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Judicial Policy Making in India: A Myth or Reality

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ABSTRACT

Policy making may be characterized as picking among possible strategies where ones activity influences the conduct and prosperity of other people who are subject to the policy maker's power. Put another way policy making is the authoritative allocation of resources. No one disputes that legislators, executive officials and bureaucrats make policy in every democratic country. But we resist the idea that judges are also policymakers and often raise certain serious question on judiciary for acting like a policy maker. It is also often seen as dereliction of judicial duty when ever judiciary come out from its conventional shell and plays dynamic role in nullifying the policy of government as unconstitutional. Nevertheless, the criticisms of judicial rulings is based on common belief that judges merely find or discover what the law is, they should not make law. Policymaking is the responsibility of the other branches of government, so judges who engage in policymaking are acting ultra vires.

In any case, another perspective is that judicial policymaking is neither outstanding nor derived. Courts "say what the law is", over the span of deciding cases, and in dealing with cases definitely entangles them in policy debate. Their decisions may report definitive legitimate measures that characterize public policy within the jurisdiction they serve. Now and again their decisions may have an impact political activity and animate or impede societal change, paying little heed to whether judges choose the cases appropriately, and whether their decisions maintain or strike down.

In the aforesaid back drop this paper endeavors to examine the quintessence and the Constitutional point of view of policy making function of the judiciary in elegance with the constitutionally conferred legislative powers of the legislature. It then turns to the second issue on discussions of the reason which justified the judiciary to indulge in policy making issues. It goes on to discuss weather judicial policy making is a myth or reality in reference to the decisions conveyed by the Supreme Court in the post emergency period.

1. Introduction

In our nation since time immemorial Judges are seen as bloodless incarnations of human integrity. From their lips streams a constant flow of insightfulness. From their pens streams not ink but instead moral fortify into which their judgments are set. We trust legal decisions with high regard, basically non discretionary, and objective. At the time when Constitution of India was drafted the framer of the Constitution made every move to draw Montesquieu's philosophy of autonomy of organs of the state. Montesquieu was absolutely right when he said, "By division of powers, government becomes the servant of the people and not the master."It means that the legislature shall by no means exercise the executive and judicial powers, or either of them. The executive shall never exercise the legislative and judicial powers, or either of them. The judicial shall never exercise the legislative and executive powers or either of them. Though there is no specific provision in the Indian Constitution regarding separation of power. Under Article 50 of the Indian Constitution state has been committed separate judiciary from the executive. The judiciary, the executive and the legislatives are given distinctive fields in the Indian Constitution and their capacities are separated. The descriptions of their areas of functioning keep running crosswise over various portrayals of the Indian Constitution. It is the executive and the legislature, who are directed to involve in policy making and the Indian judiciary has been given the tough task of maintaining the Constitutional right of citizen. In spite of the fact that Supreme Court should make rules governing the administration of all courts in the state and, subject to law, the procedure and system in such courts.

Be that as it may, since post emergency period a dynamic role of Indian judiciary over the subject matter falling constitutionally within the administrative ability of the executive brings up certain genuine and noticeable issues. It might be on account of the way Supreme Court of India has many a time sets course of action to the government by framing guidelines in a way just like legislature. Such judicial indulgence call for a need to closely analyze the constitutional point of view of policy making function of the judiciary in elegance with the constitutionally conferred legislative powers of the legislature. The Constitutional route by which court can intervene in the legislative process is by judicial review and when we theoretical the premise of judicial review it rises the everlasting debate between constitutionalism and democracy. Constitutionalism accepts that Constitution is supreme and it can supersede the decision of any body. Though democracy is pillared on the rule that an elected body has the privilege to take decision for the country. It is without a genuine doubt that in the current set up of separation of power the legislature under the Indian

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Constitution goes about as a prime mover in framing laws according to the demand of the changing situation of the civic society. But the role of judiciary is additionally to a great extent recognized, since judges of superior courts while dealing with practical cases, what we say as legal realism in genuine situation to settle upon dispute, not just move on to decipher the current laws and apply them in a given circumstance yet as well make up innovative judgments with creativity to provide justice keeping pace to the changing needs of the conflicting societal conditions. The primary reason that can be credited to such a basic element of judicial functioning with undoubted authenticity is that since law by its extreme nature is typical, no legislature can foresee with sensible sureness the future and anticipating potential the outcomes which the law tries to address. For all intents and purposes, each sanctioned law on a testing examination uncovers certain gap which the judges is required to filled up by method for interpretation.

