OF INDIA

Around 2 am on 10.03.2019 (late night of 09.03.2019) my mother-in-law called my bhabhi, Shashibala (sister-in-law) asking her to reach House No. 101, Police Colony, Tilak Nagar where my mother-in-law and daughter were residing. We were shocked to receive call at 2 am, and immediately rushed to Police Colony, Tilak Nagar fearing danger to family members. There I saw Devender Kumar, SHO of Tilak Marg PS, in casual dress (not in police uniform) and also saw my husband, Dharam Singh handcuffed. Devender Kumar, SHO asked me and my sister-in-law to sit in the police

van and misbehaved with me and my sister-in-law, pushing us inside the van. Mine and my sister in laws legs were tied after I was pushed inside the van. (A copy of the video footage of my husband Mr. Dharam Singh being brought to our residence handcuffed is annexed as **Annexure II** at Page 137 to ——).

75. My husband Dharam Singh my sister-in-law and I were forcefully taken to PS Tilak Marg, through a gate (which remains locked usually) where no CCTV cameras are installed and I was shackled with handcuffs by my feet to the bench where I was made to sit. The SHO misbehaved with me and threatened of dire consequences. At around 7-8 am on 10.03.2019, the police untied me and took me again inside the Tilak Marg Police Station where CCTV cameras are installed. The SHO, Tilak Marg misbehaved with me and my sister-in-law, and upon his order I was handcuffed again inside the ladies lock up room. At around 11 am on 10.03.2019, I was taken several times to the IO room and SHO room for investigation and also subjected to medical tests at Ram Manohar Lohia Hospital, Delhi around 12 pm and thereafter, I was produced before the Metropolitan Magistrate at around 2 pm on 10.03.2019. The police asked for 3 days of police custody but the Metropolitan Magistrate allowed police custody for a day only. My mobile phone was seized by police and there is likelihood of important evidence being deleted or planted in my phone and tampered with.

76. After grant of police custody for a day on 10.03.2019; I was kept in the police station, Tilak Marg confined in a room and put inside lock-up of the Tilak Marg PS. I was produced before the Metropolitan Magistrate on 11.03.2019 and the Metropolitan Magistrate allowed for judicial custody for fourteen days, whereupon I was kept in Tihar Jail (No. 6). On 11.03.2019, I had moved a bail application before the Court of Metropolitan Magistrate, Patiala House Court. The bail application was opposed by the police and the Metropolitan Magistrate, Patiala House Court, vide an order dated 12.03.2019 granted bail. I say that on 14.03.2019 (copy attached) an application was moved before the Court of Metropolitan Magistrate, Patiala Courts, requesting to preserve CCTV footage of 09.03.2019 – 10.03.2019 and/ or to provide a copy of it. I apprehend due to influence of local police, the said application was not listed until 26.03.2019. That case and investigation pertaining to FIR no. 0021 - dated 03.03.2019 was transferred to crime branch and one Mukesh Antil was appointed as IO of the case. Recently on 11.04.2019, the IO Mukesh Antil moved an application for

NOTARY ASHOK KUMAR ADVOCATE L. No. 48 GOVT. OF INDIA

cancellation of bail granted to me. The said application is now listed for 20th of April 2019.

77. Due to my continued harassment and illegal treatment by the Police, on 27.03.2019, I sent a detailed letter to the Delhi Commission of Women and Sh. Anil Baijal, Lieutenant Governor of Delhi regarding the harassment and inhumane treatment meted out me and my family by Mr. Devender Kumar, the current SHO Tilak Marg Police Station. In these applications I did not mention the incidents of sexual harassment by the CJI, since I was very very scared as by now my life and the lives my family members had been destroyed. I only wanted the harassment and victimisation to end and did not want to further anger the CJI and invite more torture on myself and my family. The details of the harassment as given in my letter are summarized below:-

That I along with my husband and Sister in law were illegally arrested at 2 or 3 a.m. of 10.03.2019

- I along with my sister in law were pushed in the police van and then our legs were shackled using cuffs and we were taken to the police station. As the arrest was illegal, we were not taken from the front gate instead SHO took us from another gate where there was no CCTV.

- The SHO tied my legs with a sitting bench by cuffs after reaching the police station.

- The SHO abused me by using derogatory language. The SHO also physically assaulted me by kicking me on my legs.

(A copy of the letters to the Delhi Commission of Women and the Lieutenant Governor of Delhi are annexed as **Annexure JJ** at Page 120 to 135).

78. That my husband Dharam Singh also wrote a letter to Deputy Commissioner of Police, PMO's office, National Human Rights Commission, Special Commissioner of Police Vigilance, Special Commissioner of Police Law & Order, Chief Minister of Delhi , Ministry of Home affairs regarding the illegal arrest , harassment , handcuffing , and assault meted out to him , his brother , brothers relative and sister in law by the SHO, Tilak Marg Police Station.

79. On 9.04.2019, my husband received an order from Addl. Dy. Commissioner of Police, 2nd Bn. DAP, Delhi stating that my husband and his brother were

placed under suspension while he was posted at the 2nd Bn. For the same reasons as given in the order dated 29.12.2019, departmental action was being initiated against my husband and his brother. (A copy of the order dated 9.04.2019 is annexed as **Annexure KK** at Page 136 to —).

80. I say that I have done no wrong in relation to my work nor have my husband or his brothers done any wrong in relation to their work. I say that the charges against me that I had showed reluctance in relation to my work are false and wrong. I say that I had conveyed to my superior officer that my daughter had a school function that I was required to attend and would required half a days casual leave, and that I would try my best to attend work as soon as the function was over.

81. I say that the Order dated 21.12.2018 terminating me from service was passed without giving me an opportunity to be heard and present my defense and in violation of principles of natural justice.

82. I say that given my unblemished and exemplary service record the penalty of dismissal from service awarded to me is unreasonable and highly disproportionate.

83. I say that my dismissal, the suspension of my husband and my brother in law, and the dismissal of my handicapped brother in law are all part of a well planned strategy to intimidate me. The consistent persecution, beginning from my transfer from CRP till the false F.I.R that was registered against me and our imprisonment have all been done in retaliation and with vengeance after I rejected the CJI's sexual advances during the two incidents of sexual harassment on 10th and 11th October 2018, and again when in late October 2018 I rejected CJI's offer to come back to work in his Court. On 11th October 2018 when I pushed the CJI, he became aware that I would not succumb to his unwelcome sexual advances, and again when offered I refused to work closely with him. The persecution of me and my family members is to intimidate me, silence me and prevent me from speaking about the sexual harassment by the CJI. It is now evident that the persecution and torture is a well devised strategy to harass and victimise me, to ruin me and my family and cause us economic and social devastation. It is for this reason that I was repeatedly transferred, and flimsy grounds were created for my dismissal.

NOTARY ASHOK KUMAR ADVOCATE L. No. 4[illegible] GOVT. OF INDIA

84. I say that I have been dismissed on false and frivolous charges, despite my ACR grading me as good and very good. Despite speaking to the employees welfare association of the Supreme Court I was informed that nobody could help me.

85. I say that my family has been devastated and rendered economically destitute by false and frivolous proceedings and complaints against them. I say that the CJI has misused his position, office and authority and abused his clout and power to influence the police to make unlawful arrests and torture me in police custody.

86. I say the unwanted sexual advances and sexual harassment of the CJJI was well planned for a fairly long period of time, before it actually occurred. In hindsight I say that it is clear that the CJI took and undue interest in me and supported me professionally, as his motive was to make sexual advances me. I was confused when on 10th October he told me that he was treating me like his daughter and let it pass thinking that that a person in such a high position would not want to do anything immoral. However on the next day that is on the 11th October he made his intention to have a sexual relationship with me clear and he made physical advances as described above. At that point I clearly and directly rejected his sexual advances and made it clear that his advances were unwelcome to me. It was after this and after my repeated refusal to interact with him which appears to have angered the CJI and triggered him to unleash his wrath on me and my family.

87. I say that unknown to me at that time, it is now clear that the fact that I was posted at the CJI's residence was also planned by him so that he could have access to me in private. It is also clear why the CJI for the first time chose a junior court assistant for being posted at his residence rather than a seasoned and experienced senior court master or court assistant or steno.

88. I say that it is also clear to me now why he invited my husband to the swearing in ceremony, to create a cover for himself that he had no motive other than the welfare of me and my family.

89. It is also clear to me now that the CJI used his discretionary quota to appoint my disabled brother in law which he then used to ask me what I could do for him in exchange and that he expected sexual favours in return from me.

90. I have been victimised for resisting and refusing the unwanted sexual advances of the CJI and my entire family has also been victimised and harassed due to that.

91. I have filed complaints to the DCW and NHRC in this regard. Even until that point I avoided talking about the sexual harassment, as I was very very scared and I did not want to anger the CJI further and invite any more harm to me and my family. However, it now seems like the harassment, victimisation and torture will not stop unless I speak out about the origin and motive for the harassment. Further, I knew that since he was such a powerful man, nobody would believe my experience, and would only believe that the CJI could never do something like this.

92. It is only when the victimisation has reached unbearable proportions, when me and my family were taken into police custody and tortured, and now there is an imminent danger to my life that I am compelled to speak the whole truth, in order to save myself and my family.

