Turkish Online Journal of Qualitative Inquiry (TOJQI)
Volume 12, Issue 4, Month 2021: -714-723

The Supreme Embezzlements: Public Interest Litigations and Gender Justice in India

Vedansh Sharma[1]

Abstract

Public Interest Litigation occupies a prominent space in the Constitutional history of Supreme Court. The aspiration of the court to transform itself from Supreme Court of India to Supreme Court for India and Indians by extending its accessibility, scope and fashioning new remedies for the marginalized and poor has received critical claim and now skepticism.

In India, Religion is a contentious issue which when coupled with politics, has been a source of constant discord. The tenuous relationship of state and an individual's religion has been adjudicated by the Supreme Court having a far-reaching effect. The position of Indian Nation State with religion is far more complicated than any other secular democracy in the world. The religious autonomy of an individual and his relationship with his god is categorically recognized by the courts in India.

In case of Shayara Bano, a Muslim woman who was divorced through the impugned practice of triple talaq, there was question raised on the justiciability of the remedy being fashioned by the Court in the minority opinion.

In the case of Indian Young Lawyers Association & Ors. vs. The State of Kerala & Ors. popularly known as the Sabarimala Case, the Supreme Court, in the name of public interest went on to decide the legality of a centuries old tradition barring women in the menstruating age to enter the temple. Apart from the various issues deliberated by the court, one cardinal issue was pertaining to the locus standi of the petitioner to stand before the court acknowledging the far reaching ramification and implications of the judgment across all places of worship in the country.

In the third case of decriminalization of adultery, the petitioner is not an affected person but rather a non-resident Keralite hotelier in Italy.[2] The locus of the petitioner has not been discussed by any of the judges or even the name mentioned. The judges straightaway headed into the legality of the provision and declared it unconstitutional unanimously.[3] What the court answered was rather an academic question than a legal one.[4]

This paper aims at analyzing the recent judgments which entered the Court as PIL and adjudication upon the same by secular court. The case analysis also includes an insight on the earlier precedents as to who can approach the court in public interest with respect to the matters pertaining to religion.

The first part of the paper is devoted to the origin and evolution of the PIL especially the democratic positioning of the Court in pre and post emergency phase. The second part of the paper is concerned with the cases of PIL for women rights, gender justice and gender equality before Supreme Court till the three cases aforementioned. The third part shall deal with the discontents of the PIL, considering PIL as a structural and institutional innovation. The fourth and last part carries the concluding remarks by the author.

---

[1] The Author is an Assistant Professor of Law at Amity Law School, Amity University Rajasthan, Jaipur.

[2] https://www.livemint.com/Politics/0AJo4WhxjSNdEaLtUnrdDI/Joseph-Shine-adultery-law-crusader-says-he-is-happy-for-In.html

[3] https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/369/Adultery-Writ-Petition_pdf_.pdf

[4] https://clpr.org.in/litigation/decriminalisation-of-adultery-constitutional-challenge-to-section-497-of-the-ipc/

Keywords: Public Interest Litigation, Locus Standi, Gender Justice, Secularism, Essential Religious Practices.

Introduction:

Public Interest Litigation occupies a prominent space in the Constitutional history of Supreme Court. The aspiration of the court to transform itself from Supreme Court of India to Supreme Court for India[5] and Indians by extending its accessibility, scope and fashioning new remedies for the marginalized. It has received critical claim and now skepticism for its arrogation of executive authority and fictionalizing the separation of power. The proactive role of the Supreme Court to redeem itself from the ignominy of emergency has received scholarly attention nationally and internationally. It is today, considered as the effective agent of progressive social change.[6]

In the initial years post-independence, a new legal order was percolated in the society at large but it still bore the resemblance to the colonial era. With the enforcement of an indigenous constitution, the new conception of human rights were laid down with the state ensuring its citizens rights, justice and development. The Supreme Court was conservative and followed textualist approach, with keen attention to rules of procedure. The clear anecdotes of playing by the book can be seen as the modus operandi of the court then. The time was soon followed by the phase of National Emergency, which is considered as the dark phase in the era of Indian governance system. Here, not only the union executive took control of everything thereby degenerating the federal structure, but also barring a citizen to challenge the validity of any law and the actions thereunder despite it causing serious violations of fundamental rights guaranteed by the constitution.[7]

The author intends to bring together the issue of PIL and the stance of Supreme Court in dealing with the question of religious, cultural and personal law related questions. The relaxed standing in terms of jurisdiction as well as justiciability of rights under Article 32 has led to three cases on women rights and gender justice being agitated in the Supreme Court- Sabarimala, triple talaq and adultery. All the three cases entered the Supreme Court as public interest litigation and were dealing with the issues of gender justice questioning the religious and cultural practices. The paper will further analyze these cases at length and adjudication upon the same by secular court. The case analysis also includes an insight on the earlier precedents as to who can approach the court in public interest with respect to the matters pertaining to religion.

