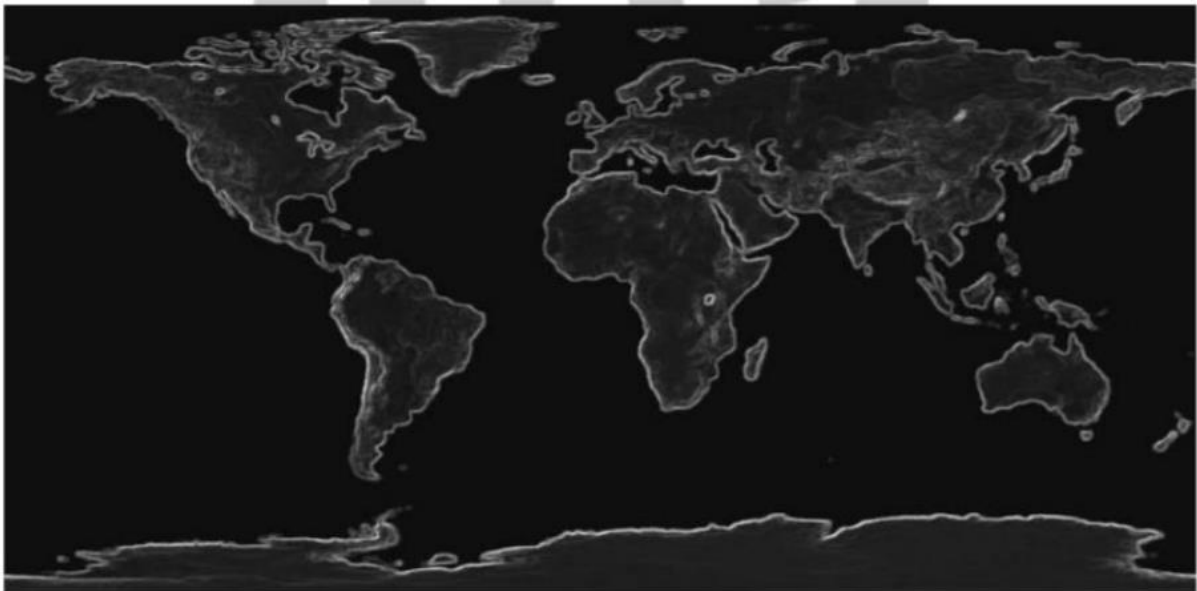




JUDICIALIZATION IN THE WAKE OF THE CORONAVIRUS PANDEMIC

The changing nature of the judiciary in India and its socio-economic consequences in the COVID Era

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Introduction

Judicialization of politics has been one of the new buzzwords emerging in India, with its impacts seeping into the grassroots of society, religion, politics and economics all the same. According to most sources, in layman's terms, Judicialization refers to the global expansion of judicial power to the extent of decision-making rights of the legislature and executive, or, at least, the conversion of existing processes into judicial processes ^[1]. This shifts the balance of power, established by our founders, towards the judicial arm of Government; an arm that is arguably the least explicitly democratic source of power. This, in India, normally refers to the Supreme Court of India where selection of judges has no direct involvement of citizens and recently we have seen the apex court of India extend beyond its purpose of maintaining balance and interpreting existing legal norms, most importantly the Constitution of India. Throughout the course of the article we will see instances of such infractions and develop a deeper understanding of the causes and impacts of Judicialization as a whole.

The root cause behind this drastic shift is fourfold and is equally applicable to most countries, or at least democracies, across the globe.

Democratisation

Preceding the expansion of judicialization all over the world, with strong correlation, was the establishment of democracy and constitutionalism. Countries, previously with inclinations towards authoritarianism or centralisation of power, have gravitated towards setting up democratic institutions for decision and policy-making, and drafting constitutions to govern said institutions and protect the basic tenets of democracy and human rights for each citizen. While this is a commendable initiative spanning decades, if not centuries, this constitutionalism and democratisation is the root behind permitting the proliferation of judicialization.

