



## Role Of Judiciary In The Democratic System Of India (Judicial Activism Under The Supreme Court Of India)

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### ABSTRACT:

*During the course of this study, it has been found that the Supreme Court has changed in its outlook and functioning, drastically in the last about 50 years of its existence. This change has been in consonance with the changes taking place in the role and status of the judiciary in other modern democratic countries in the world. As regards the evolution of judicial activism in India, it has been found that Indian judiciary is a late-starter in that direction. Judicial activism which is the use of judicial power to articulate and enforce counter-ideologies which when effective initiates significant re-codifications of power relations within the institutions of the governance explains the political role played by the judiciary.*

It is satisfying to see that its achievements have been significant in all areas of the nation's life. It has not shied away from its responsibility of upholding the goals of the constitution. One of the most powerful institutions of the world, the court decides cases touching all facts of human life and relationship. It is the defender of the constitution and the principles enshrined therein guardia of human rights and promoter of peace, cordiality and balance between different organs of the Government.

### INTRODUCTION

The Supreme Court of India plays a provital role in the Indian political economy. In a society, which is fractured and polarized on communal lines, and where ideology has reached a vanishing point, the Supreme Court despite occasional failures and not measuring upto the expectations of various sections, has become an institution on whose legitimacy there seems to be a national consensus. It was despised by the environment and development activists for its pro-establishment stand<sup>1</sup>. By the Hindu militants for its secularist stand<sup>2</sup>, by educationist for its pro-privatization stand on education<sup>3</sup>, by secularists for its soft Hindutva stand<sup>4</sup>, and by the leftist for its decision not to intervene in the Government's decision to disinvest from a public sector unit<sup>5</sup>.

The Indian constitution, the fundamental law of the land had been drafted with the four-fold objective of securing justice, liberty, equality and fraternity to all the Indian citizens. The constitution has allocated different distinct powers and functions to the three organs of the state viz. legislature, executive

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and judiciary. These organs play an important role in the achievement of the said objective. Traditionally the legislature makes the law, the executive implements them and the judiciary adjudicates and interprets the law. Even though there is no strict application of the theory of checks and balance in India, the constitution has drawn certain limits and boundaries in respect of the legislative, executive and the judicial powers.

The judiciary in India, specially the higher judiciary has been assigned a vital role in various areas like upholding the federal principle, interpretation of the laws made by respective legislatures, testing the validity of such laws and more importantly in protecting the fundamental rights of the citizens. The Supreme Court stands at the top of the hierarchy of the court constituted under the constitution. It is the final arbiter as to the upholding to the federal principle, the validity of a law or executive action and as to the enforcement of fundamental rights of the citizens.

In a welfare state like India the judiciary specially the Apex Court plays an important role. An important issue that has assumed significance in recent times has been the activist role played by the Indian judiciary specially the Supreme Court. The expression "Judicial activism" has excluded a precise definition as its means different things to different people. It might mean dynamism to judges, judicial creativity to some, judicial legislation to some others and it may be an effort to bring "social revolution" through the judiciary.

In the absence of a precise definition of "Judicial activism" it is necessary to reevaluate the functions of the judiciary because of different meanings which have been given to this concept by different academicians and jurists. The constitutional mandates to the judiciary is that while exercising its functions and powers, it should keep in view the social and economic objectives which the constitution seeks to protect, promote and provide as embodied in the law. When each of the three organs of the state respects and appreciates the role of the other organs and functions within its own sphere and parameter, the harmony which would be the resultant product would go a long way in bringing about socio-economic changes in the country.

#### **HISTORICAL PERSPECTIVE AND SIGNIFICANCE OF THE STUDY**

Judicial activism has become a subject of controversy in India. Attempts have been made to curb the power of courts as well as access to them<sup>6</sup>. In the past, several indirect methods were used to discipline the judiciary, such as super session of judges<sup>7</sup> or Transfer of inconvenient judges. It has often been said that the courts usurped the functions allotted to the other organs of Government. On the other hand the defenders of judicial activism say that the courts have performed their legitimate function. According to former Chief Justice of India A.M. Ahmadi, judicial activism is a necessary adjunct of the judicial function since the protection of public interest as opposed to private interest happens to be its main concern<sup>8</sup>. No court can interpret a statute, much less a constitution, in a mechanistic manner. In the case of a statute, a court has to find out what was really intended by the authors and in the case of a constitution, a court has to sustain its relevance to changing social, economic and political scenarios and as Cardozo says, give to its words 'a continuity of life and expression'<sup>9</sup>.

