

Judicial Activism in India

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Abstract

The emergence of judicial review gave birth to a new movement which is known as judicial activism. Judicial activism can be described when the judiciary steps in to the shoes of the executive or the legislature and embarks on the works and privileges of the other two organs of the Constitution. This paper traces the evolution of judicial activism since Independence through pronouncements of the Supreme Court. It brings out distinct phases in this evolution. The first phase of an activist judiciary where the Supreme Court primarily was concerned with protection of fundamental rights and humane treatment of citizens; the second phase where the Supreme Court took keen interest in preservation and protection of the environment; the third phase where the Supreme Court extended its reach into the socio-economic arena. From the inception of legal history till date, various critics have given various definitions of judicial activism, which are not only different but also contradictory. This is an attempt to bring out the exact connotation of "judicial activism" and to find out its effects on today's changing society.

KEYWORDS: Constitution of India, Judicial Activism and public interest litigation.

INTRODUCTION:

In the last few years the Supreme Court has, through intense judicial activism, become a symbol of hope for the people of India. It is for the judge to give meaning to what the legislature has said and it is this process of interpretation which constitutes the most creative and thrilling function of a judge.¹

MEANING AND CONCEPT:

The term "judicial activism" was coined for the first time by Arthur Schlesinger Jr. in his article "The Supreme Court: 1947,". 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*.

The emergence of judicial review gave birth to a new movement which is known as judicial activism. According to Black Law Dictionary judicial activism is known as a "philosophy of judicial decision making whereby judges allow their personal views about public policy among other factors to guide their decision". Judicial activism can be described when the judiciary steps in to the shoes of the executive or the legislature and embarks on the works and privileges of the other two organs of the Constitution.

BRIEF HISTORY IN INDIA:

In the initial years of 1950-67, the Supreme Court adopted the attitude of judicial restraint in which the court gave a strict and literal interpretation of the constitution. The nature and scope of judicial review was first examined by the Supreme Court in *A.K.*

*Gopalan*ⁱⁱ case where it accepted the principle of judicial subordination to legislative wisdom. But on the whole it limited itself and exercised judicial restraint. The second phase unfolded with the *Golaknath*ⁱⁱⁱ case which resulted in an open conflict between the judiciary and legislature. The parliament asserted its supremacy and the Supreme Court asserted its power of Judicial Review, which resulted in a series of constitutional amendments in which the parliament tried to limit the power of Judicial review. In the Emergency of 1975-77, the judiciary was made subservient to the legislature and executive. In *Golaknath* case, the Supreme Court gave an unprecedented judgment, which was clearly a case of Judicial Activism. The reason of imposing emergency was the decision of Allahabad High Court setting aside the election of Prime Minister Indira Gandhi to the Lok Sabha. The 42nd constitutional Amendment Act was also passed which put new limitations on the judiciary. After the emergency the 44th constitutional Act was passed which restored the judiciary's position as it had existed before the emergency. In *Minerva mills*^{iv} case the Supreme Court declared judicial review as part of the basic structure. Since 1980's we saw the emergence of Judicial Activism as a powerful tool in Indian Polity. Thus now we find that the Supreme Court is no longer exercising judicial restraint. But in fact, it has taken up Judicial Activism so much. A court giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the right of the individual is said to be an activist court. Thus has given birth to Judicial Activism. In the words of Justice J. S. Varma "The role of the Judiciary in interpreting existing laws according to the needs of the times and filling in the gaps appears to be the true meaning of Judicial Activism"

JUDICIAL ACTIVISM IN VARIOUS FIELDS:

Protection of ecology and environment pollution:

The efforts of the Apex court in environment pollution control through PIL is indeed laudable, particularly when the legislature is lagging behind in bridging the lacuna in the existing legal system and administration is not well equipped to meet the challenge.

In Shriram food and fertilizer case^v the Supreme court at the instance of a PIL, directed the company manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in its neighbourhood, to take all necessary safety measures before reopening the plant.

In another case of *M.C Mehta v/s UOI i.e. pollution of Taj Mahal*^{vi}, the petitioner through PIL tried to draw the attention of the court towards the degradation of the Taj Mahal due to the atmosphere pollution caused by a number of foundries, chemically hazardous industries established and functioning around the Taj Mahal. Mr. Justice Kuldip Singh better known as green judge for his decisions on pollution, held that the 292 polluting industries locally operating in the area are the main source of pollution and directed them to change over within fixed time schedule to natural gas as industrial fuel and if they could not do so they must stop functioning beyond 31st Dec 1997 and be reallocated alternative plots in the industrial estate outside Taj Trapezium.

