

Constructive Role of Judiciary in Shaping Public Policy in India

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Abstract

In India, there is a unified judicial system unlike in the USA where double system of courts exist . In the hierarchy of courts, which administer both central and state laws, there is the Supreme Court. (Articles 124-147) at the apex, High Courts of the different states and UTs (Articles 214-232), subordinate courts (Articles 233-237) and panchayat courts (set up under the state legislation). Unlike the British judiciary which is highly politicized by the absence of a clear separation of powers, the Indian and American judiciary shares its supremacy with the legislature of the state. In India and the USA, where the separation of powers is institutionalized to a larger extent than in Britain, the Constitution entitles the Supreme Court to exercise judicial review. The power of judicial review is inherent in Articles 32, 226, and 227 of the Indian Constitution. Judicial review is a necessary concomitant of Fundamental Rights. The judicial review is the power of the judicial courts to determine the constitutionality of actions of the legislature and executive and declare the null and void if such actions do not conform to the constitutionality of a legislative act.

Keywords: Judicial, Hierarchy, Legislature, Politicized, Review.

Introduction

The judicial courts, generally speaking, do not interfere with the policy matters of the legislature or executive (e.g. centers policy decision on demonetization of high currency notes on 8 November 2016) unless the policy is against the Constitution. But, of late, courts, notably the SC, greatly affected the content of public policy through the exercise of the powers of judicial review of legislation. The judiciary in India plays a constructive role in shaping and influencing public policies in two ways: by its power of judicial review and judicial decisions.

Explanation

Judicial review has become the most important expression of the country's commitment to constitutional government. The Constitution entitles the SC, and the High Courts at the state levels, to exercise a judicial review of legislation. Through the power of judicial review, the courts determine the constitutionality of legislative and administrative actions. If such actions are found to be in conflict with the constitutional provisions, the courts can declare the null and void. They are not only specifying the government's limits with regard to certain actions, but also stating what it must do for the public interest. For example, the SC on 15 July 2015 asked the central government to revisit its new National Pharmaceutical Pricing Policy, 2012 for fixing prices of essential medicines in the country and also the DPCO, notified in May 2013.

In all democratic countries, judiciary by virtue of its constitutional status plays a significant role in the policy making process. Courts are approached to interpret and decide the meaning of legislative provision that are often vaguely stated and contain conflicting interpretations. In Public interest litigation (PIL) by the National Human Rights Commission (NHRC) for a directive to the centre to submit proper inquiry reports in cases of death of persons at the hands of Army personnel, the SC said. We cannot direct the government to do something which is not contained in the statute' (Protection of Human Rights Act, 1993). Similarly, the SC on 7 December 2015 refused to entertain a PIL plea for directing Parliament to enact a Uniform Civil Code.

The power of the judiciary to make policy is inherent in the judicial function in any democratic polity. This is largely due to the following explanations: In the first place, it is contended that there exists in a democratic polity a significant body of judge-made common laws rules that have grown alongside legislative laws and acts. The courts determine rules for what constitutes criminal conduct. The courts also interpret the language of the laws the legislature has passed. They may also lay down the requirements that they may determine to be demanded by a law. They may also decide upon the constitution a limitation. In *Indira Gandhi versus Raj Narain (1975)*, for example, separation of power was treated as a basic structure of the Constitution.

Second the judicial review is important because it assures that all public policy is justifiable. Here the SC has the power of judicial review for administrative bodies. The decisions of administrative tribunals, whether in adjudication, individual cases of rule making decisions of general applicability, may be appealed against them to the High Court or SC in India. 34 The decision of the court can have significant impacts on the future decisions of administrative bodies. By contrast, as Walter Bagehot once wrote, 'There is nothing the British parliament cannot do except transform a man into a woman and woman into a man'. 35 In England, judges cannot test the validity of parliamentary enactment against some higher norm in contrast to the US SC justices who 'regularly test the validity of legislation against constitutional standards of which they are the guardians'. 36 But in the USA and India, judicial review of administrative decisions has been an established fact. The courts can strike down the administrative actions, which are not in accordance with authorizing legislation. For example, the SC on 14 October 2008 directed the government to fill vacant OBC seats by 31 October in Indian Institutes of Technology (IITs), Indian Institutes of Management (IIMs) and other centrally run higher educational institutions with eligible students from the general category. 37 The five-judge Constitution Bench, headed by Chief Justice K.G. Balakrishnan, also observed that the government was trying to benefit the 'cream out of the creamy layer' by raising the income ceiling to 4.5 lakh a year for OBC families for availing the 27 per cent quota for OBC students. The court clarified that the cut-off marks for the OBC candidates for admission cannot be beyond 10 per cent less than that of the general category. This is clearly a step towards social justice, and also the SC does not want central educational institutions, including the IITs and IIMs, to dilute the merit.

