

INDIAN POLITICS

Contemporary Issues and Concerns

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Judiciary: The Battle of Books and Beyond

INTRODUCTION

The Indian Constitution is founded on two sources of political power: (a) the principle of popular sovereignty embodied in the opening line of the Preamble that begins with the ringing declaration of "We the People of India...." as the ultimate source of sovereignty, and (b) political continuity underlined by the legal transfer of power from the British Parliament to the Constituent Assembly of India by the terms of India Independence Act, 1947. These dual legacies are naturally open to alternative and alternating notions of popular and parliamentary sovereignties, depending on the prevailing circumstances and the ideological temperament of the times. The Constituent Assembly bequeathed the constituent power to amend the Constitution under Article 368 to the Parliament and/or State legislatures. However, in the competing claims over representing "stateness",¹ the Parliament has gradually lost the "custody" over the Constitution² to the judiciary, thanks to the ingenious constitutional principle of the "basic structure" invented by the judiciary in due course. In the dynamics of institutional interaction among the Parliament, executive and judiciary, the latter has thus ended up having the last word on the Constitution what it meant and to what extent it could be amended. It is also clarified in case law that in the event of conflict between an electoral mandate and the constitutional mandate, the latter has the primacy by virtue of the fact that the constitutional consensus and mandate not only predates an electoral mandate but also sets the legal and constitutional parameters within which a periodic mandate could have any validity.

Nevertheless, this putative argument for judicial supremacy has not gone unquestioned. There are those who think that the question "who is the final arbiter of the Constitution?" cannot be so easily answered for all time to come. To quote Pratap Bhanu Mehta:

The reality of constitutionalism has been that the legislature and the judiciary are likely to remain Competitors when it comes to interpreting the Constitution. It is by no means settled who has the final word. The decisions of each are more like one link in a long chain of events that can be played out any number of times. Parliament can pass legislation, the courts can determine its constitutionality. Parliament can try to circumvent the courts by amending the Constitution, the courts can pronounce that Parliament has limited powers of amendment, Parliament can ... and so on and on.³

HISTORICAL BACKGROUND

For understanding the legal and constitutional theory underlying the structure of the judicial branch of the Indian State, we should refer back to the British rule in India, and the tradition of constitutional engineering of the British Commonwealth which India was the first Republican nation to join. The British Raj transformed the legal foundations of India, especially in relation to constitutional and criminal law. Laws in these areas were universalized in the sense of making them common for all Indians; although in matters of civil or family laws pre-existing social and religious customs were continued. Despite the ideal of a common civil code set forth in the Directive Principles of State Policy (Article 44 of the Constitution), this goal has not yet been achieved as even the independent Indian State is inclined to move liberally in this direction, hoping that the reforms should by and large come from the communities concerned.

During the British rule, the civil and criminal laws were administered by judges-cum-magistrates, with the Judicial Committee of the Privy Council (JCPC) in England acting as the final court of appeal. The separation between the executive and the judiciary was made gradually and by the Government of India Act of 1935, the highest court in India was established in the form of the Federal Court which, however, was subordinate only to the JCPC. The British colonial period also witnessed the emergence of a corporate legal profession that provided pleaders and advocates for presenting the cases of clients to the judges or magistrates.

The Supreme Court of India, the first fully independent Court for the country, was first set up under the 1950 Constitution. The Constitution also set up an integrated hierarchy of courts for a more parliamentary federal system compared to the Government of India Act, 1935. The 1935 Act was neither a fully parliamentary system (as the Governor General of India retained independent executive powers uncontrolled by the Central Legislature) nor fully a federal system (as provincial autonomy was considerably less than autonomy of States under the present Constitution). The Governor General had independent executive powers in budgetary and security matters and the Central Government had important executive powers over the provincial Governments.

