Why Judicial Activism Needs Rein of Judicial Restraint

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Abstract

The Supreme Court is the guardian of the Constitution and the Judiciary is deemed to protect the rights of citizens from inimical state actions through proper interpretational skills and application of the law. Nonetheless the design of the contours of this power of review has been gradually determined and amended by Judiciary itself. With the frequent wielding of Judicial activism by the Judicial machinery and owing to its far reaching bid it has to be earnestly broached whether the value of Judicial restraint should be ingrained vide Constitutionalism or let the ever growing reach of Judicial reach grossly undermine the sovereignty of parliament.

Keywords: Judicial activism, Organs of state, Judicial Restraint, Constitutional Morality, Judicial Discretion, checks and balances, Separation of powers.

The framers of constitution envisioned the institutionalisation of checks and balances through separation of power. Although not explicitly mentioned it is evident by elaborate and detailed explanation of the differentiated functions of different organs of the state. The three organs viz: legislature, executive, judiciary should not embark upon incursion of respective jurisdictions and the demarcations be respected to the maximum possible extent.

The caution becomes important since separation of power is not a straightjacket compartmentalisation of the pillars of democracy. The concept is fluid and the three organs namely legislature, judiciary and executive tend to mix at the edges. These edges have to work and blend harmoniously and without the apprehensions of encroachment. The institutional checks and balances purport symmetrical power sharing among the three organs while in fact the Judiciary has the final authority to ascertain any law within the Constitutional boundaries. Therefore, if judiciary becomes hyper active it raises risk of downgrade or even a collapse of democracy if not for the exercise of the virtue of self restraint.

The era of judicial activism has wrought its own set of criterion of bridled judicial discretion. The value of judges is sought to be impartial and alienated to any form of biasness. However, judges are and cannot possibly be imperious to public opinion but then they cannot be succumbing to it.

To lay the minds on the algebra of judicial activism and the virtue of self restraint their aspects are cursorily dealt with:

According to Black's dictionary Judicial Activism denotes to judgments which construe the law by going in contradictions of lawful precedents. Such pronouncements are raised on the basis of the Magistrates peculiar philosophies or radical affiliates[i]. It portrays judicial decrees alleged of being based on individual or political deliberations more willingly than on existing regulations[ii].

It has undoubtedly made the Judiciary accessible to common people and even to erstwhile unheeded citizens of our country. The Indian Community has begun seeing the judiciary as a crusader or an organ of state which if need be would rise and calibrate the missing measures in scenarios of inactions by other organs of the state. The people gradually started to expect a remedy from the judiciary for every legislative lacuna which eventually burdens pressure on judges to act sometimes on the Messiah Syndrome. However adequate it seems fulfilling public aspirations and sentiments, may even lead to usurpation of the sovereign will of legislature and its procedural working. The Supreme Court won many accolades with its social interest litigation and in fact it was to become a fountainhead of a social and judicial awareness. However its misuse has become a sorry story in recent times.

What bind our multi cultural society are will of the people and their abiding of the constitutional values. So advantageous to majority public and their opinions but alienated to the constitutional norms cannot be condoned. Here arrives the need for a stance imbibed with fairness, respect for the circumference of constitutionality and the suitable assigning of judicial restraint. The reference to judicial restraint features the effort of a judge who looks up to the language of the constitution for guidance and if further clarification is deemed necessary then elicit from the intent of the framers of the constitution. This form of judicial review has least prospect of:

(a) Creating scope for judicial adventure and

(b) Invention of constitutional law or the legislation by the courts.

Therefore the statutory law is revered, where the legislature having will of the people is given due authoritative power on the law making aspects.

