Judicial Activism with a Difference

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Judicial activism is usually described as a pro active role played by the Judiciary. It is an active pronouncement of implementation of the rule of law, essential for the presentation of functional democracy. The word 'activism' means "being active", 'doing things with decision' and activist is the 'one' who favours intensified activities. Black's Law Dictionary defines Judicial Activism as a "philosophy of judicial decision-making whereas judges allow their personal views about public policy, among other factors, to guide their decisions." Judicial Activism means the active role played by the judiciary in promoting justice. Judicial Activism to define broadly is the assumption of an active role on the part of judiciary.[1]

Justice Krishna Iyer observed 'every judge is an activist either on the forward gear or on the reverse'. Its emergence can be traced back to 1893, when Justice Mahmood of Allahabad High Court delivered a dissenting judgment. It was a case of an under trial who could not afford to engage a lawyer, So the question was whether the court could decide his case by merely looking his papers, Justice Mahmood held that the pre-condition of the case being "heard" would be fulfilled only when somebody speaks.

The following trends were the cause for the emergence of judicial activism expansion of rights of hearing in the administrative process, excessive delegation without limitation, expansion of judicial review over administration, promotion of open government, indiscriminate exercise of contempt power, exercise of jurisdiction when non-exist; over extending the standard rules of interpretation in its search to achieve economic, social and educational objectives; and passing of orders which are unworkable .In recent times, the Supreme Court has been so much in the headlines in newspapers and periodicals that it became a generally shared perception of the people that the apex court is running the country. Though the public interest litigation had

[1] Chaterji Susanta, " 'For Public Administration' Is judicial activism really deterrent to legislative anarchy and executive tyranny ? ", The Administrator, Vol XLII, April-June 1997,p9, at p11

come into its own in 1980's, yet the Supreme Court made so many pronouncements on widely-ranging matters and against bureaucrats and police officers and also others that compelled some to think that the court has became over-active and has started interfering into what was traditionally viewed as the domain of the High Courts or the Executive Wing of the Republic. There were also strong Judicial orders in the exercise of contempt jurisdiction. This has, therefore, led to a serious debate on the true role and function of the highest judiciary of the land which has so significantly influenced the nation not only by its famous rulings in Golak Nath(1967) and Keshavanand Bharti (1973) cases, but also by intervening in many cases seeking to protect the individuals rights and collective economic and social rights.

In a modern Democratic set up, judicial activism should be looked upon as a mechanism to curb legislative adventurism and executive tyranny by enforcing Constitutional limits. That is, it is only when the Legislature and Executive fail in their responsibility or try to avoid it, that judicial activism has a role to play. In other words, judicial activism is to be viewed as a "damage control", exercise in which sense, it is only a temporary phase. Recent times have seen judiciary play a intrusive roles in the areas of constitutionally reserved for the other branches of governments. Issues in judicial activism arise, when governance is apparently done by Mandamus. The Constitution of India operates in happy harmony with theinstrumentalities of the executive and the legislature.

But to be truly great, the judiciary exercising democratic power must enjoy independence of a high order. But independence could become dangerous and undemocratic unless there is a Constitutional discipline with rules of good conduct and accountability: without these, the robes may prove arrogant.[2] Judicial Activism is the view that the Supreme Court and other judges can and should creatively (re) interpret the texts of the Constitution and the laws in order to serve the judges' own visions regarding the needs of contemporary society. Judicial Activism believes that judges assume a role as independent policy makers or independent

[2] Http://www.thehindu.com/opinion/lead/article3785898.ece

"trustees" on behalf of society that goes beyond their traditional role as interpreters of the Constitution and laws. The concept of judicial activism is the polar opposite of judicial restraint.

Judicial Activism might sound, for a lay man, a heavy-duty term but in the simpler manner is quite easy to comprehend. We can say in simple words that judicial activism is a practice by the judges that does not involve the balance of law, instead it hampers it. In judicial activism, the judge places his final decision with his heart and mind, which is emotionally handled. It, at times, works in our favour to save from the wrong decision to take place but at times it also backfires on us. In other words we can easily say that judicial activism is the practice going beyond the normal law for the jury. There are some very important cases which come in the talk whenever we discuss about judicial activism in India.

