

JUDICIAL ACTIVISM

Ms. KAMLA*

The oldest remarks of active judiciary, in India, can be traced back to 1893, when **Justice Mehmoood** of the Allahabad High Court delivered a dissenting judgment which sowed the seed of judicial activism in India. It was a case of an under trial who could not afford to engage a lawyer. So the question was whether the court could decide his case by merely looking at his papers. Mehmoood held that the pre-condition of the case being 'heard', as opposed to merely being read, would be fulfilled only when somebody speaks. So he gave the widest possible interpretation of the relevant law and laid the foundation stone of the judicial activism in India. **Sikri** observes that "the judge as an interpreter of the community, of its sense of law and order must supply omissions, correct uncertainties and harmonise results with justice through a free decision. Such new dimension of judicial process is labeled as Judicial Activism". "It is he who infuses life and blood into the dry skeleton provided by the Legislature and creates a living organism appropriate and adequate to meet the needs of the society.

Mechanical theory of interpretation wholly subordinates judges to legislature. Creative aspect of judicial function is essential if judiciary is to be accountable to those who accord it the power it enjoys. Blasting the 'textual' and 'deferential' theories of constitutional interpretation, **Justice Bhagwati** articulated that "a judge is not a mimic. Greatness of the Bench is in creativity. The process of judging is a phase of never ending movement and something more is expected of a Judge than mere initiative reproduction, lifeless repetition of a mechanical routine. It is for this reason that when a law comes before a Judge, he has to invest it with meaning and control"

Legal academics often describe "judicial activism" as invalidation of legislative enactment by the judiciary but **N.S. Kamboj**, view it as "a dynamic process of judicial outlook in a changing society"

Aharon Barak, defines judicial activism as the "judicial tendency – conscious

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or unconscious - to achieve the proper balance between conflicting social values through change in the existing law or through creating new law that did not previously exist. In an existing law or creating a new law, the activist judge does not hesitate to invalidate a legal policy created by the other branches of government in the past, by judges who preceded him or her, or by individuals". **Sunil Khosla**, in his study also has a similar outlook. He observes that "judicial activism is democratization of judicial process"

The first Chief Justice of India, **Justice Harilal Kania**, at the inauguration of the apex court, proclaimed that the principal function of the court was to safeguard the fundamental right and the liberties of the people. Soon after the commencement of the Constitution, the Supreme Court recognized in **Romesh Thapar's case**, in 1950, its great responsibility in the matter of safeguarding the fundamental rights of the citizens. The apex court held that "under the Constitution the Supreme Court is constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights." So, judicial activism in the Indian context means the pro-active role played by the judiciary for safeguarding the rights and liberties of the citizens. The trend of the judicial activism emerged because of the perceived failure of the other organs of the state to perform their functions, thereby requiring the judicial process to activate them for public good. Through judicial activism, the courts move beyond their normal role of a mere adjudicator of disputes and lays down the principles and guidelines that the executive must carry out.

Judicial activism draws strength from the constitutional provisions that afford the power of review of legislative and executive actions to judiciary. "Imparting justice on rational grounds is the very function of judiciary and when it performs its function it is no activism; at the most, it can be complimented for its performance. Activism should involve things which the individual authority does which he is not expected to do in the normal course". **Vijay K. Gupta**, claims that "judicial activism has always been integral to judicial process and judicial decision making but the activist role has been camouflaged and to appear in the language of legislative intent" In the same vein **R.R. Vadodaria**, also remarks that "there cannot be and there is no judicial activism per se. Judiciary has always remained active. It cannot afford to be passive. Judiciary

protects the weakest from the oppressive acts of either executive or legislature. When judiciary protects and provides justice to the poor against oppressive acts of private persons, authority or body, there is no hue and cry but when it protects against the tyranny of the government, everyone thinks about judicial activism.”

Krishna Iyer affirms that every judge was an activist either on forward gear or backward gear. To him, contrasting views of judges in *Gopalan's Case* denying procedural due process to *Gopalan* but granting the same in *Maneka* case, are both activist judgments.

Upendra Baxi remarks that the “judicial activism consists in articulating of counter ideologies, which when effective, initiates significant recodification of power relations within the institutions of governance. It is thus perceived to be a problem by the dominant factions of the governing elite as threat to their hegemony.

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No institution can continue to keep itself in reckoning without commanding the trust and faith of the society in general. That is true for the judiciary as well. “The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people also. It should generally be so construed that they can understand and appreciate it. The more they understand it, the more they love it and the more they prize it” So, the Supreme Court of India started off as a technocratic court in the 1950s but slowly started acquiring more power through constitutional interpretation. Its transformation into an activist court has been gradual and imperceptible. The post-emergency period, which incidentally also marks the era for new human rights movement in this country, began with a wave of populism inviting the judiciary to shed some of its self-imposed restraints and get activated in the process of social reconstruction. Judiciary now became more visible and did not have to suffer ignominy inflicted upon it by the legal positivists any longer.

