

Killing a Constitution with a Thousand Cuts: The Incremental Fusion of Party and State in India

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1. Introduction

Przeworski famously described a democracy as a system where parties lose elections.¹ As such, democracies—at least of the representative variety—are inherently unstable systems of organising political power in one respect: every victorious democrat has an incentive to undermine its continued operation so that she does not lose her hard-won power in the next round of elections. Apart from corporate wealth, the ruling political party is perhaps the biggest potential source of threat to any democracy.² Contrast this with other regime types. An autocracy is stable in the sense that those with the most power (the autocrats) have an interest in maintaining their power. Same is true of oligarchies or inheritance-based monarchies. It may be that these other regimes face a greater degree of *external* threats (external to the regime, that is, not to the society at large). However, they are self-enforcing to the extent that they grant plenary political power to individuals and groups who are most interested in maintaining the stability of that particular regime type. The threat to a democratic regime comes from within.

The very idea of a democracy requires that every group must have a genuine hope of acquiring some level of state power at least some of the times.³ If this condition is breached, and a group in the polity is locked out of power semi-permanently, the regime is no longer a democracy. Furthermore, the stability of such a regime becomes vulnerable to *external* threats—those locked out of power have no reason not to try and upend it. Thus, democracies trade off internal instability for external stability, whereas other—more exclusionary—regime-types are internally more stable and externally more vulnerable.

Democracies seek to protect themselves from this internal threat by creating mechanisms to ensure that those who currently enjoy political power don't foreclose the possibility of others acquiring it in their stead in the future. The standard analysis seeks to functionally divide state power into three broad divisions—the executive, whose main task is to execute laws; the legislature, which is supposed to enact laws and to seek political accountability from the executive; and the judiciary, which adjudicates legal disputes, including by ensuring that the executive is constrained by the law. Although, in theory, all state power needs to be checked, it is the political executive, wielding the power of the sword, that is usually the most dangerous branch that internally threatens a democracy.

This traditional picture is told as an institutional story of the three main branches of the state. Rarely, though, is it seen in light of a key democratic innovation that cuts across these institutional divides: political parties.⁴ When seen through a party lens, the political executive is typically dominated by the ruling party, or a ruling coalition of parties in alliance (hereinafter, the 'ruling party'). Unlike power-sharing executives in what Lijphart called 'consensus democracies', opposition parties in majoritarian democracies tend not to participate in the political executive at all.⁵ The defining feature of a majoritarian executive system is winner-

* I am grateful to helpful comments from Pippa Norris, Zim Nwokora, Benjamin Reilly. Many thanks to Aradhya Sethia and Dilara Ozer for excellent research assistance.

¹ Przeworski, *Democracy and the market*, p 10.

² On the threat to democracy from wealth, see Khaitan, 'Political Insurance for the (Relative) Poor: Why Liberal Constitutionalism should resist Plutocracy' (Draft).

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⁴ A few honorable exceptions exist. See, Levinson and Pildes.

⁵ Lijphart, *Patterns of Democracy*, 2nd Edition, p 3.

takes-all, even if the winning party or coalition won only a plurality of votes and the opposition's combined vote-share far exceeds its own. Voters who supported opposition parties go completely unrepresented in the executive.

The relationship between a majoritarian political executive and its party is typically a tight one, although which of the two is the dominant partner in the relationship can vary. Sometimes, it is the leadership of the political executive that controls its party. At other times, the party has an independent will and subjects the political executive to it. The internal checks through which a party can hold the political executive accountable is therefore a key part of the puzzle—but not key for our purposes here. Whatever their internal relationship, the interests of a dominant party and a majoritarian political executive are likely to converge on the question of entrenching the party's power in the institutions of the state. Whether the party is using the executive, or the executive is using the party, to undermine democratic institutions is important, but beside the point of this paper.

The legislature is typically composed of the ruling as well as the opposition parties. In a Westminster system, the ruling party must have the confidence of the legislature, or—in a bicameral system—typically the lower chamber of the legislature. This often means that it enjoys a majority in the lower house, although sometimes minority parties can enjoy such confidence through deals with sections of the opposition. In practice, unless moderated by coalition partners, political executives in Westminster systems tend to dominate legislative chambers in which their party has a working majority. Presidential systems do not usually have a confidence requirement, so the ruling party may well be in the minority in either or both houses of a legislature. Mixed systems lie somewhere in between these extremes.

Federalism and devolution add a further—horizontal—dimension to this separation of political power. State power is divided up between the federal government and a number of states. This allows for the possibility of different partisan makeup at the federal level and in different states.

Most liberal democracies try to shield their judiciaries from party-political control and influence, although this is—in practice—more successful in some countries than others.⁶ In particular, the role of the political executive and the legislature in decisions concerning judicial appointments, service conditions, tenure, and post-retirement perks can lead to significant indirect influence. In some cases, corruption or coercion of individual judges could also serve as tools of partisan control, even though—as a formal matter—these are likely to be illegal in most liberal democracies. The position of other, non-judicial, unelected institutions is less clear—more on this later.

Given this background sensitivity to the role of political parties in organising state power, this paper will show how the *Bharatiya Janata Party* (BJP) government in power in India since 2014 has consistently sought to erase the distinction between the party and the state by incrementally, but systemically, seeking to undermine or capture mechanisms that seek executive accountability. Section 2 will outline three key ways in which liberal democratic constitutions make the executive accountable: vertically by demanding electoral accountability to the people, horizontally by subjecting it to accountability demands of other state institutions like the judiciary and fourth branch institutions, and diagonally by requiring discursive accountability to the media, the academy and civil society. Section 3 will show how the BJP government headed by Mr Modi has incrementally and systemically undermined all these three forms of accountability in the last four years. It has rationalised by targeting its political opponents and independent discursive civil society institutions as 'anti-national', and other

⁶ The higher judiciary in the United States, for example, is notoriously partisan.

state institutions as corrupt, inefficient or ineffective. The final section briefly identifies the possible route any reform agenda must undertake, including a move from the first-past-the-post electoral system to one of preferential voting, a robust constitutional recognition of opposition rights, greater independence of and multi-partisan appointments for fourth branch institutions and a smaller docket of the Supreme Court more focussed on the role of constitutional defence.

2. Mechanisms for Executive Accountability

Liberal democratic constitutions seek executive accountability in very specific ways. Their accountability demands can be organised around three axes. The first of these axes seeks *electoral*—also called *vertical*—accountability from the political executive.⁷ Here, the executive is required (either directly, as in presidential systems, or indirectly, as in parliamentary systems) to periodically seek the endorsement of the people through free and fair elections. The threat of losing the next election stops the executive from overreaching in ways that may not go down well with the electorate. On the other hand, this also encourages it to overreach in ways that will. In particular, electorates can sometimes be tempted to compromise their interest (and the interest of future generations) in continuing democratic governance over the long term for (often illusory) short-term promises. A prejudiced majority can persecute a hated minority too, often by seeking to permanently exclude it from political power. Furthermore, even for the electorate to express its will, a free and fair electoral contest is necessary—this at least needs a neutral referee and is not something one of the contestants can be trusted with. This is why most liberal constitutions tend not to be satisfied with electoral accountability alone.

The second axis of accountability for the executive is *institutional* or *horizontal*. To secure this, a constitution subjects the actions of the executive to the scrutiny of several other state institutions, including a legislature, a judiciary, and various ‘fourth branch’ institutions that include an auditor-general, an electoral commission, a human rights watchdog, an anti-corruption ombudsman, a chief public prosecutor and so on.⁸ These institutions are variously constituted. Some of them are themselves *elected*, primarily the legislature, and are therefore most likely to be controlled or influenced by the political executive. Usually, it is only the political opposition within the legislature that performs any checking function. Other institutions, such as the judiciary and other high constitutional offices are constituted through *appointments*. The appointment mechanism, especially the balance between the respective roles of the political executive and the political opposition in appointments, along with their functional autonomy, is key to their independence. Finally, some of these institutions, especially the lower-ranked offices in the bureaucracy and the judiciary, are *selected*—often through competitive exams.

In a liberal democratic constitution, institutional accountability is the main guarantor of liberalism and democracy. Some institutions, like constitutional courts, human rights commissions and electoral commissions watchdogs protect liberalism and democracy directly. But what is common to all these institutions seeking horizontal accountability, at least when they are well-designed, is that—unlike legislatures—they are not tied to the political executive through the umbilical cord that is the political party. A crisis of executive accountability is a crisis of holding the ruling party to account. Independent, unelected, state institutions are the most able to keep the party and the political executive in check—so long as they remain

⁷ On vertical and horizontal accountability, see G O'Donnell, ‘Horizontal Accountability in New Democracies’ in Schedler, Diamond and Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (1999) 29.

⁸ On fourth branch, see Ackerman, Brown, Fombad, Pal and Albert.

independent. This ability also makes them extremely attractive targets for executive subordination or party capture.

We can also include institutions of regional and international bodies, such as the African Union and the United Nations, as part of a supra-constitutional framework for seeking accountability from the executive (and, indeed, other state bodies, although their focus tends to be on the most dangerous branch). Some, especially newer, constitutions explicitly recognise this international dimension of institutional accountability.⁹

The third dimension of executive accountability is *discursive*—to continue with the spatial metaphor, we could call this *diagonal* accountability.¹⁰ This is the accountability of the executive (along with other state institutions) to justify its actions in a public discourse with what is called ‘civil society’. Particular civil society institutions which play a key role in ensuring this discursive accountability include the media, universities, campaign groups, non-governmental organisations, trade unions, religious organisations and charities.

These axes of executive accountability implicate democracy and liberalism. The electoral axis directly entails a basic democratic demand—that the senior executive and the legislature should be constituted through regular free and fair elections. Any pressure on electoral accountability—through gerrymandering, undue influence of wealth in politics, corruption, vote rigging, voter suppression or other such mechanisms to undermine political competition by advantaging the ruling party—compromises democracy. To the extent that the right to political participation is a basic liberal guarantee, these pressures also undermine aspects of liberalism.¹¹

A pressure on the discursive axis often takes the form of a direct violation of the liberal guarantees of free speech and association (including press freedom and academic freedom) through unwarranted curbs on the media, trade unions, universities and charities or the promotion of party propaganda through captured civil society institutions. The goal is often to silence or buy-out criticism of and encourage praise for the executive and the ruling political party. The most extreme method of securing this is by shutting down civil society organisations seen as hostile to the ruling party or capturing them through a takeover by party loyalists. Frequently, lower level threats, violence and ill-motivated regulation also suffice. These pressures undermine not only liberty but also democracy because electoral accountability needs discursive accountability to operate effectively. Citizens cannot exercise their function of electorally holding governments to account unless they are properly informed by discursive civil society institutions.

