

13. Courts amid Majoritarian Upsurge: Protector of citizen's rights?

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1. Introduction

In any vibrant democracy, it is the judiciary that is entrusted with the responsibility of ensuring that the other organs of the state operate within the confines of the law. "The judiciary must protect the citizen against (the) violation of his constitutional or legal rights, and it must stand between the citizen and the state as a bulwark against executive excesses, and misuse or abuse of power by the executive," the Supreme Court (SC) of India had noted once.⁴⁰⁵ Recently, however, India's judicial institutions, led by the same SC, have been accused of functioning in a manner that has often not been able to protect the citizen from violation of her constitutional and legal rights. A look at some of the courts' recent pronouncements reveals that the criticism is not unwarranted. In a context when the ruling dispensation is relentlessly targeting rights and freedoms of religious minorities – especially Muslims – this refusal of the court to act as bulwark against executive excess, means the violation of the constitutional and legal rights of a section of the nation's population go unchecked. This does not bode well for the trust that minorities have in the majesty of the courts. This short note examines how the higher courts in India - Supreme Court mostly as well as state High Courts - have dealt with questions concerning constitutional and legal rights of religious minorities in the recent past, drawing on a few topical case studies.

2. The Supreme Court and updation of Assam NRC⁴⁰⁶

The harbinger of the current turmoil over citizenship enveloping the country, the National Register of Citizens (NRC) updation process in the state of Assam, was ordered and closely overseen by the Supreme Court. Under the Court's watch, what was originally intended as an attempt to preserve Assam's ethno-linguistic integrity was allowed to evolve into a tool to target the region's linguistic and ethnic minorities. The oversight of the judiciary over an administrative exercise has resulted in a situation where, according to legal experts, it is impossible to

judicially challenge even foundational questions about the NRC.⁴⁰⁷ The Court's reluctance to get involved in removing the NRC's discriminatory loopholes, in fact, directly contributed to the level of bureaucratic discretion involved in the process, which typically resulted in further targeting of minorities. The Court has also refused to address flaws in the functioning of the quasi-judicial Foreigners Tribunals (FT), despite studies revealing that the FTs have discriminated against particularly Muslims.⁴⁰⁸ These FTs will now determine the fate of the 1.9 million people who have excluded from the final NRC and are at risk of statelessness. The SC has also not deemed fit to provide justice to the nearly 1000 alleged 'foreigners' who have already been condemned to life in Assam's detention centres, with their families separated and with no mechanism to get out.⁴⁰⁹

3. Facilitating the CAA, and quelling anti-CAA dissent⁴¹⁰

The Citizenship Amendment Act (CAA), 2019, the BJP government's attempt to ensure that only Muslims would be left out of the Assam NRC and a proposed all-India NRC, has been described by the United Nations (UN) as "fundamentally discriminatory"⁴¹¹. A host of petitions - over 140 at last count⁴¹² - have been filed before the SC, most of them asserting that the CAA violates the basic constitutional principle of equality and secularism.⁴¹³ Despite such fundamental questions of constitutionality, the SC has not shown any urgency in hearing the matter or providing a stay on implementation of the Act. There is no news when hearing on these Public Interest Litigation (PIL) will commence, despite passage of more than 70 days. This has contributed to the volatile situation in the country, with anti-CAA protests expanding far and wide. The Chief Justice of India (CJI) has, in fact, remarked that petitions questioning the validity of the CAA would be heard only after people stop violence - a reference to anti-CAA protests, which

407 The SC Is Exceeding Its Brief as the Apex Judicial Organ in the NRC Case <https://thewire.in/law/nrc-case-article-21-supreme-court>

408 A VICE Study of judgements passed by 4 of Assam's FTs revealed that nearly 9 out of 10 cases heard were against Muslims. Almost 90% of those Muslims were declared illegal immigrants - as compared with 40% of Hindus tried. For more: https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship

409 28 deaths in Assam's detention camps, minister tells Rajya Sabha. <https://www.telegraphindia.com/india/28-deaths-in-assam-s-detention-camps-minister-tells-rajya-sabha/cid/1722471>