THE STRUCTURE

The hierarchy of courts runs from the Supreme Court at the federal level, High Courts at the State level and District Courts at the sub-state levels. In the appointment of judges at all the levels, the President of India (in case of Supreme Court and High Courts) and the Governor of the State concerned (in case of sub-ordinate Courts) are involved. Courts at all the levels act under the jurisdiction of the immediate superior level of the judiciary. Appointments are formally made by the executive at the appropriate level in consultation with judges. The Union executive appoints the judges of the Supreme Court and High Courts "after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose". It is also provided by the Constitution that in appointment of a judge, "the Chief Justice of India shall always be consulted" (Article 124, Clause 1).

The appointment of Supreme Court judges has been a matter of some controversy and a body of case laws has grown over the years. In *S.P.Gupta v. Union of India* (1982)⁴ and *Union of India v. Sankalchand Seth* (1977),⁵ the Supreme Court ruled that this "consultation" does not imply "concurrence" though there must be exchange of views as to the merits of the appointees. In a presidential reference for its advisory opinion in 1999, the Supreme Court reiterated its earlier stand, saying that "norms and requirements of the consultation process" were not binding on the Union executive. Subsequently, however, the Supreme Court reversed this view in the *Supreme Court Advocates on Record v. Union of India*.⁶ Now the advice of the collegium of judges routed through the cabinet has become binding on the President of India.

The Superior Courts thus have virtually become a self-appointed institution causing some disquiet to the executive which feels that its powers have been constrained by the case law. The National Commission for Review of the Working of the Constitution (NCRWC) appointed by the Union Government in 2000 in its Report submitted in 2002 has recommended the appointment of a National Judicial Commission consisting of the Chief Justice of India (CJI) as the chairman and two senior most judges of the Supreme Court, the Union Minister of Law and Justice and one eminent person nominated by the President of India after consulting the CJI as members.⁷

This recommendation gives the judges a majority of one over two representatives/nominees of the executive. However, the Commission does not clarify that consultation here means concurrence nor does it specify whether the Commission will act by consensus or by majority. When the BJP-led National Democratic Alliance (NDA) Government brought a legislation in the Parliament for instituting this Commission, the temper of criticism in the press and the Parliament forced the Government to withdraw this bill. The Congress-led UPA Government has gone on record saying that this item is not on its legislative agenda (Prime Minister Manmohan Singh's address to a Judges' Conference in New Delhi a few months after forming the Government).

JURISDICTION AND JUDICIAL REVIEW

The Constitution has given the Supreme Court (and High Courts) original, appellate and advisory jurisdictions (Supreme Court) under Articles 131 and 131 (A), /132/133/134/134(A), and 143, respectively. Article 144 provides that all civil and judicial authorities in India "shall act in aid of the Supreme Court". The term "civil" here obviously includes all legislative and executive authorities. And since the military authority in India is subject to civilian control, it includes all the coercive arms of the State as well.

• The Supreme Court's original jurisdiction includes Union-State and inter-state disputes regarding the federal division of powers and fundamental rights of citizens. These matters can be directly raised in the Supreme Court itself (Article 131). A case law arising out of T.N. Cauvery Sangam v. Union of India (1990)⁸ has extended the original jurisdiction to include inter-state water disputes as well. The appellate jurisdiction of the Supreme Court includes appeals from High Courts in certain cases in civil, criminal, and other proceedings, if the High Court certifies that the dispute raises substantial question of law regarding the interpretation of the Constitution (Article 134). In other instances, the Supreme Court may grant "special leave to appeal" to itself in "any cause or matter passed or made by any court or tribunal in the territory of India" (Article 136, Clause 1). The Parliament can further enlarge the jurisdiction of the Supreme Court by law with regard to the Union List, and in relation to the State List and Concurrent List as well, if the Union and State-Governments so agreed (Article 138, Clauses 1 & 2). In addition, there is an advisory jurisdiction of the Supreme Court by Presidential reference if the Union executive considers it "expedient to obtain the opinion of the Supreme Court" (Article 143).