In Indian council for Enviro-Legal Action v/s UOI^{vii} the Supreme court has held that if by the action of private corporate bodies a person's fundamental right is violated the court would not accept the argument that it is not 'state' within the meaning of Art.12 and therefore, action cannot be taken against it. If the court finds that the Government or authorities concerned have not taken the action required of them by law and this has

resulted in violation of the right to life of the citizens, it will be the duty of the court to intervene. In this case an environmentalist organization filed a writ petition under Art.32 before the court complaining the plight of people living in the vicinity of chemical industrial plants in India and requesting for appropriate remedial measures.

The Court reasoned that the failure of statutory agencies violated the rights of citizens to life and liberty guaranteed by Article 21 of the Constitution. In doing so, the Court has enunciated guiding principles such as ‘polluter pays for pollution’^{viii} and that the burden of proof would lie on the party that wanted to change the status quo^{ix}. At the same time the Court has sought to balance development and environmental concerns and thereby limit its role to review of decision-making by governments only. The Court has intervened where relief and rehabilitation of people displaced by a project was not paid^x and in cases where projects were approved by governments without considering environmental hazards^{xi}. The Court also supported development in the Narmada Bachao Andolan v. Union of India^{xii}.

Bonded labourers:

In people’ union for Democratic Rights v/Union of India i.e. Asiad case^{xiii} the court has held that the state is bound to ensure the observance of the labour legislation enacted for securing the workmen a life of human dignity and inaction on part of state in implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Art 21.

Protection against inhuman treatment in jail:

In Sunil Batra v/s Delhi Administration^{xiv} it has been held that the writ of habeas corpus can be issued not only for releasing a person from illegal detention but also protecting prisoners from inhuman and barbarous treatment.

Whenever the rights of a prisoner either under constitution or under other laws are violated the writ power of the court can run and should run to rescue, declared Krishna Iyer, J in *Veena Sethi v/s State Of Bihar^{xv}* [the court was informed through a letter that some prisoners ,who were insane at the time of trial but subsequently declared sane, were not released due to inaction of state authorities and had to remain in jails from 20 to 30 years. The court directed that they be released forthwith.

Legislation by the Judiciary:

The Supreme Court of India took serious stance on Sexual harassment of working women at work place. It stated that “each incident of sexual harassment of women at work place results in violative of fundamental rights of Gender equality and Right to Life and liberty (Art 14 and 21 of the Constitution)”

In case of Vishkha V/s state of Rajasthan^{xvi}, the Supreme Court has made it clear that the sexual harassment of working women amounts to violation of right of gender equality and right to life and personal liberty. As a logical consequence it also amounts to the violation of right to practice any profession, occupation or trade. The SC laid down certain guidelines to be observed at all work place or other institutions until legislation is enacted for the purpose. These guidelines would be treated as the law declared by Supreme Court under Art 141.

This case law provided relief to millions of working women who were compelled to remain silent at their working place even though they face sexual comment, harassment etc. In fact this case fills the lacuna in law to deal with this kind of problem facing by working women at their working place.

Ban on smoking in public places:

In a significant judgment the SC has directed all states and union territories to immediately issue orders banning smoking in public places and public transports, including railways. The centre has introduced an anti –smoking bill in the parliament.

Professional ethics and medical men:

In a significant judgment in *Parmanand Katara v/s Union of India*^{xvii} the Supreme Court has held that it is a paramount obligation of every member of medical profession (private or government) to give medical aid to every injured citizen brought for treatment immediately without waiting for procedural formalities to be completed in order to avoid negligent death.

Child Welfare:

In *M.C Mehta v/s State of Tamilnadu*^{xviii} it has been held that the children can't be employed in match factories which are directly connected with the manufacturing process as it is a hazardous employment within the meaning of employment of children Act 1938. They can however be employed in place of manufacture to avoid exposure to accidents. Every child must be insured for a sum of five thousands and premium to be paid by employer as a condition of service.

In *Lakshmi Kant Pandey v/s Union Of India*^{xix} a writ petition was filed on the basis of a letter complaining of malpractices indulged by social organization and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. Bhagwati J (as he then was) laid down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents with object of ensuring the welfare of the child. His lordship directed the government and various agencies dealing with the matter to follow these principles in such cases as it is their constitutional obligation under Art 15(3) and 39(c) and (f) to ensure the welfare of child.