How one understands judicial activism depends upon one's conception of the role of a constitutional court in democracy. Those who conceive it narrowly, as being restricted to mere application of the preexisting legal rules to the given situation, tend to consider even a liberal or dynamic interpretation of a statute as activism. Those who conceive a wider role for a constitutional court and expect it to perform the function of providing meaning to various open-textured expressions in a written constitution and giving them new meaning as required by the changing times are bound to consider judicial activism not as an aberration but as a normal judicial function.

My purpose in these discourses is to examine the Indian experience of judicial review during the sixty two years and trace the vicissitudes of judicial activism and the changing role perception of the judiciary in Indian democracy. I shall try to understand what kind of role was envisioned by our constitution for the judiciary and what has been the perception of the Supreme Court of its own role under the constitution.

Over the period of last six decades, the Apex Court has transformed from the role of 'interpreter of law' to the role of 'maker of law'. An analysis of the judicial behaviour of the court shows that, it has always been controversial. The performance of the Supreme Court led higher judiciary in India has been uneven. In

the fifties and sixties, the judiciary was confronted with many issues involving the validity of agrarian reforms introduced by the Parliament and state legislature. In view of the existence of the right to property guaranteed higher to under article 19(1)(f) and 3110, the Supreme Court passed certain difficulties to the state in realizing the goals enshrined in Articles 38-39 of the constitution directing the state to provide social and economic justice to the people.

The Supreme Court has achieved an expansive judicial control in many areas of the constitutional law, by exercise of the power of judicial review which became a classic case of "brooding omni presence" the judicial attitude and behaviour of the courts after the 1980, gave rise to many concepts like 'Judicial activism' "judicial supremacy" "Judicial Absolutism" "Judicial liberalism" etc. in contra distinction with "Judicial self restraint", "Judicial conservatism", "Judicial traditionalism" etc. As in order to evaluate the role of the judiciary in a democracy, an overview has to be taken, of the evaluation of its present status and power, this Author has chosen the present topic namely "Judicial Activism in India" or "Role of Judiciary in Democratic System in India". The purpose of this study is to trace the judicial power of the Supreme Court and to analyse the reasons for the activist role, played by the Supreme Court in recent times.

#### JUDICIARY UNDER INDIAN CONSTITUTION

The constitution of India which was drafted by the Constituent Assembly and which came in to force on 26th January, 1950 contains number of provisions that deal with structure, function and powers of the judiciary. It introduced a unified system in all the states and Union Territories. It virtually introduced a three tier judicial system viz. The Supreme Court of India, the highest court of the land, the high courts, and a subordinate judiciary in every state and Union Territories consisting of many hierarchies. Although the constitution contains specific provisions relating only to the Supreme Court and High Courts and it leaves the subordinate judiciary to the states.

The position of the Supreme Court under the constitution came up for consideration before the Constituent Assembly at a very early age. Almost simultaneously with the appointment of the union constitution committee, a special committee was setup to consider and report on the constitution and power of the Supreme Court. This committee consisted of S. Varadachari, Alladi Krishna Swami Ayyar, B.L. Mitter, K.M. Munshi and B.N. Rau. The committee sent its report 11 on May 21, 1947. Its recommendations were mainly based on the provisions of the Act of 1935.

So, it is submitted that the judiciary plays a vital and key role in constitutional democracies. The degree of intervention by the judiciary may depending on the legal system followed in different countries likes as in Britain where there is no written constitution, the judiciary may exercise only a limited power of judicial review vis-a-vis the delegated legislation and ministerial action of the government. The role of the British judiciary is basically law application and low-interpretation. In USA the judiciary is considered to be supreme, among the three organs of the state viz. the legislature, the executive and the judiciary. This has become possible not because there is a written section in the constitution to enable the judiciary to check the other two organs if they indulge in any excesses.

In India the judiciary has come to exercise vast powers of judicial review in respect of the legislative and executive functions of the state and of the judicial actions of the judiciary. The Supreme Court and the High Courts not only act as the arbiters to determine disputes that may arise between the centre and states but also protect and enforce the fundamental rights of the citizens against the arbitrary action of the states. They also interpret the laws made by the legislature and they have the final say in the validity of any legislative or executive action of the state if it contravenes or abridges the fundamental rights of citizens. It is a unique feature identified only with the Indian higher judiciary that it has the power to determine the validity of constitutional amendments which perhaps is seen nowhere under any other constitution, written or unwritten. This power of judicial review is also vested by the judiciary by implication, even in certain quasi-judicial bodies like administrative tribunals.

