Judicial Review : Scope, Legitimacy and Conflict with Separation of Powers

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Law and justice both are indispensable to the existence of a civilized society and maintaining peace, law and order therein. Every man in the society must have his due- that is the perpetual and constant desire of everyone. In American context, the existence of judiciary- synonymous with the concept of justice, has three fold objectives according to the Declaration of Independence: the security of life, liberty and the pursuit of happiness. In the context of Indian Constitution the goals setout to be achieved by the State (wherein are included the legislature, the judiciary and the executive) are justice, liberty, equality and fraternity. This shows the paramount significance of justice, a concept the materialization whereof is the task entrusted to judiciary.

Power of judicial review is inherent in any judiciary. Let it be noted that judicial review is not just justiceability, it is a much wider concept. Almost all written Constitutions of the world vest the judiciary with the power of judicial review over legislative and executive wings of governance though the degree of power may differ. Necessity, practice and precedents have given such unprecedented width and expanse to the net of judicial review, that the exceptions where the power of judicial review may not be exercised have been narrowed down only to two general exceptions, namely (i) where the power has been specifically excluded or taken away; and (ii) where there are certain aspects which render the issuance of judicial process unmanageable by any known standards. Such complex is the concept of judicial review and so far reaching its concept that I cannot do better than quote Justice Cardozo – "The Web of Justice' is tangled and obscured, shot through with a multitude of sheds and colours, the skeins irregular and broken. Many hues that seem to be simple, are found, when analyzed, to be a complex and uncertain blend. 'Justice' itself, which we are wont to appeal to as a test as well as an ideal may mean different

things to different minds and at different times. Attempts to objectify its standards or even to describe them, have never wholly succeeded.[1]"

Under the constitutional scheme, the three wings of governance that is judiciary, legislature and executive are placed on a par but it is the judiciary which have been vested with the power to pronounce upon the constitutional validity of the actions, inactions or omissions of other coordinate branches of Government. In India, the power of judicial review vesting in the judiciary extends to review of legislative actions, judicial decisions and administrative actions. In 1928 Justice Holmes had said- "although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an act of congress unconstitutional, I suppose that we all agree that to do so is the greatest and most delicate duty that this Court is called on to perform".

Judicial authority to enforce the Constitution against unconstitutional acts is conventionally traced to Chief Justice John Marshall's opinion in *Marbury* v *Medison*[2] and its claim that the written Constitution is included within that law for which it is 'the province and duty of the judicial department to say what the law is[3]' However according to Snowiss, judicial authority over constitutional Acts was often claimed even since before *Marbury,* but its legitimacy was just as often denied. In this unresolved controversy, judicial invalidation of legislation remained an essentially controversial practice. There appeared to be no coherent or uniform defense of this judicial power which gradually assumed authority leading to *Marbury*. It quickly gained wide spread support and articulating for the first time a single standard defense[4]. Such great is the influence and recognition of the power of judicial review vesting in the judicial wing of governance that it has come to be accepted as 'a judicial substitute of revolution'[5]. It is equally accepted that this power is not only available to be exercised but also required to be performed. Modern trends shows the character and scope of judicial control over legislation regularly changing and enlarging which is termed by the critics as 'judicial supremacy' over other two wings of governance though the three are equal and coordinate. The Constitution of India

[1] (Select Writings, pp. 223-224)
[2] [5 U.S. (1 Cr.) 137, 177 (1803)]
[3] (Sylvia Snowiss, *Judicial Review and the Law of the Constitution*, Universal, 2008).
[4] (See Snowiss, pp. 1-2).
[5] (Snowiss, p. 3).

makes elaborate provisions for division and separation of powers between the three wings of governance. Though the contours are not precisely demarcated but the limits are well known with certain measure of overlapping. The concept of equality between the three wings of governance is sought to be achieved by devising two pronged methodology: first, specific provisions have been made in regard to the three heads of powers embodied in different portions of the Constitution which have to be read together; and secondly, the concept of equality between the three wings of State is sought to be achieved by introducing checks and balances in the scheme of division of powers. Constitutionally, any inroad by one into the arena demarcated for the other is considered ultra vires of the Constitution and by convention rules of self imposed restraint have developed which silently and yet forcefully guard against such overstepping by one into the area delineated for the other. Illustratively, without being exhaustive, it may be said:

(1) The Court cannot legislate;
(2) The Court may not interfere with policy decisions of the legislature or the executive and, for want of expertise in Courts, may not deal with those matters which are more appropriate for decision by democratically elected and accountable authorities;
(3) The legislature may not overrule or undo a judgment given by a Court though the legislature may, by amending the law fundamentally, alter the basis on which the judgment of the court has proceeded and may even give such amendment a retrospective effect.

