JUDICIAL ACTIVISM – CONSTITUTIONAL OBLIGATION OF THE COURTS*

INTRODUCTION

I have not had the good fortune of knowing Late Shri B.M. Patnaik personally, but from what I have gathered from my esteemed colleague Justice G.B. Patanaik, I have come to learn that he was one of those great Constitutional Lawyers which this Bar has produced. He was meticulous in all his activities of life and very sincere to the cases which came to him. Clients would feel secure, if their case was accepted by Late Shri Patnaik. His pleasant personality had endeared him to his contemporaries and everyone who came in close contact with him or knew about him. He was a lovable personality. Most of the lawyers, who had joined his Chamber, are well-settled in life and have risen to eminence. The hallmark of his success in life was his sincerity and industriousness. He argued several cases before the Supreme Court, the most notable one being the case of *Nandini Satpathi* v. *P.L. Dani*,[1] which decision in legal circles is known as a classic on right against 'self-incrimination' and 'compelled testimony'. Again, when the Governor of Orissa had not permitted the majority of the legislature belonging to a particular party to form the Government and the legislature headed by Late Shri Biju Patnaik approached the High Court, it was late Shri B.M. Patnaik, who by his erudition and forceful submissions based on research, persuaded the High Court to give a finding that the Governor had flouted the Constitutional Conventions.

The Subject

The subject, which I have chosen for today's lecture is "Judicial Activism- Constitutional Obligation of the Courts". Late Shri B.M. Patnaik was eminently a constitutional lawyer – an enlightened lawyer par excellence. Thus, I feel that a befitting tribute to the personality of Late Shri B.M. Patnaik and his memory would be to discuss the present theme related to the Constitution, which was dearest to his heart.

Definition – What is Judicial Activism?

Judicial Activism does not carry any statutory definition. Broadly, it is understood as, connoting that function of the judiciary, which represents its active role in promoting justice[2]. It has all along meant different things to different people. Its evolution and growth, effect on public administrative and other fields of social life has created a hornest's nest. On the one hand it is equated with judicial creativity; on the other it is being labelled as judicial terrorism[3].

In order to be able to understand its meaning, it is important to first understand the meaning of the word 'Activism' which according to *Chamber's 20th Century Dictionary* means – 'a policy of vigorous action of a philosophy or a creative will'. In *Webster's New Twentieth Century Dictionary (unabridged)* the word 'Activism' has been stated to mean, ' the doctrine or policy of being active or doing things with decision'.

Judicial Activism, therefore, would mean an 'Activism' by taking recourse to judicial process leading to judicial pronouncements on different intricate issues whereby new approach towards legal philosophy is made or a new and creative legal philosophy is sought to be developed by recourse to dynamism in discharge of judicial functions.

Meaning of Judicial Activism as given in *Black's Law Dictionary*[4] is difficult to swallow. It states – "A philosophy of judicial decision-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 precedents." Pejoratively, it is called – "the unchallenged authority acquired by the higher judiciary."[5] Some say it is 'Judicial co-governance'.[6]

To my mind, as would be further elaborated a little later, Judicial Activism is nothing more than a description of performance of duty consistently with the needs of the time, by the judiciary and the judges who are active, and within the parameters of Constitution and the laws. While doing so, they exercise to brim their constitutional jurisdiction in larger public interest and with innovation as they are convinced that nothing, lesser will serve the public purpose. Judicial Activism is recognition by the Courts of their constitutional obligation, in the circumstances where failure to act would be betraying the people's faith in judicial system of a constitutional democracy. Judicial Activism, in essence and, essentially aims at upholding the Rule of Law impregnated with truly democratic values.

Evolution

The concept of Judicial Activism is not one of the recent past. It was born in 1803 when Chief Justice Marshall, a great judge of the American Supreme Court decided *Marbury* v. *Maddison*[7]. He observed that the Constitution was the fundamental and paramount law of the nation and "it is for the court to say what the law is". He concluded that the particular phraseology of the Constitution of the United States, confirms and strengthens the principle supposed to be essential to all written Constitutions: that a law repugnant to the Constitution is void and that the courts as well as other departments are bound by that instrument. If there was conflict between a law made by the Congress and the provisions in the Constitution, it was the duty of the court to enforce the Constitution and ignore the law. The twin concepts of judicial review and judicial activism were thus born[8].

