

‘A Noble Tree that Bore Bitter Fruits?’ : The Supreme Court of India, Judicial Activism and Judicialization of Politics

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Abstract

Indian Constitutional law - meant as it was to be a vehicle of social transformation- is a site for mediation of competing claims and tensions. As a Constitution which is keen on detailing, it includes many aspects which ordinarily do not find place in other constitutions. Constitutionalisation of almost every debate is an important feature of the Indian experience of constitutional democracy.

The scope of constitutionalisation was significantly expanded by the judiciary through judicial activism. Notably from post-emergency period, the Indian` judiciary has tried to supplement state failure in enhancing democracy and effectuate social transformation. The activist era is most commonly divided into three stages. The first one is the era of protection of individual rights under Article 21. The second stage is of protection of collective rights, such as environmental rights. The third stage is that of good governance, where the court increasingly probes into various aspects of governance, mostly through the PIL jurisdiction.

This paper argues that celebrated as it may be, in contemporary phase the ‘activist’ judiciary-led democracy enhancement has in turn produced active judicialization of politics - delegation of political and moral questions to the judiciary instead of other designated institutions or spaces. It argues inter-alia that notwithstanding the glory days of activism, in recent phase there is large scale delegation of political responsibility to the court by institutional as well as non-institutional stakeholders of democracy, burdening the court with even more responsibilities than it has under the democracy envisaged by the constitution.

Keywords: *Judicial Activism, Public Interest Litigation, Judicial Governance, Judicialization of Politics, Supreme Court of India.*

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I. Introduction

Indian Constitutional law, meant as it was to be a site for mediation of competing interests, is interesting not only because of its attempt to be as detailed as possible, but also because of its ability to encompass nearly all aspects of public life in that process. The constitution came into being in the aftermath of violent communal strife and partition of the country into two. Indeed, while the draftsmen were debating the banes and boons of different provisions of the constitution sitting at the heart of the national capital, Delhi was already undergoing bloodied riots². Working within such extreme conditions, the draftsmen and draftswomen were keen to avoid at all costs a future where the same extremities and extra-legal political highhandedness would emerge again. They meant the Constitution to be a site for mediation of competing claims, an instrument which would engross opposing views and lead towards a peaceful transition of the newly emergent society. In other words, the Constitution was meant to substitute other means of solving differences. Thus, constitutionalization of almost every debate is inbuilt in the constitutional history of India, and expanding recourse to Constitution inherent in its length.³

Judicial Activism, though generally elusive of a universally accepted definition⁴ is simply put, a phenomenon where the judges of higher judiciary refuse to follow the traditional doctrinaire notions of judicial work being limited to finding of law which is made elsewhere. It is a direct opposite of the doctrine of parliamentary supremacy of traditional English jurisprudence. Exercising the power of judicial review, the constitutional courts can strike down legislative and executive activity. In Indian case, judicial activism also speaks the language of promoting social justice. Activist judiciary sets itself apart from the role of passive arbiter which the common law theoretical model would like it to be confined to, and enthusiastically participates in promotion of human rights i.e.,

²GRANVILLE AUSTIN, INDIAN CONSTITUTION: CORNERSTONE OF A NATION 45 (Oxford University Press, New Delhi, 13th Impression, 2008)

³ Sujit Chowdhury, Madhav Khosla *et. al.* (eds), *Locating Indian Constitutionalism* in OXFORD HANDBOOK OF INDIAN CONSTITUTION (OUP, New Delhi, 1st ed. 2016) DOI:10.1093/law/9780198704898.003.0001

⁴See, Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92(5) CALIFORNIA LAW REVIEW 1441 (2004).

in promotion of particular goals. P.N. Bhagwati, a pioneer of Indian judicial activism, who prefers the use of the term 'social activism' in context of India, defines it as activism which is directed at achieving social justice⁵. The activities of Indian 'Activist judiciary' are presently a beacon for other developing legal systems. However, any court empowered with judicial review is a political institution, and as such, liable encounter politics on a regular basis. Upendra Baxi would remind us that the first home truth about the Supreme Court of India is that it is a centre of political power, a fact more often than not overlooked by hagiographical accounts of judicial activism⁶.

