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Judicial Activism & Constitutional Challenges in the United States

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Abstract: *Mega projects in the State are difficult to be protected under constitutional jurisdiction. It is difficult for a judge to make any decision in the light of a prevailing law legislated by a parliament. The changing image of courts has culminated in the role of the legislature as the subservient organ, which no more remains a supreme body in the State. This factor badly affected the democratic development in the State. This new trend has originated in court-centric and imperialistic judges who have to play their role beyond the constitutional parameters to redress the core issues of society.*

Key Words: Judicial Activism, Independence of Judiciary, Colonial Legacies

Introduction

Judiciary has been the custodian of the constitution, but due to the polarization of society, a global expansion in judicial powers has emerged. For the last two decades, the executive, as well as the judiciary, have relied much upon the judiciary. The fundamental political questions have to be redressed. Judiciary encounters procedural justice, regime legitimacy, executive prerogatives and a novel role in the nation-building process of a State. The new trend in the judiciary has challenged the doctrine of separation of powers as enshrined by Montesquieu and Ran Hershel; it declared the new role of the judiciary as "Juristocracy". The court's involvement in political decision-making is hard to justify because it impacts the principles of canonical constitutional theory; the fairest of the procedures are questioned in many decisions, which has made the institution an activist institution. The new trend in superior courts has made this institution unable to cope with the fundamental problems of the State, i.e. Restorative justice, regime legitimacy and a core issue involved in nation building. While exploring the theory by Margit Cohn and Mordechai Kremnitzer's "Judicial Activism: A Multidimensional Model," the concept has been analyzed through content analysis for the secondary data, and grounded theory has been utilized for the primary data.

Colonial Justice System & its Impacts on the USA.

United States

All three countries share a common colonial setting but have different lifestyles. American founding fathers have a great impact on the political system, including the organs of government. They have set up their system on the pattern of separation of power expounded by Montesquieu, while Indian people have a different background, with different norms, cultures and ways of life. The colonial masters remained in the Subcontinent for many decades; they implanted a legal system for native Indians (Olson, & Shadle, 1996).

The American colonies were scared of giving powers to the unelected judges who had been in practice in British India. The government claimed to flourish full-fledged courts in the American colonies. However, in practice, it gets less attention from the British empires. They never introduced a uniform judicial system for these American colonies. Due to internal problems in England, especially the civil war 1640-60 created, dissensions were created in the government, which deviated its attention from colonies. As a result, the Governors of the colonies

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managed the judicial system in America; there was no coordination between the three organs of government in these colonies. A judge having different positions in the judicial hierarchy of the colonies created a lack of uniform authorities in these regions; the initial courts were established as a result of Executive actions, but there were some courts which were formed by virtue of rights. The Justice system in North American colonies was not uniform. The home government had to receive severe complaints, which included irregular procedures, delays in the sessions, and a lack of ability of the judges to cope with the alarming situation in these colonies. Their proceedings are many times very arbitrary and contrary to the law of the place, as is affirmed by Attorneys that have sometimes practised in their courts" (Washburn, 1923, pp. 22-25). The process of establishing courts in the American colonies was slow. Only Georgia had an established judicial system (Grice, 1931). Disputes were settled by the Governor of the States; Thomas Olive would habitually sit to settle disputes in West New Jersey (Field, 1849). The Governor of New Sweden also performed the function of the jury and decided cases personally (Lunt, 1963). The State of New Jersey was under the supervision of Mr Thomas Gates (The Governor). They provided all kinds of capital and criminal cases in the State; in civil matters, he served as the Chancellor. The Governor helped in the organization of courts in the American colonies, and limited jurisdiction of courts was established in the New England colonies. Here two forms of courts were established; one with limited and the second with broader perspectives (Browne, Hall, & Steiner 1888).

In the 17th century, Chief Justice and other two judicial members were appointed who served the colony till the independence of the United States (Osgood, 1904). The New American colonies had a peculiar judicial setup. They established the system on the coordination of power; the General Assembly had to legislate as well to adjudicate the matters in the States; till the executive order of the King, it does have appellate jurisdiction against the decisions of the trial courts. This setup was prevalent in Virginia till 1632 (Chitwood, 1905).

