



JUDICIAL ACTIVISM OR OVERREACH? — ANALYSIS OF RECENT JUDGMENTS OF THE COURTS

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INTRODUCTION

Legislation is a complex exercise. The bill to enact any legislation originally may have been well drafted and properly vetted by the Law Commission, but when it is tabled in the parliament several interest groups press for amendments of all sorts. In a democracy, decision-making often warrants the accommodation of conflicting views and opinions and also compromising with the result such that by the time the original bill comes out of the parliament as an Act, it almost loses its original shape and sharpness. Thus, can be said the intent of the legislature for that particular act may not be explicitly clear in the texts/clauses of the finalised enactment.

Judges are human as well. Hence, they have their own tendencies and ideological beliefs. Unsurprisingly, some judges consider it their privilege to judge the intent (preamble) rather than the content (clauses/texts) of the law. This gives them the opportunity to expand the scope of the law. In interpreting constitutional and state laws, the judges draw certain innovative conclusions that are not expressly contained in the laws on the problematic issues and, based on these conclusions, make judgments in order to adapt to social justice and justice.

Freedom was not an end in itself. It was only a means to achieve a goal; The aim is to liberate India through a new constitution, to feed the starving millions, to clothe the naked masses and to give every Indian the full opportunity to develop according to his abilities. In order to achieve the above motive, the Government of India has enacted various laws. But because of the brilliant wit and covert malice, the defective majority in India must live in the same fetters, but this time under the control of the Swadesi rulers. The growing pause between promise and performance, expectation and reality that comes into effect and is implemented has disappointed outsiders, who seem to develop a sense of helplessness and alienation.

There are perhaps two approaches to the exercise and exercise of judicial roles in a democratic society. The judiciary can be proactive or act within the limits of restraint. Justice activism relates to the first. Before we peel off the layers of legal activism's past, we need to review the background that led to the emergence of proactive justice. There are two popular theories that express the factors that led to the emergence and growth of right-wing activism, namely the "vacuum filling theory" and the "social needs theory".

The "vacuum filling theory" implies that due to inaction or laziness of an organ, a power vacuum arises and the remaining government organs fill that vacuum by broadening their horizons, since power vacuum can disastrous the fabric of democracy and the rule of law. Right-wing activism is thus the result of the vacuum created by the two government organs (i.e. legislative and executive). Because it is true that nature does not allow a vacuum. Famous Author Subhash Kashyap says, "What has come to be called hyper activism of the judiciary draws its strength, relevance and legitimacy from the inactivity, incompetence, disregard of law and constitution, criminal negligence, corruption, greed for power and money, utter indiscipline and lack of character and integrity among the leaders, ministers and administrators. As a result of this a vacuum was created in which the governmental



machinery seemed to be totally helpless with the corruption in legislative and executive fields. The vacuum was filled in by the judiciary”¹

One fact that we need to acknowledge here is that human beings undergo a constant recurring cycle of evolution and experimentation. With change in the standard acceptable to the society, it also evolves to adapt to the new benchmarks.² The Old ideologies & old systems give place to a new set of ideologies and new systems which in turn are replaced by different ideologies and different systems. The judges need to move to the current reality and whereas discharging their duties need to develop and expound the law on those lines whereas acting at intervals the bounds and limits taken off for them in Constitution. There’s a great responsibility on the shoulders of judges to evolve the law in accordance with changing needs & aspirations of the society so as to serve the cause of social justice. Judicial activism is the cornerstone of this approach. The mere existence of a certain useful law can only solve the problems of society as a whole if judges interpret and apply the law to ensure its usefulness to the right neighbourhoods and to ensure that the rights guaranteed by the constitution are available to the masses of the country. When the courts interpret the constitution, their decisions cannot be overruled by laws enacted by the legislature. The final values protected by the written constitution are deliberately placed outside the legal authority.

Judges can certainly be regarded as leaders whether they want to be or not. Consequently, they cannot evade responsibility in their jurisdiction for setting the standards of the administration of justice.³ Thus, the overall personality of the judge is of great significance, his sensitivity is decisive and his ‘unconscious’ plays a decisive role in the exercise of judge power, especially in scenarios where it touches contemporary economy and social issues.⁴

The judges must understand that they have to develop the law and in accordance with the changing needs and demands of the people. It is expected of a judge to give substantial reasons to justify her decisions to himself, critics, lawyers and the society in general. It can, thus, be concluded that the characteristics of judicial activism are — 1) sensitivity and understanding of social needs, demands and political pressures; 2) accountability in the form of reasons that satisfy critics, lawyers and society itself.

