Judiciary in India: The Dialogic Space

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Abstract

The judiciary in India has been praised and blamed in the same breath, praised for being the voice of the people, upholding democracy in India at a time when faith in the other institutions responsible for upholding democracy is ebbing, and blamed for making a mark in the number of pending cases that stands to at present a scary 3.2crores figure. Critics point to this pendency as undesirable, for justice delayed is justice denied. The critics further point out that this delay is caused by the tendency of the judiciary in India to go for sensationalism and overreach, taking up cases for hearing that are sensational and in the process not responding to the civil and criminal cases that get filed in the courts. Supporters of the judiciary however, have reasons for this pendency like the strength of the judiciary and the number of cases to be heard ratio, vacancies, poor infrastructure and support system etc. This is the political argument which the present paper would not focus on but would, by a discussion of some select cases; attempt to highlight the representational role played by the judiciary in India, facilitating the creation of a space for dialogue between the different sections of the society in India.

Keywords: Judiciary, activism, rights, dialogue, Demosprudence, dialogic space, public sphere, deliberation

1. Introduction

One of the preemptive assumptions that has gained ground since the historic Golaknath case (AIR 1967 SC 1643) and the Keshavanand Bharati (AIR 1973 SC146) that the judiciary in India need not follow the traditional principles of mechanistic jurisprudence rather may engage in setting out a new direction through progressive jurisprudence. Needless to say the judicial process is imperceptibly related to the country's legal culture, social reality and political processes. The judiciary therefore has to respond to the myriad realities and demands of the society, economy and the polity thereby making space for new issues to be discussed from a range of issues and new claims to be made and recognized. Although one needs to agree to the often made statement by the political establishment during the decades of the fifties, sixties and seventies of the bygone century, that judges are often influenced by their beliefs and value-preferences while deciding on the choice of issues to be placed before the people to deliberate on and form opinions about. Nevertheless, the judiciary in the Judges' Transfer case (AIR 1982 SC 149) judgement made its intentions clear about its role when it held that any member of the public, even though may not be directly involved but may have a sufficient interest can approach the court on behalf of those who cannot move the court because of poverty, helplessness or disability or socially or economically holding a disadvantageous

position. In fact in the People's Union for Democratic Rights Vs. Union of India (AIR 1982 SC 1473) the court declared that, "The time has now come when the courts must become the courts of the poor and the struggling masses of the country……They must be sensitized to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and a heartless society."

Lord Denning, the father of judicial activism, while searching for the spirit of the British Constitution had suggested that (his suggestions have strong undertones of judicial activism) rest upon three instincts: "the instinct for justice, which he associates particularly with independence of the judges and certainty of the law; the instinct for liberty which involves freedom of discussion, (including freedom of the press) and also freedom of association (including the right to form political parties); finally, a practical instinct which leads to a balancing of rights with duties, and powers with safe guards, so that neither rights nor powers shall be exceeded or abused…" (Denning 1953). According to Prof. Sathe (2002), judicial activism can be positive as well as negative. He defines a court engaged in altering the power relations to make them more equitable is said to be positively activist and a court using its ingenuity to maintain the status quo in power relations is said to be negatively activist.

The judiciary in India has been praised and blamed in the same breath, praised for being the voice of the people, upholding democracy in India at a time when faith in the other institutions responsible for upholding democracy is ebbing, and blamed for making a mark in the number of pending cases that stands to at present a scary 3.2 crores figure approximately. Critics point to this pendency as undesirable, for justice delayed is justice denied. The critics further point out that this delay is caused by the tendency of the judiciary in India to go for sensationalism and overreach, taking up cases for hearing that are sensational and in the process not responding to the civil and criminal cases that get filed in the courts. Supporters of the judiciary however, have reasons for this pendency like the strength of the judiciary and the number of cases to be heard ratio, vacancies, poor infrastructure and support system etc. This is the political argument which the present paper would not focus on but would attempt to by a discussion of some select cases; highlight the representational role played by the judiciary in India, facilitating the creation of a space for dialogue between the different sections of the society in India.

The paper is segmented into three segments, the first section would discuss the emergence and role of Public Interest Litigation (PIL) in India especially in the domain of guarding and guaranteeing the rights of the citizens in India against any form of usurpation; the second section would delve into an examination of the argument of the paper through a survey of a few cases; the

third segment would focus on the emerging trends within the judiciary and the final segment would try to draw a conclusion to the paper.

2. Public Interest Litigation: Ally of Common Man

PIL appears to be an increasing and important resource for political and social movements. Essentially PIL consists of writ petitions by people who are not immediately affected by the grievances. The new activism of the court goes along with a sense of public awareness fostered by the press. (Baxi 1985) After the emergency not only the middle class in India was less willing to tolerate human rights violations, the judiciary too, assumed an activist role. A good example of what one might call 'epistolary jurisdiction', the fact that Supreme Court justices have gone so far as to accept mere postcards concerning infringements of fundamental rights as writ petitions. PIL has been on the rise since the early 1980s and has brought justice to the doors of those who live a hand-to-mouth existence and are illiterate and unorganized. (Prakash 1984) Judiciary's role has become crucial and significant in every sphere of governance which includes: prisoners' rights, child labour, inmates of various asylums, ensuring the rights of the poor to education, to shelter and other essential amenities, sexual harassment of women at working place, preventing corruption in public offices, accountability of public servants, and utilisation of public funds for development activities. (Bhushan 2004) The reasons for the increasing concern of Court in governance arenas are varied and complex but one major factor has been failure of implementing agencies to discharge their Constitutional and Statutory duties. (Baxi 1985) This has prompted civil society groups and the people to approach the Courts, particularly the Supreme Court, for suitable remedies. Interestingly, the Court has also responded in a pro-active manner to address different governance problems. (Sathe 1998)

The judiciary has thus become a potential ally of individual citizens and of action groups insisting on better performance of state institutions. It has become a byword for judicial involvement in social, political and economic affairs, with a range so wide that anything under the sun is covered under the rubric of PIL (Singh 1992). PIL thus provides an important forum for agents of civil society to stake their claims. It has turned the judiciary into an arena in which government lawlessness and malfunctioning are debated, providing public exposure and to a certain extent relief for frustrated and even traumatized citizens.