This brings us to the concept of judicialization of politics. This has been described as a phenomenon of reliance on courts and judicial means for addressing core moral predicaments⁷. It is an umbrella like term which mostly speaks to us through three interrelated processes, first, spread of legal discourse and jargon into political sphere, secondly, expansion of the province of courts in determining public policy outcomes and lastly, reliance on courts for determination of so called 'pure' political questions⁸. This paper argues that in recent phase there is active judicialization of politics in India, while the roots of the same goes back to the celebrated itineraries of judicial activism through Public Interest Litigation. Whereas judicial activism through PIL was judicial foray into governance, judicialization of politics is deferment of political responsibilities to the judiciary, whereby the court finds itself surrounded by the raging political debates of contemporary times, and becomes vulnerable as an institution. The first section of this paper deals with the rise of judicial activism in India, and the political context. The second section discusses judicial activism in its heyday, different stages through which it has passed, and the important features of it. The third section critically discusses the different complexities

⁵ P.N Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM' J. TRANSNAT'L L. 566 (1985).

⁶ UPENDRA BAXI, *INDIAN SUPREME COURT AND POLITICS* 10 (Eastern Book Company, 1st ed. Lucknow, 1980)

⁷ Ran Hirschl, *The Judicialization of Politics*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 119 (K.E. Whittington, R.D. Kelemen *et.al.* eds. Oxford University Press, New York, 2008).

⁸ *Id* at 121-124.

activism brought, and with the help of few instances narrates the tale of judicialization of politics in India in contemporary times.

II. The Seed: Rise of The Activist Court

The scope of constitutionalization was significantly expanded by the Supreme Court of India in the post-emergency phase. A hitherto positivist court, which even declined to read due process into the words of Article 21⁹ in *A.K. Gopalan v. State of Madras*¹⁰, now became more and more flexible in its interpretation and approach. It broke down the barriers created in *Gopalan* between different fundamental rights, and in *Maneka Gandhi v. Union of India*¹¹, finally incorporated due process principles into Article 21. The emergence of an activist judiciary oversaw significant expansion of rights-jurisprudence from within the judicial premises. An interesting question therefore emerges, as to why did the court become activist? Why could not the court remain the passive umpire envisaged by analytical jurists, and a role even espoused by the initial batch of Supreme Court judges? Professor Upendra Baxi would vehemently argue that while becoming activist, the court really was responding to political conditions prevalent. The well known ‘argument of fear’¹² found its expression in *Golaknath v State of Punjab*¹³, and overruling its earlier position the Supreme Court now held that the fundamental rights are immune from amendment. The response of the state was also another series of amendments attempted at nullifying the judicial defence of right to property. Finally in *Kesavananda Bharathi v. State of Kerala*¹⁴, the Court came to a significant moment. While holding that no part of the Constitution remained unamendable, the largest ever constitutional bench in the history of Supreme Court evolved the doctrine of basic structure, notably with a very thin majority, that no part of the Constitution

⁹ Article 21 reads as, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” Constitution of India (1950); See also, S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH’ U. J. L. & POL’Y 40 (2001).

¹⁰ AIR 1950 SC 27.

¹¹ AIR 1978 SC 597: (1978) 1 SCC 248.

¹² UPENDRA BAXI, *INDIAN SUPREME COURT AND POLITICS* 10-16 (Eastern Book Company, 1st ed. Lucknow, 1980).

¹³ AIR 1967 SC 1643.

¹⁴ AIR 1973 SC 1461.

remained unalterable, except the basic structure of the constitution, because alteration of the essence of the constitution will be substitution of it with something new, and not an amendment. Through this doctrine, the court retained its review powers. Yet, within several years this bold stand of the court was heavily shaken when emergency was proclaimed at the instance of the Congress party under the leadership of Indira Gandhi, then in power. The emergency-era court was marked by what SP Sathe calls judicial surrender¹⁵, with particular respect to the Habeas Corpus case¹⁶. After the emergency came to an end, the court was in desperate need to regain its status.

The end of single party dominance after the emergency period of 1975-77 was also marked by the emergence of a new vernacular of politics. With the end of the era of single party dominance, Indian politics was beginning to enter the era of coalitions. The new vernacular spoke in several new voices, ranging from caste, regional loyalty so on so forth. In place of single national narrative, Indian politics was becoming more open to questions of caste, regional demands, and especially in the aftermath of large-scale human rights violations during the emergency, to new voices of human rights. With its public image tremendously shaken for the emergency-era silence as against executive high-handedness, the Court now found itself in desperate need to regain its image. It needed to respond to the changing discourse. It is in this political vignette the much celebrated activist judiciary slowly began to emerge.

