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Dimensions of Indian Judicial Activism

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Abstract
The Constitution of India has embodied a faith in the words of Abraham Lincon "that the Government of the people, for the people and by the people shall not perish upon this earth". In consideration, the founding fathers who wrote the constitution, created three arms-Parliament, Executive and the Judiciary. In the Constitutional scheme parliament is not supreme. It is subject to a major limitation-that legislation does not violate any fundamental rights or constitutional values. In the context, the judiciary can strike down any law that is beyond Parliament's legislative competence or is violative of the Constitution. In line, Article 142 of the Constitution had given a unique extraordinary power to our Supreme Court to do complete justice in any matter before it. As the umpire of the constitutional system and the legal process, the Supreme Court has to strive to relieve the tensions of a developing nation, to resolve the conflicts of a diverse and open society and to accommodate adjudicate antagonistic demands for justice. In performing those difficult and complex tasks with considerable erudition, understanding and wisdom, the judicial system as a whole and the summit courts, in particular, has made an important and enduring contribution to nation-building (Singhvi, 1979). In the light of these the judiciary has shed its pro-status-quo approach and taken upon itself the duty to enforce the basic rights of the poor and vulnerable sections of society, by progressive interpretation and positive action. Judicial activism refers to the interference of the judiciary in the legislative and executive fields. It mainly occurs due to the non-activity of the other organs of the government and relates closely to constitutional interpretation, statutory construction and separation of powers.

Key words: Activism; Adventurism; Interpretation; Implementation; Caution; Remedy

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INTRODUCTION
In a democratic polity, good government is indispensable for any state and the three organs of the government-legislative, executive and judiciary constitute three pillars of good and effective governance. The Constitution of India has provided an independent judiciary because the founding fathers of the Constitution were well aware that only independent and fearless judiciary free from the legislative and executive control can play an active role. Various constitutional provisions regarding the independence of judiciary have strengthened the argument that the Indian Constitution has always assigned a very active role to the judiciary as guardian of the Constitution, as final interpreter of the Constitution, as an arbitrator to settle the disputes between the Union and the States on the one hand and amongst the States on the other. Being an interpreter of the Constitution, the judiciary has to interpret its own role according to the changing socio-economic conditions of the society (Semwal & Khosla, 2008, p.118). In the event of poverty and illiteracy, its challenging task is to ensure social justice to all. In the Constitutional scheme, the judicial system works as an active catalyst to secure social justice for every citizen.

The universal demand for social justice to all citizens of the country was not sudden and during the framing of the Indian constitution in the 1940s, the engrafting of

Directive Principles of State Policy was inspired from the Irish example. To ensure the objectives of Constitution the Indian judiciary has been constitutionally vested with the power of review to keep the Executive and Legislature within constitutional boundaries. Articles 13, 21, 32, 226 and 227 encompass this power in which the judiciary can strike down any law that is beyond Parliament's legislative competence or is violative of the Constitution. Similarly it can strike down any executive action, if there is any patent illegality or arbitrariness to it. The inclusion of explicit provisions for judicial review was necessary in order to give effect to the individual and group rights guaranteed in the text of the Constitution. Dr. B. R. Ambedkar, who chaired the drafting committee of our Constituent Assembly, had described the provision as the heart of the Constitution. Article 13(2) of the Constitution of India prescribes clearly that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights or any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void (Balakrishnan, 2009, p.2). However, in most cases, the power of judicial review is exercised to protect and enforce the fundamental rights guaranteed in Part III of the Constitution. For decades the scope of judicial review has three dimensions—firstly, to ensure fairness in administrative action, secondly to protect the constitutionally guaranteed fundamental rights of citizens and thirdly to rule on questions of legislative competence between the centre and the states. At large the doctrine of "judicial review" helps in binding a polity to its core constitutional principles.