This is prominently known as judicial legislation such filling up is however anticipated that would be done in consonance and congruity with the Constitutional command. Judicial Legislation has been accepted by every modern democratic country as its necessary to uphold the democratic values but in the last few decades courts have made basic decisions in the area of agriculture, banking ,commerce ,communication, criminal justice, education, fiscal policy, industry, labour, manufacturing ,mining, national defense, natural resource, public health social welfare thus court is now not confined with interpretation of the Constitution but also come up with innovative ideas and framing polices in many issues which come under the domain of the government.

2. Reason for judicial policy making

Though their remains a consensus of opinion that within certain narrow and clearly defined limit new policies are framed by judiciary through their creative and innovative decisions. But those who refuse to recognize the fact of judicial law making take in account only one side the story. Equally important is an understanding of the reasons why India Judiciary has virtually untrammeled policy making authority which allows them authoritatively to resolve public issues with less interference from other governmental officials than do judges in any other country. Few factors directly related to the India experience provide an answer.

Fundamental Law

A major contribution that the English colonists made to Indian Legal system was the concept of fundamental law which postulated that all governmental action was to be compatible with the colonial charters and now the Constitution. From colonial times to the present day we have lived in and many times recognized the existence of an extremely political volatile environment specially at the time of emergency period but the belief in a fundamental law continued. As Constitution remains at the zenith of the pyramid and the Judiciary being a definitive watchman of the constitutional rights of the general population of this crowded land has consistently entertained itself whenever it has discovered that the enlightenment of the Indian Constitution has begun losing its sheen. Confidence rested on the Judiciary by the general population of India, remains on a considerably higher rung than on any other organ of the state. Subsequently Judiciary is considered by the citizen as the place that is known for final resort to secure the fundamental law of the nation. The Court has shown in the past that the Constitution can likewise be bent to frustrate the necessities of democracy.

Distrust of Governmental Power

In many democratic countries distrust of Government has come up as a new phenomenon, India is not also exception, now our faith in government is far less than it was in the immediate years of independence of the country. Social researchers have now begun asking whether individuals "believe the administration to make the wisest decision" reliably or more often than not. As before, generous dominant majority population of the country endorse numerous scrupulous things government did likes giving standardized health, employment and education. In any case, now the general marks of trust are much lower than in the 1960s. Most experts assume that declining confidence in government becomes out of other basic reasons. May be the coverage of governmental issues by the media, or political scandals, or the mounting every day financial battles of the working class. Due to this suspicious environment issues that customarily were viewed as within the space of the lawmaking body have come to be considered by courts. The reasons forwarded to legitimize this progress is that there are vital areas of public policy in which the political procedure can't be trusted to accomplish a proper determination of the contending claims. On the other hand unfretted flow of money in politics and mounting cost of political campaigns has further complicated the situation. The consequence, in the view of many observers, is that the outcomes of political campaigns have become dangerously dependent upon the support of those individuals and interest groups that can most easily raise funds to promote the candidates or causes that they favor. This tendency may be view as the most important reason of corruption in India, but the deeper concern is that if money permits some individuals and interest groups to exercise disproportionate influence on the formation of public policy then there will be potential distortion of democratic processes. No less as the privileged class they were paramountly concerned lest they lose their position on the top of the heap. They were also concerned that governmental power not be used against them. They logically assumed that they could perpetuate their position in society having their possession and control of economic power and the social status that accompanied it.

Separation of power

Separation of power compartmentalizes governmental activity into three separate chambers. But the framers of the constitution went a step further and gave to each branch of government some power that typologically belong to one of the others, thereby creating a system of check and balances.

Montesquieu wrote:

"When the legislative and executive powers are united in the same person or body, here can be no liberty, because apprehension might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not

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separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions, and of trying the cases of individuals".