The Governor of the Colony has dominant powers along with the council to decide civil and criminal matters. The small cases were dealt with in the colonies, and the large level cases were dealt with in the capital. The Governor of New Jersey argued that the Supreme of Judicature had the authority of King Bench Courts, common plea and the account matters; in the pattern of Britain, the colonies never established numerous courts with limited powers. In England, Lord Chancellor was the figure behind the establishment of Courts, while in American colonies, the Governor played this role. In New York, he tried to bypass the council but failed to do so (Lloyd, 1910). Historically in 1675, the Assembly of East New Jersey established four courts and also provided a mechanism for the election of the judges. In the same manner, in 1682 & 1698, it declared that it had the authority to establish courts in the colonies, but there were controversies over the issue (Grants, 1904).

Courts in American colonies were established after England. The names were identical, but the jurisdiction was quite different from each other. In English Counties, the Trial court was presided by a Justice of Peace, and in American colonies, it is by Chief Justice. After declaring independence from England, eleven out of thirteen colonies formed their own constitutions, while Rhode and Connecticut continued with their old system. Constitution was brief details had been left to Congress. Among the colonies, nine declared life terms for judges, two for annual appointments and, one for three years & a term of 5-7 years (Smith, 1796). The following States are scared to mention the judiciary in their new constitution, i.e. Delaware, Georgia, South Carolina and New Hampshire (Greenberg, 1977). The Philadelphian convention was a milestone in finalizing the documents for the new States. The procedures had to be finalized by the legislatures while adopting the common law. In 1780 various appointments to the courts of Connecticut, Virginia, and Maryland were made (Warren, 2011). In 1786, the article of confederation recommended certain things which became a part of the new constitution. It, later on, became Article III of the original document "The United States in Congress Assembled shall have the sole and exclusive power of declaring what offences against the United States shall be deemed treason and power to institute a Federal Judicial Court... that shall be vested in that body or wherein questions of importance may arise, and the United States shall be a party" (Ford et al.,1914).

The framers of the constitutions deliberately gave a constitutional role to the judiciary because of the poor judicial system introduced by colonial masters; the existence of no separation of power, common law and the lack of uniformity in the judiciary of colonies were matters of concern for the framers of the constitution. They preferred the common law for judiciary as stated: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their

situation"(Van Ness v. Pacard, 1829, pp.143-44). Anti-Federalists feared of judicial activism of the judges when they would assume powers while Brutus expressed his opinion that "when this power is lodged in the hands of men independent of the people, and of their representatives, and who is not, constitutionally, accountable for their opinions, no way is left to control them but with a high hand and an outstretched arm. His opinion was that when the judiciary is at the helm of affairs, it will victimize the remaining two organs of government. The framers were not sure what to do because they were novices to democracy.

Analysis of Judicial Activism in the United States

Two hundred years ago Supreme Court emerged as a strong actor in the political system of the United States. The new patterns in the judicial system marked a new era in judicial history. The concept was coined by Schlesinger in 1947 and was utilized in the judicial circles by many legal experts; the role of Judiciary in the democratic polity stabilized the system. The framers of the constitutions deliberately gave a weaker role to this organ not to prevent interfering in the other organs of Government. Since the decision of Justice Marshal in the famous Murbury vs Madison (1803) marked a new era, he laid the foundations for a strong judiciary in the country. In his tenure, he exercised judicial review in eighteen cases which marked a new era for the judiciary, i.e., not only strengthened judiciary but certain decisions were made in the socio-economic sector of the country. Since then, the Supreme court of the USA emerged as a guardian of the constitution, which is considered to be the soul of democracy.

Judicial Activism and Judicial Review are two concepts confusing for the students of law and political science; they have been demarcated below...Ronald Dworkin explained that judicial review had been the component of democracy; a government must think about the basic rights of the people. It must be enforced by federal courts. He concluded that "`the most important contribution our [that s, American] history has given to political theory" (Black, 1997). He reports that "`[a] constitution of principle, enforced by independent judges, is not undemocratic". Judicial review is what judges should decide the case and what stance they should take toward the remaining institutions (Ely, 1980). It is the power of the Supreme Court to declare the law of Congress or executive decree as un- constitutional. This was for the first time manifested by Justice Marshal in the Murbury vs Madison (1803). There is a conflict of opinions among Normative and Empirical thinkers regarding the concept.