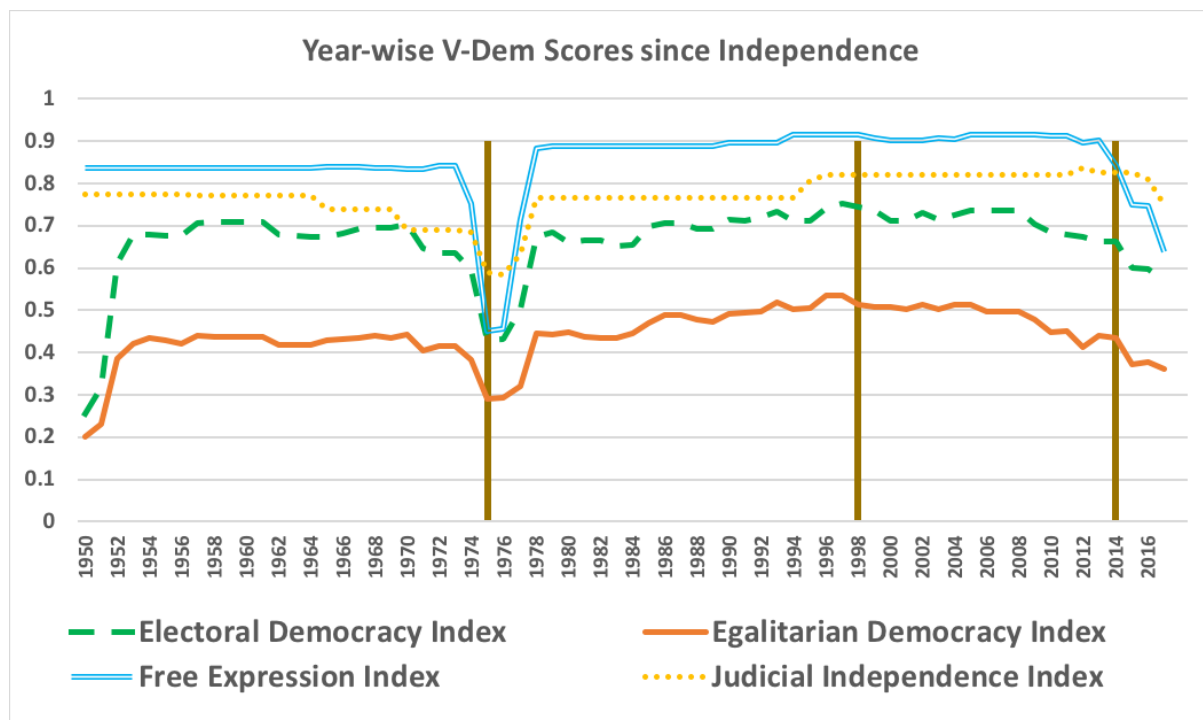
3. Attack on constitutional institutions in India since 2014

Since the election of Narendra Modi as Prime Minister in 2014, the scale and systemicity of attacks on all three types of accountability seeking mechanisms has been unprecedented—with the sole exception of the disastrously authoritarian decade in the 1970s under Indira Gandhi. This is indicated by social science data collected by the very reputable Varieties of Democracies index, where India’s various democratic indices have been nosediving since 2014.

⁹ India, South Africa.

¹⁰ AJ Brown calls it the ‘social dimension’. See Brown, ‘The Fourth, Integrity Branch of Government: Resolving a Contested Idea’, unpublished manuscript, p. 11.

¹¹ Rawls.



The three bar-lines in the graph respectively mark the start of the national Emergency declared by Indira Gandhi in the mid-1970s; the BJP's first central government in the late 1990s and its abortive attempt to amend the Constitution; and finally the Modi years since 2014. On all four fronts, the Gandhi years were disastrous, the Vajpayee years made little difference, and the Modi years have seen a less-dramatic but consistent slump. Let us add some detail to this big picture and see how precisely the three modes of accountability have been sought to be undermined for partisan gain.

3.1 Electoral Accountability

India is a multiparty democracy. The two major national parties are the right-wing BJP and the centrist Congress Party. Apart from these, there are scores of regional parties with a political relevance only in one or two of India's 29 states (or 2 union territories with elected legislative assemblies). Since coming to power at the centre in 2014, the BJP has tried to give itself a partisan advantage in future electoral contests by seeking to change the rules of the game.

Simultaneous elections

One of the major changes in the Indian electoral system that Prime Minister Modi has personally advocated time and again during his tenure is to hold simultaneous elections for the Lok Sabha (the lower chamber of Indian Parliament) and state-level legislative assemblies. All of these houses have a five-year term. While the national and state elections were synchronized in the early years of the Constitution, the cycle was first disrupted due to early dissolution of state assemblies after the 1967 elections.¹² Since then, state elections have taken place in a staggered manner with at least one election taking place each year.¹³ Those in favor of a move to a one-country-one-poll system argue that back-to-back electoral campaigns cause a

¹² In some cases, the Central Government dismissed the State Governments using its power of imposing "President's Rule" under Article 356. Law Commission of India, Draft Report: Simultaneous Elections (30 August 2018), 2, http://www.lawcommissionofindia.nic.in/reports/Simultaneous_Elections.pdf

¹³ Law Commission of India, 3

distraction from effective governance.¹⁴ They further argue that making elections a once-in-five-years affair will reduce the costs of conducting and contesting elections.¹⁵ As an aside, note that offering these managerial justifications (like efficiency and rationalization) for reform that will deliver partisan bonus has been a characteristic of this government.

The proposal of simultaneous elections is under serious consideration after strong support expressed by the Prime Minister's Office and the Presidency (a mostly—but not entirely—nominal, indirectly elected office for the head of state, currently occupied by a BJP nominee). The Law Commission of India—an executive-appointed advisory body to the Ministry of Law and Justice—has also recently released a draft report supporting the government's stance.¹⁶ The only institution to have resisted the move in public debates—other than the political opposition—has been the Election Commission of India, citing logistical and legal difficulties of holding simultaneous polls for such a large electorate.¹⁷

What is the BJP's potential partisan advantage from simultaneous polls? First, simultaneous polls signal an incremental step towards a long-standing BJP desire to move away from a parliamentary system of government (with a relatively weak executive) to a more presidential system (with a stronger executive less accountable to the legislature).¹⁸ Parliamentary democracy is part of the basic structure of India's constitution, and therefore a direct move to a Presidential system would be unconstitutional and illegal.¹⁹ When the first BJP government came to power in the late 1990s, Prime Minister Atal Bihari Vajpayee set up a constitution review committee with the main objective of moving towards a German style system which makes it harder for the legislature to vote out the political executive by requiring a positive vote of confidence in an alternative government, rather than simply a no-confidence vote in the sitting government.²⁰ That move was aborted because of an unusual public intervention by the then (non-BJP) President criticising the review effort as potentially in breach of the basic structure of the Constitution.²¹

A mandatory simultaneous polling system is a means to move closer to a presidential system, and to do so indirectly. BJP President Amit Shah did not even disguise the fact that the move is designed to secure fixed tenures for the political executive in his letter to the Law Commission recommending it.²² If polls can only take place once every five years, any executive that loses the confidence of the legislature in the intervening period will presumably remain in office anyway, until the next polls. That, in effect, is a presidential system, or as close as you can get to it while still pretending to be abiding by parliamentary democracy. This strategic move is a clever rationalisation in the name of efficiency, and without—at least ostensibly—exciting the constitutional bugbear that is the basic structure doctrine.

Second, when multiple elections take place simultaneously, big-ticket elections (usually the federal elections) tend to influence down-ballot races at the state level—even if, technically, a

¹⁴ <https://indianexpress.com/article/explained/holding-lok-sabha-and-assembly-polls-together-how-idea-came-what-implementation-will-mean-5045403/>

¹⁵ Id.

¹⁶ Law Commission of India, Draft Report: Simultaneous Elections (30 August 2018) http://www.lawcommissionofindia.nic.in/reports/Simultaneous_Elections.pdf.

¹⁷ <https://indianexpress.com/article/india/no-chance-at-all-chief-election-commissioner-o-p-rawat-on-holding-simultaneous-polls-5321447/>

¹⁸ Almost every authoritarian leader prefers a presidential system. Erdogan in Turkey, Venezuela, Sri Lanka?

¹⁹ See Kesavananda Bharati. Apparently, this judgment alone stopped Indira Gandhi from amending the constitution to move to a presidential system.

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²² <https://thewire.in/politics/amit-shah-law-commission-bjp-simultaneous-elections>

voter is free to choose candidates from different parties in the two races.²³ Given the party system in India, this is likely to benefit national parties at the cost of state-based regional parties.²⁴ Furthermore, fully aware of the populist appeal of Prime Minister Modi and the absence of a similarly populist leader in its main rival—the Congress party—a nationwide simultaneous poll in the current climate could significantly cement the BJP's electoral advantage across the country.

Campaign Finance

Two major national parties—the BJP and the Congress—were held liable for illegally accepting foreign contributions.²⁵ In response, the BJP government retrospectively amended the Foreign Contribution (Regulation) Act 2010 to narrow the definition of a 'foreign company', and thereby remove the illegality.²⁶ The brazenness of the amendment was bad enough. What was worse was that it was done surreptitiously—not through a standalone Bill amending the 2010 Act, but via clauses slipped into the Finance Act 2016 (granting immunity for foreign donations since 2010) and a further amendment through the Finance Act 2018 (to extend the immunity to all donations received since 1976). Finance Bills have hundreds of clauses which are in the public domain for a very limited period, so the possibility of proper legislative scrutiny is limited. Furthermore, as 'Money Bills', the federal upper chamber (the Council of States, or Rajya Sabha) cannot veto them. Smaller regional parties, which are less likely to be able to attract foreign donations were also disadvantaged for obeying the law, given the retrospective character of the change.

Both these changes—one proposed and one secured—are designed to target smaller, regional parties which often force the national parties into coalition governments and are a key check on the political executive. When in government in states, they also tend to act more independently of the will of the federal government, and are therefore a constant source of irritation to the national parties. The BJP seems to be nudging India's electoral system towards a two-party system by stifling the space occupied by the smaller parties.

Disproportionality of First-Past-the-Post (FPP) System

While seeking to change the rules of the electoral game, the BJP has also benefited from the deficiencies in existing rules. Most noteworthy of these is the first-past-the-post system. In the 2014 general elections, the BJP secured 31.34% of the total valid votes polled and 20.58% of the total number of voters who were entitled to vote in the country.²⁷ It, however, won 282 of 543 (i.e. roughly 52%) of the total seats in the chamber. This was the lowest ever vote-share that translated into a majority of parliamentary seats.²⁸ The Congress, which lost the 2014 election with 19.52% share of the votes cast, ended up with only 44 seats (i.e. about 8% of the total seats). In the 2009 elections, the losing party, the BJP, had won 18.5% of the votes cast, which had translated into 116 seats (about 21%).