Critics of judicial activism say that the courts usurp functions allotted to the other organs of government. On the other hand, defenders of judicial activism assert that the courts merely perform their legitimate function. According to Mr. Justice A. H. Ahmadi, the former Chief Justice of India, judicial activism is a necessary adjunct of the judicial function because the protection of public interest, as opposed to private interest, is the main concern.

(Ahmadi, 1996) Understanding of judicial activism depends on their conception of the proper role of a constitutional court in a democracy. Those who conceive the role of a constitutional court narrowly, as restricted to mere application of the pre-existing legal rules to the given situation, tend to equate even a liberal or dynamic interpretation of a statute with activism. Those who conceive a wider role for a constitutional court, expecting it to both provide meaning to various open textured expressions in a written constitution and apply new meaning as required by the changing times, usually consider judicial activism not as an aberration, but as a normal judicial function. (Sathe, 2001)

Prof. Upendra Baxi describes Indian judicial activism either as reactionary judicial activism or as progressive judicial activism. He cites the Nehruvian era activism on issues of land reform and right to property and the pro-emergency activism typified in Shiv Kant Shukla as manifestation of reactionary judicial activism. On the other hand, he describes Golak Nath and Kesavananda as the beginning of progressive judicial activism. 34 According to Baxi, 'Progressive judicial activism' extends the frontiers of that which is judicially doable in time and place, both in terms of political and social transformation. (cited in Sathe 2002)

Even more crucial remains the constitutional space provided by the SCI and High Courts for the practices of human rights and social movement activism; this judicial creation of space-time for activism has contributed to the growth of staying power of civil society interventions against the sovereign prowess of the Indian state which transforms itself from the 'post' to the 'neo' colonial formation, the latter so acutely described by Kwame Nkrumah as 'power without responsibility, and exploitation without redress.' (Baxi, 2010 b)

3. Creation of a Dialogue through PIL in India

The judiciary in India has utilised the new found tool of PIL to enter into new spheres of governance and opened up new areas for dialogue and deliberation. A diverse range of issues starting from environment to the claims of the silent voices in the society, the courts in India had been instrumental in initiating a dialogue between the various actors. Following are a series of cases that highlight the veracity of the argument that the court in India has acquired a representational role in the process of being an activist.

Case-1

The Stockholm Conference on Human Environment and growing awareness of the environmental crises in the country, India has amended its Constitution and added direct provisions for protection of environment. The Constitution (Forty-Second Amendment) Act, 1976 has made it a fundamental duty to protect and improve the natural environment. Article 48-A states that the state shall endeavor to protect and improve the environment and to safeguard forests and wildlife of the country. Corresponding to the obligation imposed on

the state, Article 51 A (g), which occurs in Part IV (A) of the Constitution dealing with Fundamental Duties, casts a duty on every citizen of India. Article 51-A (g) provides that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creature. In the following years, the enactment of the Water (Prevention and Control of Pollution) Act of 1974 has given the statute book its first real foundation for environmental protection. Other major enactments that have followed are the Forest Conservation Act (1981), the Air Prevention and Control of Pollution Act (1986), the Environmental Protection Act (1986), the National Environment Tribunal Act (1995), the National Environment Appellate Act (1997) and the Biodiversity Protection Act (2002). (Upadhyay & Upadhyay 2002) In this way, India has enacted a range of regulatory instruments to preserve and protect its natural resources. Unfortunately, the plethora of such enactments and the Constitutional provisions has not resulted in preventing environmental degradation in the country. Noticeably, the last two decades have been a period of rapid degradation in the Indian environment. The enactment of a number of laws both by the Central and State governments relating to environment has not made much headway in controlling the environmental degradation process and the laws, by and large, have remained mismanaged, mis-administered and unenforced. (Sahu 2008) Against this the judiciary engaged in environmental jurisprudence and through verdicts on various cases actually played the role of a communicator, an educator to the society , a voice of the future generations for whom we need to protect the environment. Linking up environment with the right to life, the judiciary in India brought the issue of environment with the discourse of the claims made by the individuals.

In the realm of environmental protection many of the leading decisions have been given in action brought about by the renowned environmentalist M.C. Mehta. His petitions have resulted in orders placing strict liability for the leak of oleum gas from a factory in New Delhi (M.C. Mehta vs. Union of India 1987). Directions to check pollution in and around the Ganges river (M.C. Mehta vs. Union of India, 1988). The relocation of hazardous industries from the municipal limits of Delhi (1996) The initially criticized verdict delivered (M.C. Mehta vs Union of India, 1998) to shift to CNG buses (government) then to auto rickshaws finally helped to check vehicular air pollution in New Delhi. The constitution of Green Bench by the Supreme Court in 1996 following the cases and the debate that followed on environmental protection and countering ecological degradation, fallout of the industry based mode of development thinking and the rapid urbanization and increasing human encroachment of the green belts of India. Supreme Court in India while hearing the cases was successful in creation of a dialogue between the *brown* thinkers and the *green* thinkers and was successful in ensuring a shift in government policy towards environmental concern and justice.