III. The Tree: Itineraries of Judicial Activism

Judicial activism in its Indian avatar primarily means two things. First of all, a reinvention of the interpretive techniques by the court whereby the court leans towards a more liberal understanding of the provisions of fundamental rights which leads to expansion of the textual meaning of the terms used, and secondly, facilitation of access to the court by dilution of the procedural formalities inherent in traditional judicial work¹⁷. A relaxation of strict

¹⁵ SP Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. and POL'Y 43-48 (2001).

¹⁶ ADM Jabalpur v. Shivakant Shukla AIR 1976 SC 1207.

¹⁷ S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. and POL'Y 51 (2001).

interpretive method, an enthusiasm in the judges of the Supreme Court to engage more and more in judicial lawmaking, would mean new terrains of judicial work being opened up. Further, a relaxation in the traditional approach regarding the standing of the parties to a dispute would mean new batches of petitioner, not necessarily directly affected by illegalities will come before the court. Thus Indian judicial activism evolved the concept of public interest litigation, whereby any individual apparently unconnected to a dispute could come to court to seek remedy not directly for herself, for a matter which hitherto could not be called before the court but now was possible due to the judiciary taking a liberal approach with regard to the expressions used in different provisions of the constitution.

The public interest litigation in India is a novel concept, fundamentally different from its American counterpart. The Public Interest movement in India has been almost entirely initiated and led by the judiciary¹⁸. Unlike the US, where public interest litigation means simply pro-bono lawyering, in India the public interest litigation is a jurisdiction, empowering judges to hear certain matters¹⁹. In its initial days, public interest litigation or as Upendra Baxi likes to call, social action litigation²⁰ became the site of nexus between the judiciary and intellectuals in their attempt to initiate the social reforms envisaged by the Constitution and arguably neglected by elected politicians²¹. Soon it became a tool in the hands of judiciary to engage into public affairs, and considerably expand its own ambit by admitting new issues for consideration. Therefore, a discussion regarding the development of PIL and Judicial Activism in India becomes necessary at this point.

¹⁸ Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the impossible?* 37 AMERICAN JOURNAL OF COMPARATIVE LAW 497 (1989); Also, P.N Bhagwati, *Judicial Activism and Public Interest Litigation* 23 COLUM. J. TRANSNAT'L L. 561 (1985).

¹⁹ ANUJ BHUWANIA, *COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST INDEPENDENCE INDIA* 16 (Cambridge University Press New York, 1st ed. 2016).

²⁰ Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUDIES 108-111 (1985).

²¹ See, *supra*. note 2.

In the Supreme Court's own evaluation²², the development of public interest litigation in India has undergone at least three overlapping stages. The first stage dealt with protection of fundamental rights under most notably Article 21 of hitherto underrepresented groups who could not approach the court due to extreme poverty, illiteracy and other sociological reasons. This was done by relaxing both the strict approaches of interpretation and procedural restraints. The court on the one hand, incorporated substantial and procedural due process into the words of Article 21, thus opening up the avenue for incorporation of numerous unenumerated rights in it, and on the other hand - eager as the initial activist judges were about increasing access to justice - grew impatient about formalities inherent in judicial functions as well as traditional strict approach regarding standing of the parties. Thus, the Indian Judicial Activism has overseen the incorporation of rights such as right to speedy trial²³, right to free legal aid at the cost of State to accused who cannot afford legal services for sociological reasons²⁴, issued directions as to humane treatment of detainees by the police and procedure to be followed strictly after an arrest has been made²⁵, right against solitary confinement of prisoners²⁶, right against bar fetters²⁷ and handcuffing²⁸, right to travel abroad²⁹. The court has implied right to livelihood as included in the right to life³⁰, right to medical assistance³¹, right to food and shelter³². On the other hand, judicial enthusiasm with engagement in the march for social justice and impatience with traditional procedural boundaries while doing so has resulted in steady dilution of standing. Two law professor's letter was treated by the Court as a petition to engage in improvement of living

²²State of Uttaranchal v. Balwant Singh Chauhan, (2010) 3 SCC 402

²³Hussainara Khatoon v. Home Secretary, Bihar, AIR 1979 SC 1360: (1980) 1 SCC 81.

²⁴Hoskot v. State of Maharashtra, AIR 1978 SC 1548: (1978) 3 SCC 544.

