

The Legislative Aspect of the Judiciary: Judicial Activism and Judicial Restraint

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“There is no liberty where judicial power is not separated from both legislative and executive power. If judicial and legislative powers are not separated, power over the life and liberty of citizens would be arbitrary, because the judge would also be a legislator. If it were not separated from executive power, the judge would have the strength of an oppressor.”

Thus argued Montesquieu, the great political philosopher of the Enlightenment, in favour of a system of governance in which different branches of government exercise different powers to avoid concentration of powers and preserve human liberty—the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the law. This is the doctrine of separation of powers.

Doctrine of Separation of Powers and the Constitution of India

The classic statement of Montesquieu has become one of the cardinal principles of governance in a modern constitutional democracy. While formulating the above proposition, however, Montesquieu was not clear about the inherent salient features that are the pre-requisites for a cohesive and hassle-free governance structure. These inherent salient features include :-

- (i) A written constitution which establishes its supremacy over any institution created under it;
- (ii) Distribution of powers among the three organs of the State; and
- (iii) the co-equal status, along with the coordinating powers of each of the three organs.

With regard to the judiciary, the noted constitutional scholar Prof. D.D. Basu explains the essence of the doctrine of separation of powers thus:-

“So far as the courts are concerned, the application of the doctrine may involve two propositions: namely

- (a) that none of the three organs of Government, Legislative Executive and Judicial, can exercise any power which properly belongs to either of the other two;
- (b) that the legislature cannot delegate its powers.”

The Constitution of India envisages a system of governance based on the separation of powers, even though the Constitution does not expressly mention it. For instance, Article 53(1) expressly vests the executive power of the union in the President, and Article 50 clearly states that the State should take necessary steps to separate judiciary from the executive. In the Indian Context, ‘Separation of Power’ is one of the basic features of the Indian Constitution, which has been rightly declared by the Supreme Court of India in the matter of **State of Bihar v. Bal Mukund Shah**, (2000) 4 SCC 640.

In **Rai Sahib Ram Jawaya Kapur & Ors. v. The State of Punjab**, AIR 1955 SC 549, the Supreme Court, therefore, observed:

“The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”

The doctrine of separation of power has not been adopted in its classical and strict sense. However, the Constitution of India had attempted to insulate each one of these organs against their powers being trespassed upon by the other departments of State. This is very well reflected from the various provisions of the Constitution like Article 121 of the Constitution which puts a kind of restriction on Parliament. It states that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties. A similar provision with regard to the State legislatures is Article 211 of the Constitution of India.

The Constitution further reinforces the doctrine of separation of powers thus:

According to Article 122:

"Courts not to inquire into proceedings of Parliament

(1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure

(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers."

And, according to Article 212:

"Courts not to inquire into proceedings of the Legislature

(1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure

(2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers."

Equally, by Articles 122 & 212 of the Constitution, the courts have been prohibited from inquiring into the proceedings of the Parliament and Legislature respectively.

Additionally, Article 361 of the Constitution grants a kind of immunity to the President or the Governor. It states that the President or the Governor shall not be answerable to any court for the exercise and performance of the powers and duties of his office. Besides this, Article 74 (2) of the Constitution mandates that the question whether any, and if so, what advice was tendered by Ministers to the President shall not be inquired into by any court. These provisions are illustrative enough to reach the conclusion that the Constitution makers took every possible measure to have a robust form of 'separation of power' under the Indian Constitutional scheme, thereby upholding the independence

of each organ of the state, while at the same time, keeping the mechanism of 'Checks and Balances' intact, so as to uphold the flag of the Rule of Law and to maintain the Supremacy of the Constitution.

Subsequently, in **L. C. Golak Nath & Ors. v. State of Punjab & Anr.**, AIR 1967 SC 1643, the Supreme Court reinforced its view with respect to separation of powers thus:

"The constitution creates Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them"

Today, the doctrine of separation of powers has strong footing in the constitutional jurisprudence in India. This is evident from the Supreme Court's observation in **State of West Bengal & Ors. v. Committee for protection of Democratic Rights, West Bengal & Ors.**, AIR 2010 SC 1476:

*"It is trite that in the constitutional scheme adopted in India, besides supremacy of the constitution, **the separation of powers** between the legislature, the executive and the judiciary **constitutes the basic features of the Constitution.**"*

The Limited Role of the Judge as a Law Giver

As a corollary to the doctrine of separation of powers, a judge merely applies the law that it gets from the legislature. Consequently, the Anglo-Saxon legal tradition has insisted that the judge only reflects the law regardless of the anticipated consequences, considerations of fairness or public policy. He is simply not authorised to legislate law.

Simply giving strict adherence to the law or procedure prescribed, may also cause great injustice.

In their book, 'Remarkable Trials of All Countries', New York (1978), Thomas Dunphy and Thomas J. Cummins refer to a trial in the small island nation of Malta. One morning, Judge Cambro was looking out of the window, and he witnessed a murder. After being chased for a few minutes, a man was brutally stabbed with a knife. Noticing a constable at some distance, the assailant fled the scene, with the knife stuck in the victim's body. Soon thereafter, a baker, who just happened to be passing by, tried to help the victim by pulling out the knife. By this time, the constable had arrived at the scene, and finding the baker with the blood stained knife, he arrested him. The baker was put on trial for the murder, and the case was to be heard by none other than Judge Cambro. As no other judge was available, the doctrine of necessity compelled him to take the trial and he convicted the baker on the basis of circumstantial evidence, i.e, the knife and the constable's testimony. Despite knowing personally that the baker was innocent, Judge Cambro found him guilty of murder and sentenced him to death. The baker was hanged. Later, when the truth surfaced and the real story came to be known, people demanded Judge Cambro's resignation. In contrast, a large number of jurists lauded Judge Cambro's judgment, and hailed him as an ideal judge. Clearly, according to these jurists, a judge must follow the law as enacted by the legislature, without being influenced by his personal beliefs. This view on the role of a judge has prevailed in orthodox jurisprudence until recent times.

