

EXPANDING NOTIONS OF JUSTICE THROUGH JUDICIAL PROCESS

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ABSTRACT

The article will commence with the deliberation on Judicial Activism as part of judicial process. Constitutional legal provision that backs the process of judicial activism will be dealt at length. Separation of powers is usually strongly recommended and judiciary is often accused of usurping the powers of other organs of the State. Studying the public interest litigation cases an attempt will be made to critically examine the role of judiciary in upholding the rule of law and to ascertain whether it is encroaching over the powers of other organs of the State.

In some cases like L. K. Pandey, Vishaka courts have expanded its role to law making, whereas in some other cases like Hawala and Animal Fodder scam, it has micromanaged the investigation done by premier investigating agency like CBI thus taking on itself the role of legislators and Executives. Judicial Activism has been criticized from within and outside judiciary. It has been accused of overstepping its limit. The article critically examines the role of judiciary in changing times making an attempt to provide remedy to burning social problems.

The article makes an attempt to study the decided cases of public interest litigation and will conclude on the basis of comprehensive study based on the topic.

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“The good of the people is the chief law.”
.....Cicero.

What is Judicial Process?

Judicial Process is the way a judge reaches a decision, not the decision he reaches. An activist Judge takes the law that applies to the case – may be statute or may be the Constitution and changes it to produce the results he wants. He can change it by creating a Constitutional right that does not exist such as, right to speedy trial², right to legal Aid³, rights of the accused⁴, right to free legal aid⁵, right to privacy of telephone conversation⁶, right to compensation⁷, etc. or he may ignore a Constitutional right that does exist.

Judicial Activism is, “Judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate Judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions in the legislative and executive matters.”⁸

The role of judiciary in interpreting existing law as a living concept to do complete justice in cause by promoting for the felt needs of the time and implementing the rule of law when the existing law appears to be deficient requiring the filling of the gaps, appears to be the true meaning of Judicial activism. In various cases like L. K. Pandey⁹, Vishakha’s¹⁰, etc judiciary has provided reliefs even in the matters where no law existed.

² Hussainara Khatoon v State of Bihar, AIR 1979 SC 1360; Common Cause: A Registered Society v Union of India

³ Khatri v State of Bihar AIR 1981 SC 928; Sheela Barse v State of Maharashtra AIR 1983 SC 378

⁴ D. K. Basu v State of West Bengal AIR 1997 SC 610

⁵ Suk Das V Union territory of Arunachal Pradesh (1986) 25 SCC 401

⁶ People’s union for Civil Liberties v Union of India and anr, (1997) 1 SCC 301

⁷ Nilabati Behera v State of Orissa [(1993) 2 SCC 746]

⁸ Black’s law Dictionary, sixty Edition, [Centennial Edition (1891-1991)]

⁹ L. K. Pandey v Union of India, AIR 1986 SC 272;

¹⁰ Vishaka & others v State of Rajasthan & others, AIR 1997 SC 3011

Constitutional Provisions.

It is well established Constitutional principle of the existence of judicial review. The origin of judicial review is itself traceable in judicial activism. Chief Justice John Marshall in *Marbury v Madison*¹¹ evolved a juristic principle when he said, “*It is emphatically the province and duty of the judicial department to say what the law is.*” At that time, it appeared to be an innovation or an act of judicial activism. Through judicial activism, judiciary interprets the provisions to sub serve the underline Constitutional purpose.

Two Articles in the Constitution of India puts powers in the hands of the people to move the highest courts whenever there is infringement of fundamental rights. The relevant parts of these articles are:

Article 32 (1): The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights is guaranteed.

(2) The Supreme Court shall have the power to issue directions or orders or writs, including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari, whichever may be appropriate, for the enforcement of any rights conferred by part III.

Article 226(1): Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any government, within those territories directions, orders or writs including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-Warranto, and Certiorari, or any of them, for the enforcement of any rights conferred by part III.

(2) The power conferred by clause (1) to issue directions, orders or writs to any government authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in

¹¹ [(1803) 2 L.ed. 60]

part, arises for the exercise of such power, notwithstanding that the seat of such government or authority or the residence of such person is not within those territories.

(4) The power conferred on High Court by this Article shall not be in derogation of the power conferred on the Supreme Court by Article 32(2).

The language of these two Articles is very wide. The powers of the Supreme Court and High Courts extend to issuing orders, writs or directions as may be considered necessary for the enforcement of the fundamental rights.

