



Long Arm of the Law

Imperial Judiciary & Judicial Activism

We have always heard the dialogue in Hindi movies **“Kanoon ka hath lamba hai”**. What if we take this in literal sense..... Is what is debated in this article.

In the recent past strictures passed by the Courts & Stinging observations made in many cases have given raise to the question, are judges overstretching their judicial power? Or are judges rewriting the Law? The same is the situation not only in India but also in legally powerful & progressive nations like the United States (US).

The US (United States) situation

Many times in recent political history state courts have captured national attention by grossly overstepping their proper bounds. Each time the courts gave a judgement overstepping its judicial powers by extending its long arm, republican governors in the US could do nothing of consequence and said **“We are watching the steady erosion of government powers and the rise of an imperial judiciary”**.

In the US the delicious irony about the Supreme Court's taking up a case that involved one of the most contentious legal issues was, whether judges should just interpret the law or make new laws.

In *George W. Bush v. Palm Beach County Canvassing Board, et al.*, the court has been asked to decide whether the Florida Supreme Court violated the Constitution by overriding the state's election statute in order to give extra time to counties engaged in manual recounts. At issue is Article II, Section I, of the U.S. Constitution, which says that members of the Electoral College shall be chosen by each state "in such manner as the Legislature thereof may direct."

By effectively nullifying the state election laws, the Florida judges overstepped & overrode the express will of the legislature. The US Government were outraged and said **“The point is not that the judges made the wrong decision, It was just not their decision to make, the Court "has effectively legislated from the bench,"**. It is felt that there is an "willful encroachment on the roles of both the legislative and executive branches," and it called for an end to "judicial supremacy."

Democracy and judicial imperialism in India (The Indian Situation)

The tussle between the judiciary and legislature in India is a long standing dispute which has become fiercer with the legislature and the executive alleging that the judiciary is intruding in their space. The legislature and the executive, rightly or wrongly, perceive judicial proactiveness as judicial tyranny / imperialism.

Doctrine of Separation of Powers

Under the India Constitution, the judiciary, legislature and executive are three vital organs in the body of democracy. All the three components have their own detached but inter allied functions through the doctrine of separation of powers. The Constitution of India, the highest law of the land lays out the powers and duties of these three organs. The legislative has the powers to enact/make the law, the executive to enforce the law so laid and the judiciary to interpret the law.



The main function of judiciary is to interpret the law as enacted by the legislature. Though it is the legislature, which makes the Law, the Judgments rendered by the Supreme Court and High Courts in many cases give the Law a concrete shape, which the people, understand better. Hence, there is immense importance in the decision making process. In spite of having clear separation of duties & powers stipulated in the Indian Constitution, there have been instances where the courts in India have virtually legislated from the bench.

Some of the examples of Judicial Supremacy in India:

Recently the Supreme Court upheld the Justice Lodha panel's recommendation in toto for cleaning up the India Cricket which has left the country's cricket administration stupefied and gridlocked, with little scope for manoeuvre.

The order was harsh, in this case as BCCI is the best run, most profitable sports body in the country, with this order the Supreme court has virtually treated the **BCCI as a BIFR case**, a sick business enterprise that needs urgent restructuring in management and constant monitoring, when actually BCCI is most profitable & is making super normal profits, for records the BCCI top line for March 2015 is whopping Rs.1,266 crore, and the net profits is 220 crores, all this when the economy is down and not very supportive any balance sheet bearing such impressive numbers would be the envy of any mega corporation. But it would be a misconception to see the Lodha Panel recommendations and the SC order, in fact the BCCI should be allowed to conduct itself. It is of course shameful that there was massive match fixing & spot fixing allegations against the BCCI and its officials in 2013 and a lot of ROT in the BCCI, but still one would feel that with the current SC order restructuring the BCCI management, the judiciary has acted like a fan and perhaps overacted and overstepped its jurisdiction

Earlier while the center decided on the reservation issues that OBC quota would be raised to 27% in Central Educational Institutions, the Supreme Court stayed the government order on a Public Interest Litigation stating that laws put in the Ninth Schedule of the Constitution for blanket protection were not beyond judicial scrutiny, and are amenable to judicial decisions & interference.

In the case of Tamil Nadu all political parties were up in arms when the court decided to hear a petition against the Tamil Nadu Government in the Ram Sethu Issue, which was again usurping legislative powers.

In the landmark judgment of Vishaka vs State of Rajasthan (AIR 1997 SC 3011), the Supreme Court has laid down exhaustive guidelines to prevent sexual harassment of women in the work place, until an exhaustive legislation has been enacted for the purpose. It was held that it is the duty of every public as well as private owner to prevent sexual harassment of woman in the work place. Also, it was made mandatory to display the guidelines given by the Supreme Court conspicuously and the legislature was directed to make a comprehensive law on this issue. (which was later formulated as **Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013**)

In a significant judgment, the Supreme Court has held that that it is the paramount obligation of the members of the medical profession to provide aid to every injured citizen, brought for treatment, immediately, without waiting for procedural formalities. This action was taken by the SC on the basis of a report, published in a daily, titled "**Law helps the injured to die**".

