

JUDICIAL ACTIVISM

By

—Justice P.S. NARAYANA,
JUDGE, A.P. HIGH COURT

"Justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice"

says the Apex Court in *Lily Thomas v. Union of India*, 2000 (6) ALD 16 (SC) = 2000 (2) ALD (Cri.) 686 (SC) = (2000) 6 SCC 224.

"Judicial activism" is no doubt an attractive expression but one which cannot be precisely or easily defined. Just like the different views expressed by eminent Judges and jurists on the concept of "Judicial review", this expression also is being defined, in varied forms. May be "Judicial activism" may have to be understood in contradistinction to Judicial passivism. Public confidence in Judiciary is the core of concept of democracy. If this collapses, there would be total collapse of the very system itself.

I do confess that it is very very difficult to define the clear demarcating lines in relation to interference by Judiciary - where to interfere, where not to interfere. *Pandit Jawaharlal Nehru* in the Constituent Assembly had stated :

"Within limits no Judge and no Supreme Court can make itself a third chamber. No Supreme Court and Judiciary can stand in Judgment over the sovereign will of Parliament representing the will of the entire community. If we go away here or there it can point it out but in the ultimate analysis, where the future of the community is concerned, no Judiciary can come in the way".

Judicial activism has been often understood in relation to yet another expression "Judicial restraint". As far as judicial supremacy is concerned, there are a few instances where a seeming confrontation occurred which had

not been ultimately taken to the logical end and this question is left unanswered in view of the complexity of the problem.

Indian Judicial System in its present form is a creature by relevant provisions of the Constitution of India. The British Rule in India had introduced the common law jurisprudence. English language also because of long passage of time became part and parcel of our way of life and education system as well especially in the light of the absence of any unifying common National language acceptable to all in this multi-linguistic and multi-religious mighty Nation. This system has the march from Diwani Adalats, High Courts Act 1861, Government of India Act, 1915 and Government of India Act, 1935 and the present Constitution of India. The contribution of Privy Council and the Federal Court also is noteworthy to the legal field.

A careful scrutiny and analysis of growth of Judicial activism definitely would go to show that there is a close nexus between this growth and the failures on the part of the other wings - Legislature and Executive. On several occasions interference by Judiciary was only due to the necessity and out of compulsion and intentional trespass or encroachment beyond the limits definitely had been very negligible and the least. In safeguarding the fundamental rights and the legal rights, Judiciary always has been playing a vital role. Often than not, Judiciary would be drawn into unnecessary controversy though uncalled for in the context. Judges are not expected to go to Press or make statements in public which would result in controversies. Despite the criticism levelled against this mighty Institution, often in the working of the System from the commencement, the Institution

maintained the highest integrity enjoying unshattered public confidence. The march of law from *A.K.Gopalan's* case {AIR 1950 SC 27} till *Menaka Gandhi's* case {AIR 1978 SC 597} would show the remarkable change or the shift of the stand of the Apex Court from the most conservative outlook to a broader or liberal horizon in public interest. The contribution of the Supreme Court on right of privacy commencing from *Kharak Singh's* case {AIR 1963 SC 1295} passing through *Govind's* case {AIR 1975 SC 1378} to *Malak Singh's* case {AIR 1981 SC 760} is noteworthy. The declaration of Section 9 of Hindu Marriage Act, 1955 as unconstitutional in *Sareetha's* case {AIR 1983 AP 356} was not accepted by the Supreme Court in *Saroj Rani's* case {AIR 1984 SC 1562}.

The contribution of Judiciary in relation to different social problems cannot be exhaustively dealt with and the evolution and growth of Public Interest Litigation may be relevant to be referred to in this context. Though the concept of Public Interest Litigation and the doctrine of Judicial activism have been under serious criticism, one cannot say that these are totally bad or totally good since each may depend upon particular set of facts. Care and caution to be taken by the Courts to scrutinize such litigations keeping in view the public interest alone and not to settle more private grievances based on narrow personal considerations. Political controversies do often figure under the guise of Public Interest Litigation. Quite often confrontation between Press and Contempt powers of Courts, Privileges of Legislatures and exercise of powers by Judiciary do arise for consideration. The declaration of law to the effect that Government employees have no right to go on strike is definitely a landmark Judgment though there is serious criticism as against it. In *Delhi Bar Association v. Union of India*, 2003 (5) SCALE 26, it was held by the Apex Court that smooth functioning of the Courts would be essential for maintaining law and order.

