JUDICIAL ACTIVISM IN INDIA: A LITTLE DONE AND VAST UNDONE

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ABSTRACT

From Sakal Newspaper to till now, the active role of the judiciary cannot be forgotten. Especially in Maneka Gandhi case where Article 21 of the constitution was expanded to such a level that it become a boon for the individual.

However, there are still some areas where reforms are required for the efficient working of judicial activism. Just like the United States Supreme Court, the Indian Supreme Court also expands its limits from constitution to other fields. The Indian Supreme Court should also decide cases on the basis of its own philosophy.

Indian judiciary often gets influenced by a ruling party. The A.D.M. Jabalpur case shows how weak the court could be against the executive. Sometime government does not actively respond to the decision of the judiciary (M.C. Mehta Case). So all these defective party should be reformed for the better function of judicial activism in India.

Keywords: Constitution, India, Judicial Activism.

INTRODUCTION

The term 'judicial activism' is a vague concept where several juristic efforts are put to define it. In layman language, judicial activism means active participation of the judiciary to protect the natural rights of people against the tyranny of legislature and executive. In the words of 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."[1]

The structure of Indian democracy rests on three pillars- the executive, the legislature and the judiciary. This structure is based upon the concept of balance of powers where each organ has separate powers and functions to effectively run the democratic government, such as legislation make laws, the executive executes those laws and the judiciary enforces those laws.

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[1] Manika, "*Judicial Activism: A means for Attaining Good Governance*", 3(3) Nyaya Deep, NALSA, 120, 117-132 (2006).

The Constitution of India assigns three important roles to the highest judiciary (Supreme Court) to enforce the law-

1. Interpreter of constitution to solve any ambiguity, in the language of any provision of the constitution of the constitution.

2. Protector of fundamental right.

3. Resolve the dispute which has come by way of appeals from the lower judiciary.

There is a one more function of judiciary where judiciary controls and regulates the activities of the legislature and the executive through judicial review. It helps in maintaining check and balance among these three pillars of democracy. In case of violation of any rights of an individual through any law or action of the executive, the judiciary actively participates for the protection of right of that individual. That active participation of judiciary is known as judicial activism. In other words, judicial activism focuses on personal and political consideration than on existing law. So, judicial activism is connected to constitutional interpretation, statutory construction and separation of powers.

The major history of judicial activism in India is divided into two parts: 1947 to 1975 and 1947 to 1977. In the first phase of history (1947 to 1975), judiciary was not much bothered with functions of the legislature and the executive because members of executive and legislature were very influential people and Court realized that their independence and neutrality is based upon the political parties because they are supported by the people. However the real implementation of judicial activism came into effect after the proclamation of emergency in India. Nevertheless, there are some cases which indicate the usages of judicial activism before the proclamation of emergency such as Sakal Newspaper v. Union of India[2], Balaji v. State of Mysore[3], Golaknath v. State of Punjab[4] and Kesavananda Bharati v. State of Kerala[5] etc.

A new change under the Indian legal system was come into existence after the introduction of PIL where the roots of judiciary became more powerful than ever before. The main reason behind the introduction of PIL was that, sometimes a group of victims could not approach the courts to ask any remedy or for the protection of any right, at that time through PIL any public-spirited person can approach to court for the protection of rights of groups of people. It is not

[2] 1962 AIR 305.
[3] 1963 AIR 649.
[4] 1967 AIR 1643.
[5] (1973) 4 SCC 225.

necessary that a person filing a case should have a direct interest in this PIL.[6] So the PIL is the power given to the public by court to protect interests of public at large. Hussainara Khatoon v. State of Bihar[7] is the best example of PIL where a PIL was filed for the protection of fundamental rights of some prisoner and judiciary respond positive to it.

In spite of all of this, there still remain some areas where reform is required for the active participation of the judiciary. The position of judiciary is largely depended upon the amendment power of parliament. It can be seen, that during the emergency period there were attempts to decrease the powers of the judiciary and to limit its intervention in legislative and executive function. This created fear in the judiciary as it apprehended that limits would be imposed upon its powers and function. A.D.M. Jabalpur v. Shivkant Shukla[8] case is a pure example where the judiciary gets influenced by the legislature. The judiciary often got influenced with the change of central government. As we saw that after the coming up of Janta party, all major amendments of emergency time were dismissed and new laws came into existence. There were many other reasons which restricted the functioning of judiciary and limited the scope of judicial activism in India.

So, just like US judiciary, Indian judiciary should not be influenced with the change of ruling party. The major purpose of judiciary should be preserved, that is, no bias should exist in judicial decisions. Thus, the very essence of judiciary should be saved for the proper functioning of judicial activism in India.

WHAT IS JUDICIAL ACTIVISM?