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²⁴ Suhas Palshikar, Polls Apart, Indian Express (24 November 2017)

<https://indianexpress.com/article/opinion/columns/election-commission-simultaneous-elections-in-india-lok-sabha-assembly-elections-4951569/> ; Vivek Dahejia, Simultaneous Elections are a Bad Idea, Livemint (10 July 2018) <https://www.livemint.com/Opinion/MgitLxJasfNAbKDhnCQgUJ/Simultaneous-elections-are-a-bad-idea.html>.

²⁵ Association of Democratic Reforms v. Union of India & Others, (2014) 209 DLT 609.

²⁶ <https://thewire.in/business/finance-bill-seeks-amend-fcra-condone-illegal-donations-bjp-congress-received-foreign-companies>

²⁷ https://eci.nic.in/eci_main/archiveofge2014/20%20-%20Performance%20of%20National%20Parties.pdf

²⁸ <https://timesofindia.indiatimes.com/news/BJPs-31-lowest-vote-share-of-any-party-to-win-majority/articleshow/35315930.cms>

In individual contests, FPP benefits the two frontrunners and severely penalises the third (and fourth and fifth etc) parties. It hasn't resulted in a two-party system in India because of the regional character—and therefore a relatively concentrated rather than diffused presence—of smaller parties.²⁹ Most contests are either (i) a two-way straight fight between the BJP and the Congress (where the smaller parties play spoilers); or (ii) a two-way fight between a national party and a regional party; or (iii) a three way contest between the two national parties and a regional party. In this last category, one of the national parties tends to be the smallest third party vying for a toehold.

The most significant victim of the FPP in India tends to be the losing national party, especially if its support base is diffused rather than concentrated. This currently is the Congress party, but as the BJP tries to enter the fray and convert two-party states like Bengal and Kerala currently in category (ii) to three-party states in category (iii), it will begin to take punishment from FPP as well. In four-cornered contests—as in the biggest state Uttar Pradesh—FPP's disproportionality is likely to be the most marked. Ironically, therefore, FPP might have given smaller, regional parties a greater voice in national politics than they might have merited in a system with a more proportionate relationship between vote-share and seats. On the other hand, FPP is likely also responsible for the failure of the smaller ideological, rather than regional, parties (especially the social democratic and left parties) to emerge as serious contenders on the national stage.

Partisan calculations aside, the biggest problem with FPP is that its winner-takes-all model completely discounts the voice of voters who voted for losing candidates, who may well be in majority. In its ability to capture voter choice, it is the least democratic of all electoral systems. It also incentivises political polarization since parties need to convince only a plurality, and not a majority of voters, and can be rewarded for anti-minority politics that appeals to their base.

3.2 Reducing Institutional Accountability to Elected Institutions

Not only has the BJP undermined electoral accountability to the citizens, it has also assaulted institutions that seek horizontal accountability from the political executive.

Weakening the Political Opposition: Non-Appointment of the Leader of Opposition

Soon after the election in 2014, the BJP secured a comfortable majority in the lower house. Congress Party, previously in government, emerged as the largest opposition party with only 44 seats.³⁰ The Speaker of the House, herself elected as the BJP candidate, refused to appoint a Leader of Opposition. In India, the Leader of Opposition is (at least textually) not a constitutional office. According to a 1997 legislation that governs the position, the leader of the largest opposition party and recognised by the Speaker as such is the Leader of Opposition.³¹ However, the BJP-appointed Attorney General opined that there is no law that obliges the Speaker to recognise a Leader of the Opposition if no opposition party's numerical strength is at least equal to the quorum of the House (i.e. one-tenth of its membership, or 55 seats).³² The current Lok Sabha Speaker has refused to recognize a Leader of Opposition as the Congress Party garnered only 44 out of 543 seats.³³ Although several commentators have

²⁹ Chapter on Indian in Handbook on electoral systems.

³⁰ Election Commission of India, 2014 Elections: Performance of National Parties, https://eci.nic.in/eci_main/archiveofge2014/20%20-%20Performance%20of%20National%20Parties.pdf

³¹ Sec. 2, Salary and Allowances of Leaders of Opposition in Parliament Act, 1977.

³² Opinion by Attorney General for India, 'Recognition of Leader of Opposition in Sixteenth Lok Sabha' <https://barandbench.com/wp-content/uploads/2016/11/lokpal.pdf>

³³ Declined. Speaker Rejects Congress Claim for Leader of Opposition, NDTV, <https://www.ndtv.com/india-news/declined-speaker-rejects-congress-claim-for-leader-of-opposition-650355>

doubted the legality of this decision,³⁴ courts are still to rule on the legality of the Speaker's decision.³⁵

While this is not the first time that the lower house does not have a Leader of Opposition, the position has not been vacant since 1989.³⁶ The absence of a designated Leader of Opposition matters because it denies certain perks of office—like a salary and secretarial staff—to the opposition. Further, after 1989, the Parliament has reformed or established several independent 'fourth branch' institutions, the appointment mechanisms of which involve the participation of the Leader of Opposition.³⁷ The orchestrated vacancy in this office was used by the government as an excuse to stall certain appointments to these fourth-branch institutions.³⁸ The Supreme Court has allowed these appointments to proceed while the office of Leader of Opposition is vacant,³⁹ which gives the government a free hand in these appointments.⁴⁰

The absence of the institution of the shadow cabinet in India already hampered the Opposition's ability to hold the executive to account. The absence of a Leader of Opposition makes that task extremely difficult.

Undermining Bicameralism: Overriding the Rajya Sabha's Veto

In many parliamentary systems, bicameralism is a serious check on the power of the political executive which normally controls the lower legislative chamber (Lok Sabha). Generally, both houses of the bicameral Parliament have to approve a bill to enact it into law. However, certain bills that deal with financial matters enlisted under Article 110 of the Constitution can be passed as 'money bills'. Once a bill is certified as a money bill by the Speaker of the lower house, the bill does not require the assent of the upper house to be enacted as law.⁴¹ In order to circumvent scrutiny by the upper house (Rajya Sabha), where the BJP did not enjoy majority, the government got the Lok Sabha Speaker to characterize the Aadhaar Bill 2016—validating the national biometric identity programme (*Aadhaar*)—as a money bill.⁴² The provisions of the Bill traversed far beyond the grounds for which the money bill process is normally allowed.⁴³ Further, the government also refused to accept amendments suggested by the upper house.⁴⁴ However, the Supreme Court, in a split verdict, has upheld the constitutionality of the process

³⁴ P D T Achary, *The LoP Excuse*, Indian Express (3 May 2017)

<https://indianexpress.com/article/opinion/columns/the-lop-excuse-4637880/>

³⁵ The Delhi High Court refused to entertain a public interest petition challenging this decision of the Speaker: *Imran Ali v. Union of India*, 2015 SCC OnLine Del 6707.

³⁶ Opinion by Attorney General for India, 'Recognition of Leader of Opposition in Sixteenth Lok Sabha'

<https://barandbench.com/wp-content/uploads/2016/11/lokpal.pdf>

³⁷ *Common Cause v. Union of India*, (2017) 7 SCC 158. <https://barandbench.com/wp-content/uploads/2017/04/lokpal-judgment.pdf>

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 'Special Invitee' Mallikarjun Kharge Refuses To Attend Lokpal Meet, NDTV, 19 September 2018,

<https://www.ndtv.com/india-news/special-invitee-mallikarjun-kharge-refuses-to-attend-lokpal-meet-1919092>

"An invitation as a special invitee without the right of participation, recording of opinion and voting in the procedure is an eyewash..."

⁴¹ Art. 110, The Constitution of India, 1949. See Pratik Dutta, Shefali Malhotra & Shivangi Tyagi, 'Judicial Review and Money Bills', 10(2) NUJS Law Review, 75 (2017).

⁴² Rahul Narayan & Apar Gupta, *The Money Bill Cloud Persists Over The Aadhaar Act*, LiveLaw (13 October 2018) <https://www.livelaw.in/the-money-bill-cloud-persists-over-the-aadhaar-act/>

⁴³ Suhrith Parthasarathy, *Aadhaar Act as a money Bill: It can lead to a great deal of public harm*, Hindustan Times (28 September 2018) <https://www.hindustantimes.com/columns/aadhaar-act-as-money-bill-it-can-lead-to-a-great-deal-of-public-harm/story-Xu3TtHMSXyrydO4VcBZgM.html>

⁴⁴ Lok Sabha passes Aadhaar Bill, rejects 5 amendments suggested by Rajya Sabha, India Today (16 March 2016) <https://www.indiatoday.in/india/story/lok-sabha-passes-aadhaar-bill-rejects-amendments-introduced-in-rajya-sabha-313614-2016-03-16>

followed by the central government.⁴⁵ The dissenting judge went on to call the usage of the money bill route for passing the Aadhaar Act a ‘fraud on the constitution’.⁴⁶ Notwithstanding its legal validity, the ruling party, by following the money bill route despite major opposition, not only compromised bicameralism, but also sidelined the institutional expressions of opposition voices.

While the Aadhaar Act has attracted the most attention, the current government has been using the money bill route with an unprecedented frequency, sidestepping the scrutiny by the upper house on some of the most controversial issues.⁴⁷ As already noted, two of these usages were to amend campaign finance laws to retrospectively validate foreign donations to the BJP that had already been declared illegal by the Delhi High Court. The Finance Act 2017 also amended the Representation of the People Act 1951 and the Reserve Bank of India Act 1934 to permit unlimited and anonymous corporate donations to political parties through the newly issued ‘electoral bonds’. With the Supreme Court’s endorsement of the Speaker’s extremely expansive understanding of a ‘money bill’, it appears that the upper house has been rendered politically impotent.