[redacted]

DEPONENT

VERIFICATION

I, the above named Deponent, do hereby solemnly verify that the contents of the affidavit from paras 1 to 93 are believed to be true and correct to the best of my knowledge and belief, no part of it is false, and nothing material has been concealed there from.

18 APR 2019

Verified at New Delhi on this 18th of April, 2019

[redacted]

DEPONENT

I Identify the Executant Deponent Who Has Signed in My Presence

NOTARY GOVT. OF INDIA

ATTESTED

NOTARY PUBLIC
DELHI (INDIA)

18 APR 2019

TRUE COPY

ANNEXURE-C38

426

Outlook India

Chief Justice Of India Hearing His Own Case Is Wholly Wrong, Says Ex-SC Judge Santosh Hegde

23 April 2019

Outlook Web Bureau

However, Hegde refused to comment on the allegations levelled against CJI Ranjan Gogoi by a former Supreme Court employee, saying he does not know their 'correctness or otherwise'.

Former Supreme Court Judge N Santosh Hegde on Tuesday said that Chief Justice of India (CJI) Ranjan Gogoi hearing a case involving sexual harassment allegations against him was "wholly wrong both in law and morality".

He, however, said he does not want to comment on the allegations levelled against the CJI by a former Supreme Court employee, as he does not know their "correctness or otherwise."

"What the Chief Justice of India did was wholly wrong both in law and morality," Hegde, who had also served as Solicitor General of India and Advocate General of Karnataka said.

".... the matter was being heard on a complaint filed by one of the parties... he (the CJI) presided over the bench, and look at the things he has done...he has nowhere in the records put that he is part of the bench," he said.

"He (the CJI) has participated in the dialogue there, he has not signed the order, two other judges have signed the order. What's the meaning of this?" he further asked.

The former Karnataka Lokayukta said, "First of all, he could not have sat there.. what message is he sending? As Chief Justice of India can he sit in the bench and hear his own case? It's wholly wrong both legally and morally."

Describing the allegations against him as "unbelievable", the CJI convened an extraordinary hearing at the Supreme Court on April 20, and said that a larger conspiracy was behind it and he would not stoop so low as to even deny the charges.

The apex court, which held the hearing for around 30 minutes, said the independence of the judiciary was under "very serious threat", and "unscrupulous allegations" of sexual harassment have been levelled against the CJI as some "bigger force" wanted to "deactivate" the office of the CJI.

Besides the CJI, the bench, also comprising Justices Arun Mishra and Sanjiv Khanna, hinted towards a "bigger force" behind the controversy, which has the potential to shake the faith of the public in the judicial system.

Though the CJI was heading the bench, he left it to Justice Mishra to take a call on passing a judicial order.

Dictating the order, Justice Mishra said, "Having considered the matter, we refrain from passing any judicial order at this moment, leaving it to the wisdom of the media to show restraint, act responsibly as is expected from them and accordingly decide what should or should not be published, as wild and scandalous allegations undermine and irreparably damage reputation and negate independence of judiciary."

Source:

https://www.outlookindia.com/website/story/india-news-chief-justice-of-india-hearing-his-own-case-is-wholly-wrong-former-supreme-court-judge-n-santosh-hegde-accuses-rajan-go/329217

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ANNEXURE - C39

The Wire

From the Supreme Court, a Reminder that Justice Was Sacrificed to Save a Judge

23 January, 2020

Siddharth Varadarajan

The reinstatement of the woman whose sexual harassment complaint against former CJI Ranjan Gogoi was dismissed as false suggests her sacking was wrong and likely mala fide. On whose instructions did the men who fired her act?

It was a small news item – one that most people would have failed to grasp the significance of. 'SC reinstates woman employee who levelled charges at ex-CJI', the *Indian Express* reported on Wednesday morning.

In a country with hundreds of newspapers and TV channels and websites, this news had been reported 20 hours later by just nine English media outlets and two Hindi ones. And if someone had not followed the case when *The Wire* first broke the story last year along with its reporting partners *Caravan* magazine and *Scroll*, they'd be hard-pressed to understand what this latest development tells us about the state of the Indian judiciary.

So, let's rewind this story to the beginning.

A young woman who had once worked as a junior court assistant with Justice Ranjan Gogoi in the Supreme Court and then in his residential office in 2018 found herself transferred thrice in three weeks after she rebuffed what she claimed were physical advances on the part of the judge.

These transfers were immediately followed by a show-cause notice on some trivial work-related matters. Before she could even answer the minor charges levelled against her, an administrative panel in the Supreme Court found against her and recommended her immediate dismissal. That was in December 2018.

Apart from her sacking, the young woman had to suffer further tribulations. The details are truly hair-raising. Her husband, who was a constable in the Delhi Police suddenly found himself suspended. His brother – i.e. the former junior court assistant's brother-in-law – who was also a police constable, got suspended too.

Then her second brother-in-law – who is disabled and whom Justice Gogoi had got the Supreme Court to hire – found his employment terminated.

As if all this were not harrowing enough, the woman and her husband were arrested by the Delhi police and charged with bribery and extortion on the basis of a complaint by someone who claimed he had paid her Rs 50,000 via a go-between to secure a job at the Supreme Court.

Driven to the wall by this evident vindictiveness, she decided to go public with her allegation of sexual harassment against Justice Ranjan Gogoi.

Last April, she prepared an affidavit detailing her work history, an account of Justice Gogoi's dealings with her, a narration of the incident at his residence when she alleged he had behaved inappropriately with her, and then the dreadful consequences which followed. The only problem was that the judge in question – Justice Ranjan Gogoi – was now Chief Justice of India Ranjan Gogoi.

In the hope of fair play, she sent a copy of her affidavit to all the judges on the Supreme Court, and subsequently shared the same with *The Wire*, *Caravan* and *Scroll*.

Reporters from these three publications spoke to many of the *dramatis personae* named in the affidavit and also sought Justice Gogoi's response to her charges prior to publication. Justice Gogoi authorised the registrar of the Supreme Court to reply and he did, by not just denying the charges but also by assailing the character of the young woman and alleging that her family had "criminal antecedents".

Most people thought this story was already pretty horrific, but what followed the publication of our story was even worse.

Chief Justice Gogoi convened a special bench of the Supreme Court headed by himself – breaking a key canon of natural justice that no man can be a judge in his own case. Notice was issued that a bench was convening on a Saturday comprising CJI Gogoi, Justice Arun Mishra and Justice Sanjiv Khanna, "to deal with a matter of great public importance touching upon the independence of the judiciary."

This rather pompously worded notice cleverly sought to convert a young, powerless woman's complaint of sexual harassment and vindictiveness against one of India's most powerful men into a matter "touching upon the independence of the judiciary".

At the end of the hearing – during which Justice Gogoi attacked the woman who had complained against him by saying she had a criminal record – the bench passed a peculiar order advising the media which had reported her allegations to "take off such material which is undesirable". Curiously, Justice Gogoi, who had no business presiding over the bench which was dealing with an allegation against himself, committed another departure from the Supreme Court's traditions by not signing the order to which he was clearly a party as a member of the bench.

In a subsequent hearing by another bench, an adventurist lawyer's convenient petition alleging a conspiracy by unnamed "fixers" was linked to the woman's complaint and an inquiry ordered into this irrelevant issue. In the face of growing public disbelief at his handling of the allegation, Justice Gogoi subsequently asked Justice S.A. Bobde, then the second senior-most judge, to set up an in-house panel to probe the former employee's allegations. Justice Bobde, who is now chief justice of India, inducted Justices Indu Malhotra and Indira Banerjee to serve on the panel alongside himself.

The former court employee testified before the panel but also raised objections to the manner in which it was functioning. These objections were not addressed, compelling her to withdraw from the proceedings. But the panel was not deterred; it declared that it would deliver its findings *ex parte* if needed, i.e. even without her presence and cooperation. At least one sitting judge of the Supreme Court, Justice D.Y. Chandrachud, pleaded with the panel to not to do so and instead address her concerns but he was disregarded. Attorney general K.K. Venugopal's suggestion that the panel must include an external member was also brushed aside. The panel then went ahead and concluded that it found "no substance" in the woman's allegations.

The panel's findings were not made public, nor was a copy shared or even shown to the complainant – as natural justice principles would demand.

And there the matter seemed to end, with the judiciary, and of course, the Modi government and the ruling BJP, keen to put a lid on the scandal and quickly move on. Big media, which had been forced by Justice Gogoi's theatrics to cover the story, quickly dropped the matter.

Questions that remained

However, it was obvious that the Supreme Court panel's finding left many questions unanswered. Why was the woman frequently transferred and then dismissed on

trivial grounds? Surely there was something unusual about this, and the panel could easily have summoned data from the court's administrative side – that reporters have been unable to obtain through RTI – to ask a simple question: Prior to the woman's dismissal, had any employee of the Supreme Court ever been terminated in this fashion for the minor administrative infractions she allegedly committed? The answer to that question would have given the in-house panel a clue that something odd had clearly happened in her case. And what about the coincidental suspension from the police department of her husband and brother in law? And the sacking of her second brother in law? And the bizarre criminal case filed against her for extortion?

If her allegations indeed lacked substance, was it just a coincidence that all these terrible things happened in rapid succession to her? It is not uncommon for a whistleblower to be subjected to a vendetta. But she had not blown the whistle at the time. If she was victimised nonetheless, could it have been because she had rebuffed the advances of someone powerful? That too is not uncommon.

