BOOK REVIEW

JUDICIAL PROCESS (2019). By Rabindra Kumar Pathak. Thomson Reuters, New Delhi Pp.272. Price 650/-.

THE EXERCISE of 'judicial power'[1] by the courts within the confines of *constitutional limitations* has a complex dynamics with judges occupying a prominent place in the realm of judicial process. They decide cases exercising their 'constrained' discretion. They are constitutionally entrusted with the tedious task of 'doing' justice. The process that goes on in the precincts of the courts adjudicating upon the rights of litigants before the judges has many layers, and therefore, the way judges exercise the judicial power needs to be analysed from myriad perspectives. It may be a purely philosophical perspective, or a jurisprudential, constitutional, sociological, historical or even economic perspective. Such an analysis deserves introspection in that judges do not work in a theoretical isolation. The constitutional duty to *uphold* the Constitution, and the *constitutional trust* reposed in them, require them to be alive and attentive to the constitutional goal and the existing reality. They have an arduous task of doing justice. The constitution entrusts a judge with the power to interpret the constitution and the laws, and this has resulted in a huge corpus of judicial law making. Power to interpret coupled with *judicial discretion* has been instrumental in crafting the activist *avatar* of the courts, and how judges function necessitates appreciation of the fact that any study of judicial process cannot be confined to what judges do given the fact that use of adjudicatory power, inclusive of discretion and interpretational authority, has ramifications and implications that often arguably transcend the domain assigned to the courts under the Constitution. Working of the Constitution in the preceding seven decades or so has demonstrated how the process of adjudication in constitutional courts had epochal consequences as regards the working of constitutional functionaries or organs. Courts have, earned appreciation, and sometimes criticism as well. Indian constitutional history archives instances that may act as guideposts for understanding the dynamics of judicial process that works in a complex social, political, and economic milieu.

The book[2] under review makes a modest attempt to present a coherent picture of how courts function, and while doing so, touches upon issues such as separation of powers, independence of judiciary, law of precedent, interpretation, judicial activism, and a host of constitutional provisions that facilitate the functioning of constitutional courts in India. All these issues are premised upon a jurisprudential framework that is discussed in the introductory chapter of the book.

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1 See, *William* v. *United States* 289 U.S. 553,556 (1933).

2 Rabindra Kr. Pathak, *Judicial Process* (Thomson Reuters, 2019).

The book consists of eight chapters. The author reiterates the assumption that 'rule of law operates through the instrumentality of courts'[3] where judges supposedly represent "the right-minded members of the community in seeking to do what is fair between man and man and between man and the State".[4] As the author notes, 'Instances abound when courts have acted as bulwark against discriminatory and exploitative practices violative of basic rights and moral values.' *Somerset* v. *Stewart* [5] is one of the earliest and classical example of judicial "courage and craft".[6]Indian constitutional history post independence archives many instances of judicial innovation aimed at upholding the "Constitution and the Laws".[7] However, amid all this, one should not ignore the fact that 'There are certain normative and legal obligations that judges have to discharge while performing their functions. They must apply a continuity of reasoned principle found in the words of the Constitution, statute, or other controlling instrument, in the implications of its structure and apparent purposes, and in prior judicial precedents, traditional understanding, and like sources of law.'[8]

Interpretation, which remains an essential part of adjudication,is not a matter of a "mechanical application of rules but instead involves a complex judgment about how to best harmonize text, legislative history, statutory purpose, and contemporary public policy."[9] This resonates in the following observation made by Hamburger, which the author approvingly quotes thus:[10]

> This duty to decide in *accord* with the law differed from the duty to act *under* the law. All men in England had a duty to obey the law of the land, but the judges had the additional duty to decide in accord with the law, and this mattered because most cases centered on the application of the law to the parties rather than the judges.…*the judges followed the law of the land in their decisions because they had a duty as judges to decide in accord with it.*

Be that as it may, over the years, more so in Common Law domain, the way judges decide cases and discharge their adjudicatory obligations has resulted into a categorisation of judges as being either 'activists or 'conservatives'. Their respective

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3 See, P K Tripathi, "Democracy and Rule of Law" in P K Tripathi (ed), *Spotlight on Constitutional Interpretation* 169(1972). Also see, Andrei Marmor, "Rule of Law and its Limits" 23 *Law and Philosophy* 1-43(2004); Justice H R Khanna, "Rule of Law and Democracy — Friends or Foes?" (1990) 1 *SCC* (Jour) 7.

4 Lord Denning, *The Road to Justice* 4 (1955).

5 (1772) 98 ER 499.

6 *Supra* note 2 at 4.

7 *Ibid.*

8 *Id.* at 5.

