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Power Struggle among the Parliament and Judiciary: Weakening the Idea of Democracy?

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ABSTRACT

The Democratic form of government is the most considerable form of government globally. Most of the nations across the world adhere to the democratic form. Democracy is not the platform that is prevailing independently but with the strengthening of the pillars on which this platform is upstanding. Those pillars encompass the JUDICIAL, EXECUTIVE and LEGISLATIVE body of the government. The complications emanate when these pillars are not imparted with akin strength and pinnacle. There prevail numerous cases and controversies among the pillars of Democracy i.e., the JUDICIARY and PARLIAMENT (including both executive and legislation) which allude to the nullification of the core idea of Democracy in the context of India which is one of the largest Democracy, globally. The paper on a major basis will be comprised of such cases where either the Judiciary overpowered Parliament with its decisions or Parliament did the same while exercising their powers or duties. Also, the infamous doctrines and concepts such as the Doctrine of Separation of Powers, Judicial Activism, etc. in regards to the same will also be discussed. The concluding part of the paper will be comprised of the critical comment on whether there is a necessity of overpowering the roles of the pillars of Democracy and does it nullifies the idea of Democracy.

I. INTRODUCTION

Doctrine of Separation of Power has been very well incorporated into the Constitution of India. The concept has been proposed by the famous political thinker Montesquieu, whose main object was that, “Doctrine of Separation of Power is that there should be government of law rather than having will and whims of the official³”. Another most important feature of this doctrine is the Independence of Judiciary, i.e. it should be free from the influences of the other organs of the government to render justice to the last person of the society. If there is no independence to judiciary then it is the first step towards the tyrannical form of the government i.e. power being concentrated in single hands ensuring the misuse of power. Thus the Doctrine

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³ Doctrine of Separation of Powers, Legal Service India (10th Feb'2020 10:00 AM) <<http://www.legalserviceindia.com/legal/article-35-doctrine-of-separation-of-powers.html>>

of Separation of Power plays a vital role in the creation of a fair government.⁴

Further the doctrine of separation of powers implies that each pillar of democracy i.e. the executive, legislature and the judiciary- perform separate functions and act as separate entities. The role of executive is to make policy decisions and implement the laws made by the parliament. The role of legislature remains to propose bills and focus on the law making process and the role of judiciary is to adjudicate and interpret those laws. This doctrine is very much a part of the basic structure of the constitution even though not specifically mentioned in the Constitution as held in the landmark judgment of *Keshavananda Bharti Case*⁵. Thus no law should be passed or no amendment should be made to Constitution deviating from this doctrine⁶.

Doctrine of Separation of Power especially in the Indian Context exists along with the Doctrine of checks and balances. Checks and Balances is a principle of government under which separate branches are empowered to prevent actions by other branches and are induced to share power. On one hand this principle is of prime importance to avoid the arbitrariness from the organs of the government but on the other hand this overlapping principle had led to the rise of a controversial conflict between the Parliament (inclusive of Legislature and Executive) and the Judiciary.

II. INTERCHANGING ROLES OF JUDICIARY AND PARLIAMENT

Judicial Review as a concept is the power of the courts to review statutes, interpret laws and the governmental action to determine that they are in accordance with Constitution. The concept is based on the idea that a Constitution which dictates the nature, functions and limits of a government- is the supreme law. Thus any action by the government violating the basic principles of the Constitution is invalid.

The doctrine has its roots in the Indian Constitution impliedly in the Article 13. Thus it can be clearly pointed out that judiciary exercises judicial review over executive and legislative action. There have been many instances where courts have issued laws and policy related orders through their judgment. For instance in the landmark judgment of *Vishakha v. State of Rajasthan*⁷, Supreme Court have issued guidelines on sexual harassment as workplace. This can be considered as the legislative action taken by the Judiciary.

