Judicial Review of State’s Action: Need of Express Provision in the Constitution of India

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Abstract:
Judicial Review has become a buzzword today, in Indian political discourses and legal circles. Judiciary which is one of the important part of the Government, has not only won the approbation of the general public, but it has also generated quite a few misgivings about the role of the executive and the legislature on one side and the judiciary on the other. This is because of the reason that a number of unfortunate developments took place in recent time in the country and it also happened due to the lack of adequate appreciation of the distinct roles of these institutions under the Constitution and the mutuality of their relationships. The lopsided arbitrary decisions being taken by the executive were under the scanner of judiciary since long. A few famous judgments of the Supreme Court of India like Green Judgment, interference of the Apex Court in great scams like 2G spectrum case, opinion in case of the reservation of OBC quota being extended by the Union Government and guidelines being given by the judiciary time to time, has evolve a debate in the matter of equality in policy making. This assertiveness of judiciary is called as Judicial Activism. The purpose of this paper is to highlight the relevance of this assertiveness of judiciary in reaching to the point of equal opportunity in policy making. It is no doubt a fact, that the legislature and executive being the public representatives, were the frontrunners in the policy making nevertheless, it is the judiciary who shows them the right direction towards welfare. This paper tries to explore a continuous drive of judiciary towards the creation of equal opportunities in the making of policy and also evolve a healthy census, as how we find the judiciary to be a panacea for equal opportunities in policy making.

Introduction:

“Lord Devlin once observed that the British had no more wish to be governed by judges then hey had to be judged by administrators. Given the burgeoning over recent years of a distinct English style of public law, he might have added that the public has a desire nevertheless that administrators should not go unjudged by the Courts”. ¹

The most significant fascinating—but complex segment of Governance is, ‘judicial control over the Executive actions’. It is an accepted axiom that the real kernel of democracy lies in the courts enjoying the ultimate authority to restrain the exercise of absolute and arbitrary actions of the Government’s bodies. ² In India in common with other democratic countries of the world, the courts have been given the pride of place, and they do enjoy the great deal of power to control and review State actions. Judicial review describes judicial rulings suspected of being based on personal or political considerations rather than on existing laws. It is sometimes used as an antonym of judicial restraint. Judicial review is the doctrine under which legislative and executive actions are subject to review (and

possible invalidation) by the judiciary. Specific courts with judicial review power must annul the acts of the state when it finds them incompatible with a higher authority (such as the terms of a written constitution). The term refers to "the power of a court to inquire whether a law executive order or other official action conflicts with the written constitution and if the court concludes that it does, to declare it unconstitutional and void." Judicial review is an example of the separation of powers in a modern system of governance (where the judiciary is one of three branches of government). This principle is interpreted differently in different jurisdictions, which also have differing views on the different hierarchy of governmental norms. As a result, the procedure and scope of judicial review differs from country to country and state to state.  

Judicial Review: A Positive Approach

As pointed out by Henery J. Abraham, an acclaimed American Constitutional Law scholar, judicial review in the United States comprises the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon a law or any other action by a public official that it deems to be in conflict with the Basic Law, in the United States, its Constitution. It further stated that in the United States, the highly significant power of judicial review is possessed, theoretically, by every court of record, no matter how high or low on the judicial ladder. Though it occurs only infrequently, it is quite possible for a Judge in a low-level court of one of the 50 States to declare a Federal Law unconstitutional. There are two models of judicial review. One is a technocratic model in which judges act merely as technocrats and hold a law invalid, if it is _ultra vires_ the powers of the legislature. In the second model, a Court interprets the provisions of the Constitution liberally and in the light of the spirit underlying it keeps the Constitution abreast of the times through dynamic interpretation. A Court giving new meaning to a provision so as to suit the changing social economic conditions or expanding the horizons of the rights of the individual is said to an activist Court. Under Judicial Review, a Court can adopt positive or negative approach. The decision of the United States Supreme Court in _Dred Scott_ or _Lochner_ are examples of negative judicial approach, whereas the decision of that Court in _Brown's Case_ is an example of positive judicial approach. In _Dred Scott v. Stanford_, the US Supreme Court upheld slavery as being protected by the right to property and in _Lochner v. New York_, it held a law against employment of children as violative of due process clause of the US Constitution. In _Brown v. Board of Education_, the Court held that segregation on the ground of race was unconstitutional and void. Judicial interpretations, which furthers the rights of the disadvantaged sections of the society or impose curbs on the arbitrary powers of the State, or facilitates access to justice is a positive judicial approach. Whether it is positive or negative judicial approach depends upon judge’s own vision of social change. Judicial activism, which has emerged because of powers of judicial review of the Courts, is not an aberration but it is a normal phenomenon and judicial review is bound to mature into judicial activism.