The Supreme Court and High Courts, like all courts, including those in classical parliamentary systems like England, have the power to interpret laws in cases of ambiguity and dispute. In England the courts do not go beyond this power of interpretation because of the constitutional doctrine of parliamentary supremacy. There neither the Crown nor the judges can sit in judgement over the wisdom of parliamentary enactments. That also included executive orders until 1977 because of the explicit or implied parliamentary sanction for them. Since 1977 the courts have been allowed the limited power of review over mere executive orders. Courts in India can go beyond interpretation of laws and executive orders for only making the legislative intentions clear and subject them to judicial scrutiny and review them as to their constitutional or legal validity.

The Constituent Assembly debates reveal some degree of ambiguity regarding the power of the judiciary vis-à-vis the Parliament. There were members like P.S. Deshmukh (Maharashtra), Brajeshwar Prasad (Bihar), H.V. Kamath (Maharashtra), Mahavir Tyagi (UP) who preferred a flexible amendment process typical of the British parliamentary system. Jawaharlal Nehru (UP) also had expressed similar views on the parliamentary power

over amendment elsewhere in the debates, but an amendment to this effect in the course of the debate on the issue of amendment standing in his name was finally not moved in favour of the drafting committee's preference for a more complex and mixed process whereby some provisions of the Constitution could be amended by a simple parliamentary majority, some by two-thirds majority, and some others (i.e. federal features) by the additional requirement of ratification by at least 50 per cent of State legislatures. The last point, in particular, necessarily implies judicial review. The views of some other members like K.K. Sidhva (Punjab) and Naziruddin Ahmad (Bombay) were also opposed to amendment by simple parliamentary majority. Ultimately, the view of the drafting committee as articulated by its chairman Dr. Ambedkar won the day.⁹ The federal perspective with implied judicial review was also reflected in the speeches of Ambedkar (Chairman of the Drafting Committee) and Rajendra Prasad (President of the Constituent Assembly).¹⁰

It was initially not as clear as today that the federal judiciary in India would develop into perhaps the most powerful court system in the world. For, the courts in other federal systems review only legislations and executive orders, but the Indian Supreme Court today reviews constitutional amendments as well.¹¹

Even astute legal experts in the initial decades of the Republic either descriptively or prescriptively emphasized the role of the judiciary in interpreting laws. It is interesting that Jagdish Swarup primarily dwells on an interpretative role of the courts in India. In a book of nearly seven hundred pages, the terms 'judicial review' and 'activism' are neither found in the contents nor in the index. The term right to review is found in the contents but the discussion in the relevant passages of the book is in the legislative rather than in the constitutional context; it refers to legislatures' power to review its own earlier statutes.¹²

Judicial review in India inevitably follows from at least three features of the Constitution: (1) the chapter on fundamental rights of citizens that are guaranteed against any legislative Act or executive order, (2) the Seventh Schedule of the Constitution demarcating legislative and taxing jurisdictions of the union and State legislatures in the Union List, State List and Concurrent List, and (3) the declaration that all laws previous to the 1950 Constitution would be void to the extent of their conflict with it.

A large corpus of case laws have grown over the years as a result of review powers of the superior courts. Most of the reviews centre on right to property, liberty and equality. Until right to property was deleted from the chapter on fundamental rights and transferred to Article 300-A as a legal right, it was the major cause of continuous confrontation between the judiciary and the Parliament. The Government claimed to be implementing its progressive agenda of land reforms or directive principles of State policy giving them primacy over fundamental rights. The courts, however, declared these legislations unconstitutional on the ground of unreasonable restrictions on right to property and adequate compensation for private

property taken over by the State and other rights such as freedom of occupation and legal equality.

The case laws on right to life and liberty generally concern preventive detention and denials of this right guaranteed by Article 21 of the Constitution. To preventive detention in the interest of public order and security, more recently terrorist activities have been added to these series of Acts, for example Maintenance of Internal Security Act (MISA), Terrorist and Disruptive Activities Act (TADA), Prevention of Terrorism Act (POTA) etc. In the context of Article 21 that provides that life and liberty of an individual shall not be taken away by the State except through "procedure established by law", the Constituent Assembly had deliberately avoided the American constitutional doctrine of the "due process of law". For, the latter had been a source of too much litigation in the United States due to the ambiguity and undefined nature of the "due process of law". The formulation "procedure established by law" would, it was hoped, bind the judicial flight of imagination to a given law made by the legislature.¹³

A significant body of case laws has grown around the power of judicial review centering on the issue of constitutional amendments. This direction of the extension of judicial power was probably not clear to the makers of the Constitution who had apparently granted the power of amending different parts of the Constitution to the Parliament and, in case of some federal concerns, to the aggregate legislatures (Parliament plus State legislatures).

