

Instant Triple Talaq: An Another Instance of Judicial Overreach into Mare's Nest

*Suman Choudhary

Research Scholar, Department of Sociology, University of Rajasthan, Jaipur

Abstract

The ambit of Indian judiciary has been consistently expanding since the time India opted for a constitutional democracy. The past few decades have seen a considerable surge in this direction owing to the favorable atmosphere towards judicial activism especially with regards to the cases pertaining to social justice. Instant triple talaq is the latest instance whereby judiciary has chipped away this time at Personal Laws in the guise of gender justice. Such forays of the judiciary into unknown territories is leading to all kinds of complicated situations from blaming judiciary as being the vehicle for left-leaning intellectuals/agenda to being the carrier of right wing communal agenda behind the curtain of pursuing justice while the pressing issues such as pendency of cases has been eating the trust between judiciary and people like the termites.

Keywords: Triple Talaq, Judicial Activism, Social Justice, Indian Judiciary, Personal Laws, State and Judiciary, Pendency, Power and Politics

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*Author's Correspondence

 Suman Choudhary

 Research Scholar, Department of Sociology, University of Rajasthan, Jaipur

 sheshmasuman@gmail.com

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...justice, if only we knew what it was.

-Socrates

The Issue

Triple Talaq or Talaq-e-biddat refers to the pronouncement of talaq three times by a Muslim man in one sitting to his wife resulting in an instant and irrevocable divorce. This is also called oral talaq. Indians of different religious denominations and faiths are governed by their own sets of personal laws in respect of marriage, divorce, succession, etc. Divorce cases are settled under the Divorce Act, 1869 (4 of 1869); the Parsi Marriage and Divorce Act, 1936 (3 of 1936); the Dissolution of Muslim Marriages Act, 1939 (8 of 1939); the Special Marriage Act, 1954 (43 of 1954); and the Hindu Marriage Act, 1955. Muslim family affairs in India are governed by the Muslim Personal Law (Shariat) Application Act, 1937 (often called the "Muslim Personal Law").

There are three types of divorce under Islamic law, namely, Ahsan, Hasan and Talaq-e-Biddat (triple talaq). While the former two are revocable, the last one is irrevocable. Under this law, wives cannot divorce husbands by means of triple talaq. Women have to move a court for divorcing her husband under the Muslim Personal Law (Shariat) Application Act 1937. Triple talaq is recognized but it is disapproved form of dissolution of marriage. Prophet

condemned triple talaq as “playing with the book of God while I am still alive”.¹ This irregular mode of talaq was introduced by Omeyyads in order to evade the stringency of law.² The victories in far off land by Caliph Umar led to the situation of surplus women at their disposal (capturing the women of the defeated region was the norm of the time). In order to prevent misuse of the religion by the unscrupulous husbands, Caliph Umar decreed that even repetition of the word talaq, talaq, talaq at one sitting would dissolve the marriage irrevocably. It was, however, a mere administrative measure of Caliph Umar to meet an emergency situation and not to make it a law permanently.³ The Indian judiciary has dealt with the concept of Triple Talaq as early as 1905 in the matter of *Sara Bai v. Rabia Bai* wherein the Bombay High Court recognised this form of talaq as irrevocable.⁴ The 18 April 1996 rally towards Mantralaya in Bombay marked as the first step towards protecting Muslim women’s rights was the commencement of social justice movement against triple talaq. The triple talaq judgment in 2002, the Supreme Court, in *Shamim Ara*⁵ held that talaq had to be for a reasonable cause, and preceded by attempts at reconciliation. In 2017, Shayara Bano, a 35-year-old woman, challenged the practice after getting divorced under the triple talaq custom. The Supreme Court, in a landmark 3-2 verdict, had struck down instant triple talaq.

Triple Talaq Bill

The Government first introduced the Act to Parliament in 22 August 2017. The Muslim Women (Protection of Rights on Marriage) Bill, 2017, was introduced in the Parliament by the Central government on 28 December 2017 and passed on the very same day by the Lok Sabha, or lower house of the Indian Parliament, where the ruling BJP held the majority of seats. The bill followed a 2017 Supreme Court ruling that the practice of instant triple talaq is unconstitutional and a divorce pronounced by uttering talaq three times in one sitting is void and illegal. In a major political win for the Modi government, the Rajya Sabha, or upper house of Parliament, where the ruling NDA did not have a majority, approved the bill (99–84) on 30 July 2019 after a lengthy debate. MPs from Rashtriya Janata Dal, All India Majlis-e-Ittehadul Muslimeen, Biju Janata Dal, All India Anna Dravida Munnetra Kazhagam, Indian National Congress and All India Muslim League opposed the bill. Several Opposition lawmakers called for it to be sent to a select committee for scrutiny.⁶

