

# ANTICORRUPTION BY FIAT: STRUCTURAL INJUNCTIONS AND PUBLIC INTEREST LITIGATION IN THE SUPREME COURT OF INDIA

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*Structural injunctions – where the court issues a series of interim orders over a period of time in an effort to stimulate institutional reform – are about as old in India as public interest litigation (PIL) itself. They are now virtually the default remedy in PILs at the Supreme Court. This article focuses on how structural injunctions were deployed in two politically salient cases during the United Progressive Alliance government between 2004 and 2014 – the “2G Spectrum” case and the “Coalgate” case. A close examination of these cases reveals a broader picture not just about the state of PIL and the use of structural injunctions, but also about the perception and popular legitimacy of the Supreme Court in India’s constitutional democracy.*

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## I. INTRODUCTION

It has been nearly forty years since the Supreme Court of India first embraced public interest litigation ('PIL').<sup>1</sup> What began as a novel procedural innovation is now simply part of the rough and tumble of political life in India. PIL is no longer novel – either in the sense that it is undertheorized (as one scholar puts it, there are “more American law review articles on PIL than any other area of Indian law”),<sup>2</sup> or in the sense that it is rare (PILs occupy a generous chunk of time in every superior court in the country).

The breadth and range of issues that arise in PILs remain vast. The Supreme Court has itself considered matters as diverse as cleanliness in private housing colonies,<sup>3</sup> the use of red beacon lights on cars,<sup>4</sup> the singing of the national anthem in movie halls,<sup>5</sup> the use of loudspeakers in public places,<sup>6</sup> control over automobile emissions,<sup>7</sup> compulsory use of seatbelts,<sup>8</sup> preventing the ragging of college freshmen,<sup>9</sup> demolition of parking lots, collection, storage and supply of blood in blood banks,<sup>10</sup> steps to prevent industrial pollution,<sup>11</sup> and the imposition of a ban on the sale of fireworks.<sup>12</sup> Yet, the Supreme Court's docket on PIL also includes cases of monumental political significance that shape the course of elections and impact upon the fortunes of major political parties.

This is best captured by two cases in the run up to the general elections of 2014. In the first, the '2G Spectrum' case, the Supreme Court cancelled over a hundred licenses to operators of mobile telecommunications spectrum on the basis that they were unlawful and resulted in large losses of revenue. In the second, the 'Coalgate' case, the Court struck down government allocations of coal blocks through close to a twenty-year period, on the basis that they were arbitrary and also resulted in losses to the public exchequer.

This paper will focus on the 2G Spectrum and Coalgate cases, as the most politically salient PILs during the tenure of the United Progressive Alliance ('UPA') government under Prime Minister Manmohan Singh between 2004

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<sup>1</sup> *Hussainara Khatoon (5) v. State of Bihar*, (1980) 1 SCC 108; AIR 1979 SC 1377. For an earlier example from the High Courts, see *Piloo Mody v. State of Maharashtra*, Miscellaneous Petition No. 519 of 1974, decided on 22-10-1975 (UR) cited in S. Divan, *Public Interest Litigation*, in *The Oxford Handbook on the Indian Constitution*, 662 (S. Choudhry et al eds., 2016).

<sup>2</sup> A. Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India*, 1 (2017).

<sup>3</sup> *B.L. Wadehra v. Union of India*, (1996) 2 SCC 594.

<sup>4</sup> *Abhay Singh v. State of U.P.*, (2013) 15 SCC 435; AIR 2014 SC 427.

<sup>5</sup> *Shyam Narayan Chouksey v. Union of India*, (2017) 1 SCC 421.

<sup>6</sup> *Noise Pollution (5), In re*, (2005) 5 SCC 733.

<sup>7</sup> *State of T.N. v. K. Balu*, (2017) 2 SCC 281.

<sup>8</sup> *S. Rajasekaran v. Union of India*, (2014) 6 SCC 36.

<sup>9</sup> *Vishwa Jagriti Mission v. Central Govt.*, (2001) 6 SCC 577.

<sup>10</sup> *Common Cause v. Union of India*, (1996) 1 SCC 753.

<sup>11</sup> *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1999 SC 1502.

<sup>12</sup> *Arjun Gopal v. Union of India*, (2017) 1 SCC 412.

and 2014. In each of these cases, the Court used the structural injunction, better known in India as the writ of ‘continuing *mandamus*’, to direct investigations and monitor compliance with its orders. While these cases are distinctive on their own facts, they reveal a broader picture not just about the state of PIL and the use of structural injunctions in India but also about the perception and popular legitimacy of the Supreme Court in India’s constitutional democracy.

## II. THE RISE OF PUBLIC INTEREST LITIGATION AND STRUCTURAL INJUNCTIONS IN INDIA

While the history leading up to the Supreme Court’s move towards public interest litigation is familiar to scholars of comparative constitutional law, it is worth briefly recounting some of its aspects. In the years after the Constitution was enacted, when Congress governments led by Prime Minister Nehru disagreed with judicial interpretations of the Constitution, a frequent political response was to amend the Constitution to nullify the decision. When the Supreme Court considered questions involving the scope and limits of Parliament’s power to amend the Constitution in the context of these frequent amendments, it initially relied on the text to uphold an unlimited amending power.<sup>13</sup>

The first serious confrontation between the judiciary and the executive took place in the early years of Prime Minister Indira Gandhi’s tenure. In the *Golak Nath* case,<sup>14</sup> the Supreme Court reversed its position on the scope of the amending power, holding that the Parliament lacked the authority to amend fundamental rights under the Constitution. However, as Indira Gandhi consolidated her power and amendments to the Constitution became rife, the Supreme Court made a strategic retreat by upholding Parliament’s power to amend any part of the Constitution, subject to the caveat that it could not alter, abrogate or destroy its ‘basic structure’ or essential features.<sup>15</sup>

The watershed moment, at least so far as PIL goes, was to arrive a few years after the Supreme Court’s ‘basic structure’ decision. In June 1975, the Allahabad High Court set aside the election of Indira Gandhi on the basis that she was guilty of corrupt practices. The day after the Supreme Court awarded only a conditional (rather than a complete) stay on the decision of the Allahabad High Court, the Congress Government instructed the President to declare a state of national emergency. Fundamental rights were suspended, the press was muzzled, and opposition leaders were placed under preventive detention *en masse*. Even as several High Courts held that the right to file *habeas corpus* petitions could not

<sup>13</sup> *Sankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458; *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

<sup>14</sup> *C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

<sup>15</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; AIR 1973 SC 1461.

be abridged notwithstanding the emergency, the Supreme Court caved in. By a majority of four to one, it held that no citizen had a right to file a writ of *habeas corpus* or to challenge an order of detention during the emergency, even if the detention was clearly in bad faith.<sup>16</sup>