This discursive body of constitutional law with profound jurisprudential reasoning has developed over nearly four decades since the late 1960s. This zig-zag evolutionary course may be divided into at least four broad phases: (a) 1950 to 1966 that broadly coincides with the tenures of the first and the second Prime Ministers, Jawaharlal Nehru and Lal Bahadur Shastri; (b) 1967 to 1972 that marks the decline in the electoral fortune of the Congress and early years of Prime Minister Indira Gandhi in office that heralded a new phase of the post-Nehru generation of Congressmen in office; (c) 1973 to 1979 which were the years of political ascendancy as well as turbulence of Indira Gandhi's rule during the major part of the 1970s and the Janata Party's brief stint in Government towards the fag end of the decade; and (d) 1980 to date. The decade of the 1980s witnessed the return of a chastened Indira Gandhi from opposition to Government and Rajiv Gandhi's succession after her assassination in 1984. Since 1989 India has moved from Congress dominance to a period of multi-party system with coalition or minority Governments, often both, in New Delhi.

This periodization may appear to be primarily political but it is also significantly associated with the changing patterns of judicial behaviour in the country. This would become clearer as we proceed in our discussion.

First Phase of Evolution (1950–1966)

The first phase was characterized by relatively harmonious relations between the executive and the Parliament, on the one hand, and the

judiciary, on the other. Not that differences did not crop up, but they were settled by compromise and accommodation.

Two characteristic cases decided by the Supreme Court during this phase were Sankari Prasad v. Union of India (1951)¹⁴ and Sajjan Singh v. State of Rajasthan (1965)¹⁵. The first case arose on the question of the First Amendment to the Constitution (1951), which was validated. This Amendment had added the Ninth Schedule to the Constitution to protect certain progressive laws of land, reforms and nationalization of private bus transportation, etc. from judicial review, as laws put in there were declared to be immune from judicial scrutiny. The Court had earlier declared these measures unconstitutional on their violation of property rights and freedom of occupation, etc. The Court, deterred by the First Amendment, now ruled that Article 368 granted the Parliament the power to amend the Constitution, including Part-III on Fundamental rights. The Court held that the term "law" in Article 13(2) did not cover constitutional amendments. For, laws are made by virtue of legislative power of the Parliament, whereas amendments emanate from its special constituent power.

In the years that immediately followed, several new amendments were made, of which the Fourth and the Seventh concerned the Fundamental rights. The Seventeenth Amendment (1964) added several new legislations to the Ninth Schedule. A case brought to the Supreme Court, Sajjan Singh v. State of Rajasthan (1965), challenged this. In the judgement on this case, three of the five judges of the Bench chaired by Chief Justice Gajendra Gadakar, agreed with the Supreme Court's earlier judgement in the Sankari Prasad case that the Parliament was competent to amend the Constitution, Part-III included. Two judges (Hidayatullah and Mudholkar) in their minority but finally concurring judgement expressed some misgivings whether fundamental rights should also be amended without any limitations.

Second Phase of Evolution (1967–1972)

The second phase began with the Supreme Court's judgement in Golak Nath v. State of Punjab (1967).¹⁶ The judgement was delivered only a few days before the results of the Fourth General Elections (1967) were announced in which the dominant Congress Party lost half of the States of the Indian Union, though it retained New Delhi with a reduced dominance. In the early 1970s, there also appeared a mass movement of public protest on the issue of growing authoritarianism and corruption in the Congress regime. It ultimately drew the socialist-turned-Gandhian Jayaprakash Narayan from virtual political retirement into the vortex of an extra-parliamentary mass movement. This period also witnessed a sharp conflict between the executive and the Parliament, on the one hand, and the judiciary, on the other.