Activism in judiciary may take many forms, but technically and legally for the two main forms of activism, and no legal system can survive in the modern age without giving the judge some leeway to practice these two-forms of legal activism. Beyond these two forms is the third form of activism, which Justice Bhagwati calls social activism. The judiciary in modern times cannot afford the act of hiding behind idea of legal justice and invoke ineptitude when issues of social justice are raised.⁵ It is crucial for the judiciary to gain social and political legitimacy, to go beyond legal justice and to face the challenge of making meaningful contributions to questions of social justice. And social activism is

¹ R Shunmugasundaram, Judicial Activism and overreach in India, available at:

<http://journals.sas.ac.uk/amicus/article/viewFile/1162/1045>

² Dr. A.S. Anand, “Protection of Human Rights—Role of Judiciary”

³ Arch M. Cantrall, “The Judge as a Leader: The Embodiment of the Ideal of Justice”, 45 American Bar Association Journal 339 (1959)



key to meeting this challenge. Every new decision by the court on every new situation is an evolution of the law. The law does not stand still. It's always on the move. The virtue of judicial review is to limit the inadmissible unconstitutional right to being examined by the Court and in danger of being invalid. The check itself is a serious limitation, but the check arises from the court's activist role. Needless to say, the courts have adjusted to "creativity" to encourage the needs of the weaker sections of society in terms of the liberal-realistic interpretations, sweeping the procedural cobwebs that stand in the way and filling in what the legislators left for legislation made sense.

JUDICIAL ACTIVISM IN INDIA

The Indian Constitution is a unique example which stands itself apart from other constitutions across the world. One of them being the fact that it is the longest constitution, and is so comprehensive and detailed that it deals with all kinds of complex and multifaceted situation that existed (and still exists) at the time it was drafted and adopted. It provides for the creation of federal parliamentary form of government wherein the roles, powers and functions of three bodies i.e. the executive, the legislature and the judiciary is clearly defined and limited. In such a form of government, the President is the head of the state who is also the Constitutional head whereas the real executive powers lies in the hands of the Prime Minister. The decisions are taken by the PM with the Council of Ministers in the name of the President. The third organ i.e. the Judiciary is provided for under Chapter IV and VI of the Constitution. Also, the Constitution and not the Parliament is the supreme body of the nation. Here we have a unified judicial system with the Supreme Court at the top being the apex court. It is an impartial and independent institution and has original jurisdiction in the matters connected with disputes between the centre and the states or between the various states. It is also referred to as the guardian and interpreter of the Constitution and as such it has to ascertain the constitutional validity of laws and various constitutional amendments passed by the Parliament.⁶ In addition, the Supreme Court is the guardian of the basic rights of its citizens. According to G. Austin⁷, the Supreme Court has been called upon to safeguard civil and minority rights and play the role of 'guardian of social revolution'. It is the interpreter of the law of the land and the highest court of appeal in both civil and criminal cases.

Earlier the Supreme Court of India was technocratic in nature, but with time it began to acquire muscle and prestige through its liberal interpretation of the law. This all started with judicial review in A.K. Gopalan v. Madras⁸, where it was asserted that this power was inbuilt in the very nature of a written Constitution itself. According to article 13, the state shall make no law that takes away or abridges the fundamental rights. Making a reference to this article, the Supreme Court opined⁹:



The inclusion of Article 13(1) and 13(2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the Fundamental Rights are infringed by any legislative enactment, the Court has always the power to declare the enactment to the extent that it transgresses the limits, invalid. In other words, the court took upon itself the responsibility of judicial interpretation of the Constitution and judicial review of legislative enactments. Judicial activism is an inherent feature of judicial review and arises as a result of several factors. As the polity becomes more complex and new challenges are thrown up, the judiciary has to take on a more proactive role to interpret the laws and in cases where laws do not exist(for example cybercrime, etc.), the court has to broaden the scope of existing laws to decide on matters which come up before it for decisions.

