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"JUDICIAL ACTIVISM: ASSESSING ITS IMPACT ON DEMOCRACY AND GOVERNANCE"

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ABSTRACT :

'Judicial activism' has become a buzz word. Critics and scholars are increasingly evaluating the role of the judiciary in our constitutional scheme. There is lot of confusion regarding the meaning of the term 'Judicial Activism' as different people associate different meaning to it. Some among these think that 'Judicial Activism' would overpower legislature in a democratic setup. Hence, it is imperative to explore to what extent Judiciary has infringed upon the powers of legislature and executive organs of the government. In case Judiciary is intruding over the functions of the other organs of the state we need to find out if Judiciary is becoming an independent legislative body in itself.

KEYWORDS : *'Judicial activism' , powers of legislature and executive organs.*

INTRODUCTION :

On exploring the actual role played by the judiciary and considering rationales behind several path breaking decisions delivered; on considering the inordinate delay in making judicious laws by legislature and also in some cases complete absence of laws and regulations, violation of fundamental rights and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigation or where incidence may have national and international ramification or to do complete justice. We tend to conclude that 'Judicial Activism' is not an 'at will' activity of the judges but it is something that is imposed upon them and on the Judiciary as a whole. We tend to feel that Judiciary by becoming active has only performed the solemn purpose of upholding the constitutional machinery and helped the legislature as well as the executive.

Those who desire to curb Judicial Activism do not take into consideration the tangible benefits of these vigorous and decisive interpretation of Constitution by judges and while doing so the self-restraint observed by judiciary in numerous instances and considering all such instances we tend to feel that skepticism about Judicial Activism is baseless, uncalled for.

JUDICIAL PERSPECTIVE

The conventional thinking in the past was that the appropriate role of the judiciary is to merely declare or interpret the law and not to make law. It is accepted that certain degree of legislative activity is inherent in the process of judicial interpretation. If we looked in to the history it reveals that from its inception our Supreme Court has spelt out quite a few fundamental rights which are not expressly mentioned in the part III of the constitution. While interpreting the fundamental rights

the apex court in certain cases observed that certain unspecified rights are implicit or inherent in the express enumerated guarantees. For instance, our constitution does not enumerate specially freedom of the press as fundamental rights.

In several decisions of the Supreme Court from 1950 onwards held that freedom of the press is implicit in the guarantee of the right to freedom of speech and expression. Thus, Freedom of the press, one of the pillars of democracy, has acquired the status of fundamental right due to activist judicial interpretation. The apex court has deduced other fundamental rights which are not expressly mentioned in the constitution. Like the right to privacy, the right to travel abroad, the right to free legal aid, Freedom from cruel and inhuman punishment or treatment , Right to education, Right to pollution free and healthy environment, Right to livelihood etc. this activist judicial interpretation which has expand the horizon of the fundamental rights of our people.

The survey of the landmark propositions laid down by the Apex court will be fruitful.

The apex court has delivered several important judgments the most important and historical in its judgment is **the Keshvananda Bharathi vs State of kerala-1** where the court laid down the unique doctrine of the basic structure of the Constitution, as there is a provision in our constitution for amending the constitution under article 368. The plain reading of the Article 368,it appear that the power of amendment is absolute and unlimited and any and every provision of the constitution, including fundamental rights, can be amended. In other words the power of the parliament regarding amendment, as stated in Article 368 is not subject to any limitation. In the instance case the apex court observed and held that the power of amendment was not absolute but was subject to an implied limitation, namely, that the amending power cannot exercised so as to abrogate the essential features of the constitution thereby damaging the basic structure of the constitution and laid down some of the important features of the constitution such as: (a) the rule of Law; (b) Democracy (c) Secularism (d) Federalism and (e) Judicial review. It appears from the said decision that keshvanand bharati's case was the pinnacle of judicial activism.

