JUDICIAL PASSIVISM IN THE PUBLIC INTEREST

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In the Abstract of this paper,[1] I indicated that '[i]n the excitement over judicial activism and the scramble for understanding the tricky question how judges can make law, we have forgotten to pay sufficient attention to the noticeable fact that judges are often deliberately not activist and use judicial passivism as a strategy to protect justice and the public interest, to achieve a higher aim than simple activism might ever reach'.

The present paper first discusses briefly why judicial activism linked to public interest litigation (Pil) has had such a difficult time in South Asia and continues to remain a resented and contested issue everywhere. I then present three cases from India in which judicial passivism is apparent and has led to a widely shared negative assessment of these particular decisions on the part of activists. Finally, we need to consider what lessons one may take from such legal evidence of judicial passivism.

Judicial activism and pil are still a 'dirty word' for many lawyers and scholars, even though it is well-established in India (Ahuja, 1997), reluctantly accepted in Pakistan (Menski et al., 2000), and now also hesitantly embraced in Bangladesh (see Ahmed, 1999 for the early beginnings). The objections to judicial activism and pil are largely based on positivist legocentric ideology, according to which judges are merely a mechanical tool to interpret the existing statutory law or to apply precedents. In this uncritical acceptance of positivism, most Bangladeshi lawyers clearly remain increasingly outdated champions of eurocentric and legocentric ideologies.[2] This is in effect extremely hard-nosed Austinian positivism.[3] If we apply it strictly, we might just as well not have any judges at all, merely better levels of legal literacy; there would then be no need for going to court to seek justice and ask for judicial guidance.

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1 This is a revised version of a paper given at the Annual British Association of South Asian Studies (BASAS) Conference 2006 at Birkbeck College, University of London, 19-21 April 2006. I thank Dr. Prakash Shah of Queen Mary, University of London, and Ridwanul Hoque for helpful comments.

2 This causes its own problems in Bangladeshi legal discourses, especially when it comes to fierce and \ highly politicised clashes between 'secularism' and 'lslamised' conceptualisations of law, but this is not the right place to engage in that particular discussion.

3 Even Austin himself would not subscribe to that, however, as Morrison (1997: 6) has shown.

However, another important judicial activity everywhere comprises of the task to fit new facts and circumstances into an existing legal framework. Here active judicial interpretation is quite necessary and central, as the judges fill gaps, deal with new situations, and expand the law. Somehow, this task is accepted, but its implications are often not thought about in sufficient detail. Even in the West, litigation itself is not necessarily favoured.[4] Through pil in South Asia and elsewhere, sharp focus has been thrown on how far judges may go if they become engaged with legal innovation. It seems that this requires a delicate balancing act, which requires further investigation.

Such research (see prominently Sathe, 2002) shows that it has been fairly easy to portray any form of judicial activism as interventionist and unacceptable on a number of grounds. Judges are often criticised as unelected office bearers with excessive powers. Generally speaking, judicial agency is treated as suspicious in terms of good governance. But what has made judges in South Asia become activist? A major reason has been precisely that deep-seated problems have arisen over good governance, which have made conscientious judges turn activist. When judges choke over their cornflakes, *a/u parantha* or local *deshi* breakfast while reading horror stories of abuses of justice in the morning paper,[5] when their appetite for dinner is spoilt by reports of how their co-citizens are maltreated, often by agents of the state, they have two options: They can shrug their shoulders and ignore such problems, or they may turn activist and try to make a difference. The doyen of Indian activist lawyers and judges, V. R. Krishna Iyer, ex-Supreme Court judge and now well over 90 years old, tells us very clearly in one of his recent autobiographical essays how, as a young lawyer, his sense of justice was outraged when he himself was illegally thrown into jail.[6] A rather personal and biographical sensitivity to blatant abuses of the law, shared with me privately by several other activist judges from all over South Asia, seems a central ingredient of much judicial activism. Thoughtful real activists (rather than the privileged jet set that occupies the moral high ground so effortlessly) have often suffered for themselves the indignities that they wish to save others from.

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4 There is evidence, however, that litigation through the courts has become the least favoured of all available methods of dispute settlement in the UK. Lord WooIf's reformative approach to civil justice a few years ago clearly favoured recourse to Alternative Dispute Resolution (ADR), which is also catching on in Bangladesh now.

