

CHAPTER 4

JUDICIAL ACTIVISM AS PART OF JUDICIAL PROCESS

Background

The term 'Judicial Activism' refers to judicial creativity. Judicial activism is a part of judicial process and marks a creative activity of the judiciary. Judicial activism is not an aberration. On the other hand, it is labelled as judicial terrorism. It is an essential aspect of the dynamics of a constitutional court. It is counter – majoritarian check in democracy.

The Supreme Court of India started off as a technocratic court in 1950 but slowly started acquiring more power through constitutional interpretation. The years since 1977 have been years of intense judicial activism; the Court has innovated, developed new techniques, discovered and applied new remedies for transgression of fundamental rights, and attempted to fill the vacuum resulting from executive and legislative inaction. The constitutional foundation for the new jurisdiction was established by a dilution of the doctrine of *locus standi*, notably after S.P.Gupta.³⁵

Its transformation into an activist court has been gradual and imperceptible. In fact the roots of judicial activism are to be seen in the court's early assertion regarding the nature of judicial review in *A.K.Gopalan v. State of Madras*.³⁶ More than twenty five years later, the Supreme Court overruled *Gopalan*³⁷ holding that 'the procedure' prescribed by the law could always be scrutinised by courts and any procedure which was arbitrary or unreasonable would not pass muster under Article 21.³⁸

In *Nilabati Behera v. State of Orissa*³⁹ a letter was treated as a Writ Petition under Article 32 and dealt with as such. The prayer was for award of compensation for deprivation of life guaranteed under Article 21 in a case where the petitioner's son aged 22 years was

³⁵ S.P.Gupta v. Union of India, AIR 1982 SC 149.

³⁶ AIR 1950 SC 27.

³⁷ Ibid

³⁸ Maneka Gandhi v. Union of India, AIR 1978 SC 597.

³⁹ (1993) 2 SCC 746.

picked up by the police; the court gave a direction to the District Judge in Orissa to hold an inquiry into the matter and submit a report. As a result of the findings in the report, the Court held that the petitioner's son died as a result of injuries inflicted on him while he was in police custody. The Court ultimately held that the petitioner could claim damages in public law based on strict liability for violation of the Fundamental Right namely right to life.⁴⁰

The Supreme Court of India is the guardian and watchdog of the Indian democracy and democratic rights. The judgments delivered in PIL cases have far reaching consequences to the public in general for protection of Human Rights such as right to life, liberty, environmental protection, etc. Judicial Activism is nothing but the review of legislative and executive action. The judiciary in India is kept under obligation to balance the scale of justice for protecting Human Rights in general and the rights of the weaker sections and women in particular. The Indian Supreme Court has evolved from a positivist court into an activist court over the last sixty years. It has not, as is generally believed, suddenly become activist in its approach during the last two decades. It has taken longer than that for the Court to acquire its present stature and it has had to go through many stresses and strains. The Indian Judiciary is presently the most powerful organ of the State.⁴¹

Social Justice

The concept of a 'welfare State' wherein the Government's tasks have been increased several folds, setting up various administrative agencies to carry out the objectives of a 'social welfare state' centres around the problems concerning 'social justice' and more particularly, the necessity to balance 'private' and 'social' interests. The bulk of the legislation related to 'social justice', as 'too many people, still lack the simplest necessities of life and too many are deprived of the most basic human rights'. The urgent need for mankind is not

⁴⁰ The decision rendered in *Nilabati Behera v. State of Orissa* has been mentioned in the Judgment of Cooke J. in *Simpson v. Attorney General* (Baigent's case) (1994) 3 NZLR 667, where a Court of Appeal in New Zealand held that despite the absence of a remedy clause in New Zealand's Bill of Rights, 1985, the Judiciary had power to grant pecuniary compensation for contravention of the rights guaranteed under the provisions.

