

It is in the interest of the prosecution, to answer the allegation of the accused that witnesses had the opportunity to see the accused;

- (vi) If valid reasons are given for the delay; test identification parade may be admitted;
- (vii) From the nature of crime itself, everlasting impression about the facial feature of the accused exist in the mind of the witnesses and in their memory, delay is not fatal and corroboration also is not necessary;
- (viii) There can be no time limit for holding the test identification parade, as such a limit will help professional criminal, to avoid arrests and thereby make the time limit to prevent identification;
- (ix) It is within the discretionary power of the Court to decide the various issues relating to the test identification parade,

depending upon the facts and circumstances of each case;

- (x) The evidence of test identification parade if reliable and true, it can be acted upon; and
- (xi) That no number of witnesses are required to identify the culprit.

6. These recent rulings will be of considerable help to Judges, Prosecutors and Investigation Agencies to conduct the tests required without delay, fairly and without any motives to involve an innocent person as well as in accordance with due procedure.

7. It may be necessary to point out regarding identification, that caution must be exercised with regard to persons who closely resemble each other or in the case of twins, when they look almost similar and identical. May be the Forensic Science can be used to determine accurately in such cases, in order to protect an innocent person as against the guilty actually involved.

THE INDIAN CONSTITUTIONAL CRISES AND JUDICIAL ACTIVISM IN INDIA — A PERSPECTIVE

By

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I: Real Meaning of Judicial Activism:

There cannot be and there is no judicial activism *per se*. Judiciary has always remained active. It cannot afford to be passive. While other two wings of the Government, *i.e.* executive and legislature, sometimes remain passive and sometimes become overactive, but judiciary functions within its framework and is bound to work within its parameter because of constitutional device of division of powers. The main and prior function of the judiciary is to deliver justice to all without fear or favour. The judiciary endeavours to

protect oppressed, powerless, poor and helpless people against the injustice committed by omnipotent persons, authority or body. Judiciary protects the weakest persons from the oppressive acts of either executive or legislatures. When judiciary protects and provides justice to the poorest people against oppressive acts of a private persons, authority or body, there is no hue and cry but when it protects against tyranny of the Government, everyone thinks about judicial activism.

The judicial activism is very deeprooted. The earliest example is found in *Bonben's* case,

(1608) 77 ER 646; (8 Co Rep 1136), when Lord *Coke* of England propounded the doctrine to adjudge void an Act of Parliament when it is against the right and reasons, or repugnant, or impossible to be performed. In America, there was a charge against Chief Justice *John Marshall* when he invalidated the legislation enacted by the American Congress in *Marshall v. Madison* in 1803¹.

The Indian judiciary is not lagged behind of other judiciaries of the world, on the contrary the Indian Supreme Court is probably the only Court in the history of human kind to have asserted the power of judicial review over amendments to the Constitution, e.g. *Golaknath & Kesavananda* cases. Hon'ble. Justice *P.N. Bhagwati* has rightly explained judicial activism as under:

"The Indian judiciary has adopted an activist goal-oriented approach in the matter of interpretation of fundamental right. The judiciary has expanded the frontiers of fundamental rights and in the process rewritten some parts of the Constitution through a variety of techniques of judicial activism. The Supreme Court judiciary in India has undergone a radical change in the last few years and it is now increasingly being identical by justices as well as by people as "the last resort for the purpose of the bewildered."

Last year in U.S.A. debate took place on judicial activism. Republicans call "Judicial activism" judges making laws rather than interpreting them. It was also said "In practice, "activists" often turn out to be judges who make decisions conservatives or liberals oppose. Prof. *Joel Grossman*, of Johns Hopkins University says," Judicial activism is not the property of the left, Basically, judicial activism is what the other guy does that you don't like".

The true meaning of the judicial activism may be whosoever judiciously acts, aids or

protects by howsoever judicious means and stands by with the oppressed against tyranny of omnipotent is a part and parcel of judicial activism.

II: Constitutional Crises as a Source of Judicial Activism:

Constitutional crises arise when anyone acts against constitutional provisions or constitution is moulded through amendments² for personal political benefits. Article 329-A was added to protect Prime Minister *Indira Gandhi* and to strike off from the cause list of the Supreme Court of India appeals and cross appeals pending before it. Though the S.C. on the basis of the violation of basic structure³ struck down 39th amendment as invalid⁴.

Nowadays, we have more such occasions where without amending the constitution powers may be misused, e.g. *Kalyan Singh's* ministry was dismissed by the Governor, *Shri Romesh Bhandari*. Thus when the constitutional powers or position is misused, constitutional crises would arise. The real judicial activism starts at the time of constitutional crises and then begins the true test of judiciary. After the commencement of our Constitution, it was Allahabad High Court which stood firm and then great Judge, Justice *Sinha* convicted Prime Minister *Indira Gandhi* for corrupt practices at election. Again it is the same High Court which ordered reinstallation of *Shri Kalyan Singh's* Government. These are the examples of true and real judicial activism where the principle of "rule of law" is established that how so high you may be, the law is above you. Thus the primary source of judicial activism lies in the principle of rule of law.

The second source is power of review⁵ it

1. AIR 1998 SC 19

2. 39th Amendment by which Article 329-A was added.

3. *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 366.

4. *Indira Nebru Gandhi v. Raj Narain*, (1975) Supp. 1.

