JUDICIAL INTERVENTION AND LEGISLATIVE ACTION

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I am delighted to be here to deliver this lecture in the memory of Shri P.G.C. Chengappa. I knew Mr. Chengappa at the Bar since I started practising in this Court. He was a good advocate and a fine human being, who endeared himself to all those who came in his contact. He was the founder President of Lahari, Advocates Forum, Director of Lahari Law Academy and trustee of Lahari Foundation. He was not only a good advocate but also a good organiser. He was responsible for organising endowment lectures as the General Secretary of Bangalore Bar Association in 1973. It is befitting that Lahari Advocates Forum has been organising lectures in the memory of Shri Chengappa.

Judicial intervention is a topic, which has been perpetually debated in India and all over the world, yet there seems to be no end in sight. I think it is something which is necessary and relevant and will continue to be debated and discussed in any constitutional democracy.

Earlier, many jurists perceived judiciary to be the least dangerous organ of the State, with no influence over either sword or the purse. This perception extended to think of judiciary as a non-productive organ by some. But with

passage of time, it proved to be totally wrong in almost all the democracies, especially in India.

The framers of the Indian Constitution never envisioned the judiciary to be toothless and ineffective, which is evident from the express powers given under the provisions of the Constitution of India. Apart from this legal base, one factor that has strengthened the journey of judicial activism and interventions in India in last seven decades is ‘the power of public opinion.'

The inference of an individual regarding judicial intervention being boon or bane, very much depends upon the perspective with which one looks at it. Do you see it as something in opposition to the executive; or do you see it as fundamental duty of the Court under the Constitution. Some Judges have regarded judicial activism as a misnomer, as the actions of the judiciary are considered as its ‘Dharma’ under the Constitution of India. This is because the judiciary plays the pivotal role of being the guardian of our Constitution. Therefore, we must devote efforts to protect the autonomy of our judiciary which is imperative for a democracy.

Judicial intervention as a phenomenon, is not peculiar to India, but it is to be found in varying degrees in all true democracies. There is often disquiet at judicial ascendancy or activism or as I see it, performance of duty prescribed for it, because of the perception that judiciary is seemingly encroaching into

the boundaries of delineating the jurisdiction of other limbs of the State. A pertinent query may be "is judicial intervention the cause of imbalances in the scheme of separation of powers; or is it the result of or occasioned by the failure or neglect of the other organs of the State to perform the Constitutional obligation."

Before we proceed and discuss the history of Judicial intervention in India, we may briefly see the genesis of the exercise of the powers by judiciary in other democracies.

In United Kingdom, even though there is no written Constitution, conventions developed on the basis of principles of democracy providing the constitutional scheme. The absence of a written Constitution with the acknowledged supremacy of the Parliament led to the well-known aphorism of De Lome, that '*the parliament can do everything except make a man woman, and a woman a man.'* But, the seed of judicial review was indeed sown in England by Lord Coke in ***Dr. Bonham's case***[1] much before it was propounded in the United States by Chief Justice Marshall in ***Marbury v. Madison***[2]***.*** Lord Coke had said, "*when an Act of Parliament is against right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge the Act to be void."* It was the expansion of judicial review of executive actions,

[1] 8 Co. Rep. 107, 77 Eng. Rep. 638
[2] 5 U.S. 137 (1803)

which gave rise to the development of administrative law and public law. Over a period of time even the UK has seen enlargement of judicial power by requiring compliance of state actions with human rights standards.

Even in United States of America, as we all know, Justice Marshall in ***Marbury v. Madison (supra),*** laid the foundation for judicial review. In fact, Hugh Evander Willis, in his famous treatise on the American Constitution describing the role of the US Supreme Court, said, "*it is easier to speak of the solar system without a sun than to speak of American democracy without the Supreme Court."* The importance of the powers of judicial review and intervention have been acknowledged in several democracies. However, the manner and extent of its usage in India have been unmatched. Therefore, it is pivotal for us to focus upon ways to further enhance these procedures to effectuate democratic values in our society.