²⁵D.K. Basu v State of West Bengal, (1997) 1 SCC 416.

²⁶Sunil v. Delhi Administration, (1974) 4 SCC 494.

²⁷Charles Shobhraj v. Supdt., (1978) 4 SCC 104.

²⁸Prem Shankar v. Delhi Admn. (1980) 3 SCC 526.

²⁹Satwant v. Asst. Passport Officer AIR 1967 SC 1326.

³⁰See, Olga Tellis v. BMC, (1985) 3 SCC 545: also, Board of Trustees v. DilipkumarNandkarni, (1983) 1 SCC 124.

³¹P. B. Khet Mazdoor Samity v. State of West Bengal, (1995) 6 SCC 213.

³²Shantistar v. Totame (1990) 1 SCC 520: Chameli Singh v. State of Uttar Pradesh (1996) 2 SCC 549.

conditions in a correctional home³³. Letters, even newspaper reports have been made cognizable by the court as petitions.

In its second phase, the court engaged with collective rights, and marked a slow departure from the individual rights leaning. The bulk of environmental jurisprudence in India can fit into this phase. The court dealt with cases relating to protection and preservation of ecology, environment, forests, marine life, rivers, historical monuments etc. In the process, the court evolved as well as indoctrinated many principles of environmental law. For example, the court has declared right to environment is a fundamental right³⁴. It evolved the traditional common law doctrine of strict liability into stricter absolute liability to prevent polluting industries from escaping liability³⁵. Precautionary principle³⁶ or polluter pays principle³⁷ has been accepted as part of Indian jurisprudence. The Court evolved the doctrine of public trust, where the state is considered to be a trustee of natural resources and environment for the people³⁸. In an example of judicial lawmaking, in *Vishaka v. State of Rajasthan*³⁹ the court provided detailed guidelines to prevent sexual harassment of women at workplace till the legislature provided for a law in that respect⁴⁰. Right to health, strength and hygienic working conditions is declared to be an integral facet of right to life⁴¹. The list is exhaustive and unending.

The next phase is that of directions issued towards maintenance of probity, transparency and integrity in governance. The Court has in this phase, for example, ordered internal democracy and transparency in political parties, prescribed criteria for appointment to the office of Central Vigilance

³³ *Upendra Baxi v. State of U.P.*, (1986) 4 SCC 106.

³⁴ *N.D. Jayal v. Union of India*, (2004) 9 SCC 362.

³⁵ *M.C. Mehta v. Union of India (Shreeram Food and Fertilizer case)*, (1987) 1 SCC 395.

³⁶ See, *Vellore Citizen's Welfare Forum v. Union of India* (1996) 5 SCC 647.

³⁷ *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212.

³⁸ *M.C. Mehta v. Kamal Nath*, (2000) 6 SCC 213.

³⁹ AIR 1997 SC 3011.

⁴⁰ The Parliament enacted Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013, more than a decade later, which basically follows the *Visakha* guidelines.

⁴¹ *Consumer Education and Research Centre v. Union of India*, (1995) 3 SCC 42.

Commission, limited the constitutional power of the President to suspend or dismiss duly elected state governments⁴². In the famous Jain Hawala case, the Supreme Court monitored CBI investigation against many top politicians allegedly involved in money-laundering and bribe⁴³. It has launched its own crusade against corruption of the other organs of government⁴⁴. In short, this phase marks the judiciary's attempts to overtake governance functions. A case and point to this effect can be seen in *Networking of Rivers, In Re*⁴⁵, where the Court went on to specify to the Government as to what approaches should be taken to build a consensus model for interlinking of rivers in 'national interest'.

P.N Bhagwati and C.J. Dias summarized the most innovative elements in the PIL (as he prefers to use, SAL) scheme in the following points⁴⁶. First, a relaxation in the standing of the parties in a dispute by allowing even public spirited individuals, NGOs to file petitions on behalf of those who cannot. Secondly, PIL/SAL has relaxed the procedural norms inherent in anglo-saxon model of litigation when it comes to protection of 'social justice'. Even letters addressed to the Court have been treated as petitions by activist judges, leading to the evolution of the so called 'epistolary jurisdiction'. Thirdly, the PIL/SAL as innovated by the Indian Judiciary departs from the traditional adversarial model of litigation. Instead, it is seen by the Court as a chance for collaboration between citizens, judiciary and the government to remedy longstanding social wrongs. Fourthly, it has strengthened its own investigative powers through court appointed commissions of socio-legal inquiry. Fifth, it has significantly enhanced the traditional role of Amicus Curiae, by turning the position into an empowered officer of the Court. Sixth, through PIL/SAL, the Court consciously retains jurisdiction, i.e. keeps a matter sub judice as long as it deems necessary. Seventh, the judiciary has started to follow a 'one-stop approach' while delivering remedies under PIL/SAL. It has provided a range of available constitutional, civil, criminal remedies, saving the petitioners from the turmoil

⁴² S.R. Bommai v. Union of India, (1994) 3 SCC 1.

