Judicial Suzerain over the Legislature

Dr. Lipipuspa Mohanty, Lecturer in Political Science, KIIT School of Social Science, BBSR, India.
email: mohanty.lipipuspa@gmail.com

The confrontation between the Judiciary and the Executive over the issue of appointing judges started when the 24 High Courts of the country are reeling to fill up 397 pending vacancies for Judges. The Five Judge Constitutional Bench of the Supreme Court on 16th October 2015 declared the 99th constitutional amendment to set up the National Judicial Appointments Commission (NJAC) as unconstitutional and void and ordered the revival of the Collegium System. The 99th constitutional amendment not surprisingly had the support during the UPA and NDA regime, both the parties wanting to have their share of the cake in appointing the judges. The Judicial Appointments Commission Bill was passed in both the houses of the Parliament by overwhelming majority and ratified by 20 state legislatures. Arun Jaitley, the Finance Minister, in a recent debate which also included the ex- attorney general Mr. Soli Sorabjee as well as the former Chief Justice of India Mr. RM Lodha, called the collegium system " A Gymkhana club, where the existing members appoint new members." The ex- CJI defended the collegium system pointing out that he was one the first judges to be chosen after the system was put into place. "Don't shake the confidence of the people in the judiciary," he warned but also admitted that the selection process under the collegium system is opaque, where the judges are appointed behind closed doors.

So where does the problem lie? Why NJAC was declared unconstitutional and void? The NJAC was to have six members: The Chief Justice of India (CJI), two senior most puisne judges of the Supreme Court, the Law Minister and two eminent persons, selected by the panel comprising of the CJI, the Prime Minister and the Leader of Opposition party. Then the twist comes, any two of these six members can veto an appointment.

The judgement made it quite evident and clear that it did not want the Law minister to be a member of the panel as his presence would act against the principle of the independence of judiciary and against the separation of powers.

There are two other problems regarding the NJAC in my opinion. First is to give the government a hand in appointing the judges. The government being the largest litigant has lost near about 80% of the cases in Supreme Court. So, giving the government the power to appoint the judges did not go down well with many people.

And the second, the panel consisting of two "eminent persons". The attorney general suggesting on the names of the eminent persons that NJAC could have, proposed the name of film director, Satyajit Ray and Verghese Kurien, Amul founder. It is important to note that the two persons proposed by the attorney general are now deceased. He also suggested the names of MS Swaminathan, the agricultural scientist and Mr. Bill Gates (not even Indian). Rohatgi said "the eminent persons may or may not be jurists. That will be left to the discretion of the troika (the Prime Minister, the CJI and the leader of opposition of the largest political party in parliament). Rohatgi even mooted the name of another deceased film director, Hrishikesh Mukherjee. And this was being suggested by the Attorney General, expects people who do not have any knowledge of law to help select a Supreme Court Judge. The constitutional bench giving the judgement said it would be "disastrous" to include lay persons without expertise on the selection panel.

The founding fathers of the constitution tried to strike balance between the three organs- the executive, the legislative and the Judiciary. Parliamentary supremacy borrowed from Britain and Judicial supremacy borrowed from USA arrived at middle course. As said by the CJI H.L. Dattu, "India is a country governed by rule of law, which is of paramount importance. The Courts strives every bit to uphold the Rules of law." Judicial Review power of the judiciary is an essential part of the Rule of law. In A.K. Gopalan Case, the judiciary accepted the principle of judicial subordination to legislative wisdom. But in Golaknath Case, the Supreme Court declared that the parliament has no right to take away the Fundamental Rights. It cannot do so by the amendment of the constitution. In another landmark case, Keshavanand Bharti vs State of Kerela, the court held that the legislature cannot create laws that violate the basic structure of the constitution. The confrontation between the judiciary and executive was further witnessed in Maneka Gandhi case, Minerva Mills case, etc. During the era of coalition government, the judiciary is becoming more and more active and assertive. It has being so active that the era of 90's can be called as the 'decade of Judicial Activism'.

The Constitution of India lay down that independence of judiciary is essential for upholding the rule of law. But checks and balances in relation to separation of powers is one of the basic characteristics of our constitution. It is to be seen at all times that the powers of three organs must be balanced and none of them should over reach the others.

The Legislature represents the people, reflects the public opinion, controls the government and makes law; the executive enforces the law made by the legislature. No one can interfere with its freedom and authority to do so. The judiciary adjudicates the laws, decides the disputes, interprets the constitution and is also the protector of the fundamental rights guaranteed under the constitution.

The Supreme Court is the final interpreter of the Constitution. Any provision which violates the fundamental rights will be declared as ultra vires and unconstitutional. The power of judicial review has always been with the Supreme Court and cannot be taken away. However, a number of occasions in the parliamentary history of our country where there has been 'tug of war' between the executive and the judiciary. On April 8, 2007 former Prime Minsiter Manmohan Singh in a conference said "The dividing line between judicial activism and judicial over-reach is thin one ... a takeover of the functions of another organ may, at times, become a case of over-reach." But, the former CJI K.G. Balakrishnan declared that the tension between the judiciary on one hand and the executive on the other was "natural and to some extent desirable."

India being a democratic state, the real power is in the hands of the people. But they exercise through their elected representatives. Thus the sovereignty of the people indirectly means the sovereignty of the parliament. So, the Supreme Court under no circumstance can dishonour the Parliament nor consider the Parliament to be of no consequence. As Edmund Burke said "The fire alarm at midnight may disturb your sleep, but it keeps you from being burned at midnight." Sometimes it is said that the unelected judges availing so many powers and refusing the needs and views of the elected representatives as undemocratic. But it is time that separation of powers among the three organs becomes the basic feature of the constitution of India and that the constitution does not give absolute power to any organ, so the Judiciary has the supreme rights in its sphere as well as the legislature is supreme in its own sphere. It has happened several times when the executive and the legislative have failed to perform their duties. Then judiciary had to interfere to safeguard the provisions of the constitution for public interest.

As corruption is rampant among top bureaucrats and politicians, the expectation of the common man from the judiciary has grown manifolds. However, until and unless the different organs of the government cross the limits of each other, there is no possibility of a real tug of war between them and respecting each other's power is crucial for the smooth functioning of the system.
