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ARTICLE

The Supreme Court in Modi's India

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Abstract: *Twenty-first-century elected right-wing regimes share many similarities apart from being led by "authoritarian populists" who centralize power in themselves and represent ethnic or religious majorities at the expense of other citizens. Since higher judiciaries are key to ensuring executive accountability and the separation of powers in a liberal democratic constitutional setup, they are on the front lines of authoritarian attempts at institutional capture. Unlike earlier dictatorships that suspended existing constitutional protections or imposed martial law, current authoritarian regimes maintain a semblance of legality and constitutionalism while in practice attempting to remake the judiciary in their own image. This phenomenon has been variously termed "autocratic legalism," "abusive constitutionalism," and "populist constitutionalism."*

In this article, I look at how the Indian Supreme Court (SC) has responded to executive incursions under the Narendra Modi regime since 2014. Even today, the court continues to deliver important democracy-enhancing judgments, breaking away from India's colonial inheritance in matters like criminalizing same-sex relationships and adultery. However, the last decade is strongly marked by two features: first, an unwillingness to hear major constitutional issues that might challenge the regime; and second, judgments that serve as an advertorial for the regime, reinforcing an antiminority ideological orientation, justifying the government's actions, and promoting Modi's personality cult. By outsourcing several political decisions to a seemingly disinterested and neutral judiciary, the Modi government has been far more successful than it would have been if it had imposed those decisions purely by legislative majority. In turn, by addressing a variety of political issues as purely procedural matters and not addressing them as constitutional questions, the courts have collaborated in the delegitimization of dissent and reinforced the claims of the Modi regime.

Keywords: authoritarianism, autocratic legalism, judiciary, rule of law, Indian Supreme Court, Narendra Modi, India

The Itineraries of Law in Twenty-First-Century India

> The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes.
>
> —*USA v. Altstoetter et al.*, or the Judges' Trial at Nuremberg (1947)

In the summer of 2022, the Supreme Court of India delivered two remarkable judgments on state violations of human rights, *Zakia Jafri* and *Himanshu Kumar*.[1] Not only did the judges uphold the state defense in its entirety, but they went on to accuse the petitioners of fabricating false cases and called for their arrest. In the *Zakia Jafri* judgment, the judges blamed eighty-three-year-old Zakia Jafri and her co-petitioner, human rights activist Teesta Setalvad, for having the "gumption" and "audacity" to "keep the pot boiling" for sixteen years while pursuing her legal struggle. Sixty-nine Muslims, including Zakia Jafri's husband, had been brutally killed in Gulberg Housing Society during the anti-Muslim Gujarat pogroms of 2002. The judgment was written primarily to exonerate the current prime minister, Narendra Modi (then chief minister of Gujarat), under whose watch the pogroms took place. Immediately afterwards, Setalvad and R. B. Sreekumar, a police officer who had exposed the role of the Gujarat government, were arrested. Sanjeev Bhatt, another Gujarat police officer who crossed swords with Modi when the latter was chief minister and was already in jail on another matter, was also charged along with Setalvad as being part of this supposed conspiracy to frame the prime minister.

In the *Himanshu Kumar* judgment, involving the massacre of sixteen Adivasis (indigenous people) in the state of Chhattisgarh in 2009 in the course of security operations against armed left-wing Maoist guerrillas, the judges endorsed the state's argument that by litigating against the security forces, human rights activists were conspiring to defame the government and security forces. This was in sharp contrast to a previous Supreme Court judgment that had indicted the state for sponsoring vigilantism and perpetrating human rights abuses (*Nandini Sundar and Others v. State of Chhattisgarh*, 2011).

These two cases overturn what has arguably been one of the most remarkable features of postcolonial Indian jurisprudence—the relaxation of *locus standi* in what is called public interest litigation (PIL), also known as social action litigation. This relaxation of standing rules has enabled the courts, lawyers, and citizens to collaborate in enhancing the meaning of democracy more widely (on PIL, see Divan 2016). Following *Zakia Jafri* and *Himanshu Kumar*, it is now, however, potentially dangerous to litigate on state violations. Cases filed by minorities, workers, and other disadvantaged groups are increasingly portrayed as a waste of judicial time (see Trivedi 2020). Increasingly, the PILs being filed are aimed at promoting majoritarian agendas, such as those by Bharatiya Janata Party (BJP) lawyer Ashwini Upadhaya, who has filed PILs demanding, among other things, the renaming of historical places to erase traces of Muslims, enforcement of a two-child policy, a uniform divorce law across religious communities, and an end to the promise of "freebies" (the pejorative term used by the BJP for welfare schemes

1 The *Zakia Jafri* judgment of June 24, 2022, was delivered by Justices A. M. Khanwilkar, Dinesh Maheshwari, and C. T. Ravikumar, while the *Himanshu Kumar* judgment of July 14, 2022, was authored by Justice J. B. Pardiwala for himself and Justice A. M. Khanwilkar.

promoted by opposition parties) (Tripathi 2022; for an earlier critique of PILs, see Bhuwania 2017). Even if ultimately unsuccessful, filing such cases enables discussion of these agendas in the media. We also see a growing trend of SLAPP (strategic lawsuits against public participation) suits being filed by industrialists against the media and whistleblowers (Ghosh 2016).

In this article, I look at how the Indian judiciary has fared since 2014 under the right-wing regime of the Narendra Modi–led Bharatiya Janata Party, focusing in particular on the Supreme Court since it sits at the head of a vast and multilayered system (including state high courts and district courts), in which lower courts are bound to follow SC precedent.

Authoritarian Populism/Fascism

Twenty-first-century elected right-wing regimes share many similarities apart from being led by charismatic "authoritarian populists" who centralize power in themselves and draw on, as well as fuel, the prejudices of ethnic, political, or religious majorities against vulnerable minorities. In the process, these regimes' followers often become complicit in the destruction of their own freedom and well-being (on authoritarian populism, see Hall [1979] 2017; Brown, Gordon, and Pensky 2018).

Since higher judiciaries are key to ensuring executive accountability and separation of powers in a liberal democratic constitutional setup, they are on the front lines of authoritarian attempts at institutional capture. Benjamin Netanyahu's attempts at judicial reform (Sachs 2023) or Donald Trump's claims of victimhood at the hands of an allegedly biased legal system are both examples of majoritarian attempts to shock and awe independent judiciaries. In India, the law minister Kiren Rijiju has accused retired Supreme Court judges critical of the government of being part of an "anti-India gang" and threatened them with consequences (Wire Staff 2023b).

Unlike earlier dictatorships that suspended existing constitutional protections or imposed martial law, current authoritarian regimes maintain a semblance of legality and constitutionalism while in practice constantly attempting to remake the judiciary and reinterpret the constitution in their own image. They may be more or less successful, as the recent mass protests in Israel show.

Use of the existing laws and judiciary to subvert democratic principles has been termed in various ways: see, for instance, Moustafa (2014) on the judicialization of authoritarian politics; Landau (2013, 2020) on abusive constitutionalism and populist constitutionalism; Scheppele (2018) on autocratic legalism; Meierhenrich (2021) on constitutional dictatorships; De Sa e Silva (2022) on law and illiberalism; Hendly (2022) on legal dualism under authoritarianism; and the older concept of lawfare or using law as an instrument of conquest (see Comaroff 2001; Joly 2023).

Unlike other contemporary right-wing populists, for instance Trump or Jair Bolsanaro, Modi's populist authoritarianism does not stem from his personal style alone, though it is certainly central to his government. Before becoming chief minister

of Gujarat in 2002, Modi was a full-time propagandist for the cadre-based Rashtriya Swayamsevak Sangh (RSS). Started in 1925 with the long-term aim of establishing a "Hindu nation," the RSS and the wider family of Hindu nationalists had links with both Italian Fascism and German Nazism (Casolari 2000). Golwalkar (1939, 35), one of the RSS's founding fathers, famously advocated the emulation of Hitler's final solution to deal with India's non-Hindu minorities, especially Muslims and Christians.