⁴³ Vineet Narayan v. Union of India, (1996) 2 SCC 199.

⁴⁴ For example, see, Rajiv Ranjan v. Union of India, (2006) 6 SCC 613: also, *ibid*.

⁴⁵ (2012) 4 SCC 51

⁴⁶ P.N. Bhagwati and C.J. Dias, *The Judiciary In India: A Hunger And Thrust For Justice*, 5 NUJS L. Rev. 184-186 (2012).

of having to run to and fro between multiple processes of court proceedings. Lastly, since the PIL/SAL courts do not only stop at just giving directions but feel themselves somewhat 'responsible' for attainment of the justice they seek to deliver, monitoring compliance with their directions and orders through court appointed monitoring committees has been an interesting feature of the Indian experience with activist courts.

IV. The Fruit: From Activism to Judicialization

The accounts of Judicial Activism and PIL have been voluminous, and almost entirely hagiographical⁴⁷. The rise of activism itself is rooted in judicial urgency to engage with the sea of populism that was going on in the immediate pre and post emergency Indian politics. The principal field of constitutional politics till *Minerva Mills* case⁴⁸ was right to property vis-a-vis implementation of directive principles of state policy. The Court's sustained defence of right to property earned it the label of 'anti-socialist' and backward looking.⁴⁹ In political discourse, the judiciary was being continuously judged in terms of progress and regress, with the executive office-bearers repeatedly calling for a 'committed judiciary' i.e commitment towards the social justice and socialist values of directive principles. After its emergency-era infamy with regard to protection of civil liberties, the court was in desperate need to redeem its image, and found in the vow of social justice in the Directives a refuge from such attack. To stake claim in the populist narrative, the judiciary's chosen site was the same rhetoric as that of practical politicians of the day. Bhuwania argues, with the activist path it adopted in early 80's, the Court eventually did become 'committed' - the only difference was that the Court assumed the role of vanguard of the elusive social revolution⁵⁰. Social justice was to be the only criteria of judging the outcome of PILs⁵¹. "Let me make clear that the objective for which we are trying to use

⁴⁷ ANUJ BHUWANIA, *COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA* 3 (CUP, New York, 1st ed, 2016).

⁴⁸ AIR 1980 SC 1789.

⁴⁹ GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION* 264 (Oxford University Press, New Delhi, 13th Impression, 2008)

⁵⁰ ANUJ BHUWANIA, *COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA* 25 (CUP, New York, 1st ed, 2016).

⁵¹ *Id* at 115.

juristic activism is realization of social justice”, proclaimed Justice Bhagwati⁵². Judicial work was to be judged only by the result it produces. Chintan Chandrachud identifies three trends in the interpretational style of the Supreme Court till date, the present phase being what he calls ‘panchayatieclecticism’⁵³ which is dominated by result-oriented decision making with little regard for coherent reasoning or even the doctrine of *stare-decisis*. The Court has begun to decide cases based on a certain conception of its own role – whether as social transformer, sentinel of democracy or even protector of market economy, its ‘unique decision-making process has sidelined reason giving in preference to arriving at outcomes that match the Court’s perception’ of itself⁵⁴. This periodization matches with Professor Baxi’s identification of the dynamics of ‘euphoria, chaos and disenchantment’ inherent in Activism of the judiciary⁵⁵. The Court became activist by trying to augment its support base and moral authority at a time when all other organs were facing legitimation crisis. In the process, it becomes directly a political institution, vying for power with other organs of government, and like other political institutions, ‘promises more than it can deliver and is severely exposed to the dynamics of disenchantment’⁵⁶. It has the potential to become a site of legislative/executive deferment of responsibility, more so, because notwithstanding the Court’s zeal with ‘social justice’, the term itself is capacious, and variable along with the zeitgeist⁵⁷. This point is illustrated by few examples hereafter given. If the judicial review power

⁵² P.N. Bhagawati, *Judicial Activism and Public Interest litigation*, 23 COLUM. J. TRANSNAT’L L. 566 (1985).

