

SCOPE OF JUDICIAL POWERS: JUDICIAL ACTIVISM*** PARANTAK YADAV¹****BACKGROUND**

Judicial activism is not a new phenomenon; it has grown over time with the failure of the executive to fully cope with the aspirations of the people becoming increasingly conscious of their rights in a fast changing world.

Certain legal circles are showing concerns over the proactive role our judiciary is playing in restoring fundamental rights to the common man, and taking cognizance of corrupt practices in institutions of public importance. This proactive role which is termed as judicial activism has been defined in Black's Law Dictionary as, "a philosophy of law-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Thus according to them any order or decision which is colored by a judge's subjective mind rather than the literal application of law would amount to a legal aberration and is therefore likely to cause miscarriage of justice. But the fact remains that when a judge is engaged in the task of sifting truth from falsehood, his objective and subjective faculties are simultaneously at work, and in respect of most of the questions before him, the bare literal application of law would neither be adequate nor desirable. Though the history of judicial activism dates back to 1803 when concept of Judicial review was evolved by chief justice Marshall in celebrated case of Marbury v/s Madison.

Judicial Activism¹ has no unanimously agreed definition amongst the authorities as it is understood differently in different spheres, depending upon individual view point. Professor Baxi rightly points out that there can be no objective definition of whether or not a decision is an instance of Judicial Activism¹. According to him²: Judges are evaluated as activists by various social groups in terms of their interests, ideologies and values.

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² See Upendra Baxi, Courage, craft, &Contention 3 (1985)

S.P. Sathe's approach is persuasive in Indian context and holds the field since judiciary enjoys ample powers under the auspices of Judicial Review' under the constitutional scheme. Being the final interpreter of the Constitution, it can be rightly said that judiciary itself is the body that decides the limits of its power. Interestingly, it has taken a long arduous way in crystallizing such powers often resulting in activism' and overreach' since the making of the Indian Constitution till date and the process remains ongoing. Further, innovations in the field of Public Interest Litigations (PIL) also signify the courage of conviction and the courage of confusion through which the Supreme Court of India has transformed itself into a Supreme Court for Indians³.

JUDICIAL ACTIVISM IN INDIA

The emergence of judicial review gave birth to a new movement which is known as judicial activism. The Supreme Court of India in *L. Chandra Kumar v. Union of India*⁴, observed that – Judicial review is a great weapon in the hands of judges. It comprises the power of a court to hold unconstitutional and unforeseeable any law or order based upon such law or any other action by a public authority which is inconsistent or in conflict with the basic law of the land. Judicial review in India deals with three aspects:

- (i) Judicial review of legislative action.
- (ii) Judicial review of judicial action.
- (iii) Judicial review of administrative action.

Judicial activism in India means the power of the Supreme Court and the high courts but not the sub-ordinate courts to declare the laws as unconstitutional and void if it infringes or if the law is inconsistent with one or more provisions of the constitution. To the extent of such inconsistency while declaring a law as constitutional and void the courts do not suggest any alternative measures. According to S.P. Sathe “a court giving a new meaning to the provision so as to suit the changing social or economic conditions or expanding the horizons of the rights of the individual is said to be an activist court.”⁵

³ See M.J.C Vile, Constitutionalism and Separation of Powers 1 (1967)

⁴ AIR 1997 SC 1125

⁵ Judicial Activism in India ,Satyaranjan Purushottam Sathe, Oxford University Press, 2002

Upendra Baxi, an imminent Indian Jurist has defined judicial activism as the way of exercising power vested by judiciary, which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by the members of ruling class. According to J.S. Verma (The former chief justice of the supreme court of India) “*Judicial activism must necessarily mean the active process of implementation of the rule of law essential for the preservation of a functional democracy*”⁶ In the words of A.M Ahmadi (Former Chief Justice of the Supreme Court of India) “*Judicial Activism is a necessary adjunct of the judicial function since the protection of public interest as opposed to private interest happens to be its main concern.*”⁷

EVOLUTION AND GROWTH OF JUDICIAL ACTIVISM

Law comes primarily from two sources- legislative enactments and precedents or judicial decisions, the making of laws by judges. Many provisions of Constitution enable judiciary to play an active role by asserting itself. Article 13 empowers Court to declare any law unconstitutional if it violates any fundamental right of citizens guaranteed by Constitution. Aggrieved person can approach Supreme Court under Article 32 or any High Court under Article 226. Article 19 enables Supreme Court to determine whether restrictions imposed on fundamental right are reasonable or not. Article 131 upheld the federal principle. Supreme Court is the highest Court of appeal in all criminal, civil, and constitutional matters⁸, it enjoys advisory jurisdiction⁹ and has rulemaking power¹⁰.