Now however, rigorous analysis of judicial activity has revealed and recognised the circumscribed role of a judge as a legislator. The finite generalities of law do not—and cannot—anticipate the infinite vagaries of life. It is unlikely that a law, as formulated and enacted by the legislature, would be able to reach every corner and crevice of the situation that it is meant to apply to,

or the mischief that it is meant to rectify and remedy. Therefore, even if the many rules promulgated by the legislature dictate the outcome in a vast majority of cases, there are inevitably some cases—with such unique concoctions of facts—to which, by no stretch of the imagination can any pre-existing generality of law apply incontrovertibly. In such a case, in interpreting a statute or a constitutional provision, according to the words used by the legislature, a judge performs a legislative role. He breathes life into such words, and creates and shapes a body of law that is suitable for the case at hand. He decides the specific colour and content of the words used by the legislature. The famous American pragmatist jurist Justice Holmes, in **Towne v. Eisner**, [245 U.S. 418](#) (1918), observed thus:

“A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in colour and content according to the circumstances and time in which it is used.”

The judge indeed gives meaning to what the legislature has said, and—as it has been said—the process of interpretation constitutes the most creative and thrilling function of a judge. However, the legislative role of the judiciary is highly circumscribed. Judicial lawmaking rests solely on the creative interpretation of foundational texts, such as the Constitution and statutes. The judiciary does not have any power to create laws independent of the foundational texts. Accordingly, Justice Holmes, in his dissent in **Southern Pacific v. Jensen**, 244 U.S. 205 (1917), has remarked:

“I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.”

Admittedly then, judges do legislate even if only in the interstices. The legislative aspect of a judge’s role is most crucial while interpreting a constitutional provision. Justice Dickinson of Supreme Court of Canada, in **Hunter v. Southam Inc.**, [1984] 2 S.C.R. 145, made the following insightful observation:

“The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.”

In kindred spirit, in **M. Nagaraj & Ors. v. Union of India & Ors.**, AIR 2007 SC 71, Justice Kapadia, writing for the Constitutional Bench, observed:

“The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adopted to the various crisis of human affairs. . . . A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.”

The U.S. Supreme Court in **Dred Scott v. Stanford**, (1856) 19 How 393 – a 'Negro' was the property of his master and not a citizen.

In **Plessy v. Ferguson**, 163 U.S. 537 (1896), the Supreme of U.S. held that doctrine of equality is not violated providing education to the white and black children in separate schools as the syllabus and standard of teaching remain the same. However, in **Brown v. Board of Education**, (1954) 98 LE 591, the Supreme Court of U.S. held that separate education facilities were inherently unequal and thus violated the doctrine of equality. This concept was not accepted as slavery was held to be de-harmonizing institution and further buried in **Regents of University of California v. Bakke**, (1978) 438 US 265.

On the basis of the aforesaid judgments, the argument so advanced before the Supreme Court of India in **State of Tamil Nadu v. K. Shyam Sunder**, AIR 2011 SC 3470, whether different quality of education to different students violated doctrine of equality enshrined under Article 14 of the Constitution of India. The Supreme Court held that if the same quality of the uniform education system is accepted and applied, it would not be improved the educational system. It would not only improve but also would achieve the code of common culture, removal of disparity, depletion of discriminatory values in human relations and it would also help in acceptance of uniform civil code as it may help in diminishing opportunities to those who foment fanatic and fissiparous tendencies.

Key Historical Developments that have Influenced the Role of the Judge

Judicial Review

Any discussion of the power of Judicial Review is incomplete without a reference to the US Supreme Court that for the first time asserted such a power over equal and coordinate branches of the 'State', as established under the US Constitution. The celebrated decision of **Marbury v. Madison**, 5 U.S. 137(1803), introduced the concept of Judicial Review in American constitutional jurisprudence. In India, the Constitution has entrusted the Supreme Court with the vital responsibility of acting as the apex arbitrator of disputes, and the *fountain-head of jurisprudence*; it has been conferred diverse jurisdiction, powers and duties to secure justice and the objectives of the Constitution. With a written constitution, the task assigned to the judiciary is to interpret and enforce the powers, rights and limitations imposed on institutions and individuals. In *Marbury*, Chief Justice Marshall held: '*It is emphatically the powers and duty of the Judiciary to say what the law is*'. He also asserted that the federal court has the power to refuse to give effect to Congressional legislation if it is inconsistent with the Court's interpretation of the Constitution.

It might be argued that the framers of the American Constitution did not mean to vest the wide power of Judicial Review to the weakest organ of State, i.e., to the judiciary. While the American Constitution was being negotiated, Yates raised the issue that men placed as judges would feel themselves independent of the heaven itself. However, Alexander Hamilton convincingly addressed that concern; he explained: "*Judicial Review does not suppose a superiority of judicial to Legislative power. It only supposes that the power of the people (Constitution) is superior to both. The intentions of the people would prevail over the intentions of their agents.*"

Interestingly, with regard to the nature and extent of the power of Judicial Review as proclaimed in **Marbury** (supra), the leading American constitutional scholar of his time, observed:

"For his part, Marshall in Marbury never claimed a judicial monopoly on constitutional interpretation, nor did he allege judicial supremacy, only authority to interpret the Constitution in cases before the Court."