We don't know if the Supreme Court's in-house panel of three judges asked these questions then but surely they need to ask them now. Because eight months after they essentially concluded the former junior court assistant had lied we now know that

1. The police has had to admit in court that it had no evidence in the criminal extortion case filed against her and the case was closed.
2. Both her husband and brother in law who had been suspended by Delhi Police on specious grounds are now back in service.
3. The young woman herself – and this was the news reported on Wednesday morning – has also been reinstated by the Supreme Court.

We know that in between, the woman filed an appeal for her reinstatement but then withdrew it abruptly – allegedly at the behest of a "top government functionary" who promised her and husband that everything would be sorted out.

Today, if the court has taken her back, this is clear acknowledgement that her original termination was wrong and likely malafide. So the obvious question to ask is: On whose instructions did the men who signed her sacking order act?

Second, if the Delhi Police has been forced to acknowledge they have no proof in the criminal case against her, why did they make haste to register a case on the basis of

patently flimsy evidence, arrest her, handcuff her and keep opposing her bail? Were they acting on someone's instructions?

Third, who is this "top government functionary" who allegedly intervened to get the complainant to back down from the pursuit of a legal remedy for reinstatement last July?

Breaching wall between judiciary and executive

These are not theoretical or idle questions. At that strange hearing which he presided over on April 20, 2019, Justice Gogoi had claimed the woman's allegations were an attempt to attack the independence of the judiciary. The Delhi Police reports to the Union home ministry. And its willingness to be party to the vindictive pressure the woman and her family were subjected to suggests the wall between the judiciary and the executive – one of the guarantees of judicial independence – was breached with some degree of collusion by both sides. Once breached, of course, could the "top government functionary" who got the fatigued and demoralised complainant to back down have resisted the temptation to widen that breach to the government's advantage? Finally, what does that breach imply about the soundness of the judgments Justice Gogoi delivered as CJI – both before the woman went public with her charge in April 2019 and also after?

The judges who were part of the in-house panel which concluded that the young woman's allegations against Justice Gogoi "lacked substance" owe it to their collective and individual consciences – and to the reputation of the Supreme Court of India – to raise these questions anew, provide answers to the people and reassure us that there is no need to worry about the independence of the judiciary.

Finally, it is obvious now that the Supreme Court – whose intervention years ago in the *Vishakha* case led to the eventual creation of laws against sexual harassment at the workplace – needs to get its own house in order. It must be willing to subject itself to the same sort of complaints procedure that every formal workplace in India is required by statute to keep in place. This means the creation of an internal complaints committee – with one or more external members – which can examine any allegation of sexual harassment against a judge or even the CJI, should such a complaint ever arise.

The 'internal panel' mechanism has little credibility after the way it handled the charge against Justice Gogoi last year. And the latest development in the harrowing case of the junior court assistant is surely the final nail in its coffin.

Source:

https://thewire.in/law/supreme-court-justice-sacrifice-sexual-harassment-allegations-ranjan-gogoi

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ANNEXURE-C40

Scroll

'Sad day for judiciary': Two ex-SC judges, Opposition parties condemn Gogoi's Rajya Sabha nomination

Mar 17, 2020

Scroll Staff

Retired Supreme Court judge Madan B Lokur said the decision redefines the 'independence, impartiality and integrity' of the judiciary.

Two retired Supreme Court judges – Madan B Lokur and Kurian Joseph – on Tuesday criticised the nomination of their former colleague and ex-Chief Justice of India Ranjan Gogoi to the Rajya Sabha. Opposition parties, too, attacked the government for the decision, which came just four months after Gogoi retired from the top court.

Wondering if the "last bastion" had fallen, Lokur said the decision redefines the "independence, impartiality and integrity" of the judiciary, *The Indian Express* reported. "There has been speculation for some time now about what honorific Justice Gogoi would get," Lokur told the newspaper. "So, in that sense the nomination is not surprising, but what is surprising is that it came so soon."

Kurian Joseph said he was surprised to see how a former chief justice of India had "compromised the noble principles on the independence and impartiality of the judiciary". "Acceptance of Rajya Sabha nomination by former Chief Justice of India Ranjan Gogoi has certainly shaken the confidence of the common man in the independence of the judiciary, which is also one of the basic structures of the Constitution of India," he said.

Gogoi, Joseph and Lokur were among the four senior judges of the Supreme Court who, in an unprecedented move, had addressed the media in January 2018. The judges – the fourth being Justice Jasti Chelameswar, who, too, has since retired – had said democracy would not survive if they did not speak out, as their attempts to get then Chief Justice of India Dipak Misra to address a crisis in the judiciary had gone unanswered.

After his nomination, Gogoi said on Tuesday that his presence in Parliament would "be an opportunity to project the views of the judiciary before the legislative and vice versa". He told reporters: "Let me first take oath, then I will speak in detail to the media why I accepted this and why I am going to Rajya Sabha."

Political condemnation

Opposition party leaders echoed the two judges' view. Former Union minister Yashwant Sinha said Gogoi's acceptance of the Rajya Sabha nomination would do "incalculable damage" to the judiciary. "I hope ex-CJI [chief justice of India] Ranjan Gogoi would have the good sense to say 'NO' to the offer of Rajya Sabha seat to him," he wrote on Twitter. "Otherwise he will cause incalculable damage to the reputation of the judiciary."

Communist Party of India (Marxist) General Secretary Sitaram Yechury noted that Gogoi had himself said last year that post-retirement appointments are detrimental to the independence of the judiciary.

"Shri Ranjan Gogoi had himself said last year that there's a strong viewpoint that post-retirement appointments is a scar on independence of judiciary," he tweeted. "What must one make of a govt [government] that does this, after appointing another ex-Chief Justice as the governor of a state?"

Yechury was referring to P Sathasivam, who was the governor of Kerala from 2014 to 2019. His appointment came five months after he retired as chief justice of India.

All India Majlis-e-Ittehadul Muslimeen chief Asaduddin Owaisi wondered if Gogoi's nomination was an instance of "quid pro quo". Owaisi was apparently referring to some key verdicts delivered by Gogoi's benches during his tenure that had been favourable to the government.

Congress spokesperson Jaiveer Shergill said Gogoi's nomination signalled a "sad day for democracy and the justice system". He said it was a "bad precedent", and "attacks the theory of separation of powers between the executive, legislature and the judiciary". He also called it a "sinister design to blatantly hijack independence of judiciary".

His party colleague Randeep Surjewala also criticised the move. "Judiciary is the people's last weapon against the government and administration," he said, according to ANI. "Today, questions are being raised about its independence across the nation." Surjewala also questioned the government's intention behind the decision. "Is the government saying 'be loyal or be Judge Loya'?" he said.

Rajasthan Chief Minister Ashok Gehlot said the decision to nominate Gogoi to the Rajya Sabha will erode the faith that people have in the judiciary. He also alleged that the government is trying to destroy independent institutions. "It shows NDA [National

Democratic Alliance] is hell bent on destroying independence of every institution," Gehlot said, according to PTI. Citing Lokur's remark, Gehlot said, "This will erode people's trust in judicial system and cast a doubt upon fairness of judgements delivered."

Nationalist Congress Party spokesperson Mahesh Tapase said Lokur's remarks on Gogoi's nomination should be taken seriously, adding that the power of judicial review is integral to the Constitution. "The power of judicial review over legislative actions vests with the high courts and the Supreme Court," he said, according to PTI. "This is an essential and integral feature of our constitution."

Tapase added that judges who have handled important cases must not be given such post-retirement positions. "The government should refrain from appointing to the Rajya Sabha judges who have handled sensitive cases."

Days before his retirement, Gogoi had presided over proceedings in the Ayodhya land dispute case. A five-judge Constitution bench of the Supreme Court headed by him unanimously decided to allot the disputed Ayodhya plot to a trust that will oversee the construction of a Ram temple. The bench also ruled that a separate five-acre plot be allotted in Ayodhya for the construction of a mosque.

During his tenure as chief justice, Gogoi was accused of sexual harassment by a woman who had earlier worked as a junior court assistant at the Supreme Court. He had denied the allegations at a special hearing he himself called on April 20. Gogoi had said he did not "deem it appropriate" to reply to the allegations, but claimed they were part of a "bigger plot", possibly one to "deactivate the office of the CJI".

Source:

https://scroll.in/latest/956424/sad-day-for-justice-system-politicians-ex-sc-judge-condemn-ranjan-gogois-rajya-sabha-nomination

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ANNEXURE -C41

NDTV

"Death Knell For Power Separation": Retired Judge On Ranjan Gogoi's New Role

March 17, 2020
All India Reported by Srinivasan Jain, Edited by Anindita Sanyal

New Delhi:

Former Chief Justice of India Ranjan Gogoi's nomination for a Rajya Sabha seat has been vehemently criticized by several retired judges, who have expressed deep concern over the message it is sending. Most agreed that it poses a grave risk to the independence of the judiciary and would shake the common man's faith in the institution.

The nomination - made in a first, by President Ram Nath Kovind - was announced last evening by the Union Home Ministry. Justice Gogoi said his presence in parliament will "be an opportunity to project the views of the judiciary before the legislative and vice versa".

"Let me first take oath, then I will speak in detail to the media why I accepted this...," Ranjan Gogoi told reporters.