It has authority to make final declaration as to validity of law and all its judgments are binding on all other Courts in India except itself.¹¹

It is clear that constitutional framework has given enough scope for judicial activism as judiciary, and especially Supreme Court enjoys unique position. The emergence of judicial was because of trends like expansion of power of judicial review over administration, extending the

⁶ MANIKA, *supra note 1*.

⁷ A.M. Ahmadi, “Judicial Process: Social Legitimacy and Institutional Viability”, 4 SCC (Journal) 6, 1-10

⁸ From Article 132 to Article 137, Constitution of India

⁹ Article 136, Constitution of India

¹⁰ Article 142, Article 145, Constitution of India

¹¹ Article 141, Constitution of India

scope of its interpretation to achieve economic, social and educational objectives, and excessive delegation without limitation etc. Other additional reasons are also there, that are well accepted.¹²

The term 'Judicial Activism' was introduced by Arthur Schlesinger Jr. in an article 'The Supreme Court: 1947' in a January 1947 Fortune Magazine.¹³ Courts are established for administration of justice and it plays an active role to enhance the utility of legislative enactments for betterment of society and greater welfare. History of judicial activism traces back to year 1983, it was a case of under-trial who could not afford a lawyer and a question was raised whether the court would decide merely by looking at papers. In that case Justice Mehmood of Allahabad High Court held that pre-condition of the case being 'heard' would be fulfilled only when somebody speaks. Thus widest possible interpretation was of relevant laws were given and with that founding stone of judicial activism in India was laid down.

Initially the unseasonable judicial decisions, even by Supreme Court were overcome by constitutional amendments. The 1st, the 4th, and the 17th Amendment Acts curtailed the court's power of judicial review, various property legislations were removed from purview of judicial review. The question about parliament's power of amending Constitution under Article 368 and to abridge fundamental rights were first raised in case of *Shankari Prasad v. Union of India*.¹⁴ The Court held that constituent power was not subjected to any restrictions. Question was again raised in case of *Sajjan Singh v. State of Rajasthan*¹⁵. In case of *Golak Nath v. State of Punjab*¹⁶ it was held that parliament cannot amend the Constitution so as to abridge any fundamental right. After case of *Keshavananda Bharti v. State of Kerala*¹⁷, court has endowed itself with power of determining validity of constitutional amendment acts. In this case largest constitutional bench of 13 judges has decided the case, validity of 24th Amendment Act was upheld and decision of Supreme Court in case of *Sajjan Singh* was upheld. It was decided that basic structure should remain the same.

¹² Omdutt 'Role of Judiciary In Democratic System of India'(Judicial Activism Under the Supreme court of India): Golden Research Thoughts(September; 2012).

¹³ Kmiec, Keenan D. 'The Origin and Current Meanings of Judicial Activism'(2004).

¹⁴ AIR 1951 SC 458

¹⁵ AIR 1965 SC 845

¹⁶ AIR 1967 SC 1643

¹⁷ AIR 1973 SC 1461

EXAMPLES OF JUDICIAL ACTIVISM IN INDIA

There are many path breaking judgments which made various changes in Indian social and economic scenario. Before emergency in 1975, there was rare exhibition of any activism. It cannot be ignored that initially judiciary used by elite groups for their own interest and to serve their purpose, law favored them. Judiciary was not progressive¹⁸ and main reason behind this was the same class of persons constituting legal machinery- lawyers, judge etc. Many constitutional expert regarded Supreme Court of that time as 'rich man's court'.¹⁹ We have cases in which land reforms were challenged. We have outstanding judgments in cases of

