

RECENT ACTIVIST TRENDS IN INDIAN JUDICIARY: JUDICIAL RESTRAINT AND JUDICIAL OVERREACH

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INTRODUCTION

We need not go into the history of activism in judicial sphere to understand the wave of “judicial activism” that took everything on its way in its grip with time and took seemingly divisions in a democratic set up by storm. Given the way “judicial activism” in India spread its roots, one can only watch it unfolding day by day than getting into the historical argument of “where did it all start?” Still for those curious about its history, it would suffice that we can trace it back to the time of celebrated decision in *Marbury v. Madison* 5 U.S. 137 (1803) through which concept of ‘Judicial Review’ was introduced in American constitutional jurisprudence. Not to forget Chief Justice Marshall who held in *Marbury* that ‘It is emphatically the powers and duty of the Judiciary to say what the law is.’ It was a huge statement if seen and analyzed in light of theory of ‘Separation of Powers’.

Speaking of “Judicial Activism” in India, Article 13 of the Constitution allowed enough space for “Judicial Activism” through doctrine of ‘Judicial Review’. What happened with time was for all to see when stalwarts of judicial field and legends like Justice Krishna Iyer and Justice P.N.Bhagwati sowed seeds of ‘judicial activism’, watering them with sprinkler of Article 13. From then onwards there was no looking back as we could see how these legends made sure to convert Apex Court of India into its Supreme Court, into Peoples’ Court by making its threshold open to one and all irrespective of status, colour and creed.

Before them judges showed much ‘restraint’ and exercised their powers strictly in conformity with the compartmentalization that separation of powers warranted. Such stalwarts’ who saw a scope for change and went for it did that only to make judiciary a protector – *sentinel on qui vive*. It was through them that people started looking at ‘judiciary’ as solution to all of their ills, as their Messiah – rightly called as ‘judicial romanticism’. Right from the beginning of this phase of “judicial activism” its founding fathers, mainly Justice Krishna Iyer, have been attacked by their peers for transcending the boundaries of ‘judicial restraint’. Their followers continue to contend that under the garb of ‘judicial activism’ judiciary tries to enter into the shoes of other two branches of government. So amidst all high hopes and expectations on judiciary with time, did it really take things for granted and usurped role of other institutions and considered itself legislator and executor in the process. And also is excessive juridical restraint shown by Hon’ble Court in some of the recent cases good for Indian democracy. These questions are the matters of the facts and therefore remain to be seen and analysed which forms the main thread of this paper. It is a cliché that excess of everything is bad even if it be excess of something good. Overdo good send you will ruin it, may be. So is it that under the smoke screen of “judicial activism” we see glaring examples of “judicial overreach”. Also is it that behind the veil of “judicial restraint” we see glaring examples of “imperial juridical restraint”. Should we go behind the scenes and check what is cooking inside and how? Yes, because in a democracy we have to assure about checks and balances else too much power to one institution will turn it a despot posing threat to credentials of democracy itself.

The basic point of this paper is to go to the root of the concept of ‘judicial review’ and then describe how “judicial activism” evolved. How ‘judicial overreach’ and ‘juridical restraint’ have become threats to Indian democracy. The main point of this paper is to find out balance between ‘judicial activism’ and ‘judicial restraint’.

The paper is divided into five main sections and each section is sub divided into sub sections. First section as discussed already gives the overview of the paper; second section gives the overview and brief history of ‘judicial review’ and focuses mainly on ‘judicial review’ in India; third section explains the activist role of the Indian judiciary, it also highlights recent trends of ‘judicial overreach’ and ‘excessive judicial restraint’ as risk and threat to democracy; fourth section focuses on balance between judicial activism and judicial restraint and fifth section puts

forth the conclusion. The paper draws comparative analysis with best practices and is supported with leading case laws.

JUDICIAL REVIEW

The term ‘judicial review’, in general, means the power of a court to review and potentially strike down an act of legislature as unconstitutional and invalid¹. It is the inquiry or scrutiny of the acts of other government organs by the courts to ensure that they act within the limits of the supreme document – Constitution. Countries with written constitutions are governed by the constitutions, and laws made by legislature can be set aside by the courts on the ground of being *ultra vires*. When a court interprets a statutory provision it tries to give effect to the intention of the legislature and thus it adopts an interpretation giving effect to the language – because the legislature is supposed to express itself through the language of the statute. But when judges are supposed to interpret provisions of constitution, which is an organic law, the scope of choice is much wider. A constitution often contains open textured and conceptual expressions. A court giving meaning to expressions such as ‘right to life’, ‘procedure established by law’, ‘equality before the law and equal protection of law,’ or ‘freedom of speech and expression,’ discusses political philosophy; but, unlike philosophers, judges are confined by the practical limits of the need to define their philosophy. Judges participating in judicial review of legislative action should be creative and not mechanistic in their interpretations. Judges cannot merely apply the law to the facts that come before them while interpreting written constitution.

A BRIEF HISTORY

The Jurisprudence of judicial review emanated from the U.S. Constitution and became an important aspect of American constitutional law in *Marbury v. Madison*,² where Chief Justice Marshall held that the Supreme Court has the power to invalidate acts of Congress that are contrary to the Constitution and such power was implied. Although there is no express

¹ Kermit L. Hall and John J. Patrick, *The Pursuit of Justice: Supreme Court Decisions that Shaped America* 15 *OUP* (2006)

² 5 U.S. 137, 138 (1803).

provision in the American Constitution, it is regarded as a very significant weapon to scrutinize all kinds of state action and has influenced many countries in the whole world. In England, the concept originated when the courts reviewed the acts of the executive to ensure they were within the limits of the statutes enacted by Parliament. Initially, the concept had a wider scope in the sense that it was exercised by the English Courts to review the legislative, executive and judicial actions but subsequently, after the Glorious Revolution of 1688, the scope of judicial review was abandoned in respect of legislative actions, its scope was restricted to the review of administrative actions only. The doctrine was adopted by the Indian Courts at a later point for safeguarding the fundamental rights of the people.