⁴¹ Bhurelal, *Judicial Activism and Accountability*, Siddhartha Publications, New Delhi 2004, at 19.

the recognition and declaration of fundamental human rights, but their protection by the international community. In India, 90% of social legislations pertain to the realm of human rights, and thus 'social justice' found active support at the hands of the judiciary besides other human rights champions such as the press and electronic media. The Indian judiciary has left no stone unturned in promoting the cause of 'social justice' and has devised new tools such as 'public interest litigation' to secure benefit to a class or group of persons, either victim of exploitation, or oppression or whose constitutional rights are violated but cannot access justice through courts because of their ignorance or poverty.⁴²

One of the major problems concerning 'social justice' is the one relating to enforcement of laws. In England, an ordinary citizen can seek the enforcement of law for the benefit of all, as against public authorities in respect of statutory duties.⁴³ A similar right has been conferred in Indian cases, such as the one relating to enforcement of a law restraining child marriage in Rajasthan, abolition of bonded labour, eradication of untouchability, child welfare, award of compensation in accident cases, right to livelihood, social and economic justice in industrial adjudication, protective discrimination in favour of backward classes, securing the liberty of women and children detained, women welfare in cases of loss of life of bread-winners, damages for administrative lapses, suitable educational opportunities to mentally impaired children, and in several other cases of far reaching constitutional significance. The courts in the country have done everything possible to help the poor, and to break every procedural barrier to deliver justice to the poor.⁴⁴

Right to Move the Courts

Article 32 is the heart and soul of the Constitution as it provides remedies against the infringement of fundamental rights. It guarantees the right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by Part III of the Constitution. Article 13 voids every pre and post constitutional law to the extent it abridges or

⁴² AIR 1996 Journal section, at 49-53.

⁴³ Lord Denning, *The Discipline of the Law*, Butterworths, London, 1982, at 133.

⁴⁴ AIR 1996 Journal section, at 50.

takes away any of the rights conferred by Part III of the Constitution. Articles 32 and 226 empower the judges to declare any law null and void, if it was found to be against any of the fundamental rights enshrined in the Constitution. Article 141 of the Constitution authorises the Supreme Court to lay down the law for the country in its decisions.

Judicial activism keeps the judiciary active to remove the inertia of Government in fulfilling the constitutional goals. The judicial activism in India is much more superior to the American counterpart taking into account the social conditions in India. No doubt judicial activism in India results in policy making. However, it is only for the purpose of enforcing the constitutional rights of affected persons. At the same time, the other organs of the government should take this activist role of the judiciary as a positive step to render justice rather than as usurpation of power. Justice Holmes had once remarked that the 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts. But, if the legislature itself violates or abridges the rights, the people can move only the courts and not the legislatures'. Thus, judicial activism, if properly used, can protect the interest and the rights and liberties of the individuals against the arbitrary actions of the Government. At the High Court level, Article 226 provides for such remedies for the protection of fundamental rights. Justice Patanjali Sastry observed that even the first generation of Judges of the Supreme Court were conscious of the activist role of the Court.⁴⁵

The Courts in India have evolved the concept of public interest litigation in the 1980s primarily by relaxing the rule of '*locus standi*'. The normal rule is that only the 'person aggrieved' could approach the court. The primary reason for relaxation of this rule was that the weaker sections of the Society, due to their poverty, ignorance, illiteracy and exploitation, were not able to assert their rights. Yet, the Courts have encountered delays in getting access to evidentiary records or official papers as they have the adversarial system to work with.

⁴⁵ State of Madras v. V.G. Row, AIR 1992 SC 196.

Judicial Review

Judicial review is an essential component of the Rule of Law, which is a basic feature of the Indian Constitution. The Supreme Court as an independent authority has been mandated to decide disputes between the Union and the States or between the various States. As a guardian and interpreter of the Constitution it has to consider the constitutional validity of any law and even constitutional amendments passed by the Parliament. An independent judiciary is essential for ensuring human rights and protection of democracy.