Judicial Activism, on the other hand, has a phenomenon that describes the use of judicial power to declare legislative acts invalid; the term was first used in "Fortune "magazine by Schlesinger. In this way, two concepts, "Judicial activism "and Judicial Restraint," were coined. He reported that "A wise judge knows that political choice is inevitable; he makes no false pretence of objectivity and consciously exercises the judicial power with an eye to social results."Law must aim for the social good, but he doesn't clearly indicate whether it is positive or negative; after his work, the concept was used in a negative sense. Judicial Activism and Judicial Review are two concepts confusing for the students of law and political science; they have been demarcated below... Ronald Dworkin explained that judicial review had been the component of democracy; a government must think about the basic rights of the people. It must be enforced by federal courts. He concluded that "`the most important contribution our [that s, American] history has given to political theory" (Black, 1997). He reports that"`[a] constitution of principle, enforced by independent judges, is not undemocratic". Judicial review is what judges should decide the case and what stance they should take toward the remaining institutions (Ely, 1980). It is the power of the Supreme Court to declare the law of Congress or executive decree as un- constitutional. This was for the first time manifested by Justice Marshal in the Murbury vs Madison (1803). There is a conflict of opinions among Normative and Empirical thinkers regarding the concept. Arthur Schlesinger Jr. was the first person to use the term in the famous "Fortune" magazine; they elaborated on the work of the sitting nine judges and their role in judicial perspective. He declared Justice Black, Douglas, Murphy and Rutledge as the activists while Justice Frankfurter, Jackson, and Burton as the believers of judicial restraint while the remaining two judges, i.e. Vinson and Reed, as a middle group who disliked being grouped with anyone. Under President Roosevelt's tenure, "The New Deal" excited new debates for the legal experts; the group of Black-Douglas reported that judiciary role in the socio-economic, i.e., it aims at the achievement of social results, must be dominant while the group of Frankfurter-Jackson believes in restraining within the constitutional framework and they believed that legislature and the executive must play their constitutional role (Ibid).

The first registered case was Marbury V Madison (1803), in which the Supreme Court came beyond the constitutional paradigm and declared the legislative act

of Congress invalid. Although it was the case of judicial review, it laid the foundations for a strong judiciary in the country. The story dates back to Judiciary act (1789) which authorized judiciary to issue various writs. This example led the judiciary to declare 2 congress and 60 state laws from 1789-1860 unconstitutional while from 1898-1937. It declared 50 congressional and 400 state laws illegal (Walker,1995).

American judiciary commenced judicial activism practically in 1954 "The Brown V Board of Education". The decision was based upon the segregation laws prevalent at that time. All the above laws were declared unconstitutional, which smoothened the way for Negro's to educate in every educational institution in the United States. The story dates back to the injustice made with Linda Brown. She was refused to get admission to the Elementary School in Topeka. She, along with other candidates, received the decision from Chief Justice Earl Warren, who gave a historical judgment and declared the decision of "Plessey V Ferguson" void. He reported that the existence of segregation laws in the United States had been a matter of concern and against the concept of fundamental rights as envisaged in the constitution of the country (Fourteenth amendment). When the decision of the court was implemented, it led to serious clashes in 1957 at Little Rock and Ark schools in the north, while in the south, it was truly implemented. It laid the foundation for civil rights movements in the United States from 1950-the 60s and has impacted American society.

A case was launched by Cooper V Aaron (1958) to make some concessions in respect of Brown V Board of Education. Certain officials from Southern districts, including the Governor of Alabama, refused to follow the said decree from the Warren court. The federal court declared void the appeal of the plaintiff. Earlier in 1956 Arkansas State Constitution enacted a law demanding to oppose segregation. It started to expel the African American students from the white institutions in the State of Arkansas, and a task was given to the guards to make sure this law. The student submitted a plea for Certiorari to the Supreme Court. It affirmed the decision; the court under the fourteenth amendment announced its verdict to implement the decision in Toto.

In Gideon V Wainwright (1963), Mr Earl Gideon was arrested for raiding the pool room in 1961 in Florida. He appealed to the court but was sentenced to five years in prison when Supreme Court was asked to provide justice; the federal court, according to the sixth amendments, announced the decision to provide a free attorney to the appellant in the trial. In this regard, his lawyer Mr Fortas challenged the Betts V Brady case made earlier, the court overturned the said case and was finally acquitted, and this case brought a new chapter in the judicial history of the United States (Israel, 1963, PP. 211-72).

