SCOPE OF JUDICIAL POWERS: JUDICIAL ACTIVISM

By- Adarsh Kumar

It is true on some occasions, courts have overstepped their limits. But, by and large, judicial activism has done a great service to society.

To begin with, what does the concept of 'judicial activism' mean? Let me try to put it in proper perspective with introduction.

Introduction

Under the Indian Constitution, the State is under the prime responsibility to ensure justice, liberty, equality and fraternity in the country. State is under the obligation to protect the individuals' fundamental rights and implement the Directive Principles of State Policy. In order to restrain the State from escaping its responsibilities, the Indian Constitution has conferred inherent powers, of reviewing the State's action, on the courts. In this context, the Indian judiciary has been considered as the guardian and protector of the Indian Constitution. Considering its constitutional duty, the Indian judiciary has played an active role, whenever required, in protecting the individuals' fundamental rights against the State's unjust, unreasonable and unfair actions/inactions.

Black's Law Dictionary defines judicial activism as: "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 precedent".

The judicial activism is use of judicial power to articulate and enforce what is beneficial for the society in general and people at large. Supreme Court despite its constitutional limitation has come up with flying colors as a champion of justice in the true sense of the word. JUSTICE… this seven letter word is one of the most debated ones in the entire English dictionary. With the entire world population being linked to it, there is no doubt about the fact that with changing tongues the definition does change.

The judicial activism has touched almost every aspect of life in India to do positive justice and in the process has gone beyond, what is prescribed by law or written in black and white. Only thing the judiciary must keep in mind is that while going overboard to do justice to common man must not overstep the limitations prescribed by sacrosanct i.e. The Constitution.

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1. LLB (Hons.), VIth Semester, City Academy Law College, University of Lucknow

(The Constitution of India, 1950, the Preamble.)

Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law. The question of judicial activism is closely related to constitutional interpretation, statutory construction, and separation of powers.

History of Judicial Activism

The exact history of judicial activism is unclear, but it is believed that the concept has been around for centuries. However, a man named Arthur Schlesinger, Jr. brought about the term judicial activism in 1947. Schlesinger was a specialist in American History, and was well known for his study of 20th century American Liberalism.

Schlesinger introduced the term in a Fortune Magazine article published that year entitled "The Supreme Court: 1947." In the article, Schlesinger grouped the courts into three categories: (1) judicial activists, (2) champions of self-restraint, and (3) a middle group.

Since the term first hit the political-judicial stage, it has been a point of controversy. This is especially interesting, as Schlesinger never truly defined the term. Since the term's inception, there have been varying opinions on what the term judicial activism truly means.

Law professor and leading constitutional scholar, David A. Strauss, has offered his opinion that judicial activism can take at least three forms. These include:

1. The act of overturning laws as unconstitutional
2. Overruling judicial precedent
3. Ruling contrary to a previously issued constitutional interpretation

A good example of the history of judicial activism is the 1954 case of Brown v. Board of Education. In 1951, a group of parents, on behalf of their children, filed a lawsuit against the Board of Education of the City of Topeka, Kansas. The parents had attempted to enrol their African-American children in the closest neighbourhood school that year, but were refused enrolment. The suit requested that the school district reverse its policy of racial segregation, in which the district operated separate schools for black and white children. The plaintiffs in the case claimed that racial segregation resulted in inferior facilities, accommodations, and treatment of their children.

The District Court ruled in favour of the Board of Education, based on the prior ruling of Plessy v. Ferguson, a case that upheld state laws requiring segregated transportation on trains. When the parents appealed their case to the U.S. Supreme Court, the Court ruled that segregation of whites and blacks in school was indeed unconstitutional, as it was harmful to black students.

This ruling flew in the face of the legal doctrine of stare decisis, which requires judges to uphold prior rulings of higher courts. This is also referred to as "case precedent." In this case, rather than relying on the ruling in Plessy v. Ferguson, which was a similar case, the Supreme Court overruled it.

This ruling on desegregation of public schools came with considerable resistance, as opponents of the ruling believed that the Court had relied on statistics and social theories, rather than on established law. This meant to them that the Supreme Court Justices had acted outside of its powers by creating new law. Supporters of the decision believed, on the other hand, that the court's exercising of judicial activism was appropriate. They argued that the court should use its power to adapt existing laws to address problems in current society.

Toward the end of the 20th century, the U.S. Supreme Court was seen as a powerful judicial body exercising greater activism than ever before. Conservatives criticized many of the justices, claiming they struck down many state and federal laws based on their own liberal political beliefs. The history of judicial activism shows us however, that both liberals and conservatives are known to take part in, and benefitting from the practice, while accusing the other group of doing so.