5 An interesting resulting *suo motu* petition is found in *Ram Pyari vs. Union of India* AIR 1988 Raj 124.

6 Iyer (2004: 29) reports: 'These thirty days burnt into me with acid fury. The hatred of unjust detention and love of personal liberty became my inalienable conviction. I knew jail life and resolved to undo, if some day I could, the slings and arrows of outrageous jail misfortune for every free Indian'.

Despite much negative publicity over pil, we have enough evidence to find that pil in South Asia has a strong track record (Ahuja, 1997; Menski et al., 2000), and continues to be important as a tool of seeking to improve governance and accountability of those in positions of power. We know that it all started in India at a more formal level with a good dose of self-interest by lawyers, demonstrated prominently by *S.P. Gupta v. President of India,* AIR 1982 SC 149. Similarly, the

Benazir Bhutto case of 1988 in Pakistan (PLD 1988 SC 416) is primarily based on self-interest of a leading politician, skillfully exploiting public interest rhetoric. Bangladeshi lawyers should know about the early history and recent development of pil in their own jurisdiction (Ahmed, 1999).

While pil in South Asia is certainly not free from pollutions of private interest, it also has made a significant difference. In response, courts have occasionally gone as far as redrafting statutes, as in *Mary Sonia Zachariah* v. *Union of India* 1995(1) KLT 644 (FB), where the Kerala High Court basically rewrote section 10 of the seriously outdated *Indian Divorce Act* of 1869,[7]7 to allow divorce on the ground of simple cruelty for Christian women in Kerala.

So Indian courts, in particular, have sometimes been ultra-activist, but at other times they appear to have been passivist, leading to negative publicity or some kind of strategic silence that is not easily explained. It is a very difficult balance to strike, and current doctoral research in SOAS, London University by Ridwanul Hoque from Chittagong University has the challenging task of analysing this balancing act.

Below, I now present three significant Indian case studies of judicial passivism that are not just passivist, but are in fact forms of patient activism that need to be further analysed.[8]

Case 1: *Sushila Gothala v. State of Rajasthan* AIR 1995 Raj 90

This is a pil case under Article 226 of the Indian Constitution, giving direct access to a High Court for issuing various writs in cases of violations of fundamental rights. The petitioner sought a direction to the Government of Rajasthan to stop child marriages and punishment of officials for not prohibiting child marriages. The first task, to ascertain standing of the petitioner, poses no problem, as she is a citizen of the state

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7 This Act has since been amended by the *Indian Divorce (Amendment) Act* of 2001, which is a useful model for how Bangladesh and Pakistan law might update the hopelessly outdated and neglected Christian personal laws in their countries.

8 I thank Matthew Nelson for bringing up the notion of 'patience' in this context.

and thus has the right to approach the High Court of her state. This first hurdle is evidently taken in a few minutes.

The facts are said by the judge to be shocking. On Akha Teej, an annual Hindu festival prominent in Rajasthan, thousands of child marriages take place mainly in certain communities. Such underage marriages become of course, as they would under the same old colonial law in Bangladesh, the *Child Marriage Restraint Act* of 1929, legally valid marriages. The petitioner had written previous letters in this respect, but filed her petition to the High Court on 12 May 1994, a day before the festival. The case was heard on 16 May 1994, three days after the festival, when all these child marriages would have been solemnised. Indeed, the learned single Judge states (at p. 91) that if the petitioner had been really serious, she would have approached the Court earlier.

But significantly Anshuman Singh J does not just dismiss the petition and the partially unprepared petitioner. Instead, he launches into a lecture about law and its effectiveness, stating the well-known principle that no amount of legislation by itself will be sufficient to make changes in a society where a particular custom has achieved social sanction. The judge also notes that many girls married early in this manner are abandoned and deserted during childhood and he even states that there is more condemnation required for this practice than for dowry. He clearly does not underwrite child marriages as a good institution.

