

ACTIVE JUDICIARY AND ROLE OF JUDGES

The issue of separation of powers often remain subject of discussions looking to our deep rooted commitment with democratic system, however, from last few months for various reasons such discussions are having much sharp edged, that is causing minor wounds to all organs of governance, thus, we must take adequate care of our democratic body created by the Constitution of India after achieving independence as a result of great struggle of Indian people. We have to understand as to how the doctrine of separation of powers is necessary for survival of our system of governance and how it is to be protected.

By operation of this political doctrine, the legislative, executive and judicial branches of Government are kept distinct to prevent abuse of power, therefore, it is widely known as “check and balances”. In old Indian Socio Political System we had “separation of duties” in the name of “Varna Vyavastha”, but the traces of separation of powers are too faint. In United Kingdom also strict separation of powers did not operate but in United States of America the Congress, the President and the judiciary make up three distinct branches of the Government though a vitto is available to the executive i.e. President.

The framers of Indian Constitution borrowed the formulate of check and balances from United States with an idea to have a potential mechanism, for smooth democratic governance with the aid of independent legislature, executive and the judiciary.

In our Constitution the judiciary, legislature and executive are three vital organs in the body of democracy and all these three components have their own detached but inter allied functions based on the principle of doctrine of separation of powers. These independent branches must not infringe upon each others rights and duties.

Part vth of the Constitution throughly deals with the powers, duties and fields of operation of judiciary, legislature and executive.

The question before us is how to maintain a restrain or check in functioning of the judiciary to maintain an equilibrium in all branches of the governance while emphasising for majesty of law. The Constitution itself restricts legislature as well as judiciary from interfering in the fields occupied by either wings. Article 211 of the Constitution of India puts a restriction in the terms that "no discussion shall take place in the legislature of a State with respect to the conduct of any judge of the Supreme Court or of a High Court in discharge of his duties".

Similarly, a restriction is also prescribed for the Courts that “the validity of any proceedings in the legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure”. It further provides that “no officer or a member of a legislature of a State in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business or for maintaining order in the legislature shall be subject to the jurisdiction of any Court in respect of exercise by him of those powers”. As a matter of fact Article 212 provides an immunity to the legislature from judicial interference in the matters relating to procedure.

Strangely enough, in our system of polity, the role of people does not matter except during elections. We all know that a huge number of citizens who are eligible to vote, do not cast their votes, a big number of people who cast vote are not concerned with the democratic system and good governance, simply for the reason that the criteria chosen by them to allot their vote may be caste, community, money or certain other subjective considerations, those are not relevant for system of governance. As a matter of fact the legislature with whom will of people vests mostly does not represent actual majority of people. This phenomenon provides opportunities to the elected representatives to indulge in all those activities

which are antithesis to democracy, may that be corruption, crime, castism or other similar activities.

In this kind of situation, where the people feel that legislature is least interested about their requirements, the executive is insensitive to peoples need and rights, it is expected from judiciary to come forward to the rescue of people and provide them social justice and indeed in last six decades the judiciary tried its best to serve the people and save democracy. Though, immediately after independence the Indian Courts had been applying the laws enacted during British period. The circumstances then existing forced the judges to pass judgments which seem to favour the big landlords, however, at the same time a great effort was made by judges in individual to streamline the law in consonance to the values enshrined in our Constitution.

During 1970s, a conflict of judiciary with legislature was on surface but that was not because of any interference by the judiciary in functionings of the legislature or executive, but because of the efforts made by executive in the matters of appointments and transfers of judges. By a flux of time and specially because of the deep rooted democratic values of Indian people the conflicts between the legislature and judiciary settled down.

The era of judicial activism started in 1980s, thus, came the famous judgment in Asiad Workers Cases in 1982 with the enlarged scope of “locus-standi” of the petitioners vis-a-vis the poor people. In 1980s the masses of the country acquired a most effective legal weapon i.e. “public interest litigation”. The public interest litigation was intended to promote and vindicate public interest which demands that violation of Constitutional or legal rights of a large number of people who were ignorant and in a socially or economically disadvantage position should not go un-noticed and un-redressed. In this era the Courts, at the instance of political as well as non political groups, came forward to protect environment, ecology and also for promotion of balanced urban development. The Courts emphasised the need of social justice, the need of public oriented judgments, instead of technicalities those were restricting the flow of social developments.

I have used the word “courts” and not the judiciary for the reason that as a matter of fact this effort was not of judicial system but by individual judges, the judges who were knowing that judiciary has a big role to play with legislature and executive in taking the country to 21st Century, made all efforts to bring the justice at door steps. However, while making

these efforts, a danger of induction of bureaucratic and authoritative tendency among the judges is also noticed, it was not due to judicial activism or public interest litigation but because of a developing tendency of careerism and publicity oriented approach existing among the individual judges. The self-styled judicial activism caused a judicial tyranny and that gave an opportunity to the legislatures, bureaucrats and media to create hue and cry against judiciary.

The judicial activism in the form of Public Interest Litigation or otherwise is a weapon that is to be used only to streamline the governance in favour of democratic constitutional values to promote governance in favour of Indian masses. The judicial activism in no case be transferred to the persons who in the garb of neo-liberalism want to act against the public interest. The term "public interest" is also not required to be modified by judiciary contrary to our democratic values. Whatever authority the judges are having i.e. delegated to them by the people and, therefore, in a democracy there is no need for judges to vindicate their authority or display majesty or pomp.

The judiciary also require measures to ensure accountability and transparency. The powers of contempt cannot be a shield for Courts to protect themselves from their "deeds" those are causing injury

to the confidence of Indian citizens with judicial system. The judiciary being armed with powers of destruction should act with all restrictions. A member of judicial system have to be in habit of sacrifice his personal perks those are essentially prescribed to him by the Government. The judicial activism should not be taken as a weapon to damage the concept of separation of powers but should be used to ensure and secure the great political doctrine of separation of powers. I never think that public criticism of judges will weaken and harm reputation of judiciary, on the contrary, the judges may earn great honour, respect and authority by their cautious action in favour of Indian masses.

Justice Govind Mathur,
Judge, Rajasthan High Court,
JODHPUR.

(Speech before the students of Law College, Mohanlal Sukhadia University, Udaipur)