In India, the framers of the Indian Constitution enacted several provisions designed to secure the independence of judiciary by insulating it from executive or legislative control. Just after the Constitution came into effect, the Supreme Court was very clear of its place in the Constitution. In ***V.G.Row***[3] Patanjali Sastri J., said:

[3] AIR 1952 SC 196

"Before proceeding to consider this question, we think it right to point out, what is sometimes overlooked, that our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted 'due process' clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the 'fundamental rights', as to which this Court has been assigned the role of a sentinel on the quivive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statue. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the Courts in the new set up are out to seek clashes with the legislatures in the Country."

With exceptions, the Supreme Court did not intervene much in the legislative and executive actions till emergency period. There were some progressive trends even then but the position with regard to the scope of judicial review continued to be uncertain till it was firmly laid in the life saving ***Keshavananda Bharti Case[4].***

The post emergency era witnessed judicial intervention promoting several welfare measures. These measures related to arrest, prison conditions, bonded labour, child labour, pavement dwellers, gender discrimination, healthcare, environment and ecology, wildlife and other life's necessities and many other welfare measures. The welfare measures that had to be undertaken by the executive, were mandated by judicial intervention. Some of the landmark, decisions were: ***Maneka Gandhi[5], Raman Dayaram Shetty[6], Hussainara Khatoon[7], Sunil Batra[8], Bandhua Mukti Morcha[9], Delhi Cloth Mills[10], Oleam Leak Case[11],*** etc.

As a result of an independent judiciary, the area of judicial intervention has steadily expanded through public interest litigation. Liberalizing the *locus standi* rule that enabled the development of Public Interest Litigation and class

[4](1973) 4 SCC 225
[5](1978) 1 SCC 248
[6](1979) 3 SCC 489
[7](1980) 1 SCC 81
[8](1978) 4 SCC 494,
(1980) 3 SCC 488
[9](1984) 3 SCC 161
[10](1988) 1 SCC 86
[11](1987) 1 SCC 395

actions for enforcement of the rights of the have-nots at the behest of social activists. The rule of locus standi was liberalised in ***S.P Gupta***[12]and ***Sheela Barse***[13]**.** The practice of appointing a senior counsel as *amicus curiae* that began effectively is continuing for the benefit of, and proper direction in PIL. The concept of 'continuing mandamus' developed as a progressive development of public law. Further, the *suo moto* action on the basis of media reports or any other source of information expanded the reach of the courts for protection of rights.

Problems relating to environment and natural resources of India, which ought to have been tackled on a priority basis by the executive and the legislature were brought up through PIL to be handled by the judiciary. Shedding status-quo approach, judiciary took upon itself the duty to enforce the basic rights of the poor and vulnerable sections of society. It also vowed to actively participate in the socio-economic reconstruction of society by "progressive interpretation" and "affirmative action."

Of the long list of cases referred herein by me, one case that is considered as a flagship for judicial activism and would give the impression about the new age judicial exercise of powers was the celebrated case of the

[12] (1981) Supp SCC 87
[13] (1986) 3 SCC 632

Municipal Council Ratlam vs. Vardhichand[14]. I think it is necessary to state some facts of the case and consider it in the context of 1980's jurisprudence.

The case arose out of a complaint made by the petitioner under section 133 Cr.P.C. to the Sub-Divisional Magistrate. The municipality, in its appeal to the Supreme Court, pleaded that it was unable to implement the order of the High Court and construct sanitation facilities due to financial difficulties.

Dismissing the special leave petition, the Supreme court held that financial incapacity is no defence and on this basis, the municipality cannot be exonerated from its statutory liability. The Court, inter-alia, directed that the municipality shall within six months construct sufficient number of public latrines for the use of men and women separately, provide water supply and scavenging service morning and evening, so as to ensure sanitation. Further, the Health Officer of the municipality was asked to furnish a report, at the end of the six months term, regarding the completion of work. The Court went on to hold that if these directions are not complied with, the Sub-Divisional Magistrate shall prosecute the officers responsible. In addition, the Court shall also consider action to punish for contempt, in case the submitted report by the Sub-Divisional Magistrate, proved wilful breach by any officer. The Court also issued detailed directions along these lines on a number of other points.

[14](1980) 4 SCC 162

This case shows the extent to which the Supreme Court was willing to go to secure the promises of the Constitution.

Expanding upon the role of Supreme Court as guardian of the Constitution by the use of Article 32, which enforces the Fundamental Rights and the use of the plenary powers under Article 142 of the Constitution, in all the cases discussed, there was no attempt by the judiciary to 'clutch at jurisdiction,' much less to usurp the jurisdiction of any other organ. At best, it may be said that, at times the judiciary has stepped into fill the void in the constitutional framework to avert constitutional failure and to prevent any loss of public confidence in the system.

Another technique to fill the lacuna in governance was to issue guidelines in absence of law or in addition to existing law to further the cause of justice. The Supreme Court framed 'guidelines' to regulate exercise of discretion by public authorities, in discharge of their functions consistent with the rule of non-arbitrariness in Article 14. In ***Laxmi Kant Pandey***[15] the Court laid down guidelines to provide procedural safeguards in the matter of adoption of Indian children by foreigners, in view of Article39(f). In ***Joginder Kumar***[16]***,*** it was held that an arrest should not only be legal but also justified to be valid. On that basis guidelines for making an arrest were laid down in ***D. K***

[15](1984) 2 SCC 244
[16](1994) 4 SCC 260

Basu[17]*.* Judgments like ***Vineet Narain***[18] shows the extent to which the Supreme Court travelled to use its power, with intent to keep the faith of the people in the Republic.

Some of the most significant judgments of this period were **S. R. Bommai**[19] relating to justiciability of President's Rule; ***Hawala Case (Jain Hawala Diaries)***[20] relating to monitoring investigation by CBI into accusations against influential public figures; ***M C Mehta***[21]***, TN Godavarman***[22] ***and Vellore Citizen' Welfare Forum***[23] relating to environment and ecology; ***Common Cause***[24] relating to electoral reforms, ***Parmanand Katara***[25] relating to right to medical aid.

The Supreme Court also intervened to protect human rights of affected persons due to development projects for sustainable development. As a result, mega dam projects, like Sardar Sarovar, Tehri, etc. have been monitored on this. Thereby, giving a new dimension to human rights jurisprudence.

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[17](1997) 1 SCC 416
[18](1998) 1 SCC 226
[19](1994) 3 SCC 1
[20](1998) 3 SCC 410
[21](1987) 1 SCC 395
[22](1997) 2 SCC 267
[23](1996) 5 SCC 647
[24](1996) 2 SCC 752
[25](1986) 4 SCC 286

In this regard one judgment that represents the intention behind the exercise and reflects the vacuum that existed is ***Vishakha judgment***[26], wherein the intervention was to fill the legislative vacuum to deal with 'sexual harassment' saying clearly that it will remain the law till legislation is enacted to cover the field. It is significant that a legislation came after many years but till then the executive worked to implement the decision in all sectors of employment. Is it not an acceptance by all of the utility of even extreme judicial intervention for public goods?

In addition to the above, the non-justiciable Directive Principles of State Policy, which are principles fundamental in governance, have been used to enlarge the scope and content of the justiciable Fundamental Rights, particularly the 'Right to Equality' under Article 14 and the 'Right to Life' and 'Personal Liberty' under Article 21. The courts have also relied on the directive principle in Article 48A and the Fundamental Duty of every citizen under clause (g) of Article 51A to enforce the Right to Life in Article 21 for the protection and preservation of environment, ecology, biodiversity, wildlife, marine-life and aquaculture. The Court also tested the legislative and executive measures based on these Articles.