⁵³ Chintan Chandrachud, *Constitutional interpretation*, in THE OXFORD HANDBOOK OF INDIAN CONSTITUTION (Sujit Chowdhury, Madhav Khosla *et.al.* eds. OUP, New York, 2016),

<https://www.oxfordhandbooks.com/view/10.1093/law/9780198704898.001.0001/oxfordhb-9780198704898-e-5>

⁵⁴ *ibid.*

⁵⁵ Upendra Baxi, *The Avatars of Indian Judicial Activism: Exploring the Geographies of (In)Justice*, in FIFTY YEARS OF THE SUPREME COURT OF INDIA 156-165 (S.K. Verma and K. Kusum eds. OUP, 2000).

⁵⁶ Upendra Baxi, “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” 4 *Third World Legal Studies* 107 (1985)

⁵⁷ ANUJ BHUWANIA, *COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST_EMERGENCY INDIA* 116 (CUP, New York, 1st ed, 2016).

made the court a political institution, ‘because the ultimate determination of a basic structure was bound to be a political judgment’⁵⁸, with the judiciary’s power immensely limited in comparison to the other organs to drive up rhetoric of everyday politics, the vulnerability of judiciary significantly increases. Vulnerability exists because the Court does not have a constituency of its own in the sense the politicians have⁵⁹.

It seems the Court was not entirely unaware of the travails of activism and attempted to provide guidelines for entertaining PILs⁶⁰. However, instances of the same are rare, and hard to find amongst the hegemonic narrative of judicial activism set forth by Justice Bhagawati. Judicial attempts at checking itself have been scarce and often can be attributable to a single judge rather than the institution as a whole. For example, Justice MarkandeyaKatju, in a 2007 case⁶¹, commented, “ In the name of judicial activism Judges cannot cross their limits and try to take over functions which belong to other organs of the State...Judges must know their limits and must not try to run the government.” However, one of the important features of judicial activism has been the transformation of the Court as an institution of governance through PIL⁶². The Court is mired up in attempting to answer questions that are not entirely within the domain of the judiciary to answer, or even answering the same using completely non-legal tools, often with greater urgency to justify its decisions not only legally but also publicly, because institutional or non-institutional political actor seems increasingly reluctant to take matters which I argue, essentially falls under their responsibilities into their own hands. Thus, we have the Supreme Court holding

⁵⁸ S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. and POL’Y 43 (2001).

⁵⁹ UPENDRA BAXI, *INDIAN SUPREME COURT AND POLITICS* 10 (EBC, Lucknow, 1st ed. 1980).

⁶⁰ See for example, *GuruvayyurDevaswom Managing Committee v. C.K. Rajan*, (2003) 7 SCC 546.

⁶¹ *Divisional Manager, Aravalli Golf Club v. Chander Hass*, (2007) 14 SCALE 1 : (2008) 1 SCC 683.

⁶² Shyam Divan, *Public Interest Litigation*, in *The Oxford handbook of Indian Constitution* (Sujit Chowdhury, Madhav Khosla *et.al.* eds, OUP, New York, 2016), <https://www.oxfordhandbooks.com/view/10.1093/law/9780198704898.001.0001/oxfordhb-9780198704898-e-37>.

that a mosque is not an essential part of Islamic religion, and prayers can be offered anywhere⁶³ while being engaged in the famous Ayodhya dispute. In the Sabarimala judgment, which arose from a PIL petition, the learned judges have taken recourse to religious texts too often to come to a decision which could have been arrived at using the language of the Constitution itself⁶⁴.

An interesting site of such deferment has been the now famous triple talaq case⁶⁵. This case was filed as a PIL, and the Supreme Court ruled that *talaq-ul-biddator* the practice of pronouncement of divorce with instant effect was unconstitutional. My point is not principally the judicial methods or legal intricacies through which the Court reached its decision, but the political atmosphere before and after the judgment. One day before the Court started the hearing, a survey by a New Delhi based organization Centre for Research and Debates in Developmental Policy (CRDDP) was published. Conducted on 20671 individuals, of the 331 reported cases of triple talaq in this survey, only 1 belonged to the category of instant oral talaq without any witness or record⁶⁶. Yet considerable drive was made by politicians as well as the media whereby this apparent exception became the single most debated issue after demonetization, which incidentally affected nearly all citizens of the country⁶⁷, so much so that the four judges belonging to minority communities had to be put on the five judge bench constituted⁶⁸, arguably in response to political debates surrounding it. The Court relied heavily on religious texts. The judgment of Jagdish Singh Khehar, the then CJI along with Abdul Nazeer, J. devoted four paragraphs⁶⁹ running over about 14 pages on the Holy Quran's

⁶³ M. Ismail Faruqui v. Union of India, (1994) 6 SCC 360 at para 82.