A draft constitution prepared by extreme right-wing Hindu groups in 2022 shows that in their *Hindu rashtra* (Hindu nation), non-Hindus would not be allowed to vote (Kumar 2022). Currently, however, the RSS is content to work within the existing constitution while hollowing it out from within. In practice, with some help from the judiciary, as this article shows, religious minorities are being turned into second-class citizens, even if their official status remains the same. Not surprisingly, the existing constitution has become a rallying point for all dissenting groups.

On its website (rss.org), the RSS describes its "vision and mission" as a "movement for the assertion of Bharat's national identity," which they equate with Hindu identity. Its main goal has been to "organize Hindus" and "to restore the Hindu psyche to its pristine form" after centuries of "alien rule" (RSS 2023). The RSS sees Muslims and Christians as "outsiders" who must be taught to accept their place in a Hindu nation; its members yearn for the recognition of the glories of ancient ("Hindu") India, and organize citizens on militaristic lines to achieve these goals. Although upper-caste Hindus have historically been the core constituency of the RSS, the organization has systematically reached out to lower-caste groups in order to unite all Hindus against Muslims. In the RSS ideal, any cracks caused by caste would be papered over through a harmonious acceptance of upper-caste superiority (on RSS ideology, see Anderson and Damle 2018; Noorani 2019). Now that it is in power, the RSS outsources its defense of upper-caste perpetrators of violence to the judiciary, though judicial exoneration of such violence is also a long-standing feature of India's unequal caste society.[2]

The RSS claims, as of May 2023, to have some 1.1. million members and some sixty thousand *shakhas*, or cells, which hold daily meetings (Jha 2022; RSS 2023). Apart from these core cells, the formerly secretive and now openly controlling Sangh (by which the RSS is also known) has proliferated into hundreds of fronts that work with

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2 After decades of trying to eradicate caste in the official sphere and legal reasoning, in both criminal and personal law (see Derrett 1968) it is now increasingly acceptable to bring caste identity into judicial and quasi-judicial reasoning. For instance, eleven men were given early remission after being involved in acts of gang rape and mass murder in Gujarat 2002, and this was justified by a BJP legislator on the grounds that they were Brahmins or upper caste (Wire Staff 2022a). It is not as if the caste argument was not invoked in the past—for instance, the Rajasthan High Court acquitted upper-caste men of raping a dalit woman on the grounds that they would not have violated purity principles by raping an "untouchable" (Pandey 2017). However, such claims are now met with less outrage or shame than earlier. There is also a sort of societal reversion to *Manusmriti*, a Hindu jurisprudential text reviled as the epitome of upper-caste domination. In the *Manusmriti*, crime is assessed not just by the type of violation but also by one's caste (Derrett 1968, 213).

different sectors, such as students, soldiers, women, workers, peasants, lawyers, or ex-servicemen. The BJP is the political front. Currently most leading institutional figures are members of the RSS, including the president, prime minister, the governors of states, vice chancellors of universities, and the heads of various research institutions.

As I have noted (Sundar 2020b), while the jury on what counts as fascism is still out (see Jacoby 2016), the RSS exhibits certain features that bear a close family resemblance to fascist politics. Organizational forms include a mass-mobilizing party with a cult leader, support by the most powerful forms of capital, the role of organized propaganda in spreading misinformation, a cadre base with military training, and the combination of a state monopoly over the police and army with state-sponsored vigilantism (see Banaji 2017 on state support to stormtroopers as a key hallmark of fascism). Culturally, we see anti-intellectualism and restrictions on free speech, the creation of an internal enemy (Muslims, Christians, leftists, and all political opponents), the focus on a mythic past, resentment by the hitherto dominant group (upper-caste Hindus) transformed into claimed victimhood, and the continual shifting of focus in identifying plots against the nation and its leader (see Stanley 2018; Banaji 2017).[3]

Autocratic Legalism

In one of the most influential articulations of the argument that the use of law is critical to contemporary autocratic regimes, Kim Scheppele (2018, 548) defines "autocratic legalism" as a phenomenon whereby "electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda." Drawing on Javier Corrales's description of autocratic legalism as involving the "use, abuse and non-use of law," she goes on to emphasize the "deliberate creation of new law as a way of consolidating political power" (548n9).

Among the commonly identified features of autocratic legalism are: a) attacking independent bodies that hold the regime to account (till such time as they fall in line and their legitimacy can be harnessed to bolster the regime); b) capturing institutions or the state by packing the courts and associated statutory bodies like human rights commissions or election commissions; c) making constitutional changes (whether incremental or sweeping) in order to consolidate the powers of the regime and weaken the opposition; d) enacting a battery of new legislation that speaks in the name of the majority; and e) setting up parallel legal systems and/or instituting forms of legal dualism (see Schepelle 2018; Landau 2020; Moustafa 2014; De Sa e Silva 2022).

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3 I argue (Sundar 2020b) that all regimes till 2014 in India would count as "illiberal democracies" (Zakaria 1997; Hansen 2019). The Emergency (1975–1977), when Prime Minister Indira Gandhi invoked emergency powers to suspend elections and civil liberties, ostensibly to battle internal disturbances, would qualify as a period of "authoritarian populism" (Hall [1979] 2017; Brown, Gordon, and Pensky 2018). The BJP under Modi (2014 onward) is well on the road to a form of fascism (see Ahmad 2017; Banaji 2017; Jacoby 2016; Stanley 2018).

All of these features are visible in India (see also Khaitan 2020; Narrain 2022; Acevedo 2022). The Modi regime is transforming the rules of the game in three essential respects: through changing court composition, through its legislative agenda involving fundamental assaults on existing constitutional principles, and through its weaponization of criminal law (all of these are discussed later). At the same time, it has been able to do this because of the existing weaknesses of the Indian legal system.

The judiciary is not unique: under the Modi regime, in almost all professions and institutions existing personnel are being replaced with those who are more ideologically committed, albeit at a pace mediated by the specific institutional framework. Even without direct replacement, many are falling in line (whether due to fear, opportunism, natural conservatism, or active belief in the virtues of the regime). Apart from the judiciary, new laws and rules make it easier to control the media, especially digital media, and universities. In a judiciary, however, unlike other institutions, the consequences of capture are far more serious since the state has a monopoly over key aspects of law, especially criminal and constitutional law, even if there is greater pluralism in other areas such as civil and personal law. The legitimacy provided by a judicial stamp is also of far greater consequence than in any other field, enabling majoritarian governments to claim the mantle of a universalist neutral rule of law.

Rule of Law as Artifice

The literature on autocratic legalism, while useful, is limited because it takes as its starting point liberal constitutionalism and explores the ways in which autocratic regimes use the legal framework while hollowing it out from within. The rule of law was never universalist or equitable, whether in the metropolitan centers of classic liberal democracies, which denied basic protections to their colonies (see Bhambra and Holmwood 2021), or in postcolonial states that inherited colonial structures of law. E. P. Thompson's (1975, 266) argument that the "rule of law" even in unequal societies is an "unqualified human good," reflecting struggles *about* law, is insightful in many respects. But it ignores how "rule of law" ideology (see also Hay 1975) has centralized and displaced plural legal systems that might be better at delivering "justice."[4]

As Michel Foucault (1977, 23) argues, the *form* of judicial autonomy and third-party neutrality as it arose in bourgeois Europe and was exported to the colonies was compromised, given the association of an autonomous system of justice with fiscal centralization, the concentration of force, and the criminalization of dissenting or superfluous populations. In other words, the ideological and judicial structures of

4 This is not to say that contemporary attempts at introducing alternative dispute resolution methods work very well (Krishnan and Thomas 2015); customary dispute resolution mechanisms like sharia courts are also shaped by the formal constitution (see Lemons 2019).

Western liberal democracies, including the separation of powers, have historically developed in complicity with empire or colonialism and capitalism.