In this paper, I shall be briefly discussing the origin of the public interest litigation in the ignominious shadow of national emergency suspending the core civil liberties and the abdication of the court of its Constitutional sentinel of protector of fundamental rights of its citizens. In the second part of the essay, I shall be discussing the right to religion and the public interest litigation through three cases aforementioned. I shall further discuss the discontents and disenchantment with intertwining of religion and public interest litigation.

The Rise of Public Interest Litigation

The advent of Public Interest litigation took place in the aftermaths of the National Emergency, during which the apex court denied to entertain applications dealing with writs including habeas corpus applications. It was held by the court in *A.D.M. Jabalpur v, S. Shukla*, that 'under emergency provisions no one could seek the assistance of any court in India to try and save his life, liberty and limb.'[8] After being haunted by the ghosts of such cases, the Supreme Court tried to exorcise itself to recuperate its status of being the custodian of the constitution in the country.

Since the origin of Public Interest Litigation, a denouement of grave misuse of executive powers of the state, colossal curtailment of fundamental rights of the citizens and judiciary's unequivocal buttress to the same during the fabled period of emergency (1975-77), post emergency, the Supreme Court started performing passive umpireship[9] contrasting to its traditional function with laying more emphasis on redressing the plight of the exploited strata of the society.

---

5 Baxi, U., "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India," Third World Legal Studies: Vol. 4, Article 6. (1985) http://scholar.valpo.edu/twls/vol4/iss1/6?utm_source=scholar.valpo.edu%2Ftwls%2Fvol4%2Fiss1%2F6&utm_medium=PDF&utm_campaign=PDFCoverPages

6 Rosenberg G.N., Krishnaswamy S., and Bail S., "A Qualified Hope: The Indian Supreme Court and Progressive Social Change", Comparative Constitutional Law and Policy, Cambridge University Press, 2020.

7 Singh D.K., "Emergency and the Constitution of India", Indian Constitution: Trends and Issues, Indian Law Institute, New Delhi, 1978.

8 AIR 1976 SC 1207

9 Sheela Barse v. State of Maharashtra, 1988 AIR 378.

Though the term Public Interest Litigation was first used in the year 1982[10], but the concept of was brought forward for the first time in the year 1976 wherein the Supreme Court aimed at relaxing the procedural blockades and said, procedure prescriptions are handmaid not mistresses of justice and failure of fair play is the spirit and the Courts must view procedural deviances.[11] In the years following the judgment, Justice Krishna Iyer went to liberalize the concept of locus standi.[12] Soon it was observed that the court gave up the positivist perspective and acquired the role of an activists laying the foundation stone for compensatory jurisprudence in the Indian legal system.

Rajiv Dhawan points out that, to a law scholar Public Interest litigation was the Indian Courts and the jurisprudence 'taking the suffering seriously[13]'. PIL was an effort by the Supreme Court to restore its tarnished image by stretching the traditional doctrine so that judges could reach out and assist the destitute whose existence was forgotten by a callous State.[14]

The developmental context of PIL is full of judicial activism in reaching out to the citizens after the grave violations of fundamental rights enshrined under constitution's Article 21 and 22. The Supreme Court went on to accept the letters sent to it from detained prisoners or the living standards of people in quarries.[15]

The efforts made by Supreme Court to ease the concept of locus standi and waving off the procedural requirements created a robust mechanism not only for the interpretation of existing fundamental rights but for the creation of new fundamental rights especially under the patronage of Article 21 of the Indian constitution like right to an unpolluted environment[16], right to free and compulsory education[17], right to livelihood[18], etc.

PIL gave the Indian judiciary a heroic persona as the panacea for the various endemic social and political problems that plague India.[19] The apex court was considered as the last resort to the people when no executive authority was paying heed to their concerns. PIL's conception provided Supreme Court to function as the People's Court in the true spirit. Justice Bhagwati, the chief curator of PIL in India provided for a mystical position to it by stating that it provides the poor, helpless and the disabled who themselves aren't resourceful enough to approach the court for seeking remedies for their injuries to be represented by anyone on their behalf. To a great extent PIL was able to do justice with the reverenced objective of reaching to the poor and downtrodden.