The Supreme Court's decision during the emergency was widely condemned. After the Congress Party was defeated in the early elections called in 1977, the Court commenced efforts to restore its authority and legitimacy. It interpreted the right to life under Article 21 of the Constitution to include substantive due process guarantees.<sup>17</sup> Perhaps the most significant post-emergency maneuver was to relax the rules of standing and the procedure for filing writ petitions claiming violations of fundamental rights. The Supreme Court increasingly began to explain that, in the context of fundamental rights violations, the ends (good substantive outcomes) would justify the means (a departure from procedural rules). In a widely cited passage, Justice Bhagwati (the pioneer of the PIL movement) said that procedure was merely a "handmaiden of justice", and that the cause of justice "could never be allowed to be thwarted by any procedural technicalities".<sup>18</sup>

The Court began accepting postcards and letters from 'public-spirited citizens', addressing public grievances and human rights violations. PIL heralded two new forms of standing. 'Representative standing' enabled a member of the public to seek redress for a wrong committed to a person or determinate class of persons who, "by reason of poverty, helplessness or disability or socially or economically disadvantaged position",<sup>19</sup> were unable to approach the Court personally. One scholar described this as a "modified form of class action", in which a non-class member represented the class.<sup>20</sup> On the other hand, 'citizen standing' enabled any member of the public, acting in good faith and with sufficient interest,<sup>21</sup> to file a writ petition based on a public grievance in their own right.

PIL involved several departures from conventional bilateral, adversarial litigation. As Shyam Divan explains,

Since the litigation is not strictly adversarial, the scope of the controversy is flexible. Parties and officials may be joined as the litigation unfolds; and new and unexpected issues may emerge to dominate the case. The orientation of the case is prospective.

<sup>16</sup> *ADM, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521: AIR 1976 SC 1207.

<sup>17</sup> *Satwant Singh Sawhney v. D. Ramarathnam*, AIR 1967 SC 1836; *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248: AIR 1970 SC 564; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248: AIR 1978 SC 597.

<sup>18</sup> *S.P. Gupta v. Union of India*, 1981 Supp SCC 87: AIR 1982 SC 149.

<sup>19</sup> *S.P. Gupta v. Union of India*, 1981 Supp SCC 87: AIR 1982 SC 149.

<sup>20</sup> C.D. Cunningham, *Public Interest Litigation in the Indian Supreme Court: A Study in the Light of American Experience*, 29 J. INDIAN L. INST. 494, 500 (1997).

<sup>21</sup> *S.P. Gupta v. Union of India*, 1981 Supp SCC 87: AIR 1982 SC 149.

The petitioner seeks to prevent an egregious state of affairs or an illegitimate policy from continuing into the future.<sup>22</sup>

It became common for the Court to appoint fact-finding commissions of experts to collate and consider evidence raised by the issues under consideration in the PIL. The Court also appointed senior advocates as *amicus curiae*, to “assist it in addressing the issue in legal terms, sifting out the relevant facts from the documents and pleadings, and in helping sharpen the focus of discussion”.<sup>23</sup>

The PIL movement, however, did not just involve a revolution in process. The Supreme Court also considerably expanded its toolbox of remedies in cases involving violations of fundamental rights. In what is widely acknowledged as the very first PIL in the Supreme Court, the Court addressed, in a unique way, the problem of prisoners awaiting trial remaining in custody for extended periods. Rather than pronouncing the final judgment, it issued a series of interim orders directing the State government to take steps towards resolving the crisis. The case was left pending for several years as the Court monitored compliance with its orders.

The phrase ‘structural injunctions’ was conceived to capture precisely this – a court issuing a series of interim orders over a period of time in an effort to stimulate institutional reform. To borrow the words of Owen Fiss, they are “the formal medium through which the judiciary seeks to reorganise ongoing bureaucratic organisations so as to bring them into conformity with the Constitution”.<sup>24</sup> Structural injunctions were frequently deployed in the school desegregation cases following the US Supreme Court’s seminal decision in *Brown v. Board of Education*.<sup>25</sup> They have also been deployed in Canada and South Africa with a view of securing “effective and meaningful constitutional remedies”.<sup>26</sup> As the Constitutional Court of South Africa observed, effective relief for the breach of fundamental rights “may include both the issuing of a mandamus and the exercise of supervisory jurisdiction”.<sup>27</sup>

In this way, a court issuing structural injunctions performs a different exercise to one that issues a writ of *mandamus* or an ordinary injunction. The court monitors compliance with its decisions and issues further orders as the case develops. Rather than filing fresh proceedings when the court’s orders are not observed,

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<sup>22</sup> S. Divan, *Public Interest Litigation*, in *The Oxford Handbook on the Indian Constitution*, 664 (S. Choudhry et al eds., 2016).

<sup>23</sup> S. Muralidhar, *India*, in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, 110 (M. Langford ed., 2008).

<sup>24</sup> O. Fiss, *The Allure of Individualism*, 78 *IOWA L. REV.* 967 (1993).

<sup>25</sup> *Brown v. Board of Education*, 1954 SCC OnLine US SC 44: 98 L Ed 873: 347 US 483 (1954).

<sup>26</sup> K. Roach and G. Budlender, *Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?*, 122 *SOUTH AFRICAN L. J.* 325, 351 (2005).

<sup>27</sup> *Minister of Health v. Treatment Action Campaign (No. 2)*, 2002 SCC OnLine ZACC 17: 2002 ZACC 15, para 106.

applicants can simply report non-compliance in the course of existing proceedings. Conversely, the public authority to whom an injunction is issued can seek clarifications from the court during the course of the same proceedings.

The Supreme Court of India referred to these remedies as the ‘writ of continuing *mandamus*’, a modification of the writ of *mandamus*, under which public bodies or officials are ordered to perform a legal duty. There are now several high-profile continuing *mandamus* cases that have been pending for decades and have consistently occupied a portion of the Court’s docket. Amongst the most prominent is the ‘right to food’ case, in which the Supreme Court has enforced the State’s positive duties to provide food through continuous court orders and monitoring, dating back to 2001.<sup>28</sup> Not far behind is the forests case, in which the Supreme Court began governing forest policy across the country through interim orders to this day. This included orders suspending tree felling in forests, auctioning illegally felled timber and investigating complaints of illegal mining operations.<sup>29</sup> A specially designated ‘forest bench’ (later christened the ‘green bench’) continues to hear this case on Friday afternoons.

How have the Supreme Court’s priorities changed since the emergence of PIL? At one level, this is a misleading question to ask – the Court does not hear PILs (or indeed, any cases) collectively. The norm is for PILs to be heard by benches of two or three (from amongst a maximum of thirty-one) judges. The best indication of a trend, however, comes from a case decided by the Supreme Court itself. In 2010, the Court identified 3 phases in the development of public interest litigation.<sup>30</sup> In the first phase, the Court passed orders and directions to protect the fundamental rights of marginalised groups, who were unable (due to poverty, illiteracy or ignorance) to petition the Court. In the second phase, the Court’s emphasis was on cases involving the protection of the environment, wildlife and forests. In the third phase, the Court shifted focus to maintaining “probity, transparency and integrity in governance”.<sup>31</sup>

If the prisoners<sup>32</sup> and bonded laborers<sup>33</sup> cases were exemplars of the first phase, as the forests case<sup>34</sup> was of the second phase, then the *Vineet Narain*

<sup>28</sup> S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, 130 (2008).