The Muslim Women (Protection of Rights on Marriage) Act, 2019 became law on 31 July 2019, replacing the earlier ordinance. The Bill defines talaq as talaq-e-biddat, Instant triple talaq or any other form of similar talaq pronounced by the Muslim man dissolving marriage irrevocably. It declares all such form of talaq void i.e. not enforceable by the law. The triple talaq bill makes a declaration of talaq-e-biddat in spoken, written or through SMS or WhatsApp or any other electronic chat illegal. The triple talaq bill also makes a declaration of talaq-e-biddat cognisable offence that gives a police officer powers to arrest the offender without requiring a warrant. Instant triple talaq remains cognisable offence with a maximum of three years’ imprisonment and a fine. The fine amount is decided by the magistrate. The offence will be cognisable only if information relating to the offence is given by the wife or her blood relative. The offence is non-bailable. But there is a provision that the Magistrate may grant bail to the accused. The bail may be granted only after hearing the wife and if the Magistrate is satisfied with reasonable grounds for granting bail. To check misuse of cognisable nature of the offence, the triple talaq bill makes a declaration of talaq-e-biddat only if the complaint is filed by the aggrieved woman or any of her relation by blood or marriage. A woman divorced through talaq-e-biddat is entitled to demand maintenance for her and her dependent children under the triple talaq bill. The magistrate has the power to determine the amount of subsistence allowance.

The Bench and the Verdict

The bench that gave the historic verdict in favor of Shayara Bano in 2017 by 3-2 majority, comprised of five judges. Justice U.U. Lalit (Hindu), Justice Joseph Kurien and Justice R.F. Nariman judged in favor while Justice J.S. Khehar and Justice Abdul Nazeer judged against scrapping instant triple talaq. Justices Nariman and Lalit held that, “It is

¹ Tahir Mahmood, *Muslim Law in India and Abroad*, 2nd ed. 2016, p. 132.

² Aqil Ahmad, *Mohammedan Law*, 2008, p. 171.

³ Aqil Ahmad, *Textbook of Mohammedan Law*, edited by I.A. Khan, Central Law Agency, Allahabad, 2007, p. 174-75.

⁴ ILR (1905), 30 Bombay, 537.

⁵ *Shamim Ara v. State of Uttar Pradesh and another*, AIR 2002 SC 3551, India.

⁶ Manasi Chaudhari, ‘Triple Talaq Bill: Lacunae and Recommendations’, 5(2) *NLUJ Law Review* 49, 2018.

*clear that this form of talaq (triple talaq) is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce triple talaq, is within the meaning of the expression 'laws in force' in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces triple talaq."*⁷

Chief Justice Khehar and Justice Nazeer in their dissent, upheld the practice of triple talaq. Their Lordships held that triple talaq neither violates Article 25 nor any other fundamental rights. Hence, it cannot be struck down. To arrive at this conclusion, Justice Khehar traced the history of triple talaq. His Lordship noted that triple talaq is widely practiced by the majority Muslim population in India. Due to its popularity, his Lordship held that triple talaq has the sanction and approval of the Muslims.⁸ Hence, it has to be considered an integral part of their religious practice. Even if it considered bad in theology, it is good in law. His Lordship then examined the purpose of the Shariat Act. According to him, the Shariat Act was enacted for a limited purpose- to make Shariat as the law applicable to all Muslims. Its aim was to override existing customs and usages which violated Shariat Law. The Shariat Act only establishes Shariat Law as a rule of decision. It does not codify Shariat Law. Therefore, Shariat law cannot be considered statutory law.⁹ It is an un-codified personal law.

He held that personal laws can be reviewed only against the parameters in Article 25- public order, morality, health, any other provision of part III of the Constitution. He held that triple talaq has no nexus to public order, health or morality.¹⁰ Also, it does not breach any other fundamental rights, because these are only available against state action. However, triple talaq is not a state action. Justice Khehar concluded that Triple Talaq is a personal law and has the protection of Article 25 of the Constitution. It does not warrant any interference from the judiciary. Since triple talaq has constitutional protection, Justice Khehar found it unnecessary to examine whether the Quran and Hadiths validate triple talaq. His objection to striking down triple talaq was that the judiciary is not the appropriate forum. He believed that this is the legislature's prerogative. Quoting the abolishment of social evils like sati, devdasi, and polygamy, Justice Khehar observed that none of these practices was challenged in any court of law. They were discontinued through legislative enactments.¹¹

If we summarize both sides, the arguments in favor of banning triple talaq are that it goes against the rights of equality and women's empowerment. Secondly, it propagates the dominance of men over women. Thirdly, the triple talaq has been abolished in 21 Islamic theocratic countries including Pakistan, Bangladesh, and Indonesia. There is no reason for a democratic and secular India to continue this lopsided practice. Fourthly, it goes against the constitutional principles of gender equality, secularism, right to life of dignity. Fifth, it goes against Article 14 (Right to Equality) and Article 15(1) which states that there shall be no discrimination against any citizen on the basis of gender, race, etc. and this kind of talaq is biased against the interests of women. While the arguments against banning of triple talaq are firstly, Parliament should have passed a law stating that the utterance of the words "talaq, talaq, talaq" would amount to "domestic violence" as defined in the Protection of Women from Domestic Violence Act (PWDVA), 2005. Secondly, since marriage is a civil contract, the procedures to be followed on its breakdown should also be of civil nature only. Civil redress mechanisms must ensure that Muslim women are able to negotiate for their rights both within and outside of the marriage.

⁷ The quote is taken from the article by Manasi Chaudhari, 'Triple Talaq Bill: Lacunae and Recommendations', 5(2) *NLUJ Law Review*, 49 (2018).

