should be made an offence under the Act, with an appropriate penalty.

The State should be a model service provider or a trader, when it carries on any trade or business. But, unfortunately, the State is the biggest litigant in our country. Hapless citizens are driven to litigation and are pitted against the might of the State. Therefore, and to uphold the 'the test of reasonableness' in State action, the Act should be amended to provide for awarding exemplary costs against the State if it as the opposite party loses a case, not involving any substantial question of law. For this purpose, the definition of the State under Article 12 of the Constitution of India should be adopted. The State should recover such exemplary costs from the concerned public servant/s, responsible.

JUDICIAL ACTIVISM AND RECENT CHALLENGES

By

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"Give every man thine ear, but few thy voice : Take each man's censure, but reserve thy judgment"

William Shakespeare wrote in his Hamlet many centuries back. Even today Judiciary and right justice are seen as the last asylum to many who long for the deserved justice. Over the years, this organ of Government has acquired an unprecedented energy and initiative, even to overcome the other two organs at times. Assertion of judiciary and its power is referred to as judicial activism. It is also defined as an over active judiciary recent Supreme Court judgment on IXth scheduled and Article 31-B cannot be used to concern unlimited powers directly attack on supremacy of Parliament by saying no unlimited power for parliament to enact law at will and few landmark cases that highlight judicial activism are *Keshvanand Bharati v. Kerala, Minerva Mills v. Union of India, Indira Gandhi v. Raj Narain and SP v. Union of India etc.* The active role of the Indian judiciary, particularly that of the Supreme Court, has been appreciated both within and outside India. The independence ensured through the constitutional provisions in favour of the Judiciary and subsequently strengthened by the judicial interpretation has definitely contributed to the present status of the Indian Judiciary. Yet, in this sphere of judicial activism, there are also a few coexisting misconceptions that need to be understood in order to appreciate the activist role of the judiciary in India better.

Public Interest Litigation (PIL) made judicial activism possible in India. Before the Court accepts a matter for adjudication, it must be satisfied that the person who approaches it has sufficient interest in the matter. The test is whether the petitioner has *locus standi* ! to maintain the action. This is intended to avoid unnecessary litigation. The legal doctrine that no one except the affected person can approach a Court for a legal remedy was holding the field both in respect of private and public law adjudications until it was overthrown by the PIL wave. PIL, which is a manifestation of judicial activism, has introduced a new dimension to Judiciary's involvement in public administration. The Issue of *locus standi* and the procedural complexities have taken a back seat in the

causes brought before the Courts through PIL. In the beginning, the PIL was confined only to improving the lot of the disadvantaged sections of the society, who by reason of their poverty and ignorance was unable to seek justice and, therefore, any member of the society was permitted to file a case for appropriate directions.

Consequently, the expectations of public went high and the demands on the Courts to improve the administration by giving appropriate directions for ensuring compliance with statutory and constitutional prescriptions increased. Beginning with the *Ratlam Municipality* case, the sweep of PIL had encompassed a variety of causes.

Golak Nath case is also an example of judicial activism in that the Supreme Court for the first time by a majority, despite the earlier holding that Parliament in exercise of its constituent power can amend any provision of the Constitution, declared that the fundamental rights as enshrined in Part III of the Constitution are immutable and so beyond the reach of the amendatory process.

Kesavananda Bharati had given a burial to the controversy of amendment of any of the provisions of the Constitution. By a majority of seven against six, the Court held that under Article 368, Parliament has undoubted power to amend any provision in the Constitution but the amendatory power does not extend to alter the basic structure of the Constitution.

A criticism that we often hear about judicial activism is in the name of interpreting the provisions of the Constitution. The allegations are that judiciary very often rewrites them without explicitly stating so. In the process, some of the personal opinions of the Judges metamorphose into legal principles and constitutional values. Another criticism is that in the name of judicial activism, the theory of separation of powers is overthrown and the Judiciary is undermining the authority of the Legislature and the Executive by encroaching upon the spheres reserved for them.

Never has the confrontation between Legislature and the Judiciary been as serious as in recent times. Whether it is Parliament's power of expelling tainted members exposed in the sting operations, the Supreme Court ruling dealing with minority educational institutions or Jharkhand, judicial intervention has often triggered confrontation with the Legislature.

The problem manifested itself from the very beginning. Within a year and half of commencement, the Constitution was amended to nullify certain judicial decisions and forestall future judicial actions. Matters came to a head over the judicial interpretation of the property clauses of the Constitution, which led to the enactment of the Constitution (Fourth Amendment) Act in 1955. Judiciary was severely criticized in Parliament on that count.

The fact that constitutional provisions allow Parliament to amend the Constitution, Court's decision could be circumvented. Since the Constitution could be amended by a majority vote of two-thirds of the members present and voting and an absolute majority of the total membership in each House of Parliament, the ruling party could easily muster such majority. The Court's decisions could not obstruct the reforms in the property rights.

In late sixties, the Court became bolder, and it challenged Parliament's power to amend Constitution. This brought about a major confrontation between the Judiciary and Legislature. In 1967, the Supreme Court, held in *Golaknath v. Punjab*, that Parliament could not amend Constitution to take away or abridge fundamental rights and the decision was severely criticised.