Origin of Judicial Activism

The judicial activism is a creative, innovative and dynamic role of judiciary where new laws come into existence. It means when the Court plays a positive role the court is said to be exhibiting the "Judicial Activism."[9] However it is extremely hard to trace the origin of Judicial Activism. There are diverse opinions about the origin of doctrine of judicial activism in India. According to Justice M.N. Roy, Judicial activism was originated in Marbury v. Madison. In this case Chief Justice Marshall had held that if there was conflict between a law made by the

[6] *Public Interest Litigation,* (Apr. 26, 2015), http://www.advocatekhoj.com/library/lawareas/publicinterestlitigation/whocan.php?Title=Public%20Interest%20%20%20Litigation&STitle=Who%20Can%20File%20a%20Public%20Interest%20Litigation.
[7] 1979 AIR 1369.
[8] 1976 AIR 1207.
[9] Vipin Kumar "*The Role of Judicial Activism in the Implementation and Promotion of Constitutional Laws and Influence of Judicial Overactivism*" IOSR Journal of Humanities And Social Science, 1 (2014).

Congress and the provisions in the Constitution, it was the duty of the court to enforce the Constitution and ignore the law.[10] But P.P. Vijayan disagreed with that and said that Marbury v. Madison is not a case of judicial activism. It is Dr. Bonham's case where Justice Cock gave the concept of natural doctrine in 1610. In above context Dr. Suresh Mane expressed his views that "As a result English Courts by its interpretation role extended the necessary protection; but truly, the movement of judicial activism got momentum on the soil of America under the shadow of first ever written Constitution."

The term "Judicial Activism" was coined by Arthur Schlesinger Jr. in 1947 fortune magazine titled "The Supreme Court: 1947." Prior to Arthur, the term "Judicial Activism" was used frequently to describe judicial decision or philosophy, but it can cause confusion due to the several meaning associated with it.

In India, the real picture of judicial activism came into existence under the constitution. However there are some incident under Indian judiciary during colonial period where some judges of High Court established under the Indian High Courts Act, 1861 displayed certain sparks of judicial activism. Among them, it was Justice Mahmood of the Allahabad High Court who sowed the seed for judicial activism in India. In that case which dealt with an under trial who could not afford to arrange a lawyer, Justice Mahmood held that the pre-condition of the case being heard would be fulfilled only when somebody speaks.[11]

The Constitution of India provides the base for judicial activism by inserting the provision of separation of power which was propounded by French jurist Montesquieu. India adopted this provision through separating the powers of executive vested in the president, legislative powers of parliament and the judicial powers of the Supreme Court and subordinate courts.

In fact the root of judicial activism can be seen in the power of judicial review of the Supreme Court and High Courts under Article 32 and 226 of the Constitution of India. It could be seen in the case of A.K. Gopalan v. State of Madras[12], where it was asserted that the power of judicial review was inherent in the nature of the constitution. The power of judicial review became more prominent with the introduction of PIL. It could be seen in M.C. Mehta v. Union of India[13] (Oleum gas Leak case) where the Supreme Court formulated the principle of "absolute

[10] M. Piravi Perumal, *Judicial Activism in India,* (Jan. 13, 2013), http://www.lawyersclubindia.com/articles/JUDICIAL-ACTIVISM-IN-INDIA-604.asp#.Vwby__krLIU.
[11] Ashwini Gugalla, *Judicial Activism – Critical Analysis,* (Mar. 15, 2015), https://www.academia.edu/8972806/JUDICIAL_ACTIVISM-CRITICAL_ANALYSIS.
[12] AIR 1950, SC, 27.
[13] 1987 SCR (1) 819.

liability." There are several cases where the Supreme Court exercised its powers with the changing socio-economic conditions to expand the rights of individual.

Definition of Judicial Activism

The term judicial activism has not been defined in any part of the constitution, but there are several definitions of judicial activism by famous jurist of India as well as foreign jurist which will help us to understand it.

According to Black dictionary "A philosophy of judicial law-making whereby judges allow their personal views about public policy among other factors to guide their decisions; usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent."[14]

Merriam-Webster's dictionary defined that "Judicial activism is the practice in the judiciary of protecting or expanding individual rights through decisions that depart from the established precedent or are independent of or in opposition to supposed constitutional or legislative intent."[15]

Indian jurist made attempts to define the term "Judicial Activism" in the following way. 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".[16] 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."[17] The famous Indian jurist S.P. Sathe said that "A court giving a new meaning of a provision so as to suit the changing social or economic condition or expanding the horizons of the right of the individual is said to be an activist court."[18]

Some foreign jurist also defines the term "Judicial Activism" in following way. Lord L. Scarman of U.K. explains judicial activism as " Law, it was strongly felt, can be developed into more and more refined notions, interconnections and codifications coupled with