Democracy cannot exist without justice and justice cannot exist without an independent judiciary. The Judiciary is identified as the last bulwark against arbitrariness. Judiciary being the neutral wing of Government unlike the legislature and the executive is trusted with the responsibility to check unconstitutional behaviour and enforce the constitutional mandate. Judicial activism has both merits and demerits. It ensures speedy justice protecting peoples' right through public interest litigation. At the same time, it leads to unhappy relationship with the Executive and legislature. The following are some of the circumstances, which have led to judicial activism:

- ❖ Judiciary has been able to command the respect and confidence of the people particularly after the emergency in the country, in which period people got the necessary protection from judges only.
- ❖ The power of the court to punish for its contempt has been a powerful weapon in the armoury of the Court although it uses this power sparingly.
- ❖ The fractured poll verdicts which have created an atmosphere of uncertainty to carry a Government for the full term, invites judicial activism and the executive and legislature find it as a friendly measure and a shield for themselves.
- ❖ The crux of the problem is that people have no confidence in the efficiency of the legislature.

The Indian Supreme Court is the only court in world history to have asserted the power of judicial review over amendments to the Constitution. Its strongest move was in announcing

the 'Basic Structure' limitations to the amending power.⁴⁶ The strong affirmation it gave to the limitation of the amending power in the *Minerva Mills case*⁴⁷ has served to strengthen the guarantees of the fundamental rights beyond fundamental assail by the shifting political winds and transient majorities in the legislatures. Following the affirmation of the basic structure the court has proceeded to identify several components of the Basic Structure as ingrained in Article 14, which article itself was lifted beyond amend ability by recognising it as part of the basic structure.⁴⁸ Alongside, the Rule of Law was identified as part of the Basic Structure, so was natural justice. The fundamental rights and Directive Principles are equally important components of the Basic Structure. In this exercise it has held out a hope for the citizenry of the protection against arbitrary exercise of political power. It's placing a question mark on the Ninth schedule⁴⁹ which was to be insulation against judicial scrutiny has served to check impulsive political decisions/ actions and to make the political actors more responsible in making of policy choices. Judicial Activism is an inherent feature of Judicial Review which is enforced as a result of several factors. As the policy becomes more complex and new challenges are thrown up, the Judiciary has to be taking on a more proactive role to interpret the laws and in cases where laws do not exist. For example, interpretation of fundamental rights to include sexual harassment of women at work place, gender justice, cyber crimes etc. In *Inamdar*,⁵⁰ a case filed by private institution offering professional courses, to avoid Government interference in the form of reservations, the Supreme Court passed an order doing away with quota system in admission. On the other hand, the Government considered the ruling as a stumbling block in their path to bring in social justice.

In the early eighties a new class of litigation has developed which differ from traditional litigation, in as much as, there are no plaintiffs or defendants nor

⁴⁶ *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845; *Golak Nath v. State of Punjab*, AIR 1967 Sc 1643; and *Keshvananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

⁴⁷ *Minerva Mills Ltd. V. Union of India*, (1980) 3 SCC 625.

⁴⁸ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299.

⁴⁹ *Waman Rao v. Union of India*, AIR 1981 SC 271.

⁵⁰ *P.A. Inamdar & Others v. State of Maharashtra & Others*, AIR 2005 SC 3226.

State/complainant versus accused, it is less expensive and more efficacious and is known as 'Public Interest Litigation' (PIL) or 'Social Action Litigation' (SAL).

In the case of PIL, the collective rights of the public are affected and redress is sought for such injury. There may be no direct specific injury to any member of the public as such. In the case of SAL, the petitions are made for the enforcement of the specific rights of a determinate class or group of people who are primarily injured by the impugned action. The injury suffered by members of this class is direct and redress is sought on their behalf because they are unable to approach the Court on account of indigence, illiteracy, social and economic disability, for e.g. Workers in stone-quarries, inmates of Care Homes, under trial prisoners in jails etc.

In *S.P.Gupta & Others v. President of India & Others*,⁵¹ Justice Bhagwati held that 'it could be grave lacuna in our system of public law if a pressure group or even a single spirited citizen were prevented by outdated technical rules of *locus standi* from bringing a matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped'. And in *Peoples Union for Democratic Rights v. Union of India*⁵² the Supreme Court has held that accepting less than minimum wages due to the economic compulsion comes under forced labour, and the Court directed the Government to take necessary steps for punishing the violation by private individuals of the fundamental rights of citizens guaranteed by Article 23.