This activism in judiciary may be positive or negative. When it tries to make power relations between different sections of people more equitable, it is positive. Whereas it is considered negative when personal bias and opinions are attached more significance than the norms of law and natural justice.¹⁰ Upendra Baxi¹¹ uses the terms 'reactionary' and 'progressive'. According to him, 'much of Nehruvian era activism on issues of land reform and right to property, and the pro-emergency activism typified in S.K. Shukla¹², manifests reactionary judicial activism. Progressive judicial activism commences with Golaknath¹³ and Kesavananda¹⁴ and culminates in a wholly different genre of social action activism.' In the words of Sathe¹⁵, "Judicial activism acts to breach separation of powers, which in turn upsets transactional efficiency and raises social costs. If the executive or the legislature has become dysfunctional, rotten boroughs of obsolete executives and unrepresentative legislatures, the solution is not in expanding judicial enterprise but in restructuring the dysfunctional institutions.

The areas touched by the essence of judicial activism related to public interests and welfare measures is very impressive. The Courts have liberated and rehabilitated thousands of bonded labourers,¹⁶ released thousands of women and children who had spent years in jails as under-trials, gave better deal to prostitutes and their children, enforced labour laws especially pertaining to payment of minimum wages and provided a number of measures to ameliorate the social problems like rape, dowry, housing, rehabilitation etc. It diffused the great crisis engulfing the nation along the lines of caste and class on Mandal issue by upholding reservation of jobs in the government and public



sector undertakings as a socio-economic welfare measure.¹⁷ In *Muralidhar v. Vishwanath*¹⁸, the Supreme Court held that economic empowerment of poor and down-trodden is a basic human right as a part of the right to live with equality of status and dignity. In *Dalmila Cement v. Union of India*¹⁹, the Court held that the ideal of economic justice is to make equality of status meaningful and the life worth living at its best, removing inequality of opportunity and of status.

JUDICIAL ACTIVISM VS. JUDICIAL OVERREACH

One may find the terms being used interchangeably in day to day life. However, we need to know that the terms signify different meanings. A very fine line is drawn between judicial overreach and judicial activism. The line is crossed when judicial activism crosses its limit and becomes judicial adventurism, it is then that it takes the form of Judicial overreach.²⁰ The explanation given by judiciary in this aspect is the under reach of legislative and executives bodies because of which it has to step up to put things into order. Now, it depends upon the perception of the people if they consider it as activism or overreach.

SOME IMPORTANT CASES RELATED TO JUDICIAL ACTIVISM

In Godavarman case²¹, a writ petition was filed by Mr T N Godavarman in the SC that required the intervention of the Court in directing Tamil Nadu to check felling of timber and to control the problem of deforestation in general. It is a good example of how the *amicus curiae* was repeatedly able to influence the Court's mind.²² Furthermore, what the SC can't do is to suggest the Parliament to establish a national environmental regulator under Article 253 of the Constitution. It may be said that it has used the Godavarman case as an alibi to establish an ongoing forum to discuss and implement fundamental reforms of forest regulation in the country.²³

The Supreme Court on December 2016, passed its judgment in the case of *Shyam Narayan Chouksey v. Union of India*²⁴, which makes it mandatory, that- (i) all cinemas in India shall play the



National Anthem before the feature film starts, (ii) all present in the hall are obliged to stand up to show respect to the National Anthem, (iii) the entry and exit doors shall remain closed prior to the National Anthem is played or sung in the cinema hall so that no one can create any kind of disturbance, (iv) the doors can be opened after the National Anthem is played or sung, (v) the National Flag should be displayed on the screen while the National Anthem is played in the hall. It may be regarded as a case of judicial overreach as the Bijoe Emmanuel case was completely neglected. In this, three children were expelled from the school in Kerala for not singing the National anthem because their religion did not permit them to join any rituals except in their prayers to Jehovah. The court had ruled that there is no legal provision that obliges anyone to sing the anthem and ordered the school to take back three children it had expelled. The court has ignored the situations where the people may not be able to stand up for physical reasons, intellectual or religious reasons because they may consciously believe that their religious beliefs, prevent them from standing up. Moreover, the court didn't take into account the Uphaar Tragedy Case. In ruling that entry and exit doors be closed while playing the National Anthem, the Supreme Court ignores its own earlier judgment in the Uphaar tragedy case where the court had held that under no circumstances should the doors in a cinema be shut from the outside. There will certainly be many implementation issues with this order as who will count how many people are standing and how many are sitting while the anthem is playing? Who will see if one can't stand up due to physical problems or some other reasons? And then, what if there is an emergency? What if somebody urgently needs to go to the washroom? The direction goes beyond the Prevention of Insults to National Honour Act, 1971, which says that no film, drama or show of any sort can have the National Anthem as part of the show.