<sup>29</sup> A. Rosencraz *et al*, *The Godavarman Case: The Indian Supreme Court’s Breach of Constitutional Boundaries in Managing India’s Forests*, 37(1) ENV’T L. REP. (2007).

<sup>30</sup> *State of Uttaranchal v. Balwant Singh Chauhal*, (2010) 3 SCC 402: AIR 2010 SC 2550.

<sup>31</sup> *State of Uttaranchal v. Balwant Singh Chauhal*, (2010) 3 SCC 402: AIR 2010 SC 2550. *See also* Surya Deva’s slightly different three-phase classification: Surya Deva, *Public Interest Litigation in India: A Critical Review*, 28(1) CIV. JUST. Q. 19 (2009).

<sup>32</sup> *Hussainara Khatoon (5) v. State of Bihar*, (1980) 1 SCC 108: AIR 1979 SC 1377: The Court issued detailed directions on the release of prisoners awaiting trial.

<sup>33</sup> *Bandhua Mukti Morcha v. Union of India*, (2000) 9 SCC 322: The Court issued orders and directions to improve the working conditions of bonded labourers.

<sup>34</sup> *T.N. Godavarman Thirumulpad v. Union of India*, (1997) 2 SCC 267: (1996) 9 SCR 982.

case<sup>35</sup> was surely the exemplar of the third phase. An investigative journalist, together with NGOs and others, filed a PIL on the basis that the Central Bureau of Investigation ('CBI') had evidence indicating a nexus between criminals, politicians and public officials. Through the writ of continuing *mandamus*, the Court passed interim orders making far-reaching structural reforms, including insulating the director of the CBI from political interference, making the CBI accountable to the Central Vigilance Commission ('CVC'),<sup>36</sup> and directing the government to transform the CVC into a statutory body.<sup>37</sup>

It is worth emphasising that, while there has been some discontinuity in the nature of cases on the Supreme Court's PIL docket, there have been considerable continuities in the process and methods adopted by the Court over the years. First, the structural injunction continues to be deployed as it was in the first PIL case and is, in fact, virtually the default option in all PIL cases. Second, the Court has continued to expand the inquisitorial methods adopted since the inception of PIL, relying on fact finding commissions, expert committees, and special investigative teams to report back to it on a regular basis. Third, the Court continues to rely on prominent senior advocates as *amicus curiae*, who often step into the shoes of the PIL petitioner to drive the case forward.

### III. ANTICORRUPTION, ONE ORDER AT A TIME – THE 2G SPECTRUM AND COALGATE CASES

#### A. Background

The 2G Spectrum and Coalgate cases represent the high-water mark of the governance phase of PIL in India. Both of these cases were similar, in that they involved claims that the government had failed to observe fair and transparent procedures in the allotment of natural resources. In both, the PIL petitioners claimed a violation of the fundamental right to equality based on the government's infractions.

The 2G Spectrum case raised questions concerning the basis upon which the UPA government allocated licenses to 'second generation' telecommunications spectrum. In 2007, the government invited applications for licenses to this spectrum, with a stipulated cut-off date. Shortly after the close of the application

<sup>35</sup> *Vineet Narain v. Union of India*, (1998) 1 SCC 226: Finding that the CBI had failed to investigate allegations of public corruption, the Court issued directions seeking to eliminate Central Government supervision of the CBI and placed it under the supervision of the CVC instead. The Supreme Court based its decision on the constitutional obligation of the judiciary to fill the vacuum created by executive inaction.

<sup>36</sup> The CVC is an autonomous institution that monitors all vigilance activity under the rubric of the Central Government.

<sup>37</sup> See A. Sengupta, *Anti-Corruption Litigation in the Supreme Court of India*, Open Society Justice Initiative (2016).

window, the government, on the basis of the large volume of applications received, decided to retrospectively bring forward the cut-off date to one week prior to the original cut-off date. This meant that a large number of applicants that were within time, based on the original deadline, were no longer within time under the revised early cut-off date. This first led to a petition in the Delhi High Court claiming that the government lacked the authority to shift the deadline in the absence of overriding considerations of public interest.<sup>38</sup> In addition, the government chose to issue licenses on a ‘first come, first served’ basis, a policy that many commentators considered would privilege “speed, clout and foreknowledge”,<sup>39</sup> rather than based on the competitiveness of the bid.

Simultaneously, murmurs began to grow that the allocation of 2G spectrum was procured through undue influence or corruption, and that a network of participants, including the Minister for Telecommunications, may have been involved. The Comptroller and Auditor General published a report indicating that the Prime Minister’s Office had recommended against adopting a first come, first served policy, a recommendation which was ignored by the Ministry.<sup>40</sup> It also came to light that licenses may have been awarded to applicants that did not meet the prescribed eligibility criteria.

This set the stage for a major investigation into allegations of corruption. Initially, the Delhi High Court rejected a PIL by the Centre for Public Interest Litigation (a prominent PIL organization) requesting a court-monitored investigation into the allegations. However, the Supreme Court agreed to do so on the basis that, while the CBI’s investigation was moving in the right direction, it was unable to demonstrate any ‘tangible progress’. The unsurprising consequence was that the writ of continuing *mandamus* was now afoot. The Court issued a series of directions, including that: (i) the CBI should conduct a thorough investigation into irregularities in the process of granting licenses, (ii) the CBI should not be “influenced by any functionary, agency or instrumentality of the State and irrespective of the position, rank or status of the person to be investigated”, (iii) the CBI should focus, in particular, on the loss to the public exchequer and the corresponding windfall to the licensees, (iv) the CBI should investigate why large public sector banks approved loans to applicants that enabled them to obtain licenses, (v) the CBI and income tax authorities should coordinate and share information to ensure a streamlined investigation.

The Coalgate case involved allegations of corruption that were no less significant. Equally important was the role of the CAG, which was investigating the

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<sup>38</sup> *S. Tel Ltd. v. Union of India*, 2009 SCC Online Del 1708.

<sup>39</sup> Paranjay Guha Thakurta & Akshat Kaushal, *Underbelly of the Great Indian Telecom Revolution*, 45 *ECON. & POL. WKLY.* 49, 51 (2010).

<sup>40</sup> Performance Audit Report on the Issue of Licenses and Allocation of 2G Spectrum by the Department of Telecommunications, available at [http://cag.gov.in/sites/default/files/audit\\_report\\_files/Union\\_Performance\\_Civil\\_Allocation\\_2G\\_Spectrum\\_19\\_2010.pdf](http://cag.gov.in/sites/default/files/audit_report_files/Union_Performance_Civil_Allocation_2G_Spectrum_19_2010.pdf).



allocation of coal blocks, across several states, to private companies. The CAG found that while the government had the authority to allocate coal blocks through a process of competitive bidding, it chose not to do so and allotted them on an *ad hoc* basis instead.<sup>41</sup> As further details emerged, the narrative surrounding this case also shifted from one of imprudence to corruption, as complaints were filed against private companies on the basis that they overstated their net worth, failed to disclose prior allocations and hoarded (rather than developed) the coal blocks they were allocated. Complaints of fraud, criminal conspiracy and corruption were also filed against government officials associated with the allotment.

