JUDICIAL ACTIVISM AND THE PROBLEM OF GOVERNANCE IN INDIA

ABSTRACT

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ABSTRACT

Judicial activism has been analysed scholarly with a focus on normative analysis of the exercise of judicial power in a democracy in the last three decades. The scholastic debates are still lingering over the same normative dilemma. Paying less attention to the debate, judicial activism keeps itself on more vigorously, and branded the present era- era of judicial activism. The thesis entitled, “Judicial Activism and The Problem of Governance in India”, is an effort in the process of identification and analysis of the issues of judicial activism and also an attempt to find the actual position of it in the present times. The study has also tried to discover the problems of governance in India and the role of judiciary in the functioning of government with special reference to legislation and execution of laws. The manner and extent to which apex court should interpret the constitution is a matter of great debate with varying views on the correct approach. A question which is often asked is as to what would be the appropriate role for the Supreme Court on the issue of governance. What is normally perceived, any decision which is at variance from expected lines is labelled as an instance of judicial activism. The thesis is divided into five chapters with an introduction in the beginning and a conclusion at the end to summarize analytically, and suggestions based on practical experiences are also given in the last. The study has a territorial limit of India only with appropriate references to the USA.

The first chapter entitled, ‘Functional Distribution of Governmental Work in the Constitution of India- The Three Branches of Government and the Parliamentary Set up’, deals with the scheme of separation of powers between the Executive, the Legislature and the Judiciary - three wings of the government. The doctrine of separation of powers, as understood in the United States of America, means that there are three branches of the machinery of the state each of which has its own functions namely legislative, executive and
judicial, and that each branch must be strictly limited to its own sphere and should not be allowed to trespass upon the sphere allotted to any other branch. India also adopted this scheme of distribution of powers with the purpose of providing a system of shared powers known as Checks and Balances.

_Bharat Sarkar_, officially referred to as the Union Government, and commonly as central government, was established by the Constitution of India, and was the governing authority of a federal union of twenty eight states and seven union territories, collectively called the Republic of India. Modelled after the British Westminster System, the Constitution of India provides that the country would be a federal, parliamentary, multi-party, representative, democratic, republic. The form of government in India is the quasi-federal form, a federal structure with a strong unitary spirit. The federal system also provides that the constitution is the supreme power of the land. Based on the distribution of powers between the central government and the state governments there are three lists - Union list, State list and Concurrent list (powers entertained by both centre and state). The fundamental rights cannot be violated by either the Union or the States.

The executive branch of government is headed by the President (Rashtrapati), who is the Head of State and can exercise his or her powers either directly or through officers subordinate to him in accordance with the relevant provisions of the Constitution of India. The government exercises its broad administrative powers in the name of the President of India, the head of State and chief guardian of the Constitution and the Republic. The President is elected by an electoral college. The electoral college consists of the members of both the Houses of Parliament namely; Lok Sabha and Rajya Sabha and the elected members of legislative assemblies of the states; and the elected members of the legislative assemblies of the Union Territories. The Vice President of India is elected by both Rajya Sabha and Lok Sabha.
Real executive is the Council of Ministers, led by the Prime Minister, the head of government. The Prime Minister heads the Council of Ministers and offers important pieces of advice to the President of India, who cannot function without such advice. The ministers may be of three types - Cabinet Minister, Minister of State and Deputy Minister, in order of importance and seniority. The Council of Ministers is directly accountable to the Lok Sabha which is one of the Houses of the Parliament. There is also a Governor in each of the state, appointed by the President. Every bill passed by the state legislature must receive the governor’s assent before it can become a law. He may give his assent to a bill or withhold it or he may reserve it for the consideration of the President. There is an Attorney General appointed by the President of India. He performs the functions of the chief legal advisor. There is one Solicitor General and four Additional Solicitors General to assist the Attorney General of India. The Attorney General is also required to perform all legal functions that are delegated to him by the President of India.

