



JUDICIAL ACTIVISM – A BLESSING FOR THE MODERN ERA

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ABSTRACT The subject of judicial activism is very fascinating but its dimensions are so large. In this paper I tried to place few aspects of it. Is judicial activism good so as to call a blessing for the modern era and how judicial activism in India have developed our human rights jurisprudence to environmental jurisprudence and is judicial activism important and necessary in a country like India to safeguard the constitution and democracy.

KEYWORDS :

INTRODUCTION

Judicial Activism has become a subject of controversy in India. It has been criticized by constitutional experts and politicians but it is warmly welcomed by lawyers and public. In the words of Justice V.R Krishna Iyer one of the greatest protagonist of this judicial trend in India, 'Judicial Activism is a drive to accomplish the cherished goal of social justice'. Judicial Activism is the due processes by which new juristic principles are evolved to update the existing laws to bring it in conformity with the current needs of the society and thereby to sub serve the constitutional purpose of advancing public interest under the Rule of law. The legislature and executive are the custodians of the honest public. A court giving a new meaning to the provision to suit the changing social or economic condition or expanding the horizon of the rights of the individuals is said to be an activist court.

The concept of Judicial Activism found roots in the English concepts of equity and natural rights. Austinian jurisprudence gave a very narrow view of the judicial function. Austin defined law as a command of the political sovereign with indivisible and absolute sovereignty, allowing only the legislature to make law. The function of the court was restricted to declare the pre-existing law or interpreting the statutory law. The English court created the entire common law but the common law is posted as the myth that the judges merely found the law. Despite such a self-negating perception of their own role the English judges not only made the law, but also changed to suit the entirely new conditions created by the industrial revolution. Ryland Vs fletcher and Donogue Vs Stevenson are the two common law examples of judicial law making. In these cases the English courts extended the common law concept of negligence, that had essentially evolved in an agricultural society, The judges however sustained the myth that they did not create any law. In England parliament is supreme so the courts did not have the power to review the acts of parliament, but judicial review of administrative action existed. Professor Diceys theory of parliamentary sovereignty represents incarnation of Austins theory of sovereignty. Besides all these the effort of the court is to protect individual liberty and strengthen the rule of law. English people have faith that the liberty of the subject is sacrosanct and the court allow its infraction only if supported by law. According to lord Atkin the learned judge said, according to British jurisprudence member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.

England felt secure with their parliament and the subjects had full faith in the strength of their democracy. Judicial Review allows the court to scrutinize the acts of other governmental organization to ensure that they act within limits of the constitution. In this way Judicial Review originated in England. The courts in India therefore, began exercising judicial review of legislative acts with the first act of British parliament in 1858. In *Empress Vs Burah* book book Singh, the Calcutta High court enunciated the principle of Judicial review:

'The theory of every government with a written constitution forming the fundamental and paramount law of the nation must be that an act of legislature repugnant to the constitution is void, it cannot bind the courts and oblige them to give effect for this would be to overthrow in fact what was established in theory and make that operative in law which was not law'.

When a court interprets a law it has to interpret according to the intention of the legislature because concepts behind the statutory language requires interpretation. Parliament only frames the skeleton but only if flesh and blood is added by the judiciary the laws becomes perfect. There is a saying you can pour any kind of liquid in the bottle but the shape of the bottle should not be changed that is intention of the legislature should not be altered. Court cannot interpret in a mechanistic manner what was the intention of the legislature at the time of the making the law.

In the absence of such judicial activism a constitution would become stultified and devoid of the inner strength necessary to survive and provide normative order for the changing times. Some members of the constituent assembly criticized the constitution for being potential lawyers' paradise. But Dr. Ambedkar defended the provision of judicial review as being necessary. According to justice A.K Ahmadi, Judicial Activism is a necessary adjunct of the judicial function because of the protection of public interest as opposed to private interest is the main concern. According to Dr. Ambedkar the provisions for Judicial Review in particular the writ jurisdiction that gave quick relief against the abridgement of fundamental rights, constituted the heart of the constitution the very soul of it. Constitution of India has conferred extensive powers to the Supreme court under Article 32, 141, 142 and 144 to pass necessary orders to fill up the vacuum till legislature becomes active or the executive properly discharges its responsibility.