Judicial Review in India

The concept of judicial review is based upon the doctrine of “Separation of Powers”. Article 50 of the Constitution of India just provides that “The State shall take steps to separate the judiciary from the

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5. L. Chander Kumar v. Union Of India, (1997) 3 S.C.C. 261, Para 52
7. _Dred Scott v. Stanford_ 60 U.S. 393 (1856)
10. Supra note 7
11. Supra note 8
12. Supra note 9
executive in the public services of the State”. Therefore, the Doctrine of ‘Separation of Powers’ has no place in the strict sense in the Constitution of India. In the absence of specific provisions for Separation of powers in Indian Constitution as there is in the American Constitution, division of powers between legislature, executive and judiciary is nevertheless, implicit in the Indian Constitution. The functions of different organs of the Government have been clearly earmarked, so that one organ of the Government does not usurp the functions of another. The Power of Judicial Review is vested in the Supreme Court of India by virtue of Articles 32 and 136, and in the High Courts of various States by virtue of Articles 226 and 227 of the Indian Constitution. The Indian Judiciary has so dynamically interpreted these provisions, that they become the foundation of public welfare. It is no doubt a fact that, Judiciary plays a very important role as a protector of the constitutional values those, the founding fathers of the Constitution have given to us. They try to undo the harm that is being done by the legislature and the executive and also they try to provide every citizen what has been promised by the Constitution under the Directive Principles of State Policy. All this is possible thanks to the power of judicial review.

The rule of law is the bedrock of democracy. The primary responsibility for implementation of the rule of law lies with the executive. Executive have to implement the law and to execute the actions in accordance with the provisions of the laws enacted by the legislature. When executive failed to perform their duties in accordance with the mandate of the law, only then Judiciary comes into the picture, which compels the executive to perform its duties in letter and spirit, by passing a suitable order, judgment or writ. The Indian Constitution adopted the Judicial Review on lines of US Constitution. Parliament is not supreme under the Constitution of India. Its powers are limited in a manner that the power is divided between centre and states. Moreover the Supreme Court enjoys a position which entrusts it with the power of reviewing legislative enactments both of Parliament and the State legislatures. This grants the court a powerful instrument of judicial review under the constitution. The Article 245 of the Indian Constitution states that the powers of both Union and State legislatures are subject to the provisions of the Constitution, thus, is subject to the judicial scrutiny by the Courts. The legitimacy of any legislation can be challenged in the court of law on the ground that the legislature is not competent enough to pass a law on that particular subject matter the law is repugnant to the provisions of the constitution or the law infringes one of the fundamental rights. Article 131 to 136 of the Indian Constitution entrusts the court with the power to adjudicate disputes between individuals, between individuals and the State, between the States and the union but the court may be required to interpret the provisions of the constitution and the interpretation given by the Supreme Court becomes the law honored by all courts of the land.

**Judicial Review and the Parliament:**

The Constitution enshrined certain Fundamental Rights (in Part III of the Constitution) and the Directive Principles of State Policy (in Part IV of the Constitution). Granville Austin in his book ‘Cornerstone of the Nation’ called both Part III and Part IV the Conscience of the Constitution. The former are enforceable while the latter are not enforceable by the courts. A law, which violates any

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14. Constitution of India, 1950; Article 50
17. Constitution of India, 1950; Part-IV, Articles 36-51
20. Clause (1) of Article 245 of the Constitution of India, 1950 provides that – **Subject to the provisions of this Constitution,** Parliament may make laws for the whole or any part of the territory of India, and the Legislature of State may make laws for the whole or any part of the State.
21. Constitution of India; Articles 32, 226
of the fundamental right, is void and they are binding on the legislature and the executive. A fundamental right cannot be taken away even by a Constitutional Amendment if it forms the basic structure of the Constitution. On the other hand, Directive Principles of State Policy, though fundamental in nature shall be provided by State o its discretion, whenever economic condition of State allow it to enforce them.

While liberally interpreting the rights under Article 21 of the Constitution of India, the Supreme Court did not hesitated to enforce even those rights, which are not enforceable. The Constitution of India included socio-economic rights such as right to primary education, the right to adequate means of livelihood, or the right to work in the Directive Principles of State Policy in Part-IV of the Constitution. These social and economic rights have been recognized in the Universal Declaration of Human Rights, 1948 and the International Covenant on Economic, Social and Cultural Rights, 1966. The Supreme Court of India has declared the right to education as fundamental right in the case of Unni Krishnan v. Sate of A.P. under Article 21 of the Constitution. Similarly, the same Court also declared Right to shelter as Fundamental right in Olga Tellis v. Bombay Municipal Corporation, where it also declared that right to livelihood is essential for human dignity, without which freedom of life has no meaning. Again in another case, i.e. M.C. Mehta v. State of Tamil Nadu the Court got included the Right of Childhood in the category of fundamental rights. It was generally felt and it is true also that these rights cannot be effectively made enforceable through judicial process, unless they are supported by the suitable legislation. Till now, Parliament of India has not enacted any legislation relating with any of these rights.