Every democratic institution is not without oversight and accountability and this responsibility is more often than not thrust into the hands of the judicial wing of Government. Apart from this oversight, their power is derived from being the lone wing to interpret and enforce the constitution in this policy-making process. Since the judiciary controls the constitutionality of legal norms established by the people-elected legislatures, this can create a bottleneck of power in the hands of individuals with little to no political or social responsibility derived from being elected by the people, for the people.

However, by design, this power is restricted to application and interpretation of existing law and does not extend to creating new legal norms and policies. While this continues to be the case in many countries, others have seen the emergence of creativity in legal judgements and its applications encroach into the creation of new norms and policies. Hence this serves as a poor argument in favour of the higher tiers of the judiciary, especially in India. A good example of the same came through the infamous Ayodhya Verdict of 2019, or *M Siddiq (D) Thr Lrs v. Mahant Suresh Das and Others* ^[8], where it can be argued that it was a form of judicialization to demand the creation of a Board of Trustees, the subsequent construction of a temple on the disputed land and assigning new land to the Sunni Waqf Board, all aspects previously absent from the ambit of the case or its subsequent appeals, rather than simply focus on the original case of allocating land to one of the contesting boards and the criminal nature of the destruction of the Babri Masjid.



Welfare/Social Laws

The emergence of more welfare-oriented states and policies have resulted in policies and laws growing in quantity not to mention controversy by polarising societies and communities negatively. Simply understood, the more laws that are established towards the welfare of the people or a particular community, or the converse of excluding rights of the people or a community, the more necessary courts become. This necessity propels the power of the judiciary in becoming an irreplaceable institution and an infallible one (in perception). Where a law exists, it is only a matter of time before a court is asked to apply and interpret its legalese.

This increasing reliance on courts to protect welfare and social rights grants more authority to the voice of the judiciary in other tangential matters while doing little to deter legislatures from not drafting such laws in the first place. Since the court is merely tasked with applying the law and not imposing penalties on policy and decision-making institutions for violating the basic tenets of the constitution and civil liberties, it is only a reactive measure and does not proactively restrict the same mistake from occurring twice. Each law or policy is granted due process to undergo judgement and interpretation which acts to grow the power of the judiciary in changing the laws of the land and does little to chide Governments for suspending such rights in the first place. Combined, they act as the second root cause for the emergence of judicialization in the world.

An example of the expansion of judicial processes was the establishment of Public Interest Litigation and the subsequent verdict in *S.P. Gupta v. Union of India and others* ^[9], which outlines that any member of society can approach the court in protecting the constitutional and civil rights of others, if they cannot do so themselves due to disability, poverty or other factors. While good-spirited and essential in protecting human rights in India, it has provided undue advantage to the Supreme Court to take up cases of stakeholders not directly approaching the court for relief. This hasn't been used as a means of abusing power or against the greater civil liberties, however, it does provide the groundwork for judicialization to take the next step in India.

Legal Cultur

The mandate of legislation and public policy extends well into social life and culture at a grassroots level. Hence, the view of law which was once considered distant or abstract has changed due to the lack of immunity of social life from regulation and legal norms. Governments have the power to legislate and enforce minor details in our social lives and use this power less than judiciously. Further, the Government has the power to avoid or ignore pressing social issues for the sake of a vote bank or simply to avoid controversy. This can result in systemic abuse of liberties and social life due to a lack of protection, if not promotion.

Legal culture exists contrary to such principles. As long as a claim is within mandate, a court cannot refrain from making a judgement or decision hence compelling courts, and by extension the Government, to take a stand on the most divisive of topics. Courts also face no political repercussions in taking progressive (or regressive) decisions due to no direct accountability to the public and the statute outlining contempt of court. While this is encouraged to be used to make the law a cultural accomplishment of a community, it also opens the doors to abuse of power.



