Role of Legal Positivism in Democratic Governance in India

[1]Dr. Jai Mala, [2]Seema Rani

Abstract

The element of good governance is designed by the rule of law. The doctrine 'rule of law' has very broad prospective, because it concentrate on justice, liberty and fairness. Good Governance is prerequisite for democracy. Such governance includes some factors such as transparency, accountability, rule of law and people's participation. Legal Positivism is often understood as the theory that valid legal norms are precisely those norms which have been created in the manner prescribed by the Constitution or the basic norms. India is a democratic country and in every democratic country, there is a need of good governance and transparency. Good Governance does not occur by chance. It must be demanded by citizens and nourished explicitly and consciously by the national state. It is therefore necessary that the citizens are allowed to participate freely, openly and fully in the political process. India incorporated a number of basic human rights as guaranteed Fundamental Rights embodied in Part III of the Constitution of India. In Part IV of the Constitution, certain 'Directive Principles of State Policy' which are principles that would be fundamental for "good governance" of this country. Thus, Good Governance entails effective participation in public policy-making, the prevalence of the rule of law and an independent judiciary, besides a system of institutional checks & balances.

I. ARTICLE

Democratic ideals represent various aspects of the broad idea of "government of the people, by the people and for the people." They include political characteristics that can be seen to be intrinsically important in terms of the objective of democratic social living, such as freedom of expression, participation of the people in deciding the factors governing their lives, public accountability of leaders, and an equitable distribution of power. Therefore, when we say Indian democracy, we mean not only that its political institutions and processes are democratic but also that the Indian society and every Indian citizen is democratic, reflecting basic democratic values of equality, liberty, fraternity, secularism and justice in social sphere and individual behaviour.[1]

II. DEMOCRATIC GOVERNANCE

Democracy: In Greek 'demos' means 'the community' and 'kratos' means 'sovereign power' i.e. government by the people usually through elected representatives. In the modern world, democracy has developed from the American and French revolutions. A political system can properly be called democratic only if the government in power can be peacefully removed by a majority decision of the people, through fair and open elections.

III. ELEMENTS OF GOOD GOVERNANCE

Good governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and fixture needs of society:[2]

India is proud to be the largest democracy in the world. For more than sixty-five years, we have witnessed the conduct of successful elections, peaceful changes of government at the Centre and in the States, people exercising freedom of expression, movement and religion. At the same time, we quite often experience rampant inequalities, injustice or non-fulfillment of social expectations.[3]

In India the concept of welfare state and good governance is very old and an exposition of them can be found even in the oldest scriptures of the Vedas. There is

[1] Vincent Rajkumar, Indian Democracy and Governance, available on http://www.waccglobal.org/articles/indian-democracy-and-governance assessed on 7 November 2017.

[2] Good Governance: Meaning and Concept available on https://academy.gktoday.in/article/good-governance-meaning-and-concept/ assessed on 08 November 2017.

[3] Supra note 1.

distinctive evidence from Rig Veda, which mentions a thriving republican form of Government in India. We may quote a few beautiful *slokas* from Rig Veda which were to be sung in unison at the beginning of the republican assembly[4] -

We pray for a spirit of unity; may we discuss and resolve all issues amicably, may we reflect on all matters (of state) without rancor, may we distribute all resources (of the state) to all stakeholders equitably, may we accept our share with humility" - Rig Veda - 10/191/2

But, the classical Indian traditions had a different conception of both rule and law compared to modern Western traditions. While the constraining power of legality is central to modern Western traditions, in India it is moral authority which is at the core of the rule of law. The classical law of India is characterized not by positive law and legality but by moral authority and duty what is called Dharma.

Various sources indicate an almost universal presence of

sovereign republics in India during that time. Prof. Hart

supporter of positivism define law as follows[5]:-

- legal Laws are commands,
- The analysis of legal concept is worth pursuing distinct from sociological and historical inquires.
- Decisions can be deduced logically from pre-determined rules without recourse to social aims, policy or morality.
- Moral judgements can not be established or defended by rationale, arguments, evidence or proof
- The law as it is actually laid down has to kept separate from the law that ought to be.