➢ Constitutional powers of the Supreme Court and High Courts in India

Judicial activism happens when the courts have power to review the State action. Article 13 read with Articles 32 and 226 of the Indian Constitution gives the power of judicial review to the higher judiciary to declare, any legislative, executive or administrative action, void if it is in contravention with the Constitution. The power of judicial review is a basic structure of the Indian Constitution.[2]

Article 32 of the Indian Constitution gives right to every individual to move directly to the Supreme Court of India for the enforcement of his or her fundamental right. Article 32 confers power on the Supreme Court to issue any order or writ for the enforcement of any of the fundamental rights. The Supreme Court in Fertilizer Corporation Kamgar Union v. Union of India[3] held that the power of the Supreme Court under Article 32 is an integral part of the basic structure of the Indian Constitution "because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated." It cannot be suspended even during emergency. An appropriate writ/order under Article 32 for the enforcement of Articles 17, 23 and 24 can be passed against a private individual also.[4]

2.L. Chandra Kumar v. Union of India, (1997) 3 S.C.C. 261.

3 A.I.R. 1981 S.C. 344.

4 People's Union for Democratic Rights v Union of India, (1982) 3

S.C.C. 235.

Increasingly, the Supreme Court has interpreted Article 32 in a very liberal manner in many cases in order to enforce fundamental rights even against the private entities performing public functions.

Article 226 of the Indian Constitution gives power to the High Courts to issue any appropriate order or writ for the enforcement of fundamental right and other legal rights. In this context, the jurisdiction of High Court under Article 226 seems wider than the jurisdiction of Supreme Court under Article 32. Both Articles 32 and 226 are basic structure of the Indian Constitution. Article 227 further gives power of supervisory control to the High Court over the subordinate courts, special courts and tribunals.

Further more, the Supreme Court has power to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed by any court or tribunal under Article 136 of the Indian Constitution confers special power on. The Supreme Court exercises its special power in those cases where gross injustice happens or substantial question of law is involved.

Power under Article 136 is discretionary one and can be exercised to decide the case on justice, equity and good conscience.[5] However it should be used with proper care and caution. In Pritam Singh v. The State,[6] the Supreme Court said that wide discretionary power under Article 136 should be exercised sparingly and in exceptional cases only. In Tirupati Balaji Developers Pvt. Ltd. v. State of Bihar,[7] the Supreme Court said that Article 136 does not confer a right of appeal on a party but vests a vast discretion in the Supreme Court meant to be exercised on the considerations of justice, call of duty and eradicating in justice.

Again, curative petition has been invented by the higher judiciary in order to prevent abuse of processor to cure gross miscarriage of justice. It is also maintainable in case of violation of the principles of natural justice.[8] The apex court in Rupa Hura judgment in 2002 said that the Bench considering curative petitions should have the three top judges of the Supreme Court.

One of the most important constitutional provisions giving extraordinary power to the Supreme Court is Article 142 of the Indian Constitution. This provision empowers the Supreme Court to pass suitable decree or order for doing complete justice in any pending matter before it. Despite the fact that the law-making power in India lies primarily with the Parliament only, the Supreme Court is able to legislate under Article 142 of the Indian Constitution. This provision is responsible for the judicial legislation in India. However, the judicial legislation is being done only when there is vacuum in law on the concerned subject-matter.

5. Union of India v. C Damani and Co., 1980 Supp. S.C.C. 707.
6. A.I.R. 1950 S.C. 169.
7. A.I.R.2004S.C.2351.
8. RupaAshokHurrav. AshokHurra,(2002)4S.C.C.388.

In Vishaka v. State of Rajasthan,[9]
The Supreme Court held that in the "absence of enacted law to

provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guide lines and norms specified here in after for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by this Court under Article 141 of the Constitution."

Considering the importance of Article 32 read with Article 142, it becomes necessary for the judiciary that it should perform its constitutional obligation where there is no legislation on the certain field and implement the rule of law.[10] Again, the Supreme Court in Kalyan Chandra Sarkar v. Rajesh Ranjan,[11] acknowledged the importance of Article 142 of the Indian Constitution and said that the court has power under Article 142 to issue directions and guidelines for implementing and protecting the fundamental rights in the absence of any enactment. The court reiterated that any such direction, filling up the vacuum of legislation, is the law of the land. However, the Parliament has power to replace such directions e.g. the Sexual Harassment of Women at Work place (Prevention, Prohibition and Redressal) Act, 2013 replaced the Vishakha Guidelines for prevention of sexual harassment issued by the Hon'ble Supreme Court of India in the year of 1997.