Next, it is observed that no social organisation has come forward to educate the people about the evils of child marriage (p. 92). But the state government, which was challenged in this petition for lack of activism, has produced evidence that it is concerned about the matter and has taken some action. The judge refers to a speech in Hindi by the Chief Minister, greeting his citizens on this auspicious occasion but also appealing to them to desist from child marriages so that spouses would be roughly *(kam se lam)* of the required legal minimum age. It is also noted that there was a radiogram by the Inspector-General Police to his staff, admonishing them to look out for child marriages, but also to avoid public unrest - another significant balancing act. In a subtle, sophisticated way, the learned Judge therefore conveys that implementation of the anti-child marriage law cannot simply be achieved with a heavy hand by the state, but has to be carried out by the people. Noting that there are 40.000 villages in Rajasthan, that child marriages occur in 80% of them and that the police cannot be everywhere and people are sometimes rebellious, all serve the same purpose - to remind everyone that eradicating this practice will take time.

Patience is required, therefore, and the learned judge concludes with sensible brief recommendations about appointment of child marriage prevention officers and higher deterrent penalties for those who arrange and solemnise child marriages. He does not make big moralising speeches or issues impatient directives, but remains realistic and 'on the ground'.

While this case has been seen as proof for the failure of pil, I think such an assessment is far too negative. Sagade (2004: 93-5) criticises the inadequate preparation of the petitioner and laments lost chances for activism:

> In fact, this would have been a good opportunity for the court to declare child marriage as violative of adolescent girls' human rights. The court could have held the government responsible for non-compliance with various international human rights conventions. It could have asked the government to present a time-bound programme for preventing the age-old custom of child marriages (p. 94).

Since the Court found that the government had taken some action, the above comments are just wishful thinking, merely impatient and unrealistic activism as against the apparent but well-considered passivism of the judge. The activist ambition was threefold: stop the menace of child marriage, enforce the provisions of the *Child Marriage Restraint Act* of 1929 (which of course remains silent about legal validity of such marriages), and punish officers who tolerate child marriages. Without saying so, the judge evidently recognised that the law itself does not outlaw child marriages, that the provisions of Indian law about minimum ages are educative recommendations rather than strictly enforceable rules that one might be used to in European legal systems, and that local society is the main culprit, not certain state officers. The judge therefore appears to exonerate the government, which allegedly has done its bit, and blames society. Despite being passivist in this respect, however, he also acts as an activist because he firmly expresses his views against child marriage and recommends more stringent implementation of the law. This is some kind of patient activism in the form of judicial passivism, as one also sees in other cases.

Case 2: *Ahmedabad Women Action Group v. Union of India* AIR 1997 SC 3614

The so-called A WAG case is a typical pil case under Article 32 of the Indian Constitution, giving access directly to the Supreme Court by claiming violation of a fundamental constitutional right. The case constitutes a number of petitions, but basically seeks a declaration from the Supreme Court that the personal law system of India is unconstitutional, a huge claim indeed. The first set of pleas, in brier, concerns the petition to declare the Muslim personal law of India unconstitutional under Articles 14 and 15 of the Constitution because it permits polygamy, allows unilateral

and instant *talaq* divorce, and is gender discriminatory when it comes to inheritance.[9] How anyone can dare argue this will surprise some readers in Bangladesh, but these petitions are not only directed against Muslim personal law, as further issues are raised in the same way about Hindu personal law and Christian personal laws, challenging their constitutionality and evident gender discrimination. The whole system of personal laws is under challenge in this petition.

This is clearly again impatient activism at work. This case must be understood as a follow-up of the infamous case of *Sarla Mudgal vs. Union of India,* AIR 1995 SC 1531, in which an activist Supreme Court (through Kuldeep Singh J, as he then was) had vigorously asked for implementation of India's Uniform Civil Code and had criticised Muslim law for tolerating polygamy and thereby causing havoc in Indian society. The Court in the A WAG case, composed of a Muslim Chief Justice (Ahmadi CJ), Mrs. Sujata Manohar J and Venkataswamy J, immediately states that the petitions are refused, that this trick has been tried before, and that the remedy lies somewhere else, not in knocking at the doors of the court. But rather than leaving the matter there and simply throwing the case out, the passivist court engages actively with the ongoing discussions about the litigated issues.

So we learn in particular about the following: Legal uniformity cannot be achieved in one go (p. 3615), the process of law reform happens in stages (p. 3616) and law reforms can be territorial or community-wise (p. 3616). The court should act in self- restraint (another word for passivism?) and judge-made amendments should normally be avoided (p. 3620), perhaps a mild rebuke for the activist Kerala High Court that rewrote section 10 of the *Indian Divorce Act* 1869 in *Mary Sonia Zachariah* in 1995 (see above).