JUDICIAL REVIEW IN INDIA

Unlike the United States Constitution, the Indian Constitution expressly provides for judicial review through the provisions of Articles 13, 32, 226, 141, 142 and 144. To justify its power of Judicial Review, the Supreme Court of India resorts to the troika provisions of the Constitution, i.e. Articles 32, 226 and 142. The power of judicial review is a basic structure of the Indian Constitution.³ Article 13(2) of the Constitution prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void. In a relatively short history of constitutionalism, the power of Judicial Review in India has evolved so as to ensure fairness in legislative cum administrative action; to protect the constitutionally guaranteed fundamental rights of citizens; to rule on questions of legislative competence between the centre and the states.⁴

Judicial review of executive or legislative actions is controversial, unlike the judicial review of judicial actions. The orders passed by lower courts which are either being set aside, revised or modified, are greater in number than reviews relating to executive orders or legislative actions. However, criticisms of the judicial review of executive and legislative actions are stronger and more vociferous. Unlike the English Courts, the Indian Courts continue to review every form of State action, by it legislative, administrative or judicial action. As per the Indian

³ L. Chandra Kumar v. Union of India, 3.S.C.C. 261 (1997)

⁴ Id.

constitutional scheme, the judiciary alone has been entrusted with the power and duty to test the constitutional validity of legislative provisions and the validity of the administrative actions. The superior courts are empowered to declare a statute ultra vires the constitution and to nullify an executive action as unconstitutional. These powers of judicial review are given not with a view to make the judiciary a supreme body superior to the other wings of the constitutional framework, but to ensure a system of checks and balances between the legislature and the executive on one hand, and the judiciary on the other. The mechanism has been devised to function in such a way that the unconstitutional actions of one of the wings are corrected by the other, and vice versa. It is not the purpose of judicial review to criticise legislative or executive actions, as the opposition is expected to fulfil this function in a democratic polity. On the contrary, the judiciary's role is to review executive and legislative actions and declare whether those actions conform to the dictates of the Constitution of India. Justice Dr. A. S. Anand, former Chief Justice of India and former Chairperson of the Human Rights Commission of India, while addressing on "Judicial review – judicial activism – need for caution" said:

"The legislature, the executive and the judiciary are three coordinate organs of the state. All the three are bound by the Constitution. The ministers representing the executive, the elected candidates as Members of Parliament representing the legislature and the judges of the Supreme Court and the High Courts representing the judiciary have all to take oaths prescribed by the Third Schedule of the Constitution. All of them swear to bear true faith and allegiance to the Constitution. When it is said, therefore, that the judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive are not equally to guard the Constitution. For the progress of the nation, however, it is imperative that all the three wings of the state function in complete harmony."

With the increasing public awareness in India, every major government action on judicial review has become the trend of legal development in India. Competing rights and conflicting interests of different sections of society has becomes matter of scrutiny for which the judiciary acquires the role of an activist and tries to fill the vacuum and expand its ambit to frame policies and take the roles of the other two organs of the Government. People's understanding of this

activism depends on their conception of the proper role of a constitutional court in a democracy. Those who conceive the role of a constitutional court narrowly, as restricted to mere application of the pre-existing legal rules to the given situation, tend to equate even a liberal or dynamic interpretation of a statute with activism. Those who conceive a wider role for a constitutional court, expecting it to both provide meaning to various open textured expressions in a written constitution and apply new meaning as required by the changing times, usually consider judicial activism not as an aberration, but as a normal judicial function.⁵ With these changing circumstances and time, Judges are also facing new challenges. Their role has completely taken a shift from being a passive umpire to a modern activist. With this regard, Lord Woolf has aptly opined:

The landscape in which judges have to perform their craft has been transformed. New responsibilities have been imposed upon judiciary and these responsibilities have created new challenges for judges.⁶

Thus, new challenges and responsibilities imposed upon judiciary have opened gates for judicial activism. Judicial activism is a philosophy which motivates judges to depart from strict adherence to precedents, in favour of progressive policies which are not always consistent with the restraint expected to be exercised by appellate judges.⁷ Upendra Baxi, an eminent Indian Jurist has defined judicial activism as the way of exercising power vested by judiciary, which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by the members of ruling class.

ACTIVIST ROLE OF INDIAN JUDICIARY

Judicial activism is a sharp-edged tool which has to be used as a scalpel by a skilful surgeon to cure the malady. Not as a Rampuri knife which can kill.⁸

-Justice J. S. Verma, 1996

⁵R. Shunmugasundaram, Judicial activism and overreach in India, *Amicus Curiae* Issue 72 (2007) .

⁶ Lord Woolf, Current Challenges In Judging, *The Pursuit of Justice*, Newyork: Oxford University Press, 2008, P. 305.

⁷ Black's Law Dictionary.

⁸Manoj Mitta, A strong arm is needed to make the executive work, *India Today* (March 15, 1996), <http://indiatoday.intoday.in/story/the-court-has-grown-stronger-in-keeping-with-the-need-of-the-times-justice-j.s.-verma/1/280953.html>.

