



# The fear of executive courts

Posted at: 14/12/2018

## **The fear of executive courts-India urgently needs the return of a thriving legal culture that uncompromisingly calls out political posturing**

- Justice S.R. Sen of the Meghalaya High Court observed in a judgment that “anybody opposing... Indian laws and the Constitution cannot be considered... citizens of the country.”
- The case involved the denial of a domicile certificate.
- Justice Sen, however, thought it fit to further note that in 1947 India “should have been declared a Hindu country”, “nobody should try to make India as another Islamic country”.
- Justice Sen’s ill-advised and ill-judged diatribe is only the latest in a series of instances where judges have inserted themselves into fraught political controversies, and have deployed the prestige of judicial office to lend weight to one side of the controversy which is an alarming trend.
- We normally think about judicial independence as independence from the government.
- Our Constitution is designed to ensure that judges can do their work “independent” of government influence: fixed salaries, security of tenure, and an appointments process that through the Supreme Court’s judgments is insulated from executive control.

### **Judicial independence**

- Independence also requires that judges perform their constitutional role independent of personal biases, political and moral beliefs, and partisan ideologies.
- Judicial independence, therefore, depends on judges recognising that law, while being influenced by politics, is not reducible to it.
- Law and adjudication must remain autonomous from partisan politics in important ways.
- Judges who are insulated from any external control are accountable only to themselves, and their own sense of the limits of their constitutional

role.

### **The roots of the crisis**

- The answer to the question where has the legal culture failed us takes us back a few decades.
- In the 1980s, there was a rapid expansion of judicial power.
- This expansion was motivated by a sense that the judiciary had long been a conservative institution, taking the side of landed interests against “the people” which needs to be changed
- In order to accomplish this, the Supreme Court began to dispense with procedural checks upon its power.
- The 1980s Supreme Court was highly praised for this.
- Judges were painted as crusading heroes.
- A combination of viewing the judiciary as an infallible solution to all social problems, and viewing procedure — that would otherwise constrain judicial power — as an irritant that stands in the way of a truer, purer justice has created the perfect storm that we see today.

### **A frightening prospect**

- The record of the courts in protecting civil rights has been a mixed one.
- In far too many cases, courts have tended to defer to the executive and the government.
- However, judgments like the national anthem order, the Tirukkural order, the NRC process, and Justice Sen’s recent foray raise an altogether more frightening prospect: that of an “executive court”.
- By an executive court, a court whose moral and political compass finds itself in alignment with the government of the day, and one that has no compunctions in navigating only according to that compass.
- Instead of checking and limiting government power, an executive court finds itself marching in lockstep with the government, and being used to set the seal of its prestige upon more controversial parts of the government’s agenda.

### **Conclusion**

Only a principled consistency in requiring that judges must always give reasons for their judgment can halt the transformation of the constitutional court into an executive court.