410 For more, see the 'Disenfranchising citizens' section of this compendium.

411 For more, see the 'Disenfranchising Citizens' section of this compendium.

412 <https://www.indiatoday.in/india/story/supreme-court-hear-over-pleas-challenging-citizenship-amendment-act-caa-today-1638948-2020-01-22>

413 As per Article 14 of the Indian Constitution, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

have largely been peaceful except where the State has exercised force. This was listed by a former Chief Justice of the Delhi High Court, as one of the SC's many recent missteps.⁴¹⁴

The state response to anti-CAA protests has been brutal, particularly in states directly ruled by the BJP or where the BJP-led central government has oversight over the police. Executive excesses have resulted in the violation of various constitutionally granted fundamental rights, including the rights to life and liberty, free speech and expression, and the right to peaceful assembly. A spate of gag orders have been issued across the country, including in BJP-ruled Uttar Pradesh (UP), where orders prohibiting assembly (Section 144 CrPC)⁴¹⁵ remains in effect to this day. Internet shutdowns have also been common. Over 30 people have been killed across the country, with UP alone accounting for 23 deaths, all of them Muslims. And in national capital Delhi, organised violence against Muslims raising their voice against the CAA has resulted in over 40 deaths, with the count still rising as this review was being written.

India's courts, despite ostensibly setting high standards for itself in the past⁴¹⁶ have, with some notable exceptions, failed to uphold these basic rights for its minorities. While the SC has taken suo motu notice of the matter of an infant dying in the cold after being brought to the prolonged sit-in led by Muslim women at Delhi's Shaheen Bagh, and also separately heard on the matter of the protests causing obstruction of traffic, the Court has not entertained pleas regarding various violations of fundamental rights. It refused to hear pleas against the excessive use of force against students at the Jamia Milia Islamia (JMI) in Delhi, and referred the matter to a lower court (the Delhi High Court), which denied JMI students interim protection and deferred the case by a month and a half. Observers have pointed to other matters that courts have not taken suo motu notice of, including protestors and innocent Muslim bystanders being shot and killed; illegal confiscation of property of alleged protestors by the authorities without due process; Muslim children being illegally detained and tortured; and Muslim children being interrogated by police in Karnataka for organising a school

414 Ex-judge lists SC missteps: <https://www.telegraphindia.com/india/ex-judge-lists-supreme-court-missteps/cid/1744687>

415 A colonial-era provision of the Code of Criminal Procedure (CrPC) that prohibits the assembly of four or more persons as a preventive measure.

416 "Dissent is the safety valve of democracy. If dissent is not allowed, then the pressure cooker may burst," a 3-member bench of the Supreme Court had declared in 2018, while hearing on the arrest of 5 human rights activists. For more: <https://www.livemint.com/Politics/SiXRdQbThdK92lfR0CRyEP/Dissent-is-the-safety-valve-of-democracy-says-SC.html>

play critical of the CAA.⁴¹⁷

Despite the SC's laxity regarding the suppression of dissent against the CAA, some lower courts (at the High Court level) have provided glimmers of hope.⁴¹⁸ A prohibitory order in Bengaluru city was struck down by the Karnataka High Court (HC), which noted: "People have a democratic right to protest and express their dissent on government's decisions about issues of importance."⁴¹⁹ While ordering the release of 21 accused in anti-CAA violence in Mangaluru, the Karnataka HC reprimanded the state police for its "deliberate attempt to cover up police excesses while whimsically implicating innocent persons"⁴²⁰. Courts in Maharashtra, Rajasthan and Uttar Pradesh have recently taken stronger stand regarding the protection of rights and freedoms. On 19 December, the Allahabad (UP) HC ordered the National Human Rights Commission (NHRC) - which has not taken any initiative of its own, or responded adequately to petitions filed before it - to conduct an enquiry into the police action against students of Aligarh Muslim University (AMU). Separately, the Allahabad HC, in an ongoing case regarding the wider police crackdown in the state, issued several notices to the UP state government and ordered the furnishing of documents detailing police action. Allahabad HC also registered a suo motu PIL on Internet shutdown in the state, and questioned the government on habeas corpus pleas filed regarding the illegal detention of numerous prominent human rights defenders. And yet, a bench of the same Allahabad HC rejected a petition by student bodies against Firozabad local authorities for disallowing their peaceful protests, noting that such protests would "not be in national interest"⁴²¹. And in an example of apparent executive overreach, a judge at the Delhi HC who asked tough questions of the state police had his imminent transfer fast-tracked. The case was referred to a different bench, which granted the police four additional weeks to reply to claims by civil society groups demanding Police action against hate mongering and violence against senior BJP functionaries in Delhi's ongoing violence.