Positivism was the philosophy propounded by the French thinker, Auguste Comte (1798-1875) who rejected theological and metaphysical approaches to the study of social phenomena and insisted on the scientific method of careful observation and logical inferences. In the field of jurisprudence, classical positivism is largely associated with the names of English jurists Bentham (1748-1832) and Austin (1790-1859). The Austianian analytical school is widely regarded as the classical positivist theory. After Austin, positivism was sought to be developed by (1) Kelson's pure theory, (2) neo-positivism also known as logical positivism and the Hart concept. (4) Dynamic positivism sees law not only as it is, but also as it is likely to be examines the origin of the law, its trend and direction and possibly of guiding its progress smoothly.[6]

Positivism suggests that the study of law must be confined to the written rules and regulations, which are officially declared by the government. For all positivists, officially declared rules and principles constitute the most appropriate sources of the law. Hence, statute enacted by the legislature, precedents made by the authorized courts and constitutions are the laws in proper sense. Such rules and principles may be properly considered as law because individuals may be held liable for disobeying them.[7]

However, the concept of democratic governance is qualitative in nature, and it is intimately connected with the concept of welfare state. As it is observed by R. C. Gupta, -"A Welfare state is one which takes all those steps considered necessary "to remove poverty, mass unemployment and insecurity and protect the rights of the workers and of the poor classes with a view to safeguarding them against any type of encroachment in society."[8]

The concept of welfare state pleads for a positive role of the state in the every sphere of human life and activities such as : education, health control over communications, transport, libraries, insurance, banking and other social services etc. The concept put emphasizes upon the tendency to provide assistance, and an excessive care for the needs of all, who are unable to self-realization. A welfare state makes the citizens more able to provide for themselves."[9]

National and International Levels reaffirmed that "human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations".[1] Indeed, government responsiveness to the interests and needs of the greatest number of citizens is strictly associated with the capacity of democratic institutions and processes to bolster the dimensions of rights, equality and accountability. If considered not solely an instrument of the government but as a rule to which the entire society, including the government, is bound, the rule of law is fundamental in

[4] Rakesh Goyal, Democracy in Ancient India, available on http://www.pragyata.com/mag/democracy-in-ancient-india-295 assessed on 5 November 2017.

[5] Analytical School/ Positivism Theory of Law, available on www.lawdessertation.blogspot.in assesses on 4 November, 2016.

[6] Justice Markandey Katju, the Theory of Dynamic Positivism, 24-25

[7] Dr. Yubraj Sangroula, *Jurisprudence: The Philosophy of Law*, 2nd ed. (The Loquitur Publishing Company PLC, New Delhi,2014),63.

[8] R. C. Gupta : Socialism : Democracy in India, Ed. 1966, P-69-70

[9] J. F. Sleeman in : The Welfare State, Ed. 1974 P-2

advancing democracy. Strengthening the rule of law has to be approached not only by focusing on the application of norms and procedures. One must also emphasize its fundamental role in protecting rights and advancing inclusiveness, in this way framing the protection of rights within the broader discourse on human development.

A common feature of both democracy and the rule of law is that a purely institutional approach does not say anything about actual outcomes of processes and procedures, even if the latter are formally correct. When addressing the rule of law and democracy nexus, a fundamental distinction has to be drawn between "rule by law", whereby law is an instrument of government and government is considered above the law, and "rule of law", which implies that everyone in society is bound by the law, including the government. Essentially, Constitutional limits on power, a key feature of democracy, require adherence to the rule of law.

