

Host

Good afternoon Sir, welcome to our podcast Mrigashira. It's great to have you with us and thank you for your time, what we are seeing is a kind of a judicial activism or a legal activism. How do you assess this?

Guest

To answer this why more and more people are rushing to the courts to seek its intervention. We are presently in aspect of better health conditions, it shows the people have ultimate faith in the judiciary; when they fail to get any help, assistance or even protection of their fundamental rights by the government or through the executives there is a rush to the courts, especially superior courts, the judicial activism phenomenon, and they see the directions from the court and they're sure that once the court passes an order, the government have no other go to comply with it. Now, going to the courts, is not a new phenomenon. The Constitution of India gives us guarantee that every person has a fundamental right to get justice against any injustice caused by anybody, either individual or the government or the society and get these disputes settled, in courts, in accordance with law. Now, in the judiciary, there is a hierarchy created to decide what type of cases go to which court, this personal legal dispute, go to the subordinate judiciary, like civil Judge, or district judge, and then appeal to higher courts, and then its permissible to the final court that is Supreme court. Now, it is necessary to understand when and how higher judiciary works, especially High court and Supreme Court in the light of judicial activism because judicial activism is, the power of judicial activism is available to only superior courts, like High Court under Article 226 of the Constitution and Article 32 of the Constitution to the Supreme Court, no other courts can invoke this principle of or concept of judicial activism. Now, basically, we have to understand how this phenomenon has started, and why it is now more important in the present-day conditions. Under the Constitution of India, it postulates concept of separation of power in the form of legislative, executives, and judiciary, the prime obligation of the legislation or legislative is to govern and, in that make, necessary laws. It is also a mandatory for the government to protect all the fundamental rights, human rights and civil rights of the citizens. This governance by the government is carried out through its executives, the basic normal role of the court is that whenever aggrieved person approaches it, the courts adjudicate disputes between the parties in accordance with law. Now, I said, is the Superior Court and the appellate authorities over the decisions from the states, especially High Court over this subordinate judiciary of the state and Supreme court all over the India, there is little restrain, earlier that is prior to 1960, the Superior Courts had restrained themselves from interfering with legislative or executive actions, like policy of the government and working of the government, unless the same are extremely violative of constitutional rights, fundamental rights, human rights or civic rights of the citizens, only jurisdiction basically Superior Courts had till then was interpretation of law and application of the same to the given facts before in the case before it.

There was absolute restrain from interfering with policy decisions or day to day workings of the government. There are enough mechanisms provided follow the same under our Constitution, as well as working of the judiciary. Now, in 1973, first time, there was a change in the approach of the courts regarding the so-called judicial restraint. The courts by this phenomenon basically, was because of developing a concept which is known as public interest litigation, public interest litigation is, the phenomenon is that any persona can approach the superior courts, to set right rather the lacunas of the government, in its functioning in the law etc.

Now, only condition precedent for anybody to approach the Superior Courts by way of public interest litigation was that he should not, he or they should not have any personal interest in world in seeking the remedy, if it is in the welfare of the society, yes section of the society, a group of society or entire societies as such, the public interest litigation phenomenon was started, then another major change took place is the concept of locus standi, all these three go together so I'll explain a little bit. earlier courts used to entertain disputes only when a litigant has personal interest. If you are a third party, you cannot go to the court. So, unless the person has a locus standi, he cannot go. Now, because of these two phenomenon's, Public Interest Litigation and the giving up of locus standi council or diluting the concept of locus standi, the process of judicial activism started, anybody can go to the Superior Courts bring it, bring it to its knowledge, that there is certain action or inaction on the part of the state machinery, which is affecting the society at large. And that's how the concept of judicial activism started. However, this activism in action can be indicated by the various judgments, which can be of the Supreme Court or High Court is law should be interpreted and applied on the basis of ongoing changing conditions and values in the society. Second, as a society's their belief and value change, the court also note of them and make decisions reflecting the changes.

