National Research Journal of Social Sciences (NRJSS)
Volume-1, Issue-2, Year-2016 PP: 106-109 ISSN No: 2348-473X

Judicial Activism In Conflict With Separation of Powers

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"Power corrupts and absolute power trends to corrupt absolutely".

The separation of powers, also known as trias politica. The doctrine of separation of Power is the forerunner to all the constitution of the world came into existence since the days of the "Magna Carta". Though Montesquieu was under the erroneous impression that the foundations of the British Constitution lay in the Principle of Separation of Power, it found its genesis in the American Constitution. Montesquieu had a feeling that it would be a panacea to good governance but it had its own drawbacks. A complete Separation of Power without adequate checks and balances would have nullified any Constitution. It was only this in mind the founding fathers of various constitutions have accepted this theory with modification to make it relevant to the changing times.

Doctrine of Separation of Power

Hon'ble Supreme Court authoritatively said in *Ram Jawaya's*[1] case that the strict doctrine of separation of powers does not apply to our written Constitution. As to the Judge attempting to "run the government", our Constitution excepts that elected representatives will enact laws which would enable the executive to run the government and running the government means providing law and order to its citizens and to live a decent and honourable life such as making provisions for their social security, health, education, the environment and the rests; and taking administrative decisions fairly and without bias.

When elected bodies and government performs these governmental functions strictly there can be no reason and no occasion for interference by the Courts. But it is when they don't so perform, or perform badly, that an occasion arises for invocation of Article 14 (the Equality clause) and Article 21 (the Life and Liberty Clause) contained in Part-III of the Fundamental Rights Chapter of our Constitution. When these Articles are invoked by individuals or groups, the Judges who grant relief are not "running the government"; they are remedying acts of non-governance or miss-governance.

Over the years, the Judges have read far more into the Articles 21, and after our Constitution, which are declared by the Constitution to be not enforceable in any Court (but nonetheless fundamental to the governance of the country) have now been made enforceable by Courts through the wide and liberal interpretation of Article 21, a feat of judicial "engineering" unmatched in any other part of the world.

[1] Ram Jawaya v. State of Punjab. AIR 1955 SC 549.

The recent case of *I.R. Coelho v. State of Tamil Naidu,* on Ninth Schedule, Judgment[2] delivered by the Apex Court has once again raised the debate on the doctrine of 'separation of Powers' and check and balances. The Court has laid down a two-fold test to determine the validity of the laws placed under the Ninth Schedule. A Law will lay open for judicial scrutiny if it is violative of Part III of the Constitution and if the violation found is destructive of the basis structure of the Constitution. Thus, all laws under the Ninth Schedule are now open to judicial review. This judgment has been criticized by Parliamentarians as transgression of the judicial power as the nine-judges bench unanimously pronounced the judgment on the legality of the laws enacted by the Parliament.'

It can be argued that the judiciary is only attempting to achieve the Constitutional mandate in the best way it feels appropriate in the situation and in several cases it has succeeded in advancing the cause of justice ensuring implementation of its powers and functions. It has been the stand of the judiciary that the Courts act only in the areas where there is legislative vacuum.

Though the separation doctrine in widely recognized, it has not been possible to define the functions of the three organs of a State. The American Constitution provides for a rigid separation of powers into three basic divisions the executive, legislative and Judicial. The Australian Constitution follows the same pattern of distribution of powers. The Indian Constitution on the other hand, does not expressly confer the power in different organs of the State.

It was observed in *Smt. Indira Gandhi v. Shri. Ram Narain and Anr.,*[3] that practicing restraint prevents concentration of powers in anyone organ. Is that fine balance between the three organs is distributed, it may destroy the fundamental premises of a democratic government to which we are pledged.

Separation of powers has become a debatable issue in India with the Courts, for a very long time now, laying down new propositions while deciding cases. Its consequences, however, are far reaching. Even though the functions of each organs of the State have not been specifically defined, it is accepted by all that some amount of overlapping is unavoidable and, at times, necessary. But what is the extent of this overlapping is the root of the issue.

One of the earliest reference is Kesavananda Bharti's case[4] in which the Supreme Court held that 'the Basic Structure' of the Constitution cannot be altered by Parliament. The Government later challenged the decision but a special bench, after hearing the Government's plea that Parliament was supreme and represented the will of the people, decided against changing the earlier decision.

In Bihar Assembly Dissolution[5] case where the Governor suspended the State Assembly when no party or combination of parties could form a government, but later, on the perception that here was horse-trading among MLAs, recommended dissolution of the Assembly which was immediately considered. The Supreme Court while dismissing the Government's argument that the court cannot inquire into any advice tendered by the Council of Ministers to the President, declared the government's action as 'unconstitutional'.