In light of the aforementioned the article will focus on the balancing need of the Judicial Activism vis a vis Judicial Restraint. Within the boundaries of constitutionalism including its living interpretations, the varied aspects of a Judicial restraints need to be located, and brought into practise as the best route to counter any aggressive and encroaching judicial behaviour so as to maintain the accountability of our Judicial machinery. There is a marked difference between (a) what we expect judiciary to be aware of and thereby it to evolve presuppositions of rights and justice in an ever changing society and (b) the scare of restructuring judiciary in conformity with the majoritarian agenda. The courts are not to consider the will of the legislature as subordinate and treat them as such. It can be inferred by the decisions of the Apex Court that there has been an unspoken restraint observed in the invoking of the basic structure doctrine being seldom to curb or kill the constitutional amendments. This bodes well for the sense of exercise of power of self restraint. This needs to be adhered to. Unlike other branches of democracy the Supreme Court has power to even describe what

entails constitutionalism and as a natural corollary bringing the parameters of it into perspective. It brings hence bigger responsibilities which demand a greater fail safe mechanism which can be achieved while acting within the sanctions of constitutionalism.

Judicial activism can be a misleading term in as much the judges should avoid the trap of becoming an activist. The invariable summoning of legislative vacuum due to slumbering Parliament is used to justify the impinging expanse of judicial legislation and should be curtailed. The accountability has to be restored delicately without disturbing the independence of the respective organs. Plethora of recent judgments have ascribed to constitutional morality and its implications. To work within the framework of constitutional morality is cardinal for people and democracy and most importantly for the faith of people in a thriving democracy. What therefore comes as an adjunct to it is the requisite judicial morality, that the highest court sits in its own judgments and is the authority to validate its own decisions and judgment goes on to say a lot about the need for self imposition of restraint which becomes prime in our liberal democratic structure.

Justice Indu Malhotra in her dissent note in Sabrimala Judgment has put it in unambiguous terms –The approach not sound as the power of judicial review ought not to accord courts the authority to judge the rationality of the matter of faith. Court has virtually assumed theological prerogative. The Supreme Court has allowed itself to arrogate, to itself the powers of religious pontiff[iii]. It is one of the several instances where the judiciary has trespassed the discretional boundaries and acted arbitrarily.

The following landmark decision has marked the Grounds on which the court can strike down law made by Parliament[iv]:

> *In state of Andhra Pradesh vs Mc Dowell and Co. AIR 1996 SC 1627, the Apex Court has expressed the view as under: A law made by the parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz(1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part-III of the Constitution or of any other constitutional rights. There is no third ground. If an enactment is challenged as violative of any of the fundamental rights guaranteed by clause (a) to (g) of Article 19 (1), it can be struck down only if it is found not saved by any of the Clauses (2) to (6) of article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or the other constitutional infirmity has to be found before invalidating as act. An enactment cannot be struck down on the ground that court thinks it unjustified. The Parliament and the Legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them? The Court cannot sit in Judgment over their wisdom. An enactment cannot be struck down by applying the principle of proportionality when its applicability even in administrative law sphere is not fully and finally settled. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that Court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted. The*

two rules stated above for striking down of enactments is however confined to and Act made by the Legislature.

The width of judicial discretion is alarming and can sometimes lead to being guided by the partisan influences. It cannot be put more simply than the words of a lord chancellor[v]:

> *.....Please do not get yourself into the frame of mind of entrusting to the judges the working out of a whole new set of principles which does not accord with the requirements of modern conditions. Leave that to the legislature, and leave us to confine ourselves to trying to find out what the law is*[vi].

It is worthwhile to discuss a few accounts of the want of accountability of the Judiciary in brief:

One of the several examples is the arbitrariness of the Collegium System of appointment. It is not only imprecise but also prone to be infested with personal whims. Through the three cases (referred to as judges case 1,2,3)[vii] the Apex Court has gradually attached premier power or the most unrestricted power one can have in democracy to itself regarding the appointment of Judges. The reason stated is to maintain the independence of judiciary. The question which arises is whether a better democratic alternative can be designed to save independence of an institution rather than treading an undemocratic path as is done in aforementioned procedure of appointment of judges in higher judiciary. The judiciary ought to consider its own infirmities and act accordingly and not clutch desperately to something for the sake of retaining power, which should be forgone for the sake of stronger democratic structure.