⁶⁴ (2018) SCC Online 1690.

⁶⁵ ShayaraBano v. Union of India, (2017) SCC Online 963.

⁶⁶ *Triple talaq exception rather than the rule : Survey*, INDIAN EXPRESS, June 17, 2017, 8.29.48 a.m., <https://indianexpress.com/article/india/triple-talaq-exception-rather-than-rule-survey-muslim-divorce-4659358/>

⁶⁷ Flavia Agnes, *Triple Talaq – Gender Concerns And Minority Safeguards Within a Communalized Polity: Can Conditional Nikahnama Offer a Solution?* 10 NUJS L. Rev. 430 (2017).

⁶⁸ *id* at 429.

⁶⁹ WP(C) No. 118 of 2016, para 17-21; *ShayaraBano v. Union of India*, (2017) SCC Online 963.

dictum on instantaneous triple talaq, and equal number of paragraphs on judicial pronouncements. The important point to note is that while the ministers and the majority party functionaries spoke against the condition of muslim women in public, the matter was not put to legislation at first even though legislation it seemed, was not a problem with the massive majority the Bharatiya Janata Party-led government was enjoying. On being asked by the bench as to why could not the government bring a law to that effect, the then Attorney General of India Mr. Mukul Rohatgi's response for the govt was the Supreme Court should decide it first⁷⁰. Only after the Court's pronouncement the Triple talaq Bill was introduced in the Parliament which is now an Act⁷¹. Perhaps the summing up of political deferment comes from the political party AIADMK. Initially supporting the Bill in Lok Sabha the party staged a walkout to protest against the Bill in Rajyasabha, arguing that Parliament has no competence to entertain the Bill⁷², that is, the court should decide. The outcome could have been different had they stayed and voted⁷³.

My second example would be an unfinished business, hereby called the demonitisation petitions. On 8th November, 2016, in an unprecedented move supposedly aimed at curbing the black money menace in Indian economy, the BJP government through the Prime Minister Narendra Modi declared immediate banning of 500 and 1000 rupees currency notes. The matter was judicialized immediately by a batch of PIL petitions. A three judge bench in *Vivek Narayan*

⁷⁰ *Supreme Court has to decide whether triple Talaq is unconstitutional: Mukul Rohatgi*, THE ECONOMIC TIMES, May 24, 2017, 6.26 p.m., <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-has-to-decide-whether-triple-talaq-is-unconstitutional-mukul-rohatgi/articleshow/58825758.cms?from=mdr>

⁷¹ The Muslim Women (Protection of Rights on Marriage) Act, 2019.

⁷² *AIADMK on Triple talaq: 'Unconstitutional, illegal...Cant stand judicial scrutiny*, INDIAN EXPRESS, Jul. 31, 2019, at 1.47.27 a.m., <https://indianexpress.com/article/india/aiadmk-on-triple-talaq-bill-unconstitutional-illegal-cant-stand-judicial-scrutiny-5865118/>

⁷³ Lakshmi Subramanian, *AIADMK walkout helps pass triple talaq bill, exposes party fissures*, THE WEEK (July 30, 2019, 9.13 pm IST), <https://www.theweek.in/news/india/2019/07/30/aiadmk-walkout-helps-pass-triple-talaq-bill-exposes-party-fissures.html>