The post-emergency judicial activism was inspired by the Courts' realization that its elitist social image, as dubbed during the initial stage of governance, would not make it strong enough to withstand the future onslaught of the powerful political establishment. It was also the time the Court came to terms with new issues like civil liberties, social justice and group rights etc. Therefore,

the Court made conscious effort to get itself closer to the people. The Supreme Court of India, for the first time, became Supreme Court for the Indians. Baxi remarks that “the notion of 'judicial activism' is indisputably related to problems and processes of political development in India”. If it were not so, none except the academicians would have bothered about 'activism'. He views “activism as the way of exercising judicial power which seeks fundamental recodification of power relations among the dominant institutions of the State, manned by the members of the ruling classes”. **T.R. Andhyarujina** asserts that the Indian Supreme Court of India is today the most powerful of all the apex courts in the world. It has surpassed in power even the United States Supreme Court which, Lord Bryce and Tocqueville thought in their times, was the most powerful of all the courts in the world. Similar view is also echoed by **Justice R.S. Pathak**, held in a decision that “the range of judicial review recognised in the superior judiciary of India is perhaps the widest and most extensive known in the world of law”.

But the moot question is about how and why there was a change in the perception of the judiciary in the post-emergency era. What were the compelling reason for the Court to bring realignment in her approach, strategy and thinking about delivery of justice not only to the 'men with long purses', but to the 'poor and hungry' as well? Role of Indian judiciary towards the rights of the common people during the pre-emergency era has been described in a few words by **Sampat Jain**. He points out that “our tardy court system of justice, ever-insensitive to the problems of the poor has played a passive neutral empire role, like a silent spectator doing nothing. 'To be or not to be' was the crucial existential question before the court for its legitimating. The faith of the people in the efficacy of the court to provide them justice is, perhaps, the only justification upon which the existence of the court solely depends. The judiciary soon realized that the faith was shaken and was disappearing”.

Social justice primarily meant justice to the depressed and the oppressed, the lowliest and the lost. It would remain an empty dream unless we get rid of our pre-constitutional narrow concepts of *locus-standi* and 'cause of action' and 'expand the jurisdiction of access to justice as an integral part of social justice and make the judicial process cheap, expeditious and speedy. It was for the Supreme Court to rise up to the occasion with activist magnitude and boldly come out of the 'crippling inhibitions' of the legal order as to access to justice.

The social dimensions of jurisprudence must undergo people-oriented radicalization to take a quantum jump from a dying imperial order to a living democratic order must. The judiciary cannot be a jejune and jaundiced limb in utterly witnessing the constitution being stultified”.

Against this poverty stricken injustice scenario, a movement was needed. New jurisprudence was to be evolved. Poverty syndrome was to be replaced by expiatory syndrome. A new normative regime of rights to be broad based, some innovative strategy for the purpose of making basic rights meaningful to the larger sections of the people was needed which could help them to realize their social and economic entitlements. To check social oppression, to control government lawlessness, to combat administrative defiance, what the judiciary needed was to fashion and refashion new strategies, new concepts, evolve new jurisprudence, devise new procedure and orient new equitable principle, so as to deal with new claims and demands, providing distributive justice.

Justice and justices cannot remain static in the dynamic social scenario. A judge acts as an instrument to make the law socially useful. Socially relevant judicial creativity enhances the image and legitimacy of the courts. Perhaps the best illustration of legitimization of judicial activism comes from **Justice D.P. Manon** of the Supreme Court of India:

“To deny judicial activism to the courts is to nullify the judicial process and to negate justice. The collective will of the society wants that if rich sleeps in luxury apartments, the poor should at least sleep with a roof over their head; that if rich eat both bread and cake, the poor should at least eat bread; that if rich live in opulence, the poor should at least be able to afford the basic comforts of life. If law is to operate today so as to secure social justice to all, who else can do it but judges whose constitutional task is to apply and interpret the law? Nature abhors a vacuum. Take away judicial activism and tyranny will step in to fill the vacant spaces”.

At the end of the day, it must be borne in mind that while it might not be possible for the Court to right every wrong, irrespective of how genuine it might be, it is still important for them to play a truly activist role in trying to reform the social scenario, at least through the creation of rights. Joshi, P.L., however, sounds a note of caution. He remarks, “People in general and the human rights activists

have hailed the performance of the judiciary, but its cost has to be worked out in the light of healthy development of democratic institutions in the country”.

In today's context it is futile to argue that courts have limited role and therefore, they cannot enter the forbidden domain of policy making nor can they perform the creative, constructive or transformative role. It is important to recognize that judiciary, like other institutions, has to grow and respond to the changing environment in order to continue to be relevant. It cannot allow itself to be guided by the obsolete assumptions of a despotic era and yet retain the vigor and vitality to respond to the democratic aspirations of the people who still have faith in this institution. According to Gupta, the real test for judicial activism lies in the area of human rights abuses by the State agencies and the way in which the culprits are punished and made accountable to both the individual victims as well as to the society.