The SC ruling on Liquor Ban on a PIL about road safety banned the sale of liquor at retail outlets, as also in hotels, restaurants, and bars, that are within 500m of any national or state highway.²⁵ A case of Judicial Overreach as there was unnecessary interference. Implementation of the directive principles of state policy is the governments job. It is not the upto the court to force the it to implement them. It's against spirit of separation of powers given by our constitution. State governments has the discretion in administrative matters. Secondly, it was certainly not a fit case to invoke the extraordinary powers of the court using Article 142, which talks about "the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it..."²⁶ In the absence of any similar notification by any of the State governments, the court extended the ban to State highways as well. It will give rise to many problems such as how to measure 500m, how to reduce the impact and what about places like Goa, these all matters requires executive knowledge and requires the accountability of the governments. Thirdly, there exists no empirical evidence that banning liquor sale on highways will reduce the deaths. The order has certainly caused massive loss of revenue to the state governments and the courts didn't suggest as to how that loss can be compensated. Due to this, some states have started even denotifying state highways as municipal roads. Another impact is the loss of employment



and livelihoods. The loss in business for hotels, restaurants, and bars will directly affect the jobs and indirectly will reduce the jobs in enterprises that form part of their supply chains.

The CBI registered FIR against the officials of the Department of Telecom in 2G scam case²⁷, the Supreme Court ordered to cancel 122 telecom licenses and spectrum allocated to eight companies. The Supreme Court held that the process of allocation was flawed. It further directed the government to allocate national resources through auction only. May be regarded as a case of Judicial Overreach. The rising non-performing assets (NPAs) are, to some extent, the result of the judicial decision of canceling the licenses. Courts failed to consider their impact on the economy. Due to this the telecom sector is, till today, reeling under the after-effects of the judgment. The balance-sheets of public sector banks are also adversely impacted as the defaults on bank loans have increased. The economic decisions of a country are the sole domain of the legislative and executive bodies and the court, in this case, overreached their power, which impacted the economy heavily. Banks are not willing to lend to operators already heavily indebted and return on investment was inadequate to repay the debts. Vodafone and Idea are intended to merge. Reliance is in deep trouble and has no choice except to exit.

The following are the effects of judicial overreach. First, it destroys the spirit of the constitution, since democracy is based on the separation of powers between institutions. Second, there is a conflict between the legislative and judicial systems. The message these decisions send among the people is legislative inactivity. Third, if legal activism helps build people's trust in the judiciary, it is destroyed by sheer reach.²⁸ It seems like an act of "tyranny of the unelected" in a democracy where elected representatives rule. Fourth, it diminishes people's trust in public institutions, which can be dangerous for democracy. After all, it is a waste of time in court that could otherwise be used to discuss various important public interest matters pending in court.

CONCLUSION

Judicial authorities play a sacrosanct role not only in dispute resolution per se, but also as a balancing mechanism between contradictory features and pressures that exist in a society. To fulfil this role, the judge must have a sense of moral freedom, a sense of independence in the service of justice. We cannot expect him to resist abuse of power when he feels important. The courts are the product of the constitution and decisive for the fulfilment of the ideals of the State enshrined in it.

Legal activism in response to the PIL has opened the doors of justice to the poor and needy. Hopefully the judiciary is not hyperactive in portraying rights activism. Therefore, it is used by the former CJ of the Supreme Court, A.M. Ahmadi that the judiciary is asked to act with restraint and introspection regarding the approval of the PIL in order to address criticism of legal activism from various quarters. While rights activism is certainly a very important phenomenon that serves a very important purpose, legal adventure is detrimental to democracy in the long run. Judicial restraint is the only solution to this problem. The court must be aware of the extremely important responsibility



established in it by the Constitution to determine the competence of the three organs. The whole system is based on a delicate balance of forces between the three organs, and even well-intentioned intentions cannot destroy this balance, since even the judiciary itself cannot or cannot fulfil all three functions.

The exercise of the power of judicial review by the Court in the Godavarman case has pushed the limits of judicial activism. In order to maintain constitutionalism, it is essential to keep balance among the different branches of the state. The judges in adversarial jurisprudence are assumed as non-aligned adjudicator with the aim at ensuring promotion of values and dignity. Judicial activism certainly is an effective tool which can be used to redress almost every problem in the present time, but it cannot be regarded as the prominent nature of the judiciary. It is also not in alignment with the principle of separation of power as enumerated under our Constitution. For these reasons, it must be sparingly used with due care and caution.