This power of judicial review vesting in the Courts is a constitutional necessity. Late Justice H.R. Khanna in the Legal Classic 'Making of India's Constitution'[6] delving deep into the Constituent Assembly Debates finds the Supreme Court of India having been referred to at two places: one, as having been assigned a role as **an arm of social revolution**; and two, as **the custodian of liberty** whenever the question arose about the balancing of individual's rights and society's needs. It was emphasized that the power of judicial review, which was being vested in the Supreme Court, would have a more direct basis in our Constitution than simple due process as in the US Constitution.

[6] (Eastern Book Company, 2008, p. 117)

Despite the *rule of law* having been constitutionally adopted as ruling in India and the general rules of accountability fixed across all the organs of the State, there still exists scope for abuse of power, which gives rise to the requirement of evolving specific and concrete mechanisms of accountability in addition to the diffusing and general mechanisms of elections, impeachment and popular opinion. Judicial Review has evolved as a specific and concrete method of checking the excess of administrative bodies.

Such a check is varying in degree depending on what standpoint is adopted. While the red light model advocates minimum interference on part of judiciary, relying heavily on external checks like elections etc, the green light model involves a cautious perspective, and requires presence of judicial review as an essential check on administrative bodies.

The power of judicial review has been held to be part of the basic structure of the Constitution and cannot be abridged or excluded by amending the Constitution. It is almost clear that the power of Judicial Review stands to a limited extent in exception to the strict principle of separation of powers.

Historically situations are not wanting when the judiciary has run into conflict with the legislature and the executive and has been accused of tempering with the delicate balance of power between the three wings of governance, so vital to the upholding of separation of powers. Instances are not uncommon when the judiciary has been accused of being too activist and in this context the phenomenon of ‘judicial activism’ being nick named as ‘judicial terrorism’. Lord Devlin in his famous work ‘The Judge’ notices and deals with the role of a judge as law maker. He writes, “There is no doubt that historically judges did make law atleast in the sense of formulating it. Even now when they are against innovation, they have never formally abrogated their powers: their attitude is ‘we could if we would but we think it better not’.” Something has to be said in support of the law making activity of the judges.

The judiciary has an equal role in law-making as the legislature. And “law-making” must be as broadly construed as possible to the extent that restrictions on the judicial law-making role by calling it “the power of judicial review” and “judicial activism” really end up being redundant.

A distinction needs to be drawn between the “general will” and the “will of all”.

It would seem that the entire (mis)understanding as to the role of the judiciary in the State springs from a confusion between the “general will” of the members of the civil state and the “will of all” of the members of the civil state or the “will of the prevailing majority” in a democratic civil state. While the “general will” represents that which seeks the *true* common good of the civil state or association of individuals, the “will of all” or the “will of the prevailing majority” does not *necessarily* seek the *true* common good, but only the good which is deemed by the prevailing majority to be the true common good for the time being.

Rousseau is the originator of the idea of the “general will” as being distinct from the “will of all”. An individual’s particular will is that which is in his or her private and personal interest, which (naturally) tends only to his or her own advantage. The “will of all” of a group is the aggregate of the particular wills of each of the group’s members. The “general will” is the will which is in the best interests of the group considered as a whole. One instructive way to think about the general will is to imagine the group as a single individual. That general will would be what such an individual would think, if such individual were thinking correctly and in its own best interest.

In Rousseau’s words:
“There is often a great deal of difference between the **will of all** and the **general will**; the latter regards only the common interest, while the former has regard to private interests, and is merely a sum of particular wills; but take away from these same wills the pluses and minuses which cancel one another, and the general will remains the sum of the differences.”