[14] Black's Law Dictionary (7th ed. 1999).
[15] Merriam-Webster's Dictionary of Law (1999).
[16] MANIKA, *supra* note 1.
[17] A.M. Ahmadi, "*Judicial Process: Social Legitimacy and Institutional Viability*", 4 SCC (Journal) 6, 1-10 (1996).
[18] S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS, 205 (2nd ed. 2002).

increasingly sophisticated ways of interpretation. 'A rather harmless pastime,' even legalistic might react. That attitude changes, however, when it is judges themselves who start 'developing' the law into something 'better.' Judicial activism it is called, often pejoratively."[19]

There is a another jurist, Lord Denning has given suggestions on judicial activism upon three instincts "the instinct for justice, which he associates, particularly with the independence of the judges and certainty of the law; the instinct for liberty which involves freedom of discussion, (including freedom of the press) and also freedom of association (including the right to form political parties); finally, a practical instinct which leads to a balancing of rights with duties, and powers with safeguards, so that neither rights nor powers shall be exceeded or abused…"

All these definitions indicate the importance of judicial activism. The active role of the judiciary functions for the improvement of individual rights and make roots of democracy strong through restricting the executive and legislature tyranny.

JUDICIAL ACTIVISM IN INDIA

The history of judicial activism could be understood with its division into two parts - during colonial period and after the independence.

Judicial Activism during Colonial Period

The history of judicial activism can be traced back to the commencement of the Constitution of India or during colonial period when Privy Council reviewed the decision of company court and crown court in India. Privy Council in The High Commission for India[20] decided that 'reasonable opportunity to be heard' should be included within section 240(3) of the Government of India Act, 1935. Not only in The High Commission for India case, but also in Emperor v. Sibnath Banerjee[21] case, where privy council exercised judicial activism as a tool for the improvement of present laws and, it was held that courts can investigate the validity of order passed under section 59 (2) of the government of India Act, 1935 though the burden is heavy on the person challenging the order.[22]

Not only Privy Council but also Federal Court played pivotal role for the betterment of Government of India Act, 1935. In Niharendu Dutta Majumdar v. Emperor[23] Case, Federal

[19] Bas de Gaay Fortman, "*A comparative exploration into human rights as a moral – political force in judicial law developments*", 29(2) Utrecht Law Review 22, 22-43 (2015).
[20] AIR (35) 1948 PC 121.
[21] (1946) 48 BOMLR 1.
[22] *Ibid.*
[23] 29 AIR 1942 FC 22.

Court decided that mere criticism or even ridicule of the Government does not amount to sedition unless the Act was calculated to undermine respect for the Government so as to make people cease to obey it so that only anarchy can follow.[24]

It can be assumed that judiciary actively participated only after the commencement of the Constitution. But it doesn't mean that there is no judicial activism during the colonial period. There are very few cases where Privy Council and Federal Court actively participated for the protection of individual rights.

Judicial Activism after 1947

After the independence of India, Jawaharlal Nehru became the first prime minister of India. At that time judiciary did not actively participate in restraining legislations passed by the government of India. The main reason behind of the judiciary not actively participating is that- i) Mostly those people are appointed as the judges of the Supreme Court who are former judges of federal court and high court during colonial period and these people think that like British parliament supremacy, Indian parliament have same right as British parliament to acts as ultimate authority. ii) Most of the Judges believe that main function of the judiciary is to interpret law. iii) At that time, it was politicians, not judges who actively participated in national movement. So they are considered as more prestigious than judges. "Between the politicians and the judges, the politicians enjoyed much greater prestige"[25] Not only people but court also respected the politicians. Therefore, courts did not exercise judicial restraint in invalidating laws passed by the Indian parliament. Just like India, US courts also reacted in same way from people like Thomas Jefferson and George Washington who actively participate for in freedom struggle. "The Supreme Court of India started off as a technocratic court in the 1950's but slowly starting acquiring more power through constitutional interpretation. Its transformation into an activist court has been gradual and imperceptible."[26]

Early Cases of Judicial Activism (1947 to 1975)

The judges of the Supreme Court had been brought up in the English positivist tradition and were reluctant to assume wider powers for the court.[27] Hence, it became simple for political establishment to control the judiciary.

[24] *Ibid.*
[25] SATHE, *supra* note 18.
[26] *Ibid.*
[27] *Ibid.*

In initial phase of India (Nehru period) parliament amended laws and courts merely responded to it. However, the courts did not remain passive all the time. It can be seen in Sakal Newspaper case where the court held that, a price and page schedule, which laid down how much a newspaper could charge for a number of pages was unconditional as being in violation of freedom of press. Here the court decided the position of freedom of speech and expression which includes freedom of the press, over the freedom to do business.[28] There was another case, Balaji v. State of Mysore[29] case where active role of the judiciary could be seen easily. In this case, court held that the reservation of seats in education institutes should not exceed 50% of the total number of seats. Nehru period was the most fruitful time between parliament and the judiciary where constitution undergone seventeenth amendment.

