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ORIGINAL ARTICLE

JUDICIAL ACTIVISM

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Abstract :

Judicial activism refers to judicial rulings suspected of being based on personal or political considerations rather than on existing law. It is sometimes used as an antonym of judicial. The definition of judicial activism, and which specific decisions are activist, is a controversial political issue, particularly in the United States. The question of judicial activism is closely related to constitutional interpretation, statutory construction, and separation of powers

KEYWORDS :

Political science , judicial activism ,philosophy of judicial .

INTRODUCTION :

Origin of the term

Arthur Schlesinger Jr. introduced the term "judicial activism" in a January 1947 Fortune magazine article titled "The Supreme Court: 1947".

The phrase has been controversial since its beginning. An article by Craig Green, "An Intellectual History of Judicial Activism," is critical of Schlesinger's use of the term; "Schlesinger's original introduction of judicial activism was doubly blurred: not only did he fail to explain what counts as activism, he also declined to say whether activism is good or bad."

Even before this phrase was first used, the general concept already existed. For example, Thomas Jefferson referred to the "despotic behavior" of Federalist federal judges, in particular, John Marshall.

Definitions

Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions."

Political science professor Bradley Canon has posited six dimensions along which judge courts may be perceived as activist: majoritarianism, interpretive stability, interpretive fidelity, substance/democratic process, specificity of policy, and availability of an alternate policymaker. David A. Strauss has argued that judicial activism can be narrowly defined as one or more of three possible actions: overturning laws as unconstitutional, overturning judicial precedent, and ruling against a preferred interpretation of the constitution.

Others have been less confident of the term's meaning, finding it instead to be little more than

rhetorical shorthand. Kermit Roosevelt III has argued that "in practice 'activist' turns out to be little more than a rhetorically charged shorthand for decisions the speaker disagrees with"; likewise, the solicitor general under George W. Bush, Theodore Olson, said in an interview on Fox News Sunday, in regards to a case for same-sex marriage he had successfully litigated, that "most people use the term 'judicial activism' to explain decisions that they don't like." Supreme Court Justice Anthony Kennedy has said that, "An activist court is a court that makes a decision you don't like."

Judicial Activism in India

India has a recent history of judicial activism, originating after the emergency in India which saw attempts by the Government to control the judiciary. The Litigation was an instrument devised by the courts to reach out directly to the public, and take cognizance though the litigant may not be the victim."Suo motu" cognizance allows the courts to take up such cases on its own. The trend has been supported as well criticized.

India's judges have sweeping powers and a long history of judicial activism that would be all but unimaginable in the United States. In recent years, judges required Delhi's auto-rickshaws to convert to natural gas to help cut down on pollution. Closed much of the country's iron-ore-mining industry to cut down on corruption and ruled that politicians facing criminal charges could not seek re-election. Indeed, India's Supreme Court and Parliament have openly battled for decades, with Parliament passing multiple constitutional amendments to respond to various Supreme Court rulings.

All such rulings carry the force of Article 39A of the Constitution of India. Before and during the Emergency the judiciary desisted from "wide and elastic" interpretations, termed Austinian, because Directive Principles of State Policy are non-justifiable. This despite the constitutional provisions for judicial review and Dr.B.R.Ambedkar arguing in the Constituent Assembly Debates that "judicial review, particularly writ jurisdiction, could provide quick relief against abridgment of Fundamental Rights and ought to be at the heart of the Constitution."

Fundamental Rights as enshrined in the Constitution have been subjected to wide review, and have now been said to encompass a right to privacy, right to livelihood and right to education, among others. The 'basic structure' of the Constitution has been mandated by the Supreme Court not to be alterable, notwithstanding the powers of the Legislature under Article 368. This was recognized, and deemed not applicable the High Court of Singapore in Teo Soh Lung v. Minister for Home Affairs.

Recent examples quoted include the order to Delhi Government to convert the Auto rickshaw to CNG, a move believed to have reduced Delhi's erstwhile acute smog problem (it is now argued to be back) and contrasted with Beijing's.

Implications

1. In the 2G Licenses case, the Court held that all public resources and assets are a matter of public trust and they can only be disposed of in a transparent manner by a public auction to the highest bidder.

This has led to the President making a Reference to the Court for the Court's legal advice under Article 143 of the Constitution. In the same case, the Court set aside the expert opinion of the Telecom Regulatory Authority of India (TRAI) to sell 2Gspectrum without auction to create greater tele-density in India. The Court has for all practical purposes disregarded the separation of powers under the Constitution, and assumed general supervisory function overother branches of governments. The temptation to rush to the SupremeCourt and High Courts for any grievance against a public authority has also deflected the primary responsibility of citizens themselves in arepresentative self government of making legislators and the executive responsible for their actions. The answer often given by the judiciary to this type of overreach is that it is compelled to take upon this task as the other branches of government have failed in their obligations. On this specious justification, the political branches of government may, by the same logic, take over the functions of the judiciary when it has failed, and there can be no doubt that there are many areas where the judiciary has failed to meet the expectations of the public by its inefficiency and areas of cases. Justice Jackson of the U.S. has aptly said: "

The doctrine of judicial activism which justifies easy and constant readiness to set aside decisions of other branches of Government is wholly incompatible with a faith in democracy and in so far it encourages a belief that judges should be left to correct the result of public indifference it is a vicious teaching."

