

Judicial Activism And The Role Of Indian Courts

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A judiciary which is independent and impartial is a condition of liberty. Judiciary is the custodian and guardian citizens' rights. Our Constitution contains provision that balances the powers between the three main organs or the pillars of the government which are the legislature, the judiciary and the executive.

In India the concept of Judicial review is derivative of the fact that the Constitution is the supreme law of the land, nothing is above the Constitution and in such arrangement where judicial review is in the heart and core of the 'Lex Loci' that is the law of the land, then it is justified to believe that it is a system where all governmental organs originate and derive their powers from the Constitution, and the organs will function while limiting themselves in the framework of the supreme law, and shall also bar themselves from doing anything that is not harmonious with the law.

The issue of Judicial Activism has now become a matter of national concern with the widening jurisdiction of the courts, especially through the instrument of PIL or Public Interest Litigation. Scholarly exercises and broader consensus on Constitutional values between the three pillars- the Judiciary, the Legislature and the Executive are required to reach an amicable solution.

Initially, the Supreme Court had started as a technocrat court in the 1950s but through the constitutional interpretations, it gained more power and as of now, it has transformed itself and has emerged as an activist court which is imperceptible. During such transformation, an imperative field of public interest litigation emerged that has undoubtedly improved the deprived as well as the underprivileged class of the society who were unable to seek justice due to lack of education, ignorance and poverty. Another contribution towards the process of the development of the concept of judicial review was done by the 25th Amendment Act, 1971 by virtue of which the Directive Principles of State Policy were given primacy by their enforcement so that the courts can improve the administration and ensure that constitutional mandates are complied with by allowing PIL.

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Article 37 of our Constitution states that the 'directive principles of State policy are fundamental in governance of our country'. Through this, the State has the prime responsibility to ensure justice, liberty, equality and fraternity and to protect the individual's fundamental rights. The States has to apply these principles given under Part IV of the Indian Constitution in framing laws for the governance and such principles and laws so made can be cross checked by the Supreme Court as it has the inherent powers to review the State's action under Article 136 of the Constitution. After such interpretation judiciary has now become more active in the areas of health, environment, child labour, corruption, education, etc. Another reason for the growth of the same is the basic human rights violation and abusing of constitutional provisions.

Unlike the U.S.A., the Indian Constitution has explicitly established the doctrine of judicial review in several Articles such as 13, 32, 131-136, 143, 226 and 246². Article 13(2) clearly states that "The State shall not make any law which takes away or abridges the rights conferred by this Part (Part III containing Fundamental Rights) and any law made in contravention of this clause shall, to the extent of the contravention, be void."³

It has been reinstated by the Apex Court in the case of *AK. Gopalan v. State of Madras*⁴ that the Constitution is supreme and any legislation in order to be valid shall be framed in consonance with the Constitution. Thereafter, the judiciary is the authority to decide whether such legislation in whole or in part is inconsistent with the constitution or not. It has the power to declare the statute as unconstitutional as the court is bound by its oath to uphold the principles of the Constitution.

The Indian Constitution does not afford the same scope of judicial creativity to the courts in India as does the U.S. Constitution. Further, with the passage of time, the scope of some fundamental rights has been curtailed by the constitutional amendments, and thus, the scope of judicial activism has been further restricted like in the property related rights. Since the beginning of the constitutional era, a distinct Constitutional jurisprudence has evolved as the Supreme Court has rendered hundreds of decisions expounding varied constitutional provisions and developing the already existing provisions as per the need of time. The Supreme Court has so far been successful in displaying judicial creativity of a very high

²Chs. IV, VII, X, XX And XXXIII

³Article 13(2) of the Constitution of India

⁴1950 AIR 27

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order, for example, in *Keshavanada*⁵ and in expanding Article 21. This high order creativity has mandated that to have a full comprehension of the Indian Constitution, the bare text is not sufficient but the remarkable judgements delivered by the judiciary from time to time and case to case will provide with the philosophical thought that has led to the expansion of the Constitution.

For instance, in *Maneka Gandhi v. Union of India*⁶ case and *Satwant Singh v. Asst. Passport Officer*⁷, the Supreme Court has expanded the scope of Article 21 by adding that right of personal liberty and right to life includes the right to travel abroad and that such procedure which impounds the right should mandatorily be as per the procedure that has been stated by law or else, the right of equality under Article 14 will be infringed of such arbitrary action of the State which does not confirm with the procedure established by law.