Significantly, in response to the additional claim that the *Muslim Women (protection of Rights on Divorce) Act* of 1986 (see below) should also be declared unconstitutional, the Court held that the decision on the 1986 Act was pending and that there was no case for multiplying proceedings (p. 3620). Thus, these three judges firmly declined to entertain any of these writ petitions and the decision has been criticised as conservative and lacking activism. No relief whatsoever was given by the Court. Again, however, I doubt that the way in which this case was handled is simply evidence of retrograde judicial

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9 Further, the petitioners sought a declaration that taking a second wife should be treated as cruelty under the *Dissolution of Muslim Marriages Act* of 1939, and that the *Muslim Women (Protection of Rights on Divorce) Act* 1986 should be held unconstitutional.

inactivity. Rather it is another telling and quite sophisticated sample of deliberate judicial passivism.

Case 3: *Danial Latifi vs. Union of India* 2001 [7] SCC 740

This is a follow-up of the famous Shah Bano case, *Mohd Ahmed Khan vs. Shah Bano,* AIR 1985 SC 945, which granted maintenance rights till death or remarriage to a divorced Muslim wife in India. Danial Latifi, a prominent lawyer and activist (now deceased) gave his name to a large set of petitions seeking to declare the *Muslim Women (Protection of Rights on Divorce) Act* of 1986 unconstitutional because it violated the secular principle of legal uniformity suggested by Article 44 of the Indian Constitution. The petitions also sought to challenge the presumed position under the 1986 Act that a Muslim ex-wife should not be entitled to more than three months of post-divorce maintenance.

These cases were filed in 1986 and the Supreme Court then sat on this case for 15 years, which is in itself massive evidence of deliberate judicial passivism. One cannot assume the familiar, long decried inefficiency of the Indian judicial system, because delays in decision making are becoming a matter of history in many parts of India now due to remarkable changes in how the courts operate at all levels.

The story of the *Donial Latifi* case has been told in insightful detail by Flavia Agnes (2001) in a little, very important study, which I only obtained recently. Agnes appears to have been the only leading Indian law specialist to realise that the 1986 Act had not done what everybody claims it did, namely it had not taken away the rights to post-divorce maintenance given by the Indian Supreme Court in the *Shah Bano* case. While '[i]n the public mind the new Act continued to hold a negative connotation' (Agnes, 2001: 9), the Act, as interpreted by various High Courts, 'seems to provide a better safeguard than the earlier anti vagrancy provision under S. 125 Cr.PC' (Agnes, 2001: 32). This position was firmly established by a large number of Indian High Court decisions (see Menski, 2001 and 2006a) and gradually hesitantly endorsed by the Supreme Court. The study by Agnes, which was written before the *Danial Latifi* case was decided, contains further 'concrete proof that the Act provides the scope for more innovative safeguards' (Agnes, 2001: 72).

However, the Indian Supreme Court in *Danial Latifi,* having finally heard the matter in late 2000, did not make a decision until two weeks after the world-shaking events of 9/11, which is of course extremely remarkable. Nobody noticed this and I, too, was unaware about this link until Flavia Agnes told me about this recently. In light of such globally relevant events, it appears

that the Indian Supreme Court was first of all deliberately passive in not deciding this case for 15 years, and then further deliberately passivist in not holding what the activist petitioners had wanted it to decree. The Supreme Court in *Danial Latifi* held that the 1986 Act was perfectly constitutional, that there was nothing unconstitutional about having a personal law system, and that all divorced Muslim wives in India were, as in the *Shah Bano* case, entitled to appropriate maintenance and provision from the ex-husband until their death or remarriage. The message therefore also was that the 1986 Act had not in fact nullified the *Shah Bano* case, as so many writers and especially journalists allover the world have claimed, and continue to claim.

As a result, activists have been deeply disappointed about this outcome, and nobody has been discussing the *Danial Latifi* case in detail - it received an extremely cold reception. It certainly constitutes a resounding defeat for positivist modernism in today's Indian law. The case, although it is so important, has been almost totally ignored by the press and is assessed as conservative and evidence of judicial inactivity. Nothing, it seems to me, could be further from the truth. As we now know, the large court in *Danial Latifi* were probably petrified of the risk of further Muslim riots (which occurred after the *Shah Bono* case) and chose the opportune moment of the post 9/11 climate to spring a surprise on Indian Muslims.