This phase opened with the Golak Nath case which challenged the addition of the Punjab Security of Land Tenures Act, 1953, to the Ninth

Schedule. The case argued that the Seventeenth Amendment as well as the First and the Fourth, by which new laws were added to the Ninth Schedule, were violative of the Fundamental Rights, mainly to property ownership. Two other petitions grouped with Golak Nath case challenged the inclusion of Mysore Land Reforms Act, 1962, as amended in 1969 in the Ninth Schedule on similar reasons. The Supreme Court by a majority of six to five reversed its earlier decisions and came to the conclusion that the amending power of the Parliament stopped short of Part-III on the Fundamental Rights. The ruling, however, was to have prospective effect, saving the First, Fourth, and Seventeenth Amendments. The Bench chaired by Chief Justice Subba Rao, by majority, reasoned that in intents, purposes, and constitutional scheme fundamental rights emerge as endowed with a certain permanence. The Court also ruled that Article 368 did not contain the power to amend; it only outlined the process of amendment. The power of amendment was contained in Articles 245, 246, and 248 dealing with the extent of legislative powers of the Union and States and the residuary powers of the Parliament respectively as also entry 97 in the Union List in the Seventh Schedule. The constituent power of the Parliament arises specially from its residuary power. However, amendment is a "law" within the meaning of Article 13(2) and, to the extent it abridges rights, it can be declared void by judicial review.

Third Phase of Evolution (1973–1979)

The Supreme Court judgement in *Keshavananda Bharati v. State of Kerala* (1973)¹¹ heralded a third phase in the Indian judicial behaviour. The case arose out of Kerala Land Reforms Act (1963) as amended in 1969 and 1971, when during the pendency of the case it was placed in the Ninth Schedule by the 29th Amendment. The petitioner challenged the validity of the 24th, 25th, and 29th Amendments to the Constitution. By a 13-judge Bench chaired by Chief Justice S.M. Sikri all the judges came to the conclusion reversing the Golak Nath judgement, that the Parliament had power to amend the entire Constitution, including Part-III, but seven judges (Chief Justice Sikri and Justices Shelant, Hegde, Grover, Jagannmohan Reddy, H.R. Khanna, and Mukherji) added a significant rider that amending power was subject to certain implied limitations such that "basic structure" or "features" were unamendable. Thus, the Court upheld the 24th Amendment and ruled that the Parliament's amending power could reach any or all parts of the Constitution, but it could not alter or destroy its basic structure. The majority view of the judgement is summarized as follows:

1. Golak Nath [judgement] is overruled;
2. Article 368 does not enable the Parliament to alter the basic structure or framework of the Constitution;
3. The Constitution (Twenty-Fourth Amendment) Act, 1971, is valid;
4. Sections 2(a) and 2(b) of the Constitution (Twenty-Fifth Amendment) Act, 1971, is valid;

5. The first part of Section 3 of the Constitution (Twenty-Fifth Amendment) Act, 1971, is valid. The second part, namely 'and no law containing a declaration that it is for giving effect to such policy [Directive Principles of State Policy] shall be called in question in any court on the ground that it does not give effect to such policy' is invalid.
6. The Constitution (Twenty-Ninth Amendment) Act, 1971, is valid.
7. The Constitution Bench will determine the validity of the Constitution (Twenty-Sixth Amendment) Act, 1971, in accordance with law."

Illustrative enumeration of the basic features of the Constitution varied from judge to judge with some overlap. Chief Justice Sikri: (a) supremacy of the Constitution, (b) republican and democratic form of Government, (c) secular character of the Constitution, and (d) separation of powers and federal division of powers. Shelat and Grover: (a) the mandate to build a welfare State contained in Part-IV of the Constitution, and (b) unity and integrity of the nation. Hegde and Mukherjee: (a) sovereignty of India, (b) democratic character of the polity, (c) unity of the country, (d) essential features of individual freedoms of citizens; and (e) mandate to build a welfare State. Jaganmohan Reddy: the preamble and its elaboration in the rest of the Constitution. The judgement was criticized by some as vague and confusing and as a product of a sharply divided court. It is, however, unfair to expect from a court judgement, which arises from the specific context of a case or a bunch of cases in a particular time period, to have a Constitution like precision and yet timeless and transcendent applicability. A court judgement in the common law tradition is, in fact, meant to be paradigmatic whose application is gradually extended to new situations. The Constitution, too, has a similar paradigmatic applicability to changing times, only in more amplitude and lesser liability to paradigmatic shifts that we find in case laws. The case of *Indira Gandhi v. Raj Narain* (Supreme Court, 1975)¹⁸ illustrates the kind of extensionability of a case law to new principles we alluded above. This judgement declared free and fair elections as part of the basic structure of the Constitution.