The PIL related to the Coalgate case was filed, to use the Supreme Court's historic terminology, by a 'public-spirited citizen', lawyer M.L. Sharma,<sup>42</sup> citing a violation of the right to equality. That the Court would use the structural injunction in this case was again clear from the offing, as it framed a series of questions for the Central Government and fixed a date for the next hearing. These questions included the guidelines framed by the Central government for the allocation of coal blocks, the process adopted for the allocation of coal blocks, what the objectives of the allocation policy were and whether they were achieved, why the process of competitive bidding was not undertaken, and what action (if any) was taken against those companies that failed to observe the terms of the allotment.

## B. Control disguised as monitoring

Prominent features of these cases became clearer as hearings continued week after week. To begin with, both PILs were filed on the basis of a putative violation of the fundamental right to equality under Article 14 of the Constitution. While this proved a suitable hook for the Court's jurisdiction, it was seldom made clear or articulated precisely how the violation arose or what the extent of the violation was. A prominent critic of PIL, while perhaps overstating the case, put it as follows, "[i]n reality, no fundamental rights of individuals or any legal issues are at all involved in such cases. The Court is only moved for better governance and administration".<sup>43</sup> This also reflected in the Court's ultimate decision in the 2G Spectrum case. The Court decided that an auction was the *only* method

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<sup>41</sup> For a detailed consideration of the CAG report, see Paranjay Guha Thakurta and Akshat Kaushal, *Underbelly of the Great Indian Telecom Revolution*, 45 *ECON. & POL. WKLY.* 49, 51 (2010); Ronojoy Sen, *Going Beyond Mere Accounting: The Changing Role of India's Auditor General*, 72 *J. ASIAN STUD.* 801 (2013).

<sup>42</sup> The other petitioner(s) in this case were Common Cause, a society established by a consumer protection activist; T.S.R. Subramanian (former Cabinet Secretary to the Government of India); N. Gopalaswami (former Chief Election Commissioner), Ramaswamy Iyer (former Secretary to the Government of India), Admiral (Retd.) R.H. Tahiliani (Mentor to Transparency International), Admiral (Retd.) L. Ramdas (former Chief of Naval Staff), Sushil Tripathi (former Secretary to the Government of India).

<sup>43</sup> T.R. Andhyarujina, *Disturbing Trends in Judicial Activism*, *The Hindu*, Aug. 6, 2012, <http://www.thehindu.com/opinion/lead/Disturbing-trends-in-judicial-activism/article12680891.ece>.

by which resources could be allocated amongst private players. As one scholar explains, it effectively transformed what should have been a non-discrimination enquiry into a public interest enquiry and substituted “its own vision of the public interest for that of the State’s”.<sup>44</sup> Instead of indicating to the government that its chosen method was impermissible and inviting it to try again, it foreclosed the menu of options by presenting a *fait accompli*.

The idea that an investigation must be ‘court-monitored’ seems to suggest that the Court would not involve itself with the minutiae of the investigative process. In fact, the Supreme Court cited this very justification in its leading decision on court-monitored investigations, holding that the rationale for such investigations was to ensure that government agencies carried out their public duty to investigate offences, particularly when they lacked incentives to investigate their political masters. In these circumstances, the Court would do “what it permissibly could” to keep an eye on the progress of the investigation, while ensuring that it “did not direct or channel those investigations or in any other manner prejudice the right of those who might be accused to a full and fair trial”.<sup>45</sup> Structural injunctions in such cases were meant to address the “inertia of the investigating agencies”, leaving the merits of the accusations against individuals untouched. As the Court recognized in another case,<sup>46</sup>

...the jurisdiction of the Court to issue a writ of continuous mandamus is only to see that proper investigation is carried out. Once the Court satisfies itself that a proper investigation has been carried out, it would not venture to take over the functions of the Magistrate or pass any order which would interfere with his judicial functions.

The way in which these cases unfolded reflects that the Supreme Court went far beyond an oversight role. In the Coalgate case, the CBI was ordered not to change the composition of the thirty to forty-member team investigating the case without the Court’s permission.<sup>47</sup> This meant that the Court examined the CVs of proposed candidates for the investigating team and issued orders every time any officer was to be added to (or removed from) the team.<sup>48</sup> Its permission was also required every time the investigating team sought the assistance of special counsel or prosecutors.<sup>49</sup> Officers of the CBI, who sought repatriation to their home state, could no longer apply for repatriation through the ordinary administrative

<sup>44</sup> G. Bhatia, *Competence and Legitimacy*, BLOG.MYLAW.NET, July 3, 2014, <http://blog.mylaw.net/competence-and-legitimacy-the-supreme-courts-opinions-on-the-distribution-of-natural-resources/>.

<sup>45</sup> *Vineet Narain v. Union of India*, (1998) 1 SCC 226.

<sup>46</sup> *M.C. Mehta v. Union of India*, (2008) 1 SCC 407, 412, para 9.

<sup>47</sup> *Manohar Lal Sharma v. Principal Secy.*, (2014) 2 SCC 703.

<sup>48</sup> See, for example, (2014) 3 SCC 166, (2014) 3 SCC 170, (2017) 11 SCC 731, 761. In (2014) 3 SCC 166, the Supreme Court held that that CBI could remove an officer from the team in “exceptional circumstances”, so long as the Court was later informed about this development.

<sup>49</sup> *Manohar Lal Sharma v. Principal Secy.*, (2014) 3 SCC 170.

process. Instead, they would require the express permission of the Supreme Court to do so.<sup>50</sup> When the CBI sought the removal of Deputy Inspectors General from the team, on the basis of allegations of corruption, the Court refused, emphasising the need for continuity in the investigation.

In some instances, the Supreme Court's role went even beyond approving candidates proposed by the government. For instance, the Court led the discussion surrounding who should be appointed as special public prosecutor to conduct the prosecutions of those accused of illegalities associated with the allocation of coal blocks. It eventually picked a lawyer from Chandigarh for the task, directing the government to provide access to the full set of evidence and material procured during the investigation.<sup>51</sup>

One of the hearings in November 2013 particularly highlighted the tensions associated with the Court's assumption of a controlling, rather than a monitoring role.<sup>52</sup> The Court considered the question of whether a lawyer should be appointed as *amicus curiae* to analyse the CBI's investigative reports. This proposal was vehemently opposed by the CBI, on the basis that sharing its reports with "an outsider" would "take the colour of supervising the probe and not just monitoring it".<sup>53</sup> After initially disagreeing with the CBI, that appointing *amicus curiae* would overstep the mark, the Court eventually dropped the idea.