⁸ *Shamim Ara*, supra note 130 and 321.

⁹ The quote is taken from the article by Manasi Chaudhari, 'Triple Talaq Bill: Lacunae and Recommendations', 5(2) *NLUJ Law Review*, 49, 2018.

¹⁰ *Shamim Ara*, supra note 130 and 340.

¹¹ The quote is taken from the article by Manasi Chaudhari, 'Triple Talaq Bill: Lacunae and Recommendations', 5(2) *NLUJ Law Review*, 49, 2018.

Perturbing Perspectives

There's no concrete data, on the number of Muslim women who have been divorced this way. Moreover, no reliable data is forthcoming to show that talaq/triple talaq amongst Muslims exceeds divorce amongst other communities. Publicly available data suggest that despite their vulnerability to arbitrary divorce, the recorded divorce rate for Muslims is not the highest among all communities in India. Census 2011 recorded 13.2 lakh divorcees in India. There are 9.09 lakh female divorcees, who make up 68% of the total divorced population. Among women, the divorce rate is the highest for the Buddhist community (6.73 per 1,000 marriages), followed by Christians (5.67) and Muslims (5.63). 'Other communities' (4.91), Jains (3.04), Hindus (2.60) and Sikhs (2.56) follow. However, what sets Muslim women apart from other women is the stark disparity with the divorce rates for men of the community. While Buddhist men have a divorce rate of 3.0 per 1,000 marriages and Christian men 2.92 per 1,000, for Muslim men it is 1.59, almost three times lower than the rate for Muslim women.¹²

Interestingly, despite the high rate of divorce, the rate of couples living separately from each other is one of the lowest in the country for Muslims. The Census defines a 'separated' person as one who is married but doesn't live with their spouse for reasons other than illness, work or school, and who has not obtained a divorce. The rate of women who are separated in India stands at 8.09 for every 1,000 married women. For Muslims, it is 7.64. The highest is for Buddhists (14.46), followed by Christians (14.18), 'Others' (13.36), and Hindus (8).¹³ The All India Muslim Personal Law Board, on the other hand, points out that the divorce rate is lower for Muslims than for other communities. The Board, which analyzed numbers from family courts and Darul Qazas from 8 districts in Kerala, Maharashtra, Telangana and Andhra Pradesh found that the number of cases for Muslims was 1,307 as against 16,505 for Hindus.¹⁴ The Census 2011 data on the marital status of Indians states that among all divorced women, 68 percent are Hindus and 23.3 percent Muslims. Census 2011 further reveals that 5.5 in 1,000 Hindu couples tend to get separated, including cases of wives being abandoned by husbands. Thus, both legal divorces plus separation among Hindus amount to 7.3 per thousand women. This brings to light the fact that Hindu divorce and separation rate are much higher than that among Muslims, just 5.63 per thousand women in 2011 census, wherein separation or abandonment is not a significant factor due to easy divorce and notorious use of triple talaq.¹⁵

Thus it is not the principle but the lack of adjudication that causes the problem. Unless talaq (which is only one part of a comprehensive scheme of marriage and divorce) itself is found unacceptable, the anxiety expressed about triple talaq seems misplaced given that there is more than adequate judicial and legislative material to establish that irrespective of the number of times talaq is expressed at one sitting it will count only as one. It is humbly submitted that once that is taken as the accepted position there is no further issue about *halala* since talaq '*ahsan*' allows a fresh *nikah* in case the same couple wants to get back together. It is undoubtedly within the power and duty of the court to check the uncontrolled exercise of legislative or executive power. However in performing that role the court should not be eager to subsume the powers it seeks to check. The court should refrain from legislating afresh in the guise of commenting upon the constitutional validity of Personal Law. It is ironic that a government which pledges support to the concept of a Uniform Civil Code, instead of strengthening an existing law which secures the rights of Muslim women, is proposing to place them under a special statute meant only for Muslim women in order to gain political mileage. The Protection of Women from Domestic Violence Act was enacted in 2005 to protect the rights of all women and entitles them to claim rights during the subsistence of marriage. This statute is applicable to women across all religions. This is a uniform civil law. There is already a well-oiled machinery that is provided under this statute. Though it is not in the best shape, the challenge is to render it more receptive to the needs of women. The court should thus refrain from commenting on issues such as the institution of a Uniform Civil Code, which would fall within the ambit of the Legislature.

¹² Zeeshan Shaikh, 'No solid numbers for triple talaq, but divorce data show interesting trends', *Indian Express*, Mumbai, May 5, 2017, <https://indianexpress.com/article/explained/no-solid-numbers-for-triple-talaq-but-divorce-data-show-interesting-trends-4641016/>

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Shirin Abbas, 'Triple Talaq Bill and the Muslim Voice: Is a law necessary?'

Where and when the legislature in its wisdom seeks to introduce reforms in the civil or codified personal law it shall be open to the court to judge the validity of the same. However, it should not seek to frame legislative or executive policies in the guise of judicial pronouncements. The Bill merely makes pronouncement of 'unapproved talaq' illegal and void. However, the Bill does not clarify the status of the marriage on pronouncement of 'unapproved talaq'. It is unclear whether the marriage would subsist or dissolve. However, the Bill also provides for subsistence allowance and custody of children, which are typically enacted in divorce law.¹⁶ Herein lies the inherent contradiction in the Bill. The consequences of unapproved talaq prescribed in the Bill such as immediate arrest and imprisonment up to 3 years- do not make for continuity of a marriage. The husband's imprisonment is likely to negatively impact the family's financial stability.¹⁷ This will, in fact, create more hardship on the Muslim wife, than solve her problems.