As of recent, politicians tend to leave divisive decisions to the courts to escape the impact it has on voter banks or to gauge reactions to such policies before expanding on them. This shifts too much onus on the courts to make the right decision, without having to consider public opinion. Decisions can result in violence and protests but neither can be traced back to the courts to blame and hence the judiciary can act without the appropriate deliberation on the impacts and reactions to a judgement. While this has worked to our advantage in cases including when the Supreme Court instructed Section 377 of the Indian Penal Code to be scrapped in *Navtej Singh Johar v. Union of India* ^[10], thereby promoting LGBTQIA+ rights, it can also be mindless of public sentiment. *The Sabarimala Temple Verdict* ^[7] was one such issue where the verdict caused massive protests and divided public opinion on essential religious practices, left to be handled by the remaining arms of Government. The legislature would have been required to be mindful of the resulting sentiments being hurt and the cost at which essential religious practices can be suspended but the courts, judging a case on its merits, could rule merely on facts which can be impractical to implement at a grassroots level. This is not to say the verdict was not justified, but simply to point out the lack of consideration towards the sentiments and reaction of people of the nation in making such judgements and how harmful this characteristic can be and points to the overall cost of progress.

Fragmentation

Another noticeable feature of Governments has come to light recently – separation of powers. The emphasis placed on individual state Governments to take steps towards preventing the spread of the novel coronavirus over federal or central action towards the same has shown us just how deep the quasi-federal structure we follow runs. While it can be advantageous to separate powers as we do, since states are more likely to be aware of the ground situation and craft more personalised laws towards issues, it can increase the need for courts. Judiciaries can often have the final say in separation of powers, and resolve conflicts between seemingly contradictory laws and hence choose the path that may be ill-suited for individual states. In summary, the more fragmentation there is, more is the need for judicial intervention. For example, the very Doctrine of Separation of Powers was under question early post our independence and was finally ruled to be so in multiple cases from *Ram Jawaya v. State of Punjab* in 1955 to *I.R. Coelho v. State of Tamil Nadu* ^[11].

Fragmentation leading to judicial intervention need not always be political. We have also seen a rise in fragmentation in society based on religion, gender, caste, sexual orientation and other factors, and violence as a consequence of the former, violence which is often perceived as hate crime. While the constitution and laws prohibit such discrimination and violence, it is left to the courts to enforce said laws and keep the law of the land. This increases the scope of functioning of the judicial arm of the Government and subsequently judicialization.

Oversight and Accountability

While the aforementioned root causes help us analyse why judicialization seems common in judicial systems around the world, one of the consequences of this concept is a lack of accountability. An overarching problem that seems to follow each of the root causes is the inaction towards solving judicialization. This stems from this lack of accountability apex courts have in decision-making and judgements. Few countries, if any, have institutions to analyse and critique their apex courts which leads to a power concentration at that level. While the



courts act as a balance to the legislative and executive institutions, there is a lack of power granted to the latter or other independent institutions to balance out the judiciary.

As a result of this lack of oversight mechanism, courts often have the leeway of indifference in dealing with cases. Courts have the independence to rule on whether a case comes under its purview or if it is judicial overreach if it takes it up. However, this power is often abused and mindlessness to certain issues are empowered by the same. For example, the Supreme Court of India often partakes in policy-making or actions in a similar vein as seen in cases where the court gave detailed legislation on certain topics. In the famous Vishakha Judgement ^[12], the Supreme Court went into meticulous detail, legislating what we now know as the Vishakha Guidelines on sexual harassment in the workplace. However, on topics it has no interest in undertaking, it is often seen quoting the usual lines of how the courts cannot interfere in policy matters. This provides undue power on what the courts take up for consideration or not.

Judicialization in the wake of the Coronavirus Pandemic

Having analysed the root causes of judicialization in India and abroad, we must realise the impact of the same in how the Supreme Court of India and the lower courts have handled cases regarding the novel coronavirus pandemic. This is an unprecedented public health crisis with thousands of lives at stake with every verdict and a heavy responsibility sits on the shoulders of our apex court. The court has the primary task of testing the validity of certain actions, or the lack thereof, and their compliance with the fundamental rights and principles outlined in the Constitution of India. However, there seems to be an indifference to such rights, civil liberties and welfare policies guaranteed in the Constitution and other legal sources.