The Court's role in controlling the investigation in Coalgate did not go unnoticed. A Parliamentary Standing Committee criticised the Court's control over CBI investigations, observing that the Court was engaging in a "pre-emptive and colourable exercise of power".<sup>54</sup> When making these remarks, the Coalgate case was likely at the top of its mind. The Court is also conscious of its all-pervasive role in the investigative process, for it frequently uses the phrases 'court-monitored' and 'court-directed' investigations interchangeably.<sup>55</sup> The Court straddled the divide between monitoring and direction, frequently micro-managing the work of the investigative agencies.

The same can be said of the Supreme Court's role in the 2G Spectrum case. The Court directed the CBI to investigate specific people, including certain

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<sup>50</sup> *Officers probing Coalgate not to be repatriated: SC to CBI*, The Indian Express, July 8, 2014, <http://indianexpress.com/article/india/india-others/officers-probing-coalgate-not-to-be-repatriated-sc-to-cbi>.

<sup>51</sup> *Manohar Lal Sharma v. Principal Secy.*, (2015) 13 SCC 35.

<sup>52</sup> *Manohar Lal Sharma v. Principal Secy.*, (2014) 3 SCC 172.

<sup>53</sup> U. Anand, *CBI opposes move to appoint amicus*, The Indian Express, Nov. 27, 2013, <http://archive.indianexpress.com/news/cbi-opposes-move-to-appoint-amicus/1199942/>.

<sup>54</sup> Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 77<sup>th</sup> REP., *The Lokpal and Lokayuktas and Other Related Law (Amendment) Bill, 2014* (December, 2015), <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Personnel,%20PublicGrievances,%20Law%20and%20Justice/77.pdf>.

<sup>55</sup> *Manohar Lal Sharma v. Principal Secy.*, (2014) 2 SCC 709.

companies on particular charges.<sup>56</sup> It ordered the CBI to produce the charge sheet against the Minister for Telecommunications before it was filed.<sup>57</sup> In one instance, the CBI had conducted an investigation and cleared a minister of charges, but the Supreme Court remained unconvinced and ordered production of the documents upon which the decision was based. In 2012, it directed senior officers of three government agencies to meet fortnightly to discuss the progress of the investigation.<sup>58</sup> It is revealing that, in both 2G Spectrum and Coalgate, the Court departed from the *Vineet Narain* precedent, in which it was held that court monitoring should cease as soon as a charge sheet is filed, in order to enable the 'ordinary processes of law' to take over and avoid influencing the trial.

In both cases, the Court monitored and directed investigations into allegations of corruption through hundreds of interim orders. In each, the Court held at least monthly, often weekly, and sometimes even bi-weekly, hearings to consider the progress of the investigations. In spite of being just one amongst the thousands of cases filed at the Supreme Court, 2G Spectrum and Coalgate consumed a disproportionately large share of the Court's time. Both cases have now been (and continue to remain) pending in the Supreme Court for over five years.

### C. Orders without reasons

The orders passed by the Supreme Court in these cases are vast in the breadth of issues that they encompass. They include orders seeking explanations about why confidential reports were leaked, approving changes of personnel in investigative teams, extending time to file affidavits and counter-affidavits, compelling the government to share information and documents with investigative authorities, requiring investigative authorities to file status reports promptly, appointing a special team to investigate the abuse of authority committed by the CBI Director, and deciding petitions for joint trials of defendants. However, what these orders offer in breadth, they lack in depth. As is common in continuing *mandamus* cases, an overwhelming majority of the Court's orders are short, written in perfunctory directive style, and offer very little by way of reasons or explanation. These orders are, in fact, a feature of (rather than an aberration from) the Court's jurisprudence on structural injunctions.

Consider some examples from these cases. At one of the early hearings of the 2G Spectrum case in the Supreme Court, the Court was asked to monitor the investigation.<sup>59</sup> It agreed, issuing a number of directions on how the CBI should

<sup>56</sup> *Centre for Public Interest Litigation v. Union of India*, Civil Appeal No. 10660 of 2010, order dated 25-11-2010 (SC); *Centre for Public Interest Litigation v. Union of India*, (2013) 8 SCC 18.

<sup>57</sup> *Centre for Public Interest Litigation v. Union of India*, (2013) 8 SCC 18.

<sup>58</sup> *Centre for Public Interest Litigation v. Union of India*, (2015) 17 SCC 249, 276 (1).

<sup>59</sup> *Centre for Public Interest Litigation v. Union of India*, (2011) 1 SCC 560: (2011) 1 SCC (Cri) 463. While the petitioner had asked the Court to constitute a special investigation team, it declined to do so.

investigate the case. These directions ranged from the general (the agencies should “continue their investigation without any hindrance or interference by anyone”) to the specific (the “CBI shall...now register a case and conduct thorough investigation with emphasis on the loss caused to the public exchequer”).<sup>60</sup> The Court offered very little by way of justification for its decision to monitor the investigation in the first place, apart from a bland statement that a “comprehensive and coordinated investigation... without any hindrance” was necessary. Since not all criminal investigations (or all investigations into allegations of corruption, for that matter) are court-monitored, the Court might have been expected to set out the standard for justifying judicial supervision, and why this case met that standard.

Ironically, in what are portrayed as the Court’s attempts at promoting transparency in the functioning of public institutions, the Court self-consciously chose not to provide reasons for its decisions on some occasions. In November 2014, allegations were made that the Director of the CBI was seeking to protect some of the defendants in the 2G Spectrum and Coalgate cases, and had held private meetings with them. The Court took the unprecedented step of restraining the Director from partaking in the investigation of both cases, with the investigation being led by the next senior most officer of the investigation team. However, with the view of protecting the “sanctity and the fair name” of the CBI, the Court “deliberately” chose not to issue any “elaborate reasons” for its decision.<sup>61</sup> Instead, it issued the following clarification in its order: “Let it not be said by anybody, that we have not given any reasons while disposing of the application. We are reiterating this statement only to prevent flak from several quarters of the society...elaborate reasons are not necessary, only to protect the reputation of the CBI from being tarnished.”<sup>62</sup>

The failure to give reasons reflects particularly in the Supreme Court’s most important order in the 2G Spectrum case, cancelling entirely the award of one hundred and twenty-two licenses to spectrum by the UPA government on the basis that an auction was the only constitutionally legitimate method of allocation of natural resources. In the Court’s opinion, if the “method of auction had been adopted for grant of licence [sic] which could be the only rational transparent method for distribution of national wealth, the nation would have been enriched...”.<sup>63</sup> This decision, as with almost all other orders by the Court in PIL cases such as 2G Spectrum and Coalgate, was made by a panel of two judges – effectively less than 7% of the collective composition of the thirty-one-member Court.<sup>64</sup>

<sup>60</sup> *Centre for Public Interest Litigation v. Union of India*, (2011) 1 SCC 560: (2011) 1 SCC (Cri) 463.