"I was shocked and then I thought about the message it will send," Justice (Retired) AP Shah told NDTV.

"The message it sends to the judiciary as a whole is that if you give judgments that are favourable to the executive, you will be rewarded. If you don't do so, you will be treated adversely or you might be transferred or not considered for elevation," he said.

Calling it a "death knell for the separation of powers and independence of judiciary," Justice Shah said while previously Justices Ranganath Mishra and Baharul Islam were also made part of the Rajya Sabha, the context in this case is different.

After his retirement in 1991, former Chief Justice Ranganath Mishra had joined the Congress and became a Member of Parliament in 1998. Former Justice Baharul Islam - a Rajya Sabha MP before being nominated as a Judge of the Gauhati High Court and eventually a Supreme Court judge - went back to Rajya Sabha, resigning his post.

Justice Shah said both appointments were made after the ADM Jabalpur case and it took the judiciary 15 years to "return to its former glory". Considered a black mark on the judiciary, the Supreme Court had ruled in the case that during a presidential order of Emergency, the courts cannot guarantee individual liberty.

"Chief Justice Gogoi is only the latest in the line of questionable leadership in the Supreme court," he said, drawing attention to the decisions and judicial processes adopted by the former Chief Justice and specifically mentioning the issues involving electoral bonds and habeas corpus cases from Jammu and Kashmir.

Justice Kurian Joseph, who along with Justice Gogoi, was among the judges who held the unprecedented press conference to flag a "threat to this foundation", said the former Chief Justice has "compromised the noble principles on the independence and impartiality of the Judiciary".

"According to me, the acceptance of nomination as member of Rajya Sabha by a former Chief Justice of India, has certainly shaken the confidence of the common man on the independence of judiciary, which is also one of the basic structures of the Constitution of India," he said.

Source:

https://www.ndtv.com/india-news/on-former-cji-ranjan-gogois-new-role-as-mp-justice-ap-shahs-reservations-2196290#:~:text=New%2520Delhi%253A,the%2520message%2520it%2520is%2520sending.&text=%2522I%2520was%2520shocked%2520and%2520then,Retired%29%2520AP%2520Shah%2520told%2520NDTV

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ANNEXURE-C42

The Wire

In Unprecedented Move, Modi Government Sends Former CJI Ranjan Gogoi to Rajya Sabha

16 March, 2020

The Wire Staff

The move raises a question mark over the judiciary's independence since Gogoi allocated and handled key cases in which the government had major political stakes until just four months ago.

New Delhi: In a move that has sent shockwaves through legal and political circles, former Chief Justice of India Ranjan Gogoi has been nominated as a member of the Rajya Sabha by President Ram Nath Kovind. A notification to this effect was issued by the Union home ministry on Monday.

Gogoi retired from the Supreme Court barely four months ago. This is the first time a government has used its power to nominate individuals for the Rajya Sabha to offer a post-retirement sinecure to a former Chief Justice of India.

The official notification states: "In exercise of the powers conferred by sub-clause (a) of clause (1) article 80 of the Constitution of India, read with clause (3) of that article, the President is pleased to nominate Shri Ranjan Gogoi to the Council of States to fill the vacancy caused due to the retirement of one of the nominated member (*sic*)."

The fact that a government has nominated a former CJI to the upper house will raise questions about the constitutional separation of powers between the executive and the judiciary, especially since Gogoi headed benches in key cases that the same government which has nominated him had important political stakes in.

These included the Rafale matter, the dismissal of Central Bureau of Investigation director Alok Verma, the Ayodhya matter, and several other key cases.

Speaking to *The Wire*, Dushyant Dave, senior advocate and president of the Supreme Court Bar Association, said, "This is totally disgusting, a clear reward in quid pro quo. The semblance of independence of the judiciary is totally destroyed."

"It's just so sad," lawyer Karuna Nundy tweeted. "The brazenness of it. Destroying constitutional propriety for a measly Rajya Sabha seat."

Justice (retired) Madan B. Lokur too expressed dismay at the nomination. "There has been speculation for sometime now about what honorific would Justice Gogoi get. So, in that sense the nomination is not surprising, but what is surprising is that it came so soon. This redefines the independence, impartiality and integrity of the judiciary. Has the last bastion fallen?" he told the *Indian Express*.

""Noisy" judge indeed! (remember the Ramnath Goenka lecture?). "The boy who wrote the best essay got the first prize" said C.K. Daphtary in 1973, when A.N. Ray was made CJI over the heads of three senior judges," senior advocate Raju Ramachandran wrote on his Facebook page about Gogoi's nomination.

Coincidentally, the government in January also appointed the former CJI's brother, Air Marshall (Retd) Anjan Kumar Gogoi, as a full-time non-official member of the North Eastern Council (NEC).

Mishra rewarded by Congress when in opposition

While this is not the first time a former CJI has become a member of the Rajya Sabha, a direct nomination by the government of a former chief justice is indeed unprecedented. Justice Ranaganath Mishra, who retired from the CJI's position in 1992, became an MP in the upper house in 1998 on a Congress ticket but at a time when the Congress was not in power and the government was headed by Atal Bihari Vajpayee of the BJP. Thus, the question of the government misusing its powers to influence the judiciary did not arise.

Even so, Congress leader Sonia Gandhi's decision to get Mishra elected to the upper house was controversial because it was seen as payback for his having covered up the political culpability of senior Congress leaders in the 1984 massacre of the Sikhs as head of the Justice Ranganath Mishra Commission. Earlier, he had been rewarded by the then Narasimha Rao government with chairmanship of the National Human Rights Commission upon his retirement from the apex court.

Sexual harassment charge

Justice Gogoi's tenure as CJI, which ended on November 17, 2019, was marked by various controversies, including allegations of sexual harassment and the subsequent

pursuit of a vendetta against the woman in question, her husband and her two brothers-in-law.

The sexual harassment allegations first came to light in April 2019, when three media houses including *The Wire* published detailed reports on the ordeal the woman and her family had to face. Gogoi, however, denied all the allegations and shocked observers by presiding over an "emergency hearing" on the matter himself.

In a reaction to Gogoi's nomination to the Rajya Sabha, Vrinda Grover, the Delhi-based lawyer who was counsel for the woman who had levelled the harassment charge, said, "I've said this before, and I'm saying it again, because there is fresh evidence to substantiate it, credible sexual harassment accusations by a woman do not destroy, or damage, or tarnish the reputation or prospects of powerful men."

Precedent set by Indira Gandhi, eclipsed by Modi

The first time a judge of the Supreme Court was nominated to the Rajya Sabha soon after retirement was Justice Baharul Islam, who retired from the apex court in January 1983 and was sent to the upper house by Indira Gandhi, who was prime minister at the time, in June 1983. He had earlier been a Rajya Sabha MP from 1962 to 1972, before he was made a judge.

Islam's nomination was widely seen as a reward for the relief he gave the then Congress chief minister of Bihar, Jagannath Mishra, in the Patna Urban Cooperative Bank scam case.

Unlike Justice Islam, who was a puisne judge, Justice Gogoi as CJI not only presided over politically sensitive cases but played a key role in deciding which matters were sent to which bench as he was 'master of the roster'.

Apart from Gogoi, Mishra and Islam, there are no other precedents of Supreme Court judges becoming members of the upper house.

There are of course plenty of cases of judges getting key posts.

Justice M. Hidayatullah retired as CJI in 1970 and was appointed – apparently on the basis of all-party consensus – vice president of India in 1979, in which capacity he served as chairman of the Rajya Sabha.

Justice K.S. Hegde, who resigned from the apex court in 1973 when Indira Gandhi superseded him and appointed A.N. Ray as CJI, joined the Janata Party subsequently and was elected to the Lok Sabha from Bangalore (South) on the party's ticket. He served as speaker of the house from 1977 to 1980.

M.C. Chagla, who retired as chief justice of the Bombay high court in 1958 was appointed India's ambassador to the United States and then high commissioner to the United Kingdom by Jawaharlal Nehru. He subsequently entered the government first as minister for education and then external affairs minister.

Chagla's appointment, incidentally, was criticised at the time by the eminent lawyer and jurist, M.C. Setalvad.

The Modi government triggered a controversy in 2014 itself when it appointed another former CJI, Justice P. Sathasivam, as governor of Kerala. Sathasivam had retired from the Supreme Court in 2013 but had presided over a bench that gave significant relief to the then home minister of Gujarat, Amit Shah, in the custodial killing case of Tulsiram Prajapati. Shah is now Union home minister.

While Sathasivam was the first CJI to be appointed a governor, the first apex court judge to be sent to a Raj Bhavan was S. Fazl Ali, who retired in May 1952 and was made governor of Odisha the next month. Forty-five years later, Fathima Beevi, who retired from the Supreme Court in 1992, was made governor of Tamil Nadu in 1997, five years after her last order as a judge.

In 2017, there were reports that another former CJI, Justice T.S. Thakur, had been approached by the Aam Aadmi Party to contest for one of its Rajya Sabha seats but declined the offer.

Jaitley: 'Judgments influenced by desire for post-retirement job'

Ironically, the idea of giving post retirement jobs to top judges was strongly opposed by the late BJP leader Arun Jaitley, who denounced such appointments at a meeting of the BJP's legal cell in 2012.