If we see the words mentioned in the preamble of our Indian constitution, securing to its citizen justice, liberty and equality and promoting among them fraternity and dignity to the citizens. So dignity is the focus. During the last 75 years the scope of the fundamental rights chapter has expanded by the Supreme Court in a wonderful manner. Once Upendra Bakshi has observed that India had become republic in 1950 but Supreme court become republic only in 1970's he said this because first twenty five years more or less Supreme Court revolved around other country's bullets that is decisions of other countries like US, U.K, France etc. But from 1978 onwards we have to thank justice Krishna Iyer, Bhagavathi, Chinappa Reddy etc. The India Supreme court had started evolving new principles and today with respect and admiration the Supreme Court of US, UK, Europe, Australia they quote the decision of Supreme Court of India and Supreme courts contribution opened a new leaf of jurisprudence where the focus is on individual only.

Methods of Judicial Activism are Judicial Review, Public Interest litigation and Constitutional interpretation.

Judicial review in India

The Indian constitution expressly provides for judicial review in article 13(1) and 13(2). Article 13 of the Indian constitution prevents legislatures to make any law which may take away or abridge the fundamental rights guaranteed by the constitution. A law is declared as void if it is inconsistent with or in derogation of the fundamental rights. By Article 13 it entrusts the Supreme Court and High courts the power to interpret the pre constitutional laws and to settle whether they match with the values and principles of our present constitution. If there is any conflict, they become deemed ineffective until their adoption through amendments. But they must be constitutionally compatible otherwise any deviation makes them void. Judicial review is the power bestowed

upon the judiciary by the constitution by virtue of which the judiciary can examine legislative enactments and executive orders of the government, be it state or central. This doctrine traces its origin to the United States of America in the case of *Marbury Vs Madison* Chief justice of US supreme court, John Marshall was the progenitor of the idea. As mentioned above it is a constitution of India itself grants power to the judiciary. This right of judicial review is possessed by both the supreme court and High courts of the country.

The three pillars of Indian democracy are Legislature makes law, the executive executes if and the judiciary do not make law they merely interprets the law. Whenever there are lapses on the part of the executive or legislature, then judicial activism becomes imperative to deliver justice. Constitution envisages certain special powers for the protection of fundamental rights of the citizens. The Supreme Court and High court can issue writs to government for the enforcement of the rights of the citizens. The five writs are habeas corpus, mandamus, prohibition, Quo warranto and certiorari.

Public Interest Litigation

The most important contribution of judicial activism was the emergence of Public Interest Litigation. Justice PN Bhagwati who is called as father of Public Interest Litigation, who introduced the concept of Public Interest Litigation in 1986. He strived to expand the concept of justice and make justice much more accessible to common people. Public Interest Litigation can be used as a tool to wage legal battles against a host of ills in the Indian society such as state repression, governmental lawlessness, administrative deviance, exploitation of disadvantaged groups and denial of basic human rights and entitlement and now on protection of the environment.

The idealism and simplicity of the highest court in the country responding to even a petition filed on a post card and is worthy of appreciation. It unshackled the courts from a narrow definition of locus standi and allowed a friend of the affected person or any other concerned individuals or institution, to approach the court on behalf of a citizen who had been denied justice.

So today Public Interest Litigation is the growing achievements of the Indian judicial system. The aim of Public Interest Litigation was constituted with the aim to protect the interest of the under privileged and marginalized sections of the society. Until 1980's only those people who had been personally affected by law could knock on the doors of the court. They had to demonstrate the locus standi (or the standing required in the law) only then the case will be accepted. Justice Bhagavathi who expanded the scope of locus standi which allowed any individual, institution or NGO could petition the court. If they could prove the litigation was in larger interest called the public. In *Bandha Mukti Morcha Vs Union of India* Justice Bhagawati accepted a post card as Public Interest Litigation.