Most strikingly, the Supreme Court issued a notice to the Union government seeking an explanation of the steps taken by it to ameliorate the plight of Indian students in Australia, who have been facing racially motivated attacks. Foreign policy is widely considered to be non-justiciable, under which courts cannot interfere. Yet, the interference by Indian courts has not wholly been condemned.

The Satyam Episode – A Class Apart

It is interesting & worthwhile to analyse the satyam episode in the light of the aforesaid discussions on Judicial Activism. In the developed world, there is a major shift in the thinking of the judiciary on the issue relating to investor protection due to breach of compliance of corporate governance regulations. In the wake of the corporate scandals and malfeasance, the burden of proof is shifting on the Boards of Directors to prove that they are functioning according to the required standards of Corporate Governance, In fact the judiciary has been proactive to the redressal of investor grievances and redefined the fiduciary duties of care and diligence by directors, the courts have in fact laid down guidelines, virtually in the true spirits of corporate governance which is more than that specified under any statute.

When the Satyam scandal surfaced, the entire nation was shell shocked & everyone was glued to their TV sets to hear more about the breaking news & were clamoured for action at the earliest to correct the wrong and put the company back on rail, in order to reduce the sufferings of the shareholders, The Ministry of Corporate Affairs took some swift action by invoking

the provisions of Section 388 B, 388 E, 397, 398, 401 TO 408 of the Companies Act, 1956 seeking for various interim relief from the Company Law Board (Principal Bench).

The Company Law Board (CLB) passed orders immediately thereafter and it was flashed in the media that the Central Government has superseded / dismissed the Board of Satyam and appointed new members on the Board to manage its affairs, the orders of the CLB was in the following words:

“The present Board of directors’ stands suspended with immediate effect. None of the present directors shall represent himself to be a director of the company and shall also not exercise any powers as a director... On the authority of this order, in the name and on behalf of this Board, the central government shall immediately constitute a fresh Board of the company with not more than 10 persons of eminence as directors, the central government can also designate one of them as Chairman of the Board. The said Board shall continue until further orders. The newly constituted Board shall meet within 7 days of its constitution and take necessary immediate action to put the company back on the road. It shall submit periodical reports to the Central Government, with a copy to this Board on the state of affairs of the company...”

The CLB has passed this order by virtue of powers conferred on it vide sections 388C read with Section 388 B and also under section 403 read with section 397 / 398 to regulate the affairs of the company during pendency of a proceeding for oppression & mismanagement.

A question would arise as to whether the CLB had the necessary powers to pass such an order and if yes, can the CLB virtually make the Government the proxy to exercise such powers under these sections does this really mean that the CLB has delegated its powers? As the Government superseded the Board in Satyam...

The CLB at best with strict interpretation of these Sections only give directions or pass orders on the management for oppression, mismanagement & the “managerial personal” of the company, In contrast the Courts have in various judgements in the past have observed that:

“No stranger can be appointed on the Board of Directors of any company as appointment of Directors should generally be left to the discretion of the shareholders and members of the company to decide who may represent their interest in the management of the affairs of the company”

It is clear from the above that the CLB has somewhat overstretched its jurisdiction in the case of Satyam

Conclusion

Be it the quasi judicial authorities like the CLB (Company Law Boards) or Courts they have time and again overstretched their arms, beyond just interpreting the Law, but generally it is felt, that there is nothing wrong when the Courts have done something more than what they should for social justice.

By issuing a notice in the Australian racial attacks case, the Supreme Court has in effect opened a channel of communication or dialogue with the Union government, exposing the issue to national debate, which actually had the desired effect & safety of Indians in Australia was at least debated, communicated & forced the Indian Government to sit up and take notice. The Supreme Court’s high public visibility makes it an ideal forum for such an exchange of ideas.

Even though the courts issue directions for the enactment of certain laws, it is always the discretion of the Legislature to enact it at its will and leisure. The principal function of the courts is to impart justice to the litigants. However, if the judges indulge in the function of law making, they digress from their principal function, thereby adding to the huge pendency of cases in our courts.

Unfortunately, however, some pitfalls are inherent to the process of Judicial Activism, though we do not strictly adhere to the principles of Separation of Power in India; there is always a danger of misuse of power. **As Plato has quoted "Power corrupts and absolute power corrupts absolutely."**

Better constitutional adherence and strictly following the Doctrine of separation of powers will go a long way in peaceful co existence of the Legislature & the Judiciary.

Reference: American Constitution, Indian Constitution, Supreme Court Digest, Indian law journal / Reporter, News Dailies