Bhopal Gas Tragedy and the Jessica Lal Murder case are among the top two. The latter was an open and shut for all. Money and muscle power tried to win over the good. But lately it was with the help of judicial activism that the case came to at least one decision. The two most prominent figures in the Bar Council of India whose names are the most interrelated with judicial activism are Justice Prafullchandra natwarlal Bhagwati and Justice Vaidyanathpura Rama Krishna Iyer.

The Golak Nath Case[3] is an example of judicial activism. The Supreme Court by a majority of six against five laid down that the fundamental rights as enshrined in Part-III of the Constitution are immutable and beyond the reach of the amendatory process. The power of parliament to amend any provision in Part-III of the Constitution was taken away.

In *Keshavananda Bharti* case by a majority of seven against six, the Supreme Court held that by Article 368 of the Constitution, Parliament has amending powers. But the amending power does not extend to alter the basic structure or framework of the Constitution. The basic features of the Constitution being:

(i) Supremacy of the Constitution;

(ii) Republican and Democratic form of government;

(iii) Secularism;

[3] Dr Bhure Lal, "Judicial Activism and Accountability", Siddharth Publications, ISBN:7220-158,p389

(iv) separation of powers between the Legislature, the executive and the judiciary; and

(v) Federal character of the Constitution. Supremacy and permanency of the Constitution have thus been ensured by the pronouncement of the summit court of the country with the result that the basic features of the Constitution are now beyond the reach of Parliament.

After making these observations certain reasons can be generalized which lead to judicial activism. The following are some of the well accepted reasons which compel a court or a judge to be active while discharging the judicial functions assigned to them either by a constitution or any other organic law.[4]

(i) Near collapse of responsible government.

(ii) Pressure on judiciary to step in aid.

(iii) Judicial enthusiasm to participate in social reform and change.

(iv) Legislative vacuum left open.

(v) The constitutional scheme.

(vi) Authority to make final declaration as to validity of law.

(vii) Role of judiciary as guardian of fundamental rights.

(viii) Public confidence in the judiciary etc.

In the 1980's two remarkable developments in the Indian Legal system provided a strong impetus to judicial activism in India. There was a broadening of existing environmental laws in the country and judicial activity through public interest litigation began in earnest in India. These two developments gave more scope to citizens and public interest groups to prosecute a corporation which violates environmental laws. It is a known fact that judicial activism has given us some very good case laws and path breaking judgments, which even led to revolutionary changes in the society. To deny judicial activism to the courts is to nullify the judicial process and to negate justice.Take away judicial activism and tyranny will step in to fill the vacant space. It is rightly stated by former Justice, Hidaytuallah that " the first principle to observe is that the

[4] Omdutt role of judiciary in the democratic system of india (judicial activism under the supreme court of india) : golden research thoughts (sept ; 2012)

wisdom of the law must be accepted. A little incursion into law-making interstitially, as Holmes put it, may be permissible. For other cases the attention of Parliament and Government can be drawn to the flaw."

Milestones of Public Interest Litigation in India

One of the earliest cases of public interest litigation was reported as *Hussainara Khatoon v. State of Bihar.*[5] This case was concerned with a series of articles published in a prominent newspaper - the Indian Express which exposed the plight of under trial prisoners in the state of Bihar. A writ petition was filed by an advocate drawing the Court's attention to the deplorable plight of these prisoners. Many of them had been in jail for longer periods than the maximum permissible sentences for the offences they had been charged with. The Supreme Court accepted the locus standi of the advocate to maintain the writ petition. Thereafter, a series of cases followed in which the Court gave directions through which the 'right to speedy trial' was deemed to be an integral and an essential part of the protection of life and personal liberty. Soon thereafter, two noted professors of law filed writ petitions in the Supreme Court highlighting various abuses of the law, which, they asserted, were a violation of Article 21 of the Constitution.[6] These included inhuman conditions prevailing in protective homes, long pendency of trials in court, trafficking of women, importation of children for homosexual purposes, and the non-payment of wages to bonded labourers among others. The Supreme Court accepted their locus standi to represent the suffering masses and passed guidelines and orders that greatly ameliorated the conditions of these people.