It is also unclear what recourse the Muslim wife may take while her husband is in prison. Her husband's imprisonment will force the wife to live as a single woman while he is in jail.¹⁸ She can neither divorce him nor can she remarry. The Dissolution of Muslim Marriages Act, 1939, permits divorce upon imprisonment only if the sentence is for 7 years or more.¹⁹

Muslim marriage and divorce are both civil acts, just like marriage and divorce in other religions. However, the Bill makes unapproved talaq a criminal act. '*Mens Rea*' is a necessary ingredient of a crime because the objective of criminal law is to punish a person only if he has a guilty mind. Section 3 of the Bill does not prescribe '*Mens Rea*' for the husband pronouncing unapproved talaq. It merely states that whoever pronounces talaq...shall be punished with imprisonment.²⁰ This would mean that, even if the husband does not intend to divorce his wife, utterance of talaq thrice will be held as pronouncement of unapproved talaq.²¹ The Bill does not consider that sometimes, such utterances could be made in the heat of the moment. Under extreme anger, the husband may not realize what he is saying. It is argued that imposing strict liability for unapproved talaq is excessive and unnecessary. Further, criminalization may prevent Muslim women from reporting unapproved talaq.²² This is because her disclosure could land her husband in prison. Most Muslim women would not want this, especially due to their socio-economic backwardness.²³ This will defeat the very purpose of the Bill. Section 125 of the Criminal Procedure 1973 is legislation for social justice. It provides an adequate remedy for seeking support. A follower of any religion can apply for maintenance under this section.

After the Supreme Court verdict, uttering the words 'talaq' thrice does not dissolve the marriage, but filing criminal charges against the husband for pronouncing these words certainly will. An enraged husband will either pronounce talaq in the approved form over a period of 90 days. The dimension of 'criminality' in inter-personal relations, introduced by the proposed law, would be detrimental to Muslim women, as it leaves room for further manipulation. These provisions may have the unwanted backlash of increasing Muslim women's dependence on Sharia Courts or Jamaat as the civil court procedures are getting more complicated with the 'criminality' aspect.²⁴ Therefore, is criminalizing 'utterance' of legally nullified words an effective mechanism to secure gender justice? This stringent Bill may further aggravate a clear distinction between the procedural complications of civil law and community mechanisms for justice.²⁵

¹⁶ Editorial, 'Triple Talaq Bill: Re-examine the Bill', *The Hindu*, 2018, <http://www.thehindu.com/opinion/editorial/re-examine-the-bill/article22392015.ece>.

¹⁷ Faizan Mustafa, 'Legal Excess: The triple talaq bill is a textbook case of over-criminalization', *The Indian Express*, 2017, <http://indianexpress.com/article/opinion/columns/triple-talaq-bill-passed-parliament-lok-sabha-legal-excess-5002913/>.

¹⁸ Aravind Kurian Abraham, 'Bill Criminalizing Triple Talaq a Hasty Legislation, Exposes Gap in Indian Lawmaking', *The Wire*, December 30, 2017, <https://thewire.in/law/bill-criminalising-triple-talaq-a-hasty-legislation-exposes-gap-in-indian-lawmaking>.

¹⁹ *Dissolution of Muslim Marriages Act, 1939*, No. 8, Acts of Parliament, 1939 and 2 clause-III, India.

²⁰ *The Muslim Women (Protection of Rights on Marriage) Bill, 2017*, No. 247-C, Bills of Parliament, 2017 and 3, India.

²¹ Faizan Mustafa, 'Why Criminalizing Triple Talaq is Unnecessary Overkill', *The Wire*, December 15, 2017, <https://thewire.in/gender/why-criminalising-triple-talaq-is-unnecessary-overkill>.

²² Aravind Kurian Abraham, 'Bill Criminalizing Triple Talaq a Hasty Legislation, Exposes Gap in Indian Lawmaking', *The Wire*, December 30, 2017, <https://thewire.in/law/bill-criminalising-triple-talaq-a-hasty-legislation-exposes-gap-in-indian-lawmaking>.

²³ Ibid.

²⁴ Flavia Agnes, 'Triple Talaq – Gender Concerns and Minority Safeguards within a Communalised Polity: Can Conditional Nikahnama offer a Solution?', *NUJS Law Review*, 10:427, September, 2017, pp.435-437.

²⁵ Shirin Abbas, Triple Talaq Bill and the Muslim Voice: Is a law necessary?