Another respectable thesis, in the theory of constitutional democracies is that, the other branches of state, namely, the 'Legislature' and 'Executive' also interpret the constitution. According to the proponents of this thesis, the dicta in **Marbury** (supra) was not meant to claim a broad monopoly of constitutional interpretation by the judiciary. The Court had observed: "*The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions in their natural political, or which are, by the Constitution and laws, submitted to the executive can never be made in this Court.*"

No matter what, the power does exist. It has long been exercised by Constitutional Courts in the United States, even though political scientists and scholars may continue to argue about whether such a consequential power is enshrined in the US Constitution and question the legitimacy of the power of Judicial Review.

Similarly, the Supreme Court of India has repeatedly affirmed the power of Judicial Review, by reasoning that such a power is implicit in a written Constitution, unless expressly excluded by the constitutional provisions. It has held, that the power of Judicial Review is available under the provisions of the Constitution that declares its supremacy.

Unlike, the US Constitutional scheme and texts, the Indian Constitution expressly provides the power of Judicial Review through the provisions of Articles 13, 32, 226, 141, 142 and 144. At the very least, there exists no doubt, with respect to the power of Judicial Review of the Supreme Court of India under our constitutional scheme. The Supreme Court of India resorts to the troika provisions of the Constitution, i.e. Articles 32, 226 and 142, to justify its power of Judicial Review. Article 13(2) of the Constitution prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void. In a relatively short history of sixty-three years of constitutionalism, the power of Judicial Review has evolved so as –

- (i) To ensure fairness in legislative cum administrative action. Thus, it is certain that judicial review lies only against the **decision making procedure** and not against the decision itself;
- (ii) To protect the constitutionally guaranteed fundamental rights of citizens; and
- (iii) To rule on questions of legislative competence between the centre and the states--that is an attribute of another cardinal principle of Constitutionalism i.e. Federalism.

Main Criticisms of the Power of Judicial Review

(a) Issue of Accountability of Judges

The first principled opposition to the power of Judicial Review arises from the core of democracy that envisages the rule of majority. In contrast, the judiciary is an unelected institution, wherein judges are appointed. It is often argued that, in the exercise of the power of Judicial Review, when the judiciary declares a legislation to be unconstitutional, it overturns the popular will that is reflected in the enactment of a popularly elected legislature.

The critics of Judicial Review envisage the role of the judiciary as purely one of resolving disputes between parties, and they believe that the resolution should be strictly according to the law laid down by the elected legislature. They champion the notion of 'parliamentary sovereignty', which was once the norm in the U.K., and according to which the acts of parliament are *de facto* constitutional and cannot be challenged by the judiciary. It is important to note that with the passage of the Human

Rights Act, 1998 (UK) and the Constitutional Reform Act, 2005 which established the Supreme Court of England, that the notion of Parliamentary Sovereignty has almost vanished. Consequently, the power of Judicial Review has been accorded respect in the British Constitutional regime. With respect to a written constitution that incorporates the power of "Judicial Review", it would be appropriate to refer to Justice Aharon Barak's following observation:

"To maintain real democracy and to ensure a delicate balance between its elements -a formal constitution is preferable. To operate effectively, a constitution should enjoy normative supremacy, should not be as easily amendable as a normal statute, and should give judges the power to review the constitutionality of legislation. Without a formal constitution, there is no legal limitation on legislative supremacy, and the supremacy of human rights can exist only by the grace of the majority's self-restraint. A constitution, however, imposes legal limitations on the legislature and guarantees that human rights are protected not only by the self-restraint of the majority, but also by constitutional control over the majority."

In the Indian context, it is an established fact that the Constitution of India, reflecting the WILL of WE THE PEOPLE, is supreme and sovereign, and since the Constitution entrusts its constitutional courts with the power of Judicial Review, the concern regarding accountability is unfounded. The scheme of checks and balances is enshrined in various constitutional provisions. Nonetheless, it must be emphasised that the members of the Constituent Assembly had explicitly warned against any illegitimate usurpation of power in the name of Judicial Review. In the words of Sir Alladi Krishnaswamy Iyer:-

"The doctrine of independence is not to be raised to the level of a dogma so as to enable the judiciary to function as a kind of super-legislature or super-executive."

Similarly, Shri T.T. Krishnamachari said :-

"It might be that by giving the judiciary an enormous amount of power – a Judiciary which may not be controlled by any legislature in any manner except by the means of ultimate removal – we may perhaps be creating a Frankenstein monster which could nullify the intentions of the framers of the Constitution. I have in mind the difference that was experienced in another country."

This reminds me of Franklin D Roosevelt's 'Court-Packing Plan'. With that plan, the US president threatened "to appoint justices who will act as judges and not as legislators".

(b) Doctrine of Democratic Deficits

We must also consider another popular objection to the doctrine of 'Judicial Review'. It is reasoned that the substantive contents of a constitution adopted by a country at a particular point of time reflect the will of its framers. However, it is not necessary that the intent of the framers corresponds to the will of the majority of the population at any given time. In the Indian setting, it is often argued that the members of the Constituent Assembly were overwhelmingly drawn from elite backgrounds, and hence did not represent popular opinions on several vital issues. Furthermore, the adoption of a constitution demonstrates a country's pre-commitment to its contents and the same become binding on future generations. Therefore, the idea of a 'living constitution' or a Constitution as an organic document which grows with the passage of time through amendments and judicial interpretation, has been vehemently opposed. The power of the legislature to amend the Constitution is not unlimited, and the idea of 'Judicial Review' designates the higher judiciary as the protector of the Constitution. This scheme works smoothly as long as the demands and aspirations of the majority of

the population correspond with the constitutional prescriptions. However, scope for dissonance arises when majoritarian policy-choices embodied in the legislative or executive acts come into conflict with the constitutional provisions. The higher judiciary is then required to scrutinize the actions of its co-equal branches of government. Some scholars have argued that fact-situations of this type involve tensions between the understanding of the words 'constitutionalism' and 'democracy' respectively. Hence, it is postulated that the provision for 'Judicial Review' gives a rather self-contradictory twist to the expression 'constitutional democracy'.