When it comes to the postcolonies, the nature of constitutional legalism cannot be understood without reference to imposed colonial law (see Merry 1991; Mattei and Nader 2008). The constitution of republican India is seen to mark the transition, albeit to many eyes incomplete, from a colonial use of law as an instrument of rule (or rule *by* law) to a more substantive justice-focused rule *of* law (see Baxi 2002; Kannabiran 2003; Bhatia 2019; see also Ramana 2021 for a prevailing judicial view). But several laws that displaced and disinherited citizens, especially indigenous people, like the Forest Act and the Land Acquisition Act, were continued in their colonial form until the early twenty-first century, when they were challenged by various civil-society movements. India has also used colonial-era preventive detention, sedition, and emergency laws like the Armed Forces Special Powers Act (AFSPA) of 1958 on a consistent basis against its own people, especially in Kashmir and northeast India.[5] The constitutionality of the AFSPA was upheld by the Supreme Court in 1998 (*Naga People's Movement for Human Rights v. Union of India*), allowing the security forces to continue to shoot to kill on suspicion, and to arrest without warrant.

Victims of state-enabled and ruling-party-sponsored pogroms as well as counterinsurgency operations (such as those in Delhi in 1984, Gujarat in 2002, Kandhamals in 2008, and the operation in Chhattisgarh, ongoing since 2005) have rarely got justice. In many of these cases, it is not just political backing but the deployment of legal "procedure" that is used to ensure impunity for perpetrators. For instance, the influence that the first information report (FIR) wields on subsequent investigation enables the police to purposefully botch FIRs to weaken cases against powerful perpetrators (see Hoenig and Singh 2014; Farasat and Jha 2016; Sundar 2019a).

It is in procedure that the colonial inheritance is best displayed (see also Ghosh and Duschinski 2020; Meierhenrich 2021, 426; Baxi 1982, chap. 2). Nasser Hussain (2003, 32) describes colonial rule of law as "a form of sovereignty and governmentality: a rule that is lawful, as it lays claim to legitimacy through law, but also one that is literally full of law, full of rules that hierarchicalize, bureaucratize, mediate, and channel power." The use of law as an instrument of harassment to prolong disputes (Cohn 1990), from the lowest levels all the way up to the Supreme Court, is at least as common as the aspirational constitutional vision that motivates people to approach the Supreme Court for enforcement of their fundamental rights (De 2018). Even those who come to law with hope, expecting change, find their strength as litigants sapped by the judiciary through endless deferments, as adjournments are endemic (see Baxi 1982; Robinson 2016).

5 The British introduced the Armed Forces Special Powers Ordinance in 1942 to deal with the Quit India movement.

While public trust in the judiciary is high (Krishnaswamy and Swaminathan 2019), one might see a somewhat different picture using litigation per capita as a proxy for faith in the law and judiciary. Contrary to the myth of the litigious Indian, the rate of litigation is low in relative terms (Galanter 2009). Recourse to the law—as plaintiff rather than defendant—is often dependent on class, caste, religion, or proximity to the court (see Kulkarni et al. 2022). More cases in Delhi and surrounding states are on appeal in the Supreme Court than from states farther away, and public interest litigation (PIL), which gets so much flak for taking up the court's time, constitutes only 1.3% of the Supreme Court's total docket (Robinson 2013)

As elsewhere—for instance, blacks in the US, immigrants in France—equality before the law has always been a dubious claim for certain populations. In India, Muslims, Scheduled Castes (formerly "untouchables"), and Scheduled Tribes (indigenous people), who together constitute less than 40% of the population, make up 81% of the prison population and 60% of detainees or those taken into "preventive custody" for organizing against the state (FP Staff 2020).[6] Even prior to 2014, Muslims suffered disproportionately from antiterror laws (Sethi 2014; Singh 2007). Thus, judges (at all levels) predominantly get to deal with certain kinds of populations as criminals, influencing their attitudes.

The idea of the "unsullied judicial robe," especially but not only in a postcolonial context with inherited colonial law, is thus an "artifice" or convention in which plaintiff and defendant, judge and lawmaker, collude for a variety of different reasons to maintain the *appearance* of a rule of law.[7] In 1978, Nicolas Abercrombie and Bryan Turner wrote an important article titled "The Dominant Ideology Thesis" in which they argued that the point of the dominant ideology was to organize the dominant class, not to instill compliance among the dominated (Abercrombie and Turner 1978). Much the same could be said about the legal system in India today—that it exists to shore up, within the judicial system itself and among its supporting lawyers, belief in the judiciary and the possibility of a rule of law. A number of human rights lawyers are painfully aware of judicial infirmities and fight to make the rule of law meaningful, but they are in a minority. Under the Modi regime, such lawyers are also under threat, as in the Bhima Koregaon arrests (see below).

Among the dominated, it is neither "hegemony" nor "domination" that characterizes their relationship to the judicial system. This runs contra to Ranajit Guha's (1998)

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6 According to National Crime Records Bureau (NCRB) data for 2020, Muslims, at 14.2% of India's population, constitute 16.6% of convicts and 18.7% of undertrial prisoners; Dalits (Scheduled Castes), with 16.6% of the population, are 21.7% of the convicts and 21% of undertrial prisoners; and Adivasis (Scheduled Tribes), at 8.6%, constitute 13.6% of convicts and 10.5% of undertrial prisoners. Of the detainees, 35.8% are Muslims, 18.5% Dalits, and 5.68% Adivasis (FP Staff 2020).

7 I use the term artifice to refer to a socially constructed convention rather than an empirically identifiable concept (see Hume 2007 on artificial virtues).

argument that colonial rule represented dominance without hegemony. Instead, one might argue that, like prayer, subaltern ideas of justice are shaped by desperation and faith. It is indeed remarkable how it is the nonprivileged citizens who most faithfully uphold the Indian judicial artifice, whether in their ritual invocation proclaiming faith in the judiciary when arrested, or through their legal struggles, both in the courts and on the streets. For instance, the opposition to the Citizenship (Amendment) Act, which violated the fundamental principle of equality of citizenship, was predominantly led by ordinary Muslim women, especially grandmothers.

For the vast majority of ordinary citizens who do not engage directly with the law, it is instructive to turn to another field—that of advertising, and the way it transforms the public sphere. Advertising works when agencies are successful at reading culture, but more importantly, it works when they create new desires and new publics through this reading.

In Modi's India, every intervention in political life is a form of promotion, starting from expenditure on media advertising during elections to the advertising of government works as if they were a personal gift of the prime minister to the public (Scroll Staff 2019; Wire Staff 2019a). Even COVID-19 became an occasion to advertise, through the clapping of hands and lighting of lamps, a collectivity mediated by Modi's leadership. The Modi government works through an intricate network of digital media technologies creating new mediated populations (Mazarella 2019; Sundaram 2020). It is worth asking in what ways the judiciary is being mobilized, and what the judicial contribution to "rebranding" India consists of (on branding, see Kaur 2020).

Rule of Law as Advertorial

If the rule of law was earlier "artifice," it has also increasingly become an "advertorial" for the ruling regime. The *Oxford English Dictionary* (2017 edition) defines an advertorial as "a newspaper or magazine advertisement giving information about a product in the style of an editorial or objective journalistic article." There are several instances of judges, including Supreme Court judges, openly praising Modi and advertising their allegiance.[8] Despite this, and despite their own attacks on judicial independence, the regime resorts to the Supreme Court's supposed objectivity and neutrality when it suits them.

The "rule of law" appears to work here to reinforce what Jürgen Habermas has called the "plebscitary public sphere" (or acclamatory form of the public sphere) that characterizes dictatorships in highly industrialized democracies (Habermas, Lennox,

8 In 2021, Justice M. R. Shah described Prime Minister Modi as "a model and a hero" on one occasion and "our most popular, loved, vibrant and visionary leader" on another. Justice Arun Mishra praised him as an "internationally acclaimed visionary" (Krishnan 2021).

and Lennox 1974). Courts are essential to making symbolic statements, sending messages of the form that social order is taking or should take; as Antonio Gramsci put it, the courts play an educative function along with the repressive role of the law (Gramsci 1971). Before the BJP had consolidated its power, and in its early stages in power after 2014, Modi bypassed the interpretational translation of TV anchors to directly address his audiences both through his monthly televised monologue, *Mann ki Baat* (Ohm 2015), and on Twitter, where he currently has 87.6 million followers. Now, however, as institutions have capitulated, it is easier to harness those institutional voices so that the public can be addressed through the refracted prism and seeming disinterestedness of an "independent" media or "independent" judiciary. This reliance on the judiciary is especially useful for the RSS-BJP, since even as it forms the government and claims the mantle of defending the rule of law, the main perpetrators of vigilante violence belong to RSS fronts.