Right to life and personal liberty available to non-citizen:

In the case of *National Human Rights Commission v/s State of Arunachal Pradesh*^{xx} the Supreme Court held that every citizen or non-citizen is entitled to the right of life and personal liberty guaranteed by Art 21.

Fake encounter:

In *Union for Civil Liberties v/s Union of India*^{xxi}, the court has held that the fake encounter by the police is violative of Art 21. If it is proved that the person has been killed by the police in fake encounter, the state may be directed to pay compensation and in such cases the doctrine of sovereign immunity does not apply.

Power to award compensation under Art 32:

In *M.C Mehta v/s Union of India*^{xxii} the Supreme Court has held that the scope of Art 32 is wide enough to include the power to grant compensation for violation of fundamental rights.

Recent examples of Judicial Activism:

2G Spectrum and commonwealth scam cases are glaring examples to show that how PIL can be used to check the menace of corruption in Indian Administration. In both these cases matter was initiated at the instance of public spirited person by way of PIL. On 2nd february 2012 the SC court has taken an unprecedented step and cancelled 122 2G licenses distributed by government in 2008 to different telecom companies.

Often criticised 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.

“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 recognised parameters,” the bench added.

Referring to the PILs filed by the Centre for Public Interest Litigation and Janata Party chief Subramanian Swamy, 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 revert 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. This is again an example of judicial activism.

The Supreme Court has also played a significant role in case relating 2002 Gujarat riot

Criticism of Judicial Activism:

The concept of judicial activism has been put under scanner by the critic since its inception. It has been criticized on several counts. One such criticism is that the PIL strategy is a status quoits approach of the court to avoid any change in the system and so it is a painkilling strategy which does not treat the disease. It is argued that the problems of the poor ,disadvantaged and the deprived cannot be solved by any trickle down method, therefore whatever the court is doing in PIL is merely symbolic, simply to earn a legitimacy for itself which it has lost over the years..The critics have further

argued that because of judicial activism, separation of power has been under stake. The judiciary is interfering in the field of executive and several times it has become difficult for executive to deal with new kind of problem with new strategy as it is anticipated that judiciary will struck down this type of strategy'

It is further argued that by extending its jurisdiction through PIL the court is trying to bite more than what it can chew. Lawyers have started complaining that much of the court's time is being consumed by PIL and hence for the court a postcard are more important than a fifty-page affidavit. It is further argued that at a time when the figures of pending cases before the courts are astronomical, this new area of litigation would spell a total collapse of the judicial system in India as it would open floodgates of litigation. However, the history of PIL in India does not support this apprehension. Contrary to the popular belief fresh PIL filing has registered a decline in the subsequent years.

According to one opinion, the misuse of PIL has reached ridiculous limits and petitions are being filed all over the country before the writ courts for matters like student and teacher strike, shortage of buses, lack of cleanliness in hospitals, irregularities in stock exchange, painting of road signs, Dengue fever, examinations and admissions in universities and college etc. one can go on but the list will not be exhaustive. Classical case came up when PIL petition was filed in Delhi High Court to seek direction to the United Front Government at the centre (1997) to form a coalition cabinet with the congress. A petition (1999) was filed for invalidating no-confidence vote against the Vajpayee Government.

Power and publicity apart, many judges have to entertain PIL because of the liberalization of the rule of locus standi and the concept of social justice for the poor, oppressed and exploited sections of the society. Thus indiscriminate use of this strategy is bringing it into disrepute because it has become the privilege of the privileged to have access to the court. In fact, majority of the petitions either should not have been filed or should not have been entertained. PIL must be confined to cases where justice is to be reached to that section of the society which cannot come to the court due to socio-economic handicap or where a matter of grave public concern is involved.

Conclusion:

Even if all these criticism is valid no one would suggest to abolish this strategy which the courts have innovated to reach justice to the deprived section of the society. Anything contrary would be like suggesting the abolition of marriage in order to solve the problem of divorce. This socio-economic movement generated by court has at least kept alive the hope of the people for justice and thus has weaned people away from self-help or seeking redress through a private system of justice .It is necessary for sustaining the democratic system and the establishment of a rule of law in society. Therefore, one has to be both adventurous and cautious in this respect and the judiciary has to keep on learning mostly by experience.

Public Interest litigation must not be allowed to degenerate into Private Publicity or Political or Paisa Interest litigation. Finding the delicate balance between ensuring justice and maintaining institutional legitimacy is the continuing challenge before the higher judiciary.