Judicial Indifference

The Supreme Court has stated on many occasions that it cannot interfere in policy matters and cannot act as a replacement for the Executive branch of Government. However, it has the unique power, along with the various High Courts, of taking up cases *Suo Motu* i.e. an inherent power to take up cases of concern on its own authority without a writ or appeal petition.

At the onset of the pandemic the Supreme Court seemed conscious of their responsibility to cover the gaps of inaction and protect public health in all reaches of society. They ordered the de-congestion of prisons across the country to prevent overcrowding and limit the spread of the virus via the judicial *suo motu* process ^[13]. However, the courts turned a blind eye to the rampant violation of welfare owed to the various migrant labourers by the Government. Despite multiple appeals and petitions to take up their issue to the apex court, it was vehemently dismissed under the same former pretext. This came despite over 300 judgements in India's legal history claiming India is a welfare state and has an accountability to protect its citizens in the wake of disasters and public health crises.

After weeks of delay and only after many retired judges and experts pushed the court to rule on the welfare of migrant workers was it taken up, and this delay proved costly in lives and livelihoods of many such citizens trapped in states and cities unknown to them. When petitions did come to hearings, status reports were requested from the Central Government which stated that lakhs of migrant workers were offered shelter and other necessities but made no mention of the other workers not named in this report. The court was ignorant to these pleas as well.



There was a perceived, if not real, bias towards the Government and each report was taken at its word with little regard to the on-ground situation and private, independent studies on such cases.

This judicial indifference stems from the factors governing judicialization as we have explored previously. The increasing reliance on the courts to hand out justice on the lines of welfare and civil liberties has led to the bottleneck of power we see now. Being the sole authority on interpreting and enforcing the freedoms of the Constitution comes with responsibility which is to be shouldered even in cases of inaction and this seems to have slipped under the radar. The second is the deviation from legal principles governing judiciaries to provide judgments and decisions in all cases. Due to the aforementioned lack of oversight and the freedom to interpret its own ambit and mandate, this has caused a secondary power concentration and creates the opportunity to evade responsibility previously only granted to the legislature, and this is a door we have seen opened in the course of the pandemic.

Odisha Vikash Parishad v. Union of India: A Case Study ^[15]

Every year, three wooden chariots of Devi Subhadra, Lord Balabhadra and Lord Jagannath are manually pulled a distance of three kilometres twice over the course of the nine-day festival at Puri (Odisha), celebrating the trinity. This year, the Jagannath Puri Rath Yatra was scheduled for the 23rd of July and the return for the 1st of August, and expected to draw 10-12 lakh pilgrims to witness the historic event. However, because of the lockdown and the potential public health crisis this could be, it was taken up to the Supreme Court to judge whether the festival must be allowed to take place or not.

A well-established and substantiated analysis of law under the Freedom of Religion outlined in Article 25 of the Indian Constitution is that this freedom to practise religion is subject to public health. This helps define and protect other rights that could be infringed by the freedom of religion such as the right to life and health outlined in Article 21 of the Indian Constitution. It is the role of the courts to rule upon such contradiction of rights and precedent was set on the stance that the freedom of religion could not infringe upon the rights of others. For example, in May, the Allahabad High Court ruled that *Azaan* (a call to prayer) would be permitted sans the use of loudspeakers without the permission of the local public administration ^[16]. Similarly, in the aforementioned Sabarimala case ^[7], gender equality was deemed higher in precedence to certain essential religious practices and allowed adult female worshippers to enter the previously male-only temple complex in Kerala.

The Supreme Court, cognizant of this principle and precedence, ruled on 18th June for the Rath Yatra to be stayed to protect the lives of others that may be affected by the mass gathering of pilgrims. This decision came after initially asking if the Yatra could take place in the absence of public participation to which the parties involved claimed it would be close to impossible to stop crowds from assembling to witness this historic moment. While initial consideration was given to proceeding without the public, the court eventually ruled to stay the festival in cognizance of public health.

However, on June 22nd, a bench headed by S.A. Bobde, Chief Justice of India, reversed this decision and allowed the procession to carry on in the absence of public participation after an affidavit from the state of Odisha claiming that it was possible to conduct the festival “in a limited way without public attendance”. The court then proceeded to micromanage the festival proceedings with strict rules to be followed including practising social distancing during the



processions, not allowing over 500 persons, who have tested negative for the virus, per chariot, and curfew and travel restrictions for the entire city of Puri.