*Shankari Prasad v. Union of India*²⁰, and *Sajjan Singh*²¹. These cases showed the slight changes in judicial system for the betterment of country. We have Bank's Rationalization case, *R. C. Cooper v. Union of India*²², in which Banking Companies (Acquisition and Transfer of Undertakings) Act of 1969 was challenged and Court declared those acts as invalid as it discriminate against 14 banks that were to be nationalized. Then we have *Keshavananda* case, popularly known as Fundamental Rights case, in that case decision of *Golak Nath* was overruled and Basic Structure Doctrine was given and Court retains the power to check the validity of constitutional amendments. Many basic features were chosen including federal character of the Constitution²³, fundamental freedoms²⁴, mandate to build a welfare state and egalitarian society²⁵, and any of the fundamental rights²⁶. Between 1950 and 1978, in *A. K. Gopalan and Maneka Gandhi*, Supreme Court gave judgments that expanded the scope of Article 21 of Indian Constitution. There are cases like *Govind v. State of M.P.*²⁷, in which Court contemplated right to privacy in the right to personal liberty. During 1980's, two major developments- broadening of scope of constitutional laws and judicial activities through public Interest Litigation provided a strong drive for growth of Judicial activism in India. More scope was given to citizens and different groups. Importance of Directive Principles was shown in case of *Minerva Mills Ltd. v.*

¹⁸ Lyakar Ali Justice, Judiciary and Judicial Activism, (Legal views and News, New Delhi, Feb 1998) p.26

¹⁹ Mohd. Gouse 'The Two Faces of Judicial Activism' (1990)

²⁰ AIR 1951 SC 458

²¹ AIR 1965 SC 845

²² AIR 1970 SC 564

²³ Per Sikri, C.J

²⁴ Per Shelat and Grover, J.J

²⁵ Per Hedge and Mukherjee, J.J

²⁶ Per Jagmohan Reddy, J

²⁷ AIR 1975 SC 1378

Union of India²⁸. Equal importance should be given to both Part III (Fundamental Rights) and Part IV (Directive Principles) of Constitution otherwise harmony and balance will be disturbed. While giving its decision, Supreme Court envisaged judicial and quasi-judicial bodies to change their earlier decision after impartial hearing. A new dimension was given to the legal requirement of audi alteram partem. Cases of *Bandhua Mukti Morcha*²⁹ and *Mukesh Advani v. State of Madhya Pradesh*³⁰ were focused on problem of bonded labour. In case of *National Workers Union v. P. R. Ramakrishnan*³¹, Court held that law should adopt itself with changing society, and its role is dynamic in social transformation process. In case of *M. C. Mehta v. Union of India*³², apex Court held that when any law does not fit in current scenario, it is duty of court to evolve a new law. Judicial review was held to be the heart and soul of this constitution in case of *Debu v. State of maharashtra*³³. Judiciary is the final interpreter of constitution, it has to determine the extent and scope of the powers conferred by constitution on each wing of Government to ensure that no one crosses its limits. Recent examples of judicial activism are 2G Spectrum³⁴ and commonwealth scam cases,³⁵ Noida land acquisition case, case relating to 2002 Gujarat riot, and the order to convert the Auto rickshaw to CNG to reduce Delhi's smog problem. Often criticized for alleged judicial overreach, the Supreme Court justified its order cancelling 122 licenses for 2G-spectrum, saying it was duty-bound to strike down policies that violate constitutional principles or were contrary to public interest. An apex court bench said this was needed to —ensure that the institutional integrity is not compromised by those in whom the people have reposed trust and who have taken oath to discharge duties in accordance with the Constitution and the law without fear or favour, affection or ill will and who, as any other citizen, enjoy fundamental rights but is bound to perform duties” It said, “There cannot be any quarrel with the proposition that the court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies.