The above decision was criticized, particularly on the ground that Judges had, by decision in effect amended the Constitution and exercises supra-legislative functions by importing limitations, which are not visible in article 368.definitely the criticism hold some water. But one must remember that due to this doctrine of basic structure, any party in power and having absolute majority in either house of Parliament cannot amend the constitution, to the effect that for example a) provision for free and fair elections b) judiciary cannot be deprived of the power of judicial review c) Rule of law and as to protect the democratic set up, elections would not take place if and when parliament determines instead of every five years and thus suppress the democratic values. These are some of the substantial advantages to the people of this country because of vigorous interpretation of the preamble of the Constitution.

Another criticism on the ground of Doctrine of Separation of powers

Another contentious issue is based on the doctrine of separation of powers. In our constitution, there is enumeration of separate powers and functions of the three wings of state, namely, the legislature, the executive and the judiciary under the constitution and is expected that one wing of the state should not transgress or intrude into the domain of other wings. For example, conduction of election, Policy decision is purely the matter to decide by the election Commission / Executive, and judiciary has no role to play even otherwise also no court held or ruled otherwise.

Let us discuss the doctrine with the help of following propositions of the Supreme Court.

The Supreme Court has ruled in its landmark decision in BALCO Employees Union (Regd.) v Union Of India-2 that it is not "within the domain of the courts or the scope of the judicial review to embark upon an enquiry as to whether a particular policy can be evolved. Nor are the courts incline to strike down a policy merely because a different policy would have been fairer or wiser or more scientific or more logical". And further held that the issue related to the economic policy of the government whose wisdom was not the concern of the court. However the Supreme Court has made it clear that if any policy is inconsistent with a constitutional provision or if it is in breach of a mandatory statutory provision or is mala fide, judicial

intervention will be available. In other words judiciary itself has put restrains on their power of judicial review, but in case any policy or decision is in contrast to the constitutional provision in that case the court is obliged to intervene in the interest of justice and it does not mean that the judiciary has usurp the power and function of executive and legislature.

Another instance of the judicial activism appear that the recent directions given by the apex court to the speaker of the Jharkhand Assembly in the march 2005.regarding how to proceed and asking for a video recording of the proceeding went a bit too far and have been criticized. There is mush force in this criticism. But one must remember that if the court had not intervene then the government which did not have majority could have been in the power in partisan manner, and followed by efforts to prevent of an alternative government was against in breach of well settled conventions. This intervention of the Supreme Court is to uphold the democratic process and to ensure free and fair voting and to obviate complaints about the conduct of elections.

For instance, the issue which came before the Supreme Court for direction was whether the houses of Parliament and State Legislatures in exercise of their powers and privileges are competent to expel members for indulging in the unethical and corrupt practice of taking cash for asking questions in parliament. The Supreme Court held that the Parliament and the legislature did possess those powers and can be exercised and that is not the matter for the courts to decide. However, further observed that no one, howsoever lofty, can claim to be sole judge of the powers given in the constitution and the exercise of judicial review regarding the manner of exercise of power by parliament would be done by the Supreme court and it does not mean that court is usurped the function or powers of the Parliament. Because, if a citizen, whether a member or a non-member of the Parliament or Legislature, complains that his fundamental rights have been infringed or violated, being a state organ it is the duty of the Supreme Court to examine the merits of the complaint and redress the same. Indeed it is the duty laid upon the judiciary by the Constitution.

Recently in the judgment of the case – state of West Bengal & others v The Committee for protection of Democratic Rights, West Bengal & others-3, the Supreme Court has stated that a direction by the High court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State.(west Bengal), without a consent of that State , will neither impinge upon he federal structure of the Constitution or violate the doctrine of separation of power and shall be valid in law. Besides power and jurisdiction, courts also have an obligation to protect the fundamental rights granted by the Constitution, zealously and vigilantly. .

If, we looked into the said decisions of the court it apparent that there is no conflict between judiciary and the legislatures and the criticism against the judiciary for alleged breach of doctrine of separation of power is uncalled and without any substance.

Judiciary and Law making Power

The controversial and the complex question is whether the judiciary can make a law where none exist even though there is need for it. It is said that the remedy lies with legislatures. But experience has demonstrated that it is difficult to invoke Parliament or Legislatures. The factual position in the country is that no measure has been taken by the legislature for years to remedy the several social evils.