"Pre-retirement judgements are influenced by a desire for a post-retirement job," Jaitley had said. "This clamour for post retirement jobs is adversely affecting the impartiality of the judiciary of the country and time has come that it should come to an end..."

Apart from sending Justice Sathasivam to Kerala as governor, however, Jaitley was also party to the appointment of Justice Adarsh Goel, immediately after retirement from the Supreme Court, as head of the National Green Tribunal.

Source:

https://thewire.in/law/cji-ranjan-gogoi-rajya-sabha-nomination

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ANNEXURE-C43

The Indian Express

The Gogoi betrayal: Judges will not empower you, they are diminished men

March 20, 2020
Pratap Bhanu Mehta

Justice Gogoi's actions are not simply a case of one bad apple. His actions will now cast doubt on the Court as a whole; every judgment will now be attributed to political motives.

We should be deeply grateful to Justice Ranjan Gogoi. His conduct has disabused us of any illusions we might harbour about the legitimacy of the Indian Supreme Court. The government, in a brazen contravention of all propriety, has given him a nomination to the Rajya Sabha. He has been shameless enough to accept it. In doing so, he has not just cast doubt on his own judgement, character, and probity; he has dragged down the entire judiciary with him.

The authority of the Supreme Court of India rests squarely on two things: The cogency of its reasoning, and the integrity of its judges. Justice Gogoi's track record as justice was to take a wrecking ball to the Indian Constitution and smash it to smithereens. He, inter alia, made redundant important constitutional lodestars: Habeas corpus, non-discriminatory citizenship, the evidence act, federalism, free speech. He was more executive-minded than the executive in corruption cases. His reasoning in the Ayodhya case was infinitely worse than the Allahabad High Court. His ad hominem remarks were fit for authoritarian memes. His penchant for sealed covers, even as allegations floated over what meaning "covers" might have from him, made a mockery of transparency. He assigned cases to benches in ways that seem to rig the game. And then he committed the ultimate sin: Became a judge in his own cause. He was Chief Justice and should have known better.

This is the shining star of the judiciary the government has rewarded. A justice who feigned ignorance of the basics of constitutional law could hardly be expected to follow convention, propriety or conflict of interest. There is no explicit prohibition against judges accepting Rajya Sabha nominations. But the presumption against these kinds of appointments was strong; indeed, Justice Gogoi himself had authored a judgment which acknowledged that post-retirement jobs could bring the judiciary into disrepute. The very fact that a judge accepts such an appointment could cast doubt on his

judgements. It would signal that the judiciary is not independent, but lives for crumbs thrown by the executive.

A paper by Shubhankar Dam, Madhav Aney and Giovanni Ko, and earlier work by Shylashri Shankar, collected systematic data to show how judges proactively become pro-executive as they near retirement. It is often thought that the solution to this problem requires explicit prohibition on any post-judicial appointment, including commissions of inquiry. The solution is not that simple; after all, there are many positions that require judges to be appointed. Moreover, in financial terms, the incentives are not that clear-cut. Most Supreme Court judges, apart from their pensions, can easily make a lucrative living on the arbitration circuit. Many do so.

The problem is much deeper than that of incentives. Even powerful people become habitually disposed to be on the right side of the ruling dispensation, they like being in circuits of power, and so the sources of ideological abdication are more subtle. Increasingly, even more so than in Indira Gandhi's days, deep ideological infiltration of the judiciary, where it is expected to march in lockstep with the overall ideological aims of the government, cannot be ruled out. Justice Gogoi's actions never had the cogency of reasoning; now he has given more explicit reason to doubt his integrity.

Think of the number of potentially interesting justices whose careers have been derailed by mere innuendo, most recently Justice AP Shah and Gopal Subramanium. Think of the arbitrary transfer of Justice S Muralidhar. Now set Justice Gogoi's nomination to the Rajya Sabha against this background. Here is a Chief Justice whose record is unmatched in the annals of constitutional perfidy. Here is a Chief Justice who was accused of sexual harassment. The train of developments in that case casts a deep cloud over Justice Gogoi. And yet, or perhaps because of this, the government chooses to reward him with a Rajya Sabha seat. We live in an era where integrity and innocence can be destroyed by a mere whisper. But great crimes done to protect the executive have the imprimatur of virtue attached to them.

The government is ruthless in its aims. It thinks all constitutional forms are just that: Forms that we should expose as being powerless. It will, no doubt, as it does, use ambiguous precedents set by previous governments, in cases like Baharul Islam, and Ranganath Misra to justify its actions. But that is specious reasoning: Misra did, retrospectively, cast doubt on his own work as an inquiring judge in the 1984 riots case. But he formally joined the Congress and was given a nomination nine years after retirement, when the Congress was in the Opposition. It will be ironical to use Indira Gandhi's actions as a justifying precedent for anything pertaining to the judiciary. Let us concede that previous regimes have not been the strictest about the propriety of giving executive rewards to constitutional functionaries. Yet Justice Gogoi's nomination to the Rajya Sabha is in a different league, in light of his judicial history and the alacrity with which he has been rewarded.

But why blame the government? This government's greatest success has been to show that it is the government we deserve. If someone who has held the office of Chief Justice, with all the world's protections and perks, is willing to crawl to the government's tune, for a position that, incidentally, happens to be drastically lower than that of a Chief Justice in the order of precedence, what can one say? What can one say of a legal culture – where judges usurp great power in appointments, and senior counsel enjoy possibly the maximum social immunity Indian society affords to any profession — that has no effective way of sanctioning this kind of behaviour? The call for more laws is often an evasion. Those parts of the government which have the maximum autonomy, protection and prestige, folded the fastest. No parchment barriers can ultimately hold against a contagion of venality or ideological commitment. The government is brazen. But the point of its brazenness is to show how small we are.

Justice Gogoi's actions are not simply a case of one bad apple. His actions will now cast doubt on the Court as a whole; every judgment will now be attributed to political motives. In an era where ordinary citizens are struggling to safeguard their citizenship rights and basic constitutional standing, Justice Gogoi's actions say to us: The Law will not protect you because it is compromised, the Court will not be a countervailing power to the executive because it is supine, and Judges will not empower you because they are diminished men.

Source:

https://indianexpress.com/article/opinion/columns/ranjan-gogoi-supreme-court-rajya-sabha-6320869/

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ANNEXURE - C44

Bar and Bench

CAA Protests: The Supreme Court has not acted with urgency to protect citizens from Executive excesses

24 December, 2019
Senior Advocate Dushyant Dave

One can only hope that the Court introspects and intervenes forthwith to stop any bloodshed in the country, and assuage the sentiments of a large section of the society that feels like they are no longer wanted, writes Dushyant Dave.

The Supreme Court of India enjoys an extraordinary status in the hearts and minds of Indians. The citizens look up to it when it comes to keeping the essence of the nation intact and insulated from attacks by the Executive of the day. The Court has created for itself an exalted position over the last seven decades by assuming the role of a sentinel on the *Qui Vive* ("on the alert" or "vigilant").

Part III of the Constitution of India contains Fundamental Rights and Article 13(2) thereof mandates that,

"*The State shall not make any Law which takes away or abridges the rights conferred by this part and any Law made in contravention of this Clause shall to the extent of contravention be void.*"

Thus, there is a two-fold provision — prohibiting the state from making an unconstitutional law, and simultaneously declaring that such a law would be void. Article 14 contains a positive injunction against the state:

"*The State shall not deny to any person equality before the Law or the Equal Protection of the Laws within the territory of India.*"

Affirmative action on the part of the State in favour of disadvantaged sections of society is within the framework of liberal democracy. Socio-economic justice is part of the equality clause.

Equal protection also means right to equal treatment of citizens. This is the essence of Article 14, a basic feature of the Constitution, which obliges the courts, especially the Supreme Court, to review state-made laws and declare them as unconstitutional, if found to be so.

The Court cannot desert its duty to determine the constitutionality of an impugned statute. And so, the decision of the Supreme Court, led by the Chief Justice himself, to defer the examination of the challenge to the much talked about Citizenship (Amendment) Act, 2019 is, to say the least, disappointing.

The Court should have put aside other matters and heard the group of writ petitions challenging the validity of this ex-facie unjust law. The winter vacation is hardly an excuse to defer such a challenge.

Even if the judges wanted to enjoy their much deserved winter vacation, their refusal to stay the law is even more disturbing. Such an order would have immediately defused the tempers running high across the nation, and, "*We, the People*" could have breathed a sigh of relief.

Instead, the judges have left us to fend for ourselves in the streets of our cities. The cost of this decision by the Court will only become clear with time.

The granting of a stay order against the operation of this citizenship law would not have caused any prejudice to public interest whatsoever. On the contrary, it is my belief that it would have served the public interest well. It is true that there is, generally, a presumption in favour of constitutionality of a law. But that is not an absolute rule. If the Act *ex-facie* violates the fundamental rights of citizens, a mere presumption which decides the burden cannot serve that law.

The Delhi High Court's order to defer the writs in the Jamia violence cases is a shocking abdication of its constitutional duty. It appears that judges across the spectrum are unwilling to test the Executive's actions, however unconstitutional they may be.

We must beware that the popular saying, "Nero fiddled while Rome burned", does not come true for this great nation. The Supreme Court, in recent years, has shown its leanings in favour of the Executive.

In a series of decisions, the Court has, surprisingly, justified many of the state's actions, which either needed a deeper probe or simply to be declared unlawful.