There can be other leading judgements that set an example evidencing the judiciary upholding Constitution. In *AK.Gopalan v. State of Madras*⁸, the apex court has held that the preventive detention must be reasonable, just and fair in consonance with Articles 14, 19 and 21. Further through PIL, in the case of *M C Mehta v. Union of India*⁹, it was held that the right to life extends to having a clean and healthy environment. Therefore, even though we had hundred plus amendments made so far in the constitutional history of 68 years, it can be interpreted that the constitution is being redefined and a new philosophical jurisprudence redefining the constitution is running parallel sometimes expanding the scope of the constitution or imposing reasonable restrictions. In other related cases like *Bandhua Mukti Morcha*¹⁰, *Bihar Under Trials*¹¹, *Bombay Pavement Dwellers Case*¹², *Bihar Care Home Cases*, the Judiciary has been affirmative and shown its firm stand and its commitment towards participatory justice, standard of procedures which are just and fair, and in order to prevent arbitrary actions of State, providing just and fair standard of procedures.

Nevertheless, the Supreme Court has laid down some broad guidelines for determining the reasonableness of restrictions, for instance, the restrictions should not be greater than what is

⁵(1973) 4 SCC 225

⁶1978 AIR 597

⁷1967 SCR (2) 525

⁸1950 AIR 27

⁹ AIR 1987 SC 1086

¹⁰1984 SCC (3) 161

¹¹Hussainara Khatoon v. State of Bihar AIR 1979 SC 1369

¹²Olga Tellis v. Bombay Municipal Corporation 1985 SCC (3) 545

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demanding by the circumstances,¹³ the court will apply the objective standards¹⁴ or that there must be proximate link between the restriction and the objective sought to be achieved.¹⁵ There are fundamental rights which are guaranteed with permissible reasonable restrictions, which may be imposed by the law on the enjoyment of these rights for certain purposes or in public interest and for such purpose, the determination by the legislature of what constitutes "reasonable" has not been finalised yet as it is subject to supervision by courts.

It is worth noting that the U.S. Supreme Court has interpreted the U.S. Constitution in such a creative manner that an old document of nearly 200 years of age, without many amendments, has been able to serve the needs of the present highly sophisticated and dynamic technological era. In this way, the court has not only played the role of an interpreter of the Constitution but even the role of a constitution maker.

The Constitution of India has conferred power upon the Judiciary that it has now taken another form of judicial activism, which is gaining prominence these days as already mentioned above. As of now, citizens are able to access justice in form of PIL. The scope of judicial intervention and activism has been steadily expanding through the device of PIL or in the form of Writs. The judiciary has now become more active in protecting the rights and interests of the minorities, poor, backward classes and has shed its pro status quo approach.

The Constitution empowered courts to exercise power of judicial review. Article 13(2) and the elaborate the concepts which are laid under Articles 32, 131 to 137 and Article 143 indicate the intention of the Constitution framers to confer very wide powers of interpretation on the Supreme Court. Generally accepted principles of interpretation have helped the Supreme Court to exercise these powers.

Reiterating the case of *A.K. Gopalan v. State of Madras*¹⁶, significant decision was observed as it was the first instance where the interpretation of Articles 19 and 21 was meaningfully examined. A writ of habeas corpus was instituted. Major argument was that whether the writ of habeas corpus and the provisions which are mentioned under the Preventive Detention Act, 1950 were in violation of the fundamental rights under Articles 13, 19, 21 and 22. It was submitted by the Counsel appearing for the petitioner that the right to freedom of movement is fundamental right as given under article 19 (1) (d) of the constitution and hence the defence

¹³ *Virendra v. State of Punjab*, AIR 1957 SC 896: 1958 SCR 308

¹⁴ *N.B. Khare v. State of Delhi*, AIR 1950 SC 211: 1950 SCR 519

¹⁵ *Central Prison v. Ram Manohar Lohia*, AIR 1960 SC 633: (1960) 2 SCR 821

¹⁶ 1950 AIR 27

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must prove that such detention falls under the purview of reasonable restriction under article 19(5)¹⁷.

The *Golaknath Judgement*¹⁸ is based on the assumption of judicial supremacy. What John Marshall did in America in *Marbury v. Madison*¹⁹, Subba Rao, C.J. did in India in the landmark Golaknath case. No history either of the Hon'ble Supreme Court or of the Constitutional developments can be completed without a discussion of the Golaknath Judgement.