In 2018, in order to avoid a parliamentary debate on crucial financial issues, the government passed the Budget under an extraordinary parliamentary procedure known as the ‘guillotine’.⁴⁸ This procedure allows the Speaker of the House to put a bill to vote without any discussion.⁴⁹ Despite several suggested amendments and strong protests by the opposition parties, the government passed the Finance Bill and the Appropriation Bill – two components of the Budget – without any discussion in the House.⁵⁰ The use of this procedure was especially disingenuous given that there were still three weeks left in the session of the House, so time was not of essence.⁵¹

In the same year, when several opposition parties came together to move a no-confidence motion against the government, the Speaker delayed the motion for over a month.⁵² Such a delay on the part of the Speaker in accepting the no-confidence motion is unprecedented. Out of 26 no-confidence motions proposed in independent India, most were symbolic because the government had the numbers.⁵³ Yet, they serve an important function in seeking political accountability from the government, and therefore received priority from the Speakers of the day.⁵⁴ While the government comfortably won the no-confidence motion when it was eventually brought up, it managed to avoid a publicly televised parliamentary debate on its

⁴⁵ Justice K.S. Puttaswamy v. Union of India, (Para 412, J. Sikri)

https://www.supremecourtindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_26-Sep-2018.pdf

⁴⁶ Id., J. Chandrachud (para 117)

⁴⁷ As Justice Chandrachud Calls Aadhaar Law ‘Unconstitutional’, Government Increases Use Of Controversial Short Cut, Bloomberg Quint (3 October 2018) <https://www.bloombergquint.com/law-and-policy/as-justice-chandrachud-calls-aadhaar-law-unconstitutional-government-increases-use-of-controversial-short-cut>

⁴⁸ Meghnad S, How to Get Away with Murder: Parliament Edition, Newslandry (14 March 2016) <https://www.newslandry.com/2018/03/14/finance-bill-2018-appropriation-bill-parliament-speaker-fm-arun-jaitley>

⁴⁹ Guillotine on budget debate, The Telegraph (15 March 2018) <https://www.telegraphindia.com/india/guillotine-on-budget-debate/cid/1338698>

⁵⁰ Lok Sabha passes budget without debate; both Houses adjourn amid din, Economic Times (15 March 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/finance-bill-to-be-taken-up-in-lok-sabha-at-noon/articleshow/63296956.cms>

⁵¹ Id.

⁵² P.D.T. Achary, The Speaker is Wrong to not Allow No-Confidence Move to be Tabled, The Wire (26 March 2018) <https://thewire.in/government/the-speaker-is-wrong-to-not-allow-no-confidence-move-to-be-tabled>

⁵³ M.R. Madhavan, Confidence in the House, The Hindu (5 April 2018) <https://www.thehindu.com/opinion/op-ed/confidence-in-the-house/article23437310.ece>

⁵⁴ Id.

performance before a crucial state election in Karnataka.⁵⁵ The Speaker of the Lok Sabha has always been a political appointee, but is supposed to preside over the House as a whole as a constitutional officer, rather than as an agent of the ruling party. Such blatant acts of partisanship on her part have been rare.

Attacking Federalism: Abuse of the Offices of Governors and Lieutenant Governors

By no means the first government to do so, the BJP has fully exploited India's long and unfortunate tradition of abusing a constitutional design flaw—the centrally appointed office of the Governor in every state in the country. Although a largely ceremonial head, the governor performs certain key political functions. Most importantly, in case of a hung assembly where no party has a clear majority, the governor appoints the leader of the party she believes is most likely to secure the confidence of the House as Chief Minister. The advantage of political office is so immense that even the few days within which a new Chief Minister has to prove her majority in the assembly are usually sufficient to coax, cajole, buy or coerce the support of smaller parties, independents and even factions within the main political rivals. BJP-appointed governors have typically obliged their political masters. In 2017, when the Goa assembly returned with a hung verdict, the governor invited the alliance led by the BJP, which had superior numbers to the single-largest party (the Congress). However, in 2018, the Karnataka governor decided to invite the single-largest party lacking a majority (the BJP) rather than a coalition with a clear majority (that included the Congress) to form a government.⁵⁶ It is clear that the decisions were motivated not by the likelihood of confidence but by partisan considerations. The Supreme Court made a timely intervention by ordering an immediate floor-test.⁵⁷ Ultimately, the BJP failed the floor test.⁵⁸ Consequently, the BJP nominee stepped down as the Chief Minister, and the coalition formed the government.⁵⁹

Again, in November 2018, when the non-BJP parties formed a coalition with a clear majority to form a government in the state of Jammu and Kashmir, the Governor simply dissolved the House and called for fresh elections, characterising the alliance as 'unholy'.⁶⁰ A BJP General Secretary went to the extent of accusing the political opposition of treason, suggesting that the alliance was formed at the instruction of (and, presumably, for the benefit of) a hostile foreign nation (Pakistan).⁶¹ It remains to be seen whether courts intervene to correct yet another blatantly partisan gubernatorial act.

While the occasion for abusing the Governors' offices arises only rarely, BJP-appointed Lieutenant Governors—with a wider range of powers—have been unrelenting in the abuse of their office in the union territories of Delhi and Puducherry. In 2015, a new party—the *Aam Aadmi Party*—arising out of an anti-corruption movement, formed government in National

⁵⁵ Hartosh Singh Bal, India's Embattled Democracy, New York Times (30 May 2018)

<https://www.nytimes.com/2018/05/30/opinion/india-democracy.html>

⁵⁶ <https://www.thehindu.com/elections/karnataka-2018/let-karnataka-governor-explore-all-alternatives/article23905846.ece>

⁵⁷ Supreme Court orders BJP's Yedurappa to face floor test in 24 hours, Hindustan Times (18 May 2018)
<https://www.hindustantimes.com/india-news/supreme-court-asks-yeddyurappa-to-prove-majority-tomorrow-does-not-get-into-legality-of-governor-s-decision/story-St4IAhbh1ZwusGnHuzOtDP.html>

⁵⁸ Karnataka governor invites Congress-JDS alliance to form government (19 May 2018)
<https://www.hindustantimes.com/india-news/karnataka-governor-invites-congress-jds-alliance-to-form-government-15-days-to-prove-majority/story-yh89AgZdEqjex2SjmgT0ZP.html>

⁵⁹ Id.

⁶⁰ <https://www.hindustantimes.com/india-news/j-k-s-political-thriller-ends-in-anti-climax-house-dissolved/story-Cp8VZPABYgZtrEqAScAsoI.html>

⁶¹ <https://scroll.in/article/903159/the-daily-fix-by-accusing-opposition-parties-of-treason-bjp-is-subverting-indian-democracy>

Capital Territory (NCT) of Delhi.⁶² Soon after Delhi election, the central government, acting through its appointee, Lieutenant Governor (LG), not only made key appointments contrary to the wishes of the Delhi cabinet, but also obstructed major policies and legislative initiatives of the elected government of Delhi.⁶³ In part, these controversies are owed to Delhi's peculiar status in the Indian constitutional scheme. While it does have an elected parliamentary government, the powers of Delhi's elected executive is somewhat less than those of full-fledged states.⁶⁴ In one instance, even though the state legislature passed the law excepting certain offices from 'office of profit'—a completely normal political practice—the LG intervened and reserved the Bill for President's assent, which led to disqualification of 20 members of the legislature.⁶⁵ Earlier this year, the Delhi High Court restored the membership of those legislators.⁶⁶

When the matter concerning the extent of LG's powers reached the Supreme Court, the Court interpreted LG's powers narrowly,⁶⁷ holding that he cannot override a decision of the elected government of Delhi unless an 'executive act of the government of the NCT is likely to impede or prejudice the exercise of the executive power of the Union government.'⁶⁸ While the judicial caveat left enough ambiguity for the LG to continue some meddling,⁶⁹ even this limited relief came after the elected Delhi government had already completed almost three and a half of its five years in office. As we will see shortly, misdirection of the Supreme Court's judicial energies into relatively minor matters has taken a huge constitutional toll.

In Puducherry, another territory with a peculiar constitutional status comparable to Delhi, its LG—also appointed by the central government—continues to interfere in policy decisions and day-to-day administration by the elected government.⁷⁰

⁶² Election Commission of India, Statistical Report on General Election, 2015 to the Legislative Assembly of NCT of Delhi, https://eci.nic.in/eci_main/StatisticalReports/AE2015/StatReportDelhi_AE2015.pdf

⁶³ Rajgopal Saikumar, More constitutional than political, (23 May 2015) <https://www.thehindu.com/opinion/lead/more-constitutional-than-political/article7236281.ece>; Delhi LG Anil Bajjal blocking scheme for education loan to poor, alleges Manish Sisodia, <https://indianexpress.com/article/india/delhi-lg-anil-bajjal-blocking-scheme-for-education-loan-to-poor-alleges-manish-sisodia-4856617/>

⁶⁴ Art. 239AA (4) "[I]n the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President for decision and act according to the decision given thereon by the President."

⁶⁵ Rajshree Chandra, Understanding the Ratio of Malice to Legality in the AAP MLAs Disqualification Case, The Wire (22 January 2018) <https://thewire.in/government/understanding-ratio-malice-legality-aap-mlas-disqualification-case>

⁶⁶ Kailash Gehlot v. Election Commission of India, Delhi High Court WP (C) 750 of 2018, <http://lobis.nic.in/dhir/dhc/SKN/judgement/23-03-2018/SKN23032018CW7502018.pdf>

⁶⁷ Para 277 (xviii), J. Misra, NCT v. Union of India https://www.sci.gov.in/supremecourt/2016/29357/29357_2016_Judgement_04-Jul-2018.pdf

⁶⁸ Para 142, J. Chandrachud, NCT v. Union of India https://www.sci.gov.in/supremecourt/2016/29357/29357_2016_Judgement_04-Jul-2018.pdf

⁶⁹ Delhi CM vs L-G: Round 2 begins in SC tomorrow, India Today (16 July 2018) <https://www.indiatoday.in/mail-today/story/delhi-cm-vs-l-g-round-2-begins-in-sc-tomorrow-1286575-2018-07-16>; Delhi Govt Vs LG: "Govt Paralyzed, Can't Appoint/Transfer Officers", Submits Delhi Govt. But SC Defers Hearing Of Pending Issues, Livelaw (26 July 2018) <https://www.livelaw.in/kejriwal-vs-lg-govt-paralyzed-cant-appoint-transfer-officers-submits-delhi-govt-but-sc-defers-hearing-of-pending-issues-to-july-26/>

⁷⁰ <https://www.thenewsminute.com/article/cm-vs-lg-puducherry-power-struggle-may-now-become-legal-tussle-64536>; <https://www.thehindu.com/news/cities/puducherry/sc-ruling-on-l-gs-powers-applies-to-puducherry-too-says-narayanamys/article24330112.ece>; <https://www.financialexpress.com/india-news/puducherry-power-tussle-heres-l-g-kiran-bedis-counter-to-cm-narayanamys-contempt-threat/1232354/>

3.3 Weakening Institutional Accountability to Appointed Institutions

The Modi government has also undermined mechanisms that allow appointed institutions to seek accountability from the executive. These institutions are constituted not by elections but by various appointments processes, and typically include high constitutional offices. The higher judiciary is a key component. So are a variety of ‘fourth branch’ institutions that don’t neatly fit into the traditional tripartite division between the executive, the legislature and the judiciary, and include the Reserve Bank of India, the Auditor General, the anti-corruption watchdog, the Information Commission, the Election Commission, the Human Rights Commissions, various equality commissions and so on. Although often appointed by the executive in India, these fourth branch institutions are usually meant to function independently and do not report to any governmental ministry.