The first problem stems from the violation of the exception to Article 25 as stated above. In guaranteeing the freedom to practise religion, it infringes on certain civil liberties granted to others in the city. Regardless of the social distancing norms, community spread of the virus seems inevitable in large gatherings such as this one and furthermore, curfews and travel restrictions affect citizens in the city and country regardless of their religious inclinations. This violates basic civil liberties otherwise guaranteed even during the public health crisis and in the previous judgement from the court.

Between the days of the initial and final verdict, little of the circumstances in the country changed sans the stance of the state to control pilgrims and public involvement. Therefore, there are no external factors which changed to favour a change in verdict and a lack of review of reports from the states is a dereliction of duty of the judiciary, tasked with conducting oversight to the other arms of Government. Hence, with the same severity of the crisis, if not increased, a decision was reversed with insufficient legal justification towards the same.

This stems from the root causes discussed above, from democratisation to oversight. The courts are meant to review the functioning of the legislature and executive and not pander to them instead. Only by accepting ground reports and independent studies can Government actions be questioned, however there is a lack of regard for such briefs. Courts were given a greater responsibility than intended by the Government in protecting civil liberties and pushing controversial and divisive legislation to the judiciary. This responsibility has caused a reliance on the judicial system to protect the rights of citizens and granting executives an out from enforcing the same. Lastly, a lack of oversight means the court can take such shifts in decisions with no penalty to them, thereby setting a dangerous precedent to petitioners to now revisit old cases under little changed contexts and a few affidavits.

The Way Forward

The steps to countering this concentration and abuse of power and the overall judicialization of politics is twofold.

Reducing Dependency

First, we must focus on reducing our dependence on the judiciary for decision-making and legislation. This is achieved by restricting the powers of the courts to interpretation and judging and not extending the latter into legislation and allowing micromanagement of policy. Governments must be urged to take more divisive decisions independently and this separation of powers must be defined with increased clarity. This also helps counter judicial overreach. For example, if the court rules against sexual harassment in the workplace in a case, it should then task the legislature with drafting guidelines for the future based on this precedent rather than burdening itself with that role.

Judicial deference to the other branches must also be curbed through stricter redressal mechanisms regarding corruption in the judicial system and a more robust system in tackling



and hearing such cases. Similarly, while Public Interest Litigation has worked to the advantage of civil liberties in recent history, it is an enabler of judicialization. Therefore, a more structured approach to PILs could be followed by first allowing the public to approach legislators and receiving a response, in a time-bound manner, and only then approaching courts. This can reduce or remove the shift of burden from the legislature to the judiciary on divisive and controversial issues by forcing the elected legislature to take a stand early in the process.

Democratisation

The irony behind a root cause being a solution is not lost on me. However, this refers to increasing transparency and oversight behind the appointment of judges at the various hierarchies of the judicial system. By introducing some element of democracy in this process, either through elections or at an advisory level, we can be better informed of the powers and inclinations of the courts and in return, the judges are more accountable to the people. By introducing reviews or tenures in the judiciary, we can hold them more accountable to their decisions and help protect the enforcement of our Constitution better.

All this being said, I am aware of the almost over-optimistic tone these solutions take. Governments often function for their own advantage and such drastic reforms to the system can do more harm than good for sitting parties. However, only through increasing discourse and awareness on judicialization can it become a serious political issue and hence actionable. Systemic change is slow but incremental as more people gain knowledge on the problem defining the situation in our country so it is more important than ever to raise our voices and partake in discourse about such problems regularly.

Similarly, I know this takes an overly critical tone towards the judiciary in India which might seem to undermine the achievements of the institution. It has been the cornerstone of protecting our rights and liberties in a majority of cases, acting to our advantage, and elevating our voices for even minor grievances and problems. However, this does not excuse the emergence of judicialization and political deference, and it becomes just as important to safeguard the system and institution by analysing its faults and critiquing the same.

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