The Supreme Court fashioned out new remedies enforcing its writ jurisdiction. In numerous cases the court granted interim compensation to the victims. The court adopted a remedial jurisdiction, where through judicial invigilation, the courts sought out unspectacular improvement in the administration and management of various institution of the government. At various instances, such attitude by the court was also termed as creeping jurisdiction.[20]

In the earlier era of PIL, it focused majorly on the improvement in the areas of failure of criminal justice system. But in the journey the court addressed the issues of social and economic rights also. It went on to interpret and reading the directive principles of the state policy as something incidental to fundamental right of right to life, binding the state to taking action in their enforcements. The courts appeared as the last ray of hope in the times of degrading public and institutional morality to all those who wanted a free, fair and accountable governance but were betrayed by the inefficiency and corrupt institutional structure.

---

10 S.P. Gupta and Anr v. Union of India AIR 1982 SC 149.

11 Mumbai Kamgar Sabha v. Abdul Thai, AIR 1976 SC 1455

12 Fertilizer Corporation Kamgar Union v. Union of India, AIR 1981 SC 344.

13 Baxi, U., "Taking Suffering Seriously: Social Action Litigation in the Supreme Court", Dhavan et.al. (ed.), Judges and the Judicial Power 289-315 (1985), Dhavan, R., Law As Struggle : Public Interest Law In India. *Journal of the Indian Law Institute, 36*(3), 302-338. (1994) Retrieved from www.jstor.org/stable/43952347

14 Divan S. "Public interest Litigation", The Oxford Handbook of the Indian Constitution, 2016.

15 Sunil Batra Etc. v. Delhi Administration A.I.R. 1978 S.C. 1675

16 Vellore Citizens Welfare Forum v Union of India, (1996) 5 S.C.C. 647

17 Unni Krishnan v State of Andhra Pradesh (1993) 1 S.C.C. 645

18 Olga Tellis v Bombay Municipal Corp, AIR 1986 SC 180.

19 Bhuwania, A. (2016). Courting the People: Public Interest Litigation in Post-Emergency India (South Asia in the Social Sciences). Cambridge: Cambridge University Press

20 Baxi, U., "The Avatars of Indian Judicial Activism: Explorations in the Geographies of (in) justice" in S.K. Verma and Kusum (eds.), Fifty Years of the Supreme Court of India: Its Grasp and Reach 156 (2000).

But in the due course, the nobility of PIL was corrupted. It was soon observed that the devout purpose of PIL was contested as the judiciary usurping power from the executive and legislature and becoming all mighty powerful. The actions of judiciary which was once termed as 'judicial activism' is not considered as the 'judicial adventurism' or 'judicial overreach'.

Religion and Public Interest Litigation

Religion is considered as an integral aspect of an individual's identity and is safeguarded within the constitution of India. In India, it is a contentious issue which when coupled with politics, has been a source of constant discord. The tenuous relationship of state and an individual's religion has been adjudicated by the Supreme Court having a far reaching effect. The position of Indian Nation State with religion is far more complicated than any other secular democracy in the world. The religious autonomy of an individual and his relationship with his god is categorically recognized by the courts in India.

Courts have sat as an arbiter of religious rights where more than often they are asked to adjudicate as Constitutional Court more often than not the thin line between scared and secular, with competing claims between the individual, state and religious group. While secularism is in domain of the State, religious freedom is the right of the individual guaranteed by the State and Courts adjudicate upon with often curious and sometimes tragic results.

The Supreme Court of India in recent past has dealt with not only competing claims of freedom of religion but also other competing fundamental rights. Since 2017, multifaith Constitutional Bench of Supreme Court has struck down triple talaq in *Shayara Bano v Union of India*, 2017 9 SCC 1 by 3:2. In 2018, a woman judge dissenting in 4:1 judgment which prohibited menstruating women entry in Sabrimala temple in Indian Young Lawyers Association v State of Kerala, 2018 SCC OnLine SC 1690. On the question of whether reconsideration of five-judge Bench in aftermath of Babri demolition, Dr. M. Ismail Faruqui v. Union of India, (1994) 6 SCC 360 on question that mosque was not an "essential part of the practice of the religion of Islam", 3 judge bench in M Siddiq v Mahant Suresh Das, 2018 SCC OnLine SC 1677, sole Muslim Judge dissented while majority refused reconsideration. The common thread in all the cases is discernment of essential religious practise- separating the sacred from secular, personal and public domain leading to raucous polarising public discourse in both public as well as parliament.

Indian secularism is nowhere defined but is considered as a part of the basic structure of Indian constitution.[21] The stance of the Supreme Court in dealing with the questions of religion is unsettled. In various cases the definition of secularism is susceptible to the interests of the majority impinging the rights of the minority while in some others it privileges minority. Therefore the dubious stand results in the 'weak definition of secularism' in the country.[22]

The protection given to minorities in a majoritarian society embarks the secularist ethos of the country. It was very much reflected in the 1952 where the Supreme Court held that personal law aren't a part of the laws in force and thus, aren't void even if they were in contravention to the fundamental rights.[23] The safeguards provided to the personal laws, religious and cultural practices help build the multicultural, multi religious and a secular India.