Interference with Judicial Independence and Appointments

The Indian Constitution envisages a wide jurisdiction for the Supreme Court.⁷¹ It is an eccentric court that some commentators have described as ‘the most powerful court of the world’.⁷² Its power to seriously impact the lives of a billion-plus Indians (and others, through its significant influence over other judiciaries in the global South)⁷³ is greatly enhanced by the following features:

- It is a uniquely interventionist ‘good governance court’, known for its proverbial indifference to the separation of powers. Actively intervening in affairs of policy, it has made decisions of far-reaching import in the areas of housing, environment, food security, corruption, transparency, sexual harassment, urban pollution, forest rights, and economic policy.⁷⁴
- The Constitution explicitly gives it the power to strike down unconstitutional parliamentary statutes and executive acts. It has also, through judicial interpretation, acquired the power to strike down constitutional amendments if they violate the constitutional ‘basic structure’.⁷⁵
- It is a fiercely independent court. On a strained interpretation of the Constitution, it gradually appropriated the power to appoint its own judges during the 1980s and the 1990s.

⁷¹ Arun K. Thiruvengadam, *The Crisis in Context*, Frontline (16 February 2018) <https://www.frontline.in/cover-story/the-crisis-in-context/article10055190.ecc>

⁷² Id.

⁷³ A Thiruvengadam, ‘Global Dialogue Among Courts’ in C Raj Kumar & K Chockalingam eds, *Human Rights, Justice, and Constitutional Empowerment* (OUP 2007); A Thiruvengadam, ‘Revisiting The Role of the Judiciary in Plural Societies (1987): A Quarter-Century Retrospective on Public Interest Litigation in India and the Global South’ in S Khilnani, V Raghavan, and AK Thiruvengadam (eds), *Comparative Constitutionalism in South Asia* (OUP 2012).

⁷⁴ See N Robinson, ‘Expanding Judiciaries: India and the Rise of the Good Governance Court’ 8(1) *Washington University Global Studies Law Review* (2009) 1; M Khosla, ‘Making Social Rights Conditional: Lessons from India’ (2010) 8 *ICON* 739; S Shankar, *Scaling Justice: India’s Supreme Court, Social Rights, and Civil Liberties* (OUP 2012) 149, 154; V Gauri and D Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (CUP 2008); L Rajamani & A Sengupta, *The Supreme Court of India: Power, Promise, and Overreach*, in *The Oxford Companion to Politics in India* (N Jayal & PB Mehta eds., 2010); *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (BN Kirpal et al. eds., 2001); A Thiruvengadam & P Joshi, ‘Judiciaries as Crucial Actors in Southern Regulatory Systems: A Case Study of Indian Telecom Regulation’ (2012) *Regulation and Governance* 1.

⁷⁵ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225, S Krishnaswamy, *Democracy and Constitutionalism in India* (OUP 2011).

This last feature, the control over the appointment of its judges, has been a cause of a fraught relationship between the executive and the judiciary for almost the entire life of the Constitution.⁷⁶ Partly in response to Indira Gandhi's quest for a pliant judiciary in the 1970s, the Supreme Court established the 'collegium', a body comprising five senior-most judges, in 1993.⁷⁷ The collegium was primarily tasked with appointments to higher judiciary and subsequently came to be regarded as a bulwark for judicial independence.⁷⁸ Although fiercely independent in its appointments process, Supreme Court judges retire at the relatively young age of 65 (for High Court judges, the retirement age is 62). Most of these retired judges are appointed to various tribunals and fourth branch institutions after their retirement, which are in turn made by the political executive, allowing it significant systemic influence on the career of a judge.

In 2014, the Modi government, with the support of Opposition, passed a constitutional amendment to overhaul the process of appointments to higher judiciary.⁷⁹ The amendment took away judicial primacy in judicial appointments, and gave the executive an upper hand. In 2015, the Supreme Court struck down the amendment on the grounds of erosion of judicial independence, which is part of the basic structure of the Constitution.⁸⁰ While the amendment itself had broad political support, the executive's retaliation after it was struck down has been conspicuous. The government has since not only sat on several recommendations for appointments to the higher judiciary,⁸¹ but also selectively resisted the elevation of nominees who were seen as unfavourable for partisan or ideological reasons.⁸² A petition concerning these delays in judicial appointments is currently pending before the overburdened Supreme Court.⁸³

There have also been some serious allegations against the government meddling with judicial function behind the scenes. In January 2018, four of the five senior-most judges of the Indian Supreme Court who constituted its collegium held an unprecedented joint press conference. They released an open letter they had written to the fifth member of the collegium, the Chief Justice of India (CJI) and complained that long-standing conventions governing the CJI's role as the 'master of roster' were being ignored.⁸⁴ The Indian Supreme Court sits in benches of varying sizes. While ordinarily the composition of different benches and allocation of cases between them is decided through an automated system, the CJI, as the master of roster, retains the residual power to assign benches.⁸⁵ This time, the suggestion was that the CJI may have used his powers of master of roster to benefit the ruling party and its leaders in certain politically sensitive cases.⁸⁶ In particular, there was high drama in the assignment of a case

⁷⁶ Id.

⁷⁷ Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441

⁷⁸ Rohit De & Tarunabh Khaitan, In Defence of Constitutionalism, International Journal Constitutional Law Blog (19 January 2018) <http://www.icconnectblog.com/2018/01/in-defence-of-constitutionalism/>

⁷⁹ Constitution (Ninety-ninth Amendment) Act, 2014.

⁸⁰ See Supreme Court Advocates-on-Record Association v. Union of India (2016) 5 SCC 1.

⁸¹ <https://timesofindia.indiatimes.com/india/sc-to-hear-plea-on-govt-delays-over-appointment-of-judges-in-higher-judiciary-after-8-weeks/articleshow/66480494.cms>

⁸² K. Parameshwar, Alok Prasanna Kumar, Tarunabh Khaitan, Was the Centre right in resisting Justice Joseph's elevation?, The Hindu (4 May 2018) <https://www.thehindu.com/opinion/op-ed/was-the-centre-right-in-resisting-justice-josephs-elevation/article23764213.ece>

⁸³ <https://timesofindia.indiatimes.com/india/sc-to-hear-plea-on-govt-delays-over-appointment-of-judges-in-higher-judiciary-after-8-weeks/articleshow/66480494.cms>

⁸⁴ Full text of the letter four supreme court judges wrote to India's chief justice, Quartz (12 January 2018) <https://qz.com/1178370/full-text-of-the-letter-four-supreme-court-judges-write-to-the-chief-justice-of-india/>

⁸⁵ Ashok Pande v. Registrar, Supreme Court of India, WP (c) 147 of 2018. <https://drive.google.com/file/d/131zk29w4GqCFpYIQf95W54s6PjL6tgBc/view>

⁸⁶ India's Top Judges Accuse Chief Justice of Undue Influence in Hearings, The Telegraph (14 January 2018) <http://www.telegraph.co.uk/news/2018/01/14/indias-top-judges-accuse-chief-justice-undue-influence-hearings/>

concerning the alleged murder of a trial court judge investigating a murder case implicating the President of the BJP.⁸⁷ Irregular assignments of this case to a bench headed by the then-CJI which decided that there was no need for further investigation into the case was one of the primary motivations for the press conference by the four other members of the collegium.⁸⁸

Subsequent to the press conference, given the seriousness of the charges, a few members of the parliamentary opposition filed an impeachment motion against the CJI.⁸⁹ However, India's Vice President—a former President of the BJP—refused to allow the motion to proceed without even ordering a preliminary investigation into the allegations.⁹⁰

While the BJP's hand in the above-mentioned episode is shrouded in mystery, its role in calling for open defiance of a judicial order is very public. In a recent decision, the Supreme Court ordered that women should be allowed to worship in a Hindu temple in Southern India, where women of certain ages were previously prohibited from entering.⁹¹ While the Communist Party government in the state where the temple is located hailed the verdict, the current BJP President Amit Shah threatened to 'uproot' the state government if it continued to enforce the order by arresting people protesting (and frustrating) the implementation of the Supreme Court's order (by physically blocking access to the temple by female activists).⁹² The BJP has also led protests against its enforcement,⁹³ resulting in several violent incidents.⁹⁴ While the Supreme Court has agreed to hear review petitions, the aftermath of the Sabarimala judgment—especially the BJP's response to it—may have long-lasting repercussions on the rule of law and the legitimacy of the Supreme Court.⁹⁵

The Indian Supreme Court's ability to act as a constitutional watchdog is seriously hampered because of the distraction caused by its superlatively large docket. In a recent representative year (2013), 76,742 new cases were instituted before the SCI. It disposed of a total of 77,085 cases during that year, and 66,349 cases remained pending at the end of the year to be carried over to future years.⁹⁶ The weight of the docket has strained all the traditional hallmarks of common law adjudication: adherence to precedents, carefully reasoned judgments, primacy of technical legal reasons, engagement with the key points raised by the parties.⁹⁷ In addition, the constitutional injunction that important constitutional issues must be heard by a bench of at least five judges is more or less ignored in practice.⁹⁸ The strain was dramatically felt in 2013,

⁸⁷ <https://barandbench.com/judge-loya-death-dushyant-dave/>

⁸⁸ <https://thewire.in/law/sc-justices-hold-historic-press-conference-triggered-judge-loya-case>

⁸⁹ India's opposition moves to impeach Supreme Court chief justice, Financial Times (21 April 2018) <https://www.ft.com/content/90ca99ba-4486-11e8-803a-295c97e6fd0b>

⁹⁰ Order by the Vice President, (23 April 2018) https://rajyasabha.nic.in/rsnew/HC_orders_mothion.pdf ; Congress party motion to impeach India's top judge rejected, Financial Times (24 April 2018)

<https://www.ft.com/content/ffadea5e-46f6-11e8-8ae9-4b5ddcca99b3>

⁹¹ Indian Young Lawyers' Association v. State of Kerala WP (C) 373 of 2006,

https://www.supremecourtindia.nic.in/supremecourt/2006/18956/18956_2006_Judgement_28-Sep-2018.pdf

⁹² https://scroll.in/article/902308/by-threatening-keralas-government-for-enforcing-sabarimala-order-amit-shah-breached-his-oath-as-mp?fbclid=IwARIfuAjAzfhIomEK8VRzcmZ4tsnpYS40nhQJ8oqetPaUif_xNa52UsWVXUU

⁹³ Amit Shah asks on Sabarimala: Why issue orders that can't be enforced?, Indian Express (28 October, 2018) <https://indianexpress.com/article/india/amit-shah-asks-on-sabarimala-why-issue-orders-that-cant-be-enforced-5421715/>

⁹⁴ Clashes Blocking Women From Temple in India Bring Over 2,000 Arrests New York Times (26 October 2018) <https://www.nytimes.com/2018/10/26/world/asia/india-hindu-temple-arrests.html>

⁹⁵ Pratap Bhanu Mehta, The Sabarimala Aftermath, Indian Express (24 October 2018) <https://indianexpress.com/article/opinion/columns/the-sabarimala-aftermath-5415090/>

⁹⁶ 'The Supreme Court of India Annual Report: 2014' at 79.