What distinguishes recent judgments and nonjudgments from earlier judicial performances concerning the government in power? One outstanding contrast is the role of omission or nonperformance, in particular the court's unwillingness to hear major constitutional issues that might challenge the regime. This has enabled the Modi government to change facts on the ground, such as in Kashmir, or to gain a lasting unfair financial advantage over other political parties through the sale of anonymous electoral bonds. Another contrast is in politically crucial cases that the SC has decided, coming down firmly on the government's side, brushing aside any evidence to the contrary. Some of these cases personally support Modi or exonerate him of wrongdoing, thus promoting a cult of Modi, while others magnify the RSS agenda more broadly by reinforcing an antiminority ideological orientation.

In order to explain this capitulation to the executive, it is necessary to turn to the structure and history of the Supreme Court before discussing contemporary cases.

The Supreme Court

The Indian Supreme Court came into existence with the republican constitution in 1950, and it has vast powers compared to other apex-level courts. Not only does it hear cases on appeal from state high courts or tribunals, but citizens can also directly petition the Supreme Court against violations of fundamental rights. Furthermore, judges may take up cases *suo motu*, that is, on their own accord. The case load of the Indian Supreme Court is also astounding, especially as compared to other federal or supreme courts. As of April 1, 2023, the SC had 68,847 pending matters, of which 428 were constitutional matters, involving benches of five, seven, and nine judges. Of these, 49,823 were fresh admissions (Supreme Court 2023). In comparison, the US Supreme Court gets some 7,000 requests and hears 100–150 matters per year (US Courts, n.d.).

As a number of scholars have shown, styles of judicial selection (the respective weights of executive/legislative/judicial parity in selecting judges), the length of judicial tenure, and styles of selection of cases for hearing all make a difference to the outcome

of a court's oeuvre (Mehta 2005; Robinson 2016). Unlike US judges who are appointed for life or South African judges who have a fixed tenure, Indian Supreme Court judges are appointed till they turn sixty-five, which means they spend varying lengths of time on the bench. The previous convention that retired judges did not accept jobs or prestigious constitutional positions from the executive has been overturned by the Modi government, which has appointed former Supreme Court judges to governorships and even to positions in the upper house of parliament (*Indian Express* 2022).[9]

Unlike the US or South African Supreme Courts, which sit as a single bench, the Indian Supreme Court is varied in its messaging, given that individual benches of two or three judges take different stands. As Robinson (2016, 376) notes:

> While Article 141 of the Constitution binds the rest of the judiciary to the Supreme Court's decisions, given its many benches speaking of *the* Indian Supreme Court is in many ways a misnomer. Instead, the many benches that make up the Court are perhaps better thought of as constituting a "polyvocal court" or "an assembly of empanelled judges."

Chief justices in their role as "masters of the roster" have the power to assign cases to these different benches. Once again, this is a feature that the Modi government has deployed quite effectively, working through particular chief justices. In one unprecedented press conference, four Supreme Court judges spoke out against the then chief justice for assigning all cases in which the Modi government had a stake to a particular judge. Ironically, one of the four, Ranjan Gogoi, went on to become chief justice and was then accused of behaving in the very same way (Bagriya 2019).

A considerable portion of what the courts decide depends on a wider political economy. As Dhavan (1986, 160) notes, while the judiciary is a part of the state and thus committed to state policies like equality, it is run through a private market economy of lawyers and litigants who determine its direction and use it for their own class interests. Given these factors—the vast number of cases, the conflicting voices and messages put out by different benches, and the dependence of the courts on cases that are brought before them—it is hard to speak of judicial styles over different periods, and to argue conclusively that there has indeed been a rightward turn.

At the same time, there is a widespread consensus that it is possible to discern distinct phases in the Supreme Court's history: from an early conservatism on land reform and bank nationalization, to complicity with the suspension of fundamental rights during the state of emergency (1975–1977), to an activist concern with citizens' welfare in the form of public interest litigation (Baxi 2016; Austin 2000). Even today, the

9 Chief Justice Ranjan Gogoi, who presided over the Ayodhya and Rafale judgments, was rewarded by being made a member of parliament. Justice Abdul Nazeer, the only Muslim judge on the Ayodhya bench, was made governor of Andhra Pradesh post retirement, while Justice Ashok Bhushan, also on the Ayodhya bench, became chair of the National Company Law Appellate Tribunal (Indian Express 2022).

court continues to deliver important democracy-enhancing judgments, breaking away from India's colonial inheritance in matters like criminalizing same-sex relationships and adultery. However, there are enough countervailing examples to suggest that a distinct new phase has begun. The battle over court composition has also never been as fraught as it is currently, barring a brief period during the 1975–1977 Emergency, when elections, press freedoms, and a range of other rights were formally suspended.

The Battle over Court Composition: The Return of a "Committed Judiciary"?

Unlike the US Supreme Court, where judges are nominated by the president and have to be confirmed by the Senate, the judges of the Indian Supreme Court select their own colleagues. Article 124 directs the president to appoint judges of the High Court and Supreme Court after consultation with the judges of the relevant court, especially the chief justice. Following the Emergency, when then Prime Minister Indira Gandhi transferred inconvenient High Court judges and violated existing principles of seniority in the promotion of judges to pack the Supreme Court with "committed judges" (Austin 2000), the Supreme Court arrogated the power of appointment to itself. In what are known as the Second and Third Judges Cases, the Supreme Court effectively rewrote Article 124 to mean that the process of selection would be initiated by the judges themselves, and that reference to the "Chief Justice" meant a "collegium" of the Chief Justice and four other senior-most judges (see Desai 2013; Austin 2000). High court justices are selected by the Supreme Court collegium in consultation with the chief justice and collegium of the relevant high court. However, the government plays an important role in processing the selections (see Lokur 2023).

Since the Modi government took power, judicial appointments once again reflect conditions resembling the Emergency of the mid-1970s. In 2015, the Supreme Court struck down a 2014 act setting up a National Judicial Appointments Commission (NJAC), which would have enabled the government to have greater say (*Supreme Court v. Union of India*). However, the principle of judicial independence is under prolonged attack with the government refusing to accept or act on collegium recommendations, and effectively pushing its own de facto nominees by speedily clearing the files of candidate judges it favors (Lokur 2023). As Jaffrelot (2021, 278–89) describes it, the period from 2015 to 2016 represented a "war of attrition," with the government attempting to wear down the judiciary and the judiciary struggling to fight back, while 2017–2020 represented "truce and surrender," when the collegium increasingly gave in.

Certain cases have become emblematic—such as the government's refusal to appoint Advocate Gopal Subramaniam and Justice Akil Kureshi to the Supreme Court. Both of them had been instrumental in legal proceedings against Amit Shah, Modi's right-hand man and now home minister (Vishwanath 2022; see also Lokur 2023). Inconvenient judges are transferred, such as Justice S. Muralidhar of the Delhi High Court, who was transferred overnight in 2020 to Punjab after he took up the case of hate speeches by Hindu supremacists. The government has made it very clear through its de facto veto

power that it does not forgive or forget anyone who has ever found against its senior leaders or gone against the party's interests. The unresolved death of Justice B. H. Loya, who had been hearing a case against Amit Shah, and Shah's acquittal by the judge who replaced Loya, are seen by many as a clear message—as is the fact that in 2018 the Supreme Court dismissed a plea to further investigate Loya's death (Bal 2018).

Those known to be close to the BJP have been fast-tracked as Supreme Court judges, like Justice A. K. Goel, a member of the RSS lawyers' front, Justice Arun Mishra, who always found in favor of the government and was subsequently appointed chair of the National Human Rights Commission (see Venkatesan 2020a), or Justice P. S. Narsimha, who represented the Hindu side in the Ayodhya Babri Masjid–Ramjanmabhoomi case (see Jaffrelot 2021, 290–98).