Especially in post-World War II era, the memory of devastating conflicts and oppressive colonialism ensured that these principles were initially centered on the protection of basic civil-political rights such as free speech, assembly association and movements as well as guarantees against abusive practices by state agencies such as arbitrary arrest, detention, torture and extra-judicial killings. Depending on the social profile of a country's population, the safeguards against authoritative atrocities may be in the nature of a proactive measures designed for the advancement of historically disadvantaged communities and poorer sections of society. Such initial safeguards which are meant to tackle social differences based on factors such as religion, caste, gender, class and region among others have also clear socio-economic dimensions. Therefore, the role of the courts in protecting constitutional values goes beyond the enforcement of clearly defined civil-political rights that can be litigated by individual citizens and incorporates a continuously evolving understanding of "group rights" which necessarily have socio-economic dimensions as well (Ibid., pp.9-10). In a country like India the social, economic and political justice can be achieved if every instrumentality under the Constitution functions as per the mandate of the Constitution (Bag, 1997, p.167). The inactivity, incompetence, disregard of law and constitution, by the legislature and callousness, negligence, corruption, greed for power, and money, indiscipline in the executive had created the vacuum as a result of which both the organs of the government failed to fulfil the constitutional obligations and compelled the judiciary to play an active role in order to fill the vacuum created by the executive and the legislature and to check the unconstitutional behaviour of the executive and the legislators. Thus, judicial activism refers to the interference of the judiciary in the legislative and executive fields. It mainly occurs due to the non-activity of the other organs of the government. It is the adoption of pro-active approach by the judiciary and reflects the situation when the judiciary comes out of its sphere of traditional role and becomes active in its working while laying down the policies and programmes to ensure the protection of rights and liberties of the people which otherwise is within the discretion of the executive and legislature.

1. IMPLEMENTATION AND INTERPRETATION

In the early years of the Indian constitutional experience, civil liberties and the protection against deprivation of life and liberty were understood mainly as imposing duties of restraint on governmental agencies as well as private citizens. At the sametime, in contrast to these justiciable negative rights the directive principles of state policy allude to several socio-economic objectives which had a positive dimension. The Indian courts have responded to these negative and positive rights by trying to collapse the distinction. While the fundamental rights of citizens enumerated in Part III of the constitution are justiciable before the higher judiciary, Part IV deals with the Directive Principles of State Policy that largely enumerate objectives pertaining to socio-economic entitlements. The Directive Principles aim at creating an egalitarian society whose citizens are free from fulfilling their best selves. They are the creative part of the Constitution, and fundamental to the governance of the country. Even at the time of drafting the Constitution, some of the provisions which are presently part of the Directive Principles were part of the declaration of fundamental rights adopted by the Congress Party. K. M. Munshi, a noted lawyer and a member of the Constituent Assembly had included in his draft list of rights, the "rights of workers" and social rights' which included provisions protecting women and children and guaranteeing the right to work, a decent wage and a decent standard of living (Ibid., pp.11-12). Dr. B. R. Ambedkar, Chairman of the Drafting Committee was also in favour of its importance when insisted on the use of the word "strive" in the language

of Article 38 which mentions the governmental objective of an equitable distribution of material resources. Participating in Constituent Assembly Debates on 19th November 1948 he clarified, we have used it because it is our intention that even when there are circumstances which prevent the Government or which stand in the way of the Government giving effect to these directive principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfilment of these directives…. Otherwise it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go (Constituent Assembly Debates, 19th November 1948). Gradually, the themes relating to fundamental rights and directive principles have been expanded and include several socio-economic entitlements for citizens which place positive obligations on the state. Now judges refer directly to the language of provisions contained in the part dealing with directive principles and it has transformed the substantive character of the protection of life and property. Even the Supreme Court of India has interpreted the protection of life and personal liberty as one which contemplates socio-economic entitlements.

The implementation of new dynamic approach as adopted by the judicial system pertaining to socio-economic environment of the country has widely expanded its nature and scope as well. Every fundamental right is not spelt out comprehensively in the Constitution, but the right to shelter, right to privacy, right to go abroad and right to education have all been deduced through creative interpretation of judges. Likewise, the Supreme Court has deduced the freedom of the press from the guarantee of free speech and thus press freedom has been given a constitutional status by creative judicial interpretations. Judicial interpretations are based on the realities of the situation. Every country has to work out its Constitution according to its problems, needs and demands. Once Justice Krishna Ayer said rightly, every new decision, on every new situation, is a development of law. Law does not stand still. It moves continually. Once this is recognised. Then the task of the judge is put on higher plane. The courts cannot remain mute spectators when laws are not enforced and consequently, fundamental rights are violated. If the judiciary does not intervene, it would be an inactive judiciary. Especially after the Constitution Twenty Fifth Amendment Act, 1971, primacy was given to Directive Principles of State Policy by making them enforceable. In the situation decades ago the judiciary has shed its pro-status-quo approach and taken upon itself the duty to enforce the basic rights of the poor and vulnerable sections of society, by progressive interpretation and positive action.

