The Role of a Judge - What It Is and what It Ought to Be: The Independence of Judiciary and Judicial Activism Clothed in Judicial Review in Sri Lanka

TB Abeysekara
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
thusitha313@yahoo.com

Abstract — On 24th March 2015, the Indian Supreme Court struck down Section 66A of the Information Technology Act 2000, and termed it "unconstitutional". In this landmark judgment which perpetuates the freedom of expression, the Supreme Court struck down a provision in the Cyber Law which makes available power to arrest a person for posting allegedly 'offensive' content on websites. This shows that the provision 'clearly affects' the fundamental right to freedom of speech and expression enshrined under the Indian Constitution 1949. The recent phenomenon shows that the independence of judiciary in India and their judicial activism over constitution and lastly towards the society. Do we have the same, No! Sri Lanka does not give credence to the apex judiciary. Under the Art.125 (1) of Constitution 1978, the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution and it should however be read with Art. 80 (3) which states that a Bill becomes law upon the certificate of the President or the Speaker, as the case may be being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever. As per the wordings, 'any ground', the ultimate result of such an Act may be unconstitutional and/or unjust. Without having such a great weapon, judicial review, in the hands of judges, it is difficult to confirm the rights of the people and justice in the country. Judicial review needs to be crafted with the chisel of judicial activism which lay concrete on the way for adding personal or political consideration rather than on existing hard-hitting laws with the justice in mind. As a theory, judicial restraint which works on judicial interpretation encourages judges to limit the exercise of their own power. This is the point which should be addressed in the line of solidity of independence of judiciary and will be examined throughout the paper based on Sri Lanka experience.

Key words **-** *Independence of Judiciary, Judicial Review, Judicial Activism*

I. INTRODUCTION

This research paper inspects the role of the judge in light of the Independence of Judiciary and Judicial Activism clothed in Judicial Review in Sri Lanka. It does not unavoidably mean that there is no comparative analysis. Wherever and whenever possible this research will focus to the examples in other jurisdictions. Some of those other jurisdictions are enjoying the concept of the apex judiciary which provides more flexibility over judicial reasoning process. This is what we do not have in Sri Lanka. The lack of operation of an apex judiciary in the domestic jurisdiction corresponds to the flexibility of judges. One side of the flexibility of judges consists of the judicial review and other side consists of the judicial activism. The both are fueled by the concept of independence of judiciary. Therefore lack of one of them highly affects the independence of judiciary which vehemently confirms the rights of the people. Being a legal researcher it is strongly recommended by myself providing possible interpretations for the key elements of the paper.

II. INDEPENDENCE OF JUDICIARY

As adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders which was held in Milan from 26 August to 6 September 1985 and endorsed by the United Nations General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (The United Nation-Human Rights, 2015), there are six basic principles on the independence of judiciary. They are as follows;

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive

authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4 There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5 Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6 The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7 It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions." (The United Nation-Human Rights, 2015)

The gist of the aforementioned basics emphasizes that the principle of separation of powers provides the base for the judicial independence which means that the judiciary which requires that the proceedings be kept separate from the influences of other limbs of the government i.e. the legislature and the executive.

III. JUDICIAL ACTIVISM

When the Supreme Court and other judges are able to creatively interpret or reinterpret the provisions of the Constitution, there is judicial activism (Abeysekara, 2010). This is to be believe to be something beyond the contemporary role of judges. The reverse of this argument is that legislative actions and executive actions are subject to the active review by the judiciary. This is the point which connects judicial activism with judicial review. "The concept of judicial activism is the polar opposite of judicial restraint" (USLegal, 2015). This is what we practice in Sri Lanka at the moment. However, still Sri Lankans are enjoying some considerable level of results of judicial activism thanks to the creativity of Bench & the Bar. Preserve cases under the Chapter 3- Fundamental Rights of Constitution 1978 are a solid example for the creativity of the Bench & the Bar of Sri Lanka (Ex- Wimal Fernando v. SLBC (1996) 1 Sri LR 157, Karunathilaka and Another V. Dayananda Dissanayake, Commissioner of Elections and Others SC APPLICATION NO. 509/98 (1999) 1 Sri LR 157.)

IV. JUDICIAL REVIEW

The principle of Parliamentary Sovereignty is a weak arm against the unlawful executive and administration actions or sometimes legislative actions themselves. This means that the principle of Parliamentary Sovereignty does not always stand against the breach of' rule of law. In 1950s Stanley de Smith in his doctoral thesis stated that, "...it has become clear that judicial review is not merely about the way decisions are reached but also about the substance of those decisions themselves. The fine line between appeal on the merits of a case and review still exists...towards a 'culture of justification' (Stanley de Smith, 6th edn 2007).

The justification culture has been developed on the lap of judicial review. The concept of judicial review has been justified by the notion of qualities of the democratic society. However,'...judicial review of statutes on constitutional grounds tends to raise issues of high political importance'(John C. Reitz, 2008) though it has addressed the qualities of the democratic society.

Jurisprudentially judicial review was (and is) based upon the traditions of natural law (Richard H. Helmholz, 2013) which provide more freedom and flexibility in the mechanism of reasoning or justification.

