Judiciary Activism in Democratic India: An Overview

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ABSTRACT
The independence of judiciary in itself in the first place can lead to many other factors conducive to democracy and secondly it can ensure that Montesquieu’s theory of separation of power has been implemented to some extent. Even in a Parliamentary democracy, where legislative and executive power is concentrated at one place, the independence of judiciary from the legislative and executive control ensures that justice shall be administered impartially. H.J.Laski, in his “Grammar of Politics” has written that historically the concentration of power to interpret and administer justice in the same hands has always been associated with tyranny. In a federal country like India, where the power is tilted in favour of the centre, the judiciary ensures that the powers of the states are not usurped by the powerful centre. Thus the federal balance is maintained by the judiciary. It also secures the fundamental rights of the citizens. However the greatest milestone in the role of judiciary as a protector of democratic rights of the citizens took shape in the form of public interest litigation. In light of this, while this paper will examine how the judicial activism has led to better democratic rights giving social justice to citizens and at the same time the paper will raise certain questions regarding hyper-activism of judiciary and in the end, answer and solution shall be sought.

Keywords---- Judiciary, Activism, Right, Liberty, Democracy

I. INTRODUCTION

Judiciary plays a very significant role in any democracy. It interprets laws, settles various disputes and administers justice. In federal form of Government the judiciary even settles disputes between the central and state Government. Judiciary is one of the organs of the Government, besides legislature which enacts laws and executive which executes or enforces law. Power is thus divided between these three organs of the Government.

In earlier days, when the prevalent political system in most of the countries was monarchy, all the judicial, legislative and executive powers used to remain vested in the monarch. Monarchs thus enjoyed absolute power. It was in 1748, that the French scholar Montesquieu in his book, “Spirit of Laws” gave the theory of “Separation of Powers”. According to Montesquieu, there are three sorts of powers- executive, legislative and judicial in state. If these powers or any two of them is united in the same hands, individual liberty is threatened and hence he urged the importance of entrusting each department of Government to a distinct and independent organ. In this context, E.B.Schulz says that in “Separation of powers”, powers, responsibilities and controls are dispersed rather than centered in one place[1]. A democratic Government can either have a Presidential or Parliamentary form of Government. A Presidential form of Government completely follows the doctrine of separation of powers. However in the Parliamentary form of Government, this theory of separation of powers is violated as here legislature and executive are closely connected like in India. However independence of judiciary is maintained even in Parliamentary Democracy in India. The independence of judiciary is ensured by the procedure of appointment and the removal of judges. The Supreme Court is the highest court in India. It consists of Chief Justice and twenty five other judges. Every judge is appointed by the President after consultation with such judges of the Supreme Court and High Court as the President may think necessary but in the appointment of a judge, other than the Chief Justice, consultation with the Chief Justice with the India by the President is obligatory. However the Chief Justice does not exercise this function alone. A collegium of four senior most judges of the Supreme Court alone with the Chief Justice jointly deliberates the issue and as a result the advice is given to the President. Such a procedure ensures impartiality and objectivity in this very important matter which has far reaching implications in the independence of the judiciary[2]. Similarly a judge of the Supreme Court can be removed from his position only on the ground of proved mis-behaviour or incapacity. Each house of the Parliament in order to remove the judge will have to pass a resolution, supported by the two-third of the members.
present and voting and majority of the total membership of the house. Such a resolution will be addressed to the President who will then pass the order of the removal of the judge. This makes the removal of the judges quite difficult and so the judges can work without the fear of the executive.

According to the article 129 of the Constitution, the Supreme Court is a court of record. Such records are of evidentiary value and are not questioned, When they are produced before any court. According to the article 141, the authority of Supreme Court shall be binding on all courts within the territory of India. According to article 142 of the constitution, the Supreme Court has also the power to secure the attendance before it of any person within the territory of the India for the discovery and production of any document. The court is the interpreter of the constitution and its power embraces not only the interpretation of the constitution but also that of the laws of the union, the states and the local authority. It finally settles all disputes between the states and the union or those between the states themselves. The court also plays advisory role. According to the article 143 clause 1, on matter of public importance the President can seek the opinion of the Supreme Court. There is however no constitutional compulsion for court to give its advice. However under 143 clause 2, the President is empowered to refer to the Supreme Court for its opinion on disputes arising out of any treaty, agreement etc. which had been entered into or executed before the commencement of the constitution and here the court is bound to give its advice.[3]

