

Telegraph Act. We have repeatedly held that Section 7-B of the Indian Telegraph Act does not oust the jurisdiction of the Consumer Forum” and further observed “considering however, the fact that public revenues are involved in this case and *it is a matter of public knowledge that there are mal practices indulged in by the telephone subscribers in collusion with the telecom staff* and this not only betrays lack of seriousness in investigation the complaints from the subscribers but also a total lack of understanding of the importance of the issue involved in this case.”

(N) It has been held in *Bhojraj Dalmia and Sons v. General Manager, Calcutta Telephones*, 11 (1994) CPJ 559 at Para 26 “in our view, the proceeding before the Consumer Forum is some sort of arbitrary proceeding where taking all factors into consideration, the dispute of excess billing should be settled, otherwise,

by referring the dispute under Section 7-B of Indian Telegraph Act. It would divert the consumer into the hands of the protesting party who will be the *judge of its own wrong action*. It is also our opinion that even if such reference made to arbitration proceeding the *impartial Arbitrator* must be appointed by the Consumer Redressal Forum other than the persons of Telephone Department in order to render fair justice to the Consumer and such fair justice cannot be expected from a judge who would sit for judging his own actions.”

Para 30 “we award compensation for a sum of Rs.10,000/- to the petitioner/appellant for harassment, torture and mental agony suffered by it for about 2 years.”

Para 31 “we further award to the appellant the costs of Rs.2,000/-”.

JUDICIAL OVERREACH

By

—ELURI SRINIVASA RAO,
M.A., L.L.M. (Ph.D.),
Formerly Group-A Officer,
Director General of Security, New Delhi
Founder President of “SWSTHA”
(An Orgn. Dedicated to promote Legal
and Administrative Reforms)

The DEBATE on judicial activism has been raging with varying intensity over the past few years, and has acquired a new life as it were, by the observations in a recent judgment of the Supreme Court. Calling for judicial restraint, the Court has asked Courts not to take over the functions of the Legislature of the Executive, stating that there is a broad separation of powers under the Constitution and each organ of the State must have respect for others and should not encroach on their domain. Blaming the

Supreme Court itself for passing certain orders that resulted in upsetting the balance, a Bench consisting of Justices *A.K. Mathur* and *Markandey Katju* said in a judgment : “*Jagadambika Pal's* case of 1998, involving the Uttar Pradesh Legislative Assembly and the Jharkhand Assembly case of 2005 are two glaring examples of deviation from the clearly provided constitutional scheme of separation of powers.” The Supreme Court has also made observations on overreach of judicial activism, with references to several recent

orders – demolitions, nursery admissions, air pollution, motor vehicle fines and so on – by the Delhi High Court.

The Supreme Court's arguments were the following. First, the Judiciary should not encroach on Executive and Legislature domains. Second, Judges cannot create, and they enforce it. Third, the Judiciary should concentrate on reducing backlog. Fourth, the Judiciary does not possess requisite expertise. Fifth, if Executive and Legislature are non-performers, the remedy lies in citizens throwing them out through elections. To these is added another argument. If the Judiciary overstretches there will be adverse reaction from politicians, leading perhaps to curtailment of its independence.

These remarks came as the apex Court set aside a decision of the Punjab and Haryana High Court wherein it had directed creating a post of tractor-driver and then regularizing an employee, who had been working as mali (gardener) in the Aravali Golf Club. The High Court had argued that since the services of a mali were also being used as a driver, there must be a suitable post against which he could then be regularised. On this, the Supreme Court stated, "Courts cannot direct creation of posts. Creation and sanction of posts in a prerogative of the Executive or Legislature authorities and the Courts cannot arrogate to itself this purely Executive or legislative function and direct creation of posts in any organisation."

The Bench comprising Justices *A.K. Mathur* and *Markandey Katju* also advocated judicial activism be confined to genuine Public Interest Litigations (PILs) and called for judicial restraint to prevent erosion of the independence of Judiciary be threatened exercise of political power.

Post Incidences of Judicial Activism :

Judiciary has enjoyed years of activism. Public adulation, emanating from the instant judicial solution to their problems, has

oxygenated filing of PILs in the apex and High Courts. The exercise of its prime role is protector of Fundamental Rights has made the Judiciary under deep into Executive and sometimes, into Legislature's domains. However, as long as the Executive was at the receiving end, there was hardly any protest. The first-ever clear-cut legislative action by the Supreme Court happened in *Vishakha* case. It gave a new guideline, to deal with perverted Romeos at workplace. Though the judgment came more than 10 years ago, it still holds good. For the Legislature has not bothered to enact a law to make sexual harassment at workplace a statutory offence.

Protests from Legislature became loud after the judgment on President's Rule in Bihar castigating the Governor and the Central Government for preventing a coalition from staking claim. This was followed by Supreme Court's intervention in Jharkhand trust motion, an order that made Legislatures hoist the red flag for judicial encroachment into their domain.

Take the more recent case, that of the All India Institute of Medical Sciences (AIIMS). Judicial protection was provided to a Director, all in the name of protecting the AIIMS autonomy against presumed political interference. The institutional autonomy was interpreted as total independence for the Director of the publicly funded organisation against a Health Minister, unfamiliar with the pretensions and protocols of networking within the capital's powerful elites. In yet another recent case – the Gazipur abattoir case pending before the Court for the last three years – one comes across judicial overreach. The abattoir is being constructed by the MCD. A three Judge Bench of the Supreme Court, including Justice *A.K. Mathur*, has been passing orders for speeding up the construction, the money to be paid to the contractor and the release of machinery imported from abroad. Whose function is to monitor the construction of an abattoir – Judiciary or Executive ?