Case-2

The movement to repeal Section 377 was initiated by AIDS Bhedbhav Virodhi Andolan in 1991. Their historic publication Less than Gay: A Citizen's Report spelled out the problems with 377 and asked for its repeal. A 1996 article in Economic and Political Weekly by Vimal Balasubrahmanyan titled 'Gay Rights In India' chronicles this early history. As the case prolonged over the years, it was revived in the next decade, led by the Naz Foundation (India) Trust, an activist group, which filed public interest litigation in the Delhi High Court in 2001, seeking legalisation of homosexual intercourse between consenting adults. (Naz Foundation vs. NCT Delhi, 2001) The Naz Foundation worked with a legal team from the Lawyers Collective to engage in court. In 2003, the Delhi High Court refused to consider a petition regarding the legality of the law, saying that the petitioners had no locus standi in the matter. Since nobody had been prosecuted in the recent past under this section it seemed unlikely that the section would be struck down as illegal by the Delhi High Court in the absence of a petitioner with standing. Naz Foundation appealed to the Supreme Court against the decision of the High Court to dismiss the petition on technical grounds. The Supreme Court decided that Naz Foundation had the standing to file a PIL in this case and sent the case back to the Delhi High Court to reconsider it on merit. Subsequently, there was a significant intervention in the case by a Delhi-based coalition of LGBT, women's and human rights activists called 'Voices Against 377', which supported the demand to 'read down' section 377 to exclude adult consensual sex from within its purview.

In May 2008, the case came up for hearing in the Delhi High Court, but the Government was undecided on its position, with The Ministry of Home Affairs maintaining a contradictory position to that of The Ministry of Health on the issue of enforcement of Section 377 with respect to homosexuality. On 7 November 2008, the seven-year-old petition finished hearings. The Indian Health Ministry supported this petition, while the Home Ministry opposed such a move. On 12 June 2009, India's new law minister Veerappa Moily agreed that Section 377 might be outdated.

Eventually, in a historic judgement delivered on 2 Jul 2009, Delhi High Court overturned the 150-year-old section, legalising consensual homosexual activities between adults. (Naz Foundation vs NCT Delhi, 2001) The essence of the section goes against the fundamental right of human citizens, stated the high court while striking it down. In a 105-page judgement, a bench of Chief Justice Ajit Prakash Shah and Justice S Muralidhar said that if not amended, section 377 of the IPC would violate Article 14 of the Indian constitution, which states that every citizen has equal opportunity of life and is equal before law.

The two judge bench went on to hold that:

“If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes

that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as "deviants' or 'different' are not on that score excluded or ostracised.

Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the 'spirit behind the Resolution' of which Nehru spoke so passionately. In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual." (Naz Foundation vs NCT Delhi, WP(C) No.7455/2001, para 130 and 131.) The court stated that the judgement would hold until Parliament chose to amend the law.

A batch of appeals was filed with the Supreme Court, challenging the Delhi High Court judgment. On 27 March 2012, the Supreme Court reserved verdict on these. After initially opposing the judgment, the Attorney General G. E. Vahanvati decided not to file any appeal against the Delhi High Court's verdict, stating, "insofar as [Section 377 of the Indian Penal Code] criminalises consensual sexual acts of adults in private [before it was struck down by the High Court] was imposed upon Indian society due to the moral views of the British rulers."[i]

On 11 December 2013, the Supreme Court of India ruled homosexuality to be a criminal offence setting aside the 2009 judgement given by the Delhi High Court. In its judgment the Supreme court bench of justices G. S. Singhvi and S. J. Mukhopadhaya stated —

"In view of the above discussion, we hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable."[ii]

The bench of justices G. S. Singhvi and S. J. Mukhopadhaya however noted that the Parliaments should debate and decide on the matter. This followed a series of debate and demonstrations by the LGBT population. The central government filed a review petition on 21 December 2013. In its review petition the Centre said: "The judgment suffers from errors apparent on the face of the record, and is contrary to well-established principles of law laid down by the apex Court enunciating the width and ambit of Fundamental Rights under Articles 14, 15 and 21 of the Constitution." The IPC, when enacted in 1860, was justified; but with the passage of time it had become arbitrary and unreasonable, the petition added.[iii]

Naz Foundation has also filed a review petition against the Supreme Court order on Section 377. [On January 28, 2014 Supreme Court dismissed the

review Petition filed by Central Government, NGO Naz Foundation and several others, against its December 11 verdict on Section 377 of IPC.

This issue that people especially the middle class population in India wants to keep it under wraps as it doesn't fit in with their binary notion of gender as male and female and sexual orientation specifically heterosexual considered as *'normal'* faced a challenge from those ,especially the coalition of LGBT, women's and human's rights activists, who are by now politically strong with their strong networks (both nationally and internationally), coupled with the use of social media that has made the people find support quickly and no longer isolated and scared of social persecution. In fact the recognition of it as normal has been boosted up with many of them belonging to the upper echelons of the society coming out open on their sexual orientations have given a strong support to engaging in a dialogic process for recognition of the demand for doing away with Sec377.

Case-3

Only two sexes – male and female – are recognised in Indian civil law. (Sood 2010) The Peoples' Union for Civil Liberties (PUCL) Report on 'Human Rights Violations against the Transgender Community' (2003) argues, turns the transgender status of hijras into that of a legal non-entity.