With the Supreme Court declaring triple talaq to be void, it essentially means, as has been thought from times immemorial, that triple talaq pronouncement is treated as a single talaq as such but the man would still have the *iddat* period to either take it back or pronounce it again. There is no other difference. In the circumstances, it makes no sense to impose criminal liability on something that has no legal consequences. It is meaningless to compare this with other criminal acts, because in each such case there is a consequence whereas after the Supreme Court judgment there is no consequence of pronouncing talaq three times at the same time. As a matter of good public policy, criminal law must not intrude into personal lives of citizens unless there is a pressing ground for it such as physical violence. Many grounds of cruelty within a marriage are sufficient for divorce but certainly do not qualify for criminal prosecution.²⁶

The heated debates on the triple talaq issue proffer a stereotypical image of a victimized Muslim woman, discarded by her husband and in need of protectionist reforms. The fact that this problem is common to women of both communities has been ignored. Domestic violence and desertion have been made out to seem like they are unique problems faced by Muslim women alone. Her projection as a victim of an archaic system and her alienation with the religion and the society she belongs to, burdened by the yoke of oppressive personal laws seem to give her that special status, setting her apart from all her other sisters who too are victims of domestic violence.²⁷ Under the same circumstances, the punishment to a Hindu male is only one year, so it smacks of a communal agenda in the guise of gender justice.

Flavia Agnes, human rights' lawyer is of the opinion that "Demonizing Muslim men has been an important political plank for the Modi government. The Triple Talaq Bill fits in perfectly with it. The Muslim Personal law Board has risen up in arms against the Bill calling it an infringement of the personal laws of Muslims, a liberty granted to them under the Constitution of India. "Demonizing Muslim men either as jihadis (terrorists) or love jihadis, beef eaters or cow baiters, or as being 'anti-national', has been an important political plank for the Modi government. Incarcerating Muslim men for pronouncing triple talaq fits in perfectly with this master plan," she adds.²⁸

It has been presented to seem as though the Bill is the voice of Muslim women, as they themselves have asked for it. Admittedly some Muslim women have welcomed this Bill – Shayara Bano, Ishrat Jahan, Aafreen, Farah Faiz, Zakia Soman, Noor Jehan and members of their group the Bharatiya Muslim Mahila Andolan (BMMA). Of these, Jahan has recently joined BJP. Faiz, an intervener in the triple talaq case, is the president of RSS-affiliated Rashtrawadi Muslim Mahila Sangh. Bano was recently facilitated by the UP Finance Minister and earlier in Pune by BJP leaders, even while she is fighting a legal battle to get her children's custody. These have become icons for the ruling party.

Other than the case (triple talaq) itself, there are several highly pressing issues that the Indian judicial system is grappling with having very little success whatsoever. One of the biggest among them is the issue of pendency of cases while the judiciary is busy its poking its neck in unnecessary areas. There is a famous aphorism saying that 'justice delayed is justice denied', could not be more prompt while glancing at the abysmal state of judicial affairs not to mention the 'kafkaesque' procedures to get the justice. Pending court cases in India have continued to rise gradually over the past year, straining the country's already overburdened judicial system. India now has almost 4 crore pending cases spanning the Supreme Court, various high courts and the numerous district. There are above 60,000 cases pending in the Supreme Court, and above 50 lakh cases in various high courts.²⁹ The number of unresolved litigations in the country stood at 3.59 crore in November 2019.³⁰ Over 3.7 million, or around 10% of

²⁶ Ibid.

²⁷ Flavia Agnes, 'The Politics behind Criminalising Triple Talaq', *Economics and Political Weekly*, Vol. 53, Issue No. 1, 06 Jan, 2018. See also, Flavia Agnes, 'What Survivors of Domestic Violence Need from Their New Government', *Economics and Political Weekly*, Vol. 54, Issue No. 17, 27 Apr, 2019.

²⁸ Flavia Agnes, 'The Politics behind Criminalising Triple Talaq', *Economics and Political Weekly*, Vol. 53, Issue No. 1, 06 Jan, 2018.

²⁹ See Rajya Sabha Website. Also, <https://thewire.in/law/pending-court-cases>.

³⁰ <https://www.bloombergquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-charts>.

the 37.7 million cases before high courts, district and taluka courts across India, have remained pending for over a decade, according to National Judicial Data Grid (NJDG), which monitors the performance of courts nationally. They include 2.8 million cases in district and taluka courts and 920,000 before high courts. Over 660,000 cases have remained pending for over 20 years and 131,000 for more than three decades.³¹

Over 500,000, or 1.5% of cases pending at the district and taluka level, are over two-decade-old while 85,141 cases have remained undecided for over three decades. Uttar Pradesh, India's most populous state, accounts for 40% of the 2.8 million cases pending for over 10 years at district and taluka courts and for 43% of the 500,000 awaiting completion for over 20 years. As many as 40% or 34,000 out of 85,141 cases pending nationally for over 30 years are in Uttar Pradesh.³² Uttar Pradesh's Allahabad high court has the most pendency of cases among high courts. It accounts for 30%, or 276,000, of 920,000 cases pending in high courts for over 10 years. Over 55% of cases awaiting completion for 20 years in high courts are pending at the Allahabad high court. The percentage is 86 (40,374 out of 46,754) when it comes to three-decade-old cases.³³