The central legislature referred to as Parliament, consists of the President and the two Houses-Lok Sabha (House of the People, the Lower House) and Rajya Sabha (Council of States, the Upper House). The Lok Sabha has a term of five years. The conduct of the Lower House is in the hands of a Speaker who is selected by the governing party for formal election by the House but is expected to conduct parliamentary business with fairness and impartiality. The process of legislation involves three stages corresponding to the familiar three readings of bills in the parliamentary systems; the introduction of a bill, its consideration and its enactment into law. Parliament is the only forum for amending the Constitution of India. In respect of certain specified federal features of the Constitution, the primary amending role has been given to the Rajya Sabha as the custodian of state rights. The State legislatures, in most respects, are similar to the Parliament of India. The State legislature includes the Governor and the two Houses (Legislative Assembly and Legislative Council). At the local government level the legislature — Gram Sabha and
Municipality in rural and urban areas, respectively- are institutions of self government constituted by the Constitution. The 73rd and 74th Amendments are still in the process of delivering substantive legislative power to be devolved to the local bodies by the concerned states.

Government has often come into conflicts with judiciary over the extent to which the Parliament may amend the Constitution of India. In the *Golaknath Case* (1967), the court ruled that Parliament was not competent to amend fundamental rights as they are transcendental and immutable, though the power to amend the Constitution is a legislative power, and hence, the Constitutional Amendment Act is a ‘law’ within the purview of Article 13 (2). However, in 1971, by the 24th Amendment Act, the Parliament sought to retain its sovereignty by making the Constitutional Amendment Act immune to judicial review, simply on the ground that it takes away or affects fundamental rights. Also an amendment of the Constitution passed in accordance with Article 368, will not be ‘law’ within the meaning of Article 13. The 25th Constitutional Amendment Act which allowed the Parliament to encroach on fundamental rights was said to be done pursuant to giving effect to the Directive Principles of State Policy. However, in the *Kesavanand Bharti Case*, the Supreme Court ruled that while Parliament could amend even the fundamental rights ‘guaranteed’ by the Constitution of India, Parliament was not competent to alter the ‘basic structure’ or ‘framework’ of the Constitution. The concept of the ‘basic structure’, in particular, was nowhere to be found in the Constitution itself but was instead an invention of the judges. The 42nd Amendment Act (1976) unambiguously and unabashedly declared the Parliament to be competent to amend all provisions of the Constitution and the courts to be incompetent to question Parliamentary enactments. It has been covered in the thesis with relevant cases that deal with invention of the judges (basic structure) and competency of the Parliament to amend all provisions of the Constitution.
The Judiciary of India is an independent body and is separate from the executive and legislative bodies of the government of India. The modern judicial system is based on the British legal system that was prevalent in the country during pre-independence era. Very few amendments have been made in the judicial system of the country. The judicial system of India is stratified into various levels. At the apex, it is the Supreme Court of India below which are the High Courts in each state or group of states. Below the High Court, lies a hierarchy of subordinate courts. Panchayat courts also function in some states under various names like Nyaya Panchayat, Panchayat Adalat, Gram Kachheri, etc, to decide civil and criminal disputes of petty and local nature.

The Supreme Court of India, guardian of the Constitution and the highest court of appeal is established by Part V, Chapter IV of the Constitution of India. Articles 124 to 147 of the Constitution of India lay down the composition and jurisdiction of this apex court. Primarily, it is an appellate court which takes up appeals against judgments of the High Courts of the states and union territories. However, it also takes writ petitions in cases of serious human rights violations or any petition filed under Article 32 which is the Right to Constitutional Remedies or, if a case involves a serious issue that needs immediate resolution. The independence of Supreme Court judges has been ensured in various ways. A judge of the Supreme Court cannot be removed from office except by an order of the President passed after an address in each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of members present and voting, and presented to the President in the same Session for such removal on the ground of proved misbehaviour or incapacity.

The jurisdiction of the Supreme Court is divided into original jurisdiction, advisory jurisdiction and appellate jurisdiction. Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of fundamental rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus,
prohibition, *quo warranto* and *certiorari* to enforce them. The Supreme Court has been conferred with power to direct transfer of any civil or criminal case from one State High Court to another State High Court or from a court subordinate to another State High Court. Under the Arbitration and Conciliation Act, 1996, International Commercial Arbitration can also be initiated in the Supreme Court.

Although the proceedings in the Supreme Court arise out of the judgments or orders made by the subordinate courts including the High Courts, but of late, the Supreme Court has started entertaining matters in which interests of the public at large are involved and the Court can be moved by any individual or group of persons either by filing a writ petition at the Filing Counter of the Court or by addressing a letter to Hon’ble, the Chief Justice of India, highlighting the question of public importance for invoking this jurisdiction. This concept is unique to the Supreme Court of India only and perhaps no other court in the world has been exercising this extraordinary jurisdiction. Such concept is popularly known as Public Interest Litigation (PIL).

