

JUDICIAL ACTIVISM IN INDIA: WHETHER MORE POPULIST OR LESS LEGAL?

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ABSTRACT

More recently than ever, judicial activism has become a subject of debate in India. The understanding of judicial activism is largely driven by people's perception of the role of the courts in a democracy. While some believe that judicial activism is necessary for the protection of public interest, others are of the opinion that as a judicial function, courts are required to interpret law and not make them. In this article, the authors shall analyze the recent judgments passed by the Supreme Court evidencing judicial activism; and whether the Supreme Court in such cases has 'expanded' its judicial functions beyond its mandate, thus blurring the concept of separation of powers enshrined in the Indian Constitution.

I. INTRODUCTION

A non-partisan and an independent judiciary that functions within the constitutional boundaries, defined under the principle of separation of powers is accepted as the interpreter of the constitution and when required, upholds the rule of law and the norms laid down in the Constitution. The Supreme Court of India ("SC") has opined that it is the *sentinel qui vie* and that it operates as a bulwark against violations of fundamental and constitutional rights.¹ In the context of modern democracy, the doctrine of separation of powers has a profound impact on how political institutions interact with civil organs and values of the societies. The importance of an independent judiciary has been debated since the Magna Carta in 1215 A.D. when regal authorities were envisaged to be separated from the will of the people.

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¹ Supreme Court Advocates-on-Record Association & Anr. v. Union of India, AIR 1994 SC 268.

During British rule in India, the judiciary was created as an independent and separate organ of the government through the Government of India Act, 1935. Subsequently, at the time of drafting the Constitution, the Constituent Assembly members were of the view that different branches of government must be controlled in a manner, that limits must be placed on the exercise of their powers. The Constituent Assembly therefore retained this doctrine with greater checks and balances to ensure that representative government lay within the purview of administrative and constitutional principles.

However, in decades to follow, in India where the theory of the welfare state and effective political system were still in its formative years, different organs of the government began to fill up the gaps. The conspicuous gaps of executive and its law enforcement led to the SC stepping into executive domain. Initially, these included areas of egregious human rights violation – *Hussainara Khatoon*², *Olga Telis*³, *MC Mehta*⁴ etc. It would be much later and in the rarest of rare cases, that SC would take the extreme step of framing regulations – such as in the case of *Vishaka v. State of Rajasthan*⁵. Article 32 of the Constitution of India, 1950 (“**Constitution**”) confers considerable powers to the SC to protect the right of a citizen to approach the SC for enforcement of fundamental rights. Furthermore, Article 141 of the Constitution treats such constitutional rulings as ‘law of the land’ thereby making it binding precedent. In fact, the SC, through its rulings on Public Interest Litigations (“**PILs**”), has managed to introduce numerous unique jurisprudences and creative remedies. The advent of PILs became one of the key catalysts behind the rise of judicial activism in India.

On numerous occasions, judicial activism has managed to shape many ‘inter-related and integrationist rights’ which were earlier unheard of. For instance, in *Maneka Gandhi* case⁶, the SC introduced a theory of ‘inter-relationship of rights’⁷ and held that ‘substantive due process’ of law is guaranteed under Article 21 of the Constitution. The constitutional understanding of the concept of ‘State’ for the purposes of invoking fundamental rights have been time and again expanded by courts to include varied instrumentalities of the State. This new institutional development has at times stretched itself and through

² *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1369.

³ *Olga Telis v. Bombay Municipal Corporation*, AIR 1980 SC 180.

⁴ *M. C. Mehta v. Union of India*, (1987) 4 SCC 463.

⁵ (1997) 6 SCC 241

⁶ *Maneka Gandhi v. Union Of India*, AIR 1978 SC 597.

⁷ See Justice K. G. Balakrishnan, *Growth Of Public Interest Litigation In India*, (Address) Singapore Academy Of Law, 15th Annual Lecture, Oct. 2008.

the extension of its justice delivery system, fervently re-oriented the idea of how a government should exercise its executive powers.