Rising up out of Montesquieu's teaching in the mid eighteenth century, the idea of Judicial independence keeps on holding a position of conspicuousness in every single present day of all modern democracies. The framer of the Constitution of India found that it as basic to consolidate in the Indian Constitution arrangements for establishing and maintenance of Judicial Independence . Dr. B.R. Ambedkar, the Chairman of the Drafting Committee epitomized the sort of Judiciary that the Constitution of India would stand to the general population of India in the accompanying words:

"*There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself."*In this manner, to some degree amusingly, we discover contentions for independent judiciary, which do bode well with regards to the more hardened ethical quality, transposed to help the thought of judicial supremacy. The significance of judicial autonomy is reinforced by its innate associations with democracy, separation of powers and the rule of law. Independence of judiciary in genuine sense implies that the judges are in an impartial state so they can render justice in similarity with their pledge of office and just as per their own particular feeling of equity without submitting to any sort of influence or impact be it from official or authoritative or from the seniors and colleagues.

3. Judicial approach on policy making issues

The role played by judiciary in the changing circumstances has denoted a critical move from its traditional role to a more participatory one to take into account the changing needs of the general public. Among every single democratic nation the Supreme Court of India is conceivably a notable amongst the most confident and capable court when its deal with issues of government and its policy. In a series of legal encounter with government in the 1970s, the Court announced and settled the ability to nullify Constitutional amendments that violate the basic structure doctrine and after the end of emergency rule, the Court in the 1980s built up the idea of Public interest litigation to guide the legislature to embrace social welfare polices and ensure the Constitutional rights of the citizens are protected. In the 1990s, the Court in a sequence of PIL cases asserted and assumed dynamic role in challenging and investigating government corruption as in *Vineet Narain versus Union of India*, and in subsequent cases including the 2G Telecom Scam and the Coal Block Scam cases. The Court has also played a very proactive role in regard to the policies to maintain a balance ecological and sustainable development, including water and air pollution, deforestation, and vast scale of hydroelectric dam projects cases. For instance, in *T.N. Godavarman Thirumulkpad versus Union of India*, the Court acted like the ministry of forests in implementing Forest Act and controlling cutting of timber in forest and in the Narmada Dam suit, the Court has issued orders identifying with the development of the dam and its impacts on nature and human. All the more as of late the Court has likewise perceived rights to nourishment, education, information and through its decisions, complied the legislature to enact new laws and implement regulatory and administrative structures for effectuating these rights. Post-2000, the Court extended Constitutional right to information and directed the proclamation of required informational disclosure regime for all Parliamentary and state authoritative. As of late conveying a historic ruling in *Abhiram SinghversusC.D. Commachen (dead) by Lrs. and Ors*Supreme Court held that seeking votes in the name of religion, caste or group added up to corrupt practice and election of a candidate who indulged in it can be set aside. In a noteworthy push to streamline and acquire straightforwardness into the way toward assigning advocates as "seniors", the Supreme Court in *Ms. Indira jaising versus Supreme Court of India through secretary general and ors* decided that hereafter all issues identifying with assigning advocates as "seniors", will be managed to begin with by a board headed by the Chief Justice of India. In Dr. S. Rajaseekaran (II) *versus* Union of India and OrsSupreme Court issued rules to diminish the number of deaths that happen because of road accidents. In *Rajive raturi versusUnion of India and others* the petitioner, who is a visually impaired individual, is resident of Gurgaon (now 'Gurugram') and works in Delhi with a human rights association. He has filed the petition in public interest on behalf of the disabled persons (however better articulation to depict these people is 'differently-abled people') for appropriate and satisfactory access to public places. The Supreme Court issued some crucial orders and set due dates while disposing of a petition filed by a visually disabled persons seeking proper and adequate access for such persons to public places In *Youth Bar Association of India versus Union of India* Supreme Court held FIRs, unless the offense is sensitive in nature, as sexual offenses, offenses relating to insurgency, terrorism of that classification, offenses under POCSO Act 2012 and such types offenses, ought to be uploaded on the police website. In *Narendra versus K.Meena* Supreme Court of India held that persevering exertion of the wife to compel her husband to be isolated from the family constitutes an act of 'cruelty'. In *Voluntary Health Association versus State of Punjab* Supreme Court issued additional directions to curb female foeticide and successful implementation of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. In *Swaraj Abhiyan versus UOI* a two judge bench of the Supreme Court of India issued historic judgment for disaster /drought management. Incomparable Court held individuals with disabilities have the privilege to live with reverence in *Jeeja Ghosh versus UOI* Court ordered the SpiceJet Ltd to pay Rupees Ten Lakhs to Jeeja Ghosh, a famous activist engaged with disabilities rights, for de-boarding her by force. Supreme Court in *State of Tamil NaduversusK. Balu* ordered closure of all liqour shops along National and State highways stressing on the need to enhance road safety and check danger of intoxicated driving. In *National Legal Services Authority versus Union of India and Others* a land mark decision by the Supreme Court of India which perceived transgender individuals to be the "third gender" and asserted that they were ensured major rights guaranteed by the Constitution of India.