The High Courts work under the Supreme Court in India. These courts are vested with lots of powers. Each of these courts has original and appellate jurisdictions under them. They decide on both civil as well as criminal cases. Each High Court has power to issue to any person within its jurisdiction directions, orders, or writs including writs which are in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari* for enforcement of fundamental rights and for any other purpose. Most of the cases are passed on from the district or lower courts. Each high court has powers of superintendence over all courts within its jurisdiction.

The Ministry of Law and Justice and the National Informatics Center are endowed with the responsibility of maintaining law and order in the country. There are also many legal committees and commissions that are set up in India.
so that the judiciary can run smoothly and render all possible help to the general masses of India in solving their legal problems.

Modern state, in the form of three important bodies - legislature, executive and judiciary - tries to accomplish the political goal of the society, thus endorsing the credentials of democracy. The concept of sovereignty, which contains both the descriptive as well as prescriptive elements, is essential to enforce the decisions of the legislature. An overall analysis of the functioning of the parliament in its sequence is necessary to understand the institutions and procedures. Thus, legislature contributes to achieving the goals embedded in the Preamble of the Constitution.

The second chapter entitled, “The Issue of Governance-Good Governance and Performance Appraisal of Government”, emphasises on the issue of governance, with even more emphasis on good governance and performance appraisal of government. Special attention is given to the emerging trends and developments that have been taking place in the structural functional performance of the government in the Indian sub-continent. This analysis may help in understanding of contemporary culture of governance and its evaluation of the state under study.

According to a UN paper, governance means ‘the process of decision-making and the process by which decisions are implemented (or not implemented)’. Governance also refers to ‘management’ administration and new ways of coordinating welfare-related activities through networks, partnerships and deliberative forums which give users a more central role. The government is viewed as an agency or machinery through which the will of the State is formulated, expressed and executed. Good governance may be defined as the exercise of legitimate power in a way that the nation’s resources are properly used for the economic and social well being of the people. Governance applies to several contexts; international governance, and national, regional or local governance as well as the corporate governance. The issue of good governance
and the role of judicial activism have a huge impact in a democratic political system like that of India.

A Chinese scholar, Yu, puts it; “It is critical for good governance that people have sufficient power and rights to participate in elections, decision making and supervision of a government. Obviously, only under democratic conditions can people be entitled to such power and rights. Therefore, good governance and democracy coincide here; no good governance without democracy is actionable and vice versa. There might be good government under an authoritarian regime but never good governance without a functioning democratic mechanism.” The term governance also evokes notions of transparency, accountability and the rule of law. The term has come into use in this way precisely because the coercive power and regulatory authority of the sovereign state is being called into question. In this sense the use of the term governance places emphasis on willingness and capacity to learn, and an ability to adapt to change. All of the types of governance share one important common feature. They are all based on ‘rule of the law’, which defines rights and responsibilities of members facing common social problems. Thus, in recent years the word ‘governance’ has become a very fashionable term and is being used in a variety of ways and that it covers a large number of organizations, both in public and private domains.

The Indian state does not have the monopoly of the public sphere. The civil society is increasingly more concerned with public sphere issues and government intervention is considered necessary to provide welfare schemes to cover social safety needs, upgrade health-care to protect children, and help provide opportunities for women and the minorities.

