

# JUDICIAL ACTIVISM –IS IT JUSTIFIED?

Supriyo Ranjan\*

## Introduction-

The Judicial System occupies a significant role in the Indian democracy, as it has been given the role to interpret the laws framed by the legislature and directs the executive in failure of execution of laws. It adjudicates the disputes between the centre and state, state and state or a group of state and a single state. It also resolves the disputes among individual and state and Individual and Individual. That's why it is called as the "Saviour of Democracy". Good Governance is a sine-qua- non for an Independent democracy. The three organs of the government constitute three pillars of good and effective governance. Absence of mutual co-ordination leads to administrative chaos. To remove all such chaos the Judiciary acting as a catalyst comes in power to protect the rights of the individual against the state and to protect the law of the land. This act of Judiciary is called Judicial Review. It is nothing but the performance of judicial activities. It is creativity to fill the gulf between the positive and normative aspects of law. It would not be in the interest of the democratic society, if the judiciary shuts its door to the citizen who finds that the legislature is not responding and the executive is indifferent. It must be seen that the authorities come out of the slumber and perform their due role<sup>1</sup>. The Scope of Judicial review under the Indian Judiciary has evolved in three dimensions to ensure fairness in administrative action, to protect the constitutionally guaranteed fundamental rights and to rule on questions of legislative competency. The Judiciary has widened its Jurisdictions under the Epistolary jurisdiction<sup>2</sup> which gives the victim a right to approach the court through a letter and that letter is converted to a petition or the Public Interest Litigations. This approach of the Judiciary has been social-welfare which renders justice to victim at a faster rate.

## JUDICIAL REVIEW: HISTORICAL PERSPECTIVE

Judicial review has been a controversial subject since the beginning of the constitution. Several attempts have been made to silence this power by transferring the judges<sup>3</sup> or suppression of judges<sup>4</sup>. In case of an unjust act to a person, the judiciary has made it its efforts to prepare laws for inter-country adoption<sup>5</sup>, guidelines against sexual harassment of women at workplaces<sup>6</sup>, guidelines for the abolition of child labour etc<sup>7</sup> and has given effective guidelines for application of those laws. This act has been appreciated and has been criticised by several eminent jurists. There lies two contrary views, According to one view, the court are supposed to act as constitutional convention. A Constitutional court is not bound by what was originally intended by the founding fathers but can interpret the constitution in terms of what would have been intended under the circumstances that exist at the time of such interpretation<sup>8</sup>. This view has been criticised and another view has come up where the court must strictly adhere to the original intention.<sup>9</sup> The later view was debated by most of the members of the Constitutional Assembly and it was criticised as that might lead to become a lawyer's paradise. Dr. B.R Ambedkar defended the provision of judicial review as being absolute

---

\* Tamil Nadu National Law School

<sup>1</sup> M. Jariwala, Poorman's Access to Judicial Justice: A Reality or Myth, Indian Journal of Public Administration, Vol. XLV, No. 3, July-September 1999, p.336.

<sup>2</sup> The adjective Epistolary has its genus in the word Epistle meaning thereby any of the letters in the new testament of the Bible and as such the adjective Epistolary generally manifest an expression made in the form of letter. Through a letter this jurisdiction of the higher judiciary can be invoked but certainly that must be connected with the question of upholding Human Rights.

<sup>3</sup> Judiciary Made to Measure, N.A Palkhivala(ed.) (M.R. Pai, 1973).

<sup>4</sup> S.H Sheth v. India (1976) 17 G.L.R 1017; H.M Seervai, The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism, pp.119-29 (Tripathy, 1978)

<sup>5</sup> L.K. Pandey v. Union of India, AIR 1986 S.C. 27

<sup>6</sup> Vishaka v. State Of Rajasthan, 1997 (6) SCC 241

<sup>7</sup> M.C. Mehta vs State Of Tamil Nadu And Others,(1996) 6 SCC 756

<sup>8</sup> James M. Beck, The Constitution of United States (1922 cited from Raoul Berger Government by the Judiciary: The Transformation of the Fourteenth Amendment, p.2 (Harvard University Press, Cambridge, Massachusetts and London, 1977).

<sup>9</sup> C. Fariman, "Does the Fourteenth Amendment Incorporate the Bill of Rights"; Alexander Bickel, 'The Original Understanding and the Segregation Decision', 69 Harv. L.R., p.1 (1955).

necessary and the rejected the criticism levied for this<sup>10</sup>. The provision for judicial review and particularly for the writ jurisdiction that gave a quick relief against the abridgement of fundamental rights constituted the hearts of the constitution, the very soul of it<sup>11</sup>.

The Jurisprudence of Judicial review emanated from the U.S Courts. In the case of *Marbury v. Madison*<sup>12</sup>, the Supreme Court created its authority to declare federal statutes unconstitutional. Although seldom used in the Court's early years the power of judicial review over federal statutes has been used more frequently by the Rehnquist Court. In a series of cases, the Court has declared unconstitutional federal statutes that have gone beyond the limits of the Commerce Clause, or Section 5 of the Fourteenth Amendment, or that have invaded the sovereignty of the states as guaranteed by the Tenth and Eleventh Amendments. This was adopted by the Indian Courts at later point for safeguarding the fundamental rights of the people.

### JUDICIAL REVIEW AND THE JUDICIAL SUPREMACY

In the Indian democratic setup, the three organs of the government i.e., the executive, the legislature and the judiciary enjoys equivalent power and each organ act as a watch dog against each other in their activities. Nonetheless, the judiciary has been embodied with a privilege of being Independent over the other organs which leads to an effective governance. It has been quite evident in a number of articles of the constitution which enables judiciary to act as a correctional role on the decisions of the other two organs of government. In the case of *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*<sup>13</sup> the question arose before the Supreme Court was that whether the court has authority to determine the content and scope of powers, privileges and immunities of the legislature and expulsion of member is subject to judicial review. The Court concluded that the judicial scrutiny of parliamentary powers cannot stop especially when breