

# Winds of Change: Judicialization of political system or erection of judicial leadership

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## ABSTRACT

Democratic norms and methods are essential for good governance which could not set aside by any elected Govt. Good governance clearly refers to political accountability, transparency in government procedures and openness in Govt. transaction. Today, the democratic norms & methods have minimum importance in democratic set up. In parliamentary structure every organs has its own responsibility which ultimately strengthen the democratic value & setup. Recently in our system, executive and legislative are unable to perform their assigned constitutional duties, which ultimately threaten the concept of 'Good Governance'. Since last three decades, Indian judiciary actively examines the Govt. transaction, checks out and fixed the political accountability and hardens on the matter of transparency. Now a day's democratic process is impossible unless it is eternally and vigilantly watched and guarded by an independent judiciary. The importance of the study is to reveal how judiciary actively and firmly sticks to their responsibility for executing a better decorum of good governance. In this study, researcher shows how judiciary becomes a pioneer for the democratic value and setup and tries to establish judicial leadership.

## 1. Introduction

Post-1990, the Court became more assertive in challenging the Central Government's authority in governance cases. Building on the substantive framework of the rights embodied in Articles 14, 19, and 21, the Court took over governance and policy-making functions that were once in the exclusive domain of the Central Government bureaucracy, the Executive and Parliament.

In the post-1990 era, as India shifted away from the one-party dominance of the Congress Party to a more fragmented system, the Indian Supreme Court became more assertive in directly challenging the Executive and Parliament. The Court broadened its jurisdiction and adjudicated a broader array of governance issues, asserting an expanded role in policy-making and governance.

The Court's activism in the post-1990 era represented a continuation of trends in the 1977 to 1989 era, such as the expansion of many of the procedural innovations developed in PIL cases in that earlier period. In both periods, the Court was concerned with good governance and protecting the rule of law. The Court's activism in PIL in the 1980s was motivated by the judges' desire to advance causes of social justice and to address mal governance in state governments, local governments, and bureaucratic agencies. Judicial activism in the post-1990 era stemmed from a desire to address the Executive and Parliament's critical governance failures in the following areas: judicial administration, corruption, accountable environmental policy, and human rights.

## 2. Political apathy and process of Judicialization

The Judiciary is looked upon today, perhaps more than ever before, for removal of the maladies in public life. One reason may be the general disenchantment of people for the other limbs of government. While the Legislature and Executive

in a parliamentary form of government are exposed to the pulls and pressures of the electoral forces, the judiciary well performs the entrusted task of holding the scales of justice even and aloft. In most of cases of judicial activism had witnessed gross and callous failure or neglect on the part of public functionaries or administrative authorities in the discharge of their public duties. The Supreme Court of India has come to the rescue of grossly under-paid workers, bonded, labour, prisoners, pavement dwellers, under-trial, inmates of protection homes and victims of Bhopal gas disaster and so on and so forth.

It is the primary duty of the Executive to provide a fair and just government. It is not for the Courts to function as an extended arm of the Executive. However, as has rightly been observed, judicial power or activism is inversely proportional to the political process. The weaker the political process, stronger is the judicial power; the reverse is true in part. By means of judicial activism, the Judiciary merely assists in the process of governance; it does not take over the functions of the Executive wing of the government. The aforesaid judicial activism has alone led the public administration to be conscious and conscientious of public interest as its goal. Judicial activism is not just a matter of serial affirmation of judicial power over other domains and instrumentalities of state power; it is as much a narrative of evolution of new constitutional cultures of power. No panacea for the nation's constitutional ills, it offers a kind of chemotherapy for the carcinogenic body politic. And even the therapeutic uses of judicial power change with the changing contexts of domination and resistance.<sup>1</sup> Judicial activism has made a number of salutary, wholesome and beneficial effects on the public administration to make it effective and participative. But one must not be overenthusiastic in thinking that courts can remedy all the ills in public life.

However, this changing stance of the judiciary from moderate to active role has invited wrath from some sections of the society, criticism from some others and support and cheers

from still other sections. Some political scholars feel that the judiciary is usurping powers in the name of public interest while according to others, judicial activism and interference is actually preventing the executive from going astray.

Admitting all these aspects, it is acknowledged that judicial activism or initiative is welcomed not only by individuals and social activists who take recourse to it but also by governments, political parties, civil servants, constitutional authorities such as the President, the Election Commission, the National Human Rights Commission, statutory authorities including the tribunals, commissions, or regulatory bodies, and other political players. None among the political players have protested against judicial intrusion into matters that essentially belonged to the executive.