9 A.I.R.1997S.C.3011.
10 Vineet Narain v.Union of India, A.I.R.1998 S.C.889.
11 A.I.R.2005S.C.972.

Judicial Activism and shift from Locus Sstandi to Public Interest Litigation

Access to justice is a fundamental aspect of rule of law. If the justice is not accessible to all, establishment of the rule of law is not possible. The individuals fail to reach justice system due to various reasons including lack of basic necessities, illiteracy, poverty, discrimination, privacy, poor infrastructure of the justice system, etc.

The Supreme Court of India has recognized in many landmark judgments that access to justice is a fundamental right.[12] Indian Judiciary has played an active role in ensuring access to justice for the indigent persons, members belonging to socially and educationally backward classes, victims of human trafficking or victims of beggar, transgender, etc. Since Independence, the Court sin India have been adopting innovative ways for redressing the grievances of the disadvantaged persons. In many cases, the Supreme Court exercised its epistolary jurisdiction[13] and took suo motto actions on mere post allotters disclosing the human rights violations in society. Human rights violations, which published in the newspapers, were taken into judicial consideration. The court entertains the petitions which are being filed by the public spirited persons in the public interest. By doing so, the superior courts have liberated themselves from the shackles of the principle of Locus standi and given the birth to the Public interest litigation in India.

The shift from locus standi to public interest litigation made the judicial process "more participatory and democratic."[14] S.P. Sathe says: "The traditional paradigm of judicial process meant for private law adjudication had to be replaced by an ewparadigm that was poly centric and even legislative. While under the traditional paradigm, a judicial decision was binding on the parties (resjudicata) and was binding in personam, the judicial decision under public interest litigation bound not only the parties to the litigation but all those similarly situated."[15]

12 Imtiyaz Ahmad v. State of Uttar Pradesh, A.I.R.S.C.2012642.

13 Sunil Batra v. Delhi Administration,(1978)4S.C.C.494

14 S.P. Sathe, Judicial Activism in India (Sixth Indian Impression, OUP 2010)17

15 Id.at18.

The Supreme Court in People's Union for Democratic Rights v. Union of India[16] held that public interest litigation is different from the traditional adversarial justice system. The court said that public interest litigation is intended to promote public interest. Public interest litigation has been invented to bring justice to poor and socially or economically disadvantaged sections of the society. The violations of constitutional or legal rights of such large number of persons should not go unnoticed.

In **Fertilizer Corporation Kamgar Union v. Union of India**, [17] the court held that public interest litigation is part of the participative justice.

Further more, the Supreme Court in **Bandhua Mukti Morcha v. Union of India[18]** has justified the public interest litigation on the basis of "vast areas in our population of illiteracy and poverty, of social and economic backwardness, and of an insufficient awareness and appreciation of individual and collective rights".

The Supreme Court of India in Sheela Barse v. Union of India[19] said: "The compulsions for the judicial innovation of the technique of a public interest action is the constitutional promise of a social and economic transformation to usher-in an egalitarian social-order and a welfare - State". While passing any order under public interest litigation, the intention of the court is to enforce constitution and rule of law in the society.[20]

One of the land mark cases relating to the public interest litigation was Hussainara Khatoon (I) v. State of Bihar.[21] A series of articles exposing the plight of under trial prisoners in the State of Bihar was published in a prominent newspaper. Many of the under trial prisoners had already served the maximum sentence without even being charged for the offence.

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A writ petition drawing the Court's attention to the issue was filed by an advocate. While accepting it as public interest involved, the Supreme Court held that right to speedy trial is a fundamental right under Article 21 of the Indian Constitution. The court directed the State to provide free legal facilities to the under trials so that they could get bailor final release.

16 (1982) 3S.C.C.235.

17 A.I.R.1981S.C.344.

18 A.I.R.1984S.C.802

19 (1988)4 S.C.C.226.

20. State of Himachal Pradesh v. A Parent of a Student of Medical College, (1985) S.C.C.169.

21. (1980)1S.C.C.81.

In another case of **Sheela Barse v. State of Maharashtra**,[22] a letter alleging custodial violence of women prisoners in jail was addressed to the Supreme Court. The letter was written by a journalist who had interviewed some women prisoners in jail. Treating the letter as a writ petition, the Supreme Court took cognizance and issued directions to the concerned authority.