Reasons for the Growth of Judicial Activism

The concept of judicial activism which is another name for innovative interpretation was not of the recent past; it was born in 1804 when Chief Justice Marshall, the greatest Judge of the English-speaking world, decided *Marbury v. Madison.* While dealing with the scope of judicial activism J.S. Verma, the former Chief Justice of India and also former Chairman of National Human Rights Commission, deals with the question of the need of judicial activism. He explains that the primary cause of judicial activism is the inaction of the authorities. However, the exercise being for public

[2] I.R. Coelho v. State of Tamil Naidu, 2007 (1) Scale 197
[3] Manu/SC/0304/1975; AIR SC 2299
[4] Kesavananda Bharti V. State of Kerela and anr. (1973) 4 Scc 225
[5] Rameshwar Prasad and ors. V. Union of India, AIR 2006 SC 980.

good, it generally has public support. Most of the jurists agree that judicial intervention is increasing since legislature and executive are not performing their work properly. A survey of public interest petitions shoes that people have gone to Courts because there as no means available. The governments are no longer responsive to their protests. Even is a government is performing efficiently, judicial activism is necessary to protect the rights of powerless minorities. Judicial Activism is a delicate exercise involving creativity. Great skill and dexterity Judicial Activism, is change in the outlook of judges and the functions they perform. The reasons given in the analysis made therein, are:

(a) The judges realize that there is vacuum since the Parliament is virtually under the control of executive when it was supposed to correct any Governmental injustice to individual.

(b) The modern legislation is loosely drafted and delegates large powers to the Government which trends often to be arbitrary in its exercise.

(c) The new generation of judges think of law not as fixed rules but as a set of values designed above all to protect democracy and human rights

The legitimacy of judicial review increased when the Courts started entertaining public interest petitions against government lawlessness. *In Vineet narain v. India* Court directed as to how the vigilance Commission should be appointed, it was certainly beyond its power. Having become absolutely helpless against growing corruption and misuse of power by persons holding position of power, the people saw a ray of hope in judicial intervention. Yet another reason for the judges being active is the denial of natural justice doctrine. In *Maneka Gandhi v. Union of India.* Justice Krishna Iyer observed "Natural Justice is a distillate process" there have been significant changes in the cause of judicial activism since 1260.

Merits and Demerits of Judicial Activism

Merits

1. Healthy reminder of executive and legislature.
2. Progressive interpretation of rights of the people.
3. Protection of interest of lower strata of society.
4. Uncover corrupt practice.
5. Useful for check of misuse of law.
6. Justice not beyond reach.

Demerits

1. Confusion and uncertainly in application of the provisions of the written constitution because new concept given by judiciary i.e. basic structure, prospective overruling and unremunerated fundamental rights.
2. Generate bitterness between legislature and judiciary.
3. Violates the celebrated principles of separation of powers.
4. Not to take over function of legislative justice.

Conclusion And Suggestion

"Judge must know their limits and must not try to run the government".

Because of the theory of separation powers between the legislature the executive and the judiciary. Is a matter on which there could be different opinion. There is a broad separation of powers under the Constitution and each organ of the State must have respect for the others and must not encroach into each other domains.

Our Constitution framer provided to the citizens the right to Constitutional remedies for the encroachment of the their rights. Article 32 and 226 of the Constitution give the right of judicial review over the acts and omissions of the executive. The judiciary, is the watchdog of the Constitution and through the process of judicial review it keeps the executive and legislature within their powers, they derive from the Constitution. The three organs have to remain within respective domains under the Constitution. The judicial review would extend to enforce the fundamental rights. To direct the state in appropriate cases, to provide the welfare standard under the Directive Principles, to enforce the laws enacted by the legislature, to determine the legislative competence when challenged.

However, while discharging tremendous responsibility under the Constitution with huge workload, the judiciary may have suffered some aberrations here and there. There are ample safeguards to rectify those aberrations.[6] Judicial activism spheres of action, but if the two wings of democracy fails in their job what is the alternate left with the people.

- Either to take law in their own hand
- Revolution or to approach judiciary

But, again there is a fear in the minds of people that

- If today the duty of government is shifted from government to the Courts tomorrow it may shift elected member to nominated member or to a military engine.
- As we are not questioning today to Supreme Court takes the command of this country into hands then we are not left with any choice but to revolt.

So therefore, it has been rightly said by Justice J.S. Verma

"Judicial activism and judicial restraint are two faces of same coin".

"Self-discipline must be strictly practices among the member of judiciary and judges must refrain from commenting on policy matters. As they are not the policy maker simply they are acting as guide post in policy matters.

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