American View

The U.S. Supreme Court has ever since then played a prominent role in shaping American society. At times, it has not refrained from interpreting the provisions of the Constitution to lead to governmental policy in a manner which is diametrically opposite to the majority public opinion of the time. In so upholding the Constitution, the Court had withstood the stiffest of oppositions. The U.S. Supreme Court struck down several legislations made by U.S. President, F.D. Roosevelt. There were severe uproars, but the orders of the Court were enforced. Roosevelt resorted to the extreme measure of attempting to increase the strength of the Court, to enable him to pack it with his nominees, but had to retreat when the Senate refused to endorse the measures. However, on retirement of several judges, Roosevelt appointed his nominee to the Court. Between 1953 and 1969 when Chief Justice Earl Warren was heading the U.S. Supreme Court, several decisions were pronounced upholding civil liberties of minorities and disadvantaged sections. The famous case of *Brown* v. *Board of Education,* (347 US 483) attracted the ire of the white majority, when

it held that racial segregation in public education was unconstitutional. A thorough study of the judgments of the U.S. Supreme Court would reveal that the Court has oscillated between periods of judicial self-restraint and activism. The present Chief Justice Rehnquist is a believer of judicial self-restraint and as such the Court these days has sought to impose limits on its jurisdiction.

English Judges

In Britain, the governing rule for the nature of the judicial process, for a long time, was, as expressed by Sir Francis Bacon in the early seventeenth century: "judges ought to remember that their office is to interpret law, and not to make law". This tradition, established by Jeremy Bentham, who had a deep distrust of judge-made law, stated that it is undemocratic for the non-elected judiciary to act as law makers and this function should be prerogative of the elected Members in Parliament. This tradition made the English judges to follow the principle of literal interpretation of the language of statute notwithstanding, such interpretation leading to more absurd and inequitable results. But since early sixties, Lord Reid, Lord Denning and Lord Wilberforce spearheaded with their doctrine of "purposive interpretation", which breathed new life into English Administrative law, reviving and extending ancient principles of natural justice and fairness, applying them to public authorities and to private bodies, exercising public power, and rejecting claims of unfettered administrative direction. This new role of English judges met with severe criticism and there are cases where judiciary seemed to have over extended itself to restrain its actions. But in the absence of a written constitution and a Bill of Rights, the scope of the power of judicial review of English Courts remains limited.

Britain extended the practice of judicial review of legislation to colonies such as India whose constituent acts enacted by British Parliament laid down the limits of the legislative power vested in colonial legislatures. India, therefore, experienced power of judicial review vested in judiciary over the colonial legislations as well as executive acts since the days of British rule.

Indian Constitution and Judicial Activism

Unlike the United States Supreme Court or the House of Lords in England or the highest courts in Canada or Australia, the Supreme Court of India can review even a constitutional amendment and strike it down if it undermines the basic structure of the Constitution[9].

The founding fathers of our Constitution placed enormous powers in the hands of the Judiciary. Dr. B.R. Ambedkar defended the provisions of judicial review as being absolutely necessary. According to him, the provision for judicial review and, particularly, for the writ jurisdiction that gave quick relief against the abridgement of fundamental rights constituted the heart of the Constitution, the very soul of it[10]. Alladi Krishnaswami Ayyar, during the Constituent Assembly Debates, had remarked, "the future evolution of Indian Constitution will thus depend to a large extent upon the work of the Supreme Court and the direction given to it by the Court. While its function may be one of interpreting the Constitution, it can not in the discharge of its duties afford to ignore the social, economic and work tendencies of the time, which furnish the necessary background".