In the light of the "the Constitution of India" where the privileges of the parliament and privileges of the members are encoded and equated to the British Parliamentary privileges are existed in Britain that are controlled by the sovereign power of parliament. In India the sovereign power is vested in the people and under the Rule of Law Doctrine. The parliament of India is only a representative body having powers limited to legislation, which is subservient to "Rule of Law" as enshrined in our Constitution.[10]

Our Constitution is an important document and basic law for all of us but the constitutional authorities have to function effectively and efficiently to realize dreams of the founding fathers of the Constitution. When we say that our Constitution is a living law, it is usually understood to refer to the doctrines and understandings that the courts have invented, developed and applied to make the constitution works in every situation. The law must go ahead with times and the judiciary has remained alive to this reality. Judicial activism is a means for development and growth of the law and role of judiciary is expected not only in our country but almost in all common law countries. PIL has played an important role in the field of judicial activism and the Supreme Court was inspired by the events in comparative legal systems especially in the United States while developing this jurisprudence. Unless there is a judicial activism we cannot keep our Constitution as a living law.[11]
Infact, the independence of the Country heralded a new era. The Constitution laid down the goals which the nation committed to achieve. The socio economic goal and the founding faiths of our nation were incorporated in the Constitution.[12] The positivistic approach is often considered too narrow sterile in face of the complex normative structure of contemporary legal systems.[13]

Over the years the weight of its authority on the Constitutional developments, subject to the limitation's of judicial process and its slow formalistic instances technique has often been markedly felt. The various developments testify to the inherent qualities of our Constitution & it's functioning as also the thinking, philosophy and approach of the court, as also readiness to accept the force of socio economic changes in our society through In its march from Kania to Bhagwati, the court has been trying to interpret the fundamental rights in accord with the felt spirit of the preamble and in consonance with directive principles.[14]

Thus the relation b/w the individual, society and the state have been changing and various theories regarding them have been propounded from time to time. In the beginning society was governed by customs which had an only social sanction. Then the supremacy of the priests came. After that the secular state emerged and dominated all the institutions. There were revolutions and political changes. There was the industrial revolution. The necessity of the balancing the welfare of the society and individual was realized. The approaches made from this point of view are called sociological school. The sociological school gained ascendancy in the first decade of 20th century. Sociological jurisprudence has pointed law towards social justice and has assumed that law must seek to attain certain ends.[15]
The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. "A Constitution is an experiment as all life is an experiment." As per Justice Holmes in Abrams v. United States.[16]A constitution is not an end in itself, rather a

[10] A. Lakshminath, K. Sita Manikyam, Legislative Privileges and Judicial Power: Constitutional Perspective, at46, Journal of Constitutional and Parliamentary Studies, vol. 43 Nos. 1-2, January-June (2009)

[11] S.N. Pukhan, Working of Judicial and Legal System in the Post-Independence Era, Indian Bar Review, vol. 28(4) 2001 at 6-7.
[12] P. K. Tripathi, *An Introduction to Jurisprudence* at 328-329
[13] Giorgio Pino, "The Place of Legal Positivism in Contemporary Constitutional State." March 21, 2015 vailable at *http://link.springer.com/article/10.1023%2FA%3A1006339509537#page-1*(accessed on 2014)

[14] Dr. M.C. Jain Kagji, *The Constitutional of India*, ed. 6th (India Law House, New Delhi, 2001), 1381-82.
[15] V.D. Mahajan, Jurisprudence and Legal Theory, p 607
[16] 250 US 66

means for ordering the life of nation. The generation of yesterday is not to paralyze today, it seems best to permit each generation to take care of itself.[17]

In the case of Keshav Singh[18] held that in democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. Legislators, Ministers, and Judges all take oath of allegiance to the constitution, for it is its relevant provisions that they derive their authority and jurisdiction and it is so to these provisions of the Constitution that they owe allegiance. The apex court further advised that if parliament or state legislature made any law prescribing its powers, privileges and immunities, they would be subjected to Art. 13 of the Constitution, which mandates that any law made in contravention of the fundamental rights shall, to the extent of such contravention, be void.[19]

This individualistic conservatism has promoted the Indian Supreme Court to develop judicial methods of its own. Understanding of the nature of judicial justice would involve a sociological study of judicial decisions on crucial socio-economic issues in the light of the methods that have been pursued by the Supreme Court. Such interpretation would logically result in a kind of legal positivism or legal formalism in the name of legal objectivity. Crucial decisions of the Indian Supreme Court involving socio-economic justice have been very largely influenced by this legal positivism.[20]

First, let us to the cases involving legal positivism. This was first evidence in 1951 in the State of Madras vs. Srimathi Champakam Dorairajan and State of Madras vs. C.R. Srinivasan[21] , the Supreme Court guided by the logic of legal positivism observed that since this was a conflict between the fundamental rights and the directive principles of state policy and since the former were non-enforceable, the order should be declared void.