Judicial activism has helped in protecting or expanding individual right, where the legislative and executive fail to protect the basic right of citizens like the right to dignity in such times judicial activism has played a great role. The shift from locus standi to Public Interest Litigation made the judicial process more participatory and democratic. Hence judicial act with discipline must be followed to save society from getting prejudiced and create a perfect balance. Be in the case of protecting working women from sexual harassment or in the case of bonded labour or MC Mehta's case the Hon'ble court taken the stand for protection of human rights as well as for animals and environment. The cases that have enriched environmental jurisprudence. The Supreme court formulated the doctrine of absolute liability for the harm caused by Hazardous and inherently dangerous industries etc.

Constitutional Interpretation: The constitution of India vests the Supreme Court under Article 32 and 136 and the High Courts under 226 and 227 with the power of 'Judicial Review', where state actions or inactions are put through a constitutional Litmus test. The court has the endeavour to figure out a particular meaning of a provision in the constitution. To find out, the courts employ various methods and modes of interpreting those provisions to realize the goal of equitable justice. A fine example for court interpretation is in *Menaka Gandhi's* case. A momentous case came before the Supreme Court that changed the constitutional jurisprudence of this country. We can see plethora of Rights emanating from Article 21 because of judicial activism.

Kerala, the apex court of India propounded the doctrine of basic structure according to which is said that the legislature has power to amend the constitution, but such amendments shall not change the basic structure of the constitution. What are basic structures is not mentioned in the constitution, It is the court who interpreted what constitute basic structures. If there is no present law on a subject matter and the pressure of which is essential for justice, the Supreme Court has the power to legislate under Article 142 and the same may be considered as law of the land until replaced by a consequent Act enacted by the parliament.

An example of judicial legislation can be seen in the case of *vishakha Vs Union of India* where the Supreme Court in the absence of any laws with regards to gender equality and prohibition of sexual harassment abuse, laid down certain guidelines that were to be followed at workplaces unless and until any law was enacted, After which the law would be followed. Thus the court enforced fundamental rights through Article 32 and guidelines issued by it were considered the law of the land as expounded by Article 141. In *Kalyan Chandra Sarkar vs Rajesh Ranjan* this power of the Supreme Court to issue guidelines being reconfirmed it was held that it may operate as the law.

CONCLUSION

Judges have a duty under the Indian constitution. They should maintain some kind of restraint they should not go beyond the lakshman rekha that is the constitution. Judicial Activism is good when it is for the benefit and development of under privileged section of the society. Despite India being a welfare state, benefits are not reaching to the intended beneficiaries so peoples aspiration about leading a dignified life are often met with challenges. In India poverty exist in the large scale. The marginalized sections of people they all visualize in which they have the equality of opportunity justice, social, economic and political individual dignity, freedom of thought extra. In *NALSA Vs Union of India's* case even it was a minuscule fraction of the population the court protected their rights. Right to privacy which was a debatable issue was put to rest by the judiciary in justice *Puttasamy Vs Union of India*. Judicial Activism has brought the right to privacy within the realm of fundamental rights by interpreting Article 19 and 21. Our chief justice Ramana reminded that 'the fundamental mission of the our independence struggle was to find life and dignity for all. People have faith on judiciary. The court should increase the hope of the people for justice. This is necessary for democratic setup and establishment of Rule of Law. Court is the guardian of fundamental rights and every citizen is entitled to understand the dynamic of social process involved in the country. Without this court the fundamental right will not remain and let us also remember that without parliament the court also will not remain. There will be debate and criticism but judges should continue to do their legitimate work and loyalty to rule of law with integrity. So judicial activism which is provided in the Indian constitution is a blessing in this modern era and it is not a despotic branch of the state.

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