Other Crucial Developments

To understand the evolving role of a judge, we must also take into consideration some recent developments in the legal sphere. A crucial development relates to the separation of powers. The modern view of the doctrine does not only impose a negative duty on each branch of the government to refrain from overstepping its domain, but also imposes a positive duty on each branch to perform certain minimum functions within its constitutionally mandated sphere.

Accordingly, in ***State of U.P. & Ors. v. Jeet S. Bisht & Anr.***, (2007) 6 SCC 586—even though the matter was referred to another Bench, owing to a split decision—Justice S.B. Sinha aptly described the modern understanding of the separation of powers thus:

“Separation of power in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. . . . Separation of power doctrine has been reinvented in modern times. . . . The modern view, which is today gathering momentum in Constitutional Courts world over, is not only to demarcate the realm of functioning in a negative sense, but also to define the minimum content of the demarcated realm of functioning.”

In another significant development, in 1995, the Chief Justice of India, along with the Chief Justices of the Asia and the Pacific, became signatory to the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region. They accepted the following principles as representing the minimum standards necessary to be observed, in order to maintain independence and effective functioning of the judiciary:

“The objectives and functions of the judiciary include the following:

- a) To ensure that all persons are able to live securely under the rule of law;*
- b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and*
- c) To administer the law impartially among person and between persons and the State.”*

Perhaps, with the aforementioned understanding of the circumscribed lawmaking authority of a judge, as well as some recent legal developments, we can fully appreciate Justice Bhagwati's clarion call to action, in a speech he delivered at the University of Wisconsin, Madison:

“Once it is recognized that the judges do make law, though not in the same manner as the legislature, it will immediately become apparent why judges can and should adopt an activist approach. There is no need for judges to feel shy or apologetic about the law creating roles.”

What is an Activist Approach? What is Judicial Restraint?

The activist approach—and by extension, “judicial activism”—suggested by Justice Bhagwati, envisages changes in the interpretation of the constitutional and Statutory provisions in consonance with the dynamics and uncertainties of human affairs and relations. Simply put: Courts must “apply” the law in a way that makes sense of the temporal nature of our reality. In contrast, in the conservative mind, the touchstone of activism is the failure of the judiciary to interpret the constitutional provisions and statutes in accordance with the will of the founding fathers and legislators respectively; this is how it was articulated by Raul Berger, a [professor](#) at The [University of California at Berkeley](#) and [Harvard University School of Law](#). The criticism implied in this position is, that the judiciary is overzealous in interfering in Executive and Legislative spheres, and that it acts without regard to the intent of the founding fathers/ legislators. Accordingly, the conservative position is that the judiciary fails to observe judicial restraint.

The underlying assumption is that there is singular intent of the founding fathers in adopting a constitutional provision—or of the legislators in passing a statute—and that such intent is objectively discernible. But of course, there may have been different intents held by the founding fathers or legislators in adopting a constitutional provision or statute. Moreover, even if we assume such singular intent of the founding fathers, the specificity of the intent of each of the founding fathers might not be the same. So in the act of deciphering an intent, our subjective experiences may shade its form and content. As a result, judicial activism, like beauty, may lie in the eye of the beholder. By inference, what may be considered a failure to observe judicial restraint, may vary from person to person. If strictly scrutinized, it would become apparent, that judicial activism may not be a particularly well-defined concept; the same may be more of an ink blot for varied projections, than an analytically well-defined notion that can serve as the agreed focal point for debate. The broad and diffused contours of judicial activism are visible in Black’s law dictionary too; this defines judicial activism as a judicial philosophy, which motivates judges to depart from strict adherence to precedents, in favour of progressive policies which are not always consistent with the restraint expected to be exercised by appellate judges. Since judicial restraint and activism are two sides of the same coin, this definition hardly illuminates the penumbra of judicial activism.

Judicial Activism of the Supreme Court of India

With the aforementioned caveats in mind, in the Indian context, judicial activism is regarded as the active interpretation of an existing provision with the view of enhancing the utility of legislation for social betterment, in accordance with the constitution. The Supreme Court has itself urged judges to actively strive to achieve the constitutional aspirations of socio-economic justice. In **S. P. Gupta v. Union of India**, AIR 1982 SC 149, referring to the orthodox British view of judging—judge as a neutral and passive umpire—the Court observed:

“Now this approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities’ justice, dalit justice and equal justice between chronic un-equals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and

creative approach. The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service of social justice through a pro-active goal oriented approach. . . .What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half hungry millions of India who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives.”

For a long time now, the Supreme Court has emphasised the Constitutional objectives, and has acted as if it were moved by the teary-eyed masses of India. It has understood that when some branch of the government fails to discharge its constitutionally mandated function, people are entitled to move the courts for redress; so moved, the Court has compelled the inactive branch concerned, to discharge the said function.