In fact, the Court is almost proving that it stays in ivory towers. After the appointment of the current Chief Justice, those of us who admire the Court had expected a departure from such a course.

The Preamble is an irreversible contract between the state and its people to keep India a "*Sovereign, Socialist, Secular, Democratic Republic*", and, "*to secure to all its citizens" justice, equality, fraternity and liberty of thought, expression, belief, faith and worship.*"

One can only hope that the Court introspects and intervenes forthwith to stop any bloodshed in the country, and assuage the sentiments of a large section of the society that feels they are no longer wanted.

The great judge, Justice **HR Khanna**, in the celebrated *Kesavananda Bharati case* declared that the "*State shall not discriminate against any citizen on the ground of religion only*", and, interpreted Articles 15(1) and 16(2), even before the "secular" word was added to the Preamble.

All citizens, including judges, must remember the words of **BR Ambedkar.**

"It is quite possible for this new born democracy to retain its form but give place to dictatorship in fact. If there is a landslide, the danger of the second possibility becoming actuality is much greater."

BR Ambedkar

These words appear too relevant today. Will the judiciary's conscience awaken soon?

Source:
https://www.barandbench.com/columns/litigation-columns/caa-protests-the-supreme-court-has-not-acted-with-urgency-to-protect-citizens-from-executive-excesses

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ANNEXURE-C45

The Wire

Justice Madan Lokur: Supreme Court Deserves an 'F' Grade For Its Handling of Migrants

28 May, 2020

Justice Madan B. Lokur

After humanitarian law died a million deaths, the Supreme Court finally took suo motu cognizance of the plight of the workers forced to set out for distant rural homes because of the lockdown.

News has come in that on May 26, 2020 the Supreme Court took *suo motu* cognizance of the problems and miseries of migrant labourers stranded in different parts of the country.

While taking cognizance, reference was made to newspaper and media reports of the

"unfortunate and miserable conditions of migrant labourers walking on-foot and cycles from long distances. They have also been complaining of not being provided food and water by the administration at places where they were stranded or in the way i.e. highways from which they proceeded on-foot, cycles or other modes of transport."

Will some good come out of this? Better late than never? Is it a face-saving attempt to atone for past follies? Is it an indictment of the state that has dealt (or not dealt) with the tragedy? You be the judge.

The first among many petitions pertaining to the migrants was filed by Alakh Alok Srivastava, a practicing lawyer. The petition was in public interest and the Supreme Court recorded in its order of March 31, 2020 that it "highlighted the plight of thousands of migrant labourers who, along with their families, were walking hundreds of kilometres from their work-place to their villages/towns."

By way of an example, the averment in the petition was noted to the effect that thousands of migrant labourers left Delhi to reach their homes in the states of Uttar Pradesh and Bihar, by walking on the highways. The petitioner's concern pertained to their welfare and a direction was sought to the authorities "to shift the migrant labourers to government shelter homes/accommodations and provide them with basic amenities like food, clean drinking water, medicines, etc."

On the request of the solicitor general, the court took on record a status report of March 31 and noted that it dealt with steps taken to prevent the spread of coronavirus, measures taken by the Central government in providing basic amenities like food, clean drinking water, medicines etc. to the 'lower strata' of society. A reference is also made to a relief package under the Pradhan Mantri Garib Kalyan Yojana and other schemes to ensure that persons in need are taken care of.

The report recorded that the initial reaction of the state governments and Union territories to the thousands of migrant labourers leaving Delhi was to transport them from their borders to their villages. But, on March 29, the Ministry of Home Affairs issued a circular "prohibiting movement as transportation of migrant labourers in overcrowded buses would cause more damage than help to the migrant labourers. The very idea of lock down was to ensure that the virus would not spread. It was felt that transportation of migrant labourers would aggravate the problem of spread of the virus."

The circular worked like a magic wand and abracadabra, the solicitor general stated that as per information received by the control room more than 21,000 relief camps had been set up in which more 6.5 lakh persons (migrant labour) had been provided shelter and more than 22.8 lakh persons had been provided food and other basic amenities like medicines, drinking water, etc. He further stated on instructions that as at 11.00 am "there is no person walking on the roads in an attempt to reach his/her home towns/villages."

What triggered the migration? According to the status report, panic was caused by fake news that the lockdown would last for more than three months. So, the migrant labourers chose to believe fake news rather than the hon'ble prime minister who had announced, a few days earlier, only a three week lockdown. Fake news had circulated despite an advisory by the Government of India on March 24 to the authorities to effectively deal with rumour mongering. Obviously, the authorities failed in the discharge of their duty. Therefore, the court expected all concerned to "faithfully comply with the directives, advisories and orders issued by the Union of India in letter and spirit in the interest of public safety." As far as the media was concerned, the court expected the print, electronic and social media to "maintain a strong sense of responsibility and ensure that unverified news capable of causing panic is not disseminated." Scapegoating had started.

Additionally, the court recorded the statement of the solicitor general that "within 24 hours the Central government will ensure that trained counsellors and/or community

group leaders belonging to all faiths will visit the relief camps/shelter homes and deal with any consternation that the migrants might be going through. This shall be done in all the relief camps/shelter homes wherever they are located in the country."

Two features clearly stand out. First, the Supreme Court accepted what it was told – hook, line and sinker. True, there was nothing on March 31 to doubt the correctness of the statement that no person was walking on the roads at 11.00 am but is the court so naïve as to seriously believe such a statement? Is the court also naïve enough to believe that a circular issued by the Central government could work wonders and ensure that a few lakh persons (not thousands) actually stayed off the roads? If a statutory order issued by the National Disaster Management Authority and the Ministry of Home Affairs acting in exercise of powers conferred by the Disaster Management Act could not ensure the implementation of a complete lockdown, could a mere circular prevent migrants from hitting the road? Really?

Subsequent hearings in the case on April 3 and 7 confirm that as on March 31, the Supreme Court did not even bother to question the statement made or hold the Central government to account, despite more than enough evidence available everywhere. Newspaper and media reports were ignored.

Second, did the Central government fulfil its commitment that "trained counsellors" would visit the camps and deal with the "consternation of the migrants"? Even this was not questioned by the court during the hearings on April 3 and 7. This is very important since the court was aware that "panic can severely affect mental health. We are informed that the Union of India is conscious of the importance of mental health and the need to calm down those who are in a state of panic."

Given the circumstances, was it not the constitutional obligation, not duty, of the Supreme Court – a court for the people of India and not a court of the people of India – to ascertain that a few lakhs (not thousands) of migrants are well taken care of, physically and emotionally? It is not that the court was expected to disbelieve or distrust the establishment represented by no less than the solicitor general, the court was only required to ensure through the principle of continuing mandamus that the solemn assurances given to it are faithfully carried out. Sorry, the court completely failed in this – forgot what public interest litigation is all about. If a grading is to be given, it deserves an F.

True, the events were unprecedented as far as the government is concerned, but the events were also unprecedented as far as the migrants are concerned. Unfortunately,

the lack of interest and compassion shown by the court was also unprecedented. Here was an opportunity handed over on a platter to the court to be more proactive and assertive keeping the interest and constitutional rights of the hapless people in mind.

The initial failure of March 31 and in two subsequent hearings was compounded in the final hearing on April 27, when the Court passed a rather tepid order to the effect that the solicitor general had agreed that the interim directions passed on March 31 would be continued [actually no interim directions had been passed] and the suggestions made would be examined and appropriate action taken. On this basis, the petition was disposed of. On that day, humanitarian law died a million deaths.

Surely, but surely, the court could not have been oblivious to the continuing migration to rural areas during this period in April. If the court was aware of the migrant crisis (as it should and must have been) why did it not act? Did the court feel helpless and if so, why? Leaving the migrants – men, women, children and infants to their uncertain fate was certainly not a policy decision that necessitated a hands-off attitude from the court; and if it was a policy decision, it was a perverse policy decision that should have been set aside in less than a minute.

What could the court have done? Public interest litigation is all about public interest. Well-meaning persons approach the Supreme Court for the enforcement of constitutional and statutory rights of those who have no access to justice. This is precisely what the petitioner (and others) did. The Supreme Court was approached on behalf of migrant labourers on the road for a do-something direction. Sadly, the court let them down, badly. The court could have asked pointed questions to the state. It could have asked if the Central government had a plan of action for the "unforeseen development" (an expression used in the status report); it could have asked for the steps taken and proposed to be taken to mitigate the hardships that the migrants faced; it could have asked if the state governments were geared up for the massive influx of migrants whose presence "would aggravate the problem of spread of the virus." Issues of socio-economic justice and constitutional rights are vital and raise a whole host of questions, but not one was asked in a public interest litigation, and the issue buried ten fathoms deep. If any event ever shook the collective conscience of the nation, the travails of the migrant labourers did.

Why do I say that the court could not have been unaware of the migrant labourers issue? A second petition filed by Harsh Mander and Anjali Bhardwaj came up before the Supreme Court on April 3. They had asked for a direction to the Central

government and state governments to ensure payment of wages/minimum wages to all migrant workers within a week. It was contended that despite governmental measures, thousands of labourers still lack access to basic facilities, and that studies conducted by NGOs indicate that there are several areas where the aid is not reaching the migrant workers.