Public Interest Litigation and Gender Justice:-

The initial journey of PIL was celebrated for protecting and safeguarding the rights of the vernacular sections of the society including women. The nature of the Indian society is inherently patriarchal in nature, therefore it lays down additional responsibility on the Supreme Court to accommodate a more progressive approach to ensure gender justice and gender equality.

[21] S. R. Bommai vs. Union of India, 1994 AIR 1918.

[22] Padhy, S., ''Secularism and Justice: A Review of Indian Supreme Court Judgment", Economic and Political Weekly, Vol. 39, No. No. 46/47 (Nov. 20-26, 2004), pp. 5027-5032.

[23] State of Bombay vs. Narasu Appa Mali, AIR 1952 Bom 84.

The judgment given by Supreme Court in *Vishakha's* case is considered to be a landmark in the domain of court's active role in ensuring a safe and progressive society for women.[24] In this case the court laid down various guidelines to prevent sexual harassment of women at workplaces. The guidelines issued by the court were later transformed into The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.[25] Until the act was enacted, for more than fifteen years, the guidelines issued by the court were the sole code addressing the issue.

Similarly in 2016, in the case of *High Court on its own Motion v. The State of Maharashtra,* the court admitting a case suo-moto delivered a judgment recognizing the right of women prisoner's access to abortion thereby affirming the right of women over her body and to abort, calling it a cardinal aspect of fundamental right to live under Article 21 of the constitution.

The three cases in the recent past which brought the contentions between the religious and cultural practices versus the issue of gender justice were discussed. The first case dealt with the issue of triple talaq i.e. 'talaq-e-biddat'.

The Triple Talaq Case:

The case served as the landmark as it bore the intention of the court displayed in the case of Mohd. Ahmed Khan vs. Shah Bano Begum[26] which was later overturned by The Muslim Women (Protection of Right on Divorce) Act, 1986.[27] In the case of *Shayara Bano*[28], a Muslim women who was divorced through the impugned practice of triple talaq. There was question raised on the justiciability of the remedy being fashioned by the Court in the minority opinion.

Here, in this case it was contended that "*that the practice of 'talaq-e-biddat' being socially repulsive should be declared as being violative of constitutional morality – a concept invoked by this Court, according to the petitioner, to interfere with on the ground that it would serve a cause in larger public interest.*"[29] An individual civil case was presented as cause for greater public good with various organizations calling the matter to be registered as a public interest litigation. It was specified in the case by the interveners that the practice of *'talaq-e-biddat'* i.e. instantaneous triple talaq was neither in consonance with the Quranic verses nor with the *'hadith'*.

The judgment in the triple talaq case was given by an 'all faith' five judge bench of the Supreme Court, with a majority of 3:2. The two judges dissenting were the then Chief Justice of India Justice J.S. Khehar and Justice Abdul Nazeer. The minority had the opinion that anything which is considered as a sin by the believers of the faith could never be enforceable by law. They emphasized on the fact that what was sinful could not be religious. Therefore the court found it easy to declare it unlawful in nature. The minority in this case refrained itself from adjudging whether *'talaq-e-biddat'* was a part of *'hadith'* or not, calling it undoubtedly a part of personal laws of Sunni's belonging to Hanafi school and a matter of their faith on the basis of canonical choices of materials referred..

The two learned judges held the opinion that Muslim personal law *'Shariat'* cannot be tested on the touchstone of being an action of the state. It is merely a component belonging to personal law of the religious faith. The judges declined the notion of *'talaq-e-biddat'* as a violation of constitutional morality. They considered it as their constitutional duty to preserve and protect the personal law as a fundamental right of the minorities. It was held that religion is a matter of faith, and not of logic. Though the minority opinion in this case refrained itself categorically from adjudging any question of religion or faith, the majority went on to answer the questions related to the constitutional validity of instantaneous triple talaq and declaring it violative of the fundamental rights, thereby, setting it aside.

[24] Vishakha and Ors. Vs. State of Rajasthan, (1997) 6 SCC 241.
[25] Act No. 14 of 2013.
[26] 1985 AIR 945.
[27] Act No. 25 of 1986.
[28] Shayara Bano vs. Union of India, (2017) 9 SCC 1.
[29] Ibid 24, p. 177.