<sup>61</sup> *Centre for Public Interest Litigation v. Union of India*, (2015) 2 SCC 362.

<sup>62</sup> *Centre for Public Interest Litigation v. Union of India*, (2015) 2 SCC 362.

<sup>63</sup> *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1.

<sup>64</sup> For the association between panel sizes and the strength of the Court’s reasoning, see C. Chandrachud, *Constitutional Interpretation*, The Oxford Handbook on the Indian Constitution (2016). To be sure, at least, one (and sometimes more) vacancy at the Supreme Court is left unfilled, making the actual figure slightly higher.

The decision caused shockwaves amongst those in government and in the corporate world alike. The government grew concerned that any natural resources allocated through methods other than an auction would now be vulnerable to challenge, while investors were worried that licenses awarded by the government “could be considered null and void because of a judgment two or three years down the line”.<sup>65</sup> The UPA government filed a presidential reference at the Supreme Court, seeking several clarifications arising from the decision in the 2G Spectrum case. The questions posed by the government included what the permissible scope for judicial interference was in policy-based decisions, whether the Court is obliged to take account of investments made under the existing policy, and the prickly question of “whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances” was by the conduct of auctions.<sup>66</sup> As is constitutionally required,<sup>67</sup> a five-judge panel was established to consider these questions.

Upon considering these questions at length, the five-judge panel retreated from the decision made in the 2G Spectrum PIL in significant ways. The Court held that revenue maximisation through auctions was amongst the preferable, but not the only, method of allocating natural resources. Not all methods apart from auctions could be held unconstitutional, for that would overlook the fact that valuation is a function of a number of variables.<sup>68</sup> As one scholar put it upon a close analysis of the two decisions, the decision in the 2G Spectrum PIL had the “widest material impact with no substantive legal reasons” and the presidential reference “restores substantive reasons but with no impact on 2G-spectrum allocation”. The presidential reference, thus, exposed the absence of legal reasoning in the PIL and “erase[d]” the PIL from the legal record”.<sup>69</sup>

What this suggests is that the writ of continuing *mandamus* effectively enables the Supreme Court to abdicate its duty to provide reasons for its decisions. The Court’s decision-making in these cases sits uncomfortably with well-accepted notions of judicial legitimacy. Reason is the ‘modern language of law in a liberal state’<sup>70</sup> and judges are duty-bound to give reasons for their decisions. As Rawls argues, the judiciary is the only branch of government that, on its face, is a ‘creature’ of public reason and ‘that reason alone’.<sup>71</sup> Of course, this does not mean that the Court’s decisions in these cases are illegitimate. Rather, in cases such as 2G Spectrum and Coalgate, the Supreme Courts relies upon factors other than public reasons to justify and legitimise its decisions.

<sup>65</sup> V. Bajaj, *Indian Court Cancels Contentious Wireless*, The New York Times, Feb. 2, 2012, <http://www.nytimes.com/2012/02/03/business/global/india-supreme-court-cancels-2g-licenses.html>.

<sup>66</sup> *Natural Resources Allocation, In re*, Special Reference 1 of 2012, (2012) 10 SCC 1.

<sup>67</sup> Art. 145, Constitution of India.

<sup>68</sup> *Natural Resources Allocation, In re*, Special Reference 1 of 2012, (2012) 10 SCC 1, para 147.

<sup>69</sup> S. Krishnaswamy, *Supreme Court on 2G: Signal and Noise*, 642 SEMINAR 29, (2013).

<sup>70</sup> Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 18 (2001).

<sup>71</sup> J. Rawls, *Political Liberalism*, 235 (2005).

#### IV. POPULISM AND LEGITIMACY: FROM THE “FORBES LIST” TO “CAGED PARROTS”

##### A. Press reports of the Court’s observations

The public legitimacy of the Supreme Court’s role in these cases came neither from its reasoning nor from its process or methods. Instead, it came from the outcomes sought to be achieved by the Court – outcomes which are particularly appealing to its target audience. The narrative that the court develops in both of these cases is that it performs the role of an anti-corruption crusader, whose methods are justified by the laudable objectives pursued. As one scholar puts it, the Court’s orders were riddled with the “suspicion of crony capitalism”.<sup>72</sup>

The way in which these cases were reported and, thereby, consumed by the public plays a significant role in sustaining this narrative of the Supreme Court as an anti-corruption crusader. The hearings in 2G Spectrum and Coalgate involved a high level of dialogue and engagement between the parties and the Court. This meant that although orders were brief, perfunctory and often uninteresting to the public, the Court’s oral remarks or ‘observations’ (as they are now commonly described) during the hearing were far more appealing and suited to public consumption. Indeed, in many instances where substantive reasons are missing from a particular order of the Court, the Court’s observations are ‘all that we have’ to understand why the Court decided as it did.

The proceedings in the Supreme Court are neither audio or video recorded nor officially transcribed. Instead, the Court’s observations were reported in newspapers, television channels and blogs by reporters witnessing proceedings. Several news reporters were present in Court at every hearing of the 2G Spectrum and Coalgate case, awaiting a single headline-grabbing observation from the Court that would be telecast on repeat and discussed threadbare. Both of these cases turned out to be amongst the most widely reported cases of their time.<sup>73</sup> By way of example, the 2G Spectrum case was cited no less than four hundred and seventy-seven times in a single English newspaper in 1 year.<sup>74</sup>

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<sup>72</sup> P.B. Mehta, *The Indian Supreme Court and the Art of Democratic Positioning*, Unstable Constitutionalism, 258 (M. Tushnet & M. Khosla eds., 2005). See also P.G. Thakurta, *Coalgate and India’s crony capitalism*, Aug. 28, 2014 <http://www.rediff.com/business/column/column-coalgate-and-indias-crony-capitalism/20140828.htm>.

<sup>73</sup> Dhavan for e.g., says the following of the 2G Spectrum case: “...the case was headlines material. The judges kept it in the headlines with their orders and, perforce, comments. The press and public lapped it up. It was a national drama and will remain so”. Rajeev Dhavan, SC verdict on 2G displays a new brand of activism, Mail India Online, 6 February 2012, <http://www.dailymail.co.uk/indiahome/indianews/article-2096848/Supreme-Court-verdict-2G-displays-new-brand-activism.html#ixzz501yGTMLA>.

<sup>74</sup> C. Chandrachud, *Measuring Constitutional Case Salience in the Indian Supreme Court*, Journal of Indian Law and Society, 6, 42 (2016).