Judicial activism was decided in US V Nixon (1974) regarding the watergate scandal. When serving as President, Mr Richard Nixon was asked to provide a tape of a conversation to the court. He refused to honour the court by saying that it is his administrative prerogative not to help in this regard; the court, while deciding the case, out-weighed his executive power. In Webster and Taxas V Johnson (1989), a member of the Communist Youth Brigade burnt a flag as a token of protest against the Reagan administration in Dallas city; when he was arrested by security forces, he argued that he did so as a sign of symbolic speech. Supreme Court, in her ruling, reported that under the first amendment to the constitution, it is the basic right of every citizen; he was defended by David D. Cole and William Kunster as Attorney to the court; his nature of function was political, and it is this reason that court had to concede.

Presidential elections took place in 2000. Mr Algore was the candidate in the election; a dispute came to the surface. Florida branch of the Supreme Court ordered to count the ballot papers due to doubts about the election results. George Bush and Dick Cheney challenged the review against the decision of the Supreme Court of the United States to stay. It was granted on December 9 in its oral decision. A controversial decision was made in Roe V Wade (1973) by Supreme Court with the comments that a woman can abort during the first two trimesters of the pregnancy; it was legitimized by the courts in 1973. The case was adopted in Webster V Reproductive Health Services (1989) and Planned Parenthood V Casey (1992) and stated that abortion had been the right of the individuals as declared in Roe V Wade (1973). This was according to the fourteenth amendment of the constitution of 1973, which granted fundamental human rights to all citizens of the United States.

In Dickerson V United States (2000), the court re-affirmed Miranda V Arizona (1966), which was a setback to the critics of the latter case. Justice Rehnquist, while finalizing the later decision, reported that: "[T]he police conduct at issue here did not abridge respondent's constitutional privilege against self-incrimination but departed only from the prophylactic standards later laid down by the Court in Miranda to safeguard the privilege"(Dickerson V United States, 2000).

In United States V Lopez (1995), a schoolboy had been arrested for carrying a weapon in the area of the premises and was charged with Texas State laws (Gun Free zone act 1990). It stated that " [t]he powers delegated ... to the federal government are few and defined," the powers reserved to the states "are numerous and indefinite, 'the Framers designed this structure "to ensure the protection of our fundamental liberties, and a federalism consisting of "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." The judge, while commenting, argued that possession of weapons has security and economic consequences, and violence can degrade the education environment in the area; as the commerce through implied powers has been given to the federal government, so it is the federal prerogative.

In Rasul V Bush (2004), the case was regarding the prisoners of war in Guantanamo Bay in Cuba; the United States statute regarding habeas corpus was urged by the aliens detained in the above-mentioned place. The court also held that petitioners' status as aliens held in military custody at Guantanamo Bay did not prevent the district court from exercising jurisdiction over their non-habeas claims challenging their conditions of imprisonment. In the Obergefell V Hodge case (2015), a basic question was raised in the Roe case earlier. Justice Lochner explained the position that it had been the basic right of every individual to have marriage. This right has been guaranteed in the first ten amendments to the constitution.

Senator Lafollette expressed his views regarding the ongoing waves of judicial activism as a threat to the legislative organ; he quoted "[B]y usurping the power to declare laws unconstitutional, and by presuming to read their own views into statutes without regard to the plain intention of the legislators, they have become, in reality, the supreme law-making and law-giving institution of government. They have taken to themselves a power that was never intended they should exercise; a power greater than that entrusted to the courts of any other enlightened nation". Senator Pennoyer, Norman Thomas and Alpheus Mason have expressed the same as discussed earlier by Senator Lafollette. They argued that the court had been involved in protecting the rich class at the altar of the poor in society (Roe, 1912).

The era from 1896-1937 has been regarded as judicially activist. Chief Justice Lochner was a famous activist who decided various cases, which became a basis for judicial activism in the United States. In the first decade of the twentieth century, a case was decided that limited the work hours in the backing factories. In the famous Hammer V Dagenhart (1918), the court under Lochner invalidated the congressional enactment regarding child labour; it contended the same as against fundamental human rights. On the other hand, the remaining members of the bench, especially Justice Day, opposed the decision (Bair, 2015).

In the United States V Butler (1936), the court sought the role of Congress to work for the social welfare of the people. When President Roosevelt initiated the Agricultural adjustment act, a tax was imposed on the floor and cotton industries. In the initial hearing, the district court declared it valid, while Supreme Court affirmed that tax must be proportioned according to the production of the agriculture sector.