In ***Kumari Mathuri Patil & Anr. v. Addl. Commissioner, Tribal Development & Ors.***, (1994) 6 SCC 241, the Supreme Court realised, that at the instance of fraudulent and fabricated certificates, candidates belonging to forward communities had been obtaining benefits that were meant only for reserved category candidates under the reservation policy of the State. In order to check the same, and to give such benefits to genuine candidates, the Supreme Court issued a set of 15 guidelines, providing for a complete procedure with respect to how such certificates should be granted, which would be the authority that is competent to issue such certificates, and a procedure for the issuance of the same. It also created a vigilance cell headed by a senior police officer, whose purpose was to investigate the social status of the claimant. The Supreme Court, while deciding the case, in ***Dayaram v. Sudhir Batham & Ors.***, (2012) 1 SCC 333, doubted the correctness of the said judgment. The court doubted the competence of the Supreme Court to issue such directions, which were allegedly to be legislative in nature. Therefore, the matter was referred to a larger bench, and such larger bench held, that in exercise of the powers conferred upon it by Article 32 r/w Article 142 of the Constitution, the directions issued by the Supreme Court were valid and laudable, as the same had been made to fill the vacuum that existed in the absence of any legislation, to ensure that only genuine SC/ST and OBC candidates would be able to secure the benefits of certificates issued, and that bogus candidates would be kept out. Simply filling up an existing vacuum till the legislature chooses to make appropriate laws, does not amount to taking over the functions of the legislature.

In ***Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat & Ors.***, (1991) 4 SCC 406, the situation was that, a large number of directions had been issued, as regards the manner in which the police could lodge a case against a judicial officer. In ***Supreme Court Advocates-on-record Association & Ors. v. Union of India***, (1993) 4 SCC 441, a nine-judge bench of the Supreme Court laid down the guidelines and norms for the appointment and transfer of Judges creating a collegium, though the same has not been provided for under the Constitution.

In ***Suraz India Trust v. Union of India***, (2011) 4 SCR 224, the question that was raised was, whether by creating a collegium, the Supreme Court itself had changed the basic structure of the Constitution by providing for a different mode for the appointment of High Court and Supreme Court Judges, and the transfer of High Court Judges. In connection with the said issue, the Supreme Court has consistently held, that the High Court is an independent institution subordinate to none, and that

the procedure prescribed under the Constitution provides for adequate safeguards, to preserve the independence of the judiciary. The independence of the judiciary has always been considered to be a basic feature of the Constitution.

Furthermore, the founding fathers, by the incorporation of Article 141, empowered the Supreme Court to declare the law of the land. Expounding on Article 141, in **Nand Kishore v. State of Punjab** (1995) 6 SCC 614, the Court held:

“Their Lordships decisions declare the existing law but do not enact any fresh law, is not in keeping with the plenary function of the Supreme Court under Article 141 of the Constitution, for the Court is not merely the interpreter of the law as existing, but much beyond that. The Court as a wing of the State is by itself a source of law. The law is what the Court says it is.”

In reference to its powers that may be exercised when it is moved by an appropriate proceeding for the enforcement of a fundamental right, in **Bandhua Mukti Morcha v. Union of India**, AIR 1984 SC 802, the Supreme Court observed:

“It is not only the high prerogative writs of mandamus, habeas corpus, prohibition, quo warranto and certiorari which can be issued by the Supreme Court but also writs in the nature of these high prerogative writs and therefore even if the conditions for issue of any of these high prerogative writs are not fulfilled, the Supreme Court would not be constrained to fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress, but would have power to issue any direction, order or writ including a writ in the nature of any high prerogative writ. This provision conferring on the Supreme Court power to enforce the fundamental rights in the widest possible terms shows the anxiety of the Constitution makers not to allow any procedural technicalities to stand in the way of enforcement of fundamental rights. The Constitution makers clearly intended that the Supreme Court should have the amplest power to issue whatever direction, order or writ may be appropriate in a given case for enforcement of a fundamental right.”

Quoting the observations in respect of policy making by Lord Justice Lawton in **Laker Airways** (1977 (2) WLR 234 at 267), Chief Justice A.S. Anand, as he then was, re-iterated the principle that the ‘role of the judge is that of a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts, I must neither take part in it nor tell the players how to play’. Justice Anand added:

“The judicial whistle needs to be blown for a purpose and with caution. It needs to be remembered that court cannot run the government. It has the duty of implementing the constitutional safeguards that protect individual rights but they cannot push back the limits of the Constitution to accommodate the challenged violation.”

Wise words indeed for judges to remember. The problems, however, is the absence of an effective remedy when judges cross the Lakshman rekha, consciously or otherwise, leaving no remedy to restore constitutional balance.

Courts of law are creatures of the Constitution and can act only within the sphere of their jurisdiction.

Aside from the overall importance of the Magna Carta in laying the foundation of civic and human rights, 'due process' was among the first legal instruments to create the basis for fair trial of an accused, both in procedure and in substance. The following two articles of the Magna Carta deserve attention in order to understand the primacy that the 'law of the land' and 'lawful judgment of the peers' acquired in delivering and ensuring 'justice' in a democratic system:

1. **Article 39:** No free man shall be arrested or imprisoned or disseised or outlawed or exiled or in any way victimized, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land.
2. **Article 40:** To no one will we sell, to no one will we refuse or delay right of justice.