From the positive decisions of Hon'ble Supreme Court of India, judicial activism in the Indian context can be regarded as the active and positive interpretation of an existing provision with the intent of enhancing the utility of legislation for social welfare, keeping in view the constitutional limits and boundaries. Hon'ble Supreme Court of India after playing "interpretative" role in the 1950s and 1960s, right from the mid-1970s has played an activist role in standing up against legislative and executive inactions and failures. In *Maneka Gandhi*⁹, the 7 Judge Bench of the Indian Supreme Court, while overruling the 5 Judge Bench decision in *A.K. Gopalan's* case¹⁰ introduced the due process clause in the Indian Constitution by a judicial pronouncement. In *S. P. Gupta*¹¹ case it was held that: 'the judge has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest it with a meaning which will harmonize the law with the prevailing concepts and values and make it an effective, instrument for delivery of justice.' By giving these liberal interpretations and by diluting traditional technicalities and procedures, judiciary provided soul and blood to the black letters of law. In other words, it has helped law move from 'Dickensian ass' to what it is today. In order to achieve the constitutional aspirations of socio-economic justice, enunciated in the very preamble of Indian constitution, the Hon'ble Supreme Court from time to time has itself encouraged judges to work actively and adopt positive and creative approach while deciding cases involving social welfare. In *S. P. Gupta v. Union of India*¹², referring to the old adversarial view of passive and neutral nature of judge, the Court observed:

Now this approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities' justice, dalit justice and equal justice between chronic un-equals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach. The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service

⁹ *Maneka Gandhi v. Union of India*, AIR 1978 SC 593

¹⁰ *A.K. Gopalan v. State of Madras* AIR 1950 SC 27

¹¹ *S. P. Gupta v. Union of India*, AIR 1982 SC 149.

¹² *S. P. Gupta v. Union of India*, AIR 1982 SC 149.

of social justice through a pro-active goal oriented approach. What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half hungry millions of India who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives.¹³

RELAXING RULE OF LOCUS STANDI IN PUBLIC INTEREST LITIGATION

In order to dilute the procedural technicalities and rigor of 'Locus Standi doctrine', the Supreme Court developed the strategy of public interest litigation, borrowed it from the American concept of social action litigation, with the aim of making the legal system more accessible to the poor and downtrodden people. Through this newly introduced concept of litigation, Court redefined the doctrine of standing. Traditionally, the doctrine required plaintiff to show that some personal legal interest had been invaded by the defendant; it barred publicly spirited persons who were interested as a member of the general public in the resolution of a dispute to be heard in the courts; one must have had a personal stake in the outcome of the controversy. However, through PIL the Supreme Court of India has held the view that any member of the public or social action group may approach the Court on behalf of a victim who is unable to do so, due to poverty, disability, or socially or economically disadvantaged position. The main aim behind the dilution of the doctrine of standing is to promote the rule of law which is the requirement of every constitutional democracy. By allowing common masses to challenge the unconstitutional acts of the State, Judicial Review makes the government accountable for its

¹³ Id.

individual acts, which promotes constitutionalism in the country¹⁴. In order to widen the scope of justice and remove the barriers to access to justice, the Hon'ble Supreme Court in *Sunil Batra*¹⁵ case established epistolary jurisdiction – jurisdiction invoked by writing epistles to the court – which allows a plaintiff to move to the court by means of a simple letter. In *Miss Veena Sethi*¹⁶ case and *Citizens for Democracy v. State of Assam & Ors*¹⁷, Supreme Court defined the contours of newly developed Public Interest Litigation. As a result of this broadening of access to the justice system, a large number of Public Interest Litigation (PIL) cases have been coming to court.

Although philosophy of PIL has widened the scope and ambit of fundamental rights, it has also given rise to a set of new problems and practical difficulties that are the subject matter of debate amongst the various legal stake holders. Several instances of frivolous PIL petitions have been noted by constitutional courts, which amount to abuse of the judicial process and pose a serious threat to the administration of justice. To curb such abusive practices and for regulation of PIL, Hon'ble Supreme Court has come up with adequate guidelines which include imposition of exemplary fines and issuing warnings to the respective litigants at appropriate occasions. The journey so far in PIL jurisprudence has not only widened the ambit of chapter third of the Constitution but has also put an indelible mark on constitutional developments around the globe¹⁸.

EXTENT OF JUDICIAL ACTIVISM: FILLING LEGISLATIVE VACUUM

From inventing the 'basic structure' doctrine¹⁹ to bringing constitutional amendments under the scanner of judicial review to widening the scope of the right to life and liberty by reading into it the non-justiciable directive principles of state policy such as the duty to promote

¹⁴ Dr. Justice B.S.Chauhan, The Legislative Aspect of the Judiciary : Judicial Activism and Judicial Restraint (Nov.11, 2017) <http://www.tnsja.tn.nic.in/Article/BS%20Chauhan%20Speech-%20Lucknow.pdf>.

¹⁵ Sunil Batra v. Delhi Administration, AIR 1980 SC 1579.

¹⁶ Miss Veena Sethi v. State of Bihar, AIR 1983 SC 339.

¹⁷ AIR 1996 SC 2193.

¹⁸ Dr. Justice B.S.Chauhan, The Legislative Aspect of the Judiciary : Judicial Activism and Judicial Restraint (Nov.11, 2017) <http://www.tnsja.tn.nic.in/Article/BS%20Chauhan%20Speech-%20Lucknow.pdf>.

¹⁹ Kesavananda Bharti v. State of Kerala, AIR 1973 SC 1461.

education and the duty to preserve the environment²⁰, Indian judiciary in 1970s and 1980s have played a highly proactive role in delivering justice to common masses, ensuring that India develops into a thriving democracy²¹.