Judicial activism had been dominant in the 1970s, but the Republican Party was sternly against its role as an activist. Richard Nixon, in the election campaign of 1968, clearly focused on reversing the activist judges from the US judiciary. On the other hand, Democrats favoured liberal judicial activism. Both the parties had different views about the government and national economic policies. From 1897-1911 Republicans had full control along with the White House. Only Woodrow Wilson (1913-19) was a Democrat who had different plans for the government and its various organs; most frequently, the proceedings were in the hands of Republicans except President Wilson and President Franklin D Roosevelt, from 1992-2000 and 2008-16; it has been the Republican game in the United States but with little intervals by Democrats. Theodore Roosevelt and Robert La Follett were progressive Republican who was interested in the labour movements, but they believed in judicial restraint, yet even after some time, they were against the policy of the Republicans. Actually, both parties had different attitudes at different times. For example, in the 1890s, 1950s and 1980s, their stance and voting for various bills in congress changed dramatically. In the early periods, Republicans were defending the courts while the Democrats were hostile toward Courts, but then things changed with the passage of time. From 1897-1913, the Republicans criticized, whereas the Democrats favoured the courts.

In 1992, President George W Bush criticized judicial activism and sought popular support to exercise votes against Democratic candidate Bill Clinton who, according to him, "stock the judiciary with liberal judges who will write laws they can't get approved by the voters" (Bush, 2002). The Republicans opposed a number of decisions taken by the Supreme Court regarding homo-marriages in 1993. In another

event, a Marriage act in 1996 was again opposed on the plea that it would provide opportunities for the judges and added that "federal judges and bureaucrats from forcing states to recognize other living arrangements as 'marriages"(Republican party Platform, 1996). Justice Scalia, while writing the dissent note in the United States V Windsor (2013), stated that whether it is the jurisdiction of the Supreme Court to hear the case which has been accepted by the government as the act is unconstitutional and further stated that the court should play a role in the constitutional issues with the first priority. There are both critics and admirers of the activism; Cass Sustain argues, "it is both inevitable and proper that the lasting solutions to the great questions of political morality will come from democratic politics, not the judiciary". Another legal expert Peter Straus said, "complicated fact-finding and ... debatable social judgment are not wisely required of courts unless for some reason resort cannot be had to the legislative process, with its preferable forum for comprehensive investigations and judgments of social value" (Straus, 2001).

Conclusion

It has been concluded that in the initial years, courts in the United States dealt the constitutional cases and the maximum cases were based upon judicial activism. In modern times, it avoided a direct clash with the elected organs and institutions in the country. In 2017 the court overruled the precedent on ideological lines by 5-4 and declared the collection of fees from nonmembers unconstitutional. In the same way, it decided the anti-trust laws as invalid. In another case, a court went against the backing industry to sell a wedding cake to gays. The decisions made by Robert as chief justice include the policy decisions; in the same manner, Rehnquist also based his decisions likewise. In 1934, the congress enactment was declared invalid. The Warren court exercised judicial activism as a tool as a number of precedents were used in resolving cases; it paved the way for future judges to decide cases on the basis of judicial activism in the United States. Since the coinage of the term in 1947, it has been used more than 162 times in the judicial history of the United States; Professor Westin has expressed his views that it is "in lockstep with the active consensus of this era." The term has taken a negative meaning in recent decades. The intervention of the courts has been declared as "Legislation from the Bench" the concept was widely discussed in the 1980s in the famous news dailies by Republicans and Democrats; it was the popular slogan coined by President George Bush in the 1980s (Smith & Johnson, 1991).

Recommendations

An effective measure to check the status of judicial activism has been the views and perceptions of the elected representatives, but sometimes the court makes a decision while considering the smaller elements like the minorities in the State. Justice Stevens argued as to "who submerges his or her own views of sound policy to respect those decisions by the people who have to make them"(Chevron V Natural Resource Defense Council, 1984). While Justice Scalia reported that "[v] alue judgments...should be voted on, not dictated." What is true for abortion issues should apply in other policy areas as well"(Planned Parenthood V Casey, 1992). There are some scholars who argue that the court should have a variety of rulings, not a fixed one; it should have an aggressive approach while deciding the State's behaviour and be flexible in the matters of affiliate branches (Straus, 2001). Earlier, the courts focused on declaring unconstitutional matters invalid, but its role was limited to cases and various disputes, and the enforcement mechanism was poor. The law, once declared unconstitutional, can be re-legislated by congress, or the president of the United States can replace the chief justice. Mr Dahl, in his survey in 1957, concluded that courts could delay the enforcement of laws made by congress for a few years; he had analyzed the role of Warren, Rehnquist and Robert courts in the first few decades after the introduction of judicial review in the judicial circles.

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