Thus, it can be rightly said that the Indian judiciary has been put under the constitutional obligation to hold the scale of justice even in any legal combat between the rich and the poor, the mighty and the weak, without fear or favour, by keeping all

authorities – legislative, executive, administrative, judicial and quasi judicial – within their bounds. The Judiciary in India is the expression of the law created by Indians and for Indians. No doubt, it is the most respected and powerful organ of the state[11].

The glory of the Constitution is that it enables all and sundry to directly approach the highest Court of the land for redress. The judges, thus, have a duty to redeem their constitutional oath and do justice, no less to the pavement dwellers than to the guests of five star hotels[12].

When the task of interpreting the provisions of the Constitution is entrusted to the judiciary, it brings within its sweep to test the validity of the action of any authority functioning under the Constitution, in order to ensure, that the authority exercising the power conferred by the Constitution does not transgress the limitation imposed by the Constitution, on the exercise of that power. This power of judicial review is implicit in a written Constitution and unless expressly excluded by a provision of the Constitution, the power of judicial review is available in respect of exercise of powers under any of the provisions of the Constitution. This is what was pronounced by the Supreme Court in the case of *A.K. Kaul* v. *Union of India*[13].

Article 13, clause(1) says, that, all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions contained in the fundamental rights, shall, to the extent of such inconsistency, be void. Clause (2) of the Article further says, that, the State shall not make any law that takes away or abridges any of the fundamental rights and any law made in contravention, of the above mandate shall, to the extent of the contravention, be void. The Constitution also divides the legislative power between the Centre and the States and forbids either of them, to encroach upon the power given to the other. Who is to decide, whether a legislature or an executive has acted in excess of its powers or in contravention of any of the restrictions imposed by the Constitution on its power? Obviously, such function was assigned to the courts[14].

A more explicit acknowledgement of judicial law-making is found in Article 19 of the Constitution. Article 19 guarantees to citizens of India several rights, such as, the right to freedom of speech and expression, right to assemble peaceably and to form associations, right to move freely within the territory of India, right to reside and settle in any part of the territory of India and the right to practice any profession or to carry on any occupation, trade or business. The State can impose reasonable restrictions upon the exercise of these freedoms on the grounds mentioned in the respective clauses of that Article [Clauses (2) to (6)]. The Courts have been entrusted upon with the responsibility of deciding, whether a restriction falls within the permissible grounds on which the freedom can be restricted and whether such a restriction is a reasonable restriction. It is under this provision, that the Constitution-makers vested enormous power of laying the law – sometimes amounting to law-making – in the Supreme Court, which has been by some, seen and perceived as Judicial Activism.

Article 21 of the Constitution, which protects life and liberty is being articulately interpreted and being expanded as the exigencies of situation demand.

Right to personal liberty is a fundamental right, guaranteed by the Constitution and executive interference with this right is conditioned by the safeguards contained in Article 22. The Supreme Court of India, as a guardian of constitutional democracy, is a watchdog of

Fundamental Rights of the Indian citizens. It is only natural for the judiciary to adopt an activist stance in applying the test of "relevance" to an executive order of preventive detention.

Article 32 of the Constitution has been described as the "heart and soul" of the Constitution. The High Courts and the Supreme Court in exercise of their power under Articles 32 and 226 of the Constitution of India can, not only strike down a law enacted by the parliament or any state legislature, as also a subordinate legislation made by the State Government or any other authority, it can also strike down any action of the State. It can also ask the Executive to do, what is expected of them to do.

Article 141 of the Constitution states that 'the law declared by the Supreme Court shall be binding on all courts within the territory of India.' The Article is strong evidence of the vision of the Constitution makers. They foresaw a pre-dominant role of judiciary in administering and upholding the Constitution and the laws.

Article 142 of the Constitution is a unique provision of the Indian Constitution, which probably is not there in any other Constitution of the world, conferring unfettered powers on the Supreme Court to pass any decree, order or direction, which the interest of justice demands and/or which may be necessary for doing complete justice.

While speaking on the aspect of judicial review, Justice Patanjali Sastri, had said[15] (as back as in the year 1952):—

> "In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their own way of thinking but for all, and the majority of elected representatives of the people have, in authorizing the imposition of restrictions, considered them to be reasonable."