Right to property, which had been the bone of contention between the Parliament and the Judiciary that initially gave rise to the basic structure debate right from the First Amendment (1951) to the late 1970s, was deleted from the Constitution by the Janata Party Government in 1978 by the 44th Amendment. Property was deleted from the status of a Fundamental Right and made into a legal right in Article 300 A. The legal protection that "No person shall be deprived of his property save by authority of law" is still constitutionally available. The immediate access to the Supreme Court in case of Fundamental Rights is unavailable to law suits. The case must now move sluggishly up from the lower courts. This change did not, however, wind up the legal discourse on the basic structure of the Constitution.

Fourth Phase of Evolution (1980-to date)

The fourth phase may be said to have begun with Minerva Mills Ltd v. Union of India¹⁹ (Supreme Court, 1980). The case arose on the issue of nationalization of a mill which is a property matter, but Nani A. Palkhiwala argued the case on the issue of Parliament's power to amend the Constitution.

The Minerva Mills Bench chaired by Chief Justice Chandrachud declared Sections 4 and 55 of the Constitution 42nd Amendment Act (1976) beyond the amending power of the Parliament and unconstitutional. The former because of "a total exclusion of challenge" to any law on the ground that it was justified for implementing Directive Principles of State Policy. The Court found it violative of Article 14 (equality before law) and Article 19 (freedom of occupation, trade or business). Section 55 of the 42nd Amendment was also declared void because "it removes all limitations on the power of the Parliament to amend the Constitution so as to damage or destroy its basic or essential features or its basic structure" by prohibiting judicial review. Article 31C added to the Constitution by the 25th Amendment (1971) saving laws giving effect to Directive Principles from any judicial scrutiny, already declared unconstitutional by the *Keshavananda* case judgement, was again legally and poetically assailed for removing the two sides of the "golden triangle" of Articles 14, 19, and 21 (protection of life and personal liberty). "Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power." It is this "golden triangle which affords to the people of this country an assurance that the promise held forth by the preamble will be performed by ushering in an egalitarian era through the discipline of Fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual."

Throughout the 1980s and '90s, case laws have brought numerous constitutional values threatened by the heat and fire of political conflicts and encroached upon by the State and industry under the protection of the basic structure of the Constitution. In the tenth revised edition of V.N. Shukla's legal treatise on the *Constitution of India* (2001, first published in 1950), Mahendra Pal Singh²⁰, citing a large body of case laws, observed: "With these pronouncements the existence of the doctrine of basic structure in our constitutional law is no more a matter of dispute. The only dispute remains about its contents. Some of the contents seem to have settled while others are in the process of settling and still some others will settle in course of time. From *Keshavananda Bharati* till *Sambharmurthy* judicial review clearly emerged as one of the aspects of the basic structure of the Constitution."

JUDICIAL ACTIVISM

In recent decades, there has been much debate on judicial activism in India. Despite contending views on the period when it may be regarded to have

started and on arguments for and against it, there is a wide measure of support and approval for it, at least for the time being and at least as an emergency measure to alleviate the crisis of governance and dysfunctionalities of parliamentary and executive institutions. Competent observers of institutions of Government are inclined to argue that the process of Government in India that was largely executive-driven has now become judiciary-driven.²¹

The term judicial activism is often used in much of journalistic literature without any attempt at precise conceptualization. Those who use it with a certain degree of conceptual clarity mean by it at least two things.