An example might make this clearer. Let us take the Indian cricket team. It is in the interests of each member of the cricket team to be covered in glory—that is their particular will. The will of all is the sum of these particular wills: that they should all be covered in glory. That if the team would win and that it would therefore be covered in glory may not be the will of all. Glory may be the end in itself. The general will is what is in the best interests of *the team*: that it should win. That the team may or

would get covered in glory is only incidental. The will of all is the pursuit of individual glory with or without winning, whereas the general will is simply that the team should win *even if this means players sacrificing their own glory*, perhaps by voluntarily not pursuing a personal goal such as scoring a century or attaining some record while risking victory for the team but allowing the batsman at the other end to score all the runs so that the victory of the team is assured.

For practical purposes and the problem of governance that faces almost all nations of the world, and increasingly so, it is difficult to imagine a will of *all* in multicultural, plural and diverse societies. So the real question in such polities and societies, the paramount example of which is India, is the question of the distinction between the 'general will' and the 'will of the majority'. It will not take much persuasion to establish the point that very often the short-sighted interests of transient majorities can wreak havoc on the long term interests of the nation i.e the will of the majority diverges from the general will. Instance could be the environmental destruction that one generation might wreak in the name of progress, and which the legislature and executive of the day would permit since the majority is benefited and since they depend for their political survival on what the majority wants, the environment and the interests of future generations be damned.

The right kind of civil state results when the laws are such that individual rights are infringed only when the *true* common good requires it. And the laws will be such only when they are discovered and created in consonance with the general will. And the general will can be discovered and formed best by the process of **far-sighted dialectical reason**. This conclusions that '*the right kind of laws can be made only through a process of far-sighted dialectical reason*; immediately leads to the next question as to which bodies or authorities or combinations thereof are best suited to making laws through processes of far-sighted dialectical reason?

Looked at from this point of view the institutions which come to mind are the legislature, the judiciary and the academicians including universities. I propose to confine myself to judiciary and to a slight comparison thereof with the legislature in justification of the power of judicial review vesting in the judiciary.

The primary advantage which the Judiciary has over Legislature is that the rational dialectic, necessary to discover the general will, comes very naturally to common-law Judges and the common-law judicial method of law making. *Judges must rationally justify their decisions*. Though in theory it may be said that ten individuals (as in the US Supreme Court) or twenty-six individuals (as in India) cannot match the reasoning abilities and far-sightedness of a few hundred whose only job it is to parley and discover and form the general will, it is the practice of the legislatures that belies that theoretical claim. Yes, in practice Judges too are bounded by the limits of individual reason and their personal and political beliefs, but before Judges can decide they have to process their overviews with all the distilled reason contained in case law of many decades if not many centuries, and must by a process of rational deduction and induction create law and justify the same with reasons, which a legislators may never have to do. Judicial decisions stand and fall on the strength of their reasoning, and this is as true of the final appellate courts in common law jurisdictions (where judicial opinions are not anonymous) as in Continental Europe and dissenting opinions if not actively encouraged are considered quite acceptable, since all judicial opinions of the Higher Judiciary are subject to the most thoroughgoing scrutiny by the public and the academia.

The second major strength of the judiciary for law-making is that it is *not* elected and hence not beholden to vote banks and the need of getting re-elected. The basic non-elected nature of judges is their greatest asset in law-making in a democracy where the tyranny of the majority needs to be hemmed in by the monks in black robes. This gives the judiciary the far-sightedness and the scope for rational thought and deliberation and all the other requirements of the *far-sighted rational dialectic* so necessary to discover and form the general will that elected representatives are denied by their constant need to get re-elected and remain re-electable by constantly having to pander to their votebanks.

One may argue that the judiciary, being non-elected, its law making role even though far sighted is non-democratic, which is commonly known as the counter majoritarian difficulty. However, as we shall just see: *What the judicial process and the judiciary lack theoretically in their law-making prowess as compared to legislatures, they more than make up for, in practice*. This is so because actual law making in society by

judicial review or activism is significantly more interdependent and interactive than generally described. The judiciary plays a very active role as a facilitator of debate. The judiciary *synthesizes*, *focuses*, and acts as a *catalyst* to the debate, often forcing the legislatures to take up issues that it would prefer to leave untouched—pandering to its vote bank. Judicial law making here guides the debate and gives occasions for deliberation so as to make the right laws and arrive at the general will.

To sum up, the judiciary has two basic advantages:

(1) The rational dialectic comes very naturally to judges, and

(2) Since the judiciary is not elected, it can further debate and spur action from the Legislature wherever the Legislature may choose to remain silent. Then again, this spurring of the debate by judicial law making or activist interpretation is in *practice* very much part of the democratic process.