Third, the courts play a passive role of interpreting the law rather than becoming involved in political matters. They may not take the initiative. Law suits are placed before the courts in specific and particularized form. The demands made by the litigants and the rules of the judicial process determine the manner in which the problem is presented to the court. A person seeking to invoke the power of the courts musts how direct legal injury and must have exhausted all administrative remedies before a judge will listen to the case. The judge must take that particular set of facts and make a decision that will resolve the immediate problem. If the decision is accepted by other judges, the judge has made a policy

for all jurisdictions in which that view prevails. For instance, the right of the female employees not to be sexually harassed at the work places as in the case of Vishaka versus State of Rajasthan (1997) became a court-made policy.³⁸ Infact, the SC meant the decision to have general application in all public and private organizations. If the judge does not decide, a policy choice cannot be made because it leaves the status quo intact. However, he is constrained not only by precedent, but also by constitutional requirements and legislative action. For example, the SC ruled that dismissal of a government servant for committing bigamy was neither 'shockingly disproportionate nor unconstitutional'.³⁹

It is noted that the judiciary in democratic systems has played a major role in the formation of social and economic policies. Much of the law relating to matters such as equal protection of law, property ownership, employer-employee relationships and the position of women in society have been developed and applied by the courts in the shape of common law. Judges pronounce judgments' on social and economic are as which have a wider policy implication. In this context, Anderson observes, 'Not only are the courts get- ting involved but they are playing a more positive role in policy formation, specifying not only what government cannot doubt also what it must do to meet legal or constitutional obligations'.⁴⁰ Although the courts in other countries such as Australia, Canada, Japan and West Germany have some power of judicial review, heir impact on policy has been much less than the SC of the USA. This is because the American SC has formal authority in many areas not usual in other countries. In the case of India, the relative importance of the SC and the High Court's has been increasing. The Indian courts have become increasingly involved in prescribing specific policies in economic and social areas.

There are some are as in which judicial decision-making does contribute to the formulation of public policies. The elements 'of this complexity are as follows: First, a degree of independence is secured for the judiciary by the constitutional rules, for example, judges' salaries (charged upon the Consolidated Fund, i.e. salaries are not open to discussion by the legislature), service condition sand dismissal procedure (under Judges Inquiry Act, 1968). Judges have been appointed until retirement and can only be dismissed by resolution of both Houses of Parliament. Such action has never taken.⁴¹ Judges are also protected from legal action in their administration of justice so that it may be carried out without fear and favour. Second, the judiciary is expected to function as an independent arbiter in a parliamentary democracy. Its role is to administer the law when conflicts arise in a neutral and impartial way.

The judiciary in India is now under severe attacks for its slow pace in deciding the cases. In many incidents, people have taken the law in on their own hands. Although the country's judicial system is based on the Anglo-Saxon legal tradition, the process of delivery of justice to the common person is long and tortuous. Of the 3 crore cases pending in courts, 62,794 are in the SC, 45lakh in 24High Courts and a whopping 2.7 crore in lower courts. 'Some of the major reasons for the high pendency of cases insubordinate courts are the poor judge-population ratio, prolonged and costly litigation caused by procedures and lawyers' interests, poor infrastructure, shortage of judicial personnel and weak alternative dispute resolution mechanisms', the Standing Committee on Law and Personnel, in its report on 'Infrastructure Development and Strengthening of Subordinate Courts', stated.⁴²

Concerned over alarming backlog and to ensure expeditious disposal of cases, Chief Justice of India (CJI) H.L. Dattu had asked the chief justices of all high courts to look into the dockets of cases pending for five or more year's insubordinate judiciary of all states. The CJI has set up a special 'social justice bench' to deal with the situation besides emphasizing on the disposal of petty, compoundable (cases

which can be compromised) criminal matters and other civil disputes through Lok Adalats as an alternative dispute resolution mechanism.