Unless the parameters of PIL are strictly formulated by the Supreme Court and strictly observed,

PIL which is so necessary in India is in danger of becoming diffuse, unprincipled, and encroaching into the functions of other branches of government andineffective by its indiscriminate use. In recent orders, the Supreme Court has directed the most complexengineering of interlinking rivers in India.

2. The Court has passed orders banning the pasting of black film on automobile windows.
3.TheCourt has taken notice of Baba Ramdev being forcibly evicted from theRamlila grounds by the Delhi Administration and censured it.
4. The Court has ordered the exclusion of tourists in the core area of tiger reserves.

All these managerial exercises by the Court are hung on the dubious jurisdictional peg of enforcing fundamental rights under Article32of The Constitution. In reality, no fundamental rights of individuals or any legal issues are at all involved in such cases. The Court is only moved for better governance and administration, which does not involve the exercise of any properjudicialfunction.On the other hand in its activist & controversial interpretation of theConstitution, the Supreme Court took away the constitutionally conferred power of the President of India to appoint judges after consultation with the Chief Justice, and appropriated this power in the Chief Justice of India and a collegium of four judges. In no Constitution in the world is the power to select and appoint judges conferred on the judges themselves. The Court is made the monitor of the conduct of Investigating and prosecution agencies that are perceived to have failed or neglected to investigate and prosecute ministers and officials of government. Cases of this type are the investigation and prosecution of ministers and officials believed to be involved in the Jain Hawala case, the fodder scam involving the former Chief Minister of Bihar, Lalu Prasad Yadav, the Taj Corridor case involving the former Chief Minister of Uttar Pradesh, Mayawati, and the recent prosecution of the Telecom Minister and officials in the 2G Telecom scam case by the SupremeCourt.

CONCLUSION

The Judiciary cannot take over the functions of the Executive.

The Courts themselves must display prudence and moderation and be conscious of the need for comity of instrumentalities as basic to good governance. Judicial activism has to be welcomed and its implications assimilated in letter and spirit. An activist Court is surely far more effective than a legal positivist conservative Court to protect the society against legislative adventurism and executive tyranny. When our chosen representatives have failed to give us a welfare state, let it spring from the Judiciary.

The power of judicial review is recognized as part of the basic structure of the Indian Constitution. The activist role of the Judiciary is implicit in the said power.

Judicial activism is a sine qua non of democracy because without an alert and enlightened judiciary, the democracy will be reduced to an empty shell. Judicial activism in its totality cannot be banned. It is obvious a thunder a constitution, a fundamental feature of which is the rule of law, there cannot be any restraint upon judicial activism in matters in which the legality of executive orders and administrative actions is questioned. The courts are the only forum for those wronged by administrative excesses and executive arbitrariness.

Judicial activism is not an aberration. It is an essential aspect of thedynamics of a constitutional court.

It is a counter-majoritarian check on democracy. Judicial activism, however, does not mean governance by the judiciary. Judicial activism must also function within the limits of the judicial process. The judiciary is the weakest body of the state. It becomes strong only when people repose faith in it.

Such faith constitutes the legitimacy of the Court and of judicial activism. Courts must continuously strive to sustain their legitimacy. Courts do not have to bow to public pressure, but rather they should stand firm against public pressure. What sustains legitimacy of judicial activism is not its submission to populism, but its capacity to withstand such pressure without sacrificing impartiality and objectivity.Courts must not only be fair, they must appear to be fair. Such in articulate and diffused consensus about the impartiality and integrity of the judiciary is the source of the Court's legitimacy. Take away judicial activism and tyranny will step in to fill the vacant space. So to sum up the judicial activism in India, it will be very appropriate toquote the words of Dr. A.S. Anand, Chief Justice of India who said :"…. the Supreme Court is the custodian of the Indian Constitution andexercises judicial control over the acts of both the legislature and the executive."I would like to conclude by stating that the Courts are not above the Constitution and must be conscious of the conscience of the Preamble

REFERENCES

1. Chaterji Susanta, "'For Public Administration' Is judicial activism really deterrent to legislative anarchy and executive tyranny? ", The Administrator, Vol XLII, April-June 1997, p9, at p11
2. http://indialawyers.wordpress.com/2012/08/06/disturbing-trends-in-judicial-activism/
3. http://www.thehindu.com/opinion/lead/disturbing-trends-in-judicial-activism/article3731471.ece
4. The real case of judicial activism The Times Herald, June 2, 2009
5. "Supreme Court of India Cause List". Causelists.nic.in. Retrieved 2013-12-21.
6. "The Constitution Of India". Lawmin.nic.in. Retrieved 2013-12-21.
7.http://www.academia.edu/1092288/Where_did_the_revolution_go_The_Supreme_Court_of_India_and_Socio-economic_rights_since_the_end_of_Emergency_Rule
8. Neha Lalchandani, TNN (2012-11-03). "Delhi enveloped in smog, back to pre-CNG levels". The Times Of India. Retrieved 2013-12-21.
9. http://en.idi.org.il/analysis/articles/judicial-activism-at-its-height
10. S. P. Sathe, December 2003. Judicial Activism in India (Oxford University PressPublishers), 406pp. ISBN 0-19-566823-5

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