In *Research Foundation for Science, Technology National Research Policy v. Union of India*, 2003 (9) SCALE 303, it was held that right to information and community participation necessary for protection of environment and human health would form part of Article 21 of the Constitution of India. Reasonable and fair trial in relation to Gujarat riots had been dealt with in *National Human Rights Commission v. State of Gujarat*, 2003 (9) SCALE 329. In *World Human Rights Protection v. Union of India*, AIR 2004 J&K 6, where a mother, resident of Pakistan occupied Kashmir conceived in India while she was in jail custody, it can be presumed that servants of the State are responsible for the same and hence State is liable to pay compensation. Laying down guidelines in relation to sexual harassment of working women in *Visakha's* case {AIR 1997 S.C. 3011} may be an example of Judicial activism. See also : *Apparel Export Promotion Council v. A.K.Chopra* {AIR 1999 SC 625}. In *Sheela Barse's* case {AIR 1986 SC 1773} speedy trial of juvenile cases had been dealt with. See *Hussainara Khatoon's* case also {AIR 1979 SC 1360}. Imparting education cannot be allowed to become commerce {*Unni Krishnan's* case - AIR 1993 SC 2178, *Mobini Jain's* case {AIR 1992 SC 1858}. In *Indira Jai Singh's* case {2003(3) Supreme 769} allegations against Judges and investigation thereof was discussed. References by President to the Apex Court commencing from *In re Delhi Laws Act 1912* {AIR 1951 SC 332}, *In re Kerala Education Bill* {AIR 1958 SC 956}, *In re Special Courts Bill* {AIR 1979 SC 478}, *In re Cauvery Water Disputes Tribunal* {AIR 1992 S.C. 522}, till today had been well answered while discharging the advisory function.

Freedom of speech is inclusive of freedom of press as well. Right to freely express one's own views is the fundamental concept of democracy. The Court's have been playing an active role in protecting these rights very jealously. Several newspapers had repeatedly approached Courts on different occasions complaining of the infringement of their

fundamental rights and legal rights as well. Fair criticism always has been protected.

Role of Judiciary during days of emergency, concept of committed Judiciary, supersession of Judges are a few events to be referred to as attempts to touch the independence of the system. Men may come and men may go, parties may stay or disappear, the System should function well to keep up democracy. Though the need for uniform Civil Code was emphasized in *Jordan v. Chopra* {AIR 1985 SC 935}, *Ahmed Khan v. Sha Banoo Begum* {AIR 1985 SC 945}, *Sarala Mudgal v. Union of India* {1995 (11) DMC 352}, *John Vallamattom v. Union of India* {2003 AIR SCW 3536} the diverse personal laws operate as an obstacle in achieving this object which would definitely pave the way to National integration. In *People's Union for Civil Liberties and another v. Union of India* {2003 AIR SCW 7233} the Apex Court while dealing with Constitutional validity of the anti-terrorism law (POTA) observed :

“Terrorist acts are meant to destabilize the nation by challenging its sovereignty and integrity, to raze the Constitutional principles that we hold dear, to create a psyche of fear and anarchism among common people, to tear apart the secular fabric, to overthrow democratically elected Government, to promote prejudice and bigotry, to demoralize the security forces, to thwart the economic progress and development and so on. This cannot be equated with a usual law and order problem within a State. On the other hand, it is inter-state, inter-national or cross-border in character. Fight against the overt and covert acts of terrorism is not a regular criminal justice endeavour, rather it is defence of our nation and its citizens. It is a challenge to the whole nation and invisible force of Indianness that binds this great nation together. Therefore, terrorism is a new challenge for law enforcement, by indulging in terrorist activities organized groups or individuals,

trained, inspired and supported by fundamentalists and anti-Indian elements were trying to destabilize the country, this new breed of menace was hitherto unheard of. Terrorism is definitely a criminal act, but it is much more than mere criminality. Today, the Government is charged with the duty of protecting the unity, integrity, secularism and sovereignty of India from terrorists, both from outside and within borders. To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws. In the above said circumstances Parliament felt that a new anti-terrorism law is necessary for a better future. This parliamentary resolve is emptomised in POTA.

The terrorist threat that we are facing is now on an unprecedented global scale. Terrorism has become a global threat with global effects. It has become a challenge to the whole community of civilized nations. Terrorist activities in one country may take on a transnational character, carrying out attacks across one border, receiving funding from private parties or a Government across another, and procuring arms from multiple sources. Terrorism in a single country can readily become a threat to regional peace and security owing to its spillover effects. It is therefore difficult in the present context to draw sharp distinctions between domestic and international terrorism.”

It is no doubt true that under the guise of concept of Judicial activism. Courts should not transgress their permissible limits. At the same time, Constitutional Courts cannot shut their eyes when questions do arise for consideration before them and they are bound to raise to the occasion and redress the grievances more in public and social interest. Balance may have to be maintained in between the parameters and limitations of exercise of Judicial power and restraint to be observed wherever necessary and Courts to be active in cases of need and necessity in the larger interest of the Society at large.