Provisions in the Constitution

It is being alleged that in the exercise of the PILs jurisdiction, the Judges are assuming the role of policy makers and as such are encroaching upon the powers of the Executive and the Legislature under the Constitution. Politicians rely on the doctrine of separation of powers and accuse the Judges of crossing the Lakshman Rekha (border line). However, it is quite difficult to visualize the so called Lakshman Rekha. The Constitution explicitly demarcates the parameters under which the Legislature, the Executive and the Judiciary are to function, but the doctrine of separation of powers as propounded by Montesquieu has not been adopted by the Indian Constitution.

The power of judicial review over the functioning of the Executive and the Legislature for enforcing the fundamental and other rights of the citizens under the Constitution is with the Judiciary. In the exercise of this power, the Judiciary has to go into the violation of the fundamental and other rights of the citizens and give appropriate directions. However, the extent of judicial review, especially in the field of PIL jurisdiction, primarily depends on the standards of governance by the Executive.

PILs : A Potent Tool for Masses :

Over the years PIL has done great service to the people of this country. It is a potent weapon in the hands of the poor, the oppressed and the downtrodden for the vindication of their rights. A larger number of people in India, for whose welfare rights exist, are poor and many of them are living below poverty line. More than one-third of the population is illiterate. Environmental pollution is illiterate. Environmental pollution is at its worst. Our air and water are highly polluted, resulting in suffocation and sickness. The ecosystems are choked and are beyond revival. Corruption is rampant and has gone to the fabric of human society. Way back in

1991-92, the N.N. Vorha report disclosed a close nexus between the politicians, bureaucrats and criminals. Things have not improved since then. The distance between politics and crime is narrowing day by day. The scenario is a result of years of misgovernance and non-governance by the Executive. Misgovernance and non-governance invariably affects the people's rights, thereby giving rise to judicial intervention. While examining the violations of the fundamental rights, the Court may have to probe the Executive domain in the interest of justice. It would, therefore be not possible to lay down any uniform definition of the Lakshman Rekha. It depends on each case and it is for the Judge to keep in mind the interest of justice and constitutional parameters. Nevertheless, but for the power of judicial review there would have been chaos in the country. The Courts in the PIL jurisdiction entertain only those cases where a *prima facie* case is made out for the exercise of judicial review. The Supreme Court's judgments – past and present – in the PIL jurisdiction are by and large in those cases where there are constitutional or statutory violations. In fact, 90 per cent of the PILs are dismissed by the Courts. All the above said leads to the question – is judicial activism or the overreach – by entertaining PILs that seek redress against Executive apathy a deviant from the constitutionally ascribed role of the Court ? Indisputably on occasion the High Court and the Supreme Court may have bounded the line. If the Courts should stop entertaining PILs because they have erred on occasion, then Parliament and State Legislatures should also stop making laws because they too have erred in making some laws. If institutions were denuded of their powers of their follies, democratic Government may as well be wound up. The Delhi sealing case is a good example. The sorry state of the capital is a tribute to lack of governance, a system in which outdated town planning laws were selectively enforced against those who could not “afford” to violate them, while those who had the “resources” could

violate the law with impunity – undoubtedly for a price. The order of the Court left the Government looking red faced and forced a rethinking on planning.

In a working democracy, there should be no occasion, for the Courts to deal with such issues. If the High Court has to deal with nursery admissions, it is because the Government (which is supposed to oversee education) did nothing to address the trauma caused to little children by the “interview” – which they were ready to condemn in Court. If the Court has to give directions to reform the police system it is because the political system refused to implement the reforms recommended by one police commission after the other for the principal reason that it would dilute the control of the politician over the police force. Scratch an order of the Court, and underlying it a story of bad governance. True, higher Judiciary is called upon to interpret the law and to sit in judgment on the legality and constitutional validity of a law. Equally true is that all constitutional validity of a law. Equally true is that all constitutional interpretations have political consequences. Nonetheless, the requirements in a nascent democracy like ours remains that the Judges perform their designated tasks in a manner as not to give the impression of their playing the politician’s game.

Call for Restraint

Hat the Supreme Court stated :

- * Judges a must have modesty and not behave like emperors.
- * They must exercise judicial restraint.
- * They must not encroach into executive or legislative domain.
- * Judiciary has forayed into the domain of other two organs.
- * If Judges do not exercise restraint, politicians will step in and curtail their powers and take away the independence of Judiciary.
- * Judges must know their limits and must not try to run the Government.
- * SC had erred in 1998 and 2005 by interfering in UP and Jharkhand Assembly cases.
- * If Judges act like Legislators or bureaucrats, it follows that Judges should be elected like Legislators or selected and trained like bureaucrats.
- * The constitutional tradeoff for independence is that Judges must restrain themselves from the areas reserved for the other branches.

MAJESTY OF JUDICIARY

By

—G. SRINIVASULU, M.Sc., L.L.M.
Inspector of Police,
Vigilance & Enforcement,
A.P. TRANSCO, Hyd.

The Judiciary is the most sublime instrumentality in the country. *David Pannick*, in his delectable book ‘Judges’ wrote “Judicial independence was not designed as, and should not be allowed to become, a shield for

judicial misbehaviour or incompetence or a barrier to examination of complaints about injudicious conduct on apolitical criteria.

“That a man who has an arguable case that a Judge has acted corruptly or