However, that is only half the story that needs to be told here. Just two days later (seeing that there were no riots after the decision in *Danial Latifi),* the Indian Parliament rapidly produced two further surprises,[10] this time targeting all Indian men who divorce their wives, removing the 500 Rupees limit for maintenance petitions under section 125 of the *Criminal Procedure Code* of 1973. This skilful legislative measure brought the provisions of s. 125 and of the 1986 Act back into harmony. India therefore has now again a uniform law on post-divorce maintenance without knowing it (Menski, 2006a), fooled by the co-existence of s. 125 and the 1986 Act, which both have rather similar effects. Readers in Bangladesh will not fail to note that this is an excellent example of how a well-considered and helpful rule from within the historical depth of Muslim personal law can eventually become the law of the land for all citizens of a country with what is contentiously called a 'secular' legal system.

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[10] The second surprise was the passing of the *Indian Divorce (Amendment) Act* of2001, which activists had been asking for over decades without any success. Suddenly, and almost without any discussion, Parliament was putting a further domino stone or tile in the Indian mosaic of the uniformised and now largely harmonised personal law system of India, possibly a useful model for Bangladesh.

So within a couple of days, decade-long judicial passivism and legislative passivism combined to create a totally new legal scenario, which can hardly be described as anti-women and conservative. This is radical pro-women social welfare policy in the public interest, but within an overarching patriarchal setting, which remains a key element of India's emerging model of the post-modem welfare state (Menski, 2001, 2003).

Hence, since late September 2001, we know a little better that the Indian higher judiciary and the central legislature of India continue to act in a complex, interlinked manner to protect and promote what is perceived as the public interest. Both are far from conservative and passivist, it now appears. Acting in this patient, almost stoic, but well-considered manner, courts and legislatures may well from time to time be hiding behind apparently passivist strategies to achieve activist outcomes in the public interest. It may at times appear as evidence of judicial passivism, as in the cases discussed here. But it covered evidently a higher or deeper agenda of reform that could not be put on the table in the usual adversarial and positivist manner, either just decreeing or outlawing something within the complex legal field, or simply giving in to impatient activist rhetoric and agenda. Passivist judges, at least in the cases discussed here, apparently know what they are doing, they are not just anti-activist, they are either immensely patient, or they are waiting for the right moment to become active.

The evidence produced here also demonstrates that the Indian State has its own agenda of public interest, not uninfluenced by social activism and civil society. The Indian State appears to rely less on simple top-down legislation but insists on, and is highly proficient in using, a careful, step-by-step process of negotiation of what Amartya Sen (2006) has recently called 'diverse diversities'. Other people may speak of a preference for evolution rather than revolution. I have begun to portray this need for constant legal negotiation recently in triangular form as a complex interplay of different competing types of law that have to be negotiated at all times (Menski, 2006b).

Judicial passivism, it seems then, is not necessarily a passivist, conservative and anti-reformist approach, but rather evidence of a considered and mature attitude of calm deliberation about what is feasible in the particular circumstances and situation of a case. This is what intelligent and thinking South Asian judges may do so very well when they remain outwardly passive while searching for a realistic solution to the complex problems thrown up by human lives. While this is not unique to South Asia, the continuing stark differences in the living standards of

South Asian people, whether we speak of 'a growing divide',[11] or a 'hope gap',[12] compel South Asian judges to remain cautiously activist and, thus, in many situations, outwardly passivist.

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[11] This was the phrase used by Professor Zoya Hasan of the Centre for Political Studies, Jawaharlal Nehru University, India in the Nirman Foundation Lecture held during the BASAS Conference 2006, titled 'Bridging the growing divide? The Congress and Indian democracy'

[12] This concept was used in the Keynote Address, titled 'The greatest challenge is the hope gap', of Rania Al Abdullah, Queen of Jordan, as reported in *India Today Internationa/27* March 2006, pp. 12-13. She argued that '[t]he greatest challenge we face today is the hope gap that from birth separates people into those who have a future and those who do not' (p. 13).