High Court (HC) positions are also being filled by pro-RSS persons. In 2019, Arun Mishra's nephew, Vishal Mishra, another BJP lawyer, was made a judge of the Madhya Pradesh HC despite being younger than the stipulated minimum age for appointment (Venkatesan 2020a). Most of the nine judges appointed to the Delhi HC in May 2022 had served as counsel for the central government under Modi. In March 2023, former BJP activist Victoria Gowri was appointed a Madras HC judge; despite lawyers petitioning the Supreme Court and pointing to hate speech by her, the court upheld the appointment and she was sworn in by the chief justice in record time (Bhatia 2023). On the other hand, a whole range of independent tribunals, like the National Green Tribunal, have not been staffed (*Hindu* 2022).

In the past, judicial selection of colleagues has led to a limited pool, though this is no more so today than was the case for previous executive selection (Chandra, Hubbard, and Kalantry 2018). The Modi government has used the absence of OBCs (other backward classes), a large middle-caste pool that is currently its pet constituency, to argue for the need to have greater executive say in appointments. The Union Law Ministry informed Parliament that 79 percent of all High Court judges appointed between 2018 and 2022 were from the upper castes (Wire Staff 2023). The Modi regime's idea of diversity does not, however, include women, religious minorities, or sexual minorities, with the government refusing to process a SC recommendation of a judge who is openly gay (Rajagopal 2023).

Despite the opacity in collegium recommendations, which enables the appointment of judges with known antiminority biases, and the lack of diversity, an overwhelming number of legal commentators still see it as a better system, given the fear that the Modi regime could pack the courts even more comprehensively.

Supreme Court Judgments

Capturing the full range of Supreme Court judgments between 2014 and 2023 would be an impossible task. However, in order to arrive at some sense of the overall direction, I collated lists of the most well-known and publicly discussed judgments from a variety of sources. These include coaching websites for the civil services (ClearIAS, Byju's),

listicles put out by legal websites (Bar and Bench, iPleaders, Manupatra), and a poll of practicing Supreme Court lawyers working across the fields of criminal, civil, and environmental law. The differences in choice of important cases are themselves revealing, with the coaching sites listing mainly the progressive judgments and avoiding judgments with political implications. Cases to do with land acquisition, labor, or environmental issues also capture less media attention, which is more focused on matters concerning the urban middle classes. Starting at a different point (i.e., before 2014) or covering a different period may lead to similar results in terms of the preponderance of judgments favoring the executive, especially in matters of national security. However, there is a widespread sense that something has changed since 2014.

Progressive Judgments

Many of the progressive judgments in the last decade are to do with gender/sexuality rights (see table 1). These include *National Legal Services Authority v. Union of India* (2014, upholding transgender rights); *Shayara Bano v. Union of India* (2016, striking down as unconstitutional triple talaq, or instant divorce, under Muslim personal law); *Independent Thought v. Union of India* (2017, raising the age of consent to sex within marriage to eighteen); *Navtej Singh Johar and Ors. v. Union of India* (2018, decriminalizing same-sex relations and upholding the fundamental rights of the LGBT community); *Joseph Shine v. Union of India* (2018, decriminalizing adultery); and *Indian Young Lawyers Association v. State of Kerala* (2020, upholding the right of women of all ages to enter the Sabarimala temple).

Year	**Case**	**Summary**	**Judges/Bench**
2014	*National Legal Services Authority v. Union of India (UOI)*	Recognized transgender people as third gender; enabled quotas (affirmative action)	Two-judge bench: Justices K. S. Radhakrishnan and A. K. Sikri

2016	*Shayara Bano v. UOI*	Struck down triple talaq as unconstitutional	Five-judge bench: Justices J. S. Kehar and S. A. Nazeer dissented, saying talaq protected under right to religion
2017	*Independent Thought v. UOI*	Struck down Exception 2 to Sec. 375 of Indian Penal Code (IPC); raised age of consent to sex to 18 years, within or outside marriage	Two-judge bench: Justices M. Lokur and D. Gupta
2018	*Navtej Singh Johar and Ors. v. UOI*	Struck down Sec. 377 of IPC as unconstitutional; upheld fundamental rights of LGBT community	Five-judge bench: Chief Justice D. Mishra; Justices R. F. Nariman, A. M. Khanwilkar, D. Y. Chandrachud, and I. Malhotra
2018	*Joseph Shine v. UOI*	Decriminalized adultery	Five-judge bench: Justices K. M. Joseph, A. Rastogi, A. Bose, S. Khanna, and C. T. Ravikumar

2018	*Indian Young Lawyers Association v. State of Kerala*	Allowed women of all ages entry into Sabarimala temple	Five-judge bench: Chief Justice D. Mishra; Justices A. M. Khanwilkar, R. F. Nariman, D. Y. Chandrachud, and I. Malhotra.

Table 1. Progressive judgments regarding gender and sexuality.

The Indian SC is clearly not right-wing on these social matters, unlike the Trump-era US Supreme Court. However, some of the gender-progressive judgments have fed into the larger majoritarian agenda of the RSS. Through both legislative and administrative changes, the BJP has sought to promote the idea that Muslims alone are backward and in need of reform, portraying itself as the savior of Muslim women. In doing so, it has taken the moral high ground of secularism, universalism, and formal equality (see Kapur 2019; Agnes 2016, 917). Some of the cases on Muslim personal law and Islam's essential beliefs before the Supreme Court include a law against triple talaq (instant divorce), which the court upheld, the right of Muslim women students to wear the hijab in colleges that have a prescribed uniform, on which the court was divided, and whether Muslim men can be polygamous, which is still under consideration. In all these cases, the questions of freedom of expression (clothing of one's choice), freedom of religion under Article 25, and who decides what constitutes essential religious practice are also at stake, but these concerns have been drowned out by the larger discourse of promoting the rights of Muslim women.

One of the most transformative judgments to have emerged during this period is the nine-judge bench judgment *Justice K. S. Puttuswamy and Another v. Union of India* (2017), in which the SC formulated the right to privacy under Article 21 (on the "right to life"). However, a year later, while addressing the specific concern that had motivated *Puttuswamy*—the sweeping surveillance enabled by India's identification Aadhaar project run by the Unique Identification Authority of India (UIDAI), in which every resident is given a number that is increasingly being linked to other forms of ID like voter cards or tax numbers—a five-judge bench upheld the constitutionality of the Aadhaar Act and its passage as a "money bill," thus circumventing parliamentary discussion (*Justice K. S. Puttuswamy and Another v. Union of India*, 2018).

Another judgment seen as a major blow for freedom of speech, *Shreya Singhal v. Union of India* (2015), took away the government's power to criminalize online speech

under Sec. 66A of the Information Technology Act (2000), while it simultaneously left intact Sections 69A and 79, which enable the government to block internet access or order takedowns of material (Ashraf 2022). This has left India with the dubious distinction of being "the internet shutdown capital of the world," especially in the former state of Jammu and Kashmir (Krishnan 2023). Another petition against this government power, *Anuradha Bhasin v. Union of India* (2020), in which the Supreme Court noted that any shutdown must satisfy the tests of necessity and proportionality, has never been implemented. Sweeping new rules framed under the Information Technology Act were introduced in 2020. While one portion of these rules, which impinge on the press freedom of digital media, has been stayed, the rest has not. This year, these provisions were used to block a BBC documentary showing then Chief Minister Modi's role in the Gujarat pogroms of 2002, and to criminalize students who attempted to show the documentary on campuses. The latest version of these rules—notified on April 6, 2023—empowers the government to order the deletion of any news story that its own agencies declare to be "fake" or "misleading" (Ministry 2023).