The SC, along with respective high courts is obligated to protect the tenets of law as per the provisions of the Constitution. On numerous occasions courts have extended the underpinnings of a question of law into something more tangible, which is more affirmative, right-based, constructive and liberal. On such occasions, the courts undertook purposive interpretation for filling-up gaps in law and provided value-based interpretation for safeguarding human rights and combating impunity. For instance, the Delhi High Court ruling was lauded for its efforts in upholding rights of the marginalized and striking down the specific provision of Section 377 of the Indian Penal Code, 1860 (“IPC”) which criminalized certain consensual sexual acts between adults⁸.

II. SHOULD THE COURTS MAKE LAW, OR INTERPRET THEM?

The Constitution has envisaged a system of polity and governance which is based on the doctrine of separation of powers. Although the Constitution does not expressly provide for this separation, it is reflected from the various provisions of the Constitution, which put certain forms of institutional restrictions on all the three organs of the State. “Separation of powers” between various branches of the government forms the basic feature of the Constitution⁹, however, “*the said concept of independence has to be confined within the four corners of the Constitution and cannot go beyond the Constitution.*”¹⁰ For example, Article 50 of the Constitution states that the “*State shall take steps to separate the judiciary from the executive in the public services of the State.*” Similarly, Article 53(1) of the Constitution vests executive power of the Union in the President. In fact, a reading of the Constitution clearly shows an implied separation of powers with specific chapters dealing with powers and functions of the executive, legislatures and the judiciary.¹¹

⁸ Naz Foundation v. Government of NCT of Delhi, 2009 SCC Del 1762.

⁹ State of Bihar v. Bal Mukund Sha, (2004) 4 SCC 640. Further, the doctrine of “separation of powers” has been recognized by the Court as constituting basic structures of the Constitution, and neither the laws nor constitutional amendments can violate the constitution’s basic structure (per Sikri C.J. in Kesavananda Bharathi, Chandrachud and Beg JJ, in Indira Nehru Gandhi v. Raj Narain, (1976) 2 SCR 347. Kesavananda Bharathi v. State of Kerala, (1973) 4 SCC 225.

¹⁰ Id.

¹¹ This issue has also been dealt with quite extensively by the Supreme Court in Re: Delhi Laws, Act, (1951) SCR 747.

Under the Constitution, the legislative branch has been given the role of enacting legislations, the executive branch, of implementing those laws and the judicial branch; interpreting the laws enacted. At the same time, the Constitution envisages independent functioning of all the three branches, with no supremacy of any one branch or institution over the other.¹² Thus, there are appropriate checks and balances with constitutional limitations that should be followed by all three branches of the State.

There are instances where the courts find gaps in laws and may legislate in the ‘interstices’.¹³ This should not be interpreted as an act of legislation, but simply an act of judicial interpretation. In many instances, the courts have travelled beyond the rule of strict statutory interpretation, and have resorted to “purposive” interpretation of the laws to fill-in the gaps. By using the latter, the courts have tried to understand the objective of the statute in order to correct its deficiencies. However, such “purposive interpretation” should only be used to treat legislative or constitutional deficiencies and should not result in defeating the very purpose of such legislation. The process of interpretation by the courts should effect an improvement in law, and not be in derogation of its constitutional mandate.

However, there have been instances where the courts have, in the absence of an express intent of law on a particular field, passed certain orders and/or directions to the executive that may have amounted to judicial overreach and policy-making.¹⁴ Under the Constitution, the scope of judicial review is typically limited to the following:

- (i) To act as a safeguard against legislative and/or executive excesses
- (ii) Against the decision making procedure of the Court, and not the decision itself
- (iii) To safeguard the fundamental rights of the citizens;
- (iv) On issues relating to federalism¹⁵

¹² See I.C. Golaknath v. State of Punjab & Anr., AIR 1967 SC 1643 where the Supreme Court held that: “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.”

¹³ Thomas Grey, *Holmes Language of Judging- Some Philistine Remarks*, 70 St. John’s L. Rev., 5, 10-11 (1996).