Finally in 1967, the supreme court made history by reaffirming its faith in the logic of legal positivism in L.C. Golaknath and others v. State of Punjab[22] The Supreme Court by a decision of 6:5 declared that Parliament had no power to amend part III of the Constitution with the effect from February 27, 1967 and held the Constitution 17th Amendment Act 1964 void. However, by following the rule of prospective overruling, the court allowed the said Amendment Act to continue to remain valid.

In the case of Smt. Indira Nehru Gandhi v. Sri Raj Narain[23] a Constitution Bench of the Supreme Court held that it was subversive of the principle of free and fair election postulate and basic structure of the Constitution. The court declared that the 39th Amendment violated the basic structure of the Constitution.

Subsequently, upholding the concept of 'basic structure' as propounded by the court in Keshavananda Bharati, the Supreme Court in Minerva Mills Ltd. V. Union of India[24] declared section 55 of the Constitution (42nd Amendment Act), 1976 as unconstitutional and void.

The legal –positivist approach of the court was quite explicit in the arguments which may be summed up as follows: first, with reference to the marginal note of Article 368, the court pointed out that the Article expressed only the procedure of amendment which should not be identified with the power of amendments. The power of amendment was derived from other provisions of the Constitution and hence it was subject to constitutional limitations. Secondly, a constitutional amendment is also a 'law' within the meaning of Art. 13(2) and hence this can be declared void, if it infringes fundamental rights. Thirdly, since the constitution did not specifically mention the amendment of Fundamental Rights in the chapter on Amendment, Part III could not be amended at all. Finally, the fundamental rights were regarded as immutable provisions of the constitution, because they were qualified by the expression 'fundamental' meaning, thereby that these were unalterable provisions of the constitution. The obvious implication is that the legal positivist stands of the court on these crucial issues has objectively led to a defence of the rights of the privileged few, may a defence of the Indian capitalisms and the values most cherished by the class.[25]

Thus, the Supreme Court declared in Kesavananda Bharati v. State of Kerala that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution. This decision is not just a landmark in the evolution of Constitutional law, but a turning point in Constitutional history.

Later on so many cases are decided by the Supreme Court in support of Fundamental rights. In the case of Mumbai Kamgar Sabha, Bombay vs. Abdulbhai

[17] Dr. Ambedkar, 'Constituent Assembly Debates, India vol. x at 296-297.
[18] AIR 1965 All. 349
[19] A. Lakshminath & K. Sita Manikyam, Legislative Privileges and Judicial Power: Constitutional Perspective, at 49, Journal of Constitutional and Parliamentary Studies, vol. 43 Nos. 1-2, January-June (2009
[20] -Sohanlal Datta Gupta, the Supreme Court and Indian Capitalism (1950-1967), Indian Bar Review, vol. 24(1&2) 1997, at 184-185.
[21] 1951 SCR 525. vol. 2
[22] AIR 1967 SC 1643
[23] AIR 1975 SC 2299
[24] AIR 1980 SC 1789
[25] Sohanlal Datta Gupta, the Supreme Court and Indian Capitalism (1950-1967), Indian Bar Review, vol. 24(1&2) 1997, at 197

Faizullabhai[26] became a virtual takes-over of the executive and legislative functions by the courts in Bandhua Mukti Motcha vs. Union of India[27]
Oxford English Dictionary[28]defines PIL as "the common well being…..also public welfare".