In another matter, a journalist, Ms. Sheela Barse[7], took up the plight of women prisoners who were confined in the police jails in the city of Bombay. She asserted that they were victims of custodial violence. The Court took cognizance of the matter and directions were issued to the Director of College of Social Work, Bombay. He was ordered to visit the Bombay Central Jail and conduct interviews of various women prisoners in order to ascertain whether they had been

[5] (1980) 1 SCC 81; See Upendra Baxi, 'The Supreme Court under trial: Undertrials and the Supreme Court', (1980) Supreme Court Cases (Journal section), at p. 35
[6] Upendra Baxi (Dr) v. State of U.P., (1983) 2 SCC 308
[7] Sheela Barse v. State of Maharashtra, (1983) 2 SCC 96

subjected to torture or ill-treatment. He was asked to submit a report to the Court in this regard. Based on his findings, the Court issued directions such as the detention of female prisoners only in designated female lock-ups guarded by female constables and that accused females could be interrogated only in the presence of a female police official.

Public interest litigation acquired a new dimension – namely that of 'epistolary jurisdiction' with the decision in the case of *Sunil Batra v. Delhi Administration*[8], It was initiated by a letter that was written by a prisoner lodged in jail to a Judge of the Supreme Court. The prisoner complained of a brutal assault committed by a Head Warder on another prisoner. The Court treated that letter as a writ petition, and, while issuing various directions, opined that: "…technicalities and legal niceties are no impediment to the court entertaining even an informal communication as a proceeding for habeas corpus if the basic facts are found".

In *Municipal Council, Ratlam v. Vardichand*[9], the Court recognized the locus standi of a group of citizens who sought directions against the local Municipal Council for removal of open drains that caused stench as well as diseases. The Court, recognizing the right of the group of citizens, asserted that if the: "…centre of gravity of justice is to shift as indeed the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, the court must consider the issues as there is need to focus on the ordinary men."

In *Parmanand Katara v. Union of India*,[10] the Supreme Court accepted an application by an advocate that highlighted a news item titled "Law Helps the Injured to Die" published in a national daily, The Hindustan Times. The petitioner brought to light the difficulties faced by persons injured in road and other accidents in availing urgent and life-saving medical treatment, since many hospitals and doctors refused to treat them unless certain procedural formalities were completed in these medico-legal cases. The Supreme Court directed medical establishments to provide instant medical aid to such injured people, notwithstanding the

[8] (1978) 4 SCC 494
[9] (1980) 4 SCC 162
[10] (1989) 4 SCC 286

formalities to be followed under the procedural criminal law.

In the realm of environmental protection, many of the leading decisions have been given in actions brought by renowned environmentalist M.C. Mehta. He has been a tireless campaigner in this area and his petitions have resulted in orders placing strict liability for the leak of Oleum gas from a factory in New Delhi,[11] directions to check pollution in and around the Ganges river,[12] the relocation of hazardous industries from the municipal limits of Delhi,[13] directions to state agencies to check pollution in the vicinity of the Taj Mahal[14] and several afforestation measures. Another crucial intervention was made in Council for *Environment Legal Action v. Union of India,*[15] wherein a registered NGO had sought directions from the Supreme Court in order to tackle ecological degradation in coastal areas. In recent years, the Supreme Court has taken on the mantle of monitoring forest conservation measures all over India, and a special 'Green bench' has been constituted to give directions to the concerned governmental agencies.