The issues before the court was to primarily analyze whether talaq-e-biddat is an essential practice of Islam and whether it is violate of fundamental rights of the petitioner. The court while deciding the issue gave directions to the parliament to take legislative actions.

Hon'ble Supreme Court in this case also resorted to the opinion of the amicus curae. It is contended time and again that the amicus curae who generally happen to be a senior advocate in the court virtually takes over the entire case making the original petitioner peripheral to the entire case. The scenario was no different in the current case, here even the original writ filed by the petitioner by converted into an omnibus case with numerous parties, intervenors and two amicus curae. The original petitioners were somewhere lost in the process betraying the *raison d'etre* of PIL.

The most important question raised by this judgment hanging on a thin majority is, whether the Supreme Court must at all interfere in the personal laws and practices of any religion? Is the Supreme Court the appropriate forum for the adjudication and interpretation of personal laws at all? Should the Apex Court adjudicate such sensitive issues as PIL which is majorly outcome based and no discrete and precise procedure has been laid down?

The Sabarimala Verdict:

The second case on which the author wishes to lay emphasis on is the case of *Indian Young Lawyers Association & Ors. vs. The State of Kerala & Ors.* popularly known as the Sabarimala Case, the Supreme Court, in the name of public interest went on to decide the legality of a centuries old tradition barring women in the menstruating age to enter the sanctum sanctorum of the temple. This petitions classically falls within the domain of 'cultural dissent'.[30] The petitioners seek a writ issued to the temple board for granting entry to the women of age group of ten to fifty years into the temple.

The judgment was delivered by a five judge bench of the Supreme Court with a majority of 4:1, declaring the Rule 3(b) as a discriminatory provision violative of fundamental rights of women. It allowed the women of age group between ten to fifty years to enter into the temple. As on date, there are numerous review petitions awaiting to be heard as the matter has been forwarded to a seven judge bench.

Apart from the various issues deliberated by the court in the original judgment, one cardinal issue was pertaining to the locus standi of the petitioner to stand before the court acknowledging the far reaching ramification and implications of the judgment across all places of worship in the country.

Justice Indu Malhotra, the dissenting judge in the case casts light upon the fact that the right to approach the Supreme Court under Article 32 against the violation of fundamental rights, must be on a pleading that petitioner's personal right to worship was violated. The petitioners as such weren't the followers of Lord Ayyappa, and came to know about the practice through newspaper articles. The case required the court to decide on religious questions on the behest of those who do not subscribe to the faith.

Justice Malhotra was skeptical about the fact that judging the locus of the petitioners in this case wasn't a mere technicality but rather a bare minimum requirement to maintain a challenge for impugning practices of any religious sect or denomination. The contention raised by Justice Malhotra was dismissed by the majority despite acknowledging the consequential effect of the said judgment on the society, stating that this technical plea cannot stand in the way of a constitutional court applying a constitutional principle to the case.

It was even cautioned by the dissenting judge that permitting such PILs would open floodgates to interlopers to question religious beliefs and practices, even if the petitioner isn't a believer of the faith, which potentially might cast much graver perils on the minorities. The court in the said case didn't only breach the self-established demarcation between the religion and the nation state but in fact paved a rather slippery slope for themselves as in the name of public interest they might be asked to adjudicate on essential practice of each and every religion on the wish of those who don't pursue the religion.

The aforementioned case is a classic example of the blatant misuse of public interest litigation. The judgment received disapproval from different sections of the society notably, the women followers of Ayyappa in Kerala and across the country, who considered this as the breech a sacramental practice. The idiosyncratic characteristic

[30] Sunder, M., Cultural Dissent. Stanford Law Review, Vol. 54, December 2001; UC Davis Legal Studies Research Paper No. 113. Available at SSRN: https://ssrn.com/abstract=304619

of the deity of Sabarimala is its celibacy and austerity due to which women belonging to menstruating age weren't allowed to enter. This was solely a matter of faith for which the women right activist weren't having any objective to pursue.

There are numerous temples across the country where only males or females are allowed to enter and Sabarimala is just one of the many. The sole reason as to why the centuries old tradition and practices couldn't stand in the court of law was that it was judged on the preconceived notions of gender equality completely disregarding the religious rationale behind it. As Gautam Bhatia puts it, *"it is a mistake to uncritically assume that Sabarimala is simply a right-to-worship case, a straightforward internal dispute within a religious community. It is a mistake, because it ignores how deeply intertwined religious, social, and public life is in India."*[31]

The question which still remains is whether the Supreme Court was the right in addressing a centuries old religious practice? Were the petitioners not being the subscribers of the faith and thereby not being affected by the practice at all, had any locus to approach the court? Should Supreme Court judge the constitutionality of a centuries old religious practice on modern narratives?