Some Articles of the Constitution put overwhelming powers in the hands of the Supreme Court judges. Under Article 142, they can pass any order as is necessary for doing ‘*complete justice*’ in the matter pending before them. As per Article 144, all authorities in the country shall act in aid of the Supreme Court.

Is Judiciary usurping the function of other organ of the State through its judicial process?

Judiciary at times is accused of usurping the function of other organs of the State through its process. Judicial process is a legitimate exercise by the judiciary in discharge of its Constitutional obligation which enables the development and growth of law by evolution of new juristic principles which gets absorbed and assimilated in the existing law to fill the gaps found in it. This in no way seems an attempt to usurp the function of any other organ of the State. The role of judiciary commences only when its jurisdiction is invoked in a cause brought in the court of law, which happens only as a last resort on the perception that the remedy to the aggrieved is not available elsewhere. In that event, instead of expressing helplessness, if judiciary makes an attempt to give a meaning to the law which provides a solution to the problem brought before it, the exercise is really a discharge of the Constitutional obligation of the judiciary within the role assigned to it under the Constitution. Judicial process in the form of judicial activism has reaffirmed the faith of the people in the rule of law and confirmed the belief that there is remedy under the law for every injury and a solution for every problem. In entertaining the public

interest litigation, the Supreme Court is assisting in realization of the Constitutional objectives.¹² The continuance of the faith in rule of law is essential to preserve democracy, and to avoid resort to extra legal means for redressal of grievances detrimental to interest of society as has happened in Girhotra's case - when a 29 years old Utsav Sharma, stabbed former DGP S. P. S Rathore, convicted for molestation case after 19 years.¹³ In Nagpur also nearly 200 hundred women from Kasturba Nagar basti marched into the court room of magistrate on the afternoon of 13th August, 2004 Friday and lynched their tormentor Akku Yadav to death with knives and stones.¹⁴ Many more such examples can be cited.

It is undisputed fact that where the court finds, on being moved by an aggrieved party or by any public spirited individual or social action group, that the executive is negligent in discharging its obligations under the Constitution or the law, so that the poor and the underprivileged continue to be subjected to exploitation and injustice or are deprived of their social and economic entitlements or that social legislation enacted for their benefits is not being implemented thus depriving them of the rights and benefits conferred upon them, the court certainly can and must intervene and compel the executive to carry out its Constitutional and legal obligations.¹⁵

Supreme Court has performed its legitimate function by giving full effect to the guarantee made under the Constitution. The requirement that every State action must satisfy the test of fairness; consideration of every legitimate expectation in decision making to satisfy the rule of non arbitrariness and absolute power in an individual being anti democratic, are judicially evolved principles which form part of Constitution law¹⁶. Such decisions rendered in the performance of Constitutional obligations fall within the ambit of legitimate judicial process and in no way as usurping the functions of other organs.

Judges as Lawmakers

¹² Bandhu Mukti Morcha v Union of India; (1984) 3 SCC 161

¹³ <http://www.news.outlookindia.com/item.aspx?674264>

¹⁴ <http://www.outlookindia.com/article.aspx?224949>;

¹⁵ State of H.P. v A parent of a student, (1985) 3 SCC 169

¹⁶ T. N. Seshan, Chief Election Commissioner of India v Union of India and ors, 1995 (4) SCC 611

The doctrine of 'Separation of powers' in its strict sense would assign law making entirely to the legislative wing of the State confining the role of judiciary only to the interpretation of the law. Few decades ago, it was considered almost sacrilege to suggest that the judges also make law, notwithstanding the acceptance of case law as an acknowledged source of law. It was emphasized that judges were mere interpreters of the enacted law. It is clear affirmation that such impression was a myth and it is not indecent to accept the fact that judges do make law and that to an effective and appropriate one. Acceptance of the role of the judges as law makers is occasioned more by the change in the concept of the role of the courts from mere instrument of governance to an instrument of society meant for service of people and implementation of the rule of law to preserve democracy.

Judicial Activism has grown to revolutionize law and has become a powerful factor in social and political change. Corrupt politicians have been brought down from pedestals and sent to jail, police officers who oppressed citizens have been punished; industries which polluted air, water and land have been shut down, all due to judicial activism.