Hijra (Hijras are biological males who reject their 'masculine' identity in due course of time to identify either as women, or "not-men", or "in-between man and woman", or "neither man nor woman". Hijras can be considered as the western equivalent of transgender/transsexual (male-to-female) persons but Hijras have a long tradition/culture and have strong social ties formalized through a ritual called "reet" (becoming a member of Hijra community). There are regional variations in the use of terms referred to Hijras. For example, Kinnars (Delhi) and Aravanis / Thirunangai (Tamil Nadu). Hijras / TG communities have been excluded from effectively participating in social and cultural life; economy; and politics and decision-making processes. A primary reason (and consequence) of the exclusion is the lack of (or ambiguity in) legal recognition of the gender status of hijras and other transgender people. It is a key barrier that often prevent them in exercising their rights related to marriage with a person of their desired gender, child adoption, inheritance, wills and trusts, employment, and access to public and private health services, and access to and use of social welfare and health insurance schemes. (Chakrapani & Narain 2012) The Election Commission way back in 2014 Lok Sabha Elections had introduced the option of 'other' in the voter's identity card and indicated that 'hijras' can vote or contest as 'other'. However, the legal validity of this executive order on the right to contest is not clear. Hijras had contested elections in the past. It has been documented that the victory of a transgender woman who contested in an election was overturned since that person contested in a seat reserved for women and according to the judgment of the Madhya

Pradesh High Court (Kamla Jaan v. Sadik Ali, Civil Revision Petition No 1294 of 2002) the person was not a woman but a "hijra". However, there have been other documented cases of transgender persons contesting elections as women.

The Naz decision decriminalizing Sec 377 was instrumental in the extension of the rights to the hijra/transgender community as well. What the *Naz* decision did was to apply the understanding of Constitutional rights to a minority which had never been deemed worthy of rights protection or judicial consideration. (Chakrapani & Narain 2012) In fact the judges were aware of the condition of the transgender community, when in the Naz judgement itself the judges pointed out, "During Colonial period in India, eunuchs (hijras) were criminalised by virtue of their identity. The Criminal Tribes Act, 1871 was enacted by the British in an effort to police those tribes and communities who 'were addicted to the systematic commission of non-bailable offences.' These communities and tribes were deemed criminal by their identity, and mere belonging to one of those communities rendered the individual criminal. In 1897, this Act was amended to include eunuchs…….. While this Act has been repealed, the attachment of criminality to the hijra community still continues." (Naz Foundation v. NCT Delhi, Para 50) (for detailed analysis see Siddharth Narrain, Crystallizing Queer Politics: The Naz Foundation Case and its Implications for India's Transgender Communities, 2 NUJS L. Rev. (2009) 455.)

In Karnataka, the State Legal Services Authority, then headed by Justice Manjula Chellur had organised workshops on the issues of transgender people and the law in Belgaum, Gulbarga, Shimoga and Bangalore. This initiative was part of a larger national programme spearheaded by the National Legal Services Authority (NALSA) to bring this issue in the judicial mainstream. Justice Altamas Kabir, who then headed NALSA has publicly stated that he has proposed an amendment to a bill that is being discussed around extending adoption rights to various religious groups on the lines of the Special Marriage Act, to also include provisions that will enable transgender persons to legally adopt. (Speech by Justice Altamas Kabir, "Trans genders and the Law Seminar", organised by Karnataka State Legal Services Authority and Karnataka High Court Legal Services Committee, Bangalore, October 2011) Subsequently NALSA filed a PIL on behalf of the Transgender community in the Supermen Court. In relation to NALSA's petition, the Supreme Court in its order dated October 1, 2012, has observed:

"This petition has been filed by National Legal Services Authority to recognise and grant Trans genders a legal status as a third gender and to recognise their rights under Articles 14, 15, 16 and 21 of the Constitution of India. Petitioner also seeks direction to the Union of India and State Governments to grant equal protection and rights to Trans genders as available to males and females of this country. The question involved is of considerable

public importance which calls for an authoritative pronouncement which will have far reaching consequence to Transgender community."

A Bench of Justices K.S. Radhakrishnan and A.K. Sikri, on April 14, 2014, in separate but concurrent judgments, said "eunuchs, apart from the binary gender, be treated as a "third gender" for the purpose of safeguarding their rights under our Constitution and the laws made by Parliament and the State Legislature." The ruling came on a petition filed by the National Legal Services Authority. The Bench directed the Centre and States to take steps to treat them as socially and educationally backward classes and extend reservation for admission in educational institutions and for public appointments. The Bench said "recognition of trans genders as a third gender is not a social or medical issue but a human rights issue. Trans genders are also citizens of India. The spirit of the Constitution is to provide equal opportunity to every citizen to grow and attain their potential, irrespective of caste, religion or gender.[iv]

By virtue of this verdict, all identity documents, including a birth certificate, passport, ration card and driving license would recognise the third gender. The Bench said gender identification is essential. It is only with this recognition that many rights such as the right to vote, own property and marry will be meaningful.

In September 2014, the centre sought a clarification from the court on whether lesbians, gays and bisexuals qualify as "third gender". "The centre has delayed implementation of the 2014 ruling and the clarification is just to delay the process," said senior advocate Anand Grover, who had earlier represented transgender activists in the case. The court had also clarified in 2014 that transgender does not include gays, lesbians and bisexuals. The court had, in its earlier verdict, directed all governments to take steps to resolve problems such as fear, shame, social pressure, depression and social stigma faced by trans genders.