Therefore, press reports of the Supreme Court's observations in these cases, a source often otherwise neglected in the scholarship, played a significant role in the narrative developed by the Court. In one of the Friday hearings in the 2G Spectrum case, the Supreme Court strongly reprimanded the CBI for the lack of progress in the investigation, and the UPA Government for permitting the Minister for Telecommunications to remain in office. As a judge on the bench observed, "You have not done anything till [sic] now. The same minister is continuing [in office]. Is this the way a government should function?"<sup>75</sup> This question reached no less than Prime Minister Manmohan Singh on Saturday, whose immediate reaction was that he had not yet had a chance to consider the Court's observations and would look into them. The CBI was censured in the same hearing for allowing a year to go by without much progress, "Your investigation has been slipshod. You have been dragging your feet."<sup>76</sup>

In a hearing, a few months later, the judges rebuked the CBI for tardiness in prosecuting the affluent businessmen who likely benefitted from the corruption of public authorities. One of the judges made the following remarks, "We have a large number of people who think themselves to be the law. You must catch all of them. Merely because a person is in Forbes list of millionaires or billionaires does not matter. Remember, there is no parallel to this case."<sup>77</sup> These remarks were widely reported in India and across the world.<sup>78</sup> The Court then proceeded to instruct the CBI to show the Court the charge sheet before filing it. Citizens looked on as the Court strongly reprimanded the government and investigative agencies.

Later, as the 'Radia tapes', tapped telephone conversations (including discussions over the selection of the Minister for Telecommunications) between a lobbyist and politicians, emerged, the judges again expressed their concerns over the unsacred associations between the industry and public officials. One of the judges was quoted as saying that these conversations were "indicative of the deep-rooted malice by private enterprises in connivance with government officials and others". The Court then directed the CBI to investigate some of the issues arising out of the conversations.

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<sup>75</sup> Krishnadas Rajagopal, *SC slams 2G probe: Minister still there is this how govt. works*, Indian Express (30 October 2010) available at <http://indianexpress.com/article/news-archive/web/sc-slams-2g-probe-minister-still-there-is-this-how-govt-works/>.

<sup>76</sup> Krishnadas Rajagopal, *SC slams 2G probe: Minister still there is this how govt. works*, Indian Express (30 October 2010) available at <http://indianexpress.com/article/news-archive/web/sc-slams-2g-probe-minister-still-there-is-this-how-govt-works/>.

<sup>77</sup> Alistair Scrutton, *Fresh headaches for PM as corruption scam rages*, Reuters, available at <https://www.reuters.com/article/idINIndia-54819120110211>; Krishnadas Rajagopal, *Show us 2G chargesheet before filing, SC tells CBI*, Indian Express, available at <http://indianexpress.com/article/news-archive/web/show-us-2g-chargesheet-before-filing-sc-tells-cbi/>; *2G Spectrum case: Anil Ambani quizzed by PAC*, The Economic Times, available at <https://m.economictimes.com/2g-spectrum-case-anil-ambani-quizzed-by-pac/articleshow/7874140.cms>.

<sup>78</sup> *Ibid.*



The hearings in the Coalgate case were met with similar press coverage of judicial observations. The Supreme Court's observations demonstrate equally the frustrations of the middle class with crony capitalism and corruption in public institutions. At one of the hearings in April 2013, it transpired that the CBI's status report, which was meant to be submitted to the Court in a sealed envelope, had been shared with members of the government. The Court termed the developments as "very disturbing" and considered the CBI's suppression of this fact as particularly serious.<sup>79</sup> The judges then observed that their first task in this case would be "to liberate [the] CBI from political interference" and restore its independence.<sup>80</sup>

Soon thereafter, it was reported to the Court that the draft affidavit to be filed by the Director of the CBI was shared with the Law Minister, together with government counsel and other government officials. One of the judges reacting to this development described the CBI as a "caged parrot" speaking in "its master's voice". This observation, made in a "packed New Delhi courtroom" sitting in "rapt silence",<sup>81</sup> became a thing of legend. It was a clarion call for anti-corruption activists, journalists and opposition leaders alike campaigning for independent investigations. If there ever was a moment demonstrating that the Court had struck a chord with the middle classes, who were embittered by the corrupt practices of politicians and industrialists, this was it.

In another hearing, the Court admonished the government for deliberately withholding documents from the CBI in order to stall the investigation. The Chief Justice observed that the CBI was "struggling" as it had no documents in its possession and noted sarcastically that he was sorry to hear that the Union of India did "not have basic documents".<sup>82</sup> The observations in this vein continued as the case progressed, with judges noting on separate occasions that coal was "not for charity"<sup>83</sup> and that the CBI would need to "pick up some speed" as it was "driving in the first gear".<sup>84</sup>

<sup>79</sup> *Manohar Lal Sharma case*, (2014) 2 SCC 706; see also *Coalgate: You don't need to take instructions from political masters, SC to CBI*, The Indian Express, April 30, 2013, <http://indianexpress.com/article/india/latest-news/coalgate-you-dont-need-to-take-instructions-from-political-masters-sc-to-cbi/>.

<sup>80</sup> *Manohar Lal Sharma case*, (2014) 2 SCC 706; *Coalgate: You don't need to take instructions from political masters, SC to CBI*, The Indian Express, April 30, 2013, <http://indianexpress.com/article/india/latest-news/coalgate-you-dont-need-to-take-instructions-from-political-masters-sc-to-cbi/>.

<sup>81</sup> R. Colvin & S. Bhattacharjya, *A "caged parrot" – Supreme Court describes CBI*, Reuters, May 10, 2013, <https://in.reuters.com/article/cbi-supreme-court-parrot-coal/a-caged-parrot-supreme-court-describes-cbiidINDEE94901W20130510>.

<sup>82</sup> *Coal Scam: Supreme Court slams Centre for not aiding CBI*, The Indian Express, July 10, 2013, <http://indianexpress.com/article/india/latest-news/coal-scam-supreme-court-slams-centre-for-not-aiding-cbi/>.

<sup>83</sup> *Coal is not for charity says Supreme Court*, The Indian Express, Sep. 19, 2013, <http://indianexpress.com/article/news-archive/web/coal-is-not-for-charity-says-supreme-court/>.

<sup>84</sup> *Supreme Court pulls up CBI, Government over slow probe in Coalgate case*, The Indian Express, April 8, 2014, <http://indianexpress.com/article/india/india-others/supreme-court-pulls-up-cbi-government-over-slow-probe-in-coalgate-case/>.

## B. The Court's self-imposed jurisdictional limits

As the Supreme Court continued to entrench its position as an institution for accountability, it performed a “balancing act”,<sup>85</sup> ensuring that it only extended itself to the point which would be palatable to the political community at large. As Pratap Bhanu Mehta puts it, the Court is “both providing enough to be a locus of hope but also restraining itself in its actual effects so as not to provoke a backlash”.<sup>86</sup> As the hearings in the 2G Spectrum case progressed, it became clear that the malaise reached no less than the Prime Minister's Office. This is because the Prime Minister had advised the Telecom Minister to revise the policy of allocating spectrum. This recommendation went unheeded and the Prime Minister did nothing about it.