Nearly 87.5% of all pending cases in India come from our lower courts which are the district and subordinate courts. These courts dispose of more than half the new cases filed (56%) within a year, which looks good on paper. However, such a result is mostly achieved by either dismissing cases without trial (21%), transferring them to another court (10%) or simply settling the case outside of the court (19%).³⁴ Between 2018 and the first half of 2019, the number of pending cases in high courts all across the country saw a massive jump of around 30%. There is no doubt as to why India ranks in the bottom few countries as far as enforcement of contracts goes as per World Bank data. The 245th report of 2014 of the Law Commission of India analysed the problem of backlog from various angles including arrears, delay and processes, and came up with statistics of how much needs to be done in various high courts and subordinate courts across the country. She came to the conclusion that the judge to population ratio being the main culprit for pendency.³⁵

Prospective Overtures

In a constitutional democracy, all power is by definition limited. This applies to judges as much as to legislators. What limits judges in their constitutional role as interpreters of law, are the traditions of the law, supported by a host of rules, written and unwritten: the rule that courts must be open to the public; the rule that judges must give reasons for their decisions; the principle that all judicial decisions must be appealable, at least to one other court, and in cases of national importance, on to the Supreme Court of India; and the need for deference to Parliament and the legislatures on matters of social choice and expenditure of funds. However, when judges decide issues concerning the constitutional powers of the state, attention is sure to follow. Every now and then we see editorial pages saying that judges have ventured outside their proper territory. It is improper because highly contentious issues should be decided by elected politicians, not by politically unaccountable judges. And it is impractical because judges, in their ivory towers, are ill-placed to take and respond to the pulse of the nation. Where the Constitution of India is a barrier to this expanded role of judges, then judges have been urged to "interpret" the Constitution as a set of values to be applied as judges choose, or updated as they think appropriate, rather than as a set of specific instructions to be followed. That is what "judicial activism" means³⁶, though verbal virtuosity has managed to confuse that meaning with other meanings.

³¹ Murali Krishnan, '3.7 Million Cases Pending in Courts for over 10 Years', *Hindustan Times*, New Delhi, June 29, 2020, <https://www.hindustantimes.com/india-news/3-7-million-cases-pending-in-courts-for-over-10-years-data/story-yt17P0rm5Plwe5r8ubNVyJ.html>

³² Ibid.

³³ Ibid.

³⁴ Yash Agarwal, What Does Data on Pendency of Cases in Indian Courts Tell us? *The Financial Express*, October 3, 2020, <https://www.theleaflet.in/what-does-data-on-pendency-of-cases-in-indian-courts-tell-us/#>

³⁵ Shalaka Patil, 'Why Courts and Tribunals are still Playing Catch-up with Backlog', *The Wire*, March 07, 2019, <https://thewire.in/law/courts-tribunals-backlogs-india-case-management>. See Also, Simi Rose George, 'Why Increasing the Strength of the Supreme Court Will not Help Clear the Growing Case of Backlog', August 16, 2019, <https://scroll.in/article/933407/why-increasing-the-strength-of-the-supreme-court-will-not-help-clear-the-growing-case-backlog>

³⁶ Thomas Sowell, Judicial Activism and Judicial Restraint, *The Thomas Sowell Reader*, Basic Books, New York, 2011.

In May, 2016, the then finance minister Arun Jaitley cut loose with scathing criticism of the Indian judiciary on the floor of the Rajya Sabha. He blamed the judiciary for actively encroaching on the powers of legislative and executive authorities. He claimed that “step by step, brick by brick, the edifice of India’s legislature is being destroyed”³⁷ by the judiciary. It is increasingly becoming the first port of call for solving all problems. The section of the fundamental rights of the citizens of India has become a magic wand for creatively interpreting the law as deem fit to the particular notions of a judge or his ideological inclinations towards particular issues at hand. While the creative interpretations of the text of law had started earlier, the post-Emergency phase marked a distinct turnaround in the Indian judiciary’s activism.³⁸ A series of judgements, most notably *S.P. Gupta vs President of India and others* (1981)³⁹, gave rise to a new legal instrument called public interest litigation. Rejecting the concept of political questions, this instrument allowed “public-spirited individuals seeking judicial redress” on a variety of matters beyond what would be permitted by the traditional rule of locus standi, which specifically addressed the concerns of aggrieved citizens.

Through several judgements thereafter, the judiciary has unhesitatingly shuffled into the roles of both the legislature and the executive. It assumed wide powers in matters of protection of the environment, minority, and women and oppressed and so on. The Supreme Court has also expanded its jurisdiction in undefined areas, such as its power to do “complete justice in any cause or matter pending before it.”⁴⁰ The courts have denied the claim of act of state to the government vis-a-vis the citizens and have subjected the power of pardon to judicial review.⁴¹

Of the recent forays of the judiciary are the Supreme Court decision to move Indian Premier League matches out of Maharashtra given the drought in Latur and other parts of the state by an interviewer on NDTV, transport and shipping minister Nitin Gadkari said, “If judges want to do our job, they can resign and contest elections.”⁴² Not just the drought, the courts have also evidenced their concerns about the problem of pollution in the National Capital Region. Among a spate of orders, the apex court has doubled the entry tax on trucks entering Delhi. The matter of instant triple talaq is one more into the long list of judicial intervention or rather judicial over-expansion into the unknown territory in the name of social justice with overtly expressed good intentions. But it is not the good intentions rather the consequences of a particular precedent set in order that should be the yardstick of analysis. The current and the anticipatory future costs of a particular judgement cannot be overlooked when it comes to interfering or rather playing with the historically established social mores of the society. And it is no hidden truth seeing the number of fraudulent cases, be it at the pretext of SC/ST Act, dowry, POCSO or various laws for the women in the name of gender justice. The police personnel are flooded with fake or bogus cases that the overburdened staff is finding it going really tough when it comes to criminal offences of serious magnitude.