⁹⁷ Chintan Chandrachud, in Mehta, Choudhry and Khosla

⁹⁸ Article 145, Constitution of India. See also, N Robinson, 'Bigger Bench Please' Indian Express 8 June 2012 at <http://www.indianexpress.com/news/bigger-bench-please/959194/> (last accessed 14 Feb

with the poorly-reasoned judgment of a two-judge bench of the SCI—issued several months after the conclusion of the hearings, and on the last day before the retirement of the presiding judge—that overturned a High Court order and recriminalized homosexual acts between consenting adults.⁹⁹

The docket of the Court comprises ‘admission matters’ and ‘regular hearing matters’. Admission matters are those cases which it must decide whether to admit for a regular hearing. These constitute the bulk of the docket of the Court, which spends two of every five working days determining admission matters. The remaining three days of the working week are spent on regular hearings. In 2011 alone, the Court decided some 47,000 admission matters, of which 9,070 were admitted for regular hearing. The main reason for this staggering docket, apart from the size of the country, is the Court’s remarkably liberal invocation of its ‘special leave’ jurisdiction, which allows appeals from any court or tribunal in the country to be placed directly before the Supreme Court (Article 136 of the Constitution). A direct approach to the top court deprives it of the benefit of the considered views of the courts below, and should be allowed very rarely. The special leave jurisdiction was intended by the constitution-framers as a residual jurisdiction that would be invoked only in the most exceptional cases. Robinson shows that in 2011, 84.6% of the Court’s admission docket sought to invoke this special jurisdiction. By contrast, only 1.8% of the admission docket included cases which sought the protection of constitutional norms under its ‘writ’ jurisdiction. The share of writ matters in the admissions docket in 1985, by contrast, was 41%.¹⁰⁰ So, constitutional cases make up only a tiny part of the docket of the court today (in admissions as well as regular hearing dockets), and the quality of its constitutional adjudication cannot but be affected by the sheer volume of other litigation before the Court (most of which is brought by special leave).

The very identity of the Supreme Court as primarily a constitutional court is under threat. At a time when the Court is perhaps the only institution with sufficient power to stop executive aggrandizement, the opportunity cost of the distraction and polyvocality brought about by its extremely wide special leave jurisdiction could well be the survival of democratic constitutionalism in India.

Disabling or Capturing the Fourth Branch

Contemporary constitutions subject the executive to the scrutiny not only of the political opposition and the judiciary, but also various ‘fourth branch’ institutions that include an auditor-general, an electoral commission, a human rights watchdog, an anti-corruption ombudsman, a chief public prosecutor and so on.¹⁰¹ In India, some of these institutions, like the Election Commission, are mentioned in the constitutional text. Others like the Human Rights Commission, established by statutes, have a quasi-constitutional status. The Modi government has worked systematically to either cripple these institutions to prevent them from performing their accountability-seeking function, or pack them with party ideologues to ensure their institutional capture. The fact that the political executive has an exclusive (or, at least, dominant) say in most of these appointments has aided the project of ideological capture of these institutions, which are increasingly being staffed by affiliates of the BJP’s parent organisation and ideological mentor the *Rashtriya Swayamsevak Sangh* (‘RSS’).

2015).

⁹⁹ T Khaitan, ‘*Koushal v Naz: Judges Vote to Recriminalise Homosexuality*’ 78(4) *Modern Law Review* (2015) 672.

¹⁰⁰ N Robinson, ‘A Quantitative Analysis of the Indian Supreme Court’s Workload’ 10(3) *Journal of Empirical Legal Studies* (2013) 570, 584.

¹⁰¹ On fourth branch, see Ackerman, Brown, Fombad, Pal and Albert.

Lokpal

After a long drawn anti-corruption movement, the outgoing government headed by the Congress Party enacted the Lokpal and Lokayuktas Act in 2013. This Act aimed to establish an independent anti-graft ombudsman (the ‘Lokpal’). Despite the BJP’s prominent role (then an opposition party) in demanding the legislation, and repeated reprimands by the Supreme Court, the Modi government has continued to delay the appointment of the ombudsman.¹⁰² The government took more than four years to even establish a ‘search committee’, which is supposed to recommend names to the ‘selection panel’, which, in turn, would make the final recommendations on the appointment. As of now, the search committee has not recommended any names.¹⁰³ This means that the government may finish its five-year tenure without an anti-corruption ombudsman in office.

Central Bureau of Investigation

The Central Bureau of Investigation (CBI) is the premier investigative agency in the country.¹⁰⁴ Despite its crucial role, the Bureau does not stand on a firm constitutional ground. It is a federal body with police powers in a constitutional scheme where police powers ordinarily reside with state governments.¹⁰⁵ The complicated legal status not only raises questions about the constitutionality of the Bureau,¹⁰⁶ but also compromises its independence and accountability.¹⁰⁷ The Director of the CBI—selected by a committee comprising the Prime Minister, the Leader of Opposition and the Chief Justice of India—enjoys a fixed tenure of two years.¹⁰⁸ However, there is little administrative independence as the Bureau’s administrative control vests with the government.¹⁰⁹

Allegations of the politicization of the CBI are not new. Previous governments have frequently used the CBI to selectively investigate their political adversaries, which led the Chief Justice of India to describe the body as ‘a caged parrot speaking in its master’s voice’.¹¹⁰ Even in the backdrop of this fraught history, the current crisis is unprecedented.¹¹¹ The top two officers of the agency have made allegations of bribery against each other.¹¹² After the Director of the Bureau filed a case against the Deputy Director, the latter complained to the government about

¹⁰² Common Cause v. Union of India, (2017) 7 SCC 158, <https://barandbench.com/wp-content/uploads/2017/04/lokpal-judgment.pdf>; Govt stand on Lokpal appointment is ‘wholly unsatisfactory,’ says Supreme Court, The Hindu (24 July 2018) <https://www.thehindu.com/news/national/govt-stand-on-lokpal-appointment-is-wholly-unsatisfactory-says-supreme-court/article24502495.ece>

¹⁰³ Centre announces 8-member search committee for Lokpal, Times of India (27 September 2018) <https://timesofindia.indiatimes.com/india/centre-announces-8-member-search-committee-for-lokpal/articleshow/65985596.cms>

¹⁰⁴ A.G. Noorani, A Charter for the CBI, The Hindu (21 August 2013) <https://www.thehindu.com/opinion/lead/a-charter-for-the-cbi/article5042518.ece>

¹⁰⁵ Anil Chowdhry, Independence of CBI: Myth and reality Rediff News (15 May 2013) <http://www.rediff.com/news/column/independence-of-cbi-myth-and-reality/20130515.htm>

¹⁰⁶ SC stays Gauhati High Court order declaring CBI unconstitutional, Indian Express (18 February 2018) <https://indianexpress.com/article/india/india-others/sc-stays-gauhati-high-court-order-declaring-cbi-unconstitutional/>

¹⁰⁷ Manish Tiwari, Is CBI a Legal Entity? Deccan Chronicle (28 October 2018) <https://deccanchronicle.com/opinion/columnists/281018/is-cbi-a-legal-entity.html>

¹⁰⁸ Sec. 4B, Delhi Special Police Establishment Act, 1946.

¹⁰⁹ A "caged parrot" - Supreme Court describes CBI, The Reuters (10 May 2013), <https://in.reuters.com/article/cbi-supreme-court-parrot-coal/a-caged-parrot-supreme-court-describes-cbi-idINDEE94901W20130510>

¹¹⁰ Id.

¹¹¹ Ritu Sarin, A lower low, Indian Express (26 October 2018) <https://indianexpress.com/article/opinion/a-lower-low-5418861/>

¹¹² The corruption scandal marring India's CBI, BBC (26 October 2018), <https://www.bbc.com/news/world-asia-india-45988193>

the former.¹¹³ The government reacted to this by sending both top officials on ‘indefinite leave’ despite the fixed tenure of the CBI Director guaranteed by law.¹¹⁴ In an unusual turn of events, the CBI Director himself approached the Supreme Court, challenging the government’s decision, where he also claimed that the government has been exercising its influence to interfere with the CBI’s functioning.¹¹⁵ Opposition parties have alleged that the suspension of the CBI Director is an orchestrated attempt to thwart investigation into recent corruption allegations against the government.¹¹⁶ Such is the level of distrust of the central investigative agency that two states have forbidden it from conducting any investigations within their jurisdiction without their express permission.¹¹⁷

Central Information Commission

In 2005, India passed the Right to Information Act after a long-drawn social campaign led by civil society activists.¹¹⁸ The Act, aimed at increasing transparency and accountability, requires a timely response to citizen inquiries from “public authorities”.¹¹⁹ In order to oversee compliance and resolve disputes pertaining to information requests, the Act also establishes the offices of Information Commissioners at both central and state levels. The Commissioners have the powers of a civil court and can direct a public authority to disclose information it is legally required to disclose.¹²⁰ In order to maintain their independence from the government, the commissioners’ “salaries, allowances, and other terms and conditions” are fixed in the Act.¹²¹

The government has introduced an amendment bill that will give the government significant discretion to determine salaries, perks, and tenures of the commissioners.¹²² The introduction of this amendment bill was not preceded by any public consultation, thus breaching the guidelines of Pre-Legislative Consultation Policy of 2014.¹²³ If the government succeeds in getting this amendment through Parliament, it may seriously damage the independence of India’s transparency watchdog.¹²⁴ This is not the only instance where the Commission’s independence has been compromised under the current government. In 2014, the government had entrusted the Commission’s financial powers with a governmental department, which was

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ CBI Director Cannot Be Divested Of Powers Without Approval Of High Powered Committee, Contends Alok Verma In SC, LiveLaw (24 October 2018) <https://www.livelaw.in/cbi-director-cannot-be-divested-of-powers-without-approval-of-high-powered-committee-contends-alok-verma-in-sc-read-petition/>

¹¹⁶ CBI power shift: Opposition slams ‘illegal removal’ of CBI chief Alok Verma (25 October 2018)

<https://indianexpress.com/article/india/cbi-power-shift-opposition-slams-illegal-removal-of-cbi-chief-alok-verma/>

¹¹⁷ <https://timesofindia.indiatimes.com/india/after-andhra-pradesh-west-bengal-withdraws-general-consent-to-cbi/articleshow/66657701.cms>

¹¹⁸ Aruna Roy, Excerpt: The RTI Story: Power to the People, Hindustan Times, (13 April 2018)

<https://www.hindustantimes.com/books/excerpt-the-rti-story-power-to-the-people-by-aruna-roy-with-the-mkss-collective/story-V5AWqGRa84dCxYoVsR2o4L.html>

¹¹⁹ Sec. 4, Right to Information Act, 2005.