The principle of collective cabinet responsibility demanded that not just the Telecom Minister but also the Prime Minister be held to account for the manner in which spectrum was allocated. The Supreme Court came down heavily on the Telecom Minister, effectively compelling his resignation and monitoring proceedings as he was prosecuted for corruption. However, the Court stopped short of extending the same treatment to the Prime Minister, even though he was aware that a dubious policy was being pursued. Moreover, when the Prime Minister was questioned for not granting sanction to prosecute the Telecom Minister, the Court allowed the buck to stop at the Prime Minister's advisors. It held that had the Prime Minister been properly advised, “he would have surely taken [an] appropriate decision and would not have allowed the matter to linger for a period of more than one year”.<sup>87</sup> In this way, the Court decided that in its quest for holding government officials to account while maintaining its legitimacy, it would only go so far and no further.

## C. Public perception and the Court's popularity

The Supreme Court's role in the 2G Spectrum and Coalgate cases resulted in a dramatic increase in its popularity. The reasons for this were manifold. There was a familiar narrative of institutional failure. While most other institutions around

<sup>85</sup> Shylashri Shankar, *The judiciary, policy and politics in India*, in *The Judicialization of Politics in Asia*, 61 (Björn Dressel ed., 2012).

<sup>86</sup> P.B. Mehta, *The Indian Supreme Court and the Art of Democratic Positioning*, *Unstable Constitutionalism*, 240 (M. Tushnet & M. Khosla eds., 2005). At one level, of course, the UPA government's response to the 2G Spectrum judgment, the presidential reference, may itself be conceived of as a backlash but this was hardly comparable to the backlash provoked by the property rights cases of the 1960s and 1970s, or the reservations cases of the 1990s.

<sup>87</sup> *Subramanian Swamy v. Manmohan Singh*, (2012) 3 SCC 64. The trial court followed suit, by holding (on the issue of allocations not complying with the guidelines issued by the Ministry of Coal) that the Prime Minister would have assumed that the guidelines issued by were observed. See K. Sheriff M., *In Coal Scam Ruling, 'no reason for Manmohan Singh to presume guidelines weren't complied with'*, *The Indian Express*, May 24, 2017, <http://indianexpress.com/article/india/in-coal-scam-ruling-no-reason-for-manmohan-singh-to-presume-guidelines-werent-complied-with-4670777/>.

it were seen to be incompetent or untrustworthy, the Court stepped in to plug the deficit in governance. This justification, which has long been cited in defence of the Court's expanding jurisdiction,<sup>88</sup> was of particular resonance at the time that the 2G Spectrum and Coalgate cases were being heard. Obstructionism in Parliament between 2009 and 2014 prompted plenary bottlenecks and legislative paralysis. During that period, the Lok Sabha and Rajya Sabha were functional for only 61% and 66% of their allocated time respectively.<sup>89</sup>

In addition, the second term of the United Progressive Alliance government was witness to the most high-profile corruption investigations in recent memory. This included, aside from 2G Spectrum and Coalgate, investigations into allegations of over-invoicing and corruption in the procurement of contracts for the Commonwealth Games of 2010 in Delhi. Investigations were also afoot into allegations that politicians and public officials had illegally procured apartments constructed for war widows and defence personnel in an apartment complex in Mumbai. These corruption investigations "enraged" the "newly assertive Indian middle class".<sup>90</sup>

An anti-corruption movement led by social activist Anna Hazare captured the imagination of the burgeoning middle classes. This movement eventually splintered, with one faction forming a new political party and securing victory in the Delhi elections on the plank of anti-corruption within one year of its formation. Corruption was the single most important election issue in the general elections of 2014, in which the Bharatiya Janata Party was the first political party to secure an outright majority in the Lok Sabha in twenty-five years.

The Supreme Court's approach in the 2G Spectrum and Coalgate cases garnered widespread public support in this political environment. With the benefit of hindsight, we now also know that each of the defendants in the 2G Spectrum case was acquitted by the trial court in December 2017.<sup>91</sup> These acquittals, assuming that they are not overturned on appeal, are unlikely to have a detrimental impact on the Court's public legitimacy. In the public consciousness, the jury is simply no longer out on whether the 2G Spectrum case involved serious corruption and impropriety. It is also not difficult to see why nugget sized, headline grabbing observations made by the Supreme Court close in time are more suited to public consumption than a considered judgment delivered many years after the fact.

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<sup>88</sup> See, for e.g., Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court* 8 WASH. U. GLOBAL STUD. L. REV. 1, 12 (2009).

<sup>89</sup> Kusum Malik & Mandira Kala, *Vital Stats: Performance of Parliament during the 15th Lok Sabha*, PRS Legislative Research, Feb. 21, 2014, <http://www.prsindia.org/parliamenttrack/vital-stats/performance-of-parliament-during-the-15th-lok-sabha-3146/>.

<sup>90</sup> Gurcharan Das, *India Grows at Night* (2013).

<sup>91</sup> See *Enforcement Directorate v. A. Raja*, judgement of Dec. 21, 2017 (Court of O.P. Saini, Special Judge, CBI); *CBI v. A. Raja*, judgement of Dec. 21, 2017 (Court of O.P. Saini, Special Judge, CBI).

## V. CONCLUSION

Through the course of dozens of hearings across several years, the Supreme Court took charge of two of the most significant corruption investigations in independent India. These corruption scandals formed a dominant part of the narrative in the general election campaign of 2014, leading to the Congress Party's worst ever electoral performance. Once the Court decided that it would admit these PILs, its assumption of power knew almost no limits. The Court micromanaged the investigations, made orders without reasons, and made little reference to the fundamental rights that were cited to invoke the jurisdiction of the Court. It restrained all High Courts from entertaining petitions in relation to these investigations, arrogating the authority to itself.<sup>92</sup>

The Supreme Court's role in these cases raised significant questions across the life-cycle of structural injunctions. The Court offered no justification to explain its initial invocation of the structural injunction. Structural injunctions drain the Court's resources and interfere in the day-to-day functioning of public institutions. Not every PIL is therefore suited to the invocation of structural injunctions. Once invoked, overarching orders and monitoring of investigative agencies quickly escalated into micro-management and court control. No line in the sand was drawn to mark the conclusion of the Court's role, with the Court departing from existing precedent- that its monitoring would end once the charge sheet was filed.

Yet, through its role in these cases, the Supreme Court bolstered its legitimacy as an anti-corruption crusader. It did so through 'optics', by frequently making headline-grabbing observations holding the government, investigative authorities and crony capitalists to account that were dutifully reported by the press. It also did so through 'outcomes', for India's burgeoning middle classes knew that the investigations into these corruption scandals would never have proceeded (at any rate, with the same vigour), had it not been for the Supreme Court's intervention.<sup>93</sup> While the Court's methods remain questionable in the 'governance' chapter of the history of PIL, its popularity amongst the citizens of India continues unabated.

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<sup>92</sup> Centre for *Public Interest Litigation v. Union of India*, (2013) 8 SCC 18; Centre for *Public Interest Litigation v. Union of India*, (2012) 3 SCC 117.

<sup>93</sup> *The Wellspring of Judicial Activism*, The Hindu, Mar. 13, 2011, <https://www.thehindu.com/opinion/editorial/The-wellspring-of-judicial-activism/article14946219.ece>.