

Religious extremists have not found the Court bent or bow before the fanaticism and on the whole, the salutary role of Court has made religious rights of all classes a reality.

It did not mean that the importance of religion in social life would be reduced, but it only meant 'the separation of the State from religion'. Repeatedly he emphasized that 'the Hindus must always remember that the interest and the well-being of the minorities are their sacred trust. If they fail in their trust, then they injure not only the country, but themselves. Any narrow and aggressive attitude on the part of the majority community would create a feeling of apprehension in the minds of the minority community would create a feeling of apprehension in the minds of the minority communities. Anything that creates such an apprehension in the minds of any group in India is to be deprecated. It tends to disturb and it is opposed to our secular ideal.' We are reminded of the American constitutional Caesar the things which are Caesar's and unto God the things that are God's." This accords with the Indian cultural heritage of religious fellowship but the Indian State does, constitutionally and statutorily, inter-meddle in religious endowments, among others (Article 26 and laws, for instance where social evils and public order compel disciplining). In practice, State dignitaries—even *Nehru*—did a lot of poojas and ceremonies as in Ram Leela and a host of other naked religious lamp-lighting and chanting at officials

functions. Life is compromise ! Coming to basics, *Nehru* was non-religious and anti-orthodox but he was no monolith.

The functions of law in society are to a great extent shaped and determined by the prevailing system of Government and by the purposes or ends which underlie the decision and in the sense of judicial and administrative adjudication of disputes can be thought of both as a mechanism of social control and of social change. To the extent the standard setting and regulatory functions of the law and popular expectations as to the ends and functions of the law in society converge, there is created an acceptable basis for ordered adjustment of human relations beyond the limited bonds of kinship or of religious, racial or ideological group identification. When individuals secure satisfaction of their personal and social interests within the framework of the established system of law, they tend to accept its legitimacy. As participation in the sense of a social support system satisfying a maximum of human wants becomes universal, the stability of authority structure, which obtain warrant for their operations from the legal system, increases. The key element in this process of building support for consensual authority structures founded on a welfare-State oriented version of the rule of law is the success of the modernizing regime in transforming attitudes and behaviour on the part of the masses in tune with modern and progressive ideas of mass participation in representative institutions of social control.

JUDICIAL ACTIVISM IN INDIA - WITH SPECIAL REFERENCE TO THE SUPREME COURT OF INDIA

By

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"That the 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 provision in the constitution, it was the duty of the Court

to enforce the Constitution and ignore the law”¹

The Preamble of the Constitution of India set out the object of the Constitution. It declares to secure to all its citizens, *inter alia*, Justice, social, economic and political, equality of status and of opportunity; and to promote among them all. The Indian Constitution has guaranteed number of fundamental rights to its citizens and for its enforcement provided an independent and impartial judiciary. The Judiciary is the custodian of the rights of citizens. In order to secure the objectives laid down in Preamble and for the protection of fundamental rights guaranteed under Part Three of the Constitution, the Indian judiciary has been playing active role and ensured justice to all.

The object of this paper to trace the history of judicial activism and the instances in which the Indian judiciary has invoked this concept in order to meet the ends of justice. It is through the process of ‘Judicial Activism’ enforced and protected the rights of citizens and reviewed the functions of Legislature actions of Executive, whenever it is found necessary, by maintaining the utmost judicial restraint. At the same time the ‘judicial activism’ has resulted in recognition of new rights in various fields such as Human Rights law, Civil and Criminal law, labour law, family law, women and children and the list is only illustrative.

What is Judicial Activism?

‘Judicial Activism’ in India is a movement from personal injury to public concern by relaxing, expanding and broadening the concept of *locus standi*. Allowing the access to justice to every citizen including ‘*Pro Bono Publico*’, public spirited citizens in the matters of public wrongs. For a very long time the Courts in India had shown an orthodox approach in interpreting the rules of standing.

The general rule is that only the person, whose fundamental right or any other legal right has been violated, could alone move the Court for the enforcement of the right.

The Judicial activism in India has started with the introduction of epistolary jurisdiction, that is, entertaining letters not only from the aggrieved persons but also from persons acting *pro bono publico* to initiate public interest litigation. The Supreme Court of India has shown its activism, whenever any institution in the democracy is found in lethargy or inefficiency. The Supreme Court, in its active role, set right a number of legislations and executive decisions and number of wrongs committed by the States and Executive to realize its responsibilities.

If the law fails to respond to the needs of changing society, if legislature fails to respond to the call of socio-economic conditions or if the executive becomes arbitrary in performing administrative actions, then, the judiciary has stepped into action and acted dynamically. Law must therefore, constantly be on the move of adapting itself to the fast changing society and not to lag behind.