¹⁴ For instance, (a) the Bombay High Court in the case of Loksatta Movement & Anr. v. BCCI ordered the state government of Maharashtra to shift IPL matches out of the State so that water that was to be used for watering pitches could be diverted to drought affected areas. (b) In the case of K. Veeramani v. Chairman, Teachers Recruitment Board, Justice M.V. Muralidaran of the Madras High Court while hearing a writ petition, directed that national song “Vande Mataram” be played and sung in all schools/colleges/universities and other educational institutions on specific days. It is important to note that currently, there are no laws in India that mandate singing national anthem or national song at schools, colleges or educational institutions.

¹⁵ See Justice B. S. Chauhan, *The Legislative Aspect of Judiciary: Judicial Activism and Judicial Restraint*, Tamil Nadu State Judicial Academy, <http://www.tnsja.tn.nic.in/articlenew.html>

As part of the judicial review process, courts cannot contest the policies of the government unless it amounts to legislative or executive excesses. The SC in the case of *Union of India v. M. Selvakumar*¹⁶ held that:

“It is not in the domain of the courts to embark upon an inquiry as to whether a particular public policy is wise and acceptable or whether better policy could be evolved. The Court can only interfere if the policy framed is absolutely capricious and non-informed by reasons, or totally arbitrary, offending the basic requirement of the Article 14 of the Constitution.”

In the same judgment, the Court, by citing *NTR University of Health Sciences, Vijaywada v. G. Babu Rajendra Prasad and Another*¹⁷, affirmed its observation on reservations for SCs/STs that *“how and in what manner reservation is granted, should be made a policy matter of decision for State. Such a policy decision normally would not be challenged.”* While exercising judicial review over an executive action, the Court should not take up the role of an appellate authority. The Constitution does not allow the Court to direct or advise the executive branch of the government in policy matters or on any such related matters that fall within the legislative or the executive domain, provided these authorities do not transgress their constitutional limits or statutory power.¹⁸

The Court further, in the aforementioned case, had further opined that,

“..the scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or is violative of the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court it cannot interfere. The correctness of the reasons which prompted the Government in decision making, taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.”

¹⁶ AIR 2017 SC 740.

¹⁷ (2003) 5 SCC 350. *See also* ¶13 of this judgment, where the court observes, “How and in what manner the reservations should be made is a matter of policy decision of the State. Such a policy decision normally would not be open to challenge subject to its passing the test of reasonableness”. (emphasis supplied)

¹⁸ *Ekta Shakti Foundation v. Government of NCT of Delhi*, AIR 2006 SC 2609 at ¶10.

Thus, as part of judicial review, the courts cannot decide for the government on how and in what manner a certain policy decision is to be framed or introduced. Further, such policy decisions would be open to judicial scrutiny only if they are discriminatory, arbitrary and unreasonable.

III. THE EXTRA-JUDICIAL PROHIBITION

*“It is settled law that in the areas of economics and commerce, there is far greater latitude available to the executive than in other matters. The Court cannot sit in judgment over the wisdom of the policy of the legislature or the executive.”*¹⁹ (emphasis added)

Recently, the Supreme Court of India in the case of *State of Tamil Nadu & Ors v. K. Balu & Anr.*²⁰ passed an order prohibiting the sale of liquor within a distance of 500 meters from the outer edge of national or state highways or of a service lane along the highway. The Court took up the issue of presence of liquor vends on national and state highways across the country, taking into consideration a recent report pointing towards multiple accidents involving driving under the influence of drugs/alcohol which resulted in injuries and deaths of many civilians.

The SC, ignoring its own limitation on the threshold for review of executive policies, in an apparent act of judicial overreach, ordered restriction of sale of liquor within 500m distance of national highways. The above order has again re-ignited the debate on judicial overreach. The primary reason cited by the SC behind enforcing the ban was to tackle the menace of road accidents due to drunken driving in India. Notably, imposing prohibition, either full or in part, lies within the exclusive domain of the respective states. Under Entry 8 of List II of the Schedule VII of the Constitution, each state has been empowered to regulate the production, manufacture, possession, transportation, purchase and sale of intoxicating liquors. Each State has, therefore, exclusive powers to legislate in regard to its prohibition policy and also has full administrative control over such policy implementation. Even the Union Government does not have the constitutional powers to direct any state to regulate on prohibition policy matters of the respective states, as it falls under the exclusive domain of states.²¹

¹⁹ *Bajaj Hindustan Limited v. Sir Shadi Lal Enterprises Ltd. & Anr.*, (2011) 1 SCC 640.