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In *Shahid Balwa versus Association of India and Ors* the court said that Article 136 read with Article 142 of the Constitution of India empowers this Court to pass such orders, which are vital for doing complete justice in any cause or matter pending before it and, any order so made, shall be enforceable all through the domain of India. The ability to do complete justice under Article 142 is in the idea of a remedial measure whereby value is given inclination over law to guarantee that no injustice is caused.

In the above referred cases court has turned out from its conventional shell of adjudication and conjured its discretionary jurisdiction to mediate and guarantee that rights of people are appropriately secured. But in many event Supreme court was hesitant to interfere with policy making body even in exercise of its jurisdiction under Article 142 of the Constitution of India which would be in contrary to the law. A similar view was taken on *Modern School versus Union of India and Ors* wherein Supreme court held that when any enactment is working in the field, the courts ought not be willing to force any further confinements. Once the lawmaking body has set out an educational scheme, the work of the court is simply to interpret the same. It can't and ought not issue some other or further direction. In *Manohar Lal Sharma versus Main Secy and Ors* wherein the Supreme court held that public auction is a more preferable strategy, the state can't be constrained by Judiciary to follow any specific technique for distributing its natural resources for development. Estrangement of natural resources is a policy decision and the methods embraced for the same is subsequently executive rights, it isn't the space of court to assess the benefits of competitive bidding or different strategies for distribution of natural resources. In any case, as the policy for distribution violates Art. 14 apex Court scratched off the coal blocks distribution made by the screening committee. In *Medical Council of India versusSarang and others* Supreme Court held that in academic issues court ought not regularly intervene with or decipher the standards and ought to rather leave the issue to the expert in the field. Court was hesitant to meddle in policy decisions of the academic or expert bodies. It is settled law that where an approach has been figured by the State or its instrumentality upon expert advice, it isn't for the Courts to substitute its opinion to that of an expert body.In the case of *Ugar Sugar Wroks Ltd. versusDelhi Administrative and others*, the Apex Court has held as follows:

"18. .....It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policydecisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. However, if the policy cannot be faulted on any of these grounds, the mere fact that it would hurt business interests of a party, does not justify invalidating the policy...."

In *St. Mary S Engineering College…versusThe All India Council For…*Supreme Court held that in academic matters, so long as the policy adopted by the state or an academic bodies is in accordance with the provisions of the statute, Courts would not interfere, however, except in cases where it is established that the decision is contrary to the provisions of the statute or the intendment of the enactment. The AICTE was established with the purpose of controlling and organizing the advancement of specialized instruction all through the nation and furthermore for foundation of legitimate and uniform standard of technical education in India. In achieving the object it has the power to formulate policies for implementation across the country. The power to formulate policies by the Council is within the domain of the AICTE. So long as the policies are as per the provisions of the AICTE Act, Courts have no power to interfere in such policydecisions of the Council. The Supreme Court in a catena of decisions uniformly held that Courts shall not interfere in policy matters taken by academic bodies particularly where such policydecisions have been taken on expert advice.

But all Government Orders can't be named as policy decisions. In the event that any decisions is taken on a policy matter, the same might be just subject to following certain method and endorsement by the Government in the way as given by the statute. For example, if the Government needs to take policy on a specific issue, it is the ordinary procedure that there must be an endorsement by the Government through its cabinet.

In drawing out the difference between policy matters amenable to judicial review and those where the courts would decline to interfere, the Supreme Court in *Bennett Coleman and Co. versus Union of India* has held that when a state activity is challenged, the duty of the court is to look at the activity as per law and to decide if the legislature or the executive has acted withinthe powers and capacities provided under the Constitution and if not, the court must strike down the action. Notwithstanding accepting as contended by the State that the impugned action is a policy decision, the Supreme Court, in the said case, has held that the Courts can interfere with the policy decision of the State, if the policy neglects to fulfill the test of reasonableness; the policy must be made reasonably and ought not give the impression that it was so done arbitrarily with any ulterior objective; the policy can be contestedon grounds of malafides, unreasonableness, arbitrariness or unfairness, and so forth; if the policy is observed to be against any statute or the Constitution or runs counter to the philosophy behind the provisions; if the delegate has acted ultra vires then the courts will venture in to intervene with government policy.