In its activist move, the Supreme Court has imparted new vigour to the process of constitutional interpretation. For example, the Supreme Court in plethora of cases has identified Article 32 as the constitutional provision that provides for the enforcement of fundamental rights in areas with legislative vacuum. Not only has it held that fundamental rights are limitations upon the State power, but the right to constitutional remedies is itself a fundamental right enshrined in Article 32 of the Constitution, and in the case of an infringement of a fundamental right by the State, an aggrieved party can approach the Supreme Court for a remedy²². In *Vishaka & Ors. v. State of Rajasthan*²³, the Supreme Court held:

In absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by this Court under Article 141 of the Constitution.

Similarly, Supreme Court has laid down in *Vineet Narain v. Union of India*²⁴, by noting that the issuance of guidelines and directions, in the exercise of the powers under Articles 32 and 142, has become an integral part of our constitutional jurisprudence. It also pointed out that such an exercise of powers was absolutely necessary to fill the void in areas with legislative vacuum. In addition, the Court noted:

²⁰ M.C. Mehta v. Union of India & Ors, 1991 SCC (2) 353.

²¹ Editorial, Where Should Judiciary Draw The Line, The Hindu, (Nov. 11 2017).

²² Dr. Justice B.S.Chauhan, The Legislative Aspect of the Judiciary : Judicial Activism and Judicial Restraint, <http://www.tnsja.tn.nic.in/Article/BS%20Chauhan%20Speech-%20Lucknow.pdf>

²³ Vishaka & Ors. v. State of Rajasthan, AIR 1997 SC 3011.

²⁴ Vineet Narain v. Union of India, AIR 1998 SC 889.

As pointed out in *Vishaka*, it is the duty of the executive to fill the vacuum by executive orders because its field is co-terminus with that the legislature, and where there is inaction even by the executive for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide absolution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field. On this basis, we now proceed to give the directions enumerated hereafter for rigid compliance till such time as the legislature steps in to substitute them by proper legislation. These directions made under Article 32 read with Article 142 to implement the rule of law wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under Article 141 and by virtue of Article 144 it is the duty of all authorities, civil and judicial, in the territory of India to act in aid of this Court.²⁵

Supreme Court held the same view in plethora of other cases like *Supreme Court Bar Associations case*,²⁶ *L. K. Pandey case*,²⁷ *Kalyan Chandra Sarkar case*,²⁸ just to name the few. However, Supreme Court's power of filling the legislative vacuum has received criticisms from all spheres. It is contended that in filling gaps Supreme Court has crossed the constitutional restraints. By doing so it has entered into the shoes of legislature and has thus destroyed the basic structure of constitution.

RISK OF JUDICIAL OVERREACH

There are no words to praise efforts of Indian judiciary in taking India out from the darkest phase of emergency. Before and during Emergency, the Indira Gandhi government, through a captive parliament, tried to deface and defile the Constitution. In such circumstances, people feel the need of an independent and robust judiciary which can take on an autocratic government. Gustav Radbruch was initially a positivist, but revised his opinion after witnessing the barbarism of parliamentary sovereignty under the Nazi regime.²⁹ Now, as the

²⁵ Id.

²⁶ AIR 1998 SC 1895.

²⁷ AIR 1986 SC 272.

²⁸ AIR 2005 SC 972.

²⁹ Sudhanshu Ranjan, Justice, Judocracy and Democracy in India: Boundaries and Breaches.

time has taken the turn, Indian judiciary appears to have become overactive, and is often accused of judicial overreach. This accusation is usually levelled by politicians and other supporters of positivist theory of law even within the judicial system. Earlier Chief Justice Hidayatullah and H. M. Seervai attacked on judicial activism, now their followers continue to attack the activist approach of judiciary by calling it a risk to basic structure of constitution i.e. Separation of powers.

The important decisions by the Supreme Court which can be analyzed for understanding these contentions are: Firstly, in *Advocates on Record v. Union of India*,³⁰ Court laid down that: It belongs to the Judiciary to ascertain the meaning of the constitutional provisions and the laws enacted by the Legislature. This shows advent of an over active judiciary which assumed upon itself the need to adjudicate even where it was not perceived to be warranted. Similarly In the case of *Vineet Narain v. Union of India*,³¹ the Supreme Court had invented a new writ called “continuing mandamus” where it wanted to monitor the investigating agencies which were guilty of inaction to proceed against persons holding high offices in the executive who had committed offences. Furthermore, the Court created by its judicial order a body called the Central Vigilance Commission, which was not contemplated by the statute (the Delhi Special Police Establishment Act, 1946), for supervising the functioning of a statutory body, the Central Bureau of Investigation. The Court also laid down a number of guidelines for the appointments of chiefs of investigating agencies like Central Bureau of Investigation, Central Vigilance Commission and the Enforcement Directorate; apart from the Chiefs of the State Police. These guidelines, apart from being in relation to appointment, were also with regard to their status, transfer and tenure, etc. The question that positivists pose is whether this was legitimate exercise of judicial power.

Other Instances include *Sheela Barse v. State of Maharashtra*³² where the Court prescribed norms regarding the running of the prisons and mental intuitions. In *Labors Sala Hydro Electricity Project v. State of J&K*,³³ the Court instructed the Government to implement labor

³⁰ *Advocates on Record v. Union of India*, 4 SCC 44, 1993

³¹ *VineetNarain v. Union of India*, 1998 Cri. L. J. 1208.