Criticism of Role of Judiciary as an activist

Over the past few decades, the Courts have become more accessible, participatory and even legislative. It has begun to lay down rules of governance. By traditional standards the Court has clearly gone beyond the Constitutional limits. In *Khatri's Case*¹⁷, the Court directed the Bihar government to appoint sufficient number of judges in the subordinate courts, in a ragging Case of Himachal Pradesh;¹⁸ the High Court directed the State government to legislate to stop ragging in college. In 'Hawala' and 'Animal fodder scams' of 1996 courts identified the investigating officers and asked them to report directly to the courts, bringing CBI investigation under court's supervision. Dissatisfied with the indifferent attitude of the CBI, the premier investigating agency, the Supreme

¹⁷ (1981) 1 SCC 623

¹⁸ AIR 1985 SC 910

Court had called the Director as well as Secretaries in the concerned Ministries to report directly the progress of the probes.

It is alleged that judiciary is taking over the functions of executive and legislature and playing the role of prosecutor as well as judge. There has been a serious objection to this expanded role from the stand point of separation of powers. This movement was also criticized by judges and jurists. It was judiciary which launched the movement in this country and ironically the first shots were fired from within.

In early eighties, many public interest litigations were dealt with by the court including S. P. Gupta's Case¹⁹ on locus standi, which had opened door for many more such cases. It is during this time, in 1982, sitting Justice V. D. Tulzapurkar (as he then was), speaking in a function at Pune about "*Judiciary: attacks and survival*" questioned whether it was judiciary function to supervise investigations?²⁰

In the cases like, Agra settlement home for prostitutes²¹ numerous orders were passed by the Supreme Court, the home was virtually run under the supervision of the apex court., Similarly in Bhagalpur blinding case²² one of the order stated, 'It is our duty to supervise and oversee the conduct of the prosecution to ensure that prosecution is pursued vigorously and trial is held speedily and effectively.' According to Justice Tulzapurkar this order was wrong and the court over stepped its limits.

Judicial activism is opposed because the list of subjects touched by them in recent years has been impressive. It has liberated thousands of bonded labourers, 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, approved reservations for backward classes, dealt with rape, militancy, rehabilitation of tribals and scores of social problems.

¹⁹ S. P. Gupta v Union of India AIR 1982 SC 149

²⁰ M. J. Antony, Social actions through courts, Indian Social Institute, New Delhi, Reprint 2000

²¹ Upendra Baxi v State of UP (1983) 2 SCC 308

²² Anil Yadav v State of Bihar (1981) 1 SCC 622

Even the approach of Supreme Court has changed over the years in favour of Social and Economic justice.

Glimpse through few judgments will make this clear. In *Murlidhar v Vishwanath*,²³ the court had held that economic empowerment is a fundamental right to the poor. After long deliberations it was concluded that economic empowerment was the basic human right as a part of right to life, with equality of status and dignity.

In *Madhu Kishwar v State of Bihar*,²⁴ it was held that agricultural land was the foundation of sense of security and freedom from fear. Assured possession is a lasting road for development, intellectual, cultural and moral and also for peace and harmony. In *Dalmia Cement (Bharat) Ltd. and Anr. V Union of India and ors*,²⁵ the court said that the ideal economic justice is to make equality of status meaningful and the life worth living at it's at its best removing inequality of opportunity and of status.

Such revolutionary statements from the Supreme Court contain seeds of drastic change. The ruling class has been shaken by the orders from the courts. It is but natural that the affected class will oppose judicial activism.

Conclusion

“This is court of law, young man, and not a court of justice.”

.....Oliver Wendell Holmes Jr.²⁶

The sarcasm in the barb of Holmes generates and fuels the impulse of the courts to become courts of justice.

Setting wrong right is theoretically the function of the executive, but for far too long it had become dysfunctional and the people were groping for the ray of hope from somewhere. They found it in judiciary, thanks to judicial activism. The courts with all its

²³ Jt 1995 (3) SC 563

²⁴ Jt 1996 (4) SC 379; AIR 1996(5)SC 125

²⁵ Jt 1996 (4) SC 555; 1996(10) SCC104

²⁶ <http://www.quote garden.com/justice.html>

faults and foibles have become the refuge of the people oppressed by corruption in bureaucracy and high headedness of police. They are not bothered of niceties of the separation of powers between the judiciary, legislative and the executive. For them, what matters is that justice is done and which in itself is bring about quiet revolution.

Judicial process through its activist thinking has activated Public authorities to discharge their duties under the law. In this process judiciary has become strong due to people's faith in it and this faith of people not only provides legitimacy to judicial activism but also makes the court, the Court of Justice from the Court of Law.

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