²⁰ (2017) 2 SCC 281.

²¹ Arvind P. Datar, *Judicial Prohibition*, THE INDIAN EXPRESS, (April 11, 2017, 7:55 AM), <http://indianexpress.com/article/opinion/columns/judicial-prohibition-liquor-ban-on-highways-supreme-court-order-4607893/>.

In fact, several states had already formed their own liquor policies and rules in respect of production, purchase and sale of liquor, including restrictions on retail liquor shops on highways. For example, the Excise Policy of Karnataka had already imposed a 220 meter limit on presence of retail liquor outlets while the West Bengal government's Excise Policy stated that no license for the retail sale of liquor of any category would be granted at a new site that was situated within 720 feet from any National Highway or State Highway.

The National Road Safety Council, established under the Motor Vehicles Act, 1988 (“**MV Act**”) after a detailed multi-party discussion, provided for a ban on liquor retail shops that were located within 100 meters of any religious or educational institutions and 220 meters from the national or state highways. Further, the concerned Ministry, vide circular dated December 01, 2011²² had directed Chief Secretaries of all States and Union Territories about strict enforcement of Section 185²³ of the MV Act against drunken driving, including the removal of liquor shops along national highways. Vide the above circular, the union government called upon the following:

- (i) Strict enforcement of Section 185 of the MV Act;
- (ii) Removal of liquor shops along national highways
- (iii) Non-issuance of fresh license to liquor vendors to open shops along national highways;

A closer look at the official data provided by the National Crime Records Bureau (“**NCRB**”) show that 4,81,805 traffic accidents resulted in injuries to 4,81,739 persons and 1,69,107 deaths in the year 2014. The State of Uttar Pradesh followed by Maharashtra and Tamil Nadu reported maximum fatalities in traffic accidents in the country. In fact, these 3 States accounted for 12.2%, 11.0% and 10.1% of total deaths in traffic accidents during the year 2014, respectively. These 3 States together accounted for 33.3% of total fatalities reported all over the country. The amount of rupees spent per head on intoxicants over 30 days’

²² See Ministry of Road Transport & Highways, Government of India notification vide no. Rt25035/40/2011-RS (Dec. 1, 2011), <http://morth-roadsafety.nic.in/WriteReadData/LINKS/dec-501042406620e04d2b-ae97-4a30-86a4-b07fc9668714.pdf>

²³ S. 185 reads, Whoever, while driving, or attempting to drive, a motor vehicle, (a) has, in his blood, alcohol exceeding 30 mg. per 100 ml. of blood detected in a test by a breath analyser, or]; (b) is under this influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle, shall be punishable for the first offence with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both; and for a second or subsequent offence, if committed within three years of the commission of the previous similar offence, with imprisonment for a term which may extend to two years, or with fine which may extend to three thousand rupees, or with both.

period in Uttar Pradesh is Rs. 30.08, Rs. 25.31 in Maharashtra and Rs. 54.07 in Tamil Nadu. Furthermore states like Arunachal Pradesh, Sikkim, Andhra Pradesh, Kerala and Punjab were found to be the highest spenders on intoxicants over 30 days' period.²⁴

The NCRB data further states that only 3.3% of the total accidents and/or fatalities were reported to be arising out of drunken driving.²⁵ By co-relating the per capital consumption data of a given state with the number of road accidents or fatalities reported, there seems to be no direct link between states with maximum per capital liquor consumption and states which witnessed the highest number of road accidents/fatalities. In fact, in the year 2015, the states of UP, Maharashtra and Tamil Nadu were not reported to have the highest per capital consumption of liquor despite a larger proportion of fatalities in road accidents. There is clearly a glaring gap in drunken driving statistics and the reasoning provided by the court in concluding that sale of liquor on state and national highways within a distance of 500m must be banned. While the Court contended that prescription of distance did not amount to judicial policy-making or legislative function, it did not provide any rationale or evidentiary basis for computing 500 meters as a reasonable distance that retail outlets should maintain from state or national highways.