The above quoted lines brings to light the fact, that even the first generation Supreme Court Judges were conscious of the activist role, the Court was expected to play under the Constitution.

In the words of Former Chief Justice P.N. Bhagwati, "Judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is."[16]

On another occasion he said:

> "It is necessary to assert in the clearest terms, particularly in the context of recent history, that the Constitution is supreme lex, the paramount law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of the authority. No one, howsoever highly placed and no authority, howsoever lofty, can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the

ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits."[17]

A.K. Gopalan v. *Madras,*[18] is one of the earliest cases where the Supreme Court asserted, that its power of judicial review was inherent in the very nature of the written Constitution. Referring to Article 13 which provides for judicial review in explicit terms, the Court said:—

> "The inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the court has always the power to declare the enactment, to the extent it transgresses the limits, invalid."

Reasons for (or, in defence of) Judicial Activism

I cannot do better than to quote from a recent write up, by Prof. Guillermo O' Donnell of University of Notre Damme, in support of the need for Judicial Activism. He says – "The rule of law is among the essential pillars upon which any high-quality democracy rests. But this kind of democracy requires not simply a rule of law in the minimal, historical sense…. What is needed, rather, is a truly *democratic* rule of law that ensures political rights, civil liberties, and mechanisms of accountability which in turn affirm the political equality of all citizens and constrain potential abuses of state power. Seen thus, the rule of law works intimately with other dimensions of the quality of democracy. Without a vigorous rule of law, defended by an independent judiciary, rights are not safe and the equality and dignity of all citizens are at risk. Only under a democratic rule of law will the various agencies of electoral, societal, and horizontal accountability function effectively, without obstruction and intimidation from powerful state actors. And only when the rule of law bolsters these democratic dimensions of rights, equality, and accountability will the responsiveness of government, to the interests and needs of the greatest number of citizens be achieved."[19]

Thus, in the opinion of Prof. O' Donnell, the primary function assigned to Judiciary in a constitutional democracy is to defend the Rule of Law. So long as every wing of governance and every constituent of democracy is performing its functions as expected of it for the purpose of maintaining the delicate balance of powers, as enshrined in the Constitution, the Judiciary plays the role of defender only and people are happy with independence as the quality of Judiciary. It is obvious and simply the human nature that the expectations of the people rise towards that wing of governance which is more responsive and more conscious of its obligations to the polity. With the prevalence of belief in the people, that the Legislature or the Executive, or both, are not so responsive and sensitive to the needs of the people as they ought to be, the emphasis, in the expectations of the people, shifts to Judiciary. The independent Judiciary initially moves to becoming a vigorous defender from being a mere defender. With the support of the people's faith it slowly sheds its passive role and becomes active, may be pro-active. This assumption of additional role by the Judiciary in the total discharge of constitutional obligations by all the wings of governance invites the nomenclature of judicial activism labelled on Judiciary. The Judiciary – and why the Judiciary alone – every wing of governance has to be active. If Judiciary is active while others are not, or, Judiciary is more active than its other counterparts in the governance, then

it is just what is expected of it. There is nothing to be critical about it. Rather, the judicial activism must be treated as a compliment to the Judiciary as an institution.

Judicial Activism does lead to an uneasy relationship, if not open clash, with the Executive and Legislature. In India, this happened in the third decade of the Republic. During the days of confrontation, the then Law Minister, Shri H.R. Gokhale had famously talked of the need "to save the people from the judges and the judges from themselves."[20] However, the chain of later events have justified that far from the need of saving the people from the judges, the judges have saved the people from excesses of the Executive and unconstitutional legislations by striking them down.