³² *Sheela Barse v State of Maharashtra*, 2 SCC 96, (1983).

³³ *Labors Sala Hydro Electricity Project v State of J&K*, 3 SCC 538, (1984).

laws at construction sites. In *Pradeep Kumar Jain v. B.M.C.*,³⁴ the Court recognized admissions in medical colleges throughout India laying down examination schedules.

In cases related to labour policy and also in respect of issues related to environmental and ecological matters, judicial behaviour can be perceived to be proactive but however judicial intervention in matters related to fiscal policy (political affairs, internal proceedings of the legislature etc.) can be categorized as judicial overreach. Frequent interventions tend to weaken the functioning of those two wings of the Constitution, which are expected to be performed by them. In the words of Justice J.S. Verma (former Chief Justice of India):

The judiciary should only compel performance of duty by the designated authority in case of its inaction or failure, while a takeover by the judiciary of the function allocated to another branch is inappropriate. Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial ‘ad hocism’ nor judicial tyranny.

The acknowledgement of this difference between ‘judicial activism’ and ‘judicial overreach’ is vital for the smooth functioning of a constitutional democracy with the separation of power as its central characteristic and supremacy of the Constitution as the foundation of its edifice.³⁵

RECENT INSTANCES OF JUDICIAL OVERREACH

In the recent judgment in *Shyam Narayan Chouksey v. Union of India*³⁶, popularly known as the National Anthem Case, a writ petition was filed by an individual seeking remedy to prevent the commercial exploitation of national anthem. The petitioner referred to the Prevention of Insults to National Honour Act of 1971, claiming that the “national anthem is sung in various circumstances which are not permissible and can never be countenanced in law.” The petitioner had clearly not asked the court to direct the anthem to be played in movie halls. Instead, it focused on the commercial exploitation of the anthem. However, the Supreme Court while

³⁴ *Pradeep Kumar Jain v B.M.C.*, AIR 1984 SC 1420.

³⁵ R. Shunmugasundaram, *Judicial activism and overreach in India*, *Amicus Curiae* Issue 72 (2007)

³⁶ Writ Petition(s)(Civil) No(s). 855/2016

deciding this case came up with a rule for Movie Theatres to compulsorily play the National Anthem before every show. Heading the bench, Justice Misra observed that “a time has come, the citizens of the country must realise that they live in a nation and are duty bound to show respect to the national anthem, which is a symbol of the constitutional patriotism and inherent national quality.” The Bench also said there was no space for the “perception of individual rights” in this issue. This is another clear-cut example of Judicial Overreach as there is already an existing statute, the Prevention of Insults to National Honour Act which governs the playing of National Anthem and there was absolutely no need for the court to come up with such a rule as it could have simply directed the legislature to make necessary amendments in the existing laws regarding the issue.

Some other prominent cases of judicial activism in recent times include the *Delhi Pollution case*³⁷ where court gave specific directions to curb air pollution, thus encroaching upon the executive powers of the state, and the *Jolly LLB 2 case* where the Bombay High court stepped in the shoes of the Central Board of Film Certification to order certain cuts in the movie Jolly LLB 2 even after the movie was certified by the board. Other instances include orders for removal of black film from vehicle windows, removal of billboards, the usurping of the functions of the TN Public Service Commission by the High Court in the matter of recruitment of District Judges, interference in the educational policies of the Government in cases such as the *TMA Pai Foundation case*³⁸ and the *Islamic Academy case*³⁹. The above instances show that time and again, the Indian judiciary has encroached upon the powers of the other branches, thus amounting to judicial overreach.

Thus, from the above mentioned instances unfortunately Court seems to have deviated from the basic and main motive, which the legendaries like Justice Krishna Iyer and Justice P.N.Bhagwati had, behind introducing philosophy of judicial activism.

³⁷ M C Mehta v. Union of India and Ors., Writ Petition(Civil) No.13029/1985

³⁸ T.M.A.Pai Foundation & Ors v. State Of Karnataka & Ors 8 SCC 481 (2002).

³⁹ Islamic Academy of Education and Anr. v. State of Karnataka and Ors 6 SCC 697 (2003).

JUDICIAL RESTRAINT: COUNTER TO ACTIVIST SPIRIT

The judiciary, to avoid the criticisms for its decisions on the grounds of being encroachments on powers of the other organs of the government and for tilting towards judicial populism, may oscillate to other extreme which is popularly known as judicial restraint. The two important decisions by the Supreme Court which can be analyzed for understanding this trend are, firstly, an appeal⁴⁰ from the decision of Delhi High Court in Naz Foundation case⁴¹ and secondly, the opinion of J. S. Khehar, CJ. and S. Abdul Nazeer, J. in *Shayara Bano v. Union of India and others*.⁴²

In *Suresh Kumar Koushal v. NAZ foundation*, when Section 377 IPC was challenged by the respondent on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community, the Supreme Court stated:

In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section. It might be a relevant factor for the Legislature to consider while judging the desirability of amending Section 377 IPC.⁴³

The Court also cited *Sushil Kumar Sharma v. Union of India and Ors.*⁴⁴ Quoting the relevant excerpt:

It is well settled that mere possibility of abuse of a provision of law does not per se invalidate legislation. It must be presumed, unless contrary is proved, that administration and application of a particular law would be done “not with an evil eye and unequal hand.

Interestingly, in an attempt to claim to have upholding the doctrine of separation of power the decision states explicitly as follows:

⁴⁰ Suresh Kumar Koushal v. NAZ foundation, 1 SCC 1 (2014)

⁴¹ Naz Foundation v. Government of NCT, 2010 Cri LJ 94

⁴² Supreme Court of India, Writ Petition (C) No. 118 of 2016

⁴³ Suresh Kumar Koushal v. NAZ foundation, 1 SCC 1, para 51 (2014).