417 Aakar Patel: What Supreme Court Chooses To Hear, What It Doesn't And Why <https://www.outlookindia.com/website/story/opinion-india-muslims-caa-shaheen-bagh-what-supreme-court-chooses-to-hear-what-it-doesnt/347028>

418 How High Courts Have Looked At Anti-CAA Protests And Police Action <https://www.bloomberquint.com/law-and-policy/how-high-courts-have-looked-at-anti-caa-protests-and-police-action>

419 Section 144 in Bengaluru: K'taka HC gives interim relief to anti-CAA protesters <https://www.thenewsminute.com/article/section-144-bengaluru-k-taka-hc-gives-interim-relief-anti-caa-protesters-114482>

420 Anti-CAA stir: Cops tried to cover up excesses, says HC <https://timesofindia.indiatimes.com/india/anti-caa-stir-cops-tried-to-cover-up-excesses-says-hc/articleshow/74200108.cms>

421 Allahabad HC refuses to issue directives for permission to anti-CAA stir <https://www.newindianexpress.com/nation/2020/feb/07/allahabad-hc-refuses-to-issue-directives-for-permission-to-anti-caa-stir-2100390.html>

4. Inadequate defence of civil liberties in Kashmir⁴²²

The judiciary, especially the SC, has come under criticism from constitutional scholars for having “dodged, ducked, evaded and adjourned” several cases relating to personal liberty in Kashmir.⁴²³ After the recent abrogation of Article 370 and Internet shutdown--which had become the longest ever imposed in a democracy, and left Kashmiris' livelihoods and the local economy in “tattered ruins”⁴²⁴ - the SC called for a “review” of the blockade, but stopped short of ordering any substantive actions, leaving it completely up to the executive. The right to access the Internet was earlier recognised by the HCs of Kerala and Guahati (Assam) as a fundamental right, but the SC failed to provide any relief to Kashmiris. And while SC noted that the repetitive imposition of Section 144 orders was an “abuse of power”⁴²⁵, the SC again left the review of such orders up to the executive, which has historically failed to uphold basic human rights in Kashmir. The matter of thousands of Kashmiris being locked up without charge has also not warranted the SC's attention.

Another recent example of the Indian judiciary's failure to uphold basic human rights in Kashmir was in the case of illegal detentions of children, which was widely reported in the media and confirmed by our own research.⁴²⁶ Dismissing a PIL seeking a detailed enquiry into the same, the SC in December 2019 chose to accept the authorities' version of events, which had disregarded media reports as 'propaganda' or 'unverified'. The Court concluded that there had been no illegal detentions of Kashmiri children at all. When the petitioners brought up the case of 79 children who had been admittedly illegally detained as per the Jammu & Kashmir (J&K) Police's own documents, one of the judges remarked, “Are you aware what 15-year-olds are capable of these days?”⁴²⁷

Earlier, in July 2016, the J&K Bar Association filed a PIL before the J&K HC seeking

422 See the 'Denying rights in Kashmir' section of this compendium

423 Gautam Bhatia: The absentee constitutional court <https://www.thehindu.com/opinion/lead/the-absentee-constitutional-court/article29394699.ece>

424 'Many lives have been lost': five-month internet blackout plunges Kashmir into crisis <https://www.theguardian.com/world/2020/jan/05/the-personal-and-economic-cost-of-kashmir-internet-ban>

425 'Repetitive Section 144 orders abuse of power': What Supreme Court said on Kashmir curbs <https://www.hindustantimes.com/india-news/repetitive-section-144-is-abuse-of-power-what-supreme-court-said-on-kashmir-curbs/story-yCDPbbsd2Ov7N7xk7sLdkM.html>