Article 32 of the Constitution of India forms part of the constitutional system on the basis of two major grounds:

- that the distribution of legislative and the executive powers between the centre and the states cannot function smoothly without resort to judicial review of legislation whenever necessary; and

⁵¹ AIR 1982 SC 149

⁵² AIR 1982 SC 1473.

- that the regional and linguistic diversities in India make it desirable to have an independent and impartial judiciary in order to protect the fundamental rights of the individuals and the minorities.

The Constitution of the United States of America does not provide for judicial review in the text. However, the U.S. Supreme Court has evolved this power in 1803 through its famous decision in *Marbury v. Madison*.⁵³ Since then, the judiciary has been, to a large extent, protecting the rights of citizen against the executive actions of the State.

Nature of Judicial Activism in India

The judiciary aims to extend the benefit of the constitutional set up to the entire citizenry and not only to a group or class. Social justice is the constitutional promise, the prominence of which assigns an activist role to the court and this is a radical departure from the conventional judicial function of the British and even the American judges.⁵⁴ The entire constitutional promises including that of social justice, to the extent of the function assigned, is an irrevocable obligation on the judiciary. Enforcing the constitutional promises is the sole and the only role assigned to it. To fulfil the promise, even departing from the traditional judicial functioning would be necessary. The system need not be assessed keeping in mind fallibility of individual judges.

According to Justice Krishna Iyer the meaning of judicial activism is that the function of the court is not merely to interpret law but to make it by imaginatively sharing the passion of the Constitution for social justice'.⁵⁵ Justice Iyer said that 'in being activist, the Judge has to see with his eyes where justice lies. In being legalist, he has to see through the eyes of law'.⁵⁶ This sets up tug of war between legalism and activism, as if they are stepsisters. Justice Iyer maintains that judicial activism gets its highest bonus when it wipes out some tears from some eyes. The principal object to entertain PIL petitions is to maintain

⁵³ (1803) 1 Cranch 137.

⁵⁴ Justice V.R. Krishna Iyer, '*Law, Society and Collective Consciousness*', at 8.

⁵⁵ Journal, India Law Institute. Vol 28 (3), at 338.

⁵⁶ Journal, India Law Institute. Vol 30 (3).

the rule of law and prevent abuse of law and its authority and render social justice to the millions of poor, weaker, slum-dwellers and down-trodden. Justice Iyer said that 'law and justice as delivered by the Court could never see the suppressed and tortured Indians who were below the vision'⁵⁷.

The former Chief Justice of India P.N.Bhagwati has said that judicial activism is now the central feature of every political system that vests adjudicatory power in a free and independent judiciary. The scope of judicial activism increases considerably where the power of judicial review extends not only over executive action as in the United Kingdom, but also over the legislative action as in the United States and even over constitutional amendments as in India. In India the extension of power of judicial review over constitutional amendment itself is exercise of judicial activism on the part of the Supreme Court. Although the courts decided only a few cases during the first three decades of the constitutional practice, an element of judicial activism was present in some decisions. But during the last two decades there has been tremendous growth of judicial activism. The developments that had taken place in India can be broadly classified, for convenience, into two different areas.

In the first place, judicial activism pertains only to the substantive laws, which ultimately resulted in the extension of the existing rights, establishment of new rights and in the interpretation of constitutional provisions. The scope and content of Article 21, which speaks about the protection of life and personal liberty, has been expanded by the Supreme Court in *Maneka Gandhi v. Union of India*,⁵⁸ and in subsequent cases. A landmark judgment was delivered in *Golak Nath v. State of Punjab*⁵⁹ on the point of judicial review of constitutional amendments. A logical fallacy in this decision was corrected in *Keshvananda Bharati*⁶⁰ and the power of review was affirmed in *Minerva Mills v. Union of India*,⁶¹ and clauses (4) and (5) of 368 (4) and (5) seeking to oust judicial review of constitutional amendments which had been inserted by the Constitution (Forty Second Amendment)

⁵⁷ 30 JILI (1988), at 281.

⁵⁸ AIR 1978 SC 597.

⁵⁹ AIR 1967 SC 164

⁶⁰ AIR 1973 Sc 1461.

⁶¹ AIR 1980 SC 1789.