The Invention of Public Interest Litigation

As an illustration of its commitment to not let legal technicalities impede access to justice, the Supreme Court developed the strategy of public interest or social action litigation, with the motivation of making the legal system more accessible to the poor and disenfranchised. In doing so, the Court redefined the doctrine of standing. Traditionally, the doctrine required a prospective plaintiff to show that some personal legal interest had been invaded by the defendant; it barred a person who was merely interested as a member of the general public in the resolution of a dispute to be heard in the courts; he must have had a personal stake in the outcome of the controversy. However, in a significant departure from the traditional contours of the doctrine--and an activist mode--the Supreme Court of India has held the view that any member of the public or social action group may approach the Court on behalf of a victim who is unable to do so, due to poverty, disability, or socially or economically disadvantaged position. The basic motivation behind the relaxation of the doctrine of standing is to promote the rule of law. Being a constitutional democracy, the Constitution is the supreme law of the land. Accordingly, our Constitutional courts can legitimately exercise the power of Judicial Review. By encouraging people to challenge the unconstitutional acts of the State, Judicial Review makes the government accountable for its individual acts, and it promotes a constitutional culture in the country.

In a move to further eliminate barriers to access to justice, the Supreme Court has even held that a plaintiff can move the court by means of a simple letter, giving way to the establishment of epistolary jurisdiction--jurisdiction invoked by writing epistles to the court. While being a relatively newly developed jurisdiction, its contours have been well defined by the court. (Vide: **Miss Veena Sethi v. State of Bihar**, AIR 1983 SC 339; **Citizens for Democracy through its President v. State of Assam & Ors.**, AIR 1996 SC 2193).

As a result of this broadening of access to the justice system, a large number of Public Interest Litigation (PIL) cases have been coming to court. The judicial creation and practice of the institution of 'Public Interest Litigation' represents the most innovative way and process of achieving/securing the justice in its dynamic form. In **People's Union for Democratic Rights & Ors. v. Union of India & Ors.**, (1982) 3 SCC 235, the Supreme Court defined 'Public Interest Litigation' as follows:

"Public interest litigation is a cooperative or collaborative effort by the petitioner, the State or public authority and the judiciary to secure observance of constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society."

Recently, in **State of Uttaranchal v. Balwant Singh Chauffal & Ors.**, AIR 2010 SC 2550, the Supreme Court of India explained the motivation behind PIL thus:

"This Court while exercising its jurisdiction of Judicial Review realized that a very large section of the society because of extreme poverty, ignorance, discrimination and illiteracy had been denied justice for time immemorial and in fact they have no access to justice. Pre-dominantly, to provide access to justice to the poor, deprived, vulnerable, discriminated and marginalized sections of the society, this Court has initiated, encouraged and propelled the public interest litigation. The litigation is upshot and product of this Court's deep and intense urge to fulfill its bounden duty and constitutional obligation."

In addition, in the said case the Supreme Court mapped out the development of PIL jurisprudence in the last three decades wherein it noted three phases of its developments, dealt with those set of cases/issues where directions and orders were passed primarily to protect fundamental rights under Article 21 of the marginalized groups and sections of the Society, who because of extreme poverty, illiteracy and ignorance cannot approach constitutional courts; the second phase mainly dealt with those cases which are focussed on protection and preservation of ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments, etc. In its third phase of development, the courts were mainly focused on various facets of good governance like probity, transparency and integrity in governance mechanism.

However, in this process, the constitutional courts of India faced criticism in the name of 'judicial overreach'--that is the failure to observe judicial restraint. In addition, on several occasions, it faced non-cooperation from other coordinate branches of state at the implementation stage. But, this did not deter the constitutional courts to devise remedies like 'continuing mandamus' so as to ensure the effective implementation/compliance of its orders.

This march of law--in the context of PIL--has given rise to a set of new problems and practical difficulties that are the subject matter of debate amongst the various legal stake holders. Constitutional courts have noted a few instances of frivolous PIL petitions, which amount to abuse of the judicial process and pose as a serious hindrance in the administration of justice. To curb such abusive practices, constitutional courts have imposed exemplary fines and issued warnings to the respective litigants at appropriate occasions. This precautionary approach of the Supreme Court is necessitated, to provide adequate guidelines for regulation of PIL. The journey so far in PIL jurisprudence has put an indelible mark on constitutional developments around the globe.

Production of Evidence

In another bold move, the Supreme Court of India decided to address the issue of evidence production for the poor and marginalized. In a traditional adversary system of justice, each side is responsible for producing its evidence, and the judge, as a neutral umpire, decides which side presented a more convincing narrative in light of the evidence produced. A judge in the Anglo-Saxon tradition does not participate in the process of evidence production. Recognizing the socio-economic realities of India--particularly of the poor, the Supreme Court started appointing commissioners for the purpose of investigating and making reports to the court. The reports thus produced, are made available to both sides of the legal issue so they can act accordingly.

The Basic Structure Doctrine

Besides creating procedural devices, the Supreme Court's activism has enriched jurisprudence with novel and seminal concepts such as the basic structure doctrine. According to this doctrine, any amendment that alters the basic structure of the constitution is unconstitutional. The genesis of the doctrine may be traced back to the case of **Sajjan Singh v. State of Rajasthan**, AIR 1965 SC 845, in which Justice Mudholkar pondered thus:

"It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution and if the latter, would it be within the purview of Art. 368?"

As if it were answering Justice Mudholkar's query, in **Kesavananda Bharati v. State of Kerala**, AIR 1973 SC 1461, the Supreme Court held, that the power to amend the Constitution, enshrined in the constitution, did not comprehend the possibility of amending the most fundamental and essential features of the constitution; according to the majority, the fundamental features of the constitution are rule of law, secularism, federalism, equality, and democracy. The basic structure of the constitution cannot not be altered by any amendment. The Supreme Court further added:

"It does not include the power to alter the basic structure, or framework of the Constitution so as to change its identity."