The decade 1970s was a turning point in the judicial history of India when several judgements delivered by the Supreme Court relating to Amendments, Judicial Review, Fundamental Rights, Directive Principles of State Policy and the significance of Social Action Litigation (SAL) affected the different spheres of polity and society. In the changed circumstances the primary functions of the judiciary are not restricted to the settlement of disputes and punish the defiance of law, but to safeguard individual liberty and social cohesion against undue institutional encroachment (Chatterji, 1997, p.9). In the famous Kesavananda Bharti case delivered in 1973, the Supreme Court of India held that basic features of the Constitution of India such as democracy, rule of law, federal system, secularism and independence of judiciary can not be amended. If it is amended, then the Supreme Court will declare such law as unconstitutional. Beginning with the first few instances in the late-1970s, the category of Public Interest Litigation (PIL) has come to be associated with its own "people friendly procedures". The foremost change came in the form of the dilution of the requirement of "locus standi" or initiating proceedings. Since the intent was to improve access to justice for those who were otherwise too poor to move the courts or were unaware of their legal entitlements, the court allowed actions to be brought on their behalf by social activists and lawyers (Susman, 1994). In most public interest-related litigation, the judges began to take on a far more active role in the literal sense as well as by posing questions to the parties as well as exploring solutions. In other words, the growth of constitutionalism has been synonymous with that of liberal values which seek to safeguard an individual dignity as well as collective welfare at the same time. Thus from 1979, the judiciary led by the Supreme Court in India became relevant to the nation in a manner not contemplated by the makers of the Constitution and became an active participant in the dispenser of social justice.

However, the Public Interest Litigation began halting with little idea of its potential when the Supreme Court, in 1979, entertained complaints by social activists drawing the attention of the Court to the conditions of certain sections of society or institutions which were deprived of their basic rights. In the same year Supreme Court advocate Kapila Hingorani drew the court's attention to a series of articles in a newspaper exposing the plight of Bihar under trial prisoners, most of whom had served pretrial detention more than the period they could have been imprisoned if convicted. Further in 1980, two professors of law wrote a letter to the editor of a newspaper describing the barbaric conditions of detention in the Agra Protective House for Women which was made the basis of a writ petition in the Supreme Court. In dealing with such cases, the Court evolved a new regime of rights of citizens and obligations of the State and devised new methods for its accountability. In 1982, Justice P. N. Bhagwati, corrected and stated the purpose of PIL as it originated. He emphasised it as

> a strategic arm of the legal aid movement which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation. (Andhyarujina, 2012)

Over the years this original, beneficial and unexceptionable character of the Court's activism in PIL has been largely converted into a general supervisory jurisdiction to correct actions and policies of government, public bodies and authorities. With Public Interest Litigation, the common man, the disadvantaged and marginalised sections of society had also easy access to the Court with the help of social activists. It has provided an opportunity for citizens, social groups, consumer rights activists etc., easier access to law and introduced a public interest perspective. Justices P. N. Bhagwati and V. R. Krishna Ayer have played a key role in promoting this avenue of approaching the apex court of the country, seeking legal remedies in areas where public interests are at stake. In the context it is needed to clarify that judicial activism is not the performance of the function of settling the disputes in accordance with Constitution or law of the land. A judge who selects a bold course of action is generally understood as representing judicial activism (Bakshi, 1997, p.5). No doubt, it has improved the quality of governance in India.

Judicial activism means an activism by taking recourses to judicial process, which means judicial pronouncement on different intricate issues whereby new legal philosophy can be created (Semwal & Khosla, 2008, p.115). 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. Another scholar and Professor of Political Science Bradley Canon have posited six dimensions along which judge courts may be perceived as activist (Canon, 1983): majoritarianism, interpretive stability, interpretive fidelity, substance/ democratic process, specificity of policy and availability of an alternate policymaker. While Justice P. N. Bhagwati and Justice A. S. Anand observed that judicial activism is a central feature of every political system that vests adjudicatory power in a free and independent judiciary. "The term judicial activism is not the term of fashion or popularism but a term signifying an important source of judicial power, which judges should use for the realisation of willed result" (Lakshminath, 1997, p.109). And, in line, Justice Anand holds,

> the judicial activism reinforces the strength of democracy and reaffirms the faith in the rule of law. It would not be in the interest of the democratic society, if the judiciary shuts its door to the citizen who finds that the legislature is not responding and the executive is indifferent. It must be seen that the authorities come out of the slumber and perform their role. (Jariwala, 1999, p.336)

In nutshell, it means different persons.