Case-4

The Shah Bano judgement in 1985, whereby the Supreme Court directed the husband to pay maintenance to the petitioner who was old and was incapable to support herself. This created a lot of debate among the people. Muslim Women's (Right on Divorce) act, 1986, was passed by Parliament in response to the protest lodged by Muslims against the Shah Bano decision. This was indeed a retrograde step. It was also disliked by many forward-looking Muslims. Daniel Latifi, a senior advocate of the Supreme Court and a scholar of Muslim law, filed a writ petition challenging the validity of the Muslim Women's Act. The petition came up for a hearing in the year 2001 and was finally decided upon on 28 September 2001. (*Daniel Latifi v. Union of India* (2001) 7 SCC 740. s) Section 3(1)(a) of the Muslim Women's Act provided that a divorced woman was entitled to a reasonable and fair provision and

maintenance to be made and paid to her within the period of iddat by her former husband. It was held that a divorced Muslim woman was entitled to a fair and reasonable provision for the future extending beyond the period of iddat. The High Courts of Gujarat, Kerala, Madras, Bombay and Punjab confirmed the above interpretation. The High Courts of Andhra Pradesh, Calcutta, Madhya Pradesh, and Delhi took the opposite view and held that the husband's liability would end after providing maintenance for the period of iddat. The Supreme Court had before it two plausible interpretations which the High Courts had taken while construing Section. 3 (1) (a) of the Act. Kapila Hingorani and Indira Jaising appearing for the petitioner argued that the act was un-Islamic, unconstitutional and had the potential of suffocating the Muslim women According to them, it undermined the secular character which was the basic feature of the Constitution and there was no rhyme or reason to deprive the Muslim women of the applicability of the provisions of Section 125 Cr.Pc. and therefore it violated Articles 14 & 21 of the Constitution. By excluding Muslim women from the benefits of Section 125 Cr.P.C, act discriminated between women and women on the ground of religion, it was said.

Mr. Y.H. Muchhala, appearing on behalf of the All India Muslim Personal Law Board submitted that the main objective of the Act was to undo *Shah Bano case*... He contended that the aim of the Act was not to punish the husband but avoid vagrancy and, in that context, the provisions contained in Section 4 making other relations who were potential heirs or the Wakf Board liable were good enough. He insisted that the court would have to bear in mind the social ethos of the Muslims and impugned Act was consistent with law and justice. He further contended that Parliament had enacted the impugned Act respecting the personal law of the Muslims and that itself was a legitimate basis for making the differentiation. A separate law for a community on the basis of personal law applicable to such community could not be held to be discriminatory.

Dr. A.M. Singhvi, appearing for the National Commission on Women, submitted that the interpretation placed by the decisions of the High Courts of Gujarat, Bombay, and Kerala, and the minority view of the High Court of Andhra Pradesh should be accepted and; if such interpretation was accepted, the; impugned act would remain constitutionally valid.

The Supreme Court in a 5 judges bench (comprising of Justice Rajendra Baby, Justice Patnaik G.B., Justice Mohapatra D.P. Justice Doraisway and Justice Shivraj Patil) decision held that only if section 3(1) (a) was interpreted so as to oblige the husband to pay maintenance and make provision for the future within the period of iddat, the Act would be saved from the infirmity arising from the inconsistency with Articles 14, 15 and 21 of the Constitution.

The Court used its power of interpretation in the Daniel Latifi case in 2001 and the Shamima Farooqui vs. Shahid Khan, 2015, in an intelligent

manner thereby in a way upheld the Supreme Court judgement in the Shah Bano case. Whereas the All India Muslim Personal Law Board stood by the aforementioned Act of 1986 but the community had started to feel the ripples of the need for deliberation and dialogue. The All India Shia Personal Law Board supported the stand of the Court opposing the position taken by the All India Muslim Personal Law Board. The Muslim women went ahead and the All India Muslim Women's Personal Law Board (AIMWPLB) an organisation was constituted in 2005 to adopt strategies for the protection and continued applicability of Muslim Personal Law in India, with a particular focus on women's issues, including marriage, divorce and other legal rights. The AIMWPLB consists of a 30-person executive board and is led by president Shaista Ambar. The AIMWPLB in March 2008 it released a "Sharai Nikahnama" which sought to offer India's Muslim women a religiously sanctioned alternative to conventional Islamic marriage contracts.

In January 2007, the Bharatiya Muslim Mahila Andolan or BMMA ('Indian Muslim Women's Movement') was formed. It is an autonomous, secular, rights-based mass organization led by Zakia Soman which fights for the citizenship rights of the Muslims in India. It released a draft on June 23, 2014, 'Muslim Marriage and Divorce Act' recommending that polygamy be made illegal in Muslim Personal Law of India.[v]

The age-old debate of whether the triple-talaq system in Indian Muslim personal law provides any safeguard for women in arbitrary divorce reached a new height recently as the Indian Supreme Court issued a suo moto ruling to test the legal validity of the system, resulted in mixed reactions from different quarters of the country's Muslim community.

This movement, the seeds of which could be said to have been rightly sown in 1985 Shah Bano judgement, has generated a series of debate within the community itself and has brought the silent voices, the Muslim women now to the forefront who are insisting on a change in the Muslim personal law and it is the Court that has registered itself as the platform for a dialogue and debates, instead of the Parliament and the Legislatures which should have had been the fora for discussion.

Case 4

The National Family Health Survey (NFHS) in 2005-06 posed questions to over 80,000 women between the ages of 15 and 49, on sexual violence by husbands and other men. Sensitive questions such as "did your husband ever physically force you to have sexual intercourse with him even when you did not want to?" are difficult to ask in a survey; hence informed consent for the violence module was obtained twice, and trained interviewers were given strict instructions to ensure complete privacy of the respondents. Data show that 8.5 per cent of the surveyed women (one in 12) said they had experienced sexual violence in their lifetime. Almost 93 per cent of these

women said that they had been sexually abused by their current or former husbands, while only 1 per cent said that they had been sexually abused by a stranger. In the NFHS survey, when the women were asked if wife beating is justified, 54 per cent said they believed it was.

The debate on marital rape in India echoes arguments that go back more than 125 years ago to the Phulmani case when an 11-year-old Bengali girl died after being brutally raped by her 35-year-old husband. The colonial government then proposed to increase the age of consent for sexual intercourse for a girl from 10 to 12 years. But some of India's most prominent leaders opposed the measure, and the Age of Consent Act was passed only in 1891, after much acrimony and argument.