[26](1997) 6 SCC 241

Another set of cases relating to judicial intervention in purported business of legislature needs mention. In ***Jagdambika Pal***[27], the Supreme Court directed a special session of the UP Assembly to be convened with the only agenda of a composite floor test to decide between the two rival claimants to the office of the Chief Minister. The Supreme Court followed that interim order in the Jharkhand imbroglio to issue a similar direction. In this century, we have seen many examples of such interventions by the Court where there were fractured mandate or the anti-defection law could not hold the ground. Given its role in a constitutional democracy, the court cannot remain a silent spectator to the subversion of the Constitution. The mentioned cases are only some of the instances where the Supreme Court used its power to fill the vacuum as per the aspirations of the people. In this connection, let me read the opening passage from the judgment in Shiv Sena (2019):

> *"There is no gainsaying that the boundaries between the jurisdiction of Courts and Parliamentary independence have been contested for a long time. However, there is a need and requirement for recognizing institutional comity and separation of powers so as to tailor judicial interference in the democratic processes only as a last resort. This case pertains to one such situation, wherein this Court is called*

[27] (1999) 9 SCC 95

upon to adjudicate and maintain democratic values and facilitate the fostering of the citizens' right of good governance."

In the twenty first century the judiciary has continued to develop and sustain the jurisprudence evolved in the last two decades of the twentieth century by adding innovative measures to secure the welfare measures through state to the people and enabling them to take on the might of the state which would otherwise have been impossible. A new technique that is used by the court now to ensure that the mandates of Constitution are compiled is by way of continuous mandamus and supervision. In important cases like those relating to environment protection, the Supreme Court has asked the statutory body to keep a watch on the implementation of its decisions and to submit periodical reports to the court. In some cases, the courts have appointed empowered committees to monitor follow-up actions on their behalf. The power is being used to bring necessary judicial reforms like we see in recent cases where the Supreme Court has taken *suo moto* cognizance of cases relating to rape and POCSO Act.

Several factors have contributed to judicial intervention. Some prominent factors being failure or inaction of the other branches; need to improve the quality of governance; lack of probity in public life and absence of

an alternative to speedily improve the plight of the common man. There does not appear any likelihood of the trend getting arrested because of its efficacy for public good. It enables the people to discharge their participatory role in governance and to increase accountability of public representatives.

Judicial intervention is a delicate exercise involving creativity with vision. Great skill and dexterity are required for innovation. It will remain a boon so long as it continues to serve the constitutional purpose and it retains credibility in the public eye. Lastly, unfortunate as it may sound, in the present scenario of the working of our Constitution, there seems to be no other alternative to make our Constitution workable.

Constitutional Limitations Upon the Legislature

The law-making power of Parliament or the State Legislature is bound by the concept of constitutional limitation. It is necessary to appreciate what precisely is meant by constitutional limitation.

In ***Anwar Ali Sarkar***[28], this Court, in the context of freedom of speech and expression conferred by Article 19(1)(a) of the Constitution, applied the principle of constitutional limitation and opined that where a law purports to authorise the imposition of restrictions on a fundamental right in a language wide enough to cover restrictions both within and without the limits of

[28]AIR 1952 SC 75

constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. The emphasis was laid on constitutional limitation.

In ***K.C. Gajapati Narayan Deo***[29]***,*** the Court adverted to the real purpose of legislation and colourable legislation and, in that context, expressed that when a scrutiny is made, it may appear that the real purpose of a legislation is different from what appears on the face of it. It would be a colourable legislation only if it is shown that the real object is different as a consequence of which it lies within the exclusive field of another legislature.

Dwelling upon the legal effect of a constitutional limitation of legislative power with respect to a law made in derogation of that limitation, the Court in ***Deep Chand***[30] reproduced a passage from Cooley's book on Constitutional Limitation (8th Edn., Vol. 1) which is to the following effect: (AIR p. 656, para 14).

> *"14. .. 'From what examination has been given to this subject, it appears that whether a statute is constitutional*

[29]AIR 1953 SC 375
[30]AIR 1959 SC 648

or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject matter of the Act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions."