A few factors have contributed to the emergence of the trend of judicial activism. First, the Judiciary, as an institution has been able to command the respect and confidence of the people especially, in the years which have followed the infamous Emergency. People saw their only saviour in the Judiciary. Secondly, the power of the Court to punish for its contempt, a powerful weapon though rarely used, deters the persons ordained from disobedience. Thirdly, the fractured poll verdicts have created an atmosphere of political uncertainty. The Legislature too becomes weak. The Government is not much inclined to take decisions which would invite the displeasure of the people, who are their voters. Many a times, the judicial activism is invited by the Government and the Executive as a friendly measure and as a shield for themselves. In the corridors of power, it is very common to listen – "the matter is pending in the court, await the decision" or "why not have the matter decided by the Court". Quite often, the Government, and in particular the Executive, believes in shifting the responsibility, at times passing on the buck, by inviting court's decision rather than taking a decision by themselves. Mostly, this happens in such areas as are relatable to the issues which are politically, religiously or socially sensitive. For example, take the case of Taj corridor, shifting of abattoirs, removal of monkeys from North and South Blocks, demolition of encroachments and so on.

Mr. C. R. Irani in his article "Cry the beloved Country"[21] said "when the Executive refused to apply law, and willfully, constantly and conspicuously refused to do their duty, it falls to the Judiciary to act in defence of the Constitution and the mandate of the Rule of Law and equality before law."

If the people go to the Supreme Court and the High Courts under their writ jurisdiction and raise issues of governance that seem to be non-justiciable, it is out of their relatively greater regard for the courts compared to other organs of Government. Had the courts not entertained those matters, there would have been greater frustration among the people and perhaps it might have exploded in some way detrimental to democracy[22].

A powerless minority is neither in a position to influence the outcome of an election nor to disrupt the work of the Government. It cannot get its demands accepted through direct political action. Where a group of people is small and is not likely to have any organized strength to make itself felt politically, it prefers the judicial process. Judicial Activism has always been profitably used by powerless minorities such as bonded labour, prison inmates, undertrials, tribals and downtrodden threatened by schemes of development such as a dam or a flyover, or those who want to assert the right to dissent or the freedom to see a film like Fire.

Very often the Courts are criticized for having assumed such role unto themselves, as was not contemplated by the Constitution. The criticism has no justification. The crux of the problem lies in the lack of confidence of the people in the efficacy of the Legislature and the Executive, as effective instruments, in redressing their grievances which it is the primary obligation of such instruments to do. The Constitution is a living organism and its limbs must have flexibility. The courts of law have assumed only such role, as would enable them to fulfil the ideals of the Constitution. Role of the Courts is not just to interpret laws but to function as sentinels safeguarding the fundamental, legal and human rights which legitimately belong to the people. The Judiciary has to be independent, efficient and active, if democracy has to have any meaning for the people of India.

According to Justice William J. Brennan, the advocates of judicial activism stand for going beyond the original congenitive meanings of laws; they keep their eyes open to the social progress and adapt themselves to 'changes of social circumstances'; "the genesis of the Constitution rests not in any static meaning it might have had in a world, that is, dead and gone, but in the adaptability of its great principles to cope with correct problems and current needs."

The changing social scenario necessitates the constitutional amendments. Publicly desired changes are thwarted for lack of institutional arrangements. It is a wrong charge against the judges, that they are *de facto* amending the Constitution or indulging in legislating. A judge has to find out the law on the subject, interpret it with the aid of existing precedents and in a manner that advances the cause of justice and suppresses the mischief. If there is a violation of the law, he has also to decide what action has to be taken to maintain the Rule of Law and in what manner and to what extent the situation is required to be remedied. Judges are the people's last resort and carry out their thwarted desire for essential changes.

A survey of public interest petitions shows, that people have gone to courts because there was no other means of redressal. A five-member Bench of the Andhra Pradesh High Court in *D. Satyanarayana* v. *N.T. Rama Rao*[23] has gone to the extent of laying down the proposition, that the Executive is accountable to the public through the instrumentality of the Judiciary.

Judges cannot shirk their responsibilities as adjudicators of legal and constitutional matters. How onerous the exercise of judicial power is, has been very aptly stated by Chief Justice Marshall:

> "The judiciary cannot, as the legislature may avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other is treason to the Constitution."