The need for discretional boundaries could be evidenced in the timeline of Ankush Maruthi Shinde vs State of Maharashtra[viii] wherein fortunately the Supreme Court ultimately acquit the men condemned to Death penalty. Ignoring the absence of evidence during the trial the lower court awarded death penalty which was confirmed by the High Court and finally by the Supreme Court. The travesty was remedied only after a curative petition. However, welcome the final relief be it cannot be denied that before acquittal the judiciary erred defying accountability and acted in arbitrary manner. The court appears to have been blood thirsty and happy to walk the talk of public. In Bachan Singh[ix] the court laid down the rule of aggravating and mitigating circumstances however there was and yet remains opacity on the procedure and minimum standard to be followed in the process of death sentencing. It gives ample unnerving room for judicial manoeuvre and thereby apart from degree of incoherence a scope of personal prejudice. Ironically the remedy of the above mention problem may require judicial activism so as to streamline the process however the judiciary would do good if this is within a well defined circumference of the constitution.

In Ram Jawaya vs the State of Punjab[x] the Supreme Court has stated “Our Constitution does not contemplate assumption, by one organ or part of the state, of function that essentially belong to another.” Similary the Supreme Court has asserted in Union of India vs Deoki Nandan Aggarwal (1991)[xi] -“The power to legislate has not been conferred on the courts”. Notwithstanding there have been several instances wherein the Judiciary has deliberately transgressed its authority. To mention a few[xii], in matters namely M.C Mehta vs

Union of India(2018)[xiii], Arjun Gopal vs Union of India(2017),[xiv] Subash Kashinath Mahajan vs State of Maharashtra[xv], Rajesh Sharma vs State of Uttar Pradesh[xvi] the court in its zealousness has gone beyond its mandate and has widened, amended, framed new laws thereby expanding the universe of Judicial power. The unhinged discretion tends to impinge the sovereign power vested in the parliament and state assemblies to enact laws and thus wanes the constitutional scheme.

It would be most apposite to remember the words of Justice Frankfurter's in the Dissenting Judgement in Trop vs Dulles[xvii] wherein he profoundly asserted that "Judicial Power" is not immune against human weakness... it must observe a fastidious regard for limitation on its own power and this precludes the Court's giving effect to its own notions of what is wise or politic.... Self-Restraint is of the essence of judicial oath". Also In Aravalli Golf Club v Chander Hass[xviii] the Supreme Court has succinctly put forth[xix] that "restraint stabilises the Judiciary in a system of inter-branch of equality". These are fruits of introspection which would do good for/to the constitutional mandate of imparting checks and balances. The independence of Judiciary has to be primarily preserved and promoted although the commendable must become condemnable. It should not be at the cost of Judiciary which is prejudiced and knows no bounds. The procedural aspects of discretional power should bind the judges in a perimeter so as to support the equilibrium to be maintained by the Separation of Power. The sense of judicial restraint serves dual purpose viz:

(i) It not only conserves the independence of judiciary and saves it from interference of other organs of Democracy,

(ii) It also limits the infiltration of the other organs of democracy by Judiciary which in turn would further its accountability.

There has to evolve an interdependent relationship between the branches of democracy to mould legal doctrines when need arises, also the capabilities of constitutional interpretations be strengthened for a dynamic and persevering edifice of checks and balance.

References

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[iii] *Indian Young Lawyers Association vs The State of Kerala*, 28th SEPT 018

[iv] Durga Das Basu, *Indian Constitutional law*, pg 77, Kamal Law House Kolkata,2012

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2. Supreme Court Advocate-on-Record Association VS Union of India 1993(4) SCC 441

3. In re Special Reference 1 of 1998, 1998(7) SCC 739

[viii] Ankush Maruti Shinde & Ors. vs State of Maharashtra on 5th March 2019

[ix] Bacahan singh vs State of Punjab AIR 1980 SC 898

[x] AIR 1955 SC 849

[xi] 1992 AIR 96

[xii] Markandey Katju, "*When judges legislate*" ,The Hindu(November 15,2018)

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[xiv] Arjun Gopal vs Union of India on 23rd October 2018

[xv] Subash kashinath Mahajan vs state of Maharashtra on 20th March 2018

[xvi] 201(8) SCALE 313

[xvii] Albert L Trop v John Dulles ,356 U.S 86(1958) AS CITED IN (2008)3 SCC 221

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