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 _____**

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 _____**

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 the Press Release by Judges of the Supreme Court is annexed as **Annexure _____.** 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 _____**

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 _____**

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** _____

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 _____**

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 _____**

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 _____**

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 _____**

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 _____**

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** _____. Screen shots of tweets dated 29.07.2020 with details of the bike registration are annexed as **Annexure** _____.

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_____**

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** _____

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** _____

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** _____

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.

*****

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 _____**

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.

1. 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.

45. 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.

46. 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.

47. 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.

48. 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

49. 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.

50. 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.

51. 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.

52. 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.

53. 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.

54. 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.

55. 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.

56. 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.

57. 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.

58. 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.

59. 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.

60. 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.

61. 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

62. 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.

63. 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.

64. 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.

65. 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.

66. 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.

67. 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.

68. **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 _____**

69. 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.

70. 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.

71. 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

72. 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.

73. 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.

74. 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.

75. 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.

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

77. 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.

78. 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.

79. 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.

80. 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.

81. 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.

82. 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.

83. 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.

84. 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.

85. 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.

86. 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.

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

88. 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.

89. 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.

90. 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** _____

91. 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.

92. 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

93. 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.

94. 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.

95. 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.

96. 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.

97. 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 _____**

98. 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

99. 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

100. 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:

101. 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 _____**

102. 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 _____**

103. 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** _____A copy of the order in the SLP dated 29.08.2017 is annexed as **Annexure** _____

104. 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".*

105. 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?

106. 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** _____. A copy of the order dated 4.09.2017 in Writ Petition No. 797/2017 of Prasad Educational Trust is annexed as **Annexure** _____A copy of the order dated 11.09.2017 in Writ Petition No. 797/2017 of Prasad Educational Trust is annexed as **Annexure** _____A copy of the order dated 18.09.2017 in Writ Petition No. 797/2017 of Prasad Educational Trust is annexed as **Annexure** _____A copy of the CBI FIR is annexed hereto as **Annexure** _____

107. 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.

108. 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

109. 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.

110. 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** _____ 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** _____

111. 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.

112. 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.

113. 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

114. 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.

115. 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.

116. 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:

117. 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.

118. 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.

119. 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."

120. 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

121. 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.

122. 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.

123. 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 Tharoo**r): 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.

124. 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

125. 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.

126. 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

127. 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**

Debatable judgements:

128. **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.

129. 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

130. 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.

131. 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.

132. 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.

133. 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 _____**

ASSAM NRC CASE

134. 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

135. **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.

136. 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

137. 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.

138. 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** _____

HABEUS CORPUS PETITIONS

139. 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.

140. 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** _____

CBI DIRECTORS TENURE CURTAILED

141. 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

142. 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.

143. 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.

144. 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_____**

SEXUAL HARASSMENT CASE

145. 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** _____

146. 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.

147. 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 _____**

148. 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.

149. 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_____**

Inexplicable transfers and appointments of judges

150. 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.

151. 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

152. 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.

153. 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** _____

154. 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** _____

155. 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** _____

156. 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 _____**

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

CITIZENSHIP AMENDMENT ACT, 2019

157. 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.

158. 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.

159. 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_____ _____**

ATTACKS ON UNIVERSITIES

160. 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

161. 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.

162. 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.

163. 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

164. 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.

165. 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.

166. 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."

167. 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.

168. 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.

169. 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.

170. 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** _____

171. 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_____**

BLOCKADE OF 4G IN J&K

172. 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.

173. 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_____**

174. 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).

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 _____ day of _____, 2020

DEPONENT