*Sharma v Union of India*⁷⁴ admitted them, identified nine questions of ‘general public importance’ and ‘far reaching implications’ and referred the petition for a Constitution Bench. The three-judge bench refused to grant any interim relief with the ‘hope that Government will be responsive and sensitive’ to the problems faced by common man⁷⁵. Simultaneously, the Bench allowed the respondents’ plea for a transfer of petitions from all High Courts. The matter is still pending and with the demonetization being an unavoidable reality now in 2020, any decision which the Court might render if at all after three years will be futile for practical purposes though may be important for academic interest or future. The matter was put through the doors of Supreme Court at the earliest instance, and thereafter the political actions taken by the opposition parties have been minimal, both in number and effect. On the other hand notwithstanding the party’s position against demonitisation, frequently its members have come out in public with statements of Congress being the initial planner. On such matter of utmost importance and profound economic and political significance, which affected the lives of all citizens in the country questions regarding whether the court is the place to decide is important, but for our purposes, the point is the judicialization of it and the court’s plain evasion⁷⁶ of the matter in what is obviously a response to tremendous political pressure. Similar delay in hearing can also be found in the celebrated Aadhaar judgment (5- Judge)⁷⁷. The initial petition was filed in 2012⁷⁸, when the whole biometric identity scheme was going on without even a legislation under the Congress-led government, the petition was finally heard and disposed of by the Supreme Court in 2018- by which the newly installed BJP-led government had passed a legislation⁷⁹, a staggering number of almost 37 petitions challenging various aspects of the

⁷⁴ (2017) 1 SCC 388.

⁷⁵ Id at page 392 (para 8).

⁷⁶ Gautam Bhatia, ‘Oh Brave New World’: *The Supreme Court’s Evolving Doctrine of Constitutional Evasion*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Jan 6, 2017), <https://indconlawphil.wordpress.com/2017/01/06/o-brave-new-world-the-supreme-courts-evolving-doctrine-of-constitutional-evasion/>

⁷⁷ Puttaswamy v. Union of India, (2019) 1 SCC 1.

⁷⁸ WP(Civil) No. 494 of 2012.

⁷⁹ Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016.

scheme and the passage of the Bill as a money bill was already added to it. The first hearing took place on 23rd September 2013, where the Court ordered that Aadhaar cannot be made mandatory till final disposal of the case and non-production of Aadhaar cannot result in exclusion. When the Court sat for final hearing of the matter in 2017, apparently more than ninety percent of the population was already enrolled under the scheme. The Court's decision in *Puttaswamy* where it upheld the overall validity of the Aadhaar scheme and Act but curbed several aspects of it, therefore, argues Gautam Bhatia, was ultimately a constitutionalism of convenience⁸⁰ over the inconvenience of declaring a scheme under which 90% of the population was enrolled. While the judicial technique of delay had earlier been hailed by some scholars as passive activism⁸¹- though in different context- in non-hearing, the Court actually responds to the political scene.

V. Conclusion: Courtroom as the Principal Site of Everyday Politics?

The instances of judicial work through PIL in contemporary times have several common elements, though they come from different backgrounds. Representative as they are of the wide level of remedies which are being sought now before the Activist Court, point at the ascendancy of the Courtrooms as the principal site for mediation of competing debates of everyday politics. We see a lack of political or social movement, and reliance on judicial methods through which, or after the initiation of which, public discourse starts. In the first example, the Court was chosen as the mean of proclamation whereafter legislative action started, and in the second list of examples, judicialization of the matter and judicial techniques of evasion. In the triple talaq case, we see an urge of the Court to publicly justify its judgment with heavy use of religious texts on the face of mounting political controversy and deferment of legislative responsibility. In demonitisation and Aadhaar cases, the whole of the movement

⁸⁰ See, Gautam Bhatia, *The Aadhar Judgment and the Constitution : Doctrinal inconsistencies and a Constitutionalism of Convenience*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (June 28, 2018),

<https://indconlawphil.wordpress.com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience/>

⁸¹ See, Werner Menski, *Judicial Passivism in Public Interest*, 10 BANGLADESH JOURNAL OF LAW 11-20 (2006).

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against the government decisions went on in the courtrooms. Both set of examples point at deferment of political responsibility by all institutional as well as non-institutional actors. In seeking remedies against them the Court was delegated with an extraordinary task which, by its very own nature is not meant to perform, i.e. act as a component of practical, everyday politics, and responded by simply delaying. Judicial Activism diluted rules of standing and procedures in PILs to facilitate swifter access to justice, which also enabled in time a variety of demands including those of governance and policy to be brought before the Court. It thus had the roots for also enabling the PIL to be the vehicle of siphoning questions of everyday politics before the judges which by the very nature of judicial work, they are not meant to perform. Dimensions of judicialization of politics, its implications and consequences have far reaching impact not only in academic discourse, but they bear crucial significance for judicial legitimacy as well as democracy as a whole.