The Adultery Judgment:

The third case which the author wishes to highlight pertains to the decriminalization of adultery. The court was asked to interpret the constitutionality of section 497 of the Indian Penal Code, 1860 and section 198(2) of Criminal Procedure Code, 1973 and thereby decriminalizing the same. The five judge bench struck down the provisions and decriminalized adultery.

The decision was based on the analysis of the said sections on the touchstones of Article 14, 15 and 21 of the Indian constitution. The question of privacy was dealt by the bench at length. It was held that section 497 amounts to grave violations of right to privacy as it interferes in the matrimonial cause. It was equivocally upheld that a women isn't a subject of her husband after marriage. The court deliberated on the issue of adultery being an offence of civil nature if at all, but definitely not a criminal one. Justice Indu Malhotra in the judgment went on to state that "the times when wives were invisible to the law and subordinate to their husbands had long passed." She emphasized that such laws in the progressive society cannot deny women equal status.

Though the judgment was doing justice to the progressive and contemporary society, but yet again the case was brought before the court as a public interest litigation. The petitioner in this case is not an affected person. Moreover, he happens to be a non-resident Keralite hotelier living in Italy.[32] It is very fascinating to record that neither the locus of the petitioner was discussed by any of the judges nor even the name mentioned in the judgment. The judges straightaway headed into the legality of the provision and declared it unconstitutional unanimously.[33] What the court answered was rather an academic question than a legal one.[34] It is irrefutable that presence of such colonial and regressive law should find no place in the twenty-first century society, but the procedural moderation provided for PIL are misused here again.

The exclusive concept of PIL was to allow any public spirited person to approach the court on the behalf of the poor and disadvantaged. It was defined in *S.P.Gupta vs..Union of India* as "*litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests or vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing."*[35] But, in light of the aforementioned judgments, it is evident that PIL was used as a tool to gain fame at the cost of faith, culture and religion. It was cautioned time and again by the apex court itself that Public Interest Litigation must succumb to being 'Personal Interest Litigation' or 'Political Interest Litigation'.[36]

Discontents of PIL:

---

31 https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-ii-justice-malhotra-group-autonomy-and-cultural-dissent/

32 https://www.livemint.com/Politics/0AJo4WhxjSNdEaLtUnrdDI/Joseph-Shine-adultery-law-crusader-says-he-is-happy-for-In.html

33 https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/369/Adultery-Writ-Petition_pdf_.pdf

34 https://clpr.org.in/litigation/decriminalisation-of-adultery-constitutional-challenge-to-section-497-of-the-ipc/

35 1982 2 SCR 365.

36 https://www.ndtv.com/india-news/has-pil-become-political-interest-litigation-asks-supreme-court-judge-1913645

The conception of PIL was a sacrosanct one. It opened the doors of the Apex court for the most vulnerable, exploited and deprived. The Supreme Court's writ jurisdiction came to cover anything and everything within the territorial limits, making it omnipresent. Directive principles were being attached to the fundamental rights were made enforceable, corruption cases were weeded out, judiciary started directing the executive and follow-up mechanisms were ensured, amicus curiae were appointed, interim compensation was awarded and compensatory jurisprudence was brought up. PIL was believed to be a good medicine for all ills. But, soon the Supreme Court was seen running the city administration through interim orders, controlling the cricket control board, and monitoring the organizing of commonwealth games. It was alleged that the Supreme Court was overpowering the executive and legislative.

The doctrine of separation of power forms the basic structure of the constitution, whereby, the power, function and responsibility of the three organs of the state are enshrined. For a liberal democracy it is well argued that the function of all the three organs must be kept separated with a very thin line of division, thereby, ensuring a check and balance mechanism. The power of judiciary is even kept bound within the separation of power doctrine coupled with precedents and various other notions of sovereignty. Any sort of intrusion in the domain of any other organ is criticized and considered illegitimate. [37]

The creeping jurisdiction of the court became suffocating for the other two organs. Various legal luminaries have opined that in order to gain legitimacy for its overarching actions, the court resorted to *'judicial populism'*. Upendra Baxi defines judicial populism as the transformation from a traditional dispute resolution agency with minimum social visibility into a liberated institution of governance with high socio-political visibility.[38]

Judicial Populism was time and again reflected in the court's judgment too. In the landmark case of Keshvananda Bharti, the court said that "The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed as that they can understand and appreciate it."[39]

Justice S.H. Kapadia in the 9th Nani Palkhiwala Memorial Trust Lecture, Mumbai stated that the Indian judiciary need to be independent from both political pressure as well as from public sentiment. He emphasized that all judgments must be delivered in consonance with law and not on majority opinion and popular interest.