Thereafter, the Constitution Bench referred to the observations of the Judicial Committee *in* ***R v.Burah***[31] wherein it was observed that whenever a question as to whether the legislature has exceeded its prescribed limits arises, the courts of justice determine the said question by looking into the terms of the instrument which created the legislative powers affirmatively and which restricted the said powers negatively.

Mukherjea, J., *in* ***K.C. Gajapati Narayan Deo***[32] *lucidly explained* that if the Constitution distributes the legislative powers amongst different bodies which have to act within their respective spheres marked out by specific legislative entries or if there are limitations on the legislature in the form of fundamental rights, the question will arise as to whether in a particular case, the legislature has transgressed the limits of its Constitutional power in respect of the subject-matter of the statute or in the method of making it.

[31]ILR (1879) 4 Cal 172 : (1878) 3 AC 889
[32]AIR 1953 SC 375

Recently, in ***Binoy Viswas***[33]the Supreme Court, while dealing with the exercise of sovereign power of the Centre and the States in the context of levy of taxes, duties and fees, observed that the said exercise of power is subject to constitutional limitation. It is imperative to remember that our Constitution has, with the avowed purpose, laid down the powers exercised by the three wings of the State and in exercise of the said power, the authorities are constitutionally required to act within their spheres having mutual institutional respect to realise the constitutional goal and to see that there is no constitutional transgression. The grammar of constitutional limitation has to be perceived as the constitutional fulcrum where control operates among the several power holders, that is, legislature, executive and judiciary. It is because the Constitution has created the three organs of the State.

Under the Constitution, Parliament and the State Legislatures have been entrusted with the power of law making. Needless to say, if there is a transgression of the constitutional limitation, the law made by the legislature has to be declared *ultra vires* by the constitutional courts. That power has been conferred on the courts under the Constitution and that is why, we have used the terminology "constitutional sovereignty." It is an accepted principle that the Rule of Law constitutes the core of our Constitution and it is the essence of the Rule of Law that the exercise of the power by the State, whether it be the

[33](2017) 7 SCC 59

legislature or the executive or any other authority, should be within the constitutional limitations.

Yet another classic, recent demonstration of the effectiveness of the judicial review and intervention in upholding democratic principles was seen in the judgment of the Supreme Court of India, by a Bench presided by Justice Arun Mishra in the ***Medical Council of India Case***[34]. The Court had earlier upheld the decision of the High Court, which declared the admissions of 180 students into medical colleges as illegal. This decision was based on the report submitted by the Admission Supervisory Committee of the professional colleges, which found on investigation that due procedure for admissions in medical colleges as prescribed by the Supreme Court of India, in ***Sankalp Charitable Trust Case***[35] had not been followed, while granting admissions to the aforesaid students. Therefore, the State Government of Kerala, with an intention to nullify the effects of the judgment and to overturn the Supreme Court's order passed an ordinance to regularise the admissions of the students. However, the Supreme Court in its order observed that the legislature cannot declare any decision of a court of law to be void or of no effect. Further, the power of the legislature is limited to removal of defects of the law pointed out by the court or on coming to know of it *aliunde*. As a

[34]AIR 2018 SC 5041
[35](2016) 7 SCC 487

result, the Supreme Court rightly struck down the said ordinance and declared it as '*ultra vires.'* This case demonstrates an attempt made by the legislature to undermine the judiciary and the impact of procedures such as judicial review and intervention, to fulfil the objectives of the democratic principles such as the principle of checks and balances. Further, these procedures are crucial in order to safeguard the magnanimity of the Constitution of India.

As I conclude, I wish to congratulate the organisers for having arranged a lecture on such an important topic, it is indeed imperative for us to deliberate and improvise our democratic apparatus with time. Therefore, such discussions and deliberations shall be beneficial to yield innovative reforms, to sustain and instil vigour into the democracy of our nation. In addition, I thank the organisers for giving me this great opportunity to share my views.

Thank you, Jai Hind.

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