426 See 'Denying rights in Kashmir' section of this compendium.

427 SC Accepts JK Juvenile Justice Committee's Findings Against Allegations Of Illegal Detention Of Children In Kashmir <https://www.livelaw.in/top-stories/sc-accepts-jk-juvenile-justice-committees-findings-that-no-children-are-illegally-detained-in-kashmir-150774>

an end to the use of lethal pellet shotguns to quell street protests, a practice that has been described as having caused an “epidemic of dead eyes”⁴²⁸ and “the world’s first mass blinding”⁴²⁹. The J&K HC, however, summarily dismissed the petition. In December 2016, the SC heard the same case and remarked that it would direct the government to stop its use of pellet shotguns only if there was no violence, no stone-throwing and students returned to class. The SC dragged its feet on the case till July 2019, when it referred the matter back to the J&K HC. The UN estimates that 1253 Kashmiri civilians were blinded by metal pellets between mid-2016 and end-2018 - blindings that could have been stopped if the SC had taken a stand.⁴³⁰

5. The Ayodhya Verdict

Another recent example that shook Indian minorities’ faith in the Indian judiciary’s ability to protect their rights as equal citizens of India was the SC’s verdict in the Ayodhya case, when a 5-member bench of the court unanimously awarded the disputed site of the Babri mosque to the Hindu side for the construction of a temple. This was done even as the court acknowledged that the demolition of the mosque by extremist Hindus in 1992 was illegal, as was the clandestine placing of Hindu idols inside the mosque in 1949, which had converted part of the mosque site into a de facto temple.

The verdict of the SC has been picked apart by legal and constitutional scholars⁴³¹, who say that it was a violation of the doctrine of equity, which requires one who approaches the court seeking equity to do so with clean hands. The Muslim plaintiffs, who have not been accused of any illegality in the case, have essentially been punished for failing to provide evidence of their exclusive possession of the property from the time of its construction in 1528. The Hindu plaintiffs, on the other hand, were not asked to demonstrate their exclusive possession of the site. The Court also ordered the central government to formulate a scheme to facilitate the construction of the proposed temple, raising serious constitutional questions vis-a-vis secularism.

428 An Epidemic of ‘Dead Eyes’ in Kashmir as India Uses Pellet Guns on Protesters <https://www.nytimes.com/2016/08/29/world/asia/pellet-guns-used-in-kashmir-protests-cause-dead-eyes-epidemic.html>

429 India’s crackdown in Kashmir: is this the world’s first mass blinding? <https://www.theguardian.com/world/2016/nov/08/india-crackdown-in-kashmir-is-this-worlds-first-mass-blinding>

430 Zehru Nissa: 1314 eyes of 1253 victims impaired since 2016 alone <https://www.greaterkashmir.com/news/kashmir/1314-eyes-of-1253-victims-impaired-since-2016-alone/>

431 Ayodhya verdict: SC judgement raises more questions than it answers <https://www.businesstoday.in/current/economy-politics/ayodhya-verdict-sc-supreme-court-judgement-raises-more-questions-than-answers-babri-masjid-ram-janmabhoomi-title-dispute/story/390508.html>

6. Conclusion

In a democratic system, the tussle between the judiciary and the executive is a constant battle. In the past, India's courts have had a middling but respectable record of pushing back against executive overreach and defending individual liberties. Scholars have shown that judicial institutions have historically tended to acquiesce whenever the ruling party has had an overwhelming majority in Parliament. This is what we seem to be seeing in India today, with the courts increasingly siding with the dominant narrative of the ruling dispensation. This has left India's religious minorities vulnerable like never before. Some lower courts have shown admirable resolve in defending constitutional ideals, but the SC - the watchdog of the Constitution and the ultimate protector of the fundamental rights of the people of India, including that of its religious minorities - has largely disappointed. As Justice AP Shah remarked, "It is for the SC [...] to decide whether or not it deserves the constitutional faith that the people of India repose in it, and whether or not it lives up to those expectations