As recommended by the Justice Verma Committee in 2013, the committee argued that the "relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity". The government, then led by the Congress party, had rejected this proposal. A panel of lawmakers who opposed the move at the time argued it had "the potential of destroying the institution of marriage." (Verma Committee, 2013)

"If marital rape is brought under the law, the entire family system will be under great stress," a report submitted by lawmakers to Parliament had said in 2013. The government eventually passed a new sexual-assault law, which did not criminalize marital rape.

It would be erroneous to conclude that the problem can be solved merely by removing the marital rape exception. A much bigger challenge is to change the patriarchal social norms. The present controversy was stirred when Rajya Sabha MP Kanimozhi asked the government if it plans to bring an "amending bill to the IPC to remove the exception of marital rape", to which the Minister of State for Home Affairs Haribhai Parathibhai Chaudhary reply was that the government had no plans to do so, as marriage is a sacred institution in India.vi

Clearly, the law alone cannot change mindsets. However, opening up a debate can definitely create a space for dialogue and pave the way for *'demosprudence'*

4. Judiciary and the Dialogic Space

The struggle for a democratic public sphere is waged in all arenas of public life. Following Craig Calhoun (1993:273), 'public sphere' is here taken to mean as 'an arena of deliberate exchange in which rational critical arguments rather than mere inherited ideals or personal status could determine agreements and actions'. Real dialogue is possible and can be precursor to action, in an ideal public sphere that happens when private people using their own critical

reason come together to create a public—a place and a practice in which people as citizens may address together issues of political and social concern in a way that gives access to all those with interest. For Jurgen Habermas (1989) the idea of democratic decision-making is based on an assumption that, through communicative action or communication itself, people establish a sphere of commonly shared meanings in which to transact politically. This is the basis on which real democratic participation can take place. People should be informed of all relevant alternatives when they make their choices. Very often this is considered the task of the mass media. In contrast to Habermasian influenced deliberative theory, where the medium of language itself contains the transformative possibilities "in between" two interlocutors, properly oriented towards reaching an understanding. Martin Buber's Dialogic theory, I-Thou (1923 translated in English in 1937) as a normative foundation for democratic politics based in citizen management, we get an account of the phenomenon of turning towards one another that explains our being opened up to transformation through co-participation with this particular other, rather than remove the transformative potential to the medium of language used correctly. The turning towards an other as 'thou' opens up a space ---the presence of other becomes a catalyst for change. People are more open to transformation when confronted directly with the presence of the other.

Generally speaking the viability of a liberal democracy depends on a sense of trust stemming from the accessibility and accountability of government agencies to civil society in a sufficiently transparent public sphere. In this context, the judiciary is of particular relevance as the branch of government safe guarding constitution, law and rules of democratic conduct. It has to serve as much to check and balance the coercive powers of the state as to resolve disputes among citizens. In a democratic order, legitimacy means that decisions are not only made, but also supported, understood and accepted by both the populace and decision makers themselves. The public sphere, the analytic category between the State and the civil society gives legitimacy to democracy and provides a stage for governance within society. Judiciary performs the role of a conduit and opinion maker. It opens up the space for a dialogue between the state and the civil society and the different segments within civil society, on issues that matter to both the state and the citizenry. Stressing on the creation of space for dialogue, Fletcher (1994) points out that, "Politics is too important to be left to politicians-----or the political scientists." Godden's (1998) points out towards the need for the 'democratization of democracy'. Upward democratization through the expansion of the role of public sphere towards greater openness and transparency, with the state professing a cosmopolitan outlook and downward democratization through the renewal of civil society including the protection of the local public sphere.

Dialogic democracy creates forms of social interchange which can contribute substantially to the reconstruction of social solidarity "The potential

for dialogic democracy is instead carried in the spread of social reflexivity as a condition both of day to day activities and the persistence of larger forms of collective organization" (Giddens 1994) It is possible that no consensus is achieved though, mutual tolerance is required. Therefore, dialogic democracy starts according to Giddens, in opposition to fundamentalism to all types. In fact the presence of other may serve as a catalyst for change. The normative possibilities inherent in deliberation are connected to the possibility of legitimate personal transformation. A process of deliberation (which produces such changes) makes democracy better—more fair, more just. The core of the deliberative theory places the possibility for transformation squarely on the work that the process of rational communication can accomplish. It is through the nature of communication itself, that is, through rational exchange (or something approximating it) that we can improve democracy by providing a legitimate mechanism for transforming opinions and wills of citizens towards these better ends.

Taking a cue from the above discussion, one can argue that the practice of creating a space and environment for dialogue in spheres of governance issues that touch human lives would facilitate progression and freedom. Alexander Bickel was the first to consider that the judiciary had a role to play in initiating a dialogue and become educators by developing principles that would have acceptance in the foreseeable future. The Courts in his opinion should be a leader of opinion not a mere register of it. (Bickel 1962) In recent years, "dialogue" has become an increasingly ubiquitous metaphor within constitutional theory. It is most commonly used to describe the nature of interactions between courts and the political branches of government in the area of constitutional decision making, particularly in relation to the interpretation of constitutional rights. Dialogue theories emphasize that the judiciary does not (as an empirical matter) or should not (as a normative matter) have a monopoly on constitutional interpretation. Rather, when exercising the power of judicial review, judges engage in an interactive, interconnected and dialectical conversation about constitutional meaning. (Bateup 2006 pp 1109-1180)

Theories of constitutional dialogue offer an alternative way of filling the legitimacy lacunae, because if the political branches of government and the people are able to respond to judicial decisions in a dialogic fashion, the force of the counter majoritaria difficulty is overcome, or at the very least, greatly attenuated. (Dorf 2003) Infact, Friedman (2009) points out that the Court and the public not only speak to one another, they *listen* to each other, with the Court deferring to the public when they disagree. Public ambivalence although, grants the Court some latitude, but there are boundaries that it may not cross, where the Constitution's meaning is pushed beyond the public understanding.