Without prescribing any scientific or statistical explanation for introducing the '500m' rule, the Court introduced an element of uncertainty in the way judicial scrutiny of legislative or executive functions would be carried out. The above judicial prescription, which is infringing upon the exclusive powers of the State under List II of Schedule VII of the Indian Constitution, also runs the risk of being counter-productive and may certainly lead to a substantial loss in state's exchequer. The Court failed to take into account that road traffic accidents have no single cause and that there is a myriad of contributing factors that lead to such high fatalities. Structural faults in road design, poor quality of road maintenance, inadequate global safety features in motor vehicles, non-disciplined driving behavior due to decades of poor enforcement by traffic police, absence of pedestrian and manual lanes adjacent to state and national highways are a few major reasons for road fatalities.²⁶ Surprisingly, the Court while prescribing the '500m' rule, did not take into account such complexities and substituted relevant state laws on road safety with their own directions and policy prescriptions. Further, the SC's decision for denotification of national highways and state

²⁴ Joanna Sugden, *Which Indian State Drink And Smoke The Most?*, The Wall Street Journal (Dec. 23, 2015, 02:21 IST), <https://blogs.wsj.com/indiarealtime/2015/12/23/Which-Indian-States-Drink-And-Smoke-The-Most/>

²⁵ NATIONAL CRIME RECORDS BUREAU, <http://ncrb.nic.in/statpublications/adsi/adsi2014/Chapter1a%20traffic%20accidents.Pdf> (last visited July 26, 2017).

²⁶ Anu Aga, *Roads To Nowhere*, The Indian Express (March 17, 2017, 08:08 AM), <http://indianexpress.com/article/opinion/columns/roads-to-nowhere-india-record-road-traffic-accidents-fatalities-4572440/>.

highways, has adversely affected the financial position of hotels, tourists and other recreational establishments. Given the aforementioned complexities, the legislative and executive branches are better suited for policy making in this regard.

IV. HAS PUBLIC INTEREST LITIGATION BECOME MERELY A SYMBOLIC RE-ITERATION?

Modern constitutional law theorists have always maintained that the courts are not mandated to make laws, but only interpret them; but the courts, on the other hand, in ignoring this principle, have been, at times swayed by popular sentiments. The SC in one of the cases²⁷, quoted Lord Diplock²⁸ to approve the following observations:

“Parliament makes the laws, the judiciary interprets them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it... It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law if judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest...” (Emphasis added)

Lately, it has been argued that the courts in India have taken up a disarmingly populist role on a couple of occasions. While many commentators believe that the courts may have been in deviation of the ‘separation of power’ principle, it is also argued in the same breath that political and bureaucratic abdication has exemplified Court’s role in shaping governance like never before. Having said that, several judges have been mindful of such overreach, and have advocated for exercising judicial restraint. Further, the courts must appreciate that in a democratic setup, certain pressing issues concerning governance and polity are

²⁷ Mohan Lal v. Jai Bhagwan, AIR 1988 SC 1034.

²⁸ Duport Steels Ltd. vs. Sirs & Ors., [1980] 1 WLR 142.

best resolved outside the judicial ambit through political institutions and policy-prescriptions. Another criticism is that on certain causes which lack political consensus and are considered sensitive, the courts have not been very forthcoming in supporting them in the name of judicial activism. In fact, on one hand the SC has expanded the concept of ‘right to life’ to grant citizens their legal due, on the other hand the same court failed to perform its constitutional duty in *Suresh Kumar Koushal & Anr. v NAZ Foundation and Ors.*²⁹ and chose to side with an archaic provision of the IPC. The SC was “guided”³⁰ by the legislatures’ failure to amend or revisit Section 377 of the IPC and accorded a presumption of constitutionality in reinstating the colonial position. The SC’s ruling, such as this, may seem to be more populist and less legal, particularly when analyzed in the context of moral recall value.