All this is indicative of significance of judiciary in a Parliamentary democracy but the role of Supreme Court as protector of democratic rights of citizens is of vital importance. However it is article 32 of the constitution which makes the Supreme Court the protector of democratic fundamental rights of the citizens. According to this article if the fundamental rights of the citizens are violated, they can approach judiciary for the enforcement of their rights. In this context, Dr B.R.Ambedkar had commented, “if I was asked to name any particular article of the constitution as most important- an article without which this constitution would be a nullity- I would not refer to any other article except this one. It is the very soul of the constitution and the very heart of it[4]”. However in practice it all begun with a letter written by an aggrieved citizen in 1985 to the then Chief Justice, P.N.Bhagbat, who converted that letter written on post card into a public interest litigation. This was the beginning of the judicial activism. By mid 90s, the role of the courts in this field became well understood and widely accepted. Justice Bhagwati commented, “the court has to innovate new methods and device new strategies for the purpose of providing access to justice to a large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public spirited citizens seeking judicial redress on behalf of those who have suffered a legal wrong or an injury. Judicial activism can be both negative and positive. Negatively, the court can restrict the legislator and executive in what they do. In a positive sense, the court can direct the Government to undertake some action which the court thinks is the responsibility of the Government. For instance, on 18th March, 1985 the Supreme Court asked the Union Government to file a statement within two weeks explaining how it proposed to solve the problem of pre 1964 pensioners and their widows and dependent children in consonance with the principle of social justice[5]. The Supreme Court reprimanded the Union Government in October 2014 for trying to hold back the list of those with black money in banks abroad and had that all the names must be furnished and not one or two names of account holders[6]. On August 24, 2017 a nine judge constitution bench unanimously ruled that right to privacy was a fundamental right while asserting that the state could not dictate what people should eat or wear or with who (sic) they should associate with personally, socially and politically. Justice J.Chelameshwr said, “I do not think anybody in this country would like to have the officers of the state intruding into their homes or private property at will or soldiers quartered into their houses without their consent”. However, like all other fundamental right the right to privacy is subject to reasonable restrictions. Besides this the Court has contended that the right to privacy can be invoked only against state and its instrumentalities and not against private individuals. The Supreme Court’s verdict of August 2017 overruled to earlier constitution bench judgement- M.P.Sharma vs Satish Chandra (8 Judge Bench) 1954 and Kharak Singh vs State of U.P (6 Judge Bench) 1964 that said a citizen had no fundamental right to privacy. However, the important point to be noted is that the Supreme Court has not declared the right to privacy is an independent fundamental right but this right is protected as an intrinsic part of the right to life and personal liberty under article 21 as part of freedom guaranteed by Part III (chapters on fundamental rights of the constitutions).

In Oct, 2017 (The Telegraph, 12th October, 2017) the Supreme Court of India gave the ruling that physical relationship with a wife who is less than 18 years of age will tantamount to rape. The court observed that thousands of young girls are married in India on the auspicious day of Akshay Tritiya. The Court said that the girl child must be given equal opportunity to develop like a male child. While some have admired this activism on part of the judiciary, other have somewhat skeptical attitude towards this new role of judiciary and many would brand this as hyper activism of judiciary. This is particularly the view of the members of the legislature and executive. Thus we can see that judicial activism is rather not appreciated by the
other two branches of the Government. This tension between the judiciary and executive could be traced back to 70s when some politicians stressed that the judges must act according to the public opinion and neither the constitution nor the courts can stand against the voice of the Parliament and the executive[7]. Even the makers of the constitution did not envisage a great role for judiciary. The framers of the constitution apprehended the abuses of power by judicial review. This is evident from what Jawaharlal Nehru observed in the constituent assembly, “within limits, no judge and Supreme court can make itself a third chamber. No Supreme Court and no judiciary can stand in judgement over the sovereign will of Parliament, representing the will of the entire community. Ultimately the whole constitution is the creature of the Parliament.[8]

II. CONCLUSION

The contribution of judiciary in providing social justice cannot be denied and many see judiciary in positive light. As one writer comments, “the judiciary supervises the administrative process in the country and acts as the balance wheel of federalism by settling disputes between the centre and the states and among the states[9]. As a matter of fact, it is the honesty and integrity with which the Supreme Court works, that really matters. It is this spirit of judiciary which in true sense can provide real justice to the people. As some writers have observed that a certain amount of reflection about the role of the judiciary in India’s constitutional democracy, cognizant of the challenges which it faces and possible need for self restraint and correction when such restraint is warranted, are critical if the court is to continue this professed quest for truth which it undertook sixty years ago. It is this introspection, a check against a movement towards unrestrained exercise of the judicial power which will ensure that the court continues earning the reverence of the people.

REFERENCES