Every Judge must play an active role in the discharge of his duties as "adjudicator of disputes". His role as an interpreter of law and dispenser of justice, according to law, should not be allowed to be diminished either because of the perceived notions of the other two wings of the State – the Legislature and the Executive or any section of the public. But, this alone, and by itself, cannot be termed judicial activism.

Interpretation of the Constitution is radically different from the interpretation of an ordinary legislative provision. The Constitution being the basic document incorporating the enduring values the nation cherished inevitably contains open-ended provisions, which afford wider scope for the Judiciary in the matter of interpretation. "We must never forget", observed Chief Justice Marshall, "that it is a Constitution we are expounding ... intended to endure for ages to come and consequently to be adapted to the various crises of human affairs." In line with, this thought was the view of Justice Cardozo, another great Judge: "A Constitution states or ought to state, not rules for the passing hour but principles for an expanding future."

The role of the Judge in interpreting law has been graphically described thus:

> "Judges must be sometimes cautious and sometimes bold. Judges must respect both the traditions of the past and the convenience of the present. Judges must reconcile liberty and authority; the whole and its parts."[24]
>
> "Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution-makers have meticulously defined the functions of various organs of the State. Legislature, Executive and Judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. ... Judiciary has no power over sword or the purse *nonetheless, it has power to ensure that the aforesaid two main organs of the State, function within the constitutional limits*. It is the sentinel of democracy. *Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive*. The expanding horizon of judicial review has taken in its fold, the concept of social economic justice."[25] (emphasis added)

It is true that in adjudicating public law matters, the court takes into account the social and economic realities, while considering the width and amplitude of the constitutional rights. Touching upon this aspect, the Supreme Court in a recent decision, speaking through K. Ramaswamy, J., in *C. Ravichandran Iyer* v. *Justice A.M. Bhattacharjee*[26] made very pertinent observations:

> "In this ongoing complex of adjudicatory process, *the role of the Judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario, to make the ideals enshrined in the Constitution meaningful and reality*.
>
> Therefore, the judge is required to take judicial notice of the social and economic ramification, consistent with the theory of law."

It is the duty of Legislature, to make laws which would accord with constitutional parameters, expectations and limitations. It is the duty of the Executive, to implement faithfully the laws made by the Legislature. If the Legislature overspills itself beyond the constitutional bounds, the Judiciary must step in to tell it, its limits and keep it within its bound. When the Executive fails to discharge its obligations, it becomes the primordial duty of the Judiciary to compel the Executive to perform its lawful functions. The Judiciary compels the Executive to do its 'do's' and strikes down its 'dont's' – if done. In doing so, the Judiciary is doing just what 'We the people of India' have by the Constitution ordained it to do. If the Judiciary fails to respond, it would be guilty of violating the Constitution, a treason

indeed. Such 'acting' cannot be termed 'judicial activism' by using the expression with pejorative tinge.

Judicial Activism does not only have its legitimacy, solely because, the other organs of Government have failed or lingered behind. This is only one reason for judicial activism bordering on pro-activism. Even if, the other organs of Government function efficiently, there will be need for judicial activism for recognizing and protecting the rights of powerless minorities. It is an obligation that has been cast on the Judiciary by the makers of the Indian Constitution.

Role played by the Judiciary

With the change in times and to cope with new challenges, Judiciary has innovated new methodologies. *Public Interest Litigation* is a unique device wherein, shedding the shackles of *locus standi*, the Judiciary entertains grievances of public nature. A public-spirited person or body having no personal interest in the relief claimed puts forth grievances of public nature having far-reaching implications on the society generally. The phenomenon of Public Interest Litigations has now come to stay and is consuming substantial time of the constitutional courts of the country. Similar is the device of *letter petitions,* wherein all formalities attaching with presentation of a petition to the Court are dispensed with, if the grievance relates to enforcement of fundamental rights. The device of letter petitions has been successfully used by bonded labourers, persons in illegal detention and people subjected to violation of human rights in far-off places wherefrom they may not be able to access the courts otherwise. The unique concept of *continuing mandamus,* where directions are issued and their implementation is monitored, has been able to keep corruption and inefficiency in governance, under control. The Hawala case, closure of polluting industries operating in the non-conforming areas of Delhi, polluting vehicles substituted by CNG run vehicles and the Taj Corridor case are some such examples.