Needless to emphasise that the strategy of PIL must be used by the courts carefully, prudently and with discrimination because any discriminate use of it would bring it into contempt both from the public and the government .Therefore, the correct

approach of the court in PIL cases should be a judicious mix of restraint and activism determined by the dictates of existing realities. Any misuse of this strategy must be strongly discouraged by the courts.

It is for this reason that the Apex court in *BALCO Employees' Union v/s Union of India*^{xxiii} clearly held that administrative powers cannot be challenged in PIL unless there is a violation of Art 21 of the constitution and persons adversely affected are unable to approach the court. This limits the power of the court and the initiative of a busybody.

Furthermore the Apex court in order to check the misuse of PIL has laid down several guidelines in case of *State of Uttranchal v/s Balwant Singh Chufal and others*^{xxiv} which are as under:

1. The courts must encourage genuine and bonafide PIL and effectively discourage and curb PIL filed for extraneous considerations.
2. Instead of every individual Judge devising his own procedure for dealing with PIL, it is appropriate for each High Court to properly formulate rules for encouraging genuine PIL and discouraging PIL filed with oblique motives.
3. The courts should be prima facie verifying the credentials of the petitioner before entertaining a PIL.
4. The court should be prima facie satisfied regarding the correctness of contents of the petition before entertaining a PIL.
5. The courts should be fully satisfied that substantial public interest is involved before entertaining the petition.
6. The court should ensure that petition which involves larger public interest, gravity and urgency must be given priority over other petitions.
7. The courts before entertaining PIL should ensure that PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing PIL.
8. The courts should also ensure that petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and petition filed for extraneous considerations.

The critics of judicial activism should remember the fact that in India until the Public Interest Litigation was developed by the Supreme Court; justice was only a remote and even theoretical proposition for the mass of illiterate, underprivileged and exploited persons in the country. At a time of crucial, social and economic transformation, the judicial process has a part to play as a midwife of change. The issue of Public Interest Litigation touches a matter of the highest importance literally affecting the quality of life of millions of Indians. Besides this, it will also spread wide the canvas of judicial popular support and moral authority especially at a time when other institutions of governance are facing a legitimate crisis.

In underlining the need for judicial activism to end class and ethnic exploitation, the International Workshop on 'Role of the Judiciary in Plural Societies' has echoed the emerging sentiments in favour of PIL. The need for judicial activism was also stressed in the task of balancing interest of ethnic groups as both the executive and the legislature would invariably reflect the aspirations of the majority community. Judicial inaction in

such circumstances could aggravate perceptions of injustice and eventually lead to violence. It was perhaps as much recognition of these dangers as it was a response to considerations of social justice that witnessed the growth of Public Interest Litigation in India.

It is true that the independence of the judiciary is the first concern of the Constitution but how far a judge can go is not without limits. Court is called upon to dispense justice according to the Constitution and the law of the land. Therefore, in activity it must not forget the limits of its power that call for self-restraint and in periods of restraint it must not be unmindful of its Constitutional duty and obligation. Fact remains that the judiciary in India has performed well, lapses notwithstanding.

END NOTE

ⁱ Speech of Justice P.N.Bhagabati, Chief justice of India on Judicial Activism in India. <http://media.law.wisc.edu>

ⁱⁱ A.K. Gopalan v. State of Madras, AIR 1950 SC 27

ⁱⁱⁱ LCGolakanath V. The State of Punjab, AIR 1975 SC 1643

^{iv} *Minerva Mills Ltd. and Ors. v. Union Of India and Ors.* (case citation: AIR 1980 SC 1789)

^v M.C Mehta v/s Union of India, 1986, vol 2 scc 176]

^{vi} AIR 1997 SC 735

^{vii} 1996}3SCC212

^{viii} MC Mehta v. Union of India, 1987

^{ix} AP Pollution Control Board v. MV Nayudu, 1999).

^x Narmada Bachao Andolan v. India, 1998)

^{xi} (DLF Universal Ltd. V. Prof. ALakshmi Sagar, 1998).

^{xii} Narmada Bachao Andolan v. Union of India (2000, 10 SCC 664).

^{xiii} AIR 1982 SC 1473

^{xiv} AIR 1980 SC 1759

^{xv} AIR 1983 SC 339]

^{xvi} AIR 1997 SC 3011

^{xvii} AIR 1989 SC 2039

^{xviii} AIR 1991 SC 417]

^{xix} 1984)2SCC 244

^{xx} AIR 1996 SC 1234

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^{xxii} AIR 1987 SC 1086]

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