⁴⁴ 6 SCC 281 (2005)

While parting with the case, we would like to make it clear that this Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377 IPC and found that the said section does not suffer from any constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General.⁴⁵

This judgment has been widely criticized as a regressive judgment.⁴⁶ Even the Constitutional Bench of the Supreme Court of India while critiquing *Suresh Kumar Koushal v. NAZ foundation* from a right to privacy perspective observed that the reasons given by the Court in *Suresh Kumar Koushal's* case-

It cannot be regarded as a valid constitutional basis for disregarding a claim based on privacy under Article 21 of the Constitution. That “a miniscule fraction of the country’s population constitutes lesbians, gays, bisexuals or transgenders” (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection.⁴⁷

The other major ground for criticism is the extreme reliance on judicial restraint where the judiciary has not taken into account the protection of rights even of the so called miniscule minority and on the other hand, has directly indicated to the legislative recourse for the protection of the rights. This approach on the part of the judiciary, in the absence of any adequate reasons for the same, is practice of judicial restraint. Such an approach on the part of the judiciary is contra-constitutional as the constitutional mandate for the

⁴⁵ *Suresh Kumar Koushal v. NAZ foundation*, 1 SCC 1, para 56 (2014).

⁴⁶ Siddharth Mohansingh Akali, *Learning from Suresh Kumar Koushal v. Naz Foundation Through Introspection, Inclusion, and Intersectionality: Suggestions from Within Indian Queer Justice Movements*, 31 Berkeley J. Gender L. & Just. 121 (2016)

⁴⁷ *Justice K S Puttaswamy v. Union of India and Ors.*, WP (C) 494 of 2012, para 126

judiciary is to advance the protection of the rights and advance the purpose and benefit of the rights under the Constitution to the people.

The other recent instance of exercise of judicial restraint is to be found in the opinion of J. S. Khehar, CJ. and S. Abdul Nazeer, J. in *Shayara Bano v. Union of India and others*.⁴⁸ The opinion, without directing the legislature to legislate it was stated that, 'there can be no doubt, and it is our definitive conclusion, that the position can only be salvaged by way of legislation.'⁴⁹

It also opined that,

'we are satisfied, that this is a case which presents a situation where this Court should exercise its discretion to issue appropriate directions under Article 142 of the Constitution. We therefore hereby direct, the Union of India to consider appropriate legislation, particularly with reference to '*talaq-e-biddat*'. We hope and expect, that the contemplated legislation will also take into consideration advances in Muslim 'personal law' – 'Shariat', as have been corrected by legislation the world over, even by theocratic Islamic States.'⁵⁰

The judges did not go in finding whether the practice of '*talaq-e-biddat*' is violative of certain fundamental rights of Muslim women, rather convinced with the evil effects of the '*talaq-e-biddat*', injected for 6 months 'Muslim husbands from pronouncing '*talaq-e-biddat*' as a means for severing their matrimonial relationship.'⁵¹ This opinion also implies the respect shown by the judiciary for separation of powers and conscious attempt is made to not encroach upon the limits of the other organ.

From a consequentialist perspective, such an approach, wherein the greater consideration is given to the protection of powers of the organs and their domains than to protection of rights guaranteed by the Constitution, in the instant case the rights of Muslim women as opposed to

⁴⁸ Supreme Court of India, Writ Petition (C) No. 118 of 2016

⁴⁹ Supreme Court of India, Writ Petition (C) No. 118 of 2016, para 198.

⁵⁰ Id., para 199.

⁵¹ Id., para 200.

majority belief of Islamic sanction behind '*talaq-e-biddat*'⁵² might prove to be antithetical to the cherished values and goals of constitutional democracy.

Thus, judicial resort to judicial restraint though is a welcome move from avoiding the danger of judicial overreach as discussed above. But excessive juridical restraint and selective and whimsical resort to the course of activism, appears not to be in conformity with the aim of protection rights for all.

WHERE LIES THE BALANCE?

Former Prime Minister, Dr. Manmohan Singh in his Address at the Conference of Chief Ministers & Chief Justices of High Courts, 8 April, 2007, New Delhi, without indicating any particular judgement or order, said:

Courts have played a salutary and corrective role in innumerable instances. They are highly respected by our people for that. At the same time, the dividing line between judicial activism and judicial over-reach is a thin one. As an example, compelling action by authorities of the state through the power of mandamus is an inherent power vested in the judiciary. However, substituting mandamus with a takeover of the functions of another organ may, at times, become a case of over-reach. These are all delicate issues which need to be addressed cautiously. All organs, including the judiciary, must ensure that the dividing lines between them are not breached. This makes for a harmonious functioning.⁵³

Expressing his serious concern over judicial interventions, he remarked that the Executive, the Legislature and the Judiciary have an obligation both to our Constitution and to our people and must work in harmony.

⁵² See Opinion of Kurian Joseph J. in *Shayara Bano v. Union of India and others* contesting the Islamic sanction behind the practice of '*talaq-e-biddat*'.