The above given case was concluded to two main points: Article 19, 21 and 22 are mutually exclusive. Article 19 was not to be applied to any law that affects personal liberty to which Article 21 applies otherwise. Article 19 applies to detained persons only and reasonableness of such detention is to be determined.

In another landmark judgement of *Kharak Singh v. State of Uttar Pradesh*²⁰, the constitutional validity of the UP Police Regulations and the powers which are vested upon the police officials was challenged by the petitioner. It was contended that the aforesaid regulations were violative of the rights guaranteed by the article 19(1)(d) and article 21. Relying upon the accusations that were made against him, the police constables used to enter his house, shout out at his door and wake him up and at times forced him to accompany them to police station. Restrictions were imposed upon him to leave the town. This all led to the infringement of his fundamental rights under Articles 19(1)(d) and 21. Thus, the writ of mandamus was issued and the State was directed to not to continue such visits to his house.

Here, a restrictive conception was adopted by the majority, of liberty that only extended to direct infringement of the freedom of movement, and declined to recognize the existence of a right to privacy.

In the case of *Maneka Gandhi v Union of India*²¹, the Supreme Court gave a wide meaning to the term 'personal liberty' and adopted the theory of due processes in procedure established by law. It was stated that when any law restricts the personal liberty of an individual, it becomes the duty of the concerned court to examine that whether the restrictions imposed on

¹⁷AK Gopalan v. State of Madras, AIR 1950 SC 27

¹⁸I.C. Golaknath v. State Of Punjab 1967 SCR (2) 762

¹⁹2 L ED 60: 5 US (1 Cranch) 137 (1803)

²⁰AIR 1963 SC 1295

²¹1978 AIR 597

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personal liberty also imposes the rights mentioned under Article 19 of the Constitution. It was also concluded that the right of personal liberty incorporates variety of rights which together form the liberty of an individual. It was stated that not giving the right to be heard to Mrs Gandhi before impounding her passport violated the principle of natural justice of '*audi alteram partem*' which ultimately violated the 'due procedure established by law'.

Amongst the Fundamental Rights, Articles 14, 19 and 21 of the Constitution, composing the 'Golden Triangle', has together led to the declaration of various legislation or arbitrary actions of the society as invalid. By a majority, the 7 Judge Bench held that any 'procedure established by law' under Article 21 would have to be 'just, fair and reasonable' and it moved away from the *Satwant Singh's case*²² by establishing that even in the presence of a law, an arbitrary law will not be considered. After this judgement, the Hon'ble Supreme Court became the watchdog of the Constitution instead of being a supervisor.

Such active involvement of the Judiciary in the exhaustive and detailed evaluation of law and its path breaking performance with regard to the changing dynamics of law in relation with the society, the concept of Public Interest Litigation began to develop. This concept of PIL was propounded by Justice P.N. Bhagwati wherein he stated that not only the third party on behalf of aggrieved party but also the Court can take actions suo moto. Post Maneka Gandhi's case, the Supreme Court established that for a right to be treated as a fundamental right, it is not mandatory that it should be expressly stated in the Constitution as fundamental right. The social, political and economic changes led to the establishment of new rights thereby introducing the new dimensions in the field of justice to meet the changing demands and aspirations of the ever developing society. Justices P.N. Bhagwati and V.R. Krishna Iyer have played a pivotal role in the promotion of the avenue of approaching the Apex Court to look for legal remedies in areas where public interests are at stake.

However, the Supreme Court does not have any power to give directions to amend any law, an Act or Rules as this comes within the powers of the Legislature. But where any Statute is not stating out or is silent as to a concerned subject and the authority who is implementing the same has been conferred power, either constitutional or statutory, to implement it, there

²²1967 SCR (2) 525

directions can be issued by the court to such authority on such subject matter so as to fill the void till the enactment of a suitable law.²³

The powers have been conferred upon the High Courts by the Constitution under Article 226 to issue the writs in the nature of *habeas corpus*, *mandamus*, *certiorari*, *prohibition* and *quo warranto* or any of them for the enforcement or implementation of the fundamental rights and for any other purpose. The addition of the expression 'for any other purpose' has enabled the Courts to exercise their power for not only fundamental rights enforcement but also for other purposes for which in appropriate cases the writs may be directed. Thus the Supreme Court and the High Courts have concurrent jurisdictions for the enforcement of the fundamental rights. The judgement in, *Indira Nehru Gandhi v. Raj Narain*²⁴ popularly known as the election case, shows, another aspect of the Court's power of its involvement in imparting justice actively.