We all understand why people should not take the law into their own hands. A civilized society would not be possible if everyone did that. For no one should taking the law into their own hands be more inexcusable than for judges, who not only know better but who have sworn to uphold the law. Yet judges at all levels, up to and including the Supreme Court, have been applauded for deciding cases on the basis of fashionable social theories, rather than the written law. Judges have made it increasingly difficult for Indian society to protect itself from anyone or anything, by creating new “rights” out of thin air and by leaning over backward for the benefit of those with anti-social behavior. In short, judges have taken the law into their own hands, instead of carrying out the laws duly passed by democratically elected representatives, reflecting the concerns of a self-governing people. The pretense that judges

³⁷ “The judiciary is shifting the balance of power”, *Livemint*, May 18, 2016.

³⁸ After the ignominious failure to protect the fundamental rights of the citizens in *ADM Jabalpur vs Shivakant Shukla*, 1976, the court believed a constitutional correction would be insufficient. So, the pursuance of constitutional legitimacy was replaced, in the words of Lavanya Rajamani and Arghya Sengupta—“by a quest for popular legitimacy”. The quote is taken from the article, “The judiciary is shifting the balance of power”, *Livemint*, May 18, 2016.

³⁹ *S. P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149; *State of Rajasthan v. Union of India*, A.I.R. 1977 S.C. 1361.

⁴⁰ India Constitution. Article-142. For cases interpreting Article 142, see *State of Punjab v. Bakshish Singh*, (1998) 8 S.C.C. 222; *Supreme Court Bar Ass'n v. Union of India*, (1998) 4 S.C.C. 409; *Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 241; *Delhi Judicial Service Ass'n v. State of Gujarat*, (1991) 4 S.C.C. 406; *Union Carbide Corp. v. Union of India*, (1991) 4 S.C.C. 584; *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S. C. 812; *Nilbati Bebra v. State of Orissa*, A.I.R. 1993 S.C. 1960; *M. C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086; *Rudul Sah v. State of Bihar*, A.I.R. 1983 S.C. 1086.

⁴¹ M. P. Singh, ‘Securing the Independence of the Judiciary-The Indian Experience’, *India International & Comparative Law Review*, Vol. 10:2.

⁴² The judiciary is shifting the balance of power, *Livemint*, May 18, 2016.

do this to uphold the Constitution is wearing so thin that growing numbers of people now see this as the fraud that it is.

For more than a century and a half after the Constitution was written, the greatest legal minds in the history of the Supreme Court failed to discover these new criminal “rights” discovered by intellectual lightweights and ideological zealots on the High Court during the past 30 years.

Justice or injustice is characteristic of a process. Just like the game of Cricket where the rules of play are the same for everybody i.e. everybody has a level playing field. But this is exactly the opposite of social justice idea carriers. Social justice or cosmic justice is not about the rules of the game. It is about putting particular segments of society in the position that they would have been in but for some undeserved misfortunes. The idea is that a third party must intervene in order to bring fairness and wield power to control outcome and over-ride rules of the game. Implicit in this is the notion that a segment of society lack things due to no fault of their own and that we (the third party, anointed intellectuals or feel good social reformer) can rectify this.

Much of the quest involves regional, religious or other categories of people needs restoring to the ‘would be’ deserving position. Yet each group tends to trail the long shadow of its own cultural history, as well as reflecting the consequences of external influences. The history of every people is a product of innumerable cross-currents, whose timing and confluence can neither be predicted beforehand nor always untangled afterwards. There is no standard history that everyone has or would have had “but for” peculiar circumstances of particular groups, whose circumstances can be “corrected” to conform to some norm. But the dangers increase exponentially when we presume to know so many things and the nature of their complex interactions. Causation and morality are two different things.⁴³

Two centuries ago, British statesman Edmund Burke warned of the dangers to any society that promotes the idea that some of its citizens are the natural prey of others.⁴⁴ When courts of law become courts of political correctness, those who suffer are not just those who lose particular cases. The whole society loses. Law exists for a reason—and that reason is not so that judges can indulge their own egos or flatter themselves that their squeamishness is a higher morality.⁴⁵

This same spirit of playing fast and loose with the law, in order to impose a social agenda or ‘make a statement’ has spread downward from the Supreme Court to other appellate courts and into the trial courts. If the principle of free-wheeling judicial law-making becomes established and accepted across the ideological spectrum, then swings of the ideological pendulum over time can unleash a judicial war of each against all, in which the fundamental concept of law itself is undermined, along with the willingness of the people to be bound by the arbitrary dictates of judges.⁴⁶ Justice Oliver Wendell Holmes exemplified this legal philosophy when he said that his role as a judge “is to see that the game is played according to the rules whether I like them or not.”⁴⁷ He also said, “The criterion of constitutionality is not whether we believe the law to be for the public good.”⁴⁸ In the meantime, the sophistry of ‘results’ oriented judges can make a mockery of the very concept of law, including the Indian Constitution.