An important step in the area of gender justice was the decision in *Vishaka v. State of Rajasthan*[16]. The petition in that case originated from the gang-rape of a grassroots social worker. In that opinion, the Court invoked the text of the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) and framed guidelines for establishing redressal mechanisms to tackle sexual harassment of women at workplaces. Though the decision has come under considerable criticism for encroaching into the domain of the legislature, the fact remains that till date the legislature has not enacted any law on the point. It must be remembered that meaningful social change, like any sustained transformation,

[11] M.C. Mehta v. Union of India, (1987) 1 SCC 395
[12] M.C Mehta v. Union of India (1988) 1 SCC 471
[13] M.C. Mehta v. Union of India, (1996) 4 SCC 750
[14] M.C. Mehta v. Union of India, (1996) 4 SCC 351; Also see Emily R. Atwood, 'Preserving the Taj Mahal: India's struggle to salvage cultural icons in the wake of industrialisation', 11 Penn State Environmental Law Review 101 (Winter 2002)
[15] (1996) 5 SCC 281
[16] (1997) 6 SCC 241; See D.K. Srivastava, 'Sexual harassment and violence against women in India: Constitutional and legal perspectives' in C. Raj Kumar & K. Chockalingam (eds.), Human rights, Justice and Constitutional empowerment (OUP, 2007)at p. 486-512

demands a long-term engagement. Even though a particular petition may fail to secure relief in a wholesome manner or be slow in its implementation, litigation is nevertheless an important step towards systemic reforms. A recent example of this approach was the decision in People's Union for Civil Liberties v. Union of India[17], where the Court sought to ensure compliance with the policy of supplying mid-day meals in government-run primary schools. The mid-day meal scheme had been launched with much fanfare a few years ago with the multiple objectives of encouraging the enrolment of children from low-income backgrounds in schools and also ensuring that they received adequate nutrition. However, there had been widespread reports of problems in the implementation of this scheme such as the pilferage of foodgrains. As a response to the same, the Supreme Court issued orders to the concerned governmental authorities in all States and Union Territories, while giving elaborate directions about the proper publicity and implementation of the said scheme.

Recently the supreme court has directed providing a second home for Asiatic Lions vide Centre for Environmental Law V Union of India (writ petition 337/1995 decided on 15.4.2013) on the ground that protecting the environment is part of Article 21. The right to sleep was held to be part of Article 21 vide In re Ramlila Maidan (2012) . In Ajay Bansal V Union of India, Writ Petition 18351/2013 vide order dated 20.6.2013 the supreme court directed that helicopters be provided for stranded perons in Uttarakhand.

Thus we see that a plethora of rights have been held to be emanating from Article 21 because of the judicial activism shown b the Supreme Court of India. However there can be grave reservations about some of these orders. One wonders whether there will be any limit to the number of such rights created by court orders.

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 is consists of several political

[17] (2007) 1 SCC 728 24

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. Judiciary can not take over the functions of the Executive. The Court themselves must display prudence and moderation and be conscious of the need for comity of instrumentalities as basic to be welcomed and its implications assimilated in letter and spirit. An activist Court is surely far more effective than a legal positivist conservative court to protect the society against legislative adventurism and executive tyranny. When our chosen representatives have failed to give us a welfare state, let it spring from the Judiciary. The power of judicial review is recognized as part of the basic structure of the Indian Constitution. The activist role of the judiciary is implicit in the said power.

Judicial Activism is a sine qua non of democracy because without an alert and enlightened judiciary, the democracy will be reduced to an empty shell. The courts are the only forum for those wronged by administrative excesses and executive arbitrariness. So, all kinds of matters can be decided by the Indian judiciary but there must always be a balance of power, otherwise there will not be transparency in the judiciary. There are some major flaws which need to be reformed by the legislature. Such as legislature cannot decrease the powers of the judiciary and government should actively respond to the decision of the Supreme Court. 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 balance of powers would be maintained among all three organs. All these reforms can enforce the real practice of judicial activism India.

So to sum up the judicial activism in India, it will be very appropriate to quote the words of Dr A S Anand, Chief Justice of India who said, "……the Supreme Court is the custodian of the Indian Constitution and exercises judicial control over the acts of both the Legislature and the Executive."