Similarly, epistolary jurisdiction was exercised by the Supreme Court in Sunil Batra v. Delhi Administration[23] when a prisoner's letter was treated as writ petition. The prisoner alleged in the letter that Head Warder brutally assaulted another prisoner. The Court said that the technicalities can not stop the court from protecting the civil liberties of the individuals.

In Municipal Council, Ratlam v. Vardichand,[24] the Court admitted the writ petition filed by a group of citizens who sought directions against the local Municipal Council for removal of open drains. The Court said that if the "centre of gravity of justice is to shift as indeed the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, the court must consider the issues as there is need to focus on the ordinary men."

Similarly,a petition seeking court's directions for protecting the lives of the people who made use of the water flowing in the river Ganga, was accepted as public interest litigation by the Supreme Court of India in the case of M.C Mehta v. Union of India.[25] In this case, the court directed the local bodies to take effective measures to prevent pollution of the water in the river Ganga.

In Parmanand Katarav. Union of India,[26] a writ petition seeking court's directions, in order to provide immediate medical treatment to the persons injured in road or other accidents with out going through the technicalities of the criminal procedure, was filed by an advocate. The Supreme Court accepted the application of the advocate and directed the medical establishments accordingly.

Another good example of public interest litigation is S.P.Gupta v. Union of India.[27] In this case, the court recognized the locus standi of bar associations to file writs by way of public interest litigation. It was said that questioning the executive's policy of arbitrarily transferring High Court judges is in the public interest. Explaining the significance of public interest litigation, the court observed that: "It must now be regarded as well-settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reasons,

22 A.I.R.1983S.C.378.
23 (1978)4S.C.C.494.
24 (1980)4S.C.C.162.
25 A.I.R.1988S.C.1115.

26 A.I.R.1989S.C.2039.
27 A.I.R.1982S.C.149.

Such as his socially or economically disadvantaged position, some other person can invoke the assistance of the court for the purpose of providing judicial redress to the person wrongdoer injured, so that the legal wrong or injury caused to such person does not goun-redressed and justice is done to him."[28]

However, the public interest litigation should not be abused by anyone.[29] it cannot be allowed to be used for creating nuisance or for obstructing administration of justice.[30]

CONCLUSION

The Judiciary cannot take over the functions of the Executive. The Courts themselves must display prudence and moderation and be conscious of the need for comity of instrumentalities as basic to good governance. Judicial activism has to be welcomed and its implications assimilated in letter and spirit. An activist Court is surely far more effective than a legal positivist conservative Court to protect the society against legislative adventurism and executive tyranny. When our chosen representatives have failed to give us a welfare state, let it spring from the Judiciary.

The power of judicial review is recognized as part of the basic structure of the Indian Constitution. The activist role of the Judiciary is implicit in the said power. Judicial activism is a sine qua non of democracy because without an alert and enlightened judiciary, the democracy will be reduced to an empty shell. Judicial activism in its totality cannot be banned. It is obvious that under a constitution, a fundamental feature of which is the rule of law, there cannot be any restraint upon judicial activism in matters in which the legality of executive orders and administrative actions is questioned. The courts are the only forum for those wronged by administrative excesses and executive arbitrariness.

Judicial activism is not an aberration. It is an essential aspect of the dynamics of a constitutional court.[17] It is a counter-majoritarian check on democracy. Judicial activism, however, does not mean governance by the judiciary. Judicial activism must also function within the limits of the judicial process.

The judiciary is the weakest body of the state. It becomes strong only when people repose faith in it.[18] Such faith constitutes the legitimacy of the Court and of judicial activism. Courts must continuously strive to sustain their legitimacy. Courts do not have to bow to public pressure, but rather they should stand firm against public pressure. What sustains legitimacy of judicial activism is not its submission to populism, but its capacity to withstand such pressure without sacrificing impartiality and objectivity. Courts must not only be fair, they must appear to be fair. Such inarticulate and diffused consensus about the impartiality and integrity of the judiciary is the source of the Court's legitimacy.
Take away judicial activism and tyranny will step in to fill the vacant space.

26 Id. at162.

27 Dattaraj Nathuji Thaware v. State of Maharashtra, A.I.R.2005 S.C.540.

30 Common Cause (A Regd. Society) v. Union Of India and Others.

So to sum up the judicial activism in India, it will be very appropriate to quote the words of Dr. A.S. Ananda, Chief Justice of India who said :

"…. the Supreme Court is the custodian of the Indian Constitution and exercises judicial control over the acts of both the legislature and the executive."

[17] S.P. Sathe, Judicial Activism: The Indian Experience, 6 Wash. U. J. L. & Pol'y 029 (2001)

[18] http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1443&context=wujlp