With the advancement of information and communication technology, the society has become capaciously unbarred. Due to the enormous coverage of every case and the constant media trial, an aura is created which exerts pressure on the judges to decide a case in the favour of any particular group or in a distinct manner. The judges being a constituent of the society cannot remain uninfluenced or unmoved with the high voltage media coverage. The 200th Report of Law Commission of India[40] said that the whole pattern of publication of news has changed leading to have a prejudicial impact on the accused, witness, suspects, and even on judges in the general administration of justice.[41]

The then Chief Justice of India, Y. K. Sabharwal expressed grave concerns over the issue of media trial before courts pronouncing judgments, and cautioned that 'if this trend continues, there can't be any conviction. Judges are confused because the media has already given a verdict.'[42]

The remarks made by Justice S. R. Sen where he observed that India should have been declared a Hindu Rastra on the lines of Pakistan at the times of independence and urged the Prime Minster to correct the erroneous process of NRC and enacting a uniform law for the all the citizens. These statements reflect the populist impulse in the country fostered by grandiose executive judgment by virtue of article 142 of the Indian constitution which has the original intent was to do complete justice. [43]

---

[37] Cassels, J. (1989). Judicial Activism and Public Interest Litigation in India: Attempting the Impossible? The American Journal of Comparative Law, 37(3), 495-519. doi:10.2307/840090

[38] Upendra Baxi, *The Indian Supreme Court And Politics*, and *Taking Suffering Seriously: Social Action Litigation In The Supreme Court Of India.*

[39] Kesavananda Bharati Sripadagalvaru and Ors vs. State of Kerala and Anr, AIR 1973 SC 1461, para 2013.

[40] Law Commission of India, 200th Report on Trial by Media: Free Speech versus Fair Trial under Criminal Procedure Code, 1973 (Aug, 2006).

[41] Ranjan, S., Media and Judiciary: Revitalization of Democracy, Journal of the Indian Law Institute, Vol. 57, No. 3 (July-September 2015), pp. 415- 436.

[42] Ranjan, S., "Media on Trial", The Times of India, Jan. 26, 2007.

[43] Amon Rana vs. State of Meghalaya, WP(C). No. 448 of 2018

It is momentous for the judiciary, now more than ever, to remain infallible because of the grandeur repute it has attained among the common masses. The past has registered incidents of judicial activism culminating into mere adventurism thereby tarnishing the image of the entire judiciary.

The Challenges Ahead:

The review of Sabrimala decided by a five judge constitutional bench kept the case pending to for a nine judge constitutional bench with thin majority of 3:2.[44] The court here, as the regular approach with public interest litigation cases clubbed all the review cases filed. The court also attached writs filed in different subject matters like Muslim women's right to enter mosques, Parsi women's right to enter the fire temple after having married a non-Parsi, and the practice of female genital mutilation among the Dawoodi Bohra community with the current referral on Sabrimala calling it the time for the court to lay down a 'judicial policy' to 'put at rest recurring issues touching upon the rights flowing from the Article 25 & 26 of the constitution, and thereby, assuming the task of guiding the PIL through succeeding benches of the court, as Bhuwania argues.[45]

Therefore, the court on its own motion, made the review petition in Sabrimala and the other matters related to religious practices of minorities clubbed together in turn to make the case to be tried by the nine judge bench as the 'Omnibus Religious Public Interest Litigation'. The case again qualifies to be judge led petition which will reach to a monstrous proposition and will deal with all the problems associated with the society and cultural rights of the minorities on a monumental scale. The nine judge constitutional bench for Sabrimala can be considered as the judiciary's attempt to approach towards its long awaited perturb of the implementation of a uniform civil code in the country.

The very initiation i.e. setting up of a nine judge bench directly in deciding the review petition apprehends the possibility of a conflict with the previous judgment in this regard, namely, the *Shirur Mutt* judgment[46] (seven judge bench) or the *Durgah Committee* judgment[47] (five judge bench) where the court dealt with the question of determining the essential religious practices. The bench was initially setup to hear the referral questions on Sabarimala, but then went on to decide on all the cases which might be impacted by the judgment. This in itself questions the overarching jurisdiction of Supreme Court where the case for review of the referred question was extended to hear three different petition pending before smaller benches without any reference being made to the bench.[48]