9 See, Brian Leiter, "Heidegger and the Theory of Adjudication" 106 *Yale L.J.* 253 (1996).

10 Philip Hamburger, *Law and Judicial Duty* 104 (2010, Indian reprint).

approach to interpreting the legal text also differs. This brings into focus the 'process of interpretation'. Owen Fish describes the process as a "dynamic *interaction* between *reader* and *text*, and *meaning the product of that interaction*. It is an activity that affords a proper recognition of both the subjective and objective dimensions of *human experience*; and for that reason, has emerged in recent decades as an attractive method for studying all social activity."[11]Seen in the context of the legal or constitutional interpretation (adjudication), the aforesaid '*interaction'* between the '*reader'* (judge) and '*the text'* (the Constitution or a statute), under the overarching presence of judicial discretion and experience, has resulted into judgments, especially in India, that have been studied and debated under the epithet of 'judicial activism'.[12]

Judicial activism in India is so profoundly reflected in the 'journey that judiciary has travelled: from being the "least dangerous branch" to being the "most powerful".'[13] As the author observes, "In the annals of constitutional adjudication in India or any other democratic constitutional set-up, judicial activism has been a tale of judicial creativity and innovation, and arguably also a tale of judicial over-reach, leading to assertions that judiciary has over-stepped its constitutionally prescribed limits."[14]A critical appraisal of the judicial activism in India would showcase the great constitutional service that courts have served by safeguarding the constitutionally recognised *rights* and *limitations*, but at the same time, there are 'adjudicatory moments' that have invited criticism in plenty as well. As Professor Baxi reminds, "Judicial activism is at once a *peril* and *promise,* an assurance of solidarity for the depressed classes of Indian society as well as a site of betrayal."[15]He further adds that its spectacular achievements mask the horrible failures, such as the most tragically the outcome in the *Bhopal* case.[16] The

11 Owen M Fish, "Objectivity and Interpretation" 34 *Stan. L. Rev.* 739(1982). Emphasis added.

12 Ch. 8 of the book under review deal with the topic 'Judicial Activism'. See, Keenan D. Kmiec, "The Origin and Current Meanings Of "Judicial Activism" 92 *Cal. L. Rev* 1441 (2204); Lino A. Graglia, "It's Not Constitutionalism, It's Judicial Activism" 19 *Harv.J. l.& Pub. Pol'y* 293, 296 (1996); Upendra Baxi, "The Avatars of Indian Judicial Activism: Explorations in the geographies of [In]justice" in SK Verma(ed), *Fifty Years of the Supreme Court of India* (2001); Upendra Baxi, "Preface" in S P Sathe, *Judicial Activism in India,* (2011); Upendra Baxi, *The Indian Supreme Court and Politics* (1979); Rajeev Dhavan and Salman Khurshid (ed) *Judges and Judicial Power* (1985).

13 *Supra* note 2 at 255.

14 *Id.* at 256.

15 Upendra Baxi, "The Avatars of Indian Judicial Activism: Explorations in the geographies of [In]justice" in SK Verma(ed), *Fifty Years of the Supreme Court of India* 161 (2001).

16 *Ibid.*

most debatable aspect of judicial activism is reflected in constitutional courts' innovation of, and persistence with, public interest litigation.[17]

The power of judicial review has been one of the most instrumental aspects of the 'judicial power' that courts have under the Constitution, as the author remarks, 'the power of judicial review has been court's potent weapon to invalidate governmental actions'.[18] The chapter on judicial review seeks to trace and explore the natural law moorings. It is stated that '…higher law conception has percolated down the ages, refined and evolved. It finds reflection in the major constitutions of the world in the form of judicial review'[19] which, according to Basu, means "courts of law have the power of testing the validity of legislative as well as other governmental actions with reference to the provisions of the Constitution."[20] There are certain important questions or concerns with regard to the exercise of the power of judicial review. One such question arises with respect to 'policy decisions' as it is argued that 'It is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be.'[21] However, there have arisen occasions where the courts "have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of *constitutional or legal limits on power or so abhorrent to reason*, that the courts would decline to interfere."[22]

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17 G L Peiris, "Public Interest Litigation in the Indian Subcontinent: Current Dimensions" 40 *In'tl Comp L Q* 66 (1991). Also see, Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" 37 *Am. J. Comp. L.* 495 (1989; Parmanand Singh, "Protection of Human Rights through Public Interest Litigation in India" 42 *JILI* (2000); Nick Robinson, "Expanding Judiciaries: India and the Rise of the Good Governance Court" 8 *Wash. U. Global Stud. L. Rev.* 1 (2009); T R Andhyarujina, *Judicial Activism and Constitutional Democracy in India* (1992); Madhav Khosla, "Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate" 32 *Hastings Int'l & Comp. L. Rev.* 55 (2009); David L. Anderson, Note, "When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante" 42 *Stan. L. Rev.* 1549, 1570 (1990).

18 *Supra* note 2 at 108.

19 *Ibid.*

20 *Ibid.* See, D D Basu, *Tagore Law Lecture on Limited Government and Judicial Review* (1972). Also see, V S Deshpande, *Judicial Review of Legislation* (1975).