'Demosprudence' is an emergent and fully contested term of art in US constitutional theory. This rubric at last takes more seriously the finite yet

complex ‘dialogic relationship between the courts and the people’ (Guinier, 2008). As happens always with hegemonic modes of production of constitutional knowledge, the notion remains entirely US-centric. Its proponents see *no* comparative advantage in making any reference to the imagination and experience of transformative constitution-making and development in the Global South (Baxi, 2001, Baxi, 1989; see also Ray, 2010.) Nevertheless, the discussions carried on above and the examples which has proved that the emerging trends visible in the domain of constitution making with the judiciary engaging in as an initiator and a facilitator in the dialogic process as well as the complex dialogic relationship that the judiciary in India has engaged in has definitely proved to be transformative in constitution making and creation of a progressive democracy.

What extended the possibilities of high judicial activism in India, as opposed to creating it, (Rudolph and Rudolph, 2001; Ruparelia 2013), was the diffusion of power that marked India’s democratic politics after 1989. It had many distinct causes; its ramifications were many too. The increasing electoral participation of historically subordinate groups, who began to vote in higher numbers relative to more privileged sections and express their grievances through vernacular conceptions of social justice, undermined the alignments and broadened the discourses that had previously configured the party system. The proliferation of new state-based parties, often representing lower-caste groups and peripheral regions, diminished the relative electoral power of national political formations. High electoral volatility and minority coalition governments ensued. And economic liberalization devolved power to the states, created new arenas of prosperity, and empowered the rise of the corporate capitalist class, whose values, beliefs, and desires acquired social legitimacy amongst the aspiring middle classes of metropolitan India. Yet these reforms also engendered growing social inequalities across classes, sectors and regions and produced new opportunities for rent-seeking and corruption, feeding the avarice of an ever more assertive corporate sector and mendacious political class. In short, the simultaneous fragmentation of power in the electoral system, democratization of status in the social order, and concentration of wealth in the economy created unprecedented political uncertainty.

These massive changes enabled the apex judiciary to expand its purview and deepen its institutional self-confidence vis-à-vis parliament and government. On the one hand, its growing power in the early 1990s was a deliberate concession by party elites, keen to “to legitimize unpopular decisions that they did not have the courage to take and to avoid taking decisions that were likely to incur unpopularity.” As a result, the political establishment itself began to refer more questions to the Court. (Rudolph & Rudolph 2001)

There is another side of the story as well. Often the question of whether the courts should have the power to decide issues of policy has always evoked a

vehement debate. Judicial activism has thus become a subject of controversy in India. (Sathe, 1997, p 441) Recent and past attempts to hinder the power of the courts, as well as access to the courts, included indirect methods of disciplining the judiciary, such as supersession of the judges (Palkiwala, 1973) and transfers of inconvenient judges. (Seervai, 1978). Equally troubling is the possibility of enforceability of court orders, that appears to be questionable in many instances (Delhi Janwadi 1997, EPW 1996, Kishwar 1994, Sivaramayya 1993) Dealing with environmental matters, Banerji and Martin (1997) claim that the Supreme Court does not have adequate knowledge and ends up giving unrealistic orders. The credibility of the judges' depends wholly on the conviction that the relief granted by the Supreme Court is enforceable (Agrawal 1985:34) the efficiency of PIL is further undermined by the fact that court administrations like other bureaucracies in India do not have the reputation of being fast and efficient (Kishwar 1994). PIL may drag on for years. For petitioners this is highly frustrating, particularly if the court is far away. Scholars like Marc Galanter (1989) observe that PIL tends merely to react to episodic cases of outrage. It still depends largely on initiatives of classes because poverty, lack of literacy and scarce legal knowledge deprive oppressed strata of Indian society of access to the courts. Sivaramayya (1993: p296) even concludes that PIL appears to be more a 'sedative' than a 'cure' and that its 'effectiveness' is 'limited to the judicial arena'. Oliver Mendelson (1981) too, concludes the same. Conrad (1995) warns the judiciary of running the risk of overburdening itself by taking up an array of politically sensitive issues. This is particularly true in the context of the shortage of manpower within the judiciary as is the present state of the judiciary in India.

However, judicial activism has not cowed down under pressure. The judiciary India has internalized the importance of laying down clear normative standards which drive social transformation. A number of distinctive innovative methods are identifiable, each of which is novel and in some cases contrary to the traditional legalistic understanding of the judicial functions. (Cassels 1989) Its interventions through strategies such as the expansion of Art 21 and the use of innovative remedies in PIL cases has actually expanded the scope and efficacy of constitutional rights by applying them in previously unenumerated settings. Furthermore, the courts allow groups and interests with unequal bargaining power in the political sphere to present their case in an environment of due deliberation. Not just within the corridors of court the deliberation and dialogue extends out within the greater social milieu. Moreover, when the Courts take cognizance via PIL of activist petitioners, and as much time they take to finally decide on contestations, they also bestow on them a measure of immunity from the repressive powers of the local political state. This aspect is often unfortunately obscured by studies engaging judicial outcomes concerning contested developmentalist projects (Baxi 2010b).