V. THE JUDICIAL MORALITY

In a certain sense, all law is a reflection of morality. A legislature, in theory, represents the will of the people, and thus represents and reflects the mores of society, or the majority of society, at least. However, rule of law principles dictate that the state be governed by laws, not by the whims of men. Majoritarian preferences are subject to the rule of law, lest the rights of the minority disappear. Indeed, “*an individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution ‘was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.’*”³¹ (Emphasis added)

The idea of judicial review implies a certain degree of skepticism of pure majoritarianism. As Justice Marshall articulated in the landmark decision *Marbury v. Madison*, “*an act of Congress repugnant to the Constitution cannot become a law,*”³² for if the Constitution is indeed the paramount law, it does not follow that it should be able to be changed by the legislature so easily. While the Constitution provides structural limits on the authority of various branches of the government and serves as a check on its power, it is ultimately the duty of the judiciary to “say what the law is.”³³ As a result, the Court must strike a balance between

²⁹ (2014) 1 SCC 1.

³⁰ *Id.* at ¶32.

³¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015) (quoting *West Virginia Board of Education V. Barrette*, 319 U.S. 624, 638 (1943).

³² *Marbury v. Madison*, 5 U.S. 137, 138 (1803).

³³ *Id.*

protecting minority liberty interests from majoritarian preferences while simultaneously avoiding putting forth their own individual policy preferences.³⁴

Throughout India's post-independence history, the validity of morals legislation or state interventions have gone essentially unquestioned. Much of such interventions, such as standing up for national anthem³⁵ or prayer requirements, the regulation of sexuality³⁶, or the regulation on culinary preferences³⁷ or regulation of minority-community-centric-trade in the name of cow protection³⁸, is based on notions of 'public morality' and 'majoritarian sentiments'.

(A) SHOULD THE JUDGES FOLLOW PUBLIC MORALITY OR CONSTITUTIONAL MORALITY?

*Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat & Ors.*³⁹ is a classic example where the Court sided with public morality over constitutional morality and allowed its personal judgments and ethics to dictate the interpretation of law. In this case, the SC upheld the constitutional validity of the resolution of Ahmedabad Municipal Corporation in respect of closure of slaughter houses for a certain number of days during a Jain festival on the pretext that it hurt religious sentiments of Jain community. The case came before the SC as an appeal against the decision of the Gujarat High Court⁴⁰ which held that municipal resolutions affecting the local bodies banning slaughter of animals in slaughter houses were unconstitutional. The Gujarat High Court held that the petitioner's right to carry out a trade could not ordered closure for a few days in the name of showing reverence towards any other community which espoused or believed or practiced strict vegetarianism and/or non-violence. Further, the High Court also held that the culinary preferences of individuals are strictly private, and it is not for the Court or the State to prescribe food preferences to the citizens. However, on appeal, the SC declared the resolutions to be constitutionally valid and held that the

³⁴ See *Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977). While discussing previous decisions of the Court as a balancing act between the rights of the individual and the demands of organized Society, the Court went on to state that "The balance struck by [the U.S. as a country], having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That Tradition Is A Living Thing."

³⁵ See the Interim Order passed by the SC in the case of *Shyam Narayan Chouksey v. Union of India*, 2016.

³⁶ *Supra note* at 28.

³⁷ *Hinsa Virodhak Sangh v. Mirzapur Kuresh Jamat & Ors.*, AIR 2008 SC 1892.

³⁸ *Hanif Quareshi & Others v. State of Bihar*, AIR 1958 SC 731.

³⁹ AIR 2008 SC 1982.