The cases tagged along before the bench are completely disconnected. The most distant association they share is the ruling required on essential practices of a religion. The striking fact in this 'omnibus religious public interest litigation' is that the court here will examine the essential religious practices belonging to different religions at once. It is important for the court to ensure that the constitutional freedom of religion must be upheld irrespective of the fact of it being abhorrent to the popular sentiments. As Gary Jeffrey Jacobsohn states, *"....in India, where faith and piety are more directly inscribed in routine social patterns, judges cannot avoid the perilous jurisprudential vortex of theological controversy as conveniently as their American counterparts...more frequently than American judges, Indian jurists in religion cases are burdened by interpretative responsibilities that exceed their field of expertise.*"[49]

The secular Indian constitution guarantees freedom of religion. It has been stated position of the courts time and again that all rights are inherently equal in nature. The relation between one's beliefs and the state was laid down by the court as 'full concept and scope of religious freedom is that there are no restraints upon the free exercise of religion according to the dictates of one's conscience or upon the right freely to profess, practice and propagate religion save those imposed under the police power of the State and the other provisions of Part III of the Constitution. This means the right to worship God according to the dictates of one's conscience. *Man's relation to his God is made no concern for the State*.'[50]

---

[44] Kantaru Rajeevaru v. Indian Young Lawyers' Association, Review Petition (Civil) No. 3358/2018 in Writ Petition (Civil) No. 373/2006. https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/1060/38452_2018_1_1501_18283_Judgement_14-Nov-2019.pdf

[45] Ibid 15 pp. 90

[46] The Commissioner, Hindu Religious Endowments, Madras vs. Sri Lakshmindra Thirtha Swamiar Of Sri Shirur Mutt, 1954 AIR 282.

[47] The Durgah Committee, Ajmer vs. Syed Hussain Ali & oth., 1961 AIR 1402.

[48] https://indconlawphil.wordpress.com/2020/01/14/the-curious-continuing-afterlife-of-the-sabarimala-review/

[49] Gary Jeffrey Jacobsohn, The Wheel Of Law: India's Secularism In Comparative Constitutional Context (Princeton University Press, 2003) xii.

[50] Commissioner of Police v. Acharya Jagadishwarananda Avadhuta (2004) 12 SCC 770

Practice and profession of religion is an absolute freedom. It should be the foremost concern for the Supreme Court to reconsider the essential religious practices test that is existing since last six decades.[51]

Concluding Remarks:

In a secular and liberal polity like India, with its own conception of a secular theist, prioritizing individual autonomy, religious freedom is predicated on voluntarist conception of religious identity.[52] The constitutional courts adjudicating cases bearing on religion is expected to walk on eggshells. More so ever in the 'poly-centric'[53] cases of competing interests between the individual, state and religious group filed before the court as a PIL solely relaying on the 'citizen standing', it becomes extremely contentious.

As Justice Malhotra points out, the question of maintainability of a PIL is great concerns to the judiciary as it might result in the opening of flood gates of litigation for the court. If the practice of allowing 'citizen standing' in the PIL jurisdiction in the matters pertaining to religious affairs is continued, it will be chaotic situation across the country. It is important for the court to keep a 'principled distance' from adjudicating PIL concerning religion.[54]

The seven thesis on Public interest litigation presented by Bhuwania, namely, the marginalization of original petitioner, primacy of amicus, failure to hear all the concerned and affected parties, eschewal of standard rule of evidence, ignorance to the catastrophic outcome of the judgment, lack of adequate understanding of the problem and panacea in the name of outcome based approach, are the raising serious concerns with respect to the credibility of public interest litigation and the Supreme Court as a whole.[55] The Supreme Court has to revisit its role while ruling on the case concerning religion. It has to avail a fine-grain balancing approach when it hang in dilemma while confronting questions concerning religion.

---

[51] Bhargava, R., *Politics and Ethics of the Indian Constitution* (Oxford University Press, 2008), and *The Promise of India's secular democracy* (Oxford University Press, Delhi, 2010)

[52] Chang, Wen-Chen, Li-ann Thio, Kevin Y.L. Tan, and Jiunn-rong Yeh , Constitutionalism in Asia: Cases and Materials.(1st ed,London: Hart Publishing, 2014)782

[53] Lon L. Fuller and Kenneth I. Winston, The Forms and Limits of Adjudication, Harvard Law Review, Vol. 92, No.2 (Dec., 1978), pp. 353-40

[54] Berman, B., Bhargava, R., and Laliberté, A. (eds),Secular States and Religious Diversity (UBC Press, Vancouver, 2013),21, Rajeev Bhargava, ' India's Secular Constitution' in Sridharan, E., Hasan, Z., Sudarshan,R. (eds), 'India's Living Constitution: Ideas, Practices, Controversies, (Permanent Black 2002), 327

[55] https://indconlawphil.wordpress.com/2017/01/20/iclp-book-discussionanuj-bhuwanias-courting-the-people-i-a-radical-revision/