Year	Case	Summary	Judges/Bench
2015	*Shreya Singhal v. UOI*	Struck down Sec. 66A of IT Act, which criminalized online speech	Two-judge bench: Justices R. F. Nariman and J. Chelameswar
2017	*Justice K. S. Puttuswamy and Another v. UOI*	Introduced right to privacy	Nine-judge bench: Justices J. S. Kehar, J. Chelameswar, S. A. Bobde, R. K. Agarwal, R. F. Nariman, A. M. Sapre, D. Y. Chandrachud, S. K. Kaul, and S. A. Nazeer

2018	*Justice K. S. Puttuswamy and Another v. UOI*	Constitutionality of Aadhaar Act upheld, reversed gains of Puttuswamy (2017) in specific instances	Five-judge bench: Justices A. Sikri, A. Bhushan, A. M. Khanwilkar, and D. Mishra; D. Y. Chandrachud dissented.
2020	*Anuradha Bhasin v. UOI*	Internet shutdowns must satisfy necessity and proportionality—never implemented	Two-judge bench: Chief Justice N. V. Ramanna and Justice V. Ramasubramnian
2020	*Rambabu Singh Thakur v. Sunil Arora*	Electoral candidates must declare criminal history	Two-judge bench: Justice R. F. Nariman and Justice S. R. Bhat
2022	*S. G. Vombatkere v. UOI*	Stayed operation of sedition clause 134A of IPC; final decision on constitutionality of sedition pending	Three-judge bench: Chief Justice N. V. Ramanna; Justices S. Kant and H. Kohli
2023	*Anoop Baranwal v. UOI*	Ruled that the prime minister, chief justice, and leader of the opposition should appoint the election commissioner	Five-judge bench: Justices K. M. Joseph, A. Rastogi, A. Bose, H. Roy, and C. T. Ravikumar

Table 2. Progressive judgments, weakly implemented.

In short, several of the progressive judgments of the Supreme Court have either not been implemented by the government or have subsequently been challenged in review by the government (e.g., the *Indian Young Lawyers Association*, or Sabarimala, judgment). In many cases, the court itself has weakened their impact by subsequent judgments or by refusing to hear petitions pointing out the inaction by the government (contempt petitions).

Weaponizing Criminal Law

A remarkable feature of the Modi regime is the degree to which minorities or critics of the government are charged and arrested, without regard to the class or profession of those targeted,[10] while those on the Hindu right, even if involved in terror and heinous offenses, are simply not charged, or their bail is not opposed by the police.[11] The most glaring example is Sadhvi Pragya, released on bail for the Malegaon bomb blasts of 2006, who is now a BJP member of parliament (Apoorvanand 2019; Nileena 2022).

Vigilantism—ranging from state sponsored to state tolerated—has become increasingly common. The first Modi government (2014–2019) was marked by the rise of self-styled cow protection squads who lynched Muslim cattle traders with impunity; what is worse, it was the victims who were charged under stringent laws against cow slaughter (Baksi and Nagarajan 2017).[12] In addition, there continue to be a number of cases of Muslims and Christians being arbitrarily attacked by Hindu supremacist groups on such grounds as being engaged in forced conversion; "love jihad," or luring Hindu girls into romance; praying in public places; and spreading COVID-19 (see Jaffrelot 2021, chap. 6; *Quint* 2018). Inevitably, the perpetrators face no consequences from the police or judicial system.

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10 Teachers, students, lawyers, journalists, comedians, actors, cricketers—anyone and everyone is fair game. To give just a few examples: Disha Ravi, a twenty-one-year-old climate change activist, was arrested for circulating a protest tool kit and charged with sedition; a stand-up comic, Munnawar Faruqi, and his friends and relatives were arrested for a joke he never made; and a journalist, Siddique Kappan, was in jail for two and a half years, charged with "unlawful activities" even before he managed to reach the site of the rape he was to report on. India's position in the press freedom and academic freedom indexes has fallen sharply with physical attacks and arrests of journalists, students, and faculty, sometimes for reporting on or speaking at events, but also simply for Facebook posts or tweets against the government or politicians in power (CPJ 2022; Wire Staff 2019b; Sundar and Fazili 2020; RSF 2021). The media is virtually dead in Kashmir (HRW 2021).

11 In those rare cases where progovernment journalists have been charged, they have immediately been bailed out by the Supreme Court (Singh 2020).

12 For a detailed analysis on lynching, see Narrain 2022, chap. 4. In *Tehseen S. Poonawala v. Union of India* (2018), the Supreme Court issued a series of guidelines to check lynching, but these have not been implemented, and the court in turn has been unwilling to hear contempt petitions (Ramgopal and Singh 2020).

However, the two judgments that mark a major turn in criminal jurisprudence are the *Watali* and the PMLA judgments. In *NIA v. Zahoor Ahmad Shah Watali* (2020), the Supreme Court overturned a Delhi High Court order releasing Kashmiri businessman Ahmad Shah Watali on bail. The Supreme Court bench ruled that trial courts hearing offenses under the Unlawful Activities Prevention Act (UAPA) could not go into the veracity of the documents produced by the prosecution while hearing bail appeals, since that was a matter for an actual trial. As Narrain (2022, chap. 3) shows, this impossible bar on bail has enabled the police to use the UAPA rather than the regular provisions of criminal law against minorities and anyone inconvenient to government.

Among the better-known cases in which *Watali* has been used by the prosecution to keep critics of the government in jail indefinitely are the Bhima Koregaon case and the Delhi riots cases. The Bhima Koregaon case involves sixteen human rights activists, lawyers, and others charged with being part of a Maoist network. The earliest arrests took place in 2018. Despite growing evidence that their laptops and phones had been infected with Pegasus and other malware, and despite the fact that several of them are elderly with serious illnesses, only three so far are out on bail. One of the accused, the Jesuit priest Father Stan Swamy, died in jail in 2021. In the Delhi riots cases of 2020, following the protests against the Citizenship Amendment Act, a large number of students, faculty, and activists who took part in the protests were questioned. However, it was predominantly the Muslim students who were arrested, accused of masterminding a vast jihadi-leftist network to create violence (see Narrain 2022). In one Delhi riots case, where the Delhi High Court granted bail to three students charged under the UAPA, the Supreme Court promptly declared that the high court's reasoning could not serve as a precedent for the other accused (Venkatesan 2021).

Apart from ordinary citizens, the government has also extensively targeted political opponents for alleged economic crimes through agencies like the Central Bureau of Investigation and the Enforcement Directorate (ED), which investigates money laundering and violations of foreign exchange. In 2022, in *Vijay Madanlal Choudhary and Ors. v. Union of India*, the SC upheld the Prevention of Money Laundering Act (PMLA). A range of offenses have been brought within the ambit of the act: "fraud, forgery, cheating, kidnapping, copyright and trademark infringements, environmental offenses and even the immoral traffic of women" (Panchu 2022). Panchu points out that, as with the UAPA, invoking the PMLA gives the state wide arbitrary powers and sets up two parallel legal systems:

> [There are] two sets of enactments to deal with this wide range of offences, one under the standard Indian Penal Code (1860), the Indian Evidence Act (1872) and the Code of Criminal Procedure (1973), which contain the traditional long-standing safeguards against unreasonable action for investigation and seizure, balancing considerations for grant of bail which recognise the primordial right to liberty but also the need to enable proper investigation, and helming the powers of the police with judicial control.

> On the other hand is this PMLA, which obliterates these rights and leaves the accused persons at the mercy of an ED, which is *sans* procedure and oversight. Now the important point is this—it is left to the executive to pick and choose to which persons it would apply the harsh provisions of the PMLA. The executive is unguided and unfettered and by this, we mean not just the ED officers but also, importantly, the political executive who are the masters of these officers. (Panchu 2022)

In effect, India now has a triple legal system—one with normal criminal law, one with special laws like the UAPA and the PMLA, and one where there is total impunity.