¹²⁰ Sec. 18, Right to Information Act, 2005.

¹²¹ Sec. 13 & 16, Right to Information Act, 2005.

¹²² Right to Information (Amendment) Bill, 2018

<http://www.prsindia.org/uploads/media/RTI/Right%20to%20Information%202018.pdf>

¹²³ ‘Serious attack’: Activists say Centre’s proposed amendments will weaken RTI Act, Scroll, (18 July 2018)

<https://scroll.in/article/886927/serious-attack-activists-say-centres-proposed-amendments-will-weaken-rti-act>

¹²⁴ Has the Right to Information Act been weakened?, THE HINDU (27 July 2018)

<https://www.thehindu.com/opinion/op-ed/has-the-right-to-information-act-been-weakened/article24523104.ece>

restored to the Commission within a year, only after protests by activists and opposition parties.¹²⁵

Senior Bureaucracy

A non-partisan bureaucracy which can provide ‘frank and fearless’ advice to the political executive is crucial for impartial implementation of laws and policies. The top bureaucracy in India is filled by senior officers initially selected by competitive examinations at the entry level, governed by an independent constitutional body called the Union Public Services Commission (UPSC).¹²⁶ This system of appointments has substantially, though not completely, insulated civil services from political influence.¹²⁷ However, the government has recently introduced a direct lateral-entry system, which calls on ‘talented and motivated Indian nationals’ from various professional backgrounds to apply for ten high-ranking positions in the central government bureaucracy.¹²⁸ Despite a specialized constitutional body for public services, the government has retained the power of appointment for this parallel system to itself. Several commentators have criticized this move as a return of the ‘spoils system’—a system where civil service positions may be awarded to party supporters by bypassing the constitutionally mandated mechanism.¹²⁹ Notice, yet again, that a move designed to facilitate the partisan capture of a state institution was justified in terms of managerial rationales such as efficiency and diversity of talent.

Reserve Bank of India

The importance of the independence of the central bank to a democracy is especially noted by Lijphart in his classic work *Patterns of Democracy*.¹³⁰ He notes that ‘independent banks are widely considered to be better at controlling inflation and maintaining price stability than banks that are dependent on the executive.’¹³¹ The Reserve Bank of India (RBI) is India’s central bank and in charge of the country’s monetary policy. While the previous governments have had disagreements with the bank, they have managed to reach a compromise through negotiations behind closed doors.¹³² Since Modi came into power, the relationship between the government and the Bank has been fraught with public stand-offs, which soared after the government’s poorly envisaged and shabbily implemented currency ban (where 86% cash notes in Indian economy were invalidated overnight) and a new regime of Goods and Services Tax.¹³³ The major policy disagreements concern interest rates, bad debt crisis of Indian public sector banks, setting up a separate regulator for payment wallets, and most importantly, cutting the RBI reserves.¹³⁴ In 2016, the then independent-minded RBI Governor Raghuram Rajan

¹²⁵ CIC’s financial powers restored by government, Hindustan Times (1 August 2015) <https://www.hindustantimes.com/india/cic-s-financial-powers-restored-by-government/story-oBSX52JwNbR44qG4JvZqiN.html>

¹²⁶ K. Ashok Vardhan Shetty, Lateral Entry into Senior Bureaucracy: A Flawed Approach, The Hindu Centre for Politics and Public Policy (11 July 2018) <https://www.thehinducentre.com/the-arena/current-issues/article24386653.ece>

¹²⁷ Id.

¹²⁸ Government opens doors to lateral entry, The Hindu (10 June 2018) <https://www.thehindu.com/news/national/government-opens-doors-to-lateral-entry/article24130060.ece>

¹²⁹ K. Ashok Vardhan Shetty, The Hindu (19 June 2018) <https://www.thehindu.com/thread/politics-and-policy/lateral-entry-into-senior-bureaucracy-opening-the-flood-gates-for-a-spoils-system/article24201356.ece>

¹³⁰ Lijphart, *Patterns of Democracy*, 2nd edn, ch 13.

¹³¹ Lijphart p. 20.

¹³² P. Vaidhyanathan Iyer, Urjit Patel: RBI Governor and his governance, Indian Express (4 November, 2018) <https://indianexpress.com/article/india/governor-his-governance-rbi-urjit-patel-5433021/>

¹³³ Explained: The Widening Rift Between the RBI and the Modi Government, The Wire (29 October 2018) <https://thewire.in/economy/explained-the-widening-rift-between-the-rbi-and-the-modi-government>

¹³⁴ RBI: What is the Indian central bank's conflict with the government?, BBC (1 November 2018) <https://www.bbc.com/news/world-asia-india-46054042>

resigned after it was made clear to him that he did not have the government's confidence.¹³⁵ The government has continued to clash with his successor, Urjit Patel, which it itself appointed.

The level of governmental interference can be gauged by the highly unusual move of the Deputy Governor of the Bank making a strong case for the independence of the central banks in a public speech in 2018.¹³⁶ According to some commentators, the government's attack on the RBI's reserve is motivated by its political need to increase public spending on populist policies before the upcoming national elections but lacking the budgetary resources for doing so.¹³⁷ There were media reports that the government may issue binding directions to the RBI, but the government was quick in issuing clarification stating that RBI's autonomy, 'within the framework of the RBI Act' is 'essential'.¹³⁸ Although the government can force the Bank to fall in line by issuing legally binding directions, this legal provision in its parent statute has *never* been invoked by any government to date.¹³⁹ Hence, its use will be an extraordinary step and is likely to be a big blow on RBI's independence.¹⁴⁰ The threat of the directive, and the pressure from the government's allies packed into the Bank's board to corner the Governor,¹⁴¹ eventually forced a compromise of sorts where the government mostly got its way.¹⁴²

3.4 Controlling Discursive Institutions

While the independence of fourth branch institutions has some legal protection, the media, universities and non-governmental organisations that are critical to seeking diagonal accountability from the executive have been extremely vulnerable. The Indian judiciary has a mixed record of defending press freedom or academic freedom, and free speech jurisprudence in India has been rather flexible.¹⁴³ While every previous government has sought to control and influence these civil society institutions, the scale of the attacks—including violent attacks—on discursive institutions since 2014 is unprecedented, excepting only the Emergency years under Indira Gandhi.

Overhauling the University Grants Commission

The University Grants Commission (UGC) is a statutory body set up to set standards, promote and monitor higher education, and allocate grants to universities for the purposes of research, teaching and infrastructure.¹⁴⁴ Although the Commission is not completely independent, it enjoys a limited degree of autonomy. For instance, the Chairman of the Commission has a fixed tenure.¹⁴⁵ Furthermore, unless there is an explicit direction by the central government to the

¹³⁵ <https://www.nytimes.com/2016/06/19/business/head-of-indias-central-bank-says-he-will-step-down.html>

¹³⁶ Viral Acharya, On the Importance of Independent Regulatory Institutions – The Case of the Central Bank, A. D. Shroff Memorial Lecture, Mumbai (26 October 2018)

<https://rbidocs.rbi.org.in/rdocs/Speeches/PDFs/ADSML51EEB918B7194BC6AA8B764B05006B15.PDF>

¹³⁷ Mihir Swarup Sharma, Why RBI Is Suddenly Standing Up To Modi - And What's At Stake, NDTV (31 October 2018) <https://www.ndtv.com/opinion/what-modi-vs-rbi-is-all-about-its-an-election-year-stupid-1940419?pfrom=home-opinion>

¹³⁸ RBI autonomy is 'essential', says Centre, The Hindu (31 October 2018)

<https://www.thehindu.com/business/Economy/autonomy-of-rbi-essential-nurtured-by-govt-finance-ministry/article25378028.ece>

¹³⁹ What is Section 7 of the RBI Act and Why This Extreme Step May See Urjit Patel Call it Quits, News 18 (31 October 2018)

<https://www.news18.com/news/business/what-is-section-7-of-the-rbi-act-and-why-this-extreme-step-may-see-urjit-patel-call-it-quits-1925835.html>

¹⁴⁰ Id.

¹⁴¹ <https://thewire.in/government/narendra-modi-stacks-rbi-board-with-allies-to-turn-heat-up-on-governor>

¹⁴² <https://timesofindia.indiatimes.com/business/india-business/government-mostly-gets-its-way-but-rbi-has-a-deal-it-can-live-with/articleshow/66700156.cms>

¹⁴³ Rajeev Dhavan, Only the Good News; Gautam Bhatia

¹⁴⁴ Sec 12, University Grants Commission Act, 1956.

¹⁴⁵ Sec 6, University Grants Commission Act, 1956.

contrary, the Commission can exercise its powers without any authorization by the central government.¹⁴⁶

In June 2018, the government released the draft of a new legislation that will not only dismantle the Commission, but also overhaul the entire regulatory scheme for higher education.¹⁴⁷ Under the Bill the new regulator, unlike the UGC, is not empowered to allocate grants to universities. Some commentators fear that without explicit statutory allocation to the regulator, the grants-making power will devolve to the political executive.¹⁴⁸ This will give the executive a substantial influence in directing academic research agendas. The Bill has other problematic provisions, as it requires universities to seek permission from the Commission for starting any new courses they may wish to offer.¹⁴⁹ If this Bill is enacted into law, it is likely to undermine the comprehensive independence of the Indian higher education regulator, thereby undermining academic freedom.

Recently, the central government issued a directive to public universities to implement Central Civil Services Rules for their employees—which means that, like civil servants, academics employed by public universities would not be allowed to criticize the government or its policies.¹⁵⁰ Amid severe protests that such measure would undermine academic freedom, the government declared that the directive is recommendatory, not mandatory.¹⁵¹ The government takes many small steps towards institutional capture—some invite vociferous protests or judicial intervention, and have to be rolled back. Others manage to stick.

Foreign Funding of NGOs

Even since the Modi government came into power, it has proceeded with a vehement clampdown on civil society organisations. Since May 2014, it has cancelled the Foreign Contributions licenses of more than 20,000 non-governmental organizations (NGOs).¹⁵² Some NGOs were in genuine violation of the law—for instance, by failing to submit their accounts.¹⁵³ However, many of these licenses were cancelled under a vaguely worded provision, which empowers the government to cancel the license if ‘in the opinion of the central government’, the cancellation is ‘necessary in the public interest’.¹⁵⁴ Many organisations against which this provision has been used are engaged in human rights advocacy, frequently targeting the government for its human rights breaches.¹⁵⁵ Once the licenses are cancelled, organisations can no longer accept foreign contributions, resulting in a shrinking civil society space.¹⁵⁶ While the

¹⁴⁶ Sec 20, University Grants Commission Act, 1956.

