JUSTICE, JUDOCRACY AND DEMOCRACY IN INDIA: BOUNDARIES AND BREACHES (2012). By Sudhanshu Ranjan. Routledge: Taylor & Francis Group. Pp. xxviii + 331. Price Rs. 895/-.

IN THE area of public law, 'judicial activism' and 'judicial appointments' are two of the most contentious subjects, which have generated widespread debates and extensive literature in the recent times. Extension by the judiciary of its power of judicial review and taking over the power of appointment of judges to the higher judiciary (an extra-curricular task undertaken by them), leaving only a nominal role to be played by the executive, are the principal causes behind these developments in India.

In the scheme envisaged under the Constitution of India (COI), undoubtedly, judiciary enjoys an important position. Several provisions have been made in the COI to secure its independence. Power of judicial review has also been expressly conferred on it. Both the Supreme Court of India and the high courts have the power to review the validity of legislative and executive actions on the touchstone of principles and rules envisaged in the Constitution and, as the case may be, other laws of the land. They have the power to punish for contempt. There is not much obscurity in the scheme envisaged under the COI with regard to scope of their powers, jurisdiction and the role they are expected to play in India's democratic polity. Perhaps, the theory of separation of powers (SOP), which is incorporated in the COI, can be relied upon to understand the defined boundaries of each organ of the government including the judiciary. Though, in the COI, the theory of SOP has not been recognized with its absolute rigidity, it has sufficiently demarcated the functions of different organs of the government and, thus, it can be said that it does not contemplate assumption, by one organ of the government, of functions that essentially belong to the other.[1] However, notwithstanding such demarcation of boundaries, the history of working of the COI in the last six decades is replete with several instances of breaches committed by different organs.

The executive's attempt to sideline the legislature by re-promulgating ordinances on their expiry and conducting the governance relying on such ordinances without having to pass them through legislative process;[2] its attempt to browbeat the judiciary by demoralizing several judges (either by arbitrarily superseding them notwithstanding their seniority or transferring from their parent high court to another high court or by refusing to confirm those who had been appointed as additional judges in the high courts), who have not taken pro-government stands in their judicial discourses

1 *Ram Jawaya Kapur* v. *State of Punjab*, AIR 1955 SC 549.

2 See D. C. Wadhwa, *Re-promulgation of Ordinances: A Fraud on the Constitution of India* (1983).

in important cases having political overtone and the legislature's attempt to curtail the power of judicial review by amending the Constitution and inserting provisions such as articles 31A, 31B (and the ninth schedule), 31C and 329A (mainly clause 4 and 5), *etc.*, are some of the classical instances of breaches of boundaries by the legislature and the executive. But, in the recent time, it is the judiciary that is committing more and more breaches on the pretext that unless it intervenes to correct the inaction or failure of the legislature and the executive, the country would be "transformed into a state of repose".[3] The judiciary, particularly the Supreme Court of India, has extended its judicial powers to the extent and in a manner wholly unanticipated by the framers of the COI. It may be interesting to note that even the doctrine of political question[4] and lack of judicially manageable standards[5] are not recognized as limitations on the power of judicial review.

Breach of boundaries by different organs of the government is a matter of serious concern as it threatens to debilitate the basic constitutional framework. Adequate attention needs to be paid on the likely consequences of such breaches and steps need to be taken to prevent governance getting transformed into a state of chaos. In this context, the publication of the book under review authored by a noted journalist Sudhanshu Ranjan serves as an eye opener and a timely warning. It throws light upon instances and issues relating to breach of boundaries by the judiciary and other organs of the government. Discussions in various chapters of the book provide insights on conflicts among various organs and enable the reader to understand the power game among them to establish supremacy over one another.

The book has five main chapters apart from introduction. In the introductory chapter, the author explains, at the very outset, what he meant by 'judocarcy' – a term used in the title of the book. He clarifies that by 'judocracy', he refers to virtual taking over by the judiciary, under the guise of judicial activism, the power of legislature and the executive to run the government. Since, the author himself has coined the term, the explanation at the outset helps the reader to understand what he meant by it in the beginning itself.