Year	**Case**	**Summary**	**Judges/Bench**
2015	*Assam Mahasanghmilita and Ors. v. UOI and Ors.*	Directed publication of Assam NRC (National Register of Citizens); 2019 list rendered 1.9 million persons stateless	Two-judge bench: Chief Justice Ranjan Gogoi and Justice R. F. Nariman—in 2014, in *Assam Mahasanghmilita* and *Ors. v. UOI and Ors.*, they referred the question to a five-judge bench, still pending, along with *Assam Public Works v. UOI*
2019	*NIA v. Zahoor Ahmad Shah Watali*	Made bail impossible under UAPA	Two-judge bench: Justices A. M. Khanwilkar and A. Rastogi

2020	*Indore Development Authority v. Manoharlal*	Struck down Land Acquisition, Rehabilitation, and Resettlement Act (LARR, 2013) to make it easier to acquire land	Five-judge bench: Justices A. Mishra, I. Banerjee, V. Saran, M. R. Shah, and S. R. Bhat
2021	*Kerala Union of Working Journalists v. UOI*	Affirmed that undertrial prisoners have right to medical treatment; reiterated only an existing right and did not take up plaintiff's clearly unjust imprisonment	Two-judge bench: Justices A. S. Bopanna and V. Ramasubramanian
2022	*Vijay Madanlal Choudhary and Ors. v. UOI*	Upheld PMLA	Three-judge bench: Justices A. M. Khanwilkar, D. Maheshwari, and C. T. Ravikumar (sections of the judgment are being reconsidered)
2022	*Noel Harper v. UOI*	Upheld 2020 amendments to the Foreign Contribution (Regulation) Act (FCRA) making it hard for NGOs to get foreign money; advised NGOs to rely on domestic philanthropy	Three-judge bench: Justices A. M. Khanwilkar, D. Maheswari, and C. T. Ravikumar

2022	*Zakia Jafri v. State of Gujarat*	Exonerated Modi of complicity in Gujarat pogroms; criminalized human rights activists	Three-judge bench: Justices A. M. Khan-wilkar, D. Ma-heswari, and C. T. Ravikumar
2022	*Himanshu Kumar v. State of Chhattisgarh*	Acquitted security forces; fined human rights activist Himanshu Kumar	Two-judge bench: Justices A. M. Khan-wilkar and J. B. Pardiwala
2023	*Arup Bhuyan v. The State of Assam Home Department*	Making association with a banned organization a crime under UAPA; overturned 2011 SC judgment	Three-judge bench: Justices M. R. Shah, C. T. Ravikumar, and S. Karol

Table 3. Judgments criminalizing opponents and minorities.

Upending Procedure

Apart from overturning the fundamentals of criminal law—making guilt rather than innocence the presumption for certain cases—some Supreme Court judges have also upended regular procedure.

Perhaps most egregious was the brazen abuse of power displayed by former Chief Justice of the Supreme Court Ranjan Gogoi. Gogoi presided over a bench set up on a Saturday, a non-workday, to respond to a sexual harassment charge against him by a former court staffer. The case was titled *In Re: Matter of Great Public Importance Touching upon the Independence of the Judiciary*. The bench described the allegation as a potential conspiracy to subvert the court and nation by preventing Gogoi from discharging his duties as chief justice. The victimhood style that authoritarian populists appear to thrive on seems to extend also to authoritarian judges (see Gogoi's autobiography, *Justice for the Judge*). An in-house bench of the Supreme Court exonerated Gogoi. Curiously, however, after his retirement, and after facing criminal charges and being removed from service, the staffer was reinstated in 2020 (Wire Staff 2020).

Justice Arun Mishra was also known for circumventing procedure, especially when it came to helping out corporations known to be close to the Modi government. On one occasion, *Indore Development Authority v. Manohar Lal* (2019 and 2020), he ignored precedent (stare decisis) set by a previous bench (even though both were three-judge benches) and then sat on a larger bench deciding between his own earlier judgment and that of the other bench. Not surprisingly, this overturned a progressive clause in the 2013 Land Acquisition Act that would have restored land to the owner if the compensation had not been received in five years' time (Venkatesan 2020b).

Cases Helping Modi

Several cases decided by the Supreme Court have personally helped Modi. The two most significant ones, which helped him to erase the stigma of his time as chief minister of Gujarat in 2002, were the Haren Pandya judgment in 2019 and the *Zakia Jafri* judgment in 2022 (mentioned at the beginning of this article). In *Central Bureau of Investigation v. Mohd. Parvez Abdul Kayuum* (2019), a Supreme Court bench of Justices Arun Mishra and Vineet Saran convicted twelve Muslim men who had earlier been acquitted by the Gujarat High Court of killing BJP leader Haren Pandya. Haren Pandya was a former confidante of Modi who revealed Modi's complicity in the pogrom to an independent investigative tribunal. As Jha (2020) explains in detail, while overturning convictions at the apex level is not unusual, overturing such a clearly reasoned acquittal is rare.

In 2018 (and again in a review petition in 2019), in *Manoharlal Sharma v. Narendra Damodardas Modi*, the SC refused to interfere with the purchase of thirty-six fighter jets from a French company (Wire Analysis 2019), despite the petitioners' pointing out that the government had misled the court on critical matters (Rajagopal 2018), as well as investigations in the French courts following exposés of kickbacks in the French media (Wire Staff 2022b). In clearing the Rafale fighter deal of corruption charges, the SC reinforced Modi's self-publicized image as incorruptible. Again in 2022, while showing some spine in setting up a committee to investigate the use of Israeli Pegasus malware on the phones of Indian journalists, opposition politicians, and human rights activists, among others, the SC declined to make the report public and read out mealymouthed portions of it that appeared to exonerate the government. And though the court noted that the government had flouted its direction to cooperate with the committee, it has done nothing about this.

Finally, in 2023, after six years of waiting in which the verdict became somewhat academic, the Supreme Court (in a 4-1 decision) in *Vivek Narayan Sharma v. Union of India* found no flaw in Modi's 2016 decision to "demonetize" by removing 87 percent of the country's legal tender in the form of 500- and 1,000-rupee notes. It is widely accepted that "demonetization" has had few beneficial consequences and instead caused widespread devastation, especially of small industries (see Kumar 2017); Modi himself no longer talks about it as a major achievement. Yet, it was crucial to maintaining his

image as an anticorruption strongman, and a verdict pointing out the absence of process while arriving at the decision to demonetize would have challenged this.

Year	Case	Summary	Judges/Bench
2018	*Manoharlal Sharma v. Narendra Damodardas Modi*	Court refused to go into Rafale procedure	Three-judge bench: Chief Justice R. Gogoi; Justices K. M. Joseph and S. K. Kaul
2019	*Central Bureau of Investigation v. Mohd. Parvez Abdul Kayuum*	Overturned HC acquittal of twelve Muslim men for killing Haren Pandya	Two-judge bench: Justices A. Mishra and V. Saran
2022	*Zakia Ahsan Jafri v. The State of Gujarat*	Absolved Modi; led to jailing of Teesta Setalvad and R. B. Sreekumar	Three-judge bench: Justices A. M. Khanwilkar, D. Maheshwari, and C. T. Ravikumar
2023	*Vivek Narayan Sharma v. Union of India*	Court upheld demonetization process	Five-judge bench: Justices S. A. Nazeer, B. R. Gavai, A. S. Bopanna, V. Ramasubramanian, and B. V. Nagarathna; dissent by Justice Nagarathna

Table 4. Cases that helped Modi personally.

Cases Helping the RSS

The Ayodhya Babri Masjid–Ramjanmabhoomi case, formally known as *M. Siddiq (D) Thr. Lrs. v. Mahant Suresh Das and Ors.* (2019), showed how close the SC was ideologically to the RSS worldview (Sundar 2019b), and not just to upholding the government side. Using convoluted reasoning to claim that Hindus had a longer tradition of worship there, a five-judge bench of the Supreme Court decided a long-standing "title dispute" for the Hindu side, allowing a temple for the Hindu god Ram to be built on the plot, after the RSS-BJP and its various other fronts had demolished a fifteenth-century mosque at the site. The court acknowledged the severity of the crime committed by those who demolished the Babri Masjid in December 1992 but ended up awarding the land in question to the same broad set of petitioners who were linked to that crime. Not surprisingly, the BJP-RSS leaders who had been involved at the time used this to escape any punishment, even though the vandalism had led to riots and bloodshed across India. Predictably, despite claims that settling this dispute would put an end to all such Hindu designs on Muslim places of worship, the judgment only whetted the appetite of the Hindu supremacists. It also reinforced the Modi government's attempt to consolidate Hindu votes.