In the Habeas Corpus case²⁵, the power of judicial review was exercised to deny to the detenus any remedy for securing release from detention during emergency. The judgement was not unanimous. The majority of four judges held that no writ of habeas corpus would lie on any ground whatsoever. The decision on this case was severely criticised both in India and abroad.²⁶ One has to accept that the Supreme Court falsified hopes of people who looked upon the Court as the custodian or guardian of the rights of the people during emergency. But as *Kesavananda*²⁷, came after *Golaknath*²⁸, the Judgement in *Maneka Gandhi*²⁹ followed the Habeas Corpus judgement³⁰.

In *Minerva Mills's* case³¹, the Supreme Court asserted its power of judicial review in striking down clauses (4) and (5) inserted in Article 368 by the 42nd Amendment Act, 1976 and limited the scope of the power of the Parliament to amend the constitution under Article 368. The Forty-fourth Amendment Act deleted Article 19(1) (f) and Article 31. Thus, cases relating to property rights would be rare. However, the principles of compensation laid down in the *Bank Nationalization Case*³² may govern cases of acquisition of property in future.

²³ Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294

²⁴ AIR 1975 SC 2299

²⁵ Adm Jabalpur v. Shivkant Shukla 1976 AIR 1207

²⁶ For a very severe criticism of this judgement, see H.M. Seervai, Emergency, Future Safeguards and the Habeas Corpus Case: A criticism, 1978, Chapter II

²⁷ (1973) 4 SCC 225

²⁸ 1967 AIR 1643

²⁹ 1978 AIR 597

³⁰ (1976) 2 SCC 521

³¹ AIR 1980 SC 1789

³² (1970) 1 SCC 248

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Moreover, the noble principles laid down in *Maneka Gandhi's case*³³ may also be made applicable to property cases as the right to property to continuous to be a Constitutional right. The future is definitely bright and hopeful as far as judicial review of legislation affecting personal liberty is concerned. In the process of judicial review, there is a possibility of judicial law-making. The post-ADM Jabalpur³⁴ decisions of the Supreme Court have shown the Supreme Court as a strong champion of the rights of humans embodied in the fundamental rights chapter and in the directive principles of State policy. In addition it has used international human rights documents for interpreting constitutional rights and used them to fill a legislative vacuum (unless the international doctrine conflicts with any legislation). The Supreme Court has in fact gained a 'reputation' as an activist Court, in other words, displaying the power of Judicial Activism.

In the case of *Bandhua Mukti Morcha v. Union of India*³⁵, the Supreme Court directed that the child labour to be abolished and eliminated from the carpet industry in the State of UP and to issue such directives that prohibits child labour and provide such children with education, health facilities.

From the above stated judgements, it is thus conclusive that not only the person who is wrongfully and illegally deprived of his liberty, then anyone on his/her behalf in whom the law recognizes a locus standi to maintain an action of such nature can become a petitioner. This provision is established under Article 32 of the Constitution otherwise known as the heart and soul of the Constitution. This interpretation was conclusively established by the Supreme Court that a petition can be filed by a person on behalf of another acting pro bono public in the case of *P. Gupta v. Union of India*³⁶.

Conclusion

In a hierarchical system of courts the highest judiciary must provide the necessary leadership to keep the path of justice untrammelled by overgrowth of precedents, which are not suited to the times. Since the court is entrusted with the responsibility of declaring the law for the authoritative guidance of the subordinate courts, it has an added responsibility to bring the law in line with modern and progressive ideas. This function can neither be undertaken by

³³ (1978) 1 SCC 248

³⁴ ADM, Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521: AIR 1976 SC 1207.

³⁵ (1997) 10 SCC 549

³⁶ 1975 AIR 865

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courts lower in the order because of institutional and functional constraints nor can it be left to the legislature whose priorities may not permit it to allot time to law reform work that the judiciary would want it to undertake. A bird's view of the above material would reveal to us under what great mental agony the court was labouring when it was faced with the necessity to explain or interpret the word like 'State' under article 12 of the Constitution or the phrase 'due process of law' or the Right to Life under Article 21 of the Constitution. The concept of judicial activism has strengthened the Court's power in a manner that no other organ of the Government could have ever done that when the field of imparting justice comes into being in the world's largest Democracy and second largest populated country in the World.