²⁸ AIR 1980 SC 1789

²⁹ AIR 1984 SC 802

³⁰ AIR 1985 SC 1363

³¹ AIR 1983 SC 75

³² AIR 1987 SC 1086

³³ (2000) 8 SCC 437

³⁴ Available at <http://m.thehindu.com/opinion/lead/disturbing-trends- in-judicial-activism/article3731471.ece>

³⁵ Available at <http://www.insightsonindia.com/2016/01/26/2-unrestrained-judicial-activism-india-unmoored-sound-principles-disservice-governance-country-damaging-economic-growth-prospects-agree-statement/>

“However, when it is clearly demonstrated before the court that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognized parameters,” the bench added. Referring to the PILs filed by the Centre for Public Interest, it said: —When matters like these are brought before the judicial constituent of the State by public spirited citizens, it becomes the duty of the Court to exercise its power in larger public interest...” While admitting that TRAI was an expert body assigned with important functions under the 1997 TRAI Act, the bench said, the Trai in making recommendations cannot overlook the basic constitutional principles and recommend which should deny majority of people from participating in the distribution of state property. Holding that spectrum was a natural resources, the court said natural resources “are vested with the government as a matter of trust in the name of the people of India ,and it is the solemn duty of the state to protect the national interest, and natural resources must always be used in interest of the country and not private interest.” In Noida land acquisition case the Supreme Court cancelled the acquisition of land by U.P government as it was acquired for industrial purpose but it was given to builders for making apartments. The court ordered that land should be reverting back to farmers from whom land was acquired. Often Supreme Court and different high courts pass order for CBI investigation in several cases. Under the law these power lies with the governments. These are an example of judicial activism.

THE CONTRIBUTION OF PIL IN JUDICIAL ACTIVISM

The term Public Interest Litigation is composed of public interest and litigation where “public interest” means benefit or welfare of the community at large and the word “litigation” means a legal proceeding against a person with the purpose of enforcing a right or seeking a remedy. Thus, Public Interest Litigation means “litigation or legal proceeding for the benefit of minority or disadvantage people or community as whole.

In simple words, public interest litigation means any person can approach to court for the welfare or interest of the public at large to the supreme court under Article 32, to high court under article 226 or before public magistrate under section 133 of Criminal Procedure Code, 1973. The main reason behind the introduction of PIL was that sometimes due the some circumstances, the

victim himself could not approach to court such as in *Hussainara Khatoon v. State of Bihar*³⁶ case where prisoners themselves could not approach the court. So a PIL was filed by Kapila Hingorani under the name of all these prisoners and the Supreme Court released 40,000 prisoners whose suits were pending in the court. It was further added that the prisoners should get the benefit of free legal aid and fast hearing. However, it was *S.P. Gupta v. Union of India*³⁷ case where the Supreme Court first time defines the term Public interest litigation in India. PIL is filed for a variety of cases such as maintenance of ecological balance, making municipal authorities comply with statutory obligations of provision of civic amenities, violation of fundamental rights etc. It is not much costly to file a PIL in courts. As Justice Bhagwati observed in *Asiad workers are being thrown open to the poor and the downtrodden*. The courts must shed their character as upholders of the established order and the status quo. The time has come now when the courts must become the courts for the poor and the struggling masses of this country.³⁸ In a real sense, PIL provides a boost to judicial activism, where the judiciary can easily introduce changes with the change in time and circumstances under Indian legal system

CRITICAL ANALYSIS OF JUDICIAL ACTIVISM IN INDIA

Articles 12 to 35 of the Constitution pertain to fundamental rights of the people and cover a wider ground than the Bill of Rights under the U.S. Constitution. The framers of the Indian Constitution visualized great many difficulties in enunciating the fundamental rights in general terms and chose to leave their plight and enforcement in the hands of judiciary by vesting the powers of Judicial Review on it. The Constitution of India explicitly confers the power of judicial review in several Articles such as 13, 32, 131-136, 143, 226 and 246.³⁹ Judicial Review is thus firmly rooted in India and has the explicit sanction of the Constitution. The courts in India are thus under a constitutional duty to interpret the constitution and declare the law as unconstitutional if found to be contrary to the constitutional spirit. In doing so, the courts act as a sentinel on the *qui vive*.⁴⁰