Following the decision in the **Keshavananda Bharati** (supra), the Supreme Court has struck down several Constitution Amendments, testing them on the anvil of basic structure. In **Indira Nehru Gandhi v. Raj Narain**, (1975) Supp SCC 1, the court struck down the 39th Amendment as unconstitutional, because the amendment tried to impart validity to Ms. Gandhi's election, after it was set aside by the Allahabad High Court, and while her appeal was pending before the Supreme Court.

In **Minerva Mills Ltd. v. Union of India**, (1980) 3 SCC 625, the Supreme Court declared that the Parliament cannot, in exercise of its limited power of amendment contained in Article 368, enlarge this very power into an absolute power.

In **Kihoto Hollohan v. Zachillhu**, (1992) Supp. 2 SCC 651, the Supreme Court held, that paragraph seven of the 10th Schedule to the Constitution, which excluded judicial review of the decision of the Speaker/Chairman of the House on the question of disqualification of MLAs/MPs, offended the basic structure of the Constitution.

By coining the basic structure doctrine, the Supreme Court has ensured that at least some basic rights of the poor, the minorities, and the weak cannot be diluted in the Constitution, even by way of constitutional amendments.

Article 32 and Article 142 Jurisprudence

In its activist streak, the Supreme Court has also imparted new vigour to the process of constitutional interpretation. For instance, the Supreme Court has insightfully identified Article 32 as the constitutional provision that provides for the enforcement of fundamental rights in areas with legislative vacuum. Not only has it held that fundamental rights are limitations upon the State power, but the right to constitutional remedies is itself a fundamental right enshrined in Article 32 of the Constitution, and in the case of an infringement of a fundamental right by the State, an aggrieved party can approach the Supreme Court for a remedy. In **Vishaka & Ors. v. State of Rajasthan & Ors.**, AIR 1997 SC 3011, the Supreme Court held:

“In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.”

Providing further reinforcement to the Article 32 jurisprudence, in **Vineet Narain v. Union of India**, AIR 1998 SC 889, the Court noted that the issuance of guidelines and directions, in the exercise of the powers under Articles 32 and 142, has become an integral part of our constitutional jurisprudence. It also pointed out that such an exercise of powers was absolutely necessary to fill the void in areas with legislative vacuum. In addition, the Court noted:

*“As pointed out in **Vishaka** (supra), it is the duty of the executive to fill the vacuum by executive orders because its field is co-terminus with that of the legislature, and where there is inaction even by the executive for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide relief till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.*

On this basis, we now proceed to give the directions enumerated hereafter for rigid compliance till such time as the legislature steps in to substitute them by proper legislation. These directions made under Article 32 read with Article 142 to implement the rule of law wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under Article 141 and by virtue of Article 144 it is the duty of all authorities, civil and judicial, in the territory of India to act in aid of this Court.”

Similarly, the Supreme Court has vitally contributed to the development of Article 142 jurisprudence. In **Supreme Court Bar Association v. Union of India**, AIR 1998 SC 1895, a Constitution Bench of the Court held:

“Indeed this Court is not a court of restricted jurisdiction of only dispute- settling. It is well recognized and established that this court has always been a law maker and its role travels beyond merely dispute settling. It is a “problem solver in the nebulous provisions dealing with the subject matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject.”

Describing the scope of the powers under Article 142, in **Kalyan Chandra Sarkar v. Rajesh Ranjan**, AIR 2005 SC 972, the Court noted:

“Article 142 is an important constitutional power granted to this court to protect the citizens. In a given situation when laws are found to be inadequate for the purpose of grant of relief, the court can exercise its jurisdiction under Article 142 of the

Constitution. This court reiterated that directions issued by this court under Article 142 from the law of the land in the absence of any substantive law covering the field and such directions "fill the vacuum" until the legislature enacts substantive law. This court has issued guidelines and directions in several cases for safeguarding, implementing and promoting the fundamental rights, in the absence of legislative enactments."

The Court described this power to do 'complete justice' as a 'corrective power', which privileges equity over law. The Supreme Court explaining the nature of inherent power in article 142 of the Constitution stated that:

"... in exercise of its plenary powers under Article 142 this Court could not ignore any substantive statutory provision dealing with the subject. It is a residuary power, supplementary and complementary to the powers specifically conferred on the Supreme Court by statutes, exercisable to do complete justice between the parties where it is just and equitable to do so."

Hence, the power under Article 142 of the Constitution was vested in the Supreme Court to prevent any obstruction in the stream of justice; it can be considered as a tool for rendition of individualized justice. Recently, the Court held:

"This Court's power under Article 142(1) to do "complete justice" is entirely of different level and of a different quality. What would be the need of complete justice in a cause or matter would depend upon the facts and circumstances of each case and while exercising that power the Court would take into consideration the express provisions of a substantive statute. Any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of this Court. Once this Court has seisin of a cause or matter before it, it has power to issue any order or direction to do "complete justice" in the matter."

Nevertheless, Supreme Court had cautioned itself against the abuse of the power to review by declaring:

"The power, however, has to be exercised for doing full and complete justice. But wider the discretionary power, the more sparing its exercise. Times out of number this Court has stressed that though parties promiscuously provoke this jurisdiction, the Court parsimoniously invokes the power."

While considering the nature and ambit of its own power under this Article, this Court observed that it was advisable to leave its power uncatalogued so that it remains elastic enough to be molded to suit the given situation, even where no alternative remedy is efficacious due to lapse of time. The recent prudence on the part of Supreme Court itself, to streamline its jurisdiction and ambit of Art. 142 of the Constitution is well reflected when a division bench of it referred the question at hand to the Chief Justice of India for constituting a higher bench.