① First, a kind of assertiveness on the part of the judiciary in defense of its review power that was not there in the Nehru era or the early years of the Indira Gandhi rule. For example, right in the First Amendment, the Nehru Government created the Ninth Schedule in the Constitution as a kind of strong room in which Union and State laws were put, which the executive wanted to keep out of bounds for the judiciary to scrutinize. The courts demurred but somehow tried to accommodate the views of the executive/state legislatures. The Supreme Court is presently examining the constitutionality of the Ninth Schedule in a case pending before it, in Summer 2007. However, as already mentioned above, the Supreme Court beginning with the Golak Nath (1967) and Keshavananda (1973) cases tried to cling to its power of judicial review of even constitutional amendments through which this power was sought to be taken away. The enlargement of this extent of judicial power may obviously be regarded as an instance of activism on the part of the courts. In a similar vein, expansion of review powers to such areas as what happens inside the Parliament and State legislatures, e.g. Speakers' or Presiding Officers' rulings and parliamentary/legislative privileges may also be considered indicators of Judicial activism.

Secondly, the most glaring examples that came to be subsumed under the concept of judicial activism were the Public Interest Litigation (PIL) or Social Action Litigation (SAL). This extension of judicial power was made by the Supreme Court under the influence of some progressive judges like V.R. Krishna Iyer, P.N. Bhagwati and others who prevailed upon their colleagues to change the rules of business of the court. By this change the conventional rule of locus standi to allow the Supreme Court and High Courts to take cognizance of denial of fundamental and legal rights brought to the Court by third parties (other than those directly involved in the dispute) or by a postal letter was made permissible. This has also come to be known as the "epistolary jurisdiction" of the Court in addition to the original, appellate and advisory jurisdictions mentioned in the Constitution.

This category of cases began with the right of the poor, construction workers, pavement dwellers, undertrials (who had been languishing in jail without being produced before a Magistrate or a Court for periods far in excess of the period of punishment for their offences under the law) etc.

Besides these, the Public or Social Interest Litigation of the Court has been amplified to include rights of children, women, environment and ecology, historical monuments, and so on and so forth.

There seems to be a tremendous public support and approval for judicial activism today. A national probability sample survey has found that the judicial branch now happens to be the most legitimate organ of the Indian State in the public estimation and esteem.²² Moreover, the challenges to the judiciary from the executive and legislative branches have also practically disappeared compared to the 1970s when such challenges were most formidable. During the Emergency despite some lingering resistance to such onslaughts by some High Courts, the Supreme Court had more or less caved in under political pressures. However, in the wake of the post-Emergency election and the dismantling of the authoritarian 42nd Amendment, the courts reasserted their review power with a vengeance. It was also in the post-Emergency era that judicial activism emerged in a most spectacular way and reached its apogee in the era of multi-party system and federal coalition Government. So far so good.

In a perceptive study of judicial activism from sociological and psychological perspectives, Upendra Baxi locates this phenomenon in contemporary India where globalizing upper and middle classes have no qualms in practicing violent social exclusion of the poor, where politics tends to merge on callous dehumanization, and where the Constitution "stands informally but comprehensively amended in an era of heedless and headlong globalization", where rhetoric of justice and human rights are "increasingly harvested by the forces of comprador and global corporate capitalism", and where the judicial profession is wont to promote "the structural adjustment of judicial activism".²³ Baxi's impression is that even more than the psychology of Indian judges it is the growing constituencies of social and human rights activists who goad the judges into judicial activism. His enumeration of this supportive field of judicial activism includes: civil rights/people rights activists, consumer rights groups, anti-bonded labour groups, ecologists, child rights groups, custodial rights groups, poverty rights groups, indigenous peoples' rights groups, womens rights groups, Bar-based groups, media autonomy groups, assorted lawyers-based groups, assorted individual petitioners etc.²⁴

