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MATTERS OF POLICY: TOO MANY FINGERS IN THE PIE

Public Interest Litigations have gone berserk, but new guidelines aren't required

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We take the optimistic view that successive Chief Justices of India shall henceforth act in accordance with the Second Judge's case and this opinion,' Justice S.E Bharucha said on October 28, 1998, delivering the Supreme Court's advisory opinion on the President's Reference. The Court ruled in that case (in 1993) that the CJI must consult two other judges before recommending judges for appointment to the Supreme Court and the High Courts. Justice Bharucha himself ignored the court's rulings after he became CJI on November 1, 2001.

An affidavit filed by the Law Ministry disclosed that "a total number of 351 additional judges have been appointed permanent judges during the period 1.1.1999 and 31.7.2007. In these cases, successive CMs have not consulted the collegium while considering the cases of appointment of additional judges as permanent judges of the High Courts and have advised appointments on their own consideration. There has been no case where an additional judge has been appointed a permanent judge after consultation with the collegium". For nine years, the 1993 judgment, gravely flawed as it was, was rendered irrelevant by the CJIs whom it gave primacy. It flouted the clear intent of the framers of the Constitution. B.R. Ambedkar told the Constituent Assembly on May 24, 1949: "To allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice of India which we are not prepared to vest in the President or the Government of the day". He proposed "a middle way", a consultative process, provided by the Constitution. The Supreme Court subverted the system. In Lord Simonds' words, this was "a naked usurpation of the legislative function under their disguise of interpretation". The judgment of 1993 enjoined consultation with two judges. In 1998, its opinion added two more. Another Bench can add yet more. A distinguished counsel and scholar, Robert Stevens holds: "Judges choosing judges is the antithesis of democracy" This is precisely what the Supreme Court did. Analysing the ruling, H.M. Seervai remarked that the majority judgment was "null and void". It is now a total wreck. In 1991 the Supreme Court held, in the case of a former CJ of the Madras High Court, K.Veeraraswami, that judges are covered by the Prevention of Corruption Act. But a majority (3-2) "directed that no criminal case shall be registered" against a Judge of the Supreme Court or a High Court without the approval of the CJI. "If the Chief Justice is of opinion that it is not a fit case for proceeding under the Act, the case shall not be registered." No law contained this immunity. It was created by the judges themselves. What the Supreme Court has done in recent years is to raise a painful question. If the Court's ruling is "null and void" or otherwise demonstrably violates a provision of the Constitution, can the government or, indeed, the people, refuse to abide by it? These rulings are no aberrations. They reflect a judicial outlook and an ambition wholly opposed to democratic governance under the rule of law. In Veeraswami's case, Justice K.Jagannathan Shetty bared the outlook candidly. Justice Holmes said, "Judges do and must legislate but they can do so only interstitially."

Quoting him, Justice Shetty said "the Court's role today is much more...It is a problem solver in the nebulous area". But as Justice Cardozo said, "Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in spite of it. They have the power - though not the right to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. Nonetheless, by that abuse of power, they violate the law". A Supreme Court which chafes at "the walls of the interstices" erected by the Constitution is usurper of power. None other than the great and 'activist' judge, Lord Denning posed the question: "May not the judges themselves sometimes abuse or misuse their power? It is their duty to administer and apply the law of the land. If they should divert it or depart from it and do so knowingly - they themselves would be guilty of a misuse of power." Belatedly, the Court's order in the Jharkhand case on March 9, 2005, set the alarm bells ringing. The Court had openly violated the Constitutional bar to interfere with legislative proceedings. A former CJI, Justice J.S. Verma, cited similar instances in a lecture: "The judiciary has intervened to question a mysterious car racing down the Tughlag Road in Delhi, allotment of a particular bungalow to a judge, specific bungalows for the judges, monkeys capering in colonies, stray cattle on the streets, clearing public conveniences, levying congestion charges at peak hours at airports with heavy traffic, etc. under the threat of use of contempt power to enforce compliance of its orders."

One might mention his own attempt to curb free speech. On August 8, 1995, while hearing a contempt of court case, Justice Verma noted that Article 19(1) (a) guarantees freedom of speech and expression while clause (2) specified the grounds on which "reasonable restrictions" can be imposed on its exercise. He made this shocking observation: "But the time has come for this Court to lay down some inherent (sic) limitation in clause (1) itself so that something obnoxious which is not contemplated under the guaranteed freedom and content of clause (1) itself excludes such situation." The Constitution need not be amended. The Court will expand its power by its own rulings. Consider other instances. The Supreme Court admitted a PIL alleging that the Chief Minister of Nagaland, S.C. Jamir, had a nexus with armed rebels and issued notices to him, the CBI and the Centre. It issued notices on a PIL on the Indo-US nuclear accord, "until the same is thoroughly examined by a committee appointed by this Hon'ble Court...and until the matter is thoroughly discussed and passed by Parliament". A petition seeking judicial intervention in diplomatic process merits summary dismissal. Why complain of arrears if such PILs meriting instant dismissal are entertained at all? It took suo moto notice of the violence in the Gujjar agitation and asked the DGPs of Rajasthan, Uttar Pradesh and Haryana and the Delhi Police Commissioner to report on the action taken. The Court has ruled repeatedly that "no court can direct a legislature to enact a particular law". Repeatedly has it violated this ruling. On September 6, 2005, it asked the Union to report on the Lok Pal BM's status. On April 13, 2004, it went so far as to assert "we may clarify (sic) that the provisions of Section 126 of the Representation of the People Act, 1951 shall apply to the advertisement covered by this order". This was no clarification. It was naked legislation, applying a penal provision to political ads on the TV; cases not covered by Section 126. The PILs have gone berserk. But new 'guidelines' are not required. Justice EN. Bhagwati's judgment in the First Judges' Case (1981) is a classic on PILs. Two fundamentals are relevant. One, for the public, was said by Lord Bingham. "The courts tend to be more assertive, active and creative when political organs of the State are least effective. The other for the courts was said by Robert Stevens: "History is littered with examples of judicial hubris ending in judicial tears."