It may be pointed here that in the UK, the SC hears only 55 appeals in a year. In the USA, of the 5,000 petitions for leave to appeal every year, only 185-195 are admitted and the rest are rejected even without any oral hearing. Each SC judge in the USA handled a mere 9 cases (every year) against disposal of 2,600 cases by every judge on an average in the SC, High Court or trial court in India, every year. The American SC decides 81 cases in one full year compared with addition of 114 cases everyday to pending cases in the SC

41 The dismissal of a judge of the High Court and Supreme Court is a complex process, and since 1773 no judge has ever been dismissed. For example, the process to impeach Justice Soumitra Sen. of the Calcutta High Court on charges of misappropriation of several lakh rupees began in September 2008 on the advice of the Chief Justice of India. The motion, passed by the Rajya Sabha in August 2011, was not taken in by the Lok Sabha as Justice Sen resigned in September 2011. In May 1993, a motion to impeach Justice V. Ramaswami, a judge of the Supreme Court, was moved, but the Congress under P.V. Narasimha Rao government did not issue the whip and Congressmen stayed away, enabling the motion to collapse. The frequency of executive-judiciary turf war and procedural delays in removing a judge of doubtful integrity raise a question whether the present system needs a change. Judges accused of malpractices no longer resign on their own to maintain the dignity of the office they hold.

in India.⁴³ On the contrary, the Union Law Ministry statistics show there are 4,600 vacancies in the subordinate judiciary, 470 vacancies of judges in 24 High Courts (sanctioned strength of 1,050 judges) and 6 in the SC as on 20 April 2016. Thus, there is an urgent need of reforms in the judiciary that would speed up the judicial process.⁴⁴ India's current judge-population ratio stands at 17 on its sanctioned strength, that is, one judge for a population of over 58,800. Nearly, 3.38 crore cases were pending before the judiciary.

Conclusion

Thus the role of the judiciary in responding to administrative action has been to protect the rights of the citizens against the growing state power. The increasing governmental interference in citizens' lives the failure of governmental action on social and economic problems and the willingness of the judiciary to play a more constructive role all tend to ensure a continuation of judicial activism in policy formation. 'Independence of the judiciary is an important basic structure of the Constitution. To strengthen it, one does not have to weaken Parliamentary sovereignty which is not only an essential basic structure but is the soul of our democracy'.⁴⁵

Reference

1. See The Times of India (New Delhi), 'Editorial', 12 March 2015. The British courts accept the sovereignty of Parliament. The country's most senior judge, the Lord Chancellor, is both a member of the Cabinet and Speaker of the Upper House of the Legislature. In India, the Supreme Court in various cases rules that separation of powers is a basic feature of the Constitution
2. 31 See The Financial Express (Chandigarh), 16 July 2015.
3. 32 See The Tribune (Chandigarh), 14 May 2015 and 8 December 2015.
4. 33 For example, in order to protect women against gender discrimination and social exploitation, the High Court in Himachal Pradesh said that women belonging to the tribal areas of the state will in her

it property under the Hindu Succession Act, 1956 and not as per customs and usages. See The Tribune, 26 June 2015.

5. 34 Article 136 of the Indian Constitution empowers the Supreme Court to hear an appeal by special leave from any order or determination of tribunal.
6. 35 Quoted from Henry J. Abraham, *The Judicial Process* (New York, NY: Oxford University Press, 1980), 311.
7. 36 F.L. Morrison, *Courts and the Political Process in England* (London: SAGE Publications, 1973), 97.
8. 37 See The Tribune (Chandigarh), 15 October 2008 and 20 August 2011.
9. 3a 1997(6), sec 241.
10. 39 See The Tribune (Chandigarh), 10 February 2015.
11. 40 Anderson, *Public Policy-making*, 41
12. 42 See also The Financial Express (Chandigarh), 15 May 2015