⁴Doctrine of Separation of Powers, Legal Service India (10th Feb'2020 10:00 AM)<<http://www.legalserviceindia.com/legal/article-35-doctrine-of-separation-of-powers.html>>

⁵ AIR 1973 SC 1461

⁶ Simran, Legislature versus Judiciary, PRS Legislative Research (10th Feb'2020, 10:00 AM) <<https://prsindia.org/theprsblog/legislature-versus-judiciary>>

⁷ *Vishakha v. State of Rajasthan*, AIR 1997 SCC 3011

Back in 2010, another controversy arose between the Judiciary and Cabinet was when Apex Court ordered the Ministry of Agriculture to free distribution of food grains to the poor instead of allowing it to rot in go downs and it was not a suggestion as made out by the then Agriculture Minister, Sharad Pawar. The court clearly specified that it was not a suggestion but an order as alternatively interpreted by the Minister. The Court had passed the direction while dealing with a public interest litigation filed by civil rights group PUCL on rampant corruption in Public Distribution System (PDS) besides rotting of food grains in FCI go downs⁸.

The Hon'ble Supreme Court in the case of *Swaraj Abhiyan vs Union of India and Ors.*⁹ directed the ministry of agriculture to have a look at the drought management manual and revise it accordingly. Not only this, it was ordered to the union government to set up a National Disaster Mitigation Fund within three months by the apex court. The order put the union government in dilemma as the appropriation bill was passed and to make such fund viewed to be difficult. Supreme court issued notice to the governor of Arunachal Pradesh but the notice was called off later as constitution provides the governor with no accountability to any court¹⁰. Also, former CJI of India, TS Thakur's statement came out that there is requirement of some process to audit the performance of the government. The question was raised here on the constitutionality of the statement.

Constitution bench of Supreme Court in *Supreme Court Advocates-on-Record-Association vs Union of India*¹¹, declared the National Judicial Appointment Commission Act and the amendment unconstitutional and void raising the question on the destruction of doctrine of separation of powers by the judiciary. The act was passed in parliament with 100 percent majority and also gained support of people but it came quite shocking for everyone when was declared void by the court. This act provided the appointment of the judges to the highest court with the transparency. This decision reflected the judicial overreach which means exercising of judicial activism at extent. Judicial Activism, approach to the exercise of judicial review, or a description of a particular judicial decision, in which a judge is generally considered more willing to decide constitutional issues and to invalidate legislative or executive actions¹². Judicial activism comes into scenario only when the courts have to exercise their power of reviewing a particular action of the state. According to Black's Law Dictionary judicial

⁸ Dhananjay Mahapatra, *Distribution of food grains an order, not a suggestion, SC pulls up Pawar*, TOI, August 31, 2010.

⁹ WRIT PETITION (C) NO. 857 OF 2015

¹⁰ Art 361 of Indian Constitution

¹¹ WRIT PETITION (CIVIL) NO. 13 OF 2015

¹² Kermit Roosevelt, *Judicial Activism*, Encyclopedia Britannica, (Apr.04,2020, 8:30 PM), <https://www.britannica.com/topic/judicial-activism>

activism is a “philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions.” Judicial activism is articulated and enforced by judicial rulings suspected of being based on personal or political considerations rather than on existing law. Judicial activism implies going beyond the normal constraints applied to jurists and the Constitution, which gives jurists the right to strike down any legislation or rule against the precedent if it goes against the Constitution.¹³

Discussed below are the instances where Legislature have overturned the judicial pronouncements by passing laws for the sole purpose of overturning those judgments.

There are traces of controversies that can be witnessed in the popular case of *Mohammed Ahmed Khan v. Shah Bano Begum*¹⁴, the controversial maintenance lawsuit which made the Uniform Civil Code a flashpoint. The Apex Court in the case held that Bano, a Muslim woman, is entitled to get alimony from her former husband, and in the context of that judgment stated that UCC should apply to the personal law. As a consequence of this order the then government piloted a law in the Parliament to overturn the Supreme Court Ruling¹⁵.

Another instance where Parliament has overpowered the decisions of the Judiciary is, On September 7, 2011 the Parliament passed the Customs Amendment and Validation Bill, 2011 which retrospectively validates all duties imposed and actions taken by certain customs officials who were not authorized under the Customs Act to do the stated acts. Some of the duties imposed were in fact challenged before the Supreme Court in *Commissioner of Customs vs. Sayed Ali*¹⁶ in 2011. The Supreme Court struck down the levy of duties since these were imposed by unauthorized officials. By passing the Customs Bill, 2011 the Parliament circumvented the judgement and amended the Act to authorize certain officials to levy duties retrospectively, even those that had been held to be illegal by the SC¹⁷.