2. PROSPECT AND CAUTION

Judicial activism is gaining prominence in the present and mainly in the form of Public Interest Litigation (PIL) citizens are getting access to justice. During the past decade, many instances of judicial activism have gained significance. The areas in which the judiciary has become active are health, child labour, political corruption, environment, education, etc.. Through various cases the judiciary has shown its firm commitment to participatory justice, just standards of procedures, immediate access to justice, and preventing arbitrary action. After the PIL judgements in relation to poor and marginalised sections of society the courts have assumed an active role in shaping the society. The approach and working of the judiciary has undergone an incredible change because the erosion of values in public life since seventies have brought into focus the Supreme Court of India. It has adopted a proactive approach having regard for the peculiar socio-economic conditions prevailing in the country.

Meanwhile a look at major High Court and Supreme Court decisions in recent years shows that they have clearly transcended the limits and undertaken functions that fall within the domain of either the Legislature or the Executive. A court is not equipped with the skills and competence to discharge the functions that essentially belong to the other organs of the State. Judges are neither trained to deal with macro-economic policy issues nor do they have the required skills or administrative infrastructure to handle them. Consequently, many are critical of judicial activism as an exercise of judicial power which displaces existing law or creates more legal uncertainty than is necessary, where or not the ruling has some constitutional, historical or other basis. This, it is argued, violates the doctrine of separation of powers. An accusation of judicial activism implies that the judge is not performing his or her duty as an interpreter of the law, but is instead ruling on the basis of personal political convictions or emotions. Critics say that this can violate a judge's sworn allegiance to uphold the constitution, because, in effect, it encourages judges to write their own constitutions.

In fact, by interfering in the jurisdiction of the Legislature and the Executive as given by the Constitution of India, the practice of judicial activism somewhere disregarded the separation of powers under the Constitution. The philosophy behind the doctrine of judicial restraint is that there is broad separation of powers under the constitution, and the three organs of the State must respect each other, and must not ordinarily encroach into each other's domain, otherwise the system cannot function properly. The Judiciary must realise that the legislature is a democratically elected body, which expresses the will of the people and in a democracy this will be not to be lightly frustrated or

thwarted (Katju, 2012). In several decisions this theme of Indian Constitution has been recognised by the apex court very clearly. In Asif Hameed vs. The State of Jammu and Kashmir, AIR 1989 (paragraph 17 to 19), the Indian Supreme Court observed, although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity, the Constitution makers have meticulously defined the functions of various organs of the State. The legislature, executive, and judiciary have to function within their own spheres demarcated in the constitution. No organ can usurp the function of another. In another recent judgement delivered in 2006 in Divisional Manager, Aravali Golf Course vs. Chander Haas the Supreme Court of India upheld,

> judges must know their limits and not try to run the government. They must have modesty and humility and not behave like emperors. There is broad separation of powers under the Constitution, and each of the organs of the state must have respect for the others and must not encroach into each other's domain. (Ibid.)

In a democracy, the remedy for a malfunctioning legislature and executive must come from the people, not the judiciary.

However, despite the clear theory and practice of separation of powers under the Indian Constitution and acceptance of judicial activism, in its true sense, which is sought for enforcing the rights of the disadvantaged or poor sections of society, the apex court began to dilute the dimension of PIL. In this type of litigation, the court's intervention is sought simply for correcting the actions or omissions of the executive or public officials, or departments of government or public bodies. For example, in the interest of preventing pollution, the Supreme Court ordered control over automobile emissions, air and noise and traffic pollution, gave orders for parking charges, wearing of helmets in cities, cleanliness in housing colonies, disposal of garbage, control of traffic in New Delhi etc.. Even very recently the Supreme Court has directed the most complex engineering of interlinking rivers in India and on its own, the Court has taken notice of Baba Ramdev being forcibly evicted from the Ramlila grounds by the Delhi Administration. All these managerial exercises by the Court are hung on the dubious jurisdictional peg of enforcing fundamental rights under Article 32 of the Constitution. The court is only moved for better governance and administration, which does not involve the exercise of any proper judicial function (Andhyarujina, 2012). A review of case laws proves that judicial activism may work towards the benefit of the society but that is not always the case. Some judgements have been delivered with great insight and vision but some others are based only on self-conviction and belief, that such a judgement would help the parties, without taking into consideration the repercussions on the law or on the society at large. There has been an increase in the number of frivolous cases being filed and as a result genuine cases got receded to the background and privately motivated interests started gaining predominance in Public Interest Litigation cases. In view of this, the Supreme Court has framed certain guidelines in this regard.

To conclude, the analysis leads us to the fact that judicial activism has given some very good case laws and even led to revolutionary changes in society. At the same time judges should be careful not to make judicial activism judicial adventurism. It is essential for the progress of the country that all the three wings should function in complete coordination. The judicial activism and judicial restraint should go side by side so that all the three wings of the State can continue harmoniously.

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