What the hell is going on: SC on black money

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The history of judicial review can be traced back to 1607, when Edward Coke, a courageous English judge, ignored the threat of being charged with treason to tell King James I that it was outside the King's power to adjudicate upon a dispute: "true it was, that God has endowed His Majesty with excellent science, ... but His Majesty was not learned in the laws" and must therefore leave adjudication to judges.

Ever since, the principle that the law is higher than kings and prime ministers has become a touchstone of civilized nations. The principle was recently reaffirmed by the UK's new Supreme Court. In its very first case, it struck down a draconian governmental order that froze the assets of suspected 'terrorists'. The court found that in the absence of direct parliamentary sanction, the minister concerned lacked the authority to interfere so dramatically with fundamental rights.

But even by British standards, the Indian Supreme Court (SC) is said to be among the most 'activist' courts in the world today. Its critics argue our SC has overstepped the limits of judicial power. Closer analysis reveals a rather complicated picture of activism by the Indian court. There are three key areas in which our SC differs significantly from its counterparts in Canada, South Africa, the UK and US. One of these differences clearly points towards greater activism; another suggests that our SC may appear to be more activist than it really is, and the third shows that it may actually be more deferential than activist in certain respects.

First, the Indian SC only rarely accepts that certain issues are not amenable to judicial decision-making and are best left to politics to determine. Foreign courts tend to be more hesitant in dealing with complex cases involving multiple stakeholders. Cases dealing with environmental pollution and budgetary allocation are classic examples, where an adversarial judicial process is simply not designed to represent all relevant interests before the court.

Second, the sheer number of cases that our SC hears every year is mind-boggling. Article 136 of the Constitution empowers the SC to hear an appeal directly from any other court in India. The SC has failed utterly to define the scope of this power on a principled basis and spends two days every week determining whether it should exercise it on a case-by-case basis instead. In 2007, it dealt with about 57,000 such requests and agreed to hear 6,900 of them in appeal. Research done by Nick Robinson, professor at the Global Jindal Law School, shows that of these 6,900 accepted cases, only 68 related to the much-maligned public interest litigation. Using the remaining three working days every week, the Court managed to decide 5,000 cases in regular hearing in the same year. Compare these statistics with the fact that in its 2009 term, the US Supreme Court disposed of 77 cases. The UK Supreme Court has handed down a total of 89 decisions since its constitution in October

2009; while the South African Constitutional Court delivered a total of 28 decisions in 2010. The staggering work-load of the Indian SC means that even if only a very small proportion of its orders interfere with administrative decisions, in absolute terms the number of such interferences every year is higher than other courts.

Finally, and perhaps most surprisingly, our SC is less activist than most American, European, Canadian and South African courts in the intensity with which it scrutinises legislative and executive action. Barring a few murmurs of dissent, the SC overwhelmingly adopts a rather deferential approach to examine decisions by other branches—the main question it asks is whether the challenged action was 'reasonable'. Foreign courts hear far fewer cases and deal with a limited subject-matter, but often ask more demanding questions, such as whether the decision was 'necessary in a democratic society', 'proportionate', 'serving a compelling interest', etc. Indeed, Robinson's recent survey of all constitutional bench cases decided by our SC since independence shows that the government has consistently won more often than any other class of litigants. The deferential approach of our SC is particularly obvious in cases involving a tension between civil liberties and law and order and in antidiscrimination cases. Our SC tends to err in favour of law and order and of permitting discrimination. My hunch is that as a proportion of the total number of challenged actions, the Indian SC finds fewer actions unlawful when compared to its counterparts in other democracies. A statistical analysis on these lines is long overdue, and will be a significant contribution to this debate.

A judge is 'activist' (in its pejorative sense) when she does something she ought not to be doing. We must hold judges accountable not only for their activism but also for their failure to do what they ought to do. We must demand that their judgments are based on sound reasons, and are unaffected by fear, favour or public opinion. Their accountability, however, is policed not by politicians but by the academy. Barring a few exceptions, our academia in general and legal academia in particular, has not always performed this scrutinizing duty diligently. However, the sheer volume of decisions makes it difficult for judges to write sound judgments and for academics to criticize them.

It would be better if our judiciary examined fewer cases, but took the time to decide them well, and was subject to academic scrutiny as a matter of course. An undecided case is usually better than a badly decided one, especially when one is staring at a court of last resort.

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