Adam Smith, who said, “Society cannot subsist unless the laws of justice are tolerably observed.”⁴⁹ Smith asserted: Society may subsist, though not in the most comfortable state, without beneficence; but the prevalence of injustice must utterly destroy it.⁵⁰ Justice thus derived its importance from the need to preserve society—not society its *raison d’être* from the need to produce justice. Moreover, justice need only be “tolerably observed” to serve its social

⁴³ Thomas Sowell, *The Quest for Cosmic Justice*, Touchstone Publishers, New York, 2002, pp. 15-16.

⁴⁴ Thomas Sowell, ‘Power to the Parasites’, *The Thomas Sowell Reader*, Basic Books, New York, 2011.

⁴⁵ Thomas Sowell, *The Thomas Sowell Reader*, Basic Books, New York, 2011.

⁴⁶ Thomas Sowell, ‘Judicial Activism and Judicial Restraint’, *The Thomas Sowell Reader*, Basic Books, New York, 2011.

⁴⁷ Oliver Wendell Holmes, *Collected Legal Papers*, New York, Peter Smith, 1952, p. 307.

⁴⁸ *Adkins v. Children’s Hospital*, 261 U.S. 525, 1923, at 570.

⁴⁹ Adam Smith, *The Theory of Moral Sentiments*, Indianapolis, Liberty Classics, 1976, p. 169.

⁵⁰ *Ibid.*, p. 167.

function of maintaining order, and that overriding need for social order was due to the limitations of man. Holmes said, "Justice to the individual is rightly outweighed by the larger interests on the other side of the scales."⁵¹ He opposed "confounding morality with law."⁵² Law existed to preserve society. Criminal justice, for example, was primarily concerned with deterring crime, not with finely adjusting punishments to the individual. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder.⁵³ Law, as Holmes conceived it, was not the deliberate logical creation of great minds, but rather represented the evolved and codified experience of vast numbers of people. The life of the law has not been logic: it has been experience. . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.⁵⁴

To Burke, for example, jurisprudence "with all its defects, redundancies, and errors, is the collected reason of the ages."⁵⁵ To Hayek, the law "does not owe its structure to the design of either judges or legislators."⁵⁶ Adam Smith saw "the sacred and necessary law of retaliation" for murder as "antecedent to all reflections upon the utility of punishment,"⁵⁷ and natural resentment in general as "the safeguard of justice and the security of innocence."⁵⁸ With all, law evolved as an expression of the natural feelings and experiences of human beings in general, not the articulated rationality of intellectual or moral leaders. Moreover, human nature was not considered to vary fundamentally over time. Holmes assumed that "the earliest barbarian . . . had a good many of the same feelings and passions as ourselves."⁵⁹ Here too his assumptions were typical of the kind of equality conceived by the constrained vision.

The legislative and executive powers are representative of the society. Such representation is necessary to justify the government of the people which rules them by their consent. Perhaps at some point in time long ago it could have been argued that the judiciary does not rule but simply applies the law in a dispute between two private parties. But it is no more in dispute that the judiciary not only makes laws but also participates in policy making, particularly when handling matters concerning the government and its agencies. The courts, by contrast, are the interpreters of the law and the constitution. Drafting, debating, and passing laws are essentially political activities. Interpreting the laws and the constitution are essentially legal activities. The purposes of the two functions are different. The aim of the legislative role of drafting, debating and passing laws is to create the laws that will best serve the people, in the collective and negotiated wisdom of the elected legislators. The aim of the judicial role, by contrast, is to interpret the laws that our common law tradition and the legislators have put in place. The role of the judge is to maintain law and order just like the caretaker of an apartment building. Unlike politicians, judges do not have agendas. They take the laws and the cases as they find them, and apply their interpretative skills to them as the constitution requires. A quotation by Noble laureate Milton Friedman would justly conclude the issue at hand and the way forward to the prevailing conundrum. He said, "A society that puts equality in the sense of equality of outcome-ahead of freedom will end up with neither equality nor freedom. The use of force to achieve equality will destroy freedom and the force, introduced for good purposes, will end up in the hands of people who use it to promote their own interests."⁶⁰

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⁵¹ Oliver Wendell Holmes, Jr., *The Common Law*, Boston, Little, Brown and Company, 1923, p. 48.

⁵² Oliver Wendell Holmes, Jr., *Collected Legal Papers*, New York, Peter Smith, 1952, p. 179.

⁵³ Oliver Wendell Holmes, Jr., *The Common Law*, p. 48.

⁵⁴ Oliver Wendell Holmes, Jr., *The Common Law*, p. 1.

⁵⁵ Edmund Burke, *Reflections on the Revolution in France*, New York, Everyman's Library, 1967, p. 92.

⁵⁶ F. A. Hayek, *Law, Legislation and Liberty*, Chicago, University of Chicago Press, 1973), Vol. I, p. 100.

⁵⁷ Adam Smith, *The Theory of Moral Sentiments*, p. 142.

⁵⁸ *Ibid.*, p. 156.

⁵⁹ Oliver Wendell Holmes, Jr., *The Common Law*, p. 2.

⁶⁰ Milton and Rose Friedman, *Free to Choose*, New York, Harcourt Brace Jovanovich, 1980, p.148.

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