Another instance where Parliament has nullified the effect of a judicial decisions by enacting a law is, The court had before it a case, arising out an award made by the Central Government Industrial Tribunal more than two decades back. The Tribunal ruled that that apart from the bonus which the staff of the State Bank of India was paid under the Payment of Bonus Act, they were also entitled to get, as in past years, ‘customary bonus’ at the rate of one month’s

¹³ Aishwarya Talwar, “Separation of Power and Judicial Activism in India” <<https://www.lawctopus.com/academike/separation-of-powers-and-judicial-activism-in-india/>> Accessed on 29th September, 2018

¹⁴ Mohammed Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945

¹⁵ Raghav Ohri, *Law Ministry used Shah Bano Case to justify itself before PMO*, The Economic Times, October 18, 2016.

¹⁶ Commissioner of Customs V. Sayed Ali (2011) 3 SCC 537.

¹⁷ Simran, *Legislature versus Judiciary*, PRS Legislative Research (10th Feb’2020, 10:00 AM) <<https://prsindia.org/theprsblog/legislature-versus-judiciary>>

substantive pay every half year. However, Parliament nullified the effect of the Tribunal's award by a 1984 Amendment Act. It inserted a new Section, 43A, in the State Bank of India Act¹⁸; it stipulated that "notwithstanding any judgment, decree or order of any court, tribunal or other authority", the staff of the State Bank of India "shall not be entitled to be paid any bonus, except what is payable under the Payment of Bonus Act". By a single stroke this legislative amendment nullified the Tribunal's ruling, and the State Bank staff in India was deprived of 'customary bonus'. But rather than taking it lying down, State Bank's Staff Union embarked on a long legal battle, first unsuccessfully at the Madras High Court and then at the Supreme Court. The Union assailed the 1984 Amendment Act as being ultra vires the Constitution¹⁹.

Justice Muralidharan of Madras High Court passed order making singing of the national song mandatory in schools, universities and other educational institutions in Tamil Nadu once a week. The order of High Court was an example of judicial overreach along with the idea that patriotism can be inculcated by the force of law as its basis. Not only this, Supreme Court also made the playing of national anthem in the cinema halls compulsory, initially making mandatory for everyone to stand in respect of the anthem. This not only showed the overreach of judicial activism but also inculcating the sense of patriotism in people by the force of law.

III. CONCLUSION

Instances discussed above prove that both Parliament and Judiciary as an organ of the government have functioned in a manner in the past which reflected the power tussle between them. These examples highlight that where Parliament have overturned the judicial pronouncements by passing laws with the sole motive of going against the judgment of the Court, Similarly Judiciary have used of Judicial Activism and Judicial Review as a tool to declare the laws made by the Government as void. These actions by Judiciary and Parliament somehow weaken the concept of Democracy which India as a nation has adopted in its Constitution. Though it can be rightly said that both the organs are doing their respective duty

¹⁸ 43A. Bonus.-(1) No officer, adviser or other employee [other than an employee within the meaning of clause (13) of section 2 of the Payment of Bonus Act, 1965 (21 of 1965)] of the State Bank shall be entitled to be paid any bonus.

(2) No employee of the State Bank, being an employee within the meaning of clause (13) of section 2 of the Payment of Bonus Act, 1965 (21 of 1965), shall be entitled to be paid any bonus except in accordance with the provisions of that Act.

(3) The provisions of this section shall have effect notwithstanding any judgment, decree or order of any court, tribunal or other authority and notwithstanding anything contained in any other provision of the Act or in the Industrial Disputes Act, 1947 (14 of 1947), or any other law for the time being in force or any practice, usage or custom or any contract, agreement, settlement, award or other instrument.]

¹⁹ *Parliament's Power to Nullify Judicial Decisions*, HT, Oct. 09, 2006, <https://www.hindustantimes.com/india/parliament-s-power-to-nullify-judicial-decisions/story-UtpXUVCE5kRhX8meYPvqkO.html>

but the retaliating actions indicate towards a power tussle. It is also accepted that the organs of the government cannot act in water tight compartments and some amount of intervention is necessary to ensure there is no arbitrary power control, but the intervention by the organs should be done in a harmonious way to maintain the spirit of Democracy and should aim towards the public welfare at large justifying Indian Nation as a welfare state.