To protect the fundamental rights and to maintain the quality of life, the Supreme Court of India has on several occasions outlawed arbitrary and unreasonable actions of all kinds and protection has been extended to pavement dwellers, destitute women, bonded labourers and victims of pollution.

In *Bommai's* case,[27] the Supreme Court in exercise of its rights to judicial review, struck down a proclamation made by the President of India under Article 356 of the Constitution on finding that, there was no material on which the President could have reached the conclusion. When the Parliament brought about the 39th Amendment to the Constitution making election of Prime Minister immune from challenging in the Court, the Supreme Court struck down the offending part of the said Amendment in the case of *Indira Gandhi* v. *Raj Narain*[28] on the grounds that they were inconsistent with the doctrine of, "the sepration of powers", which was a basic structure of the Constitution.

In *Minerva Mills Case*,[29] the Supreme Court held the restrictions and exclusions brought forward by the 42nd Amendment of the Constitution to be void since, it contravened Articles 14 and 19. The Court said in unmistakable terms that Fundamental Rights occupy a unique place in the lives of civilized societies and have been variously described in the Judgments of the Supreme Court as "transcedental" 'inalienable' and "primordial." For us, they constitute the ark of the Constitution. Thus, it shall be right to say that the Supreme Court has proved to be a constant upholder of the intentions of the Constituent Assembly

expressing the ideals and beliefs of Pandit Jawaharlal Nehru as the founder of independent India.

In the case of *Maneka Gandhi* v. *Union of India,*[30] the Supreme Court went further and held that the procedure contemplated under Article 21, must be "right, just and fair" and not arbitrary, and it must pass the "test of reasonableness". The expression and the language of Article 21, is under constant expansion by process of interpretation, as is apparent from the judgment of the Court in, *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi.*[31] Giving the meaning and expansion to guarantee conferred by Article 21, the Court said – "Any act which damages or injures or interferes with the use of, any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21. Any act, which offends against or impairs human dignity would constitute deprivation *pro tanto* of this right to live." These ringing words, written in gold, pose a question – Could there be a better definition coined for 'right to live' except by Judicial Activism?

The mushroom growth of industries in and around metros made the environment so polluted that it became almost impossible to breathe fresh air even in the morning. The Supreme Court then took upon itself the task of providing a pollution free environment, as a facet of right to life guaranteed under Article 21 of the Constitution. In *Subhash Kumar* v. *State of Bihar,*[32] the Supreme Court ruled that the right to pollution free air falls under Article 21. In *M.C. Mehta* v. *Union of India,*[33] the Supreme Court held that it is a fundamental right, to have a clean environment for healthy living and therefore pollution treatment plant must be a pre-condition to have an industry.

It is not possible to list all the cases in which the superior courts have played their part as was envisioned by the Framers of the Constitution. I have only discussed a few of the important judgments, and on account of time do restrain myself here from stating any more. To sum up, the role that has been played by the Supreme Court, it can be said that the Supreme Court has strengthened the foundation of the Rule of Law in a way that was never done before either in India or else where. It has compelled the State and its instrumentalities to do, what they should have done and prohibited them from doing, what they intended to do but should not have done. A strong and powerful Judiciary, as the Indian Courts have proved they are, is essential to protect the rights, interests and entitlements of the weaker sections of the society.

Need for Care and Caution

Judicial Activism is not an aberration. It is an essential aspect of the dynamics of Indian constitutional courts. It is a counter-majoritarian check on democracy. Judicial activism, does not, however, mean governance by the Judiciary. It also must function within the limits of the judicial process. When the judges discharge their constitutional duty, they have to bear in mind this hard reality and, naturally therefore, while discharging their constitutional obligation, they have to expand and develop law on those lines and within the limits, set out for them under the Constitution and equally those dictated by prudence of self-restraint learnt by judicial experience.