The earlier attitude of the courts, that no we are here only to interpret to the law and giving decisions was a little bit diluted by this activism principle. Now third principle concept involved along with this was the courts started exercising what is called as Suo motu power. Suo motu power is earlier whenever a person approaches the court, he must show that he has his personal interest or something connected with him, he has been affected but now because of this dilution of Locus Standi concept again, anybody as it subject to if he has no personal interest, can approach the Supreme court or the High Court by invoking his judicial activism principle, this is in nutshell, it is the basic principle and because of the people's now observation or people's opinion that whenever government fails, unless and until the superior courts involved or Supreme courts take active part, the remedy will be lost and it will be a loss to the society. This is the basic principle.

Host

Is it fair to then say that the judicial activism is here to stay?

Guest

Yes, law in the present from last many, I mean, almost a decade or so. This principle, I mean this judicial activism has to stay there, there is no doubt about it. But the only restrain which the courts, in my view, have to apply or breaks have to be applied that it is not judicial overreach. We are not, judiciary is not to govern the state, it is the duty of the government and through executives, you cannot or should not interfere, each and every aspect of the government working, otherwise practically the judiciary would be taking the role of the government itself. And hence, governments in mean the judiciary must think before intrusion into the domain of the state that the courts directions are practical and viable only towards the welfare of the society. Because we have seen one example of overreach of the judicial activism and it was much commented upon. The government's Supreme Court's order on BCCI, governing the BCCI and how cricket should be played, who should play, where should it be played, no, this is not the role of the judiciary. So, unless it is in the welfare of the society as such, activism has to be there and it has to stay and more and more it is, it will be necessary for the government. Now, for example, in the last few weeks or months after this pandemic started, the governments are now firmly asking the courts are firmly asking the government what steps you have taken, this is all in the interest of the welfare of the society and protection of fundamental rights of the people.

Host

What is the kind of impression that the world is getting about India? Is there any kind of dent in India's reputation?

Guest

Personally, I don't think reputation of India can be dented anywhere by anybody. It is one of the greatest largest democratic country surviving for the last more than 60 years, the democracy is surviving for the last more than 60 years, when it failed in many, many, many countries. So, reputation of country as such will not go but only the reputation of the government, the party which is a governing and the executives will have to be affected by this judicial, if the judiciary starts intervening and directing them to take steps.

Host

The legal system is under a lot of pressure, there are cases that have been pending for many, many years. It is, it is these kinds of activism, will it not put too much pressure on the system itself?

Guest

Yes, now by itself presently, by itself, the system is almost over burdened, reasons are many forget about it. Lakhs and lakhs of cases are pending before the superior courts like Supreme Court and High Court, forget about lower judiciary, lower judiciary, it takes anywhere between 10 to 15 years to decide a case, almost a generation is lost in litigating. but so far as Superior Courts are concerned, now there are what is called as alternate dispute resolution mechanism in place now, which has been worked out, like mediation between the parties and arbitration, then the holding Lok Adalats, these normal civil disputes, if can be brought down. And I'm sure it will be brought down by using this mechanism, then the Superior Courts can concentrate only on the welfare of the society by protecting, issuing directions and protecting the fundamental rights, human rights and civics rights of the society. But it will take time because the courts are working on that.

And so as far as present day pandemic is concerned, if courts by themselves are not the experts, let me be very clear, we are not experts by ourselves, we need help from experts like medical experts or scientific experts, etc. So, what I felt is that while looking at or starting the judicial activism process or interfering with the working of the government the courts should have a small committee, not big, the bigger the committee more confusion. So, it's should have a small committee of possibly a legal expert, retired judge and well-known legal imageries along with the experts in the field, and then through them collect in time bound, time bound measures, data is required and then you can issue the directions? Of course, the burden is going to be on burden of I mean pressure of the pendency of the cases is large till today.

Host

Thank you, sir. Thanks for your time. It was great speaking to you. And thank you once again for coming on this podcast Sir.

Guest

Thank you. Thank you. Radha,