Discussions in the first chapter – Judicial Activism: Making Justice Accessible or a Power Game? – convince the reader that the judicial activism, at least in the recent days, is more a power game and not contributing so much for meeting the ends of justice. In this chapter, the author traces the origin of judicial review, which is a basis for judicial activism. He points out that it was Lord Coke, who laid down the foundations for judicial review in *Dr. Bonham's* case in 1608 much before Marshall

3 Per S. B. Sinha J in *State of U.P.* v. *Jeet S. Bisht* (2007) 6 SCC 586.

4 See for e.g., *A. K. Roy* v. *Union of India* [(1982) 1 SCC 271], in which the Supreme Court observed that "[T]he doctrine of the political question was evolved in the United states based on rigid separation of powers and does not strictly apply in India."

5 See *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha*, (2007) 3 SCC 184.

CJ's pronouncement in *Marbury* v. *Medison*.[6] Further, while discussing about India's history of Constitution making and conflicts between courts and governments, he brings to the notice of the readers the not so well known fact that the seeds of judicial activism in India can be traced as far back as 1893 when Mahmood J enunciated the principle of natural justice while deciding a criminal appeal in *Queen Empress* v. *Pohpi*.[7]

There is a very incisive discussion on exercise of the power of judicial review after the commencement of the Constitution, which gradually led to the conflicts between the legislature and the executive, on the one side, and the judiciary on the other. It helps the reader to understand how the debate over 'right to property' versus 'land reforms' has turned into a conflict between the government and the judiciary, which ultimately led to the evolution of the doctrine of basic structure that represents the highest benchmark of judicial activism in India. The author points at the mysterious way in which the view expressed by Khanna J on the basic structure of the Constitution has been enunciated as a principle laid down by the majority in *Kesavananda Barati*[8] without even calling for a conference of all judges to ascertain such majority view. It was done by circulating for signature by the judges a note called 'View of the Majority', which was hastily prepared by Sikri CJI, who was due to retire the very next day after delivering the judgment.[9]

The author has given a brief account of how the basic structure doctrine, which was criticised initially by many scholars got legitimized during the emergency. The conflict that ensued between the government and the Supreme Court; supersession of judges and failed attempt to reverse the basic structure doctrine have also been discussed briefly in the first chapter.

The author is of the opinion that the credibility of the Supreme Court, which was so assiduously built, got badly damaged in the *Habeas Corpus* case.[10] The author indicates that the decision of the majority in the *Habeas Corpus* case might be the direct fallout of the earlier supersession of three judges. Since, the bench, which heard the matter, consisted of, apart from Ray CJI, four other senior most judges of the Supreme Court who were to become Chief Justice unless superseded, it is the fear of supersession that led to the majority view. However, the fear of supersession could not deter Khanna J from deciding the case according to his convictions. The author cited what Niren De, the then Attorney General for India, has stated in a private conversation that "he wanted to show the Supreme Court how wrong he was so that it could hold him wrong. Alas, that did not happen."

6 Sudhanshu Ranjan, *Justice, Judocracy And Democracy In India: Boundaries And Breaches* 18 (2012).

7 ILR 13 All. 171 (F.B.). *Id.* at 26.

8 *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.

9 *Supra* note 6 at 43 and 44.

10 *Id.* at 64.

However, the source of information about that private conversation has not been indicated by the author.

Further, the book discusses about the interpretative dynamism exhibited by the Supreme Court in *Maneka Gandhi*[11] and cases decided thereafter. In the opinion of the author, introduction of the procedural due process is one of the many examples where the Supreme Court has drifted away from the original intent of the framers of the Constitution. The author explored the evolution of public interest litigation in India and explains how it has contributed for building the *pro – poor* image by seeking to protect the interest of the common man. But, the author categorically states and provides convincing reasons in support thereof to make the readers understand that how the Supreme court after acquiring the much – needed power, again moved backward, crushing the common man's interest in several cases. Discussions on some of the recent cases decided by the Supreme Court clearly demonstrate the 'selective activism' of the judiciary. It is well within the knowledge of every close observer of judicial process that the activism is exhibited very selectively. The author has analysed several cases to clearly suggest how judiciary very strategically aggrandised its jurisdiction by invalidating laws and amendments that curtails or precludes its jurisdiction but upholding other draconian provisions contained in such legislations.