Act, 1976, were declared as unconstitutional. In 1981 the Supreme Court in *A.B.S.K. Singh (Railway) v. Union of India*,⁶² held that even an unregistered association could maintain a writ petition under Article 32 of the Constitution for the redressal of a common grievance. In deciding this case Justice V.R. Krishna Iyer declared that access to justice through 'class actions'. PIL and 'Representative Proceedings' is the present constitutional jurisprudence in India. Thus judicial activism has come to occupy an important position and status in the judicial process. The second area of judicial activism is more important than the first one in many aspects. The second area of judicial activism has made a greater impact in the ordinary life of the citizen of India. In other words, the Supreme Court started relaxing various rules of procedure to enable the ordinary common man in protecting his fundamental rights.

The courts in India started relaxing various procedural requirements by taking *suo motu* action in a few cases. Letters were treated as writ petitions and granted immediate relief. In *Sunil Batra v. Delhi Administration*,⁶³ the Supreme Court converted a letter into a habeas corpus petition. In the second stage of development of judicial activism, a procedural aspect, the '*Locus Standi*' rule was relaxed to the maximum possible extent. A letter addressed by two professors of law on behalf of the inmates of a protective home run by the State of U.P. was accepted as a writ petition by the court. In *Kadra Pahadiya v. State of Bihar*,⁶⁴ a letter written by a social science researcher about the plight of several under trial prisoners kept without being tried for more than five years was accepted as a writ petition. These are a few examples to illustrate the active role played by the judiciary in India with respect to the rules of procedure. In the judges transfer case the court further relaxed the concept of *locus standi*.

The third stage of development of judicial activism in India has resulted in the Supreme Court using Commissions or Committees to investigate into certain matters to

⁶² AIR 1981 SC 298.

⁶³ AIR 1980 SC 1579.

⁶⁴ AIR 1982 SC 1167.

enable it to decide the case. In *Bandhua Mukti Morcha v. Union of India*,⁶⁵ the Supreme Court appointed a commission to investigate and report on the facts of the case, and on the basis of its report decided the case. In *Hussainara Khatoon v. State of Bihar*,⁶⁶ the Supreme Court directed the state government to prepare an actual census of under-trials kept as prisoners as on October 31 of each year, and submit it to the High Court. Thus the Supreme Court asserted itself that it could appoint a Commission for making an inquiry or an investigation into facts relating to a complaint in a Public Interest Litigation of violation of fundamental rights, and also held that it had the power to do so in the interest of justice. This power was again invoked by the court in December, 1985 when the court appointed an expert committee to submit a report on the safety aspects of the working of the chlorine unit of a Delhi factory in the Delhi Gas Leak case.⁶⁷

Observations

The judiciary is the weakest organ of the State. It becomes strong only when people repose faith in it. Such faith of the people constitutes the legitimacy of the court and of judicial activism. Courts must not only be fair, must appear to be fair. Social action groups or individuals find that the courts are more than willing to respond and the courts are the best bet against violations of their fundamental rights. People generally believe that the courts do render justice. People know that the courts can also give wrong decisions, can exceed their powers or may not always be fair but, their experience tells them that such instances are exceptional.

With all the lapses of the judicial system, it is perceived to be better than the political process. This widely shared belief in the fairness of the courts is what has given legitimacy to judicial activism. The courts have to strive continuously to sustain and maintain such legitimacy. This effort can also be described as being accountable to the people. Since

⁶⁵ AIR 1984 SC 802.

⁶⁶ AIR 1979 SC 1360.

⁶⁷ (*Shriram Food and Fertilisers*) M.C. Mehta v. Union of India, (1986) 2 SCC 176.

the power of the court is derived from its social legitimacy, a court sustaining its legitimacy is in effect being accountable to the people. The courts should watch against PIL being used as private interest litigation or publicity interest litigation. Courts should not reject genuine PILs on the plea of judicial self-restraint. PIL opens the door to easier access to justice in an adversarial system although it places heavier burden on the judges in the onerous task of delivering justice. In the context of a controlling Constitution guaranteeing fundamental rights and liberties and imposing limitations on the powers of the State, the Supreme Court has incrementally responded to the questions presented before it and strived to protect individual liberties to a considerable extent.