A few recent incidents have given a way to the ongoing debate on the legitimacy of alleged judicial interference in the domain of executive and legislature in the constitution scheme of separation of power. This time judiciary has upheld the parliamentary law and endorsed the ruling of government as well as parliament. But like previously many questions also raises on the judiciary whether he has authority in the religious matter particularly in the case of Triple Talaq, Shabarimala and Ram Mandir matter. Some historical and strategic court decisions that have a disastrous impact on Indian politics were comes from the the Supreme Court in last few months. These include the legitimacy of the Rafael Deal, the office of the Chief Justice of the Supreme Court under the Right to Information and, most importantly, the decision on entry of women of all ages in Shabarimal temple and the Ayodhya land dispute. The issue arises as to whether the legal process involving the Rafael Deal was adopted. It is not advisable that the decision of bringing the office of the Chief Justice of the Supreme Court under the Right to Information Act, in any case other than the result of the law relating to the Court of Liability, will be seen in this case.

Supreme Court, in 2019, while delivering many historical verdicts put an end to many questions and raised several new once at the same time. The apex court, while pronouncing judgments on some of the highly contentious cases, which affected 1.3 billion people of this Country, has set a precedent. As we bid adieu to 2019, here are the four significant judgements passed by the top court in 2019.

### **2.1 Ayodhya Verdict**

The Supreme Court finally pulled down the curtains on the Ram Janmabhoomi-Babri Masjid land dispute in Ayodhya. It was one of the most communally charged, packed with high drama cases that the country has ever witnessed. The case was regarding a 2.77 acre disputed land in Uttar Pradesh's Ayodhya as Hindu and Muslims claimed its ownership. Advertisement Almost 27 years after the demolition of Babri Masjid in Ayodhya and 69 years after the title suit in connection with the disputed land was first filed, the apex court finally ruled in favour of a Ram Lalla. On December 9, a five-judge bench of the apex court handed the disputed land to a trust that will build a temple of Ram Mandir in the area. The SC also directed the government to form the trust within three months. The court ordered the Centre to grant 5 acres of land to the Muslim

claimant – Sunni Waqf Board in Ayodhya for construction of a mosque. After the verdict, several review petitions were filed by different parties. However, the Supreme Court dismissed them all.<sup>2</sup>

### **2.2 Sabarimala Case**

The case surrounded the Ayappa temple in Kerala, where menstruating women were not allowed inside the temple. The apex court while hearing the petition in 2018 with 4:1 majority vote had allowed the women of all age to enter the temple. The court said it could not allow discrimination on physiological grounds as it is against the fundamental rights. However, the verdict led to several protests in the state. Review petitions were filed challenging the top court's order. The review plea which was allowed by the court and will be heard in the time to come also argued that the Sabarimala deity is a "Brahmachari" [celibate] and "centuries-old beliefs" should not be disturbed by the entry of menstruating women worshippers.<sup>3</sup> The top court in November said that its order in 2018 is not the final and with a majority vote 3:2 has referred the matter to a seven-judge bench. The larger bench will now re-examine other religious issues such as entry of women to mosques, Parsi women married to non-Parsi being barred from the holy fire temple, and the practice of female genital mutilation in the Dawoodi Bohra community.<sup>4</sup> A Constitution Bench led by Chief Justice of India (CJI) Ranjan Gogoi had passed the order on a series of petitions seeking reconsideration of its September 2018 judgment that lifted the bar on menstruating women from worshipping in the Sabarimala temple in Kerala. The Court said, "The entry of women into places of worship is not limited to this temple only. It is also involved in the entry of women into mosques."<sup>5</sup>

### **2.3 CJI's Office under RTI**

The question that was raised that whether the CJI's office will come under the ambit of Right To Information (RTI) Act, 2005. The issue was raised after an appeal filed by the Secretary-General and Central Public Information Officer of the Supreme court against the 2010 Delhi High Court's order that CJI's office will be answerable to the RTI queries. Withholding the Delhi HC's order, the top court said that transparency is requisite for judicial independence and declared that CJI's office is a "public authority" and will come under the ambit of RTI. The court, however, warned that the Act should not be misused. A five-member DC bench led by CJI Ranjan Gogoi agreed in principle to share information but on a case-to-case basis and subject to RTI safeguards. Reading out the verdict, Justice Sanjiv Khanna said independence and accountability go hand in hand and that independence of the judiciary cannot be ensured only by denying information. Concurring with it, Justice NV Ramana said there should be a balance between RTI and privacy, and that information-seeking should be calibrated.<sup>6</sup>

### **2.4 Rafale Verdict**

The deal by India and France to procure Rafale jets in a move to upgrade the country's air force was in the headlines for a couple of months. The Indian National Congress questioned Modi government's cancellation of the original deal during Congress tenure and alleged that the BJP government's deal is far more expensive than what was proposed. The conflict which was supposed to be a defence matter became political.