*Balco Employees Union (Regd.) versus Union of India and Others*Supreme Court held that the Courts cannot interfere with policydecisions unless it is opposing any legal provision or the Constitution. In *State of Kerala v. Manager, Nirmala Public School Karimannoor and another* Supreme Court declared the Government order to be irrational and unreasonable as the said order was unworkable. Further it was held that the reason that new schools can be started only where there is concentration of Muslim population as they are socially and economically backward was found to be discriminatory and violative of Article 14 of the Constitution, as there were other socially and economically backward communities. In another judgment *N.Kunjichekku Haji v. State of Kerala and Others*in which the Supreme Court upheld the up gradation granted to a

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school observing that when the Government finds that there exists need for up gradation of an existing school into upper primary the Government must be allowed to exercise its statutory power unless it is mala fide or colourable exercise of power. In *Union of India and others v. S.Sreenivasan*it was held if a rule was beyond rule making power conferred by the parent statute or if a rule supplants any provision for which power is conferred it becomes ultra vires. While declaring a statute ultra vires the court should consider the source of power which is relevant to the rule. Another imperative judgment is *Academy of Nutrition Improvement and others v. Union of India* wherein Supreme Court held that courts will be hesitant to interfere with policy decisions taken by the Government in issues of general public health, nor will courts endeavor to substitute their own perspectives in the matter of what is insightful, safe, judicious or legitimate in connection to technical issues relating to public health in inclination to those prescribed by people said to possess specialized ability and rich experience. However in another judgment *Bannari Amman Sugars Limited v. Business Tax officer and others*the Supreme Court held that the discretion to change policy in exercise of executive power, if unrestricted by any statute or govern is sufficiently wide, however what is basic and understood as far as Article 14 is whether the change in policy is made reasonably and not discretionarily or with any ulterior intention.

Apart from the decisions rendered by the Supreme Court in the supra referred judgments, in series of different cases, the court has held back to entertain itself with issues those fall under the domain of the executive and the legislature.

4. Conclusion

From the above discussion it may be concluded that judicial policy making is not completely a reality because a judicial decision either 'criticizes or legitimizes' a policy of the government. In any way the court neither favors nor denounces any policy approach of the government, nor is it worried about its intelligence or practicality. Its worry is just to decide if the enactment is in congruity with or opposite of the arrangement of the Constitution. Its often incorporates the thought behind the objectivity of the statute. So likewise, where the court strikes down an executive order, it does all things considered not in a soul of experience or to express its predominance however in arrival of its obligation to ensure Constitutional commitments and the majesty of the law. From the cases referred to above in this paper it creates the impression that Supreme Court has actually kept up an almost negligible difference of boundary between the policy making issue of the executive and issues which are of assurance of social intrigue. Court has effectively engaged with the situation where question of maintaining rule of law and assurance of Constitutional esteems is there. Be that as it may, numerous times the action of court has been seriously reprimanded by the legislature as obstruction of their space. Actually there is an established concept called "*Colourable Legislation"* which says that under the pretext of power given for one specific purpose, the legislature can't look to accomplish some other purpose which it is generally not competent to legislate on. But the problem arises when executive use all its mechanism to nullify this cardinal principle of administration. Thus court has no way but to indulge, as court is the observer and has the power of judicial review. In any democratic country where rule of law prevails government can take any policy as per their will but that policy must be taken according to law and the policy as well the law according to which the policy has been framed must be just fair and reasonable. The landmark English case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* sets out the standard of unreasonableness of public-body decisions that would make them liable to be quashed on judicial review otherwise called Wednesbury unreasonableness. The Court held that it couldn't intervene to overturn the decision of the public-body just on the grounds that the court couldn't help contradicting it. Also, in conclusion a definitive obligation of the judiciary is to see that justice is done as it cherished in the preamble to our Constitution and if justice be not a natural principle, it is no principle at all. If it be not a natural principle, there is no such thing as justice. If it be not a natural principle, all that men have ever said or written about it, from time immemorial, has been said and written about that which had no existence.

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