The primary function of the Parliament is to represent the people. It is the supreme forum through which people seek to realize their aspirations, urges and expectations. The Members of Parliament are the elected representatives of the people and they act as the chief communication channel between the people, Parliament and the Government. Multiplicity of political parties in Parliament represents the multi-cultural and plural society of India. Parliament acts as a forum for ventilation of the grievances of the people, their difficulties and their passions, anxieties and frustrations. Various grievances, needs and aspirations of the people are discussed in the Parliament and necessary legislation is taken up in this regard. In recent decades, emphasis has shifted more and more representational and grievance ventilation role of the Parliament. It is the peoples’ institution par excellence. As mentioned earlier the role of Parliament is to enact the laws for good governance of the Nation. But the fundamental aspect of law making is – the Public Welfare. Since India is a welfare State and members of the Lok Sabha, the Lower House of the Parliament are directly elected by the people, therefore, they represent the people in the Governance. Now the thought provoking question is ‘why Parliament itself not making the rights given under Part-IV enforceable by enacting a suitable legislation? Some people will answer that enforcement of these rights depends upon the economic capacity of the State. But, here it does not seem to be a logical answer, because India’s Economy, today, is one of the fastest growing economies of the world. Why Courts have to come forward to ensure the dignity of the common by declaring

22. Constitution of India; Article 37
23. Constitution of India; Article 13 Clause (1) & (2), but subject to the Provisions contained in Articles 31-A, 31-B and 31-C.
25. Constitution of India; Article 37
26. Constitution of India; Article 45
27. Constitution of India; Article 39(a)
28. Constitution of India; Article 41
29. Universal Declaration of Human Rights, 1948; Article 23(1) Right to Work; Article 23(3) Right to Just and Favourable Remuneration; Article 26 Right to Education
30. International Covenant on Economic, Social and Cultural Rights, 1966; Article 7(a) Right to Fair Wage; Article 6- Right to Work.
31. (1993) 1 S.C.C. 645
those rights enforceable, which are, in fact, not enforceable under the Constitution of India? But, when Courts deliver the judgment executive have to implement them, and if executive failed to do so, it will be amount to contempt of Court.

Implications
Judicial Activism by way of Judicial Review is good, and served the people very much by providing those remedies to general public, which were not intended to provide by the legislature. For instance, Right to Compensation is not given in the Constitution of India, but the apex court in *Rudul Shah v. State of Bihar*\(^{36}\) has awarded compensation to the victim of illegal detention, and, in *Nilabati Behera v. State of Orissa*\(^{37}\) Compensation of Rs. 1,50,000 was awarded to the mother of the boy who became the victim of Custodial Death. Moreover, the Court has constituted Committees for the inspection of the site and to find out the truth in many cases.\(^{38}\) We all know that conducting the investigation and constitution of committees for that purpose is the function of the executive, and not the judiciary. Obviously, there will be obliteration of separation of powers and it is judicial interference in the powers which are falling within the sphere of executive.

Concluding Remarks:
The dichotomy of judicial activism evolves a debate over one major question as why, Legislature fails to gain confidence of the masses in drafting and execution of welfare schemes. It is therefore, not surprising that people have started approaching the higher courts to obtain relief. A phase in the Indian democracy has now evolved, in which the legislature is going to lose its confidence in the bona fide of the executive. And the executive is also losing its credibility in an impartial execution of the concerned policies. Therefore, judiciary has to come forward to sort out all such issues.\(^{39}\) The above mentioned discussion diagnoses one trend that, a fine balance between the important organs of the State has been disturbed. The masses now brought forward all their queries to the court and thus expect the court to provide an amicable solution. But, one must not forget that this shall not become a regular feature for the working of any democracy. The court though, always made it clear that it is not a law making body provided, whatever comes in front of it, the interpretation shall be done. Nevertheless, the legislature and executive should realize their responsibilities and the masses must also have to revitalize their faith in the institutions of ‘Representative Democracy’\(^{40}\).

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\(^{36}\) (1983) 4S.C.C. 141
\(^{37}\) (1993) 2 S.C.C. 746
\(^{39}\) Financial Express, 11 January, 1996.
\(^{40}\) The legislature and executive are the major institutions of representative democracy.