Congress Party's Lok Sabha campaign was spun around the irregularities Modi government made in the Rafale deal. A three-judge bench presided by Chief Justice Ranjan Gogoi and comprising Justice Sanjay Kishan Kaul and K M Joseph dismissing a bunch of review petitions, upheld its 2018 verdict of Narendra Modi government buying 36 Rafale Jets from France. The court had dismissed the petitions asking for a court-monitored probe into the procurement of the jets. However, the court said there was no merit to initiate a probe.<sup>7</sup>

### 3. Good Governance & Judiciary

An essential prerequisite for good governance is a stable and truly representative majority of the people which would go a long way in accelerating economic growth and development and ensuring the welfare of all sections of society. Transparency, as an important attribute of good governance must not be forgotten. Openness and opportunity for public participation have emerged as a universal principle of good governance. Various groups of society should be provided with opportunities to observe and contribute in policy making of the State where availability of relevant information would give them a chance to advance their ideas thereby augmenting the policy making process. Moreover, in India, most social transformations have come about in society through cross-fertilization of ideas and experiences from different social setups. But one more aspect of these social transformations could not neglect in the coteremporary political system i.e. Indian Judiciary.

It is clear that the decision given on Shabarimal and on the issue of Ayodhya dispute would be a constitutional reference on gender equality, women's rights and equality as well as historical religious questions. The issue of political apathy, lack of will power and, more importantly, the failure of the executive and parliament, and the lack of decision-making in these matters, is another chapter in increasing the importance and activism of the court.

On the issue of judicial activism, former Speaker of the Lok Sabha, Somnath Chatterji, criticized the judiciary for taking away the rights of the executive and the legislature in an illogical way while speaking at the Kolkata Press Club. He said, "Judiciary would have to step in when the Government does not work and the legislatures and Parliament are not active saying "this view, I feel, is unwarranted and the judiciary has no power to exceed its limit". Chatterjee said while the legislature and Parliament were accountable to the people, the judiciary was seeking to "take away rights of the legislatures and the executive too". Further he said, "This unelected body has no responsibility so far as it intervenes in the powers of executive and the legislatures."<sup>8</sup>

While making such remarks, the judiciary did not feel the need to ponder why cases involving a political diagnosis were the same. If there is not enough political maturity to accept the concept of political inevitability, then the unpopular case of judicial instinct will be the cause of activism of the judiciary. The Shabarimala and Ayodhya cases are the result of this political failure. Obviously the decision has come in favor or against somebody. The first of them sung the praises of the judiciary and the second cried of court intervention and encroachment. It is unfortunate that the legislature and the executive will fall into

oblivion of the expectations of the people that all elements of the regime will behave in a fair manner. In the case of Shabarimala, gender discrimination on the basis of outdated and unconventional practices, after the judiciary invalidated the admission on the principle of equality, it becomes an interference with religious traditions and practices. If the entry of women into a temple or a mosque is a religious matter, then the constitutional sin of promoting it is done by the executive and the legislature. Had the judiciary decided in the Shahabano case had been accepted, it would not have been necessary for the judiciary to decide and activate in the case of Shabarimala and Ayodhya. Only the myth that Parliament represents the sovereign will of the people, but if the sentiment that the judiciary represents the will of the people today, it becomes irrational. The fact that more than sixty applications against women's entry into the temple were filed in the Supreme Court and forcing judiciary to reconsider its decision is itself a decisive act of our women's empowerment.

In 1994, the President of India had sought the Supreme Court's advice on the Ayodhya dispute. But the court rejected the President's request that the Ayodhya dispute be a political issue and that it should be resolved at the political level. Today, for the past 25 years, political parties, executives and parliament have failed to find any unanimous settlement of the Ayodhya dispute. The expectation is that all parties should adhere to the maturity of the decision that the judiciary has given in this regard. Otherwise, the tradition of hitting our failures and frustrations with the judiciary will continue. An unprecedented decision given by the apex court in relation to the Triple Talaq and the entry into the Shabarimala Temple, principle of equality was followed by constitutional principles in relation to the empowerment of women and discriminatory treatment of women. But at the political level, the reactions expressed in relation to the Triple Talaq and Shabarimala were a question mark on the authority of the judiciary. The decision on Triple Talaq was an act of modernization, but the decision on the Shabarimala was an intervention against family and faith. Suffice it to say that after the judiciary decision, the innovative form of women not being allowed to enter the temple and the support provided by the political parties to the representation of women in the legislature is minimal.