21 *Premium Granites* v. *State of T.N.* (1994) 2 SCC 691.

22 *BALCO Employees Union* v. *Union of India,* (2002) 2 SCC 333 at 362 (emphasis added). *Natural Resources Allocation, In re, Special Reference No. 1 of 2012* (2012) 10 SCC 1; *State of Haryana* v. *Des Raj Sangar* (1976) 2 SCC 844.

A notable feature of the book is that it discusses the jurisprudential aspect of judicial process in detail, elucidating the theoretical contributions made by jurists such as Oliver Wendell Holmes, Jr., Cardozo, Blackstone, HLA Hart, Dworkin and Fuller. It explores the both the conceptual contours and depth of the propositions and premises made them in their writings. One noteworthy discussion is upon 'judges and discretion'[23] followed by Dworkinian analysis of constitutional adjudication along with a lucid delineation of the idea of 'constitutional integrity'.[24] The jurisprudential discussion on judicial process ends with Fuller's proposition of 'polycentric problem'. Thus, the chapter dealing with the theoretical premises of judicial process presents a holistic and analytical treatment.

Be that as it may, there are certain aspects of judicial process, both juristic and judicial, that should have been part of the book. *First*, the author should have had some discussion upon Richard Posner's writings upon judging and how judges think.[25] *Secondly*, with the rise of comparative study[26] of constitutional law and practice, it is desirable that a book on judicial process would incorporate some deliberation on the dynamics of judicial process in other legal systems and 'constitutional cultures'.[27] At a time, when ideas such as 'judicial cosmopolitanism'[28] and 'migration of constitutional ideas'[29] have become an integral part of comparative constitutional law parlance, a book on judicial process should analyse the relevance and acceptability of such ideas, more so in the context of *principles* and *practices* of constitutional law in India. Recently, Justice Chandrachud speaking at the International Judicial Conference 2020, said: "We are enriched by precedent from across the world. We learn from the wisdom of the other

23 *Supra* note 2 at 24.

24 *Id.* at 35.

25 See, Richard Posner, *How Judges Think* (New Delhi, Universal Law Publishing Pvt Ltd, 2010); Richard Posner, *Reflections on Judging* (Cambridge, Harvard University Press, 2013).

26 Comparative Law has three main objectives-professional, sociological, and cultural for the purposes of Comparative law legal system includes *inter alia* legal extension, legal penetration, legal culture, legal structure, legal actors, and legal processes. See, David S. Clark, "Comparative Law in United States Legal Education" find *Soochow Law Journal* 147-174 (2005)

27 See generally, Robert Nagel, *Constitutional Cultures* (Berkeley, University of California Press,1989); Mark Tushnet, "Constitutional Cultures" 24 *Law & Society Review* 1999 (1990).

28 Qerim Qerimi, 'Cosmopolitan Law and Constitution Making: A comparative View'15 *Soochow Law Journal* 35-62 (2018).

29 Sujit Chowdhay, 'The Migration of Constitutional Ideas' (2006). Literature abounds in 'On Migration of Constitutional Ideas'. For a partial list of literature, see, Sujit Chowdhary, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' 74 *Indiana Law Journal* 819-892 (1999); Vicki C. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' 119 *Harvard Law Review* 109-128 (2005); Aalt Willem, Herringa and Philipp Kiiver, 'Constitution Compared: An Introduction to Comparative Constitutional Law (2007); Elisabeth Zoller, 'Introduction to Public Law: A Comparative Study' (2008).

and grow together. In the judges' craft, comparative law turns from an abstraction to reality." Chief Justice Bobde emphasised upon the need of creating a "transnational judicial network which thrives on the constant exchange of ideas and dialogue on common challenges that require our immediate attention." The third aspect of the judicial process which should have been included in the book relates to the increasing use of international law and foreign domestic law in constitutional interpretation.[30] The reviewer expects and hopes that the book under review will incorporate the aforesaid aspects of judicial process in future edition.

All said, the book endeavours to present the dynamics of judicial process in a simple and lucid manner. It discusses some of the important areas of study as to how judges decide cases or ought to decide cases. The eight chapters bring together eight different dimensions of judicial process. The unique feature of the book is its constant focus in each chapter upon bringing to fore the basics of the topic being discussed in a language which is coherent and comprehensible. There has been a long felt need to provide an introduction cum reference book to serve the needs of students as well as specialists alike. And by a young and bright legal scholar who already has to his credit five books and twenty five articles, this well researched and well organized book should hopefully serve the purpose. Published by a prestigious publisher, this book deserves to be placed in the shelves of all important libraries.

It introduces the reader to jurisprudential premise, and practice, of judicial process in India. The book will be useful to students, lawyers, judges and to a reader who is interested to explore the working of judicial process.

*B C Nirmal**

30 *Supra* note 28 at 54-58.

* Former Vice-Chancellor, National University of Study and Research in Law, Ranchi; Former Dean, Faculty of Law, Banaras Hindu University.