In the important decision of the Supreme Court in the case of Vishaka v State of Rajasthan-4, the court had confronted with the problem of sexual harassment of women in the workplace. This landmark judgment has been the source of legislative reforms which are lying before the parliament and the new law will surely be able to curb the prevailing social evil. The court after referring to various international covenants particularly the Convention for Elimination of all forms of Discrimination Against Women and also the constitutional provision under different Article namely, Article- 14, 15, 16, 19, 21, 39, 50, 51 etc. and taking note of the absence of domestic law occupying the field issued several directions, which needs to be followed at all workplaces until suitable legislation enacted by the legislature. These directions included definition of sexual harassment and the preventive steps that can be taken, the disciplinary action and

criminal proceedings that may be adopted for sexual harassment. The court also devised the complaints mechanism and a complaint committee. The court also emphasized that these directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. This judgment is definitely beneficial to the victims of the sexual harassment. It's a classic example of pro-tem ad-hoc judicial legislation and will provide remedy, till equally efficacious legislation is made by the legislature.

Recently the Apex court in B.P. Achala Anand v. S. Appi Reddy-5, observed that an unusual fact situation posing issues for resolution is an opportunity for innovation. Law as administered by Courts transforms into justice. The law does not remain static. It does not operate in vacuum. As social norms and values change, laws too have to be reinterpreted and recast. As law is really a dynamic instrument fashioned by society for the purposes of achieving harmonious adjustment of human relations by elimination of social tensions and conflicts".

It is pertinent to note the observation of their lordship K. Ramaswamy, on "judicial activism" he said that "The Judge cannot retain his passive role when he administers the law under the Constitution ideals. The extraordinary complexity of modern litigation require him not merely to declare the rights of citizens but to mould the relief warranted under given facts and circumstances and often command the executive and other agencies to enforce and give effect to the orders, writs, directions to do constitutional acts. In this ongoing complex adjudicatory process the role of the Judge not merely to interpret the law but also to lay down new norms of law and to mould the Law to suit the changing social economic scenario to make the ideals enshrined in the Constitution meaningful and reality. The society demands active judicial roles, writs formerly were considered exceptional but now a routine. The Judge must act independently if he is to perform the function as expected of him and he must feel sure that such action of his will should not lead to his down fall". It means that judiciary in which Judges, while dispensing justice, the Judges not only interprets the statutory provisions but also makes law to fill the gaps left by the Legislature.

CONCLUSION

In the backdrop of the above discussion, survey of cases and the vigorous interpretation of the statutory and the constitutional provisions by some of the eminent judges, it appears that there is no uniform judicial activism. But it depends on so many factors, namely prevailing situation in a particular country, its legislations or absence of legislation, quality of judicial system, quality of public administration, political scenario of a particular country and also the quest for justice, especially social justice and relief of human suffering is some of important factors which are the motivators of judicial activism. Thus, it can be said that the above developments are positive and beneficial to the welfare of the society. However, despite of all these good decisions and broader interpretation of statutes by some of the eminent judges, we lack at implementation stage. To criticize over judiciary for their activist approach, one must remember that the decisions are not delivered by slot machine; hence we cannot expect mathematical precision in dispensing justice. As judges are human beings and are not infallible. They might have at times looked at the situations in an unusual way but we have to admit that mostly Judicial Activism has worked in favour of the common citizens in general.

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REFERENCES:-

1 AIR (1973) SC 1461)
2 AIR (2002) SC 350)
3 delivered on February 17, 2010),
4 AIR (1997) SC 3014)
5 (2005) 3 SCC 313,

6 Indian Constitutional Law, M.P. Jain.
7 The Constitutional Of India, P.M. Bakshi.
8 Fifth Nani A. PalKhivala Memorial Lecture, March 2008, by Soli A Sorabjee.
9 West Bengal & other v The Committee for Protection of Democratic Rights, West Bengal, Pub. In The Hitavada on 15th March 2010.
10 The Constitution of India, Dr. J.L. Pandey.