Thus the judiciary generally performs one or many of the following functions in constitutional democracies.

- i) Interpreting the constitution final with due difference to the wishes of the framers of the constitution;
- ii) Upholding the federal principle of maintaining the balance between the various organs of Government and also the centre and the states by whichever name they are called; (Particularly in Federal Constitutions).
- iii) Guarding and protecting the fundamental rights of the citizens.

- iv) Testing the validity of legislative, quasi-legislative, executive or quasi-judicial action of the state on the touch stone of the constitution and
- v) Applying and interpreting the laws of the legislature.

Article 32 and 226 confer on the Supreme Court and the High Court respectively the power to issue direction, Order or writs for achieving the objectives of those articles. The court have issued directions for various purposes. In public interest litigation, the Supreme Court and the High Courts have issued directions for appointing committees or for asking the government to carry out a scheme. They may constitute specific orders to the parties to do or not to do something. For example, directions in the Azad Rickshaw Puller case<sup>12</sup> asked the Punjab National Bank to advance loans to the Rickshaw Pullers and contained a whole scheme for the repayment to such loans. Directions in common cause V. India<sup>13</sup> provided for how blood should be collected, stored and given for transfusion and how blood transfusion could be made free from hazards. Directions were given to the government to disseminate knowledge about environment through slides in cinema theaters or special lesson in school or college<sup>14</sup>. The Supreme Court laid down direction as to how children of prostitutes should be educated<sup>15</sup>. Some of these directions have legislative effect. Law making by the Supreme Court through directions has belied the legal theory regarding ratio decidendi and obiter dicta. In a case<sup>16</sup> Chief Justice J.S. Verma said "The primary responsibility for ensuring the safety and dignity of the citizens through suitable legislation, and the creation of a mechanism for its enforcement is of the legislature and the executive. When, however instances of violation of fundamental right of the citizens taken place then some guidelines should be laid down for the protection of this right to fill the legislative vacuum.

#### DEVELOPMENT OF JUDICIAL ACTIVISM IN INDIA

It is very difficult to trace the origin of judicial activism in India. Since the judiciary has come to be recognised as an independent and separate organ of the government under the government of India act 1935 and subsequently under the constitution of India. It would be prudent to scan the period subsequent to 1935 for tracing the origin. However there are a few instances even prior to that period where certain selected judges of High Courts established under the Indian High Courts Act, 1861 exhibited certain flashes of judicial activism. Way back in 1893, justice Mahmood of the Allahabad High Court delivered a dissenting judgment which showed the seed for judicial activism in India. In that case which dealt with an under trial who could not afford to engage a lawyer, Justice Mahmood held that the pre-condition of the case being "heard" would be fulfilled only when somebody speaks.<sup>17</sup>

The concept of judicial activism can be seen to be reflecting from the trends exemplified by some decision and orders of the Supreme Court. They are as follows :-

- i) The judiciary since 1973, claims the power to nullify on substantive grounds even an amendment made to the constitution by the amending body if it changes "the basic structure of the constitution". This concept of judicial control over the constitution has been evolved by and known to courts in India only.<sup>18</sup>
- ii) The undoubted privileges of the legislature even in respect of their internal proceedings have been brought under the purview of judicial review.<sup>19</sup>
- iii) Power of judicial review as exercised by the Supreme Court and the High Courts has been recognised by those courts to be an unalterable "basic structure of the constitution."<sup>20</sup>

Thus the above some examples of judicial assertiveness makes it clear that this is very difficult to trace the origin of judicial activism in India. The amount of activism varied in different areas like interpreting the constitution, guarding the fundamental rights of the citizens, expansion of scope of "Locas standi" in PIL etc.

Now it would be quite essential to analyse and discuss the definition, reasons, the frame work, different dimensions and the Indian perspective of the judicial activism.

At the outset it has to be stated that there is no precise definition of judicial activism accepted by one and all. However there is a widely accepted notion that it is related to problems and processes of political development of a country. In other words, judicial activism deals with the political role played by the judiciary, like the other two branches of the state viz. the legislature and the executive.

An eminent Indian jurist defines judicial activism in the following words.

(Judicial) Activism is that way of exercising judicial power which seeks fundamental re-codification of power relation among the dominant institutions of state, manned by members of the ruling classes."<sup>21</sup>

So it is submitted that the expression "Judicial activism" has eluded a definition as an abstract concept. It is incapable of formulation by definition only.