5. Conclusion

Dialogue facilitates a creative partnership between active citizens and activist justices (see Sathe, 2002; Baxi, 2001). New human rights norms and standards not explicitly envisaged by the first constitution stand judicially invented such as the right to privacy and dignity, the combined reading of which gives us the recent Delhi High Court *Naz Foundation* decision by Chief Justice A.P. Shah and Justice Muralidhar, which declares as unconstitutional the criminalization of the right to sexual orientation and conduct among consenting adults. (Baxi 2010) Further, the SCI brings back into the realm of the constitutional state (rights?) features often declared to be unsuitable by the emerging political state (such as the right to speedy trial, bail, compensation for injurious state action or conduct). This is scarcely an occasion to narrate the achievements any further (see Baxi, 2001, Fredman, 2008).

However, sceptics point to the not so celebratory aspects to the trend posing certain questions that tend to problematize the claim of the commentators about the activist and facilitation role of the judiciary. The questions that are posed are many and to start with, the quality of discourse and the quantity of participation, it is argued, is dependent on the nature of mediation. Social relations and our individual social identities are constructed in a process of mediation. This could often result in two problems, as our communication stands mediated, the access is dependent on resources one has in one's disposal be it money or influence to critically influence the mediation and thereby the dialogue itself; and, second, content of communication and the subject of debate also stands mediated. The selection of subject for debate and the content of communication is not a free exercise but are dependent on the politics centering on the issue. The environment—social and economic, social and political and the composition of the groups involved in the dialogue as well as the issue enjoying the support of the powerful lobby at a particular point of time determines the success of the dialogue or the issue successful in entering the dialogic fray.

When talking about the public sphere that is impregnated with vast potential of freedom and a serves to be an arena that can make the state accountable through discussions, Fraser (1992) points out the requirement of the elimination of inequality as a precondition to effective discourse and communication in order to remove the exclusionary tendencies. Feminist research especially in the seminal studies by Joan Landes, Mary Ryan, and Geoff Eley has shown how that the public sphere is not so an ideal space. Exclusions due to inequalities affect deliberation. Moreover as, Jane Mansbridge, in Feminism and Democracy (1990) points out, deliberation can serve as a mask for domination not only concerning gender but also other kinds of unequal relations. Although doubts remain with its velocity but once the participants become more aware of their real interests, even when those

interests turn out to conflict dialogue and deliberation would become more effective.

Not wishing way the doubts, it is a fact that, PILs (and the judiciary which has often been instrumental in picking up issues for deliberation in the form of admitting PILs) in India have become instruments to initiate dialogue in those areas where neither the political establishment nor the society in general either consider it as not so important and exhibit a casual ignorance (as could be seen in matters of environment, the argument can be substantiated by the need to launch a Swacch Bharat Abhiyan in the 21st century) or the apathy towards certain individuals and their claims (for example the claims of the transgender community and the LGBT people) or the patriarchal mindset that gets reflected on issues related to women within the private sphere (the issue of marital rape) or the careful bypassing of the state to initiate reform in the personal laws of minority communities.

In 1943, Ambedkar regretted that "political reform" had taken precedence over "social reform". Despite this, he continued to seek both legal and social changes to improve the lot of India's Dalits and women. Today, what is getting priority is economic reform, but we would do well to remember Ambedkar's words from the same address: "Rights are protected not by law but by the social and moral conscience of society… if fundamental rights are opposed by the community, no Law, no Parliament, no judiciary, can guarantee them in the real sense of the word". To quote Epp (1998) "rights are not gifts: they are won through concerted collective action arising from both a vibrant civil society and public subsidy…through an interaction between supportive judges and the support structure for rights-advocacy litigation. The independence and freedom of civil society is the basis for a democratic public sphere in which matters of policy can be openly and critically debated–not only in parliaments and legislative assemblies, but also in the media, academia, non-governmental organizations, clubs, neighbourhood get-togethers, marketplaces and even bar-rooms. (Dambowski 2001:13) In the words of Dahrendorf (1996:237), Civil society describes the associations in which we conduct our lives, and which owe their existence to our needs and initiatives rather than to the State. Some of these associations are highly deliberate and sometimes short-lived like sports clubs or political parties. Others are founded in history and have a very long life, like churches or universities. Still others are the places in which we work and live–enterprises, local communities. The family is an element of civil society. The criss-crossing network of such associations–their creative chaos as one might be tempted to say–makes up the reality of civil society.

Civil society has a twofold, almost ambiguous nature. It is an instrument to enforce social order and thus an asset of governance. Yet it also involves all social strata and provides space for the articulation of discontent

and opposition. (Dembowski 2001:22) Compromise and consensus are constantly renegotiated in manifold bargaining processes that stretches down to the micro-levels of social life and these create a vibrant civil society. As it becomes more vibrant, possibilities and avenues for deliberation and dialogue that is effective is sure to emerge. A process of deliberation that makes possible transformation, both at the personal level and at the policy level, makes democracy better—more fair, more just. And judiciary in India has been creative enough to open up the dialogic field for the open interplay of hopeful voices who till now were either silent due to their uneasy and adverse positions or were silenced by the politics of so called cultural ethos or blind laws.

End Notes

i) *Verdict reserved on appeals in gay sex case". The Hindu. New Delhi, India. 27 March 2012. Retrieved 7 December 2012.)*

ii) "Homosexuality is criminal offense: Supreme court". The Economic Times. *11 December 2013. Retrieved 16 January, 2014.*

iii) "Centre moves apex court for review of Section 377 ruling". *Chennai, India:* The Hindu. *21 December 2013 Retreived 16 January 2014.*

iv) *The Hindu, 2014*

v) *see* www.insafbulletin.net/ *July 2008, No.16 Retrieved 16 January 2014*

vi) *http://timesofindia.indiatimes.com/Cant-criminalize-marital-rape-as-marriage-sacred-in-India-Govt/articleshow/47102099.cms*

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