

JUDICIAL ACTIVISM IN INDIA: A STUDY WITH REFERENCE TO LEGISLATIVE FUNCTIONS

CHAPTER 1

INTRODUCTION: JUDGING THE COURT

Manu Needhi Cholan was a legendary Chola king believed to have killed his own son to provide justice to a Cow, following Manu Needhi or Manu's law. Legend has it that the king hung a giant bell in front of his courtroom for anyone needing justice to ring. One day, he came out on hearing the ringing of the bell by a Cow. On enquiry he found that the Calf of that Cow was killed under the wheels of his chariot. In order to provide justice to the cow, he killed his own son under the chariot as a punishment to himself i.e. makes himself suffer as much as the cow. His name has since then been used as a metaphor for fairness and justice in Tamil literature.¹

This illustrates how justice was delivered in ancient times in our country. Judicial institutions have a sacrosanct role to play in a constitutional democracy like India. Apart from their traditional function of dispute resolution between the parties inter-se, such institutions are also required to act as a balancing mechanism between the conflicting pulls and pressures operating in the society. Equally true is the fact that courts of law, on the other hand, are the products of the Constitution and also the instrumentalities for fulfilling the ideals of the state enshrined therein. While recognising the same, the framers of the Indian Constitution took infinite care to provide for an independent and impartial judiciary as the interpreter of the Constitution and as a custodian of the citizen's rights, by endowing it with the power of 'Judicial Review' in order to keep all the organs within the four walls of the Constitution.

¹http://en.wikipedia.org/wiki/Manu_Needhi_Cholan accessed on 25 Sep 11,1:15 pm

Judges in India were brought up in the British tradition of parliamentary supremacy and therefore rarely questioned the validity of the legislative actions except on the ground of being ultra-vires. However, they scrutinised the acts of the executive with vigilance and held them invalid where they went beyond the powers given to them. The courts were supposed to interpret the Constitution not in terms of what it 'should be' but in terms of 'what is'.

Soon after the adoption of Bill of Rights in the Indian Constitution with the passing of Government of India Act, 1935, the nation gradually started witnessing a gradual shift from the traditional judicial role to a more participatory one. Consequently, the judiciary started playing an 'activist' role in shaping the constitutional commitments adopted by way of interpreting the cold letters of the Constitution in a much profound and objective manner.

The Supreme Court of India being the highest court of the land shapes the destiny of millions of Indians by exercising the various jurisdictions vested in it by the constitution. In his address delivered at the Diamond Jubilee Celebrations of the Madras High Court Advocates Association way back on 17 April 1949, Sir Alladi Krishnaswami Aiyar had predicted with great vision the following:-

*"The future evolution of the Constitution will to a large extent depend upon the work of the Supreme Court and the direction given to it by the court...From time to time in the interpretation of the Constitution, the Supreme Court will be confronted with apparently contradictory forces at work in the society for the time being. While its main function may be one of interpreting the Constitution as contained in the instrument of the Government, it cannot in the discharge of its duties afford to ignore the social, economic and political tendencies of the times which must furnish the necessary background. It has to keep the poise between the seemingly contradictory forces."*²

In recent times the activist role played by the Indian Judiciary especially the Supreme Court has evinced keen interest among the common citizens and has become an issue of

² Alladi Krishnaswami Aiyar, "The Supreme Court of India: Its Constitutional Importance", AIR 1949 Journal 36.

significance. To recall a recent instance, Lok Sabha Speaker, Mrs Meira Kumar, in her address at the conference of presiding officers of legislative bodies in the country held at Jaipur on 23 Sep 11 said, "In the interest of harmonious and smooth functioning of various organs of the State, I strongly feel that no organ should encroach upon the functions which essentially belong to another, nor should it abdicate its essential functions and thereby undermine the Constitutional scheme of checks and balances".³ In the 2G spectrum case probe, the Senior Counsel for the Centre while opposing the monitoring of the case by the Supreme Court said that the Supreme Court should not cross the *Lakshman Rekha* and must act in accordance with law. To this the Honourable Justice observed: "Had Sita not crossed *Lakshman Rekha*, Ravan would not have been killed. *Lakshman Rekha* is not sacrosanct. *Lakshman Rekha* is for a limited purpose."⁴ One is reminded of a Bollywood Court scene dialogue, but the underlying message is obvious – the prophetic statement of 'contradictory forces at work' cited above is confronting the Supreme Court today like never before.

Day to day happenings such as these reported in the newspapers and the scores of other contemporary issues are affecting our country's Governance. The role of judiciary and rule of law being an important indicator of good governance, it is imperative to study the vital organ of judiciary in Indian democracy and deduce certain conclusions.

Purpose of the Study

The underlying purpose of this study is to examine the Indian experience of judicial review and trace the vicissitudes of judicial activism and changing role perception of the judiciary. By so doing, help the uninitiated fellow citizens to understand and evaluate the work of the Supreme Court which is crucial to the health of our constitutional democracy.

³The Hindu, Delhi Edition dated 24 Sep 2011 page 5.