There is a feeling among some scholars and politicians that judicial activism is a danger to democracy and hence society. Contrary to this belief judicial activism is beneficial, not harmful to society and democratic set-up. Welfare of society and adherence to democratic spirit are positively correlated. Democracy believes in the worth of human beings and is based on rule of law. **Justice Krishna Iyer** speaking about the contribution of judiciary in upholding the rule of law, observed in *S.P. Gupta v. President of India* that judiciary protects the citizens from violation of their constitutional or legal rights or abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses. Judicial activism is an obligation to be shouldered and not to be shirked by the judiciary when occasion and opportunity arise and demand the same. Otherwise, the judiciary will be failing to redeem the obligation to the people in accordance with the letter and spirit of the Constitution. **Inder Malhotra** has “no doubt that of all the democratic institutions of Indian republic, the highest judiciary is the most respected.” The aim of protection enshrined in Article 21 is not only to ensure the human dignity of a person concerned, but to ultimately contribute to the achievement of social justice. The interests of the society at large are inextricably interwoven in this pursuit. After all, there can never be any advancement in a society as such unless its individual citizens have been in a position to enjoy the fundamental freedoms of 'Life and Personal Liberty'.

It is pertinent to mention in this connection that Indian Constitution is not a non-aligned charter. The Constitution abounds in provisions for commitment to social justice and human rights. There is a constitutional mandate for the judiciary to be active and the judges are constitutionally bound to uphold the values of the Supreme Lex. Even after assuming activist leaning in the post-emergency era, judiciary has never posed any danger to democracy. In fact, enjoyment of human rights cannot be imagined in an unjust social system. Social and economic justice to the masses is *sine qua non* of democracy. As judiciary is making positive noises for ameliorating the plight of the masses, judicial activism is not an undemocratic value.

Social legitimacy of the judicial activism may be gauged from faith of masses in judiciary to solve almost any conceivable problem - from pollution caused by DTC buses in Delhi to building of roads for residents in hilly areas in Himachal Pradesh. Instances of expansion in the rights of the people, in no way, harm the society. It is another matter that the present state of economic development of India does not afford implementation of judicial directions for dignified and healthy enjoyment of right to life by the people. To use the words of Krishna lyer, the society where freedom suffers from atrophy, activism is essential for participative public justice.

Deng Xiaoping, the Chinese leader, who set his country on the path of reforms and prosperity back in the late 70s, said eloquently that "It does not matter, of what color the cat is, as long as it catches the mice". So does it matter if Supreme Court oversteps its limits? Unfortunately, yes. Judicial activism is usually good, especially in a country like India where the executive is often found wanting and the man-on-the-street has no means of redressal. But too much reliance on the judicial governance poses a danger to democratic ethos and upsets the constitutional apple-cart. Judiciary's excessive indulgence in governance issues would further exacerbate the problem of delay in delivery of justice to people. Judiciary should concentrate more on its core function of efficient, hassle free and affordable delivery of justice to the masses while continuing its tirade against human rights violation by the State and non-state actors. Victims, whose right to life is in jeopardy or has been violated, should not be made to suffer further ignominy on account of delay in hearing by the courts.

The process of judicial governance is obviously not without controversies or problems as it raises issues relating to the role of judiciary in a democracy and how judiciary as an institution should position itself in promoting human rights and justice. The courts cannot do what the governments will not do. And so long as judicial processes continue being inordinately slow and subject to corruption, the courts, themselves, provide all too little protection for citizen's fundamental rights.

Despite some shortcomings, problems and failures, journey of Indian judiciary has been very encouraging. **Chandrasekhar Pillai** and **Jyoti Dogra**, describe that "it has been a tedious journey for this wonderful institution trekking a territory far and wide, mostly unexplored and unexploited, obviously without any lamp posts. It is a matter of pride to note that the court travelled this territory of hills and valleys with all their turns and bounds, humps and bumps, marshy at times, mostly slippery, with ease holding the flag of freedom always upright"

Justice Bhagwati remarked that constitutional values exhort judges to adopt a positive and creative disposition to serve the cause of social justice. The passive or negative 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 of social justice through a pro-active goal oriented approach. But this cannot be achieved unless we have judicial cadres who share the fighting faith of the Constitution and who are imbued with the constitutional values. The necessity of a judiciary, which is in tune with the social philosophy of the Constitution, has nowhere been better emphasized than in the following words of **Justice Krishna Iyer**:

"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.

So, the Supreme Court discharges a multi-faceted role in relation to fundamental rights. It acts as the interpreter and a protector and guardian of the fundamental rights of the people, and has been seeking to integrate directive principles with fundamental rights. So, the increasing power of the judiciary is not a danger to democracy or society. The rationale for judicial activism lies in the highly unequal social profile of the Indian society. Repeated concern shown by the higher judiciary for protecting and widening the scope of right to life and its commitment to the social and economic philosophy mentioned in the Preamble of the Constitution indicates that judicial review is not undemocratic.