Judiciary making law has been Constitutionally recognized in India. The law declared by the Supreme Court shall be binding on all Courts within the territory of India. Having a Constitution mandate, the Apex Court of the country has been playing a very significant role for rendering social justice with the innovation of judicial activism. The Supreme Court of India, while justifying its judicial activism, held that it is not exercising any extra-constitutional jurisdiction, rather, Public Interest Litigation has its roots in Articles 14 and 21 of the Constitution of India. The judicial activism can be noticed in the decisions relating to property, life and personal liberty, upliftment of poor, underprivileged communities, equal pay for equal work, ecology, exploitation of children, women and labour, *etc.* Thus, judicial activism in India has resulted in explosion of rights.

1. *Marbury v. Madison*, (1 Cranch 137 (US 1803)

Remedies for Enforcement Fundamental Rights

Clause (1) of Article 32 of the Constitution guarantees the right to move to Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part-III (Fundamental Rights) of the Constitution. In this Article the Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *Habeas Corpus*, *Mandamus*, *Prohibition*, *Quo Warranto* and *Certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this part².

Clause (3) of Article 32 provides that without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2). The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution³.

Doctrine of Public Interest Litigation

The general principle of law in India is that the legal process can be initiated in a Court of law at the instance of an aggrieved person. A third party generally does not have the legal capacity to initiate proceedings against others. It means under the normal circumstances and on the basis of traditional rule in regard to *locus standi*, it is only a person who has suffered a legal injury by reason of violation of his legal right by the impugned action or who is likely to suffer an injury by the reasoning of violation of his legal right, can alone approach the Court invoking its jurisdiction for the issuance of any of the writ contemplated either under Article 226 or under Article 32 of the Constitution of India.

In India, Public Interest Litigation (PIL) or Social Action Litigation (SAL) is the latest development in the fields of Constitutional Law and Administrative Law. Lexically, the expression "Public Interest Litigation" (PIL) means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

The Courts have fixed the accountability, exercised legislative functions by laying down guidelines in various cases, exercised administrative and executive functions by directing the various agencies to report back to the Court in respect of action taken according to the directions issued by the Courts. Judicial activism of the Indian Judiciary and liberalized rule of *locus standi* has been reflected in the below cited decisions, which mostly in the form of Public Interest Litigations before the Supreme Court. The guidelines, directions and decisions given in the following cases are the classic examples of Judicial Activism in India:

In *Chiranjit Lal v. Union of India*,⁴ it is held that a Corporation has a social character of its own and it must not be regarded as the concern primarily or only of those who invest their money in it. In *D.B.M. Patnaik v. State of A.P.*,⁵ it is observed that the protection of Article 21 is available even to convicts in jails. In *Bar Council of India v. M.V. Dabholkar*⁶, the Supreme Court first time advocated liberal interpretation of *locus standi* in PIL. In this case it allowed the Bar Council of Maharashtra to initiate proceedings against Mr. *Dabholkar*, an Advocate, for professional misconduct. In *Maneka Gandhi v. Union of India*⁷, Supreme Court has given the widest possible interpretation to the words 'personal liberty'. It held that any law, which is taking

2. Article 32(2) of Constitution of India.

3. Article 32(4) of Constitution of India

4. AIR 1950 SC 41

5. AIR 1974 SC 2092

6. AIR 1975 SC 2092

7. AIR 1978 SC 597

away life or personal liberty, must be fair, just and reasonable.

In *Bai Tahira v. Ali Hussain*⁸, Supreme Court, after considering the question of payment of maintenance and held that payments of illusory amounts by way of customary or personal law requirement will be considered in reducing the rate of maintenance but cannot be considered as wiping it out altogether. In *M.H. Hoskot v. State of Maharashtra*⁹, and in *Hussainara Khatoon State of Bihar*¹⁰, recognized that right to speedy trial as a fundamental right.

In *Prem Shankar v. Delhi Administration*¹¹, the Court held that handcuffing is *prima facie* inhuman and, therefore, unreasonable, is over harsh and at the first flush, arbitrary. In *Bhagalpur Blinding case (Khatri v. State of Bihar)*¹², issued directions to the Government to provide medical aid and legal representation to the victims of police blinding. In *Arun Shorie v. State*¹³, the Court issued the directions for prohibition of sale of women and awarded relief for the victims. In *Fertilizer Corporation Kamgar Union v. Union of India*¹⁴, it is held that jurisdiction conferred on the Supreme Court by Article 32 is an important part of the 'basic structure' of the Constitution. The Public enterprises are owned by the people and those who run them are accountable to the people. The accountability of the public sector to the Parliament is ineffective. In such cases the Court would under duty to interfere. In *Sunil Batra v. Delhi Administration*¹⁵, recognized the Right against torture.