³⁶ 1979 AIR 1369

³⁷ AIR 1982 SC 149

³⁸ Ibid

³⁹ 8 See Chs. IV, VIII, X, XXXIII Constitution of India

⁴⁰ *State of Madras v. V.G.Row* AIR 1952 SC 196

However it is well known that Indian Judiciary plays a very effective role for betterment of individuals. But there are some flaws which are still not covered. It can be seen that during emergency period there were several amendments which were passed to decrease the powers of the judiciary. *A.D.M. Jabalpur v. Shivkant Shukla*⁴¹ decision had revealed that how weak the court could be against a hegemonic executive. Earlier courts thought that their independence and neutrality depended upon the political parties because they were supported by the people. But after the emergency period, judiciary got the opportunity to expand the rights of individuals such as the right to equality and the right to personal liberty. In *Maneka Gandhi* case judiciary expanded the ambit of article 21 through introducing various rights into it. That approach of Indian judiciary was similar to that of US Supreme Court, which incorporated the first ten amendments in the fourteenth amendment, which alone was applicable to the states, and thus made the entire bill of rights applicable to the states. However, there is a huge difference between Indian and U.S. Judiciary. The scope of judicial activism in India is narrower than the U.S. judicial activism. In US, if the judges think that a particular law and the philosophy of it, is not liked by the judges, then also the judiciary may reject the law. But it is not same in India, where constitution becomes the basis for rejection of law means laws were rejected on the basis of contravention of Indian constitution. In the US, Judiciary not only interprets the laws but also makes new laws in its place. Although, it is not the responsibility of the US judiciary to make laws. In India there is no such role played by Indian Judiciary. The Judiciary can reject laws and then leave the matter to the legislature to make a new law. Indian judiciary often gets influenced with the change in political parties. So it is necessary that the judiciary should be kept separate from the legislature. The real purpose of judiciary, is vested on its independence from the legislative, otherwise there will not be transparency in judicial decision. There is one more flaw in Indian legal system that judicial decisions are not much binding on the legislature. In *M.C. Mehta v. Union of India*⁴², a writ petition was filed with concern of huge vehicular pollution in Delhi. In this case the Supreme Court had passed directions for the phasing out of diesel buses and for the conversion to CNG. However, the government did not respond speedily to that order. So there is a need to reform that government should actively respond to the decision of the courts.

⁴¹ 1976 AIR 1207

⁴² (2001), 3 SCC 763

CONCLUSION

The major strength of Indian judiciary is that it is not elected by people and it has a secure (through not life) tenure. On the other hand parliament, which consists of several political parties and these parties are depend upon vote bank. So they cannot take strong steps toward modernity. But judiciary which is not depended upon any kind of vote bank can do it.

It cannot be disputed that judicial activism has done a lot to ameliorate the conditions of the masses in the country. It has set right a number of wrongs committed by the states (J.N. Pandey, 1998) as well as by individuals. The common people are very often denied the protection of law due to delayed functioning of the courts, also called judicial inertia or judicial tardiness (Nikhil Chakrawartty, 1997). Judicial activism has started the process to remove these occasional aberrations too. This can be furthered only by honest and forthright judicial activism and not by running down the judiciary in the eyes of the public. The Chief Justice of India Adarsh Sen Anand (as he then was) has realized that the real source of strength of the judiciary lies in the public confidence in it (A. S. Anand, 1998) and the judges have to ensure that this confidence is not lost. As Justice J.S. Verma (as he then was) has referred: "Judicial activism is a sharp-edged tool which has to be used as a scalpel by a skilful surgeon to cure the malady. Not as a Rampuri knife which can kill." (J. S. Verma, 1996). The courts have innovated to reach justice to the deprived section of the society

Conservatives tend to argue that judicial activism is the process of ignoring, or at least selectively choosing precedent in order to hand down rulings which dramatically expand personal freedoms. This, it is argued, violates the doctrine of separation of powers. Whatsoever may be the case, one can negate the fruits of justice which the common public got duke to this enhanced and activist role of the judiciary.

Just like the US Supreme court, Indian Supreme court should also decide the cases on the basis of its own philosophy to declare laws as unenforceable. Indian Supreme court should expand its limits from constitution to its own philosophy. So judiciary will not be affected with the change in ruling party and the balance in separation of powers would be maintained. All these reforms can enforce the prudent practice of judicial activism India.