Assumption of pro-active role by the courts cannot be a permanent feature. It has some shortcomings which too need to be taken note of. By assuming additional responsibility, the judicial system has done a dis-service to itself in the sense that it is crumbling under the burden of additionally collected cases over and above the insurmountable backlog of arrears.

Secondly, there are several such issues which need expertise – financial, technical or otherwise which the Judiciary is not possessed of and hence the possibility of directions being issued, without an in-depth consideration of all the relevant factors, cannot be ruled out. Thirdly, the judicial decisions suffer from inflexibility. Having delivered a decision, the court becomes *functus officio* and cannot mould its decision with the needs of changing times which the Legislature and the Executive can always do. The court cannot have recourse to the innovative technique of issuing continuing mandamus in all the cases. Fourthly, constitutionally the courts do not have any machinery of their own for implementing their decisions. The only power available is the one of contempt which cannot be exercised frequently and certainly not always. And lastly, higher assumption of responsibility by the Judiciary has the deleterious effect of weakening other wings of governance, which is not a good indication of otherwise healthy constitutional democracy. These are a few aspects, which the courts shall have to keep in mind as dictating the need for exercise of self-restraint while expanding the arena of their jurisdiction in public interest.

Justice J.S. Verma, former Chief Justice of India, in his book "New Dimensions of Justice"[34] has indicated "Judicial Activism is a delicate exercise involving creativity, great skill and dexterity is required for innovation. Judicial creativity is needed to fill the void occasioned by any gap in the law or inaction of any other functionary, and, thereby, to implement the Rule of Law. Diversion from the traditional course must be made only to the extent necessary to activate the concerned public authorities to discharge their duties under the law and to catalyse the process, but not to usurp their role. The credibility of the judicial process must not get eroded. Monitoring of investigation in the case of inaction, by the investigating agencies has to be done avoiding the expression of any opinion on the merits, which it is for the competent court to consider during the trial. In short, the need for self-restraint must never be lost sight of."

A word of caution given by Benjamin Cardozo[35] is very apt to be remembered by the judges while exercising their discretion. "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will, in pursuit of his own ideal of beauty or of goodness. He has to draw his inspiration from consecrated principles. He is not to yield, to spasmodic sentiment, to vague and unregulated benevolence. He has to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'. Wide enough in all conscience is the field of discretion that remains".

To preserve the sanctity and credibility of the judicial process and to overcome the criticism of judicial activism, it is necessary to practice self-restraint while innovating new tools. The court may assume an activist role only for public good and under circumstances when no other efficacious means is available under the legal framework. In a democracy, it is an ideal form of governance when all organs discharge their true functions so that there is no occasion for any judicial intervention to, activate or regulate other wings in the performance of their duties. Judicial creativity even when it takes the form of judicial activism should not result in rewriting of the Constitution or any legislative enactments. Reconciliation of the permanent values embodied in the Constitution with the transitional and changing requirements of the society must not result in undermining the integrity of the Constitution. Any attempt leading to such a consequence would destroy the very structure of the constitutional institutions.

On the other hand, Judicial Activism characterised by moderation and self-restraint is bound to restore the faith of the people in the efficacy of the democratic institutions which alone, in turn, will activate the Executive and the Legislature to function effectively under the vigilant eye of the Judiciary as ordained by the Constitution.

Conclusion

I can vouchsafe as the Head of the Indian Judicial Fraternity, that wherever and whenever the courts have exercised powers, and issued directions, commented on as 'activist role', the courts have done so for public good and in the interest of the society and the need of the hour and I believe the courts, particularly the superior courts, exist in the constitutional scheme to sub-serve that purpose.

Satya Sai Baba, the great saint of modern times, has once said—

I answer to whatever name you use,
I respond to whatever request you make
with a pure heart and sanctified motive.

Borrowing the words from the above quote, I may say that an active Judiciary holds out a promise—

"I answer to you from my doors ever open,
I respond to whatever request you make
(subject to the limitations of Constitution)
with a pure heart and sanctified motive."

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* B.M. Patnaik Memorial Lecture delivered on 22nd January, 2005 at Cuttack.

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