Now coming on the reasons of judicial activism it is further submitted that, it is very difficult to state under any constitution. There can not be any universal acceptance of these reasons to be correct, in view of the conflicting interests and ideologies of various groups of the society concerned with judicial activism in particular and judicial power in general. The following are some of the well accepted reasons which compel a court or a judge to be active while discharging the judicial functions assigned to them either by a constitution or any other organic law.

- i) Near Collapse of responsible government.
- ii) Pressure on judiciary to step in aid.
- iii) Judicial enthusiasm to participate in social reform and change.
- iv) Legislative vacuum left open.
- v) The constitutional scheme.
- vi) Authority to make final declaration as to validity of a law.
- vii) Role of Judiciary as guardian of fundamental rights.
- viii) Public confidence in the judiciary etc.

It may be submitted that the above reasons are not the only reasons which prompt the judiciary to be active. However these are the primary reasons for this. Now if we talk about the framework of judicial activism in India we find that after the initial hesitation and with some aberration, the present activist approach of the highest Bench has now provided a philosophy that can meet the inadequacies of the traditional judicial role, its perception and performance. This behavioral change has attracted the attention of the legislature, executive and the people to many neglected facts of judicial process. New conception are being developed wherein in the impact of judicial decisions will beyond the courtroom is being increasingly realised.

After this if we see the dimensions of the judicial activism then we find that they are as follows :

- 1-Majoritarianism
- 2-Interpretive stability
- 3-Interpretive fidelity
- 4-Substance Democratic – Process Distinctions
- 5-Specificity of Policy and
- 6-Availability of Alternative policy maker.

So an analysis of some of the most importance decisions rendered by the Supreme Court before the 1980's compels a researcher to believe that the Supreme Court of India has exhibited activist traits very rarely before the 1980's.

#### ACCESS AND DEMOCRATIZATION OF THE JUDICIAL PROCESS

Starting from mid seventies, a harmonie called "Judicial activism" injected to the judicial stream through necessity, suddenly brought about a revolutionary change in the outlook of the Indian judiciary. Till then, a generally conservative, tradition bound institution became sensitive to the need of the weaker sections, downtrodden and traditionally oppressed classes of India. It is the lack of legislative thinking and executive inaction coupled with exploitation of the masses by the opportune few which made a section of the judiciary come down almost in a revolt to extend its hand of help to atleast some of the needy people.<sup>22</sup>

Public Interest Law popularly known as PIL in India has been described by the Supreme Court as a strategic arm of the legal aid movement and which is intended to bring justice within the reach of poor masses, who constitute the low visibility area of humanity.<sup>23</sup>

In his pioneering work on public interest litigation in India Prof. S.K. Agarwala<sup>24</sup> remarks that



"Public Interest law has been an uniquely American development."

#### LOCUS STANDI

Public Interest Litigation is very closely linked with the relaxation of "Locus Standi" and providing easy access to justice. It is also concerned with the protection of the countless and unrepresented mass of India, a third world country, who are in no position to protect their rights due to poverty, illiteracy, indigence and other social, economic and political factors. As regard the civil remedies they recognised the 'locus standi' of only the aggrieved person, to seek a remedy in a civil court. A minor concession is made under the code of civil procedure, providing for class or representative action.<sup>25</sup>

The definition of Public Interest Litigation is "a Litigation at the instance of a public spirited citizen espousing cause of others."<sup>26</sup>

Justice Krishna Iyer one of the pioneering judges who legitimated and popularised the public interest litigation in India consider public interest litigation as the product of creative judicial engineering. According to the eminent judges "The jurisdiction of the Indian Supreme Court is the widest in the world; the challenges of India's social changes are the sharpest; the Dynamics of a functional jurisprudence is the creative expression of judicial response to the crisis of hunger for justice. Public Interest Litigation is the off spring of these social forces. This burgeoning process, seminal and innovative, makes the court a catalyst to social justice, a defendant of the constitutional faith and the protagonist in the drama of human rights for the common man."<sup>27</sup>

In India Public Interest Litigation is an innovative strategy which has been invented by the Supreme Court for the purpose of providing easy access to the weaker sections of Indian humanity and it is a powerful tool in the hands of public spirited individuals and social action groups for combating exploitation society, their social and economic entitlements. It is a highly effective weapon in the armory of the law for reaching social justice to the common man.<sup>28</sup>