5. Article 137 of Indian Constitutional.

is a charter for judicial activism. The S.C. reviewed its own judgments given in *Sankari Prasad*,⁶ and *Sajjan Singh*,⁷ cases in the case of *Golak Nath*,⁸ and put fundamental rights outside the reach of the Parliament. Again in *Kesavananda Bharti's* case the S.C. reviewed its judgment given in *Golak Nath's* case and profounded the concept of "basic structure" of the Constitution, which cannot be changed by the Parliament. Thus through judicial review the Apex Court of India has achieved topmost position in the world.

The third and most recent source of judicial activism is found in Article 142 of the Constitution which provides powers to the S.C. while exercising its jurisdiction to pass decree or make order as is necessary for doing "complete justice" in any cause or matter pending before it. Thus began the era of PIL's (Public - Interest Litigations) and Justice P.N. Bhagavati, Justice Venkata Chaliab, Justice Kuldip Singh, Justice Ahmadi, Justice J.S. Verma etc. gave judgments in *Havala's* case, *Satish Sharma's* case, *Sheela Kaul's* case and provided the sound foundation of judicial activism in India.

III: Judicial Activism:

No doubt, the judiciary is the main and basic generator of judicial activism. The judiciary and the judgments should be more society oriented and sensitive to the people. If a choice is to be made between social justice and technical aspects of law, the social justice should be given precedence over the technical and procedural aspects of law. NGO's, lawyers, citizens and other institutions may also play a vital role in bringing the matters before the judiciary where gross injustice is being committed against the weaker sections of the society.

Now the question remains about the judicial activism for whom? The unorganised labour

force, illiterate rural womenfolk, and the children are the groups which require the help and assistance from the judiciary and the society. The affluent and brave will get justice through his own efforts but the poor and fearful persons require remedy through judicial activism.

IV: Judicial Activism and Its Applicability

Without its prompt applicability the judicial activism would lose its charm. The order and the judgment is not the end, rather it is beginning. Because in most of the cases orders passed against the Government, or authorities, they do not comply the order and when contempt proceedings are taken they think about the implementation of the order.

After demitting office while giving interview, Justice J.S. Verma said "Till the last day, I made orders. But what I tried to do for others, I now realise might not be happening. For instance, I passed an order for security for officials in the Mirzapur District because of the nature of their work. And after demitting office, I realise that despite being in the Z category, I did not get security for 24 hours till the Home - Security intervened. Not that I am bothered about myself. If this happens in my case, what must be happening to many others? I was bothered about them and that is the unfinished task that has to be carried on. The class for which I was bothered about, I am sure my colleagues will continue to be bothered about.

So the judiciary should not rest with the order but it should see that as a result of judicial activism the persons get justice through prompt imploration.

V: Human Rights and Judicial Activism

Many incidents of violation of human rights go unnoticed but the vigilant persons and organisations have brought before the judiciary the cases and proper remedy was provided. Bhagalpur case is the glaring example. During the 1990's the S.C. and High

6. *Sankari Prasad v. Union of India*, AIR 1951 SC 458

7. *Sajjan Singh v. State of Rajasthan*, AIR 1964 SC 854

8. *I.C. Golak Nath v. State of Punjab*, AIR 1967 SC 958

Courts were flooded with PIL's ranging from child labour to environment issues which forced the Government, to do some rethinking but the Government approach was more in curbing the Court's power (82nd amendment Bill) of PIL's affecting the executive and politician.

But the recent trends of the judiciary towards the violation of human rights are quite surprising because PIL's are diverted to the National Human Rights Commission. The Commission does not have the powers like S.C. or High Courts. The NHRC can play a fact-finding role but it cannot bind Government, by its decision.

VI: Accountability - Transparency and Judicial Activism

Commenting on judicial activism, *Nani Palkhivala* said, "Not a day passes when front pages of newspapers do not scream about 'landmark' judgment of the Supreme Court which virtually involves usurping the function of the executive." Anyhow there is difference between judicial activism and 'judicial extremism'. The judiciary is well aware of its jurisdiction and limitation. Because the judiciary acts with accountability having full transparency and the aggressive role played by the judiciary will be temporary. In the words of Justice *A.M. Ahmadi*, "However, by virtue of the fact that the present situation is a corrective measure the phenomenon of judicial activism in its aggressive role will have to be a temporary one. Fears of judicial tyranny are really quite unfounded because judges themselves are aware of the fact that the

non-elected judiciary is neither meant nor equipped to act as a policy-making body. Judges by virtue of their office, are supposed to live lives that do not allow them to continuously maintaining links with the ground realities in society. That is why I have always advocated restraint and circumspection."

Conclusion

Stalwarts like Justice *Krishna Iyer*, Justice *P.N. Bhagwati* and Justice *D.A. Desai* started the trend of treating even a letter from the public as a petition. Followed by the string of PIL's which translated the normal functions of the judiciary into alleged activism.

The aim of the judicial activism should be "Bahujan hitay, Bahujan sukhay". It must be in the larger interest of the society, Late Justice *S.D. Shah* of Gujarat High Court provided peace, health and safety through his directions in *Navratri's* case, drainage line at Ahmedabad and cattle menace on the roads of Ahmedabad.

The judiciary would be required to take firm decisions against the industries in this era of globalisation and Economic Liberalisation even against MNCs National Companies to protect the environment from various kinds of pollution. The Apex Court has rightly banned further registration of vehicles, particularly, three-wheelers, scooter rickshaws (TSRS) in Delhi. In fast developing era of science and incorporation technology, judiciary will be burdened to decide strange cases like "human cloning"

SEXUAL HARASSMENT OF WOMEN AT WORKPLACE IN A INDEPENDENCE OF INDIA - A PERSPECTIVE

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INTRODUCTION

While India has completed -63 years of

Independence and the women of this country have entered in all fields from medicine to politics and from politics to police force and