It has become an integral part of our political process, forcing the people to call for justice, and for telling the public again that they are facing obstruction of good governance and development without any action on unpopular events and decisions. The real fact of our good governance is that the decision and action is not taken without the court's order whether it may be the case of Environment degradation, Air and Water Pollution, Right to Education, Religious Issues, Freedom of Person, Legislative Delegation of the Legislature, Decision of the Executive, Public Rights, Freedom of Expression, Cases of Decontamination of Rivers, Preservation of Historic Monuments, Political and Constitutional Powers, Regulatory Rights of Presidents, Governors. In this regard, the attempt of good governance through the judiciary has never been met by this general attitude of government-elected governance. Why the representatives of the political community do forced the peoples for solving their problems by Judiciary? The judiciary is not directly responsible and accountable to the people in one

sense. In other sense judiciary is constitutionally binding for the welfare of people and good governance. Why the judiciary is engaging itself for solving the problem created by the political leadership? We see how the Parliament makes a tremendous contribution to the problems of the people. Why judges less in number could invalidate your law in just a few moments? It is imperative for the public to decide which of these issues would be treated in an ill-mannered and mannered. It is necessary to say that the legislative body is not maturing that the judiciary is matured.

The morality and maturity of the executive and parliament cannot be an option for the judiciary. But if the atmosphere in the country is only politically widespread, it is imperative for the judiciary to be active and effective in a turbulent environment so that the elements of the Constitution will be stopped. The responsibility of the Supreme Court is very big in this regard.

#### 4. Judicial leadership in lieu of political

In any political system a specific diagram of the relation of the governing is given. In this diagram, there is a possibility of change from the occasion of the rulers or from the rulers. But a new dimension is now being added to the framework of justice and governance. When changes in the surrounding environment occur, changes in the political leadership of the people are disrupted if the corresponding changes do not take place in political leadership. That creates anarchy about power. If there is no communication between the needs and the needs of society, then there is an increase in such incidents as political violence or revolution. The situation in India is no different. The growing violence in the country, the increasing disregard of the people about the political system, the frequent forms of law-making, the widespread confrontation of small events, the changing attitude of the governing, and the dry response from the government to all these shows the weakening of the political leadership. If the judiciary recognizes its responsibility from time to time and starts responding to the aspirations of the people through activism, then there is no movement except to look at the judiciary as an alternative to political leadership. The leadership of the judiciary should be ready for alternative leadership until such leadership is enabled after the option of

political leadership is exhausted. Otherwise, the potential risk above will not survive the destruction of the entire system. Fortunately, the Indian judiciary recognizes the potential danger and has accepted such leadership through activism.

Indian society is going through a transition phase. The self-proclaimed leadership, which has lost faith and lack of public opinion, seems to have come out of the air. Heads with narrow mindedness and no understanding of the subject appear to play an important role in the decision making process. At this time, the common man is looking forward to the judiciary as the protector of justice and human rights. While economic progress does not lead to the destruction of the nation, the lack of leadership sometimes destroys the economic power that is strong. Fortunately, the judiciary is accepting this challenge and trying to give such leadership through activism. Political leadership is failing to meet the expectations of ordinary people. On the day when political leadership is able to bow to expectations, court leadership will have limitations.

#### 5. Conclusion

In the coalition era, the role of judiciary is paramount in ensuring that the constitutionally defined boundaries of executive action are not breached. A duly constituted government, after taking office, must work in the interest of the country as a whole rather than in the narrow political interest of parties represented. The most significant role in shaping India's future is naturally that of the government. The Primary task of the government at present is to improve governance. But past and present experience and working of executive and parliament shows that both wings in parliamentary form failed to perform their duty towards the development and welfare of the people of this country. Certainly it is not a case of good governance. As compare this two wings, Indian Judiciary from last two to three decades were successful to establish rule of law and constitutionalism in India. Now the question, is judiciary is capable to perform primary task of government at present to improve governance? However after taking all these aspects of parliament form, the behavior and working of executive and legislature into account, there is no doubt that, the country is better off with the judiciary as an additional check point on the government.

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