⁴⁰ *State of Gujarat v. Mirzapur Moti Kureshi Kasaab Jamat & Ors.*, AIR 2006 SC 212.

closure of slaughter house for nine (9) days during *Paryushan* festival fell within the ‘reasonable restriction’ under Article 19(6) of the Constitution. The Court justified the ‘reasonability’ test by stating that:

“a period of 9 days is a very short time and surely the non-vegetarians can become vegetarians during those 9 days out of respect for the feeling of the Jain Community. Also, the dealers in meat can do their business for 365 days in a year, and they have to abstain from it for only 9 days in a year. Surely, this is not an excessive restriction, particularly since such closure has been observed for many years.” (Emphasis added)

There are many grounds on which this reasoning can be analyzed and criticized. First, the Court instead of reviewing the said resolutions through the litmus test of arbitrariness and unreasonableness took up the role to sermonize on culinary preferences. While the Court should have ideally tested the validity of the resolutions on constitutional provisions, it accommodated religion-based claims as a deterrence to uphold its validity. Second, it ignores that the ‘right to eat’ cannot be separated from ‘right to free choice’ as guaranteed under Part III of the Constitution. For another, the Court turned a blind eye to the socio-economic impact of the closure for the butcher community and instead takes upon itself to enforce the homogenous and majoritarian view of tolerance and community behavior.

The Court, instead of rationalizing its arguments within the contours of constitutional law, took up an interventionist role to discipline and regulate inter-community behavior in the name of enforcing tolerance. From a distance, it may not be entirely unfair to argue that the Court may have been guided by an honest desire to promote religious toleration. However, upon a closer analysis of the reasoning given by the Court, it becomes clear that the Court went beyond its cardinal duty to interpret the law, and, instead, imported the majoritarian view of cultural homogenization and secularism to uphold the constitutional validity of shutting down slaughter houses and enforcing a ban on culinary preference of a particular community.⁴¹

The SC in deciding this case of religious faith and economic survival, cited the examples of pre-modern reign of Akbar where slaughter of animals and livestock was banned to uphold the present constitutional and legal position. The Court uses illustrations from the medieval reigns to support the ‘religious tolerance’ arguments despite the fact the individual liberty and fundamental rights did not exist back then, and tolerance was driven by benevolence, not claimed as a fundamental right.

⁴¹ Moiz Tundawala & Arpita Sarkar, *Hinsa Virodhak Sangh v. Mirzapur Modi Kuresh Jamaat: A Critique of the State Enforcement of Toleration*, 1 Jour. of Ind. L. & Soc. 105, 115-116(2009).

CONCLUSION

To quote Jawaharlal Lal Nehru:

“Within limits no judge and no Supreme Court can make itself a third chamber....But we must respect the judiciary, the Supreme Court and the other High Courts in the land. As wise people, their duty it is to see that in a moment of passion, in a moment of excitement, even the representatives of the people do not go wrong; they might. In the detached atmosphere of the courts, they should see to it that nothing is done that may be against the Constitution, that may be against the good of the country, that may be against the community in the larger sense of the term. Therefore, if such a thing occurs, they should draw attention to that fact, but it is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of Third House of correction. So, it is important that with this limitation the judiciary should function.”⁴²

The higher judiciary in India has had a tendency to stray outside its constitutional domain and end up exercising judicial creativity that cannot always be said to be valid in law. While the norm of following a strict separation of powers has been moderately successful in India, many a times the judges do not exhibit judicial restraint in deciding cases that are political or concern larger public sentiments. A lot of times, judges opine on technical matters outside their permissible limits, on core policy issues that fall within the purview of legislative and executive authority. While the judicial institution in India has been arbiter of democratic values and constitutional decency, it must also be mindful of self-inflicted dangers such as judicial intolerance, aggressive political posturing and grand-standing. An overreaching or interventionist court only results in the executive becoming inefficient. It is plausible for the executive to choose not to be reactive in case the SC adopts a proactive and interventionist approach in all cases. SC's imposition of morals and values only undermines its role and the political process and in doing that, derogates the Constitution.

⁴² THE CONSTITUENT ASSEMBLY DEBATES (Sept. 10, 1949). Available on <http://parliamentofindia.nic.in/ls/debates/vol9p31a.htm>