On April 7, a status report was presented to the court on behalf of the state. Annexure B to this report gave some startling figures. The status report of March 31 stated that there were 21,604 relief camps and 6,66,291 persons had been provided shelter while 22,88,279 persons had been provided food. As per the report of April 7, the number of relief camps and shelters (including those of NGOs) had gone up to 26,476; shelter had been provided to 10,37,027 persons and food provided to 84,26,509. In addition, 15,05,107 workers were said to have been given shelter and food by employers/industry where they were working. Given this massive increase in numbers within a week, how could the court be unaware of the problem facing the country and how could the court not do anything about it? It seems to me that after the migrant workers, empathy and compassion were the next casualties.

The status report goes on to debunk newspaper reports by stating: "The petition as well as further Affidavit filed is bereft of any facts and is based on some newspaper reports." The newspaper reports that the Supreme Court has now referred to are also not worthy of credence? The status report trashes the studies relied on by the petitioners by not even bothering to refer to them. Unfortunately, nor does the Supreme Court.

And then what happened? The petition filed by these two social activists was adjourned to April 21, and the following order passed: "Taking into consideration the material placed before us, we call upon the respondent – Union of India – to look into such material and take such steps as it finds fit to resolve the issues raised in the petition." Excuse me? What about payment of wages? Executivization of constitutional justice?

The status report points out, interestingly, that "when the country is facing such unprecedented crisis, filing of such petitions and attempting to sit in appeal over all actions taken by the respective governments by few individual needs to be discouraged as it diverts energy and attention of the statutory functionaries which ought to have been utilised to its optimum in discharging their duties on ground." The Supreme Court can very well be similarly told at the next hearing in the *suo motu* proceedings – don't interfere since you are diverting our energy and attention

and effectively preventing us from utilising them from discharging our duties on the ground.

A third opportunity came the way of the Supreme Court when Jagdeep Chhokar filed a petition for a direction to the Government of India to allow migrant workers across the country to return to their hometowns and villages after conducting necessary testing for COVID-19 and to arrange for their safe travel by providing necessary transportation to this effect.

It was noted by the court on May 5 that an order of the government issued on April 29 allowed movement of migrant workers, pilgrims, tourists and students stranded at different places. All state and Union territory governments were required to designate nodal authorities and develop standard protocols for receiving and sending such stranded persons. "The main relief which was sought in the writ petition, thus, stood substantially satisfied by the aforesaid order." QED. Shouldn't questions of this nature have been asked on March 31? Any follow-up steps?

The court also noted that on May 1, an order was issued by the Ministry of Railways to run "Shramik Special" trains to move migrant workers, tourists, students and other persons stranded at different places due to lock down. A grievance was made by Prashant Bhushan appearing for the petitioner that the migrants were required to pay 15% of the fare, which they could not afford. Remember, the court had earlier declined to pass any order for payment of wages to the migrant labour. What was the answer now? "Insofar as charging of 15% of Railway tickets' amount from workers, it is not for this court to issue any order under Article 32 regarding the same, it is the concerned State/Railways to take necessary steps under the relevant guidelines." The petition stands disposed of.

One thing is clear – the migrant workers, women (some of them pregnant), children and infants will remember these dark days till the very end. Images that have haunted us for two months and the horrific struggles of millions will remain etched in our psyche and many will long remember that when it came to the crunch, the Supreme Court did not see those images or read those stories. Over the past few months, constitutional rights and remedies were overlooked and socio-economic justice, a cornerstone in the preamble of our constitution, was disregarded. Some eminent members of the legal fraternity have already expressed dissatisfaction with the present-day functioning of the Supreme Court. Isn't that tragic or is it farcical?

The facts speak for themselves. Can the court redeem itself and reimage its brand as a court for the people of India and not of the people of India? By addressing the plight of the migrant workers *suo motu*, as the court has now done, will the situation on the ground change? Will the Supreme Court change? You be the judge.

Source:

https://thewire.in/law/after-humanitarian-law-died-a-million-deaths-the-supreme-court-has-finally-stirred-itself

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ANNEXURE-C46

The Hindu

Failing to perform as a constitutional court

25 May 2020

Justice Ajit Prakash Shah

The Supreme Court ignored migrant workers when they most needed protection

As India, along with the rest of the world, grapples with the public health crisis caused by COVID-19, it faces many unique challenges. The most acute problem is faced by migrant labourers: they have no work, no source of income, no access to basic necessities, no quality testing facilities, no protective gear, and no means to reach home. Every day, we hear of migrant labourers walking hundreds of miles, many dying in the process. The saddest is the apathy shown by the institutions meant to look out for their interests. I refer here to the Supreme Court, which has failed to satisfactorily acknowledge that the fundamental rights of migrant labourers have been violated, and ignored these workers when they most needed protection.

Undeniably, the state must ensure that adverse consequences of this pandemic are minimised. But any duty performed by the arms of the state, even during emergency, must always be bounded by constitutional propriety, and respect fundamental rights. The judiciary becomes the all-important watchdog in this situation.

No relief for workers

In this lockdown, enough and more evidence points to fundamental rights of citizens having been grossly violated, and especially those of vulnerable populations like migrant labourers. But instead of taking on petitions questioning the situation, the Supreme Court has remained ensconced in its ivory tower, refusing to admit these petitions or adjourning them. By effectively not granting any relief, the Court is denying citizens of the most fundamental right of access to justice, ensured under the Constitution. In doing so, it has let down millions of migrant workers, and failed to adequately perform as a constitutional court.

In one of the strictest lockdowns in modern India, the Centre issued many directives, but designated the States as the implementing authorities. But the issue of migrant labourers is inherently an inter-State issue, and States have had to tackle it both internally as well as inter-se. Who will guarantee safe transport for the return of

migrant workers? When in quarantine, who will grant them a sustenance allowance, or look after their health issues, or look after needs besides food? Who will ensure job loss compensation? Who will conduct regular and frequent testing? Only the Supreme Court can enforce accountability of the Centre in these matters.

In rejecting or adjourning these petitions, the Court has made several questionable remarks: the condition of migrant labourers is a matter of policy and thus, does not behove judicial interference; or, governments already provide labourers with two square meals a day, so what more can they possibly need (surely, 'not wages'); or, incidents like the horrific accident where migrant labourers sleeping on railway tracks were killed cannot be avoided because 'how can such things be stopped'. Equally, lawyers have been castigated for approaching the Court 'merely' on the basis of reports. But the Court has rarely insisted on such formality: its epistolary jurisdiction (where petitions were entertained via mere letters) is the stuff of legend, so its reaction here, during an emergency, seems anomalous.

Many of the so-called excuses of the Court have been tackled by previous judgments, notably the question of policy and non-judicial interference. There are numerous judgments where it has laid out matters of policy: for instance, the Vishaka guidelines on sexual harassment in the workplace; the right to food; and various environmental protection policies. In these cases, the Court formulated policies and asked the States to implement them. Today, there is an unfortunate presumption discernible in the Court's response that the government is the best judge of the situation. In believing thus, the Court seems to have forgotten that the Constitution does not fall silent in times of crises. Similarly, nothing prevents the Court from monitoring the situation itself directly, especially regarding the state's obligations: it could easily direct bureaucrats to collect empirical data on the ground, as it has done before.

One is struck immediately by the lack of compassion or judicial sensitivity in handling this situation, and it prompts two observations. First, the Court is not merely rejecting or adjourning these petitions; it is actively dissuading petitioners from approaching the courts for redress because the Court determines that it is the executive's responsibility. Ordinarily, the Court would have at least nudged petitioners towards the High Courts, but here, even that choice is not available — the Court is practically slamming the door shut.

Second, there is the matter of how the Court is treating such public interest litigations. PILs are a specific instrument designed to ensure the protection of the rights of the poor, downtrodden and vulnerable, and "any member of the public" can seek appropriate directions on their behalf. This lies at the heart of the PIL. The concept of a

PIL is to be non-adversarial, but the Court is treating these as adversarial matters against the government. PILs, in fact, ought to be a collaborative effort between the court and all the parties, where everyone comes together in seeking a resolution to the problem. Today, we find ourselves with a Supreme Court that has time for a billion-dollar cricket administration, or the grievances of a high-profile journalist, while studiously ignoring the real plight of millions of migrants, who do not have either the money or the profile to compete for precious judicial time with other litigants.

Role of High Courts

At this stage, I must acknowledge the stellar role being played by some High Courts, even though governments have tried to discourage them on grounds that since the Supreme Court is not interfering, High Courts need not do so either. At least four High Courts (Karnataka, Madras, Andhra Pradesh and Gujarat) have started asking questions about migrant rights. This is almost a replay of what happened during Emergency, where High Courts boldly stood up and recognised violations, but were overruled eventually by the Supreme Court. The Madras High Court, for example, has quashed criminal defamation cases against media houses, stating that democracy cannot be throttled this way. Contrast this with the Supreme Court's reaction to the bizarre claim of the Solicitor-General who argued that the exodus of workers was due to fake news: the Court seemed to have accepted this, and media houses were advised to report more responsibly.

In such times, High Courts come across as islands of rationality, courage and compassion. However, in truth, the subject matter of migration is inherently an inter-State issue, not an intra-State one. This is a time when the apex court must intervene and monitor the calamitous situation, instead of taking the government's word as gospel. Justice Brandeis' words quoted by Justice H.R. Khanna in ADM Jabalpur ring especially true in these times: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent ... [the] greatest danger to liberty lies in insidious encroachment by men of zeal, well-meaning but lacking in due deference for the rule of law."