Since the onset of neo-liberal reforms and globalization in the early 1990s, there appears to be a perceptible change in judicial behaviour. While public interest litigation as an institution continues, there is a palpable shift to business liberalism (as distinguished from political liberalism) in some recent court decisions. For example, in *BALCO Employees Union v. Union of India* (2000), the employees of the Government company had petitioned against the decision of the Government of India to disinvest on arguments, among others, that the process was arbitrary and lacking in transparency in fixing the reserve price for disinvestment. The Supreme Court dismissed the petition, observing: "The decision to disinvest and the implementation

thereof is purely an administrative decision relating to the economic policy of the State and challenge to the same at the instance of a busybody cannot fall within the parameters of public interest litigation."²⁵

Commenting on the judgement, Prashant Bhushan, a Supreme Court advocate and activist, wrote that this "effectively meant that a citizen could not challenge the loot of the public exchequer by way of PIL unless he was personally affected". Bhushan discusses some other cases like *CITU v. Union of India* (1997), *State of Karnataka v. Arun Kumar Agarwal* (2000), *Centre for Public Interest Litigation v. Union of India* (2000), *Delhi Science Forum v. Union of India* (1996), *Union of India v. Azadi Bachao Andolan* (2003), *HPCL-BPCL v. Union of India* (2000), *Narmada Bachao Andolan v. Union of India* (2000), *N.D. Jayal v. Union of India* (2003), *Tata Housing Development Company v. Goa Foundation* (2003), *Almitra Patel v. Union of India* (2000), and *T.N. Rangarajan v. State of Tamil Nadu* (2003), and concludes:

"The above cases provide more than anecdotal evidence for the propositions that: (a) the Supreme Court as an institution has frowned upon challenges to any action of the executive taken in the purported furtherance of 'economic reforms', even when such challenges were based on violations of statute and evidence of corruption; and (b) the court appears to have diluted its interpretation of Article 21, in the recent past. At the very least, it has often not acted to enforce the rights that it had declared earlier in favour of the poor and the weak."²⁶

The CPI (M) ideologue and general secretary, Prakash Karat has also recently lamented that the judiciary was getting attuned to neo-liberal capitalism and globalism which are against the spirit of the Constitution of India. Referring to the Kerala High Court order putting ban on campus politics, he goes on to say that this is against the values of the freedom struggle and there was "nothing in the Constitution that prevents students from forming their associations".²⁷

It would, however, be a naive assumption that judicial activism is an unmixed blessing or a panacea for all problems of governance. For one thing, the judiciary may be the least dangerous branch and also the weakest branch. It neither controls the purse nor the sword. The former belongs to the Parliament and the latter to the executive. The power of the judiciary lies in its adherence to the rule of law. But the judiciary cannot ensure constitutionalism alone without a balanced constitutional Government in which each branch performs its functions and duties within the framework of the Constitution. Hence, the guarantee of good governance can be found only within the framework of a balanced constitutional regime.

From this point of view, it would appear to be a welcome development that the Parliament and the State legislatures demonstrated to assert their control over parliamentary and legislative proceedings in the wake of Supreme Court directive to the Jharkhand legislature to meet and elect the leader of the House in the early months of 2005. Moreover, in the initial months of 2006 the Parliament summarily expelled some members after the

sting operation by a TV channel which caught some of them accepting bribe for raising questions in the Parliament. The Supreme Court on being approached by some expelled members, issued directives to the Presiding officers. In response, the Lok Sabha Speaker, Somnath Chatterjee convened a Speaker's conference which decided that the Court's summons would not be accepted. The legislatures are thus belatedly seeking to reclaim the lost ground from the court at least in the matter of legislative proceedings which, under the Constitution, are beyond judicial intervention. But the legislatures to regain their legitimacy must adhere to ethics, law, and constitution without the judicial and popular pressures. For another thing, judicial activism in its overuse can degenerate into politicization and corruption of the judiciary. The lower judiciary in India is already not only hopelessly dilatory but also extremely corrupt. Instances of corruption in higher judiciary have also been becoming rather frequent, at least upto the level of the High Courts. And the access to higher courts is excessively expensive and prohibitive. For these reasons, the remedy of judicial activism may be cosmetic and it may eventually backfire and lead to constitutional crises.

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