The landmark judgement by Justice Bhagwati in S.P. Gupta v. Union of India[29] held that the new era of PIL movement by holding that any member of the public or social action group can maintain an application in the High Court or the Supreme Court on behalf of the people who because of poverty or any other disability are unable to safeguard their constitutional or legal rights.
The subsequent decisions of the Supreme Court in Fertilizer Corporation Kamgar Union (Regd.) Sindri v. Union of India,[30] Free Legal Aid Committee, Jamshedpur v. State of Bihar,[31] Rural Litigation and Entitlement Kendsra, Dehradun v. State of UP[32], M.C.Mehta v. Union of India[33], show the conception of the concept of PIL in India. Prof John Rawls says that human right do not depend on any particular comprehensive moral doctrine, they express a minimum standard of well ordered political institutions for all peoples, who belong, as members in good standing, to a just political society of people. The emergence of the Indian supreme court as a custodian of peoples rights and a democratic, functional institution is the most significant and important development in the judicial history of independent India.[34]

The court in number of cases has expounded the scope of Art. 21 so as to safeguard the rights of prisoner. In M.H.Hoskot v. State of Maharashtra[35] the court provided the free legal aid services to the prisoners as part of fair trial procedure. In another case, Hussainara Khatoon v. State of Bihar[36] The SC held that the speedy trial was a part of fundamental right to life and liberty. In Azad Rickshaw Pullars Union, Amritsar v. State of Punjab[37] the judiciary has accelerated the process of socio – economic revolution. In Centre for Environment Law v. Union of India[38] on the ground that protecting the environment is a part of Article 21. In Ramlila Maidian[39] the right to sleep was held to be part Article 21. In University of Kerala v. councils of Principals of Colleges[40] the SC could have directed the concerned authority to consider these recommendations, and could not have directed that they be implemented.
In case of Aruna Ramchandra Shanbugh v. Union of India[41] in landmark judgment the SC allowed passive euthanasia i.e. withdrawal of life support to a person permanently vegetative state, subject to the High Court of state. In Re Networking Rivers case[42] the SC directed the interlinks between the rivers of India. In another case Dayas Ram v. Suhi Balham[43] the SC saying that they were meant to fill legal vacuum. In Ajay Bansal v. Union of India[44] the SC directed that helicopter be provided for stranded person in Uttarakhand. In Sukhdev Singh v. Bhagat Ram[45], R.D. Shetty v. International Airport Authority of India[46], Ajay Hashia v. Khalid Mujib[47] and Pradeep Kumar Biswas v. Indian Institute of Chemical Biology[48] provide new dimensions to the constitutional concept of 'other authorities' within the Constitutional language of 'State'.

IV. CONCLUSION

The Supreme Court of India also assumed the role of reformer while criticizing the existing practices. Thus, the judicial interference in this regard has a mixed reaction. Some of the legal and political luminaries eulogised it for demonstrating judicial activism while others criticised it as distorting the constitution. There is no denying the fact that the Supreme Court by its interpretation particularly in post Maneka Gandhi case ventured to amend the constitution. Further, the SC from Gopalan case up to 1977, preferred the positivistic interpretation and thereby adopted crime control model with only dissent by the justice Fazl Ali. In the case of Maneka Gandhi judges were softer and dealt with it more emotionally than Gopalan's case whereby opted for due process model. Thereafter, the Supreme Court played hide and seek game with the phrase 'Due Process"

[26] AIR 1976 SC 1455.
[27] AIR 1984SC 802.
[28] Vol. XII. 2nd ed.
[29] AIR 1982 SC149 at 188-89
[30] AIR 1981 SC652
[31] AIR 1982 SC 1463
[32] AIR 1985 SC 652.
[33] 1987(1) SCC 395
[34] Dr. Dilip Ukey and Tejaswini Malegaonkar, Right to Life and Personal Liberty- Challenges and Judicial Response, Indian Bar Review, vol. 30(4) 2003 at 539-540.
[35] AIR 1978 SC 1948
[36] AIR1979SC1377.
[37] AIR 1980 SC 14
[38] (2013) 5SCC
[39] AIR 2012 SC11
[40] (2010)1 SCC 353
[41] JT(2011) SC 300
[42] (2012)4 SCC 51
[43] (2012)1 SCC 333
[44] AIR 2013 SC
[45] (1975) 1 SCC 421
[46] (1979) 3 SCC 489.
[47] (1981) 1 SCC 722.
[48] (2002) 5 SCC 111