The thesis further deals with a separate sub-heading, ‘National Value Perspective’ in order to comprehend the phenomenon of national values in the second chapter. These values in the Indian context at the time of the inauguration of the republic were those of nationalism, democracy, secularism,
non-alignment and mixed economy. Many people wonder as to whether it was appropriate to expect that a constitution largely based on the colonial model of Government of India Act of 1935 would ensure compliance with value premises combined with the notion of good governance in a democratic set-up together with the ideals of a welfare state. Hence, it is necessary that the citizens are allowed to participate freely, openly and fully in the political process. Citizens must have the right to compete for office, form political parties and enjoy fundamental rights and civil liberties. These are only possible in a system of government which is based on the parameters of good governance. Good governance is a form of governance that encompasses a broad agenda that includes effective government policies and administration and it embodies eight specific characteristics, and can be seen as the ideals of governance; these are: (i) Accountability (ii) Consensus-Oriented (iii) Effectiveness and Efficiency (iv) Equity and Inclusiveness (v) Participation (vi) Responsiveness (vii) Rule of Law (viii) Transparency. The thesis evaluates performance of the government of India in promotion of good governance through a number of parameters which are; securing justice, prevention of threats to peace, easy access to justice, implementing rule of law, empowerment of women and weaker sections, employment for all encompassing regional diversity, efficient delivery of services, positive administrative responses, optimum capacity building and establishment of an egalitarian society with equality of opportunity for all classes of people. Innovations are taking place in the government, in the market and in the civil society in order to achieve the targets set out for the benefit of masses. The nature and content of good governance would undergo changes in tune with rising expectations and fresh demands by the people. Democratic governance would expect and secure from its leadership to be alive to such aspirations and to continually tune institutions of polity to be effective instruments of citizens’ welfare. The need is of negotiations that would ensure that government, market, and civil society work together for the poor and the down-trodden.
The third chapter entitled, “Parliamentary versus Judicial Supremacy: Theoretical Framework”, tries to comprehend the issue of superiority of parliamentary over judiciary or judiciary over parliament. We have presented a theoretical framework of this controversy. In the absence of an impartial, independent and sovereign judiciary, democracy cannot succeed. Parliamentary supremacy pursues the concept that judicial supremacy which is expressed in the form of judicial review, is incompatible with a democratic government because the importance of majority rule lags behind by the few unelected judges who are not directly accountable to people. It is generally assumed that in a democratic country like India, having a written constitution, both the legislative and judicial organs are supreme in their own domains for the proper functioning of the largest democracy of the world. Legislature is repealing and amending earlier laws, introducing new ones frequently. Judiciary is also playing its own role by declaring some laws, or parts thereof, as unconstitutional which causes confusion and instability all the time. A kind of rivalry and competition have started between the two most important organs of government. For the success of democracy both should act in co-operation and understanding, keeping in view the general welfare of the people.

This controversial issue in the Indian constitution is typical because of the simultaneous adoption of parliamentary and federal features. Parliamentary form of government hints at legislative supremacy, but the federal nature of the constitution makes it imperative that the highest judiciary is able to exercise the power of judicial review. The roots of the present problem also lie in the design of the Constitution of India. The Supreme Court seems in a mood to ever interpret the powers, privileges and immunities of parliament that remain uncodified so far. On the other hand, Parliament insists that being the sole custodian of its rights and privileges, it is within its rights to define its privileges and immunities. The whole issue has certainly triggered a new kind of situation that has serious implications of which two are legal-constitutional. First pertains to immunities of the legislature from judicial intervention in its
Proceedings. Second relates to defining powers and privileges of the legislature and its members. Is Parliament the sole interpreter of its powers and privileges? Or, is this power of parliament subject to judicial scrutiny? These issues have been explored in this chapter supported with relevant Articles and cases. To tackle this subject they have developed the concept of ‘basic structure’ of the Constitution, but the issue seems to remain unresolved for quite some time.

The fourth chapter entitled, “Judicial Activism: Concept and Historical Background. Judicial Review”, strives to deal with the concept and historical background of judicial activism. We deal with the concept, definitions, and actual acts of judicial activism in detail. The term ‘judicial activism’ is generally used by scholars of social sciences to describe a tendency by judges to consider outcomes, attitudinal preferences, and other public policy issues in interpreting existing and applicable laws. Despite the term’s prominence, due to one reason or the other, the controversy about its definition has not been resolved and its universally acceptable meaning still remains elusive. Some politicians would like to call it as ‘Judicial Anarchy’, ‘Judicial Over-activism’ and ‘Judicial Despotism’. It is formally considered the opposite of judicial restraint, but it is also used pejoratively to describe activist judges who endorse a particular agenda. Views about constitutional interpretation abound, ranging from strict constructionism to the living constitution, and therefore, in practice, any controversial decision striking down a statute may be labelled by the decision’s critics as judicial activism.