⁵³ Available at <http://www.thehindu.com/todays-paper/Manmohan-talks-of-judicial-over-reach/article14746620.ece>

JUDICIAL ACTIVISM VERSUS JUDICIAL RESTRAINT

Judicial Activism has become one of the most controversial issues nowadays. Earlier its critiques would critique it by resorting to Raul Berger's⁵⁴ argument, in which he criticised Judicial Activism by arguing that, "the touchstone of activism is the failure of the judiciary to interpret the constitutional provisions and statutes in accordance with the will of the founding fathers and legislators respectively."⁵⁵ Today its critiques challenge it by relying on Professor Waldron's⁵⁶ argument, which states that, "empowering judges to decide on policy issues amounts to disrespecting the democratically elected representatives of the majority." The logic on which this argument rests is that judicial activism results in upsetting the balance of power between the executive, legislature and the judiciary. The implied criticism embedded in both of the aforementioned arguments is, that the judiciary is overzealous in interfering in Executive and Legislative spheres, and that it acts without regard to the intent of the founding fathers/legislators. To put it simply: judiciary fails to observe judicial restraint.⁵⁷

It has frequently been remarked by the supporters of judicial restraint that the Indian Supreme Court through its activism has assumed the role of the Legislature; the criticism is that it has not only performed the assigned role of a law giver, but that it has actually assumed the role of a plenary law-making body, like the Legislature.⁵⁸ To put it simply, it has been stated that the SC has clearly overstepped the limits of the judiciary and has entered into the domains of the other branches of the government. Many proponents of judicial restraint have opined, that by providing some remedies like 'continuous mandamus', judiciary has failed to observe judicial restraint, which clearly shows failure to accord respect to other co-equal branches of the government. According to this view, the judiciary acts as if it were first among equals.⁵⁹

True it is that our Constitution under certain provisions clearly recognizes three co-equal branches of the government. It is also true that all the three branches are supreme within their

⁵⁴ Raul Berger, Professor At The University of California at Berkeley and Harvard University School of Law.

⁵⁵ Dr. Justice B.S.Chauhan, The Legislative Aspect of the Judiciary : Judicial Activism and Judicial Restraint (Nov.11, 2017) <http://www.tnsja.tn.nic.in/Article/BS%20Chauhan%20Speech-%20Lucknow.pdf>.

⁵⁶ Editorial, Where Should Judiciary Draw The Line The Hindu (Nov. 11 2017) .

⁵⁷ Dr. Justice B.S.Chauhan, The Legislative Aspect of the Judiciary : Judicial Activism and Judicial Restraint (Nov.11, 2017) <http://www.tnsja.tn.nic.in/Article/BS%20Chauhan%20Speech-%20Lucknow.pdf>.

⁵⁸ Id.

⁵⁹ Id.

own respective spheres and it is also true that no democracy and no constitution gives absolute powers to the judiciary. And it is of course the acknowledged fact that the consolidation of power by any one branch of government is anathematic to the very idea of democracy. Thus any attempt made by the judiciary to re-write the Constitution, particularly in light of the Court's own creation of the basic structure doctrine, ought to be regarded as unconstitutional.⁶⁰

The basic question that arises here then is whether the Hon'ble Supreme Court has followed the principle of separation of powers even as it has embraced judicial activism? After going deep down into the history of Judicial Activism – because we have history to have a look into – the answer has to be a reverberating yes. History clearly reveals that the Hon'ble Court has always abided by the Constitution. It has kept its promise of wiping moist eyes by valiantly fulfilling its primary responsibility of upholding the Constitutional goals. Constitutional Courts' duty to enforce the law directly flows from constitution. So if Court enforces law for violations that result in grave consequences for the public at large, it cannot be termed as judicial overreach. In other words criticism of such acts as judicial overreach is not sustainable within our constitutional framework⁶¹.

Justice Kapadia, writing for the constitutional bench, in *M. Nagaraj*⁶² case observed:

The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adopted to the various crisis of human affairs.. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges⁶³.

⁶⁰ Dr. Justice B.S.Chauhan, *The Legislative Aspect of the Judiciary : Judicial Activism and Judicial Restraint* (Nov.11, 2017) <http://www.tnsja.tn.nic.in/Article/BS%20Chauhan%20Speech-%20Lucknow.pdf>.

⁶¹Id.

⁶² *M. Nagaraj & Ors. v. Union of India & Ors.*, AIR 2007 SC 71.

⁶³ Id.

Despite being inspired by the constitutional objective of socio-economic justice, the Court has been rather cautious in its activism. It is only when both the legislature and the executive have failed to provide legislation in an area, that the Court has found it to be the duty of the judiciary to intervene and, that too, only until the Parliament enacts proper legislation covering the area, the best example of which is Criminal Law (Amendment) Act, 2013, which came on the heels of '*Vishaka guidelines*'. To put it aptly, the Court has invited the legislature to pass laws in the very areas where it has passed directions to fill the legislative vacuum. In order to respond to the critiques favouring Professor Waldron's argument that, "judicial intervention means that judges have the final say on the policy issue", the constitutional courts can promote decision making relating to policy issues without being the ultimate decision maker.

Although Indian model of Judicial activism forms the basis of South African jurisprudence, there are certain landmark South African decisions which can be used as a guide as to where Courts must draw the lines which include:

- 1) ***Rand Properties*⁶⁴ case**: It involved a challenge to the state's eviction of inmates of dilapidated buildings in central Johannesburg. Since right to housing was a fundamental right which the state had failed to provide, the judiciary directed the state and the inmates to "engage with each other meaningfully ... and in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the duties of citizens concerned" to resolve the dispute. The judiciary, by its interventions, ensured that these deliberations were on a level playing field as the final result of the deliberations was susceptible to scrutiny by the Court. In this manner, while it ensured that executive inaction was not pardoned, the final decision itself was left to the executive but subject to judicial superintendence.⁶⁵
- 2) ***Minister of Health v. Treatment Action Campaign*⁶⁶**: In this case, the government was given directions to review its policy regarding distribution of antiretroviral drugs and plan an effective and comprehensive national programme to prevent Mother To Child Transmission (MTCT) of HIV. In order to ensure enforcement, the judiciary required that MTCT prevention policy should have timeframes for its implementation and that it must take into consideration

⁶⁴ *City of Johannesburg v. Rand Properties (Pty) Ltd*, (253/06), [2007].