IV. THE PROBLEM

This paper has already emphasised the thread that runs through the independence of judiciary and judicial activism coupled with judicial review. Finally the lack of the each of them follows the role of the judge. Eventually it affects the creativity of the judge. The judge's creativity would have been enhanced by the provisions of statutes which provide more independence of judiciary. However, this needs to be balanced by the principle of separation of powers since this principle needs to be quite separate from each limbs of the government. While maintaining the check and balances works out a space for independence for judiciary it is a must in order to ensure a smooth function of judicial review. Richard H. Helmholz states that "[t]he judges would probably have said that they were simply aligning 'open-ended' legislative enactments with the requirements of justice as established by the law of nature and as intended by the sovereign" (Richard H. Helmholz, 2013). Hence the open ended nature of the legislative offers room for creativity over reasoning of judgments. This means that lack of the open ended nature of the legislative still remains with the robust functions of the judges.

Richard A. Posner's wordings in his enormous piece of work 'The Role of the Judge in the Twenty-First Century', clearly identifies this nature that as he explains, "[s]o against Chief Justice Roberts' umpire analogy I set the story of the three umpires asked to explain the epistemology of balls and strikes. The first umpire explains that he calls them as they are, the second that he calls them as he sees them, and the third that there are no balls or strikes until he calls them. The law professor is the first umpire. The modest formalist judge, who has no illusions that his method yields demonstrable truth, is the second umpire. The judge deciding cases in the open area is the third umpire; his activity is creation rather than discovery." (Richard A. Posner 2006).

Therefore, the role of the judge extensively depends on the opportunity for the judicial review which fueled by judicial activism. All of this collectively denotes the independence of judiciary which finally enhances the creativity of judges. The creative decisions or judicial reasoning stand to protect rights of the people. The lack of one of them or collectivity of them eventually generates less protection of citizens' right.

VII. THE SRI LANKAN SCENARIO

Though the judicial officers in US and India are enjoying the concept of judicial review (Ex- Marbury v Madison 5 US (1 Cranch) 137 (1803) and Minerva Mills Ltd v Union of India AIR 1980 SC 1789 (1925-26) respectively), the Sri Lankan Bench does not have such a benefit in order to uphold the rights of the people. As Article 80 (3) of the Constitution 1978/SL states, "[w]here a Bill becomes law upon the certificate of the President or the Speaker, as the case may be being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever". The provision's wording of "any ground whatsoever" creates a situation which attacks the heart of the constitutionalism. Any unconstitutional provisions in other statutes cannot be challenged as they are shielded by the term "any ground" in the Article 80 (3). This simply means that it could be an unlawful provision which concretely devastates the rights of the people.

Article 120 of the Constitution 1978 states that "[t]he Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution". Therefore, judicial review ends up with the Bill stage at the legislative process. All creative measurers need to be taken before being passed the Bill. However, literary the concept of independence of judiciary stands with the Sri Lankan judiciary (Chapter XV, Article 107-111 of the Constitution 1978). This shows that there are some differences between the literary meaning of independence of judiciary and the practical aspect of the same. The constitution itself takes precautions to affirm the independence of judiciary, but still there is a lacuna to be fulfilled compared to the practicality of the concept.

VIII. RECOMMENDATIONS

Therefore the government of Sri Lanka must take effective stapes to confirm the independence of the judiciary and the rule of law which together corroborate the judicial activism and judicial review.

1) Need to setup a Constitutional mechanism to form the judiciary with special attention to the post of Chief Justice as the chief judicial arm of the government. In order to strengthen this, it is essential to setup an independent public commission as the Chief Justice has responsibilities for all aspects of the work of the Supreme Court and the justice of the Island.

2) Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR) states that "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." (United Nations Human Rights, 2015). In accordance with the Article 14 of the ICCPR, the Chief Justice could be granted the opportunity to conduct an impartial judicial panel and to make a just ruling which empowers the notion of 'rulers must be just!'.

3) To comply with the proposal made under the draft Constitution 2000, it is recommended that the required legislation be enacted in order to establish a tribunal consisting of three persons who served in the apex courts of any country of the commonwealth to inquire in to the misconduct of judges of the Supreme Court.

IX. CONCLUSION

Judges play many roles in the context of carrying out their

judicial functions. They interpret the words of statutes and cases in order to apply the law, to assess the evidence presented by both parties, and to control how hearings and trials unfold in their courtrooms. Most important of all, judges are impartial decision-makers in the pursuit of justice. It is worthwhile to bear in mind that law is not another meaning for justice. Law is and ought to be the mechanism which used to achieve the justice.

Judicial review is a version of check and balances as a part of the modern and developed version of principle of separation of powers. As the paper discussed throughout, the concept of judicial review closely connects with related concepts of judicial activism and judicial review. A judge's creativity enhances the arms of the protective mechanism of human rights in a jurisdiction. A judge's creativity is enhanced by the force of establishment of proper and meaningful judicial review which arises with judicial activism. Through the judicial activism, judges could be able to work out a political decision rather legal decision. The professional personality of judges dominates their reasoning. In judicial review, judges examine the constitutionality of a statue or its application. Therefore judicial activism is a legitimate (justification of reasoning) version of judicial review.

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BIOGRAPHY OF AUTHOR

Author, Dr Thusitha B Abeysekara, is a Senior Lecturer in the Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana. He completed his PhD in Computer Law in 2013 at University of Exeter/UK. He holds an LLM in Computer and Communications Law from Queen Mary/University of London, LLB (Hons)-University of Colombo, Dip in IR (BCIS-Sri Lanka), Dip in HR (Adam Mickiewicz University/Poznań-Poland) and Cert. in Digital Archives (Central European University/Budapest-Hungary). He was called to the Bar after completing his Attorney-at-Law (finals) with a 1st Class. He is an editor of the Sri Lanka Journal of International and Comparative Law published by the Faculty of Law/KDU.

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