Now it is submitted that the Public Interest Litigation in India is an aspect of post-emergency catharsis. The press made an important contribution for the development of Public Interest Litigation in India by highlighting the repression unleashed by the state against the people and by exposing the courts behaviour during the emergency of 1975-1976. The first dramatic opportunity to initiate this new kind of constitutional litigation in India was probably provided by the Supreme Court Advocate Mr. Kapila Hingorani, who filed a writ based on a series of article in 'Indian Express' A national daily, exposing the plight of Bihar under trial prisoners, most of whom has served long-pre trial detention. This culminated in Supreme Court accepting the "Locus Standi" of the advocate and another in a series of six interim matters viz. Hussainara Khatoon (1) to Hussainala Khatoon (vi) Vs. State of Bihar.<sup>29</sup>

In 1980 tow law professors initiated a writ petition before Supreme Court, by sending a letter addressed to the editor, Indian Express, describing the inhuman condition of detention in Agra protective home for women, which was considered as a writ petition on the ground violation of Article 21.<sup>30</sup>

This was followed by acceptance of petitions filed by law students, law teachers, social workers and legal correspondents of newspapers as writ petitions under Article 32, by the Supreme Court in a number of cases like as Sunil Batra Vs Delhi Administration<sup>31</sup>, Bar Council of Maharashtra Vs. M.V. Dhabolkar<sup>32</sup>, Municipal Council of Ratlam Vs. Vardhichand<sup>33</sup> etc. are some leading cases related to the development of Public Interest Litigation in India. Justice Iyer further stated about Public Interest Litigation that "Access to justice to every 'bona fide' seeker is a democratic dimension of remedial jurisprudence even as Public Interest Litigation, class action, pro bono proceedings are."<sup>34</sup>

The real and most powerful thrust to the Public Interest Litigation in India was given by a seven judges special bench of the Supreme Court in S.P. Gupta Vs. Union of India<sup>35</sup> popularly known as the Judges Transfer Case No. 1. As the Supreme Court itself has acknowledged the newly invented proposition of Law laid down by many learned judges of the Supreme Court in the Arena of Public Interest Litigation irreparable and manifestly establishes that the court's dynamic activism in the field of Public Interest Litigation is by no means less than those of other activists judicial systems in other parts of the world.

#### CONCLUSION AND SUGGESTIONS

The Supreme Court plays a vital role in India Democracy. It is the highest court in the Indian

judiciary system and one of the three coequal branches of the national government. It has primary, though not exclusive responsibility for interpreting the Indian constitution and for defining the scope and content of its key position. As a principal guardian of the constitution, the courts is frequently called upon to assess the validity of statutes passed by legislative majority. However there is no evidence to show that the Supreme Court has been trying to achieve judicial supremacy of the cost of the legislature and the executive in general. Infact the court has been acting as a catalyst to activate them in discharging their constitutional obligations. Judicial activism appears to be a temporary phenomenon because it has never been consistent any where in the world. The present day activism of the Supreme Court may read in to background once there is a strong government and responsible legislature. And the judicial activism of the Supreme Court has also contributed immensely for the development of specific areas in the constitutional law after 1980 which ultimately helped the weaker sections downtrodden and oppressed sections of the society in the long run. It is a fact that the judiciary led by the Supreme Court has at times made forays into the typical political arena but it has retracted to its own jurisdiction because of self realization and public out cry.

So in the end this study revealed that the Supreme Court has by and large played its constitutional role very well and has always upheld the principal of constitutionalism. The judiciary may remind itself that under no constitution can the power of courts go for to save the people from their own failure. Judicial creativity even when it takes the form of judicial creativity even when it takes the form of judicial activism should not result in rewriting the constitution or any legislative enactments. The courts must stay-off from political arena by not donning the political role. They should remember that the court can not save the country but they may be able only to buy the time necessary for revitalization of other institution of government. Though it is a very well established fact that the judicial activism of the Supreme Court has helped in enforcing the rights and interests of the citizens, and also in keeping the other branches of the government within their constitutional boundaries, the judiciary should constantly remind itself that the need of the hour is the supremacy of the constitutional and not the supremacy of the judiciary.

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

"26 January 2000 marks the completion of fifty years of the Supreme Court of India. At this juncture, it is time to weigh what it has contributed and where it has lagged behind. This all the move so when the Supreme Court is the custodian of the Indian Constitution and exercises judicial control over the acts of both the legislature and the executive."

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