In *Peoples' Union for Democratic Rights v. Union of India*¹⁶, *Salal Hydro Electric Project v.*

*State of Jammu and Kashmir*¹⁷ and *Bandhua Mukti Morcha v. Union of India*¹⁸, the Court held that a person who provides labour or service to another for remuneration which is less than minimum wage amounts to forced labour under Article 23. In *Sanjit Roy v. Rajasthan*¹⁹, the Supreme Court held that the petitioner, Director of a social action group working for the upliftment of Scheduled Castes and Scheduled Tribes, had the standing to file a petition to remedy the violation of the Minimum Wages Act. In *National Textile Worker's Union v. P.R. Rama Krishna*²⁰, the Court held that workers have *locus standi* to be heard before the winding up petition is admitted and an order for advertisement is made and they also have right to be heard at the winding up proceedings.

In *P. Nella Thamby Thera v. Union of India*²¹, the Supreme Court entertained a petition at the behest of a railway commuter against the Indian Railways for improving the railway services. In *M.H. Hongray v. Union of India*²², a writ was issued for producing two missing persons alleged to have been illegally kept in army custody. In *Mukesh Advani v. State of M.P.*²³ a letter, enclosing the paper cutting, depicting the horrid plight of the bonded labour working in stone quarries at Raisen in M.P., was treated a writ petition. In *Olga Tellis v. Bombay Municipal Corporation*²⁴, it is held that right to livelihood is a part of Article 21 of the Constitution of India.

In *Mohammed Ahmed Khan v. Shab Bano Begum*²⁵, a Five Judge Bench of the Supreme Court held that a sum payable to the wife out of respect cannot be a sum payable on

8. AIR 1979 SC 362

9. AIR 1979 SC 1548

10. AIR 1979 SC 1369

11. AIR 1980 SC 1535

12. AIR 1981 SC 928

13. (1981) 4 SCC (Jour)

14. AIR 1981 SC 344

15. AIR 1980 SC 1979

16. (1982) 2 SCC 235

17. (1983) 2 SCC 181

18. (1984) 2 SCC 161

19. AIR 1983 SC 328

20. AIR 1983 SC 75

21. AIR 1984 SC 74

22. (1984) 3 SCC 81

23. AIR 1985 SC 1363

24. (1985) 3 SCC 545

25. AIR 1985 SC 945

divorce. It further held that if she is unable to maintain herself, she is entitled to take recourse to Section 125 of the Code of Criminal Procedure. In *Bhim Singh v. State of J.K.*²⁶, the Court awarded a sum of Rs.50,000/- to the petitioner as compensation for the violation of his Constitutional right of personal liberty under Article 21 of the Constitution. In *Rural Litigation and Entitlement Kendra v. State of U.P.*²⁷, the Court ordered the closure of certain lime stone quarries on the ground that there were serious deficiencies regarding safety and hazards in them. In *Upendra Baxi v. State of U.P.*²⁸, it is recognized that right to human dignity is part of fundamental rights.

In *M.C. Mehta v. Union of India*²⁹, Pollution of Taj Mahal, the Court has passed the various direction with regard to protection of Taj Mahal from foundries, chemically hazardous industries established and functioning around the Taj Mahal. In *Paramananda Katara v. Union of India*³⁰, it has been held that it is the professional obligation of all doctors, to extend medical aid to the injured immediately to preserve life without waiting for any legal formalities.

In *M.C. Mehta v. State of Tamil Nadu*³¹, the Court held that the children cannot be employed in match factories which are directly connected with the manufacturing process as it is a hazardous employment within the meaning of Employment of Children Act, 1938. In *Mohini Jain v. State of Karnataka*³², the Supreme Court held that the right to education is a fundamental right under Article 21 of the Constitution as 'it directly flows' from right to life. In *All India Imam Organization v. Union of India*³³, it was held

that Imams who are in charge of religious activities of Mosque are entitled to emoluments even in the absence of statutory provisions in the Wakf Act, 1954. In *Neelabati Behera v. State of Orissa*³⁴, the Court has awarded compensation of Rs.1,50,000/- to the mother of the deceased who died in the police custody due to beating.