The author makes a useful suggestion that subordinate courts should be empowered to enforce the fundamental rights so that the less fortunate ones, who do not have the means to approach the high court or the Supreme Court, can also enforce their fundamental rights. However, he feels that articles 226 and 227 of the Constitution need to be suitable amended for the purpose. It may be noted that no such amendment is required as there already exist a provision in clause (3) of article 32 of the Constitution. It enables the Parliament to enact a law for the purpose of empowering any other court, within the limits of its jurisdiction, all or any of the powers exercisable by the Supreme Court under clause (2) of article 32.

In the chapter 2, titled "Balance of Powers between the Legislature, Executive and the Judiciary", author discusses about the SOP, its incorporation in the COI and several instances of breaches of boundaries by the judiciary and the other organs of the government. He forcefully argues that judicial legislations "tantamount to issuing ordinances of unlimited periods which even the Governor or the President, empowered under the Constitution, can issue only for a limited period when the House is not in session."[12] There is an illuminating discussion and sufficient information on overstepping by different organs based on which the author has drawn a very convincing conclusion that in India "different limbs of the state have trampled upon the domain of others".[13]

11 *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

12 *Supra* note 6 at 138.

13 *Id.* at 175.

The chapter 3 that deals with "Appointment of Judges to the Higher Judiciary" is very rich in information that is mind boggling. The chapter speaks not only about law and practice but also about politics in judicial appointments. The author has shown courage and conviction to write about the politics and provide insights thereon, which many others choose, very conveniently, to avoid speaking about except in private conversations. In the chapter, the author clearly points out that:

(i) The scheme evolved for the purpose of appointment of judges in the *second judge's* case, which was revised in the *third judge's* case, is not in conformity with the constitutional provisions dealing with appointment of judges.

(ii) In making appointments, history shows, even the said scheme has not been strictly followed by the collegiums. Perhaps, no rule has ever been followed consistently.

The chapter highlights the lack of transparency in the process of appointment of judges, which gives scope for appointment of tainted judges and perpetuation of nepotism. The role assumed by the Supreme Court in the matter of appointment of judges has made the high court virtually subordinate to the judges of the Supreme Court, which itself is contrary to the spirit of the Constitution. It may be noted that appointment to post of chief justice of high court, judge of the Supreme Court and Chief Justice of India are not intended to be done through promotion. Constitution does not contemplate conferring any right on any one to seek promotion to any of these posts in the higher judiciary. So the proposition that "the appointment of a Chief Justice of a High Court is a promotion, whereas appointment to the Supreme Court is an elevation, not a promotion"[14] does not seem to be correct.

After highlighting the failure of both the systems followed before and after 1993, the author reiterates the need for a broad based body for appointment of judges.

Chapter 4, deals with another important issue of great contemporary relevance *i.e.*, contempt powers of the high court and the Supreme Court. The author discusses in great detail the selective use of the contempt power by the judiciary, its refusal to accept truth as defence in contempt proceedings and the confusion that exists in the law of contempt. The author is highly critical about the reluctance shown by the judiciary to use civil contempt powers and the selective use of criminal contempt powers. The author makes a very pertinent suggestion that "[T]he law of civil contempt must be used effectively and contemners punished, but the law of criminal contempt should not be invoked just because someone has made a statement derogatory to the judiciary or judges. For this, a person can be punished under the law of defamation. It should be used sparingly, where there is an actual interference with the course of justice." It may be shocking to know that in certain cases judiciary

14 *Id.* at 203.

has chosen not to invoke its contempt power even when judges themselves openly levelled charges relating to attempts by influential persons to interfere with the course of justice.

In the last chapter, the author has discussed about the legislative privileges and the power to expel its members. The chapter focuses on the judicial review of house proceedings and the recent case relating to *cash – for – query*, which created a controversy between the legislature and the judiciary.

The book, on the whole, is a great contribution by the author and a value addition to the existing legal literature. Simplicity, clarity and coherence in the language; citation of very interesting but not so well known facts; insightful quotes and presentation of arguments in a persuasive manner encourage the readers to complete the book in one go. It also reflects the range of resources consulted and the depth of understanding of the finer aspects of judicial process by the author, who is a juournalist by profession. The book deserves to be read by everyone interested in law and politics. It is a must read for judges and policy makers. The issues the author has raised in several chapters need to be seriously considered by them.

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