There is ample evidence of permissibility and democratic nature of the judicial review in India. Judicial review in India is absolutely essential and not undemocratic because the judiciary while interpreting the constitution or other statutes is expressing the will of the people of India as a whole who have reposed absolute faith and confidence in the Indian judiciary. *Judges are protected from political pressures; they can be impartial and dispassionate; they are free to entertain issues of principle rather than relying on mere partisan preference or political expediency. The legal process itself obligates the judges to listen to all parties, to make a decision, and to justify that decision according to law.*

It is best to set out Montesquieu's doctrine or the Rigid **Doctrine of Separation of Powers** since that is what is taken as the first and last word on the separation of powers between the Wings of the State. However, as we shall see, the Modern Oversight Doctrine of Separation of Powers, in light of the above discussion, is better suited to balancing the powers of the two central law-making organs in the modern constitutional democracy.

Montesquieu argued that if the State is to provide its citizens with the greatest possible liberty, a government must have certain features. First, since "constant

experience shows us that every man invested with power is apt to abuse it ... it is necessary from the very nature of things that power should be a check to power". This is achieved through the separation of the executive, legislative, and judicial powers of government. If different persons or bodies exercise these powers, then each can check the others if they try to abuse their powers. But if one person or body holds several or all of these powers, then nothing prevents that person or body from acting tyrannically; and the people will have no confidence in their own security.

Certain arrangements make it easier for the three powers to check one another. Montesquieu argues that the legislative power alone should have the power to tax, since it can then deprive the executive of funding if the latter attempts to impose its will arbitrarily. Likewise, the executive power should have the right to veto acts of the legislature, and the legislature should be composed of two houses, each of which can prevent acts of the other from becoming law. The judiciary should be independent of both the legislature and the executive, and *should restrict itself to applying the laws to particular cases in a fixed and consistent manner*, so that "the judicial power, so terrible to mankind, ... becomes, as it were, invisible", and people "fear the office, but not the magistrate"

There is merit in the basic division of powers postulated by Montesquieu. Today following Montesquieu's doctrine no matter how powerful the judges get as makers and interpreters of the law, they are constrained by the nature of their function, for they cannot make law independent of disputes before them. The judicial process is such that the judiciary cannot, independent of any dispute, or harm to certain individuals who cannot protect themselves (as in the case of PILs) pursue goals or conceptions of utopia independent of the parties to the dispute, that is, it cannot take up the task of legislation suo motu.

The legislature, on the other hand, has the advantage of making rules and structuring society in accordance with what ought to take place independent of disputes, while also having the means and resources to pursue those goals. The legislature with the executive can become institutions that determine the monitory policy for the nation, redistribute land, pursue any of the goals enshrined in the Directive Principles of State policy, make amendments to the Constitution, or even wage war. In this sense, Montesquieu is right, giving all and absolute powers to the Judiciary may indeed

result in judicial despotism. This power has however never been claimed by the judiciary.

However, the entire understanding of the judicial role in law-making seems to be understood based only on what Montesquieu had to say about it: that the judiciary should *restrict itself to applying the laws to particular cases in a fixed and consistent manner*, and that itself has become a kind of law. Montesquieu's view of the role for the judiciary needs to be put in perspective. There may be two main reasons why Montesquieu held the judiciary in such contempt. Firstly, judges in Continental Europe usually wrote anonymous opinions so they never acquired the stature that English Judges enjoyed and hence probably never had the courage to be as independent as English Judges to cross the Government of the day. Secondly and more importantly, Continental judgment writing did not emphasise the giving of reasons and the citing of precedent so typical of common law judgments. Obviously cryptic orders howsoever correct they may be, anonymously authored could not have inspired any confidence. So the Continental judiciary could not enjoy the reputation and prestige that it did and does in common law jurisdictions. This may have very much to do with the very narrow and limited role that Montesquieu envisaged for judges.

Then again, if one goes to the heart of Montesquieu's theory of separation of powers the emphasis is too much on curbing *acts of commission* so as to keep each organ of the State *within* its demarcated sphere of power. It does not envisage a situation where there may be arrant dereliction of duty, or mere silence on controversial difficult actions by organs of the State which may fail to perform the law-making task in consonance with the general will. Never did Montesquieu, envisage a role for the judiciary where it may need to spur on debate and action from Legislature.