In 2022, in *Janhit Abhiyan v. Union of India*, the Supreme Court upheld the Constitution (One Hundred and Twenty-Fourth Amendment) Act of 2019 in what is popularly called the EWS (Economically Weaker Sections) quota case. In India's original constitution, only Scheduled Castes and Scheduled Tribes (and later OBCs) were considered categories deserving affirmative action. This was not, however, specifically on grounds of poverty but because they had historically been discriminated against, religiously and socially. Dalit converts to Islam and Christianity were not entitled to reserved places in educational institutions and jobs, despite continuing to be economically and socially deprived, because the disability was seen as specifically stemming from Hinduism. The 2019 amendment to Articles 15 and 16 of the constitution, however, distorted this entire history by including poverty among upper castes as a ground for reservation, creating a 10 percent quota for them. The amendment—and the court decision—helped the BJP to appease its upper-caste constituency, who have always resented "lower" castes and Scheduled Tribes benefitting from affirmative action. Coming three years after the amendment was challenged, this case also enabled a whole class of beneficiaries to be created and the amendment to be normalized.

Year	Case	Summary	Judges/Bench
2019	*M. Siddiq v. Mahant Suresh Das*	Ayodhya case; gave Babri Masjid site to Hindu Party	Five-judge bench: Chief Justice R. Gogoi; Justices S. A. Bobde, D. Y. Chandrachud, A. Bhushan, and S. A. Nazeer
2021	*Mohammad Salimullah and Ors. v. UOI*	SC allowed deportation of Rohingyas	Three-judge bench: Chief Justice S. A. Bobde; Justices A. S. Bopanna and V. Ramasubramanian
2022	*Janhit Abhiyan v. UOI*	Upheld 103rd Amendment; gave quotas to "Economically Weaker Sections" (i.e., relatively poor members of upper castes)	Five-judge bench (3-2 split): Former Chief Justice U. U. Lalit; Justices Dinesh Maheshwari, S. Ravindra Bhat, Bela M. Trivedi, and J. B. Pardiwala
2022	*Aishat Sifha v. State of Karnataka*	Split decision on whether hijab could be banned in government colleges	Two-judge bench (1-1 split): Justices H. Gupta and S. Dhulia

Table 5. Cases magnifying the RSS agenda.

Cases Not Heard

Perhaps the biggest favor by the Supreme Court, however, is in *not* hearing challenges to laws that rewrite fundamental principles of the constitution (*News18* 2022). In refusing to hear such cases, not only is the court enabling the changes to become accepted social fact, but it is also signaling that their unconstitutionality or constitutionality will be tested against election results, coproducing with the RSS a de facto rewriting of the constitution.

The two most significant political changes to the constitution both came in the second term of the Modi government: the Jammu and Kashmir Reorganisation Act and the Citizenship Amendment Act, both of 2019. The J & K Reorganisation Act struck down Article 370 and its provision for extensive autonomy, which was the condition of the state's accession to the Union of India in 1947. This was followed by the downgrading and division of the state into two union territories and by the arrest of almost all J & K's major political leaders, a year-long internet blackout, and a variety of other severely repressive measures (on Article 370, see Noorani 2011; on its abrogation, see Varadarajan 2019). As of April 2023, the Supreme Court has not even heard habeas corpus cases from J & K before it, let alone cases on the broader constitutionality of the abolition of Article 370, and extensive violations of human rights continue (Forum for Human Rights 2022).

The Citizenship Amendment Act (CAA) of 2019 for the first time introduced religion as a criterion for granting citizenship to refugees. Coupled with the National Register of Citizens (NRC)—which succeeded in disenfranchising 1.9 million people and was overseen by the Assamese nationalist Chief Justice Gogoi—the CAA sparked widespread protest across the country. Not only was the hearing regarding the constitutionality of the act initiated only in September 2022, three years later, but in the intervening period BJP governments or police controlled by them (as in Delhi) took vindictive action against those protesting, including arrests, physical attacks (e.g., on university students), and bulldozing of homes (in Uttar Pradesh). Worse, in *Amit Shani v. Commissioner of Police and Ors.*, a three-judge bench of the Supreme Court heard a frivolous complaint against the iconic anti-CAA protest in Shaheen Bagh, which occupied street space and was led primarily by local Muslim women. The court held that the rights of commuters must be respected and that people must protest only in officially designated spaces (Sundar 2020). A similar judgment against protests was later passed by the Karnataka High Court (Shivakumar 2022). Not only are such orders unenforceable but given that the SC order came *after* the protest had been disbanded due to COVID-19, it aimed primarily at sending a message that protest would not be tolerated.

A third major issue that is still pending is the electoral bonds scheme of 2018, which enabled anonymous donations to political parties through the sale of electoral bonds. The identity of the donor is known only to the government. Since the scheme came into existence, a total of over ten billion rupees worth of bonds have been sold (with the

lowest average purchase being ten million rupees), and 68 percent of this amount has gone to the BJP alone. The scheme is clearly a way of subverting the electoral process by cornering funds, denying funds to the opposition, and enabling unaccountable quid pro quo policies (Bhatnagar 2022; ADR 2022).

The Supreme Court has also been sitting on the constitutional validity of laws against religious conversion in BJP-ruled states, some of which also penalize interreligious marriages (Poddar 2022), as well as on the validity of laws against cow slaughter (see Narrain 2022, 210).

Conclusion

This article has charted the path from an unequal and inaccessible judiciary shaped by colonialism to one that has been weaponized against dissenters and used to sell the virtues of the Modi regime, or what I call the itinerary from rule of law as artifice to rule of law as advertorial. The artifice, of course, also enables the advertorial.

The judiciary has been one of the primary sites of engagement for the Modi regime—from changes in court composition and sweeping legislative agendas that include fundamental assaults on constitutional principles (setting up what amount to parallel legal systems for different categories of citizens) to criminalizing the political opposition.

The RSS has not needed to bring in a new constitution, at least not immediately, to achieve its goal of a Hindu supremacist nation. Instead, as Kapur (2019) has argued, it has weaponized existing constitutional principles like secularism and equality against minorities. This is especially stark when it comes to "saving Muslim women" from Muslim men in the name of gender equality. However, as in cases of interreligious marriage, conversion, and cow protection, as well as in the Ayodhya case (and all cases of recovering Hindu temples from mosques that were allegedly built over them), the Supreme Court's judgments reflect the Hindu supremacist view that Hindus have historically been victims of discrimination by minorities. Here, the principle that is invoked is the right of the Hindu majority to the public expression of their religion, a right that was seen to be kept in abeyance by a hitherto flawed definition of "secularism" that recognized the rights of minorities (so-called minority appeasement) and suppressed the rights of the majority. The scrapping of Article 370 in Kashmir was also carried out in the name of ending "minority appeasement."

By outsourcing several political decisions to an ostensibly disinterested and neutral judiciary, the Modi government has been far more successful than it would have been if it had imposed those decisions purely by legislative majority. The judiciary is also a useful prop when it comes to entangling dissenters and opponents in legal harassment, including jail, and ensuring impunity for one's own criminal elements. In turn, by addressing a variety of political issues as purely legal matters involving land titles, crime, or economic policy, and not addressing them as constitutional questions, the courts

have collaborated in the delegitimization of dissent and reinforced the claims of the Modi regime.

Several factors affect the way the SC operates—what cases are brought to it and by whom; the speed with which cases travel through the judicial system; the composition of the court, which is currently under negotiation between the court and the government; the assignment of particular benches to a case; executive flak for "encroaching" into its domain, coupled with general right-wing flak whenever the Supreme Court rules against the government; media coverage of particular judgments or issues (e.g., the overwhelming interest shown in "Muslim" cases like triple talaq and the hijab ban); and, of course, the government's unwillingness to implement any judgment with which it disagrees. In Shylashri Shankar's (2009) words, the Supreme Court has always been an "embedded negotiator"; perhaps its capacity and desire to negotiate has now been reduced given the changed terrain.

Scholarly opinion is divided on what influences judges who do not have clearly political backgrounds (see Potter 2011), and evidently different judges on the SC have different interests. The same judges may be part of benches producing some of the most progressive judgments (on gay rights and privacy) and some of the worst ones (e.g., Ayodhya). By choosing to be liberal on matters of personal rights (gender/sexuality) and avoiding difficult questions that might challenge the government (e.g., regarding Article 370 and electoral bonds), judges are perhaps trying both to preserve their reputation among liberal and international audiences, especially judicial peers, and to preserve themselves from a vindictive government.

The judiciary, especially the higher judiciary, remains the hope for many (see Acevedo 2022; Narrain 2022), but to expect judges to save democracy is to look in the wrong direction.

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