In *Janata Dal v. H.S. Chowdhary and others*³⁵, the Court in this case has reiterated the widely enlargement of the scope of PIL by relaxing and liberalizing the rule of standing by treating letters or petition sent by any person or association complaining violation of any fundamental rights and also entertaining writ petitions filed under Article 32 of the Constitution by public-spirited and policy oriented activist or persons or journalists or of any organization. In *Chiranjit Kaur v. Union of India*³⁶, the Court awarded the widow of the deceased Army Officer, due to negligence of army officers, a compensation of Rs.6,00,000/- as well as special Family Pension and Children allowance. In *K.R. Srinivas v. R.M. Prem Chand*³⁷, it was held that the petitioner who comes to the Court for relief of public interest must come not only with clean hands, but also with clear heart, clean mind and clean objective.

In *Consumer Education and Research Centre v. Union of India*³⁸, the Supreme Court held that the right to health and medical care is a fundamental right under Article 21 of the Constitution of India. In *State of Maharashtra v. Manubhai Pragaji Vasthi*³⁹, the Court widened the scope of right to free legal aid and held that there is a need to have well trained lawyers in the country. It directed the State to pay grant-in-aid to law Colleges for development of infrastructure and to impart

26. (1985) 4 SCC 677

27. (1985) 2 SCC 431

28. (1986) 4 SCC 106

29. (1987) 4 SCC 463

30. AIR 1989 SC 2039

31. AIR 1991 SC 417

32. (1992) 3 SCC 666

33. AIR 1993 SC 2086

34. (1993) 2 SCC 746

35. AIR 1993 SC 892

36. (1994) 2 SCC 1

37. 1994 (6) SCC 620

38. (1995) 3 SCC 42

39. (1995) 5 SCC 730

standard education. In *Delhi Domestic Working Women's Forum v. Union of India*⁴⁰, the Court has laid the detailed guidelines for trial of rape cases.

In *D.K. Basu v. State of West Bengal*⁴¹, the Supreme Court has laid down the detailed guidelines to be followed by the Police in all cases of arrests and detention. In *People's Union for Civil Liberties v. Union of India*⁴², the Court has awarded compensation to the dependents of persons killed in fake encounter. In *Vishaka v. State of Rajasthan*⁴³, the Supreme Court has laid down exhaustive guidelines to prevent sexual harassment of working women in place of their work until a legislation is enacted for the purpose. It also directed that all employers, persons in charge of work place whether in the public or private sector, should take appropriate steps to prevent sexual harassment.

In *Gaurav Jain v. Union of India*⁴⁴, the Supreme Court has issued a number of directions to the Government and all social organizations to take upon appropriate measures for prevention of women in various forms of prostitution and rescue them from

falling them again into the trap of red light areas and for rehabilitation of their children. The Supreme Court in *Zabira Habibulla H. Sheikh and another v. State of Gujarat*⁴⁵, reversing the Gujarat High Court judgment held that, if the State's machinery fails to protect citizen's life, liberties and property and the investigation is conducted in a manner to help the accused persons, it is appropriate that the Supreme Court should step in to prevent undue miscarriage of justice that is perpetrated upon the victims and their family members. The Court transferred this case from State of Gujarat to Maharashtra State and directed that the retrial shall be done by a Court under the jurisdiction of the Bombay High Court.

Conclusion :—The study of above judicial decisions delivered by the Supreme Court of India clearly shows that how the Indian judiciary has raised to the occasion and protected the rights of citizens guaranteed under Indian Constitution. There is also considerable growth of several rights, in the field of human rights, criminal law, labour law. Law relating to protection of women and children, environmental law *etc.*, through the process of judicial activism.

THE USE OF FORCE BY STATES AND ITS LIMITATIONS IN INTERNATIONAL LAW

By

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As with every other legal system, International law must seek to prevent its subjects from using violence to settle their differences. As emphasised by the International Court in *Nicaragua v. USA*, 1986 ICJ Rep 14, these rules encapsulate some of the most fundamental of all International obligations.

Prior to 1945, there was a web of customary and treaty law which regulated the unilateral use of force by states. In the early days of International law, the use of force by state was governed by the Just War doctrine. As developed by writers such as St. Augustine and Grotius, the Just War theory stipulated that war was illegal unless undertaken for a

40. (1995) 1 SCC 14

41. AIR 1997 SC 610 = 1997 (1) ALD (Crl.) 248 (SC)

42. AIR 1997 SC 1203

43. AIR 1997 SC 3011

44. AIR 1997 SC 3021 = 1997 (2) ALD (Crl.) 199 (SC)

45. (2004) 4 SCC 158 = 2004 AILD 316 (SC).