After the death of Nehru situation changed and conflict started between the judiciary and parliament. In the Golaknath v. State of Punjab[30] case, the Supreme Court ruled that parliament have no right to curtail any fundamental right of the constitution. At that time Chief Justice K. Subba Rao invoked that the doctrine of prospective legislation to save the existing first, fourth and seventeenth amendment of the constitution from infirmity. It was also decided that the parliament should not amend any law which would violate the fundamental rights of the constitution. However, it was overruled by seven out of thirteen judges in Kesavananda Bharati v. State of Kerala[31] case where the Supreme Court held that parliament has wide power to amend the constitution of India except the basic structure of the constitution and that certain fundamental rights are part of the basic structure of the Constitution.

Emergency Period (1975 to 1977)

Prior to the commencement of emergence, the principle of basic structure had already been laid down in Kesavananda Bharati v. State of Kerala[32] case. However the decision was not easily accepted by executive and legislation because it challenged the basic tenants of democracy. The question arises that how can judiciary decide the limits to amend the constitution? How can parliament be not empowered to amend that part of the constitution? People raised their voice that the roots of democracy resides on theirs elected representative who are empowered to make laws for their betterment. Even through the US Supreme Court does not have such

[28] SATHE, *supr*a note 18.
[29] (1946) 48 BOMLR 1.
[30] 1967 AIR 1643.
[31] (1973) 4 SCC 225.
[32] *Ibid.*

power.[33] It took long time for people to accept that decision of the Supreme Court. On 1975, a case was filed against Indira Gandhi (Indira Gandhi v. Raj Narain[34]) where the Allahabad High Court found Indira Gandhi guilty of electoral malpractices and held that Indira Gandhi should leave the seat of P.M. The result of that decision was that on 25 June 1975 Indira Gandhi government proclaimed emergency under article 352 of the constitution. The reason for imposing emergency was justified on internal disorder. At that time several members of opposition parties were arrested without any reasonable ground. 'The emergency of 1975 imposed several restrictions on individual liberty and judicial review. There was strict press censorship and most of the leaders of the opposition parties had been imprisoned without trial under the than existing Maintenance of Security Act (MISA).'[35]

The Indira Gandhi government passed thirty-ninth amendments, which describes that election of the president, vice-president, prime minister and speaker of Lok Sabha will placed beyond the ambit of review of Indian courts. It clearly shows that the main purpose of this amendment is to prevent the scrutiny of Indira Gandhi's election to the Lok Sabha by court. In other way it can be said that this amendment decrease the power of judiciary and disturb the check and balance of between legislature and judiciary.

Here the real importance of judicial activism comes into existence. This amendment was challenged in Indira Gandhi v. Raj Narain[36] case where the Supreme Court held that clause (4) of Article 329A inserted by the Constitution (Thirty Ninth Amendment) Act, 1975 was unconstitutional. Finally, in 1977, the emergency period ended with the announcement of a parliamentary election. The end of the emergency inaugurated a new political era in the Indian political scene, putting an end to the hegemonic Congress domination and opening up opportunities for alternative political forces to make their presence felt at the Centre of power in New Delhi. After the election, the new government under the leadership of Morarji Desai, repealed the all constitutional amendments of introduced during the emergency period and restore the check and balance among judiciary, executive and legislature.

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

[33] SATHE, *supr*a note 18.
[34] 1975 AIR 865.
[35] 1975 AIR 865.
[36] *Ibid.*

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[37] 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[38] 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 case that 'now for the first time the portals of the court 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.[39]

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

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

[37] 1979 AIR 1369.
[38] AIR 1982 SC 149.
[39] *Ibid*

of the judiciary. A.D.M. Jabalpur v. Shivkant Shukla[40] decision had revealed that how weak the court could be against a hegemonic executive.[41] 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.[42]

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. During the emergency period when Congress party under the leadership of Indira Gandhi passed several amendments and these amendments affected the position of judiciary as we saw in A.D.M. Jabalpur case, but after the coming up of Janta party powers of the judiciary were restored through another amendment. 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[43], a writ petition was filed with concern of huge vehicular pollution in Delhi. In this case the Supreme Court had passed directions for the

[40] 1976 AIR 1207.
[41] SATHE, *supra* note at 18.
[42] SATHE, *supra* note at 18.
[43] (2001) 3 SCC 763.

phasing out of diesel buses and for the conversion to CNG.[44] 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.

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 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. Recently the Supreme Court in case of 'honor killing' held that there must be mandatory death sentence for the accused and the police and administrative officials who did not prevent them must be immediately suspended. So, all kinds of matters can be decided by the Indian judiciary. All these matters cannot be decided by the parliament due to the voter bank politics.

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.

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[44] KUMAR, *supra* note at 9.