It has been argued and shown how the judiciary is well-suited in practice to perform the law-making task truly in consonance with the general will of the civil state and that such law making is not non-democratic. This is so because in practice law created by judicial interpretation or legislation takes place by means of a far more interactive process that is commonly understood. It has also been shown how the legislature has inherent limitations in its having to get its members re-elected that prevents it from

properly performing its law-making function. Thus, it is time that we move beyond Montesquieu to a fuller and more complete theory of the separation of powers: a theory that provides for addressing situations not only where there are errors of commission in exercise of powers by the organs of the State but where the organs of the State exercise the power of oversight over the other organs to address *errors of omission*.

Such a **theory of separation of powers** is to be found well stated in a decision of the U.S Supreme Court in *Youngstown Sheet & Tube Co.* v. *Charles Sawyer*.[7]

In *Youngstown case* the U.S Supreme Court, commented on the utility of separation of powers within the constitutional scheme to maximise good governance in the following terms: (US at p. 635)

> "The actual art of governing under [the U.S.] Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

The Supreme Court of India, speaking through S. B. Sinha, J. has recently observed in *Jeet S. Bisht case*[8] .

> "Each organ of the State in terms of the constitutional scheme performs one or the other functions which have been assigned to the other organ. Although drafting of legislation and its implementation by and large are functions of the legislature and the executive respectively, it is too late in the day to say that the constitutional court's role in that behalf is non-existent. Judge-made law is now well recognised throughout the world. If one is to put the doctrine of separation of powers to such a rigidity, it would not have been possible for any

[7] (96 L Ed 1153; 343 US 579 (1951)
[8] (2007 6 SCC 586 paras 77,78,80,81,83 &99)

superior court of any country, whether developed or developing, to create new rights through interpretative process".

Separation of powers is a limit on the *active jurisdiction* of each organ. But it has another deeper and more relevant purpose: to act as *check and balance* over the activities of other organs. Thereby the *active jurisdiction* of the organ is not challenged; nevertheless there are *methods of prodding* to communicate the institution of its excesses and shortfall in duty. The constitutional mandate sets the dynamics of this communication between the organs of polity. The separation of powers doctrine has been reinvented in modern times.

The modern view, which is today gathering momentum in constitutional courts the world over, is not only to demarcate the *realm of functioning* in a negative sense, but also to define the *minimum* content of the demarcated *realm of functioning*.

Tensions in the relationships between the courts and the other branches of the State, if not constant are yet noticeable occasionally. This tension obviously stems from different roles assigned to the branches. The judiciary constantly watches over the 'DO's and DON'Ts of other branches and evaluates their acts and omissions. Emergence of opposition in other branches is a natural outcome because they feel as if being governed or dictated by the judiciary. The tension arises because of difference of view point and perception of reality. The legislative view point is political; the executive view point is to attain efficiency at all costs; the judicial view point is legal and seeks to attain and sustain legality. The peak of the tension is reached when other branches try to use their powers to change the composition of or assume jurisdiction over or from the judiciary. In these situations, an impartial court examines the use of these powers by the other branches with the same objectivity that it usually exercises; *for the court does not seek to protect its own composition or jurisdiction but rather to protect the values of democracy*. The judges remain faithful to their judicial approach. They are aware of this tension but do not give in to it. Indeed, every judge learns, over the years, to live with this tension[9].

[9] (Aharon Barak, *The Judge in a Democracy*, p. 215-216)

I propose to conclude by quoting an observation by an English judge, in juxtaposition with the oath of a judge, which appear to be at some divergence from each other. I would then leave the learned audience to draw the line which may lie somewhere in between.

"The judges have no doubt a genuine creative role but as warned by LORD SCARMAN "the Constitution's separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk. For if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right (or, as SELDON put it, by the length of the Chancellor's foot), confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of judges. Their powers to do justice will become more restricted by law than it needs be, or is today"[10].

The oath[11] which a judge takes, either by swearing in the name of God or by solemnly affirming, is that 'I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws'.

I may not be considered being too philosophical if I say that in India power of judicial review emanates *inter alia* from the oath of a judge. Exercising power of judicial review is just being true to the oath taken by a judge.

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[10] (Justice G.P. Singh, Statutory Interpretation, 11th Ed. 2008, p. 23)
[11] (Constitution, Third Schedule, IV)