¹⁴⁷ The Higher Education Commission of India Bill,

http://mhrd.gov.in/sites/upload_files/mhrd/files/HE_CoI_India_2018_act.pdf

¹⁴⁸ K. Shok Vardhan Shetty, The Higher Education Commission of India Bill is a remedy worse than the disease, Scroll (7 August 2018), <https://scroll.in/article/889220/the-higher-education-commission-of-india-bill-is-a-remedy-worse-than-the-disease>

¹⁴⁹ Id.

¹⁵⁰ Ministry backpedals on ‘gagging’ rules for academics University World News (26 October 2018)

<http://www.universityworldnews.com/article.php?story=20181026124012244>

¹⁵¹ Id.

¹⁵² FCRA licences of 20,000 NGOs cancelled: Act being used as weapon to silence organisations, First Post (26 October 2018) <https://www.firstpost.com/india/fcra-licences-of-20000-ngos-cancelled-act-being-used-as-weapon-to-silence-organisations-3181560.html>

¹⁵³ Trilochan Shastri, NGOs, Foreign Funds and a Trust Deficit, The Hindu (29 June, 2015)

<https://www.thehindu.com/opinion/op-ed/ngos-foreign-funds-and-a-trust-deficit/article7364282.ece>

¹⁵⁴ Sec. 14(1)(c), Foreign Contributions Regulation Act, 2010.

¹⁵⁵ FCRA and NGOs: What Lies Behind the Government's Crackdown? (31 December 2016)

<https://thewire.in/rights/fcra-ngos-lies-behind-governments-crackdown> ; Suspension Of Human Rights NGO's Foreign Funding License Must Be Revoked, Amnesty International India (3 June 2016),

<https://amnesty.org.in/news-update/suspension-human-rights-ngos-foreign-funding-license-must-revoked/>

¹⁵⁶ Sec. 14, Foreign Contributions Regulation Act, 2010.

government has been harsh on civil society organisations, it has enthusiastically allowed foreign contributions to political parties, even when that required the smuggling in of a retrospective amendment to exempt political parties already held liable by a constitutional court of illegality.

Use of Police Powers and Violence against Discursive Institutions

Apart from curtailing foreign contributions, the government has also made extensive use of its coercive powers under tax law to raid its adversaries in media and civil society space. The CBI (a central government agency) conducted four simultaneous raids in the offices and residences connected to news corporation, NDTV. While the CBI stated ‘loan defaults’ as the ostensible reason for such raids, several senior media personalities, highlighting NDTV’s anti-government stance, argued that the raids amounted to political harassment and that the government has not been so enthusiastic with its raids when it comes to other loan defaulters.¹⁵⁷ BJP-controlled state governments, which retain control of police powers, have repeatedly used their powers of search and seizure against several other human rights and media organizations, who have taken stands against its policies and actions.¹⁵⁸ Going beyond search and seizure, the BJP-ruled state governments have also aggressively used their police powers to arrest several human rights lawyers and activists, describing them as ‘urban Maoists’.¹⁵⁹ Five students of a leading national university in Delhi—the Jawaharlal Nehru University—were charged with sedition for protesting the execution of a Kashmiri separatist, and the university itself was labelled ‘anti-national’.¹⁶⁰ Characteristically, the government targets independent institutions in the name of managerial efficiency and its political opponents as treasonous.

Furthermore, Hindu nationalist groups—sister organisations of the ruling BJP—have been involved in spreading hardline majoritarian nationalism.¹⁶¹ Anti-government journalists like Gauri Lankesh have been murdered.¹⁶² Leaders of anti-religious ‘rationalist’ movements have been murdered.¹⁶³ Muslim citizens have been lynched for allegedly possessing or consuming beef.¹⁶⁴ Inter-faith couples have been harassed, and Muslim men marrying Hindu women have been accused of launching ‘love jihad’.¹⁶⁵ Despite several allegations against Hindu nationalist groups, the central and state governments have been unable or unwilling to check, punish, credibly investigate and sometimes even condemn vigilante violence.¹⁶⁶ In fact, many BJP lawmakers have publicly expressed support to some of these groups.¹⁶⁷

¹⁵⁷ Raids in India Target Founders of News Outlet Critical of Government, New York Times (5 June 2017)

<https://www.nytimes.com/2017/06/05/world/asia/india-ndtv-raids-narendra-modi-prannoy-roy.html>

¹⁵⁸ Income tax officials leave The Quint’s office in Noida after 22 hours, Scroll (11 October 2018)

[https://scroll.in/latest/897830/income-tax-officials-visit-the-quints-office-in-noida-and-founder-raghav-bahls-](https://scroll.in/latest/897830/income-tax-officials-visit-the-quints-office-in-noida-and-founder-raghav-bahls-home)

[home](https://scroll.in/latest/897830/income-tax-officials-visit-the-quints-office-in-noida-and-founder-raghav-bahls-home); Amnesty India Says Raid, Frozen Accounts Aimed at Silencing Government Critics, New York Times

(26 October 2018) <https://www.nytimes.com/reuters/2018/10/26/world/asia/26reuters-india-amnesty.html>

¹⁵⁹ There is No Disputing the ‘Emergency-Like’ Situation in the Country, The Wire (29 July 2018)

<https://thewire.in/government/there-should-be-no-debate-about-the-countrys-emergency-like-situation>

¹⁶⁰ <https://www.hindustantimes.com/delhi-news/jnu-protests-a-year-on-how-the-feb-9-anti-national-event-changed-five-lives/story-4jbNO1ByQtC9B8XbOMFFUK.html>

¹⁶¹ In India, Another Government Critic Is Silenced by Bullets, New York Times (6 September 2017)

<https://www.nytimes.com/2017/09/06/world/asia/gauri-lankesh-india-dead.html?module=inline>

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¹⁶⁵ Hadiya case. On the rise of majoritarian violence under Modi, see Manoj Mate’s chapter in Graber, Tushnet and Levinson, *Is Constitutional Democracy in Crisis?*

¹⁶⁶ India: Unchecked Attacks on Religious Minorities, Human Rights Watch World Report (18 January 2018)

<https://www.hrw.org/news/2018/01/18/india-unchecked-attacks-religious-minorities>

¹⁶⁷ Id.

The violence against the media has also been expressive. A Minister in Modi's cabinet characterised journalists as 'presstitutes'.¹⁶⁸ A BBC report showed that the main driver of fake news on social media was advocacy of Modi's Hindu-majoritarian politics or personal advocacy for the Prime Minister himself.¹⁶⁹ Discursive freedoms—never robust in India to begin with—have suffered especially under the Modi regime. Conscious of the climate of hatred and violence being created, the former President Pranab Mukherjee, before and since his retirement in 2017, has made repeated public calls for greater tolerance in political discourse.¹⁷⁰

4. A way forward

We have seen that the Modi government has incrementally but systemically attacked all existing mechanisms that are in place to hold the political executive to account, mainly by ensuring that these mechanisms are captured by party loyalists. With multiple small steps, the state is being identified with the party, and patriotism with the BJP's narrowly-defined majoritarian nationalism. Opponents of the party are being labelled anti-national or traitors, and independent institutions billed as ineffective, corrupt and inefficient.

The Constitution is being killed with a thousand cuts. Responding to these multiple, small-scale, incremental assaults is very difficult for checking institutions. Seen in isolation, each assault is relatively unthreatening to the constitutional scheme taken as a whole. Many of these abuses have been inflicted on the Constitution by previous governments as well. What makes them worrying is their systemicity—that so many of them are launched against constitutional institutions simultaneously and in a clearly choreographed fashion. Checking institutions, keen on picking their battles carefully and on not appearing too partisan, keep waiting for the big battle worth fighting for, even as the war is lost.

There are several lessons that can be drawn from India's experiences in the last four years. It is clear that the actor that smells an attack of democracy first is *the political opposition*—mainly because it will be hurt the most if these attacks are successful. If only for self-interested reasons, it seems to understand what is at stake. It is not surprising that the opposition Congress Party has launched a 'Save the Constitution' campaign.¹⁷¹ Ironically, it also seems to be the least potent actor to be able to hold the executive to account, especially given the winner-takes-all design of India's governmental framework. This is exacerbated further by the extremely disproportionate first-past-the-post system which ensures that parties that a majority of the voters supported have no role in governance. The record of the Indian judiciary in thwarting executive aggrandizement is mixed—when it acts, it is usually successful, but it cannot be counted upon to act every time or to act in a timely manner. Fourth branch institutions are too weakly protected by the Constitution to be a real check—given their institutional weakness, it is surprising that they have managed to effectively check the political executive even on the occasions they have.

An agenda for constitutional reform to make it more resilient against executive aggrandizement should focus on ensuring that (i) the ruling party has deeper democratic legitimacy than what first-past-the-post system requires (by moving to a preferential or ranked-choice vote system which preserves the territorial constituency model specified in the constitution but requires the

¹⁶⁸ <https://timesofindia.indiatimes.com/india/VK-Singh-in-new-row-calls-media-presstitutes/articleshow/46844032.cms>

¹⁶⁹ <https://www.bbc.com/news/world-46146877>

¹⁷⁰ <https://www.firstpost.com/india/president-pranab-mukherjee-stresses-on-the-need-for-tolerance-heres-the-full-text-of-his-speech-3482493.html>

¹⁷¹

winning candidate to garner at least 50% preference votes); (ii) the political opposition has a greater share in governance (chiefly by the constitutionalization of the offices of the leader of opposition and the shadow cabinet, and a real say in appointments to fourth branch offices); (iii) fourth branch institutions and other constitutional actors such as governors and attorneys general are appointed through a multi-party process, have their functional independence guaranteed, and are accountable to multi-party legislative committees rather than to the political executive; and (iii) the Supreme Court is better able to act as an independent constitutional watchdog (by constraining its non-constitutional ‘special leave’ jurisdiction, increasing the retirement age of Supreme Court and High Court judges and making tribunal appointments multi-partisan). The details of these reform agendas must be left for future papers. What is imperative is that any new government that might come to power after the 2019 general elections decides to insure the political opposition against an overweening executive, rather than focus on short-term capitalization of its access to the empowered executive.¹⁷² If democracy is a system where parties lose power, it will do well to know that a robust protection of opposition rights and independent institutions will come in handy when it inevitably loses a future election.

¹⁷² Ros Dixon, political insurance paper.