In India, it is generally believed that the concept of judicial activism contributed to the upholding of the rule of law and consequently, it has had a positive impact on governance. In some of the Indian experiences, judiciary has been able to keep up with the standards of good governance in the face of corruption, failed political processes, incompetent political elite and lack of respect for human rights. Some scholars, in India, have defined it in the context of Public Interest Litigation (PIL) or Social Action Litigation (SAL) or Private Attorneys of Law (PAL). For example, K.L. Bhatia has outlined the
imperatives of judicial activism in the context of widening the perspectives of *locus standi* as follows: Judicial activism, in India, is a movement from personal injury to public concern by relaxing, expanding, and broadening the concept of *locus standi*. Judicial activism is correlated, with a progressive movement from ‘personal injury standing’ to ‘public concern standing’ to allowing access to justice to *pro bono publico*, that is, public spirited individuals, groups and organizations, on behalf of ‘lowly and lost’ or ‘underprivileged’ or ‘underdogs’ or ‘littlemen’ who, on account of constraints of money, ignorance, illiteracy, have been bearing the pains of excesses without access to justice. The principle of judicial review, where the whole idea of judicial activism comes from, elaborated and justified in one of the most famous US Supreme Court decisions, *Marbury v. Madison* when parts of the Federal Judiciary Act of 1789, was declared unconstitutional. Chief Justice John Marshall, on behalf of the Court, noted that, ‘the Constitution organizes the government, and assigns to different departments their respective powers’. In case of India, it was the judgement of *Kesavananda Bharati Case* which is popularly known as, ‘the fundamental rights case’, was an innovative decision of the Supreme Court. It is the basis for the power of the Indian judiciary to review, and strike down, amendments to the Constitution of India passed by the Indian parliament which conflict with or seek to alter the constitution’s ‘basic structure’. It is established that the power of judicial review is a part of the ‘basic structure’ of the Constitution, and is permanent even by a constitutional amendment as affirmed by the Supreme Court in *Kesavananda Bharti case*. The Supreme Court of India as the guardian of democratic morality will remember that the exercise of constitutional power is persistent in the final analysis by the intellectual integrity, independence and fearlessness of judges without any doubt.

The fifth chapter entitled, “Judicial Activism in India: Necessity, Causes, Cases of Judicial Intervention in Governmental Work”, is an analysis of the nature and magnitude of judicial activism in India, with necessity and causes, with
relevant cases of judicial intervention in governmental work. The framers of the Constitution of India enacted several provisions designed to secure independence of judiciary by insulating it from executive or legislative control. Due to an independent judiciary, the area of judicial intervention steadily expanded through concepts of judicial activism, public interest litigation etc, in India. People regard it as a positive development because through judicial activism courts have assisted in the legitimizing and channelling of various movements for social change and social justice.

In India, the main cause for the growth of judicial activism is the change in the outlook of judges and the functions they perform. Another cause of it is inactive executive. With a view of enforcing the fundamental rights of citizens judiciary adopted an activist approach. High Courts have taken many cases as PIL on the basis of newspaper reports. Normally, PIL is to be heard at the level of High Courts or the Supreme Court and, not at the level of the district courts. Later on, even district courts were allowed to conduct cases under the PIL. Media already is reporting and exposing lots of public grievances and misuse of power by way of news and investigative newsletters at national and regional levels. Various PILs over the past two decades have paved the way for the preservation and development of the environment in India. The Supreme Court has interpreted the right to environment as a fundamental right and a right guaranteed by the Constitution of India.

The last portion of the study is its conclusion which contains the findings of the study. It cannot be denied that judicial activism has played an important role in protecting living beings, particularly human beings, in all aspects; legal, non-legal, social, environmental, etc, and thereby also promoting good governance in the country. Consequently, it has indeed proved to be a boon to the victims of arbitrary, illegal and unconstitutional actions of state as well as of public servants. Right to life and personal liberty have been given a broader meaning to include all the essential rights for human life with dignity and those rights are easily made available through the channels of an activist judiciary. The
rights to life and personal liberty were elevated to the status of fundamental rights, which could not be abridged, defeated or taken away by the State. Thus, in order to promote good governance in a country by eliminating corrupt practices of the administration throughout its hierarchy, judiciary must be active in its process of adjudication. In a federal democracy where fragmented socio-cultural population lives together, only an active judiciary can protect the rights and liberties of minorities and weaker sections of society, by creating effective checks on the activities of other branches of the government.