Parliament retaliated by passing the 24th amendment, which explicitly stated that the

House was not limited in its power of constitutional amendment. When that amendment was challenged, the Court, in its 13-Bench verdict held in *Kesavanand Bharathi v. State of Kerala* that although Parliament could amend every provisions of the Constitution, it could not alter the basic structure of the Constitution. This decision seemed most unsustainable and contrary to the theory of judicial review. It established the supremacy of a non-elected body against the elected one.

However, during the emergency in 1975, the Ruling Congress passed draconian amendments with the help of its comfortable majority and absence of any Opposition. As a result the limitation upon Parliament's power of constitutional amendment acquired legitimacy. The Supreme Court struck down in *Indira Gandhi v. Raj Narain* (supra), a constitutional amendment, which sought to validate the election of the Prime Minister, earlier set aside by the Allahabad High Court on some technical ground, deemed destructive of the basic structure of the Constitution. The post emergency period (1977-98) is known as the 'period of judicial activism, because it was during this period that the Court's jurisprudence blossomed with doctrinal creativity.

Whether Judiciary is accountable for its decisions, and if yes, to whom are the moot questions. The answer to this is found in the Constitution itself. A Judge of the Supreme Court or a High Court can be impeached on the ground of proved misbehaviour or incapacity. The power to impeach a Judge is vested in Parliament *vide* Articles 124(4) and 217(1)(b). In the case of Judge's impeachment, Parliament acts as a judicial body and its members must decide the guilt or otherwise of the Judge facing the indictment objectively. They should be influenced by extraneous considerations in this regard.

When such a judicial function is discharged by Parliament, it is highly debatable whether political parties can issue whips directing members to vote in a particular manner. An interesting case study in this regard is the impeachment proceedings against Shri Justice *V. Ramaswamy*, which ended unsuccessfully.

So what can be the remedies to come over such issues confronting the Judiciary….The Constitution of India has enough provisions for separation of powers between the Legislature, Executive and the Judiciary. Their powers have been clearly demarcated. It is the spirit of the Constitution that delineates the harmonious relationship. The delicate balance between these three organs of the Government has to be maintained for a successful federal structure.

However, the problem of drawing a line between legislative power and judicial authority is always a difficult one in any system of Government, where the Judiciary is the final arbiter of legislative action. There is danger, on the one hand, of the Judiciary overstepping its bounds and stultifying important measures of economic and social reform. One the other hand, the Judiciary may become so subservient to the legislative will as to render innocuous the constitutional safeguards to individual liberty. The Indian Judiciary is still to evolve a happy compromise between these two extremes.

Judicial review is fundamental to rule of law. However, while reviewing the constitutionality of the law, the Court should not consider itself as a "super Legislature". All the three wings of the Constitution work in close co-operation with each other. The Laxman Rekha will have to be respected. Ultimately, every act of the three wings will have to be tested on the touchstone of the Constitution and public weal for its validity and legitimacy.

The Supreme Court is the final authority on deciding the basic structure of Parliament. Consequently, Parliament cannot overcome a decision of the Supreme Court declaring a

constitutional amendment *ultra vires* the basic structure. The Supreme Court's powers to examine the constitutional validity of the laws passed by the Legislature and oversee the functioning of the Executive cannot be diluted. This is bound to give rise to two views.

As the Constitution is a living organism, there is need to examine its successes and failures so that necessary course corrections can be introduced. Admittedly, the Courts have used their powers to facilitate a *modus vivendi* rather than articulate clear constitutional principles. Judicial reforms are a must to strengthen the Judiciary.

Judicial activist fervour should not flood the fields constitutionally earmarked for the Legislature and the Executive. That would spell disaster. Judges cannot be Legislators – they have neither the mandate of the people nor the practical wisdom to gauge the needs of different sections of society. They are forbidden from assuming the role of administrators. Governmental machinery cannot be run by the Judges. Any populist views aired by Judges would undermine their authority and disturb the institutional balance. Fidelity to a political or social philosophy not discernible from the constitutional objectives in the discharge of judicial functions is not judicial activism; it is subversion of the Constitution. Any judicial act which is politically suspect, morally indefensible and constitutionally illegitimate must be curbed. "Judicial activism must be used in a restrained manner to fill up any institutional vacuum or failure not as a point of confrontation among various organs of the Government".

FOR BETTER PROOF OF PROMISSORY NOTES AND CHEQUES

By

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The introduction of promissory note owes its origin to the bartering system prevailing in the primitive society. The source of Indian Law relating to such instruments is admittedly the English Common Law. The word 'promissory note' has been defined by several Acts keeping in view the aims and objects of that particular enactment.

Section 4 of the Negotiable Instruments Act, 1881 defines 'promissory note' as an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

As per Section 2(9) of the Limitation Act, 1908 'promissory note' is defined to be a plain and direct acknowledgment, in writing, to pay a sum specified, at the time therein limited, to the person therein named or sufficiently indicated, or to his order or to bearer.

According to Section 2(22) of the Indian Stamp Act, 1899, 'promissory note' includes a note promising the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen. Generally speaking, the promissory notes are used in commercial world *i.e.*, to facilitate the activities in trade and commerce. The law relating to