Is Judicial Activism a Challenge to the Executive Power: The Indian Experience

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Power corrupts and absolute power corrupts absolutely (Lord Acton).With the horrendous experience of the despotic regime of King Louis XIV behind him, Motesquieu has advocated the doctrine of separation of powers among the three organs of the State. The legislature makes laws, the Executive enforces laws and the Judiciary applies laws where they are clear and makes laws clear where they are not clear. A natural corollary of this has been the system of checks and balances. This has been incorporated in the democratic constitutions all over the world. In contemporary times, the working of liberal and democratic constitutions has proved that sometimes fissures arise in the working of the principle and the delicate apple cart has been upset causing severe strains to the working of the system.

Ever since Marshall has propounded the principle of judicial review stating that we are governed by the constitution but the constitution is what the judges say what it is, a debate has been raging over respective roles of the three organs of the state. The New Deal is too familiar an illustration. Can a bunch of Judges, who are nominated, arrogate to themselves the power not fully envisaged in the Constitutional scheme of things and undo the Acts of the people who are elected periodically by the people? Can this be done in the name of the Constitutional values? The moot question is- Who are the better judges of people's aspirations and expectations? Can the judges say populist measures are transient and smack of political expediency and therefore be relegated to the background for protecting the long term goals and the cherished values of the Constitution? Are not the judges entrusted with the Holy mission of protecting the Constitution? If, yes, is it only singular to judges? Is not the executive also clothed with the same responsibility? These are some of the issues dividing the jurists into two different camps.

Sixty two years after commencing her tryst with destiny, India has emerged as one of the true champions of the RULE OF LAW. The principles of liberal democracy have been like the clarion call and the signature tune of the Constitution of India has been the protection of the dignity of the individual. One thing needs to be mentioned. A number of countries became independent along with India and a number of Constitutions have been drafted. But in most of the countries, democratic forms of government have disappeared and Constitutions have been thrown overboard .The unique feature of working of the Indian Polity has been that the Constitutional principles have been growing from strength to strength. This in no small measure is due to the role of the Supreme Court of India which has been rightly called the Sentinel on the qui vive. Today the evolving principles and the expanding horizons of different facets of constitutional moorings being enunciated by the Supreme Court of India are looked at with awe and admiration by jurists and judicial institutions all over the world. In fact, Prof. Upendra Baxi in his inimitable style observes that India might have had become Republic in 1950 but the Supreme

Court of India became Republic only in 1970's. This is because, the Supreme Court has started evolving the new principles of administrative Law only in 1970's by liberating itself from the narrow confines of the earlier years. Whereas in the first twenty odd years, the Supreme Court of India has been always quoting the Courts of the United States, United Kingdom and France among other countries, later it started enunciating new principles of administrative law to such an extent that today the judgments of the Supreme Court of India are quoted with respect by the U.S Supreme Court and the Highest Courts in other countries.

This judicial activism has been possible due to the advent of judges with vision and far sighted wisdom like Justice P. N. Bhagwati, Justice V. R. Krishna Iyer and Justice O. Chinnappa Reddy among others. The poor people who have hitherto been price out of the Indian legal system found the saviour in the Supreme Court. The butcher, the pavement dweller, the bonded labour, the destitute woman, the neglected child, the hapless prisoner -the list is only illustrative – found the beacon light in the new vistas of jurisprudence with focus on human rights. Epistolary jurisdiction, public interest litigation and forsaking of forms have been cited as examples of the Court's concern for Human rights culture.

The whips issued to the Executive have sought to drive out the indifference of the executive in fulfilling the mandate of the Constitution. But the saga bordering on hyper activism has sent ripples when the judiciary started entering the domain hitherto considered as the exclusive preserve of the Executive. One should remember that executive and legislative action is the province of the organs specified in this regard. There may be grey areas on the boundaries, especially with the steady growth of case law on intervention in the public interest.
Former Chief Justice of India, Justice K.M.Ahmadi observed that it is a misnomer to call it judicial activism and it is only common man's activism. Judicial activism should be only a temporary phenomenon when the other organs fail to discharge their constitutional obligations. The three organs of the state should remember that the days of mutual fault finding are over and that they are collectively responsible to fulfil the Constitutional mandate. What is required is JUDICIOUS ACTIVISM on part of all the three organs.

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