⁴The Hindu, Delhi Edition dated 23 Sep 2011, page 10.

Rationale for the Study

Supreme Court decisions are tremendously important. They deal with hot-button social, political, economic and religious issues with which every citizen should be concerned.

It must be understood that our Constitution does not belong to judges, as a mystery intelligible only to a priestly caste nor does it belong to politicians, as a set of incendiary talking points. It belongs to the people since it is made by them for themselves. It is therefore our responsibility to judge the Court whether it is working as per the constitutional mandate or not. After all, it is people's judgement that must be decisive in the end. And this argument forms the basis/rationale for undertaking the study on Judicial Activism.

Some Important Developments

The following illustrations reflect the trends of 'Judicial Activism' as exemplified by some decisions and orders of the Supreme Court:-

- Since 1973, the judiciary claims the power to nullify on substantive grounds, even an amendment made to the Constitution by the amending body if it changes the basic structure or framework of the Constitution.⁵
- The undoubted privileges of the Legislature even in respect of their internal proceedings have been brought under the purview of judicial review.⁶
- Power of 'Judicial Review' as exercised by the Supreme Court and the High Courts has been recognised by these courts to be an unalterable basic structure of the Constitution.⁷
- The concept of 'state' for the purpose of enforcement of fundamental rights has been widened by successive judgements of the Supreme Court so as to include all public, quasi-public authorities.⁸

⁵ Keshavanand Bharti v. State of Kerala AIR 1973 SC 1463.

⁶ In re Keshav Singh AIR 1965 SC 745.

⁷ Indira Nehru Gandhi v. Raj Narain (1975) SCC Supp.1.

⁸ See Art 12.

- The courts have broadened the scope of '*locus standi*' in the PIL matters, in the early Eighties.
- The Supreme Court has often resorted to judicial legislation by virtue of its power under Art.141 to fill the void created by the so called legislative vacuum.⁹

Statement of the Problem

The modern trends of increasing judicial interference purported to be done under 'activist' judicial process throw open certain vital questions in the constitutional jurisprudence of India. They offer a situation of tug-of-war between certain assumed notions of justice on one hand and the sanctity of the constitutional spirit and values on the other. With its sacrosanct role, the Indian Judiciary is often stigmatised of overstepping its constitutional limits, of overreaching in the domain of other co-ordinate organs, of behaving like emperors and of substituting its own will to that of the legislature, the correct interpretation of which is its paramount function.

Main Objectives

In the light of above discussion, the main objectives of this study are:-

- To understand what kind of role was envisioned by our Constitution for the judiciary and what has been the perception of the Supreme Court of its own role under the Constitution;
- To discuss and analyse the concepts of judicial power, judicial review, judicial activism and judicial overreach/ judicial excessivism;
- To compare and contrast judicial activism vis- a- vis judicial overreach with special reference to legislative functions; and
- To suggest ways and means to ensure the delicate balance between the co-ordinate organs of the state.

⁹ The famous exercise of this sort undertaken by the Supreme Court could be seen in *Vishakha v.State of Rajasthan* (1997)6 SCC 241.

Research Questions

This study has been undertaken to find answers to the following issues:-

- Whether, under the constitutional scheme, judges make law? If yes, whether such lawmaking power at parity with the legislature's power to enact law?
- Given the role 'Judicial Activism' has played in developing the constitutional jurisprudence of India, whether it is constitutionally justified for the judiciary to encroach in the domain of legislature?
- Whether it is justified to resort to 'Judicial Activism' as a solution for every anomaly that arises as a result of the mal-functioning or mis-functioning of other state organs?
- How far has the Indian Constitution adopted the Doctrine of Separation of Powers?

Limitations

The scope of this study is limited to the judicial activism of the Supreme Court of India with reference to legislative functions.

Methodology

The study will be mainly library based and doctrinal in nature with traits of historical and analytical methodology. It will be in the form of critical surveys of judicial decisions or of the constitutional provisions. These surveys will focus on short term and long term impacts of the judgements. The main purpose is to cull out the long term impacts of the Supreme Court decisions and their contribution in bringing about a legal and social change within the framework of the Constitution of India. Besides, this work will endeavour to find out the judicial trends and reach certain conclusions.

Chapter Plan

Chapter 1 gives introduction to the subject of the present study. The available literature on the topic will be comprehensively reviewed in Chapter 2. The concept of Separation of Powers and how far does the Constitution adopt it in essence is the real question which the study undertakes under Chapter 3. Chapter 4 attempts to focus on the analysis of the powers which are constitutionally vested with the constitutional courts in India which, in turn, provide scope for the judiciary to behave in an 'activist' manner. Under Chapter 5, attempt is made to examine the term 'Judicial activism', why judicial activism, its dimensional analysis and demarcation between 'activism' and 'overreach'.

Chapter 6 is aimed at drawing a distinction between 'adjudication' and 'legislation' and highlights certain peculiar instances of judicial lawmaking resulting in clear-cut 'overreach' in the legislative domain and further analyses the cases into three categories to lucidly understand the distinction. Chapter 7 finally ends with conclusion and suggestions of the study.