⁶⁵ Editorial, Where Should Judiciary Draw The Line, *The Hindu* (Nov. 11 2017) .

⁶⁶ *Minister of Health v Treatment Action Campaign, (TAC)* (2002) 5 SA 721 (CC).

the condition of those who cannot afford to pay for medical treatment. Most importantly, it required the state to continuously report to it about the implementation of the Programme.⁶⁷

These instances clearly show that it is possible for courts to monitor actions of the other branches of government without actually stepping into their shoes. These precedents get theoretical support from the writings of Professor Roach⁶⁸ who argues that, “the judiciary should not create policies to enforce rights but must require the government to draft its own policy and submit it along with a timetable for execution. The finalisation of this plan must be only after the judiciary has heard objections from other interested parties”⁶⁹.

Once such a policy is framed by a legislature/ executive, it is to be interfered with by the judiciary in a very restrictive manner, using the principle of deference. According to this principle, the judiciary, while evaluating executive/ legislative action (or inaction), should modify the policy framed only when the reasons provided are not reasonable.⁷⁰ A court should merely see whether the reasons provided by the executive justify its decision, not whether the court would have reached the same decision. This standard should be applied not only when a policy is tested before the courts but also by courts to see if executive or legislative inaction is justified.⁷¹ While there is the danger of judicial activism being misused by unscrupulous elements and the Supreme Court has come down heavily on such misuse, the solution is not to throw away the baby with the bathwater.

The mere risk of judicial over-activism cannot be an argument against judicial activism. Judicial activism, keeping in view the ideals of democracy, is, in fact, necessary to ensure that unheard voices are not buried by more influential and vocal voices. Indeed, on most occasions, timely interventions of the judiciary in India — the home of judicial activism — has helped democracy flourish in our country despite repeated failures of the other organs.

⁶⁷ Editorial, Where Should Judiciary Draw The Line, *The Hindu* (Nov. 11 2017).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

CONCLUSION AND WAY FORWARD

Upendra Baxi, referring to one of the Krishna Iyer's texts praises Justice Krishna Iyer's efforts in sowing seeds of "judicial activism" in following words:

"Krishna's text exemplifies his very own imagery of transcendental jurisprudence. Even the rudimentary sense of 'transcendence' as going 'beyond' entails understanding that which has in turn to be also transcended. The subtlety of textual moves remains forbidding, indeed. At times, this going 'beyond' means simply transcending the colonial inheritance; at times, it signifies reverence owed to the variously constructed justice potential of the Indian constitution; and at times, it also requires the judges to go beyond the constitution itself, a form that Negri evokes in his insurgencies. But the passage from where we are to where we all ought to be poses the question beloved of philosophers: to transcend is to go beyond 'appearance' to 'reality', the phenomenal to the noumenal, the particular to the universal, error to truth, expedient to the essential, contingent to the necessary. In sheer jurisprudential terms, this move marks the passage from the positive law (law that is posited by the will of the 'sovereign') to 'natural law' (law posited by the reason of God, by 'nature', or by human reason). A ceaseless quest for the 'higher law' defines Krishna's endeavours at juridical and juristic transcendence⁷²."

From the aforementioned beautifully drafted and crafted excerpt of Upendra Baxi's article, the intention of legendary Justice Krishna Iyer in introducing "judicial activism" in decolonized India seems clear. Thus, we can say that "judicial activism" is not a deviation. It is an essential thing for maintaining dynamic nature of every constitution. It acts as a counter-majoritarian check on democracy. Having said that, however, "judicial activism" does not mean ultimate authority of judiciary. The intention of founding fathers of Indian Constitution in keeping scope for judicial review was to prevent people from authoritarian rule. Therefore, judicial activism must also function within the limits of the judicial process. Within those limits, it easily performs the function of legitimizing, the actions of the other two branches of

⁷² Upendra Baxi, *The Promise and Peril of Transcendental Jurisprudence, Human Rights, Justice, and Constitutional Empowerment*, P 4.

government. True it is that in order to keep the Constitution up to the mark Hon'ble Supreme Court should lend life to the dead letters of law. But while doing so it has to maintain the Constitutional balance contained in principle of "separation of powers". It has to maintain a proper balance between "judicial activism" and "judicial restraint". A calculated risk of judicial overreach for promotion of constitutional ideology of governance and protection of rights has to be taken. Excessive exercise of judicial restraint may prove to be regressive and oppressive and is to be viewed as a threat to the constitutional democracy which India envisions in the preamble and the text of the Constitution of India. Judiciary of a particular country becomes strong only when people repose faith in it. Such faith comes from the good and legitimate decisions and from legitimate judicial activism. Courts must therefore play their best role in maintaining such legitimacy. Courts need not to bow to any sort of public pressure, but rather they should stand firm and act with due diligence against every such pressure. What maintains legitimacy of judicial activism is not its submission to unscrupulous forces, but its capacity to withstand such forces without sacrificing impartiality and objectivity – which our Hon'ble Supreme Court, barring few decisions, has shown in almost all cases post emergency period. All these reforms are needed to be developed to better appreciate the role of judiciary.

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