Source:

https://www.thehindu.com/opinion/op-ed/failing-to-perform-as-a-constitutional-court/article31665557.ece

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ANNEXURE - C47

Bar and Bench

The Dangers of Outsourcing Justice

Jun 7, 2020
Adv. Arvind Datar

On May 11, 2020, a Full Bench of the Supreme Court of India created constitutional history. Three writ petitions had been filed under Article 32 to quash executive orders that restricted the mobile internet speed to 2G, on the ground that they violated several rights and fundamental rights of the people of Jammu & Kashmir. The writ petitions sought restoration of 4G, which is available in the rest of the country.
Serious constitutional issues relating to Articles 14, 19, 21, proportionality and strict scrutiny arose for consideration. This critical judicial function was simply outsourced to a Special Review Committee constituted by the Supreme Court. The Committee was to consider the rival contentions of parties, and "advise" the Union Territory of Jammu & Kashmir on the basis of its earlier directions in *Anuradha Bhasin*. By tossing this important writ petition into the lap of the executive, this Bench has achieved the unique distinction of converting *judicial review of executive action into executive review of executive action*. The judgment is even more remarkable as it does not set any timeline to complete this executive review and "advise" the Government. Indeed, justice outsourced is justice denied.

The *Anuradha Bhasin* case

Between August 4 and August 5, 2019, mobile phone networks, internet services, landline connectivity were all discontinued in the valley. This was challenged in a batch of cases where the Supreme Court issued 16 directions including two that held that suspending internet services could only be temporary and such orders were subject to judicial review. The *Anuradha Bhasin* case teaches us that giving directions is meaningless unless it is accompanied by a consequential Mandamus.

From 4G to 2G

In Jammu & Kashmir, a series of executive orders from January 14, 2020, restricted the mobile internet speed to 2G. The petitioners had produced voluminous data to demonstrate that 2G was useless except for making phone calls and sending a few text messages. Without 4G, the population of Jammu & Kashmir is unable to access important websites that facilitate online courses, business activity, statutory compliances and so on. The State/Union denied this and made the astonishing claim

that 2G speed is adequate to access websites and also make downloads. The State also took a contradictory stand by claiming that restricting the internet speed to 2G was necessary to disable terrorist groups from communicating with each other and to also prevent fake news and anti-national propaganda in social media. The two contentions cannot co-exist. If 2G is sufficient to access websites and e-learning applications, it is equally sufficient for all terrorist activities to be carried on. The several practical problems faced by students, businessmen, doctors, advocates and others were not considered by the Court.

The Supreme Court's ruling effectively enables the executive to indefinitely deny high speed internet connectivity to the entire population of Jammu and Kashmir. The problem of terrorism has plagued Kashmir for more than three decades and it is unlikely to disappear even in the distant future.

Does this mean that the 1.3 crore population of this Union Territory will be indefinitely stripped of internet access?

Arvind Datar

National Security v. Individual Liberty

The conflict between individual liberty and national security is not new and nobody denies the paramount importance of national security. But it has always been the duty of a constitutional court to test whether the restrictions on fundamental rights are justified and, most importantly, proportionate and rational.

In *Liversidge v Anderson* 1942 AC 206, Lord Macmillan observed:

"The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject- rather the contrary."

In this judgment, rendered during World War II, Lord Atkin gave his memorable dissent and expressed concern over his judicial colleagues being more executive minded than the executive. It was Lord Atkin, who also held in *Eshugbayi Eleko v Officer, Government of Nigeria,* AIR 1931 PC 248, that it was a tradition of British justice that *"judges should not shrink from deciding such issues in the face of the executive*".

The need to restrain individual freedom in times of crisis or to counter terrorism has resulted in a number of landmark cases. After the attack on the World Trade Centre, the United Kingdom passed a stringent law that enabled the detention and deportation of non-UK citizens, if they "were suspected of being concerned in terrorism". In *A v. Secretary of State for the Home Department* [2005] 2 AC 68 (the Belmarsh decision), the House of Lords struck down this legislation on various grounds including

discrimination between aliens and citizens. It held that while national security was a matter of political judgement of the executive and Parliament, it was the duty of courts to adopt an "intensive review" of whether rights of individuals were impugned, and the courts were not precluded by any doctrine of deference from examining the proportionality of the measures taken to restrict each rights on the touchstone of strict scrutiny. It is impossible to imagine the House of Lords sending the dispute back to the Home Secretary for "advice".

In *Hamdan v Rumsfeld* 548 US 557 (2006), the US Supreme Court struck down the Military Commission set up by the Bush Administration to try detainees at Guantanamo Bay as being violative of the Uniform Code of Military Justice and the four Geneva Conventions of 1949, to which the US was a signatory. The fact that Hamdan was the chauffeur of Osama Bin Laden and several detainees were members of the Al Qaeda did not deter the Supreme Court from upholding constitutional principles.

Bank Mellat, a large Iranian bank with 1800 branches, 20 million customers and a business of almost three billion pounds in the UK, was suspected to be funding entities that supported Iran's nuclear and ballistic missiles programs. The UK Treasury issued a directive prohibiting any person from dealing with Bank Mellat, effectively shutting down its business activities in the UK. A judicial challenge failed in the High Court and the Court of Appeal. However, in a remarkable and bold judgment, the UK Supreme Court, in *Bank Mellat v. Treasury* (2013) UKSC 39, quashed this directive as it failed to meet the test of rationality, proportionality and also because it singled out Bank Mellat from other Iranian banks. Lord Sumption, for the majority, observed that the directive failed to strike a fair balance between rights of the individual bank and the interests of the community. The UK Supreme Court had the courage to set aside this directive despite serious allegations and suspicions of the bank's involvement in Iran's nuclear program.

Our Supreme Court has been equally emphatic in stressing the paramount requirement of the Constitution, that even during an emergency, the freedom of Indian citizen could not be taken away without the existence of justifying necessity. In *State of Madhya Pradesh v Thakur Bharat Singh* AIR 1967 SC 1170, Justice J.C. Shah pointed out that the essence of the rule of law was judicial review against arbitrary executive actions.

It is indeed sad that the present Bench did not even make a preliminary inquiry on rationality and proportionality. Does the existence of terrorism and the involvement of terrorist organizations justify an indefinite and complete denial of 4G internet access to the entire Union Territory? What were the materials to show, even *prima facie,* that

denial of internet access had curbed terrorism, when the Solicitor-General referred to an increase in the frequency of terror attacks?

Sentinel on the *qui vive*

The role of the Supreme Court as a sentinel on the *qui vive* is to act as a dyke against unwarranted encroachment of our fundamental rights. The 4G decision has spread darkness over Jammu & Kashmir and made life indefinitely miserable for 1.3 crore people. The Review Committee, to be best of my knowledge, has not even met and, even if it does, is unlikely to retract from the harsh position the executive has taken. When the Solicitor General has vehemently justified the imposition of 2G, it is astonishing, if not shocking, for the Supreme Court to expect a Special Review Committee to grant any relief to Jammu & Kashmir. This judicial retreat and the increasing tendency to turn a Nelson's eye on the ritual incantation of national security and terror to justify violations of fundamental rights is a cause for serious concern.

If benches of the Supreme Court choose to repeatedly put Article 32 in cold storage, it is a matter of time before Indians begin to lose faith in this institution. Let us not forget the chilling implication of what Dante said in Canto III of the *Inferno* -

"All hope abandon ye who enter here".

Source:
https://www.barandbench.com/columns/the-dangers-of-outsourcing-justice

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IN THE SUPREME COURT OF INDIA
CIVIL/CRIMINAL/APPELLATE/ORIGINAL/JURISDICTION

SUO MOTO CONTEMPT PETITION (Crl) No. 1 of 2020

IN RE:

VERSUS

PRASHANT BHUSHAN AND ANR. ....Respondent(s)

VAKALATNAMA

I, Prashant Bhushan, S/o Shri Shanti Bhushan, B-16, Sectoor-14, Noida, U.P. -201 30, the Respondent, In the above Petition Appeal do hereby appoint and retain.

Ms. KAMINI JAISWAL, Advocate To act and appear for me/us in the above Petition/Appeal and on my/our behalf to conduct and prosecute (or defend) or withdraw the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed therein, including proceedings in taxation and application for Review, to file and obtain return of documents and receive money on my/our behalf in the said Petition/Appeal and to represent me/us and to take all necessary steps on my/our behalf in the above matter. I/We agree to ratify all acts done by the aforesaid advocate on record in pursuance of this authority

Dated 02nd day of August 2020

Accepted, Identify&Certified:

Jaiswal

Ms. KAMINI JAISWAL
(Advocate)

Prashant Bhushan

(PRASHANT BHUSHAN)
(Respondent No. 1)

MEMO OF APPEARANCE

To
The Registrar
Supreme Court of India
New Delhi

Sir,

Please enter my appearance for the above-named appellant(s)/Petitioner(s)/Respondent(s) in the above mentioned matter

Dated 02nd day of August 2020

Jaiswal

Ms. KAMINI JAISWAL
(Advocate)
For the Respondent No. 1

The address for service of the said Advocate is:43, Lawyers Chamber, Supreme Court oof India. New Delhi-110 001