Other Examples Where the Court Issued Guidelines

As an example, in the absence of the any legislation enacted by Parliament on the subject of inter-country adoption, i.e., the adoption of Indian children by foreign nationals, the Supreme Court issued detailed guidelines in **L. K. Pandey v. Union of India & Anr.**, AIR 1986 SC 272. Since there has been no subsequent legislation, these guidelines continue to be the law. Similarly, in the absence of any relevant legislation, the Supreme Court issued guidelines required to be followed while making

arrests, in ***D. K. Basu v. State of West Bengal***, AIR 1997 SC 610; concerned about the plight of the undertrials, the Supreme Court issued pertinent guidelines in ***Ramamurthy v. State of Karnataka***, AIR 1997 SC 1739.

The Bounds of the Supreme Court's Activism

Notwithstanding the risk of being redundant, it is crucial to stress that the Court has always understood it to be the obligation of the executive branch to pass orders in areas of legislative vacuum; this is because the executive's field is co-terminus with that of the legislature. It is only when both the legislature and the executive have failed to provide legislation in an area, the Court has found it to be the duty of the judiciary to intervene and, that too, only until the Parliament enacts proper legislation covering the area. The Supreme Court has been remarkably cautious while deciding whether to perform legislative or executive functions.

In ***Aravali Golf Club v. Chander Hass***, (2008) 1 SCC 683, it observed that judges should not unjustifiably try to perform executive or legislative functions; in the name of judicial activism, the judiciary cannot attempt to take over the functions of another organ of the State. Nonetheless, the Court noted that judicial activism is a useful, if not necessary, adjunct to a healthy democracy. Such activism, however, should be resorted to only in exceptional circumstances where the interests of the nation or of the poorer or weaker sections of the society would be in peril in the absence of judicial action. Ordinarily, the task of legislation or administrative decisions is for the legislature and the executive and not for the judiciary.

Crucially for our constitutional democracy, the Supreme Court has always held the Constitution to be the supreme and immutable source of law. According, even in its activist posture, in ***Dayaram*** (*supra*), the Court has noted:

"This Court has neither re-written the Constitution nor resorted to 'judicial legislation'. The judicial power was exercised to interpret the Constitution as a 'living document' and to enforce fundamental rights in an area where the will of the elected legislatures have not expressed themselves."

A million dollar question: Has the Supreme Court in its activism failed to respect the Constitution?

It has frequently been remarked that the Indian Supreme Court through its activism has assumed the role of the Legislature; the criticism is that it has not only performed the circumscribed role of a law giver, but that it has actually assumed the role of a plenary law-making body, like the Legislature. Put differently, it has been stated that the SC has clearly overstepped the limits of the judiciary and has ventured into the domains of the other branches of the government. Many proponents of judicial restraint have opined, that some remedies designed by the Supreme Court such as the 'continuous mandamus' demonstrate the failure of the judiciary to observe judicial restraint, and that is undesirable because it is a failure to accord respect to other co-equal branches of the government. According to this view, the judiciary acts as if it were first among equals.

It is, of course, true that our Constitution comprehends three co-equal branches of the government. No democracy and no constitution gives absolute powers to the judiciary. In fact, it must be acknowledged that the consolidation of power by any one branch of government is anathematic to the very idea of democracy. Consequently, judicial creativity ought not to result in subverting the Constitution. Any attempt made by the judiciary to re-write the Constitution, particularly in light of the Court's own creation of the basic structure doctrine, ought to be regarded as unconstitutional. An act of

the judiciary that is motivated purely by goals other than those enshrined in the Constitution must be considered constitutionally illegitimate, and such an act must be curbed in its infancy.

The basic question that then arises is whether the Supreme Court has followed the principle of separation of powers even as it has embraced judicial activism? The answer has to be a resounding yes. The Court has always abided by the Constitution. It has valiantly fulfilled its primary responsibility of upholding the Constitutional goals. It is the Court's constitutionally mandated duty to enforce the law, not for each minor violation but for those violations that result in grave consequences for the public at large. In such cases, no criticism of such acts as judicial overreach is sustainable in our constitutional framework. Despite being inspired by the constitutional objective of socio-economic justice, the Court has been rather cautious in its activism. It is only when both the legislature and the executive have failed to provide legislation in an area, that the Court has found it to be the duty of the judiciary to intervene and, that too, only until the Parliament enacts proper legislation covering the area. In a manner of speaking, the Court has invited the legislature to pass laws in the very areas where it has passed directions to fill the legislative vacuum. Being pragmatic and prudent, the Court has withstood the test of time and proved to be an illustrious example of an active judiciary in a democratic set-up.

Thus, the aforesaid cases clearly reveal that the courts in India have not violated the mandatory constitution, rather they have only issued certain directions. Some of them are admittedly legislative in nature, but the same have been issued only to fill up the existing vacuum, till the legislature enacts a particular law to deal with the situation. Therefore, there cannot be any justification for anyone to say that judiciary has become judocracy, and has taken over the role of the executive and legislature.

With its activism, the Supreme Court has only protected the citizenry—particularly the weak and the downtrodden sections—against the unconstitutional acts of the legislature and the executive. So judicial activism has served as an invaluable tool for the court in strengthening our democracy. Employing it strategically and cautiously, the Supreme Court has profoundly enriched our fundamental rights jurisprudence. Far from Montesquieu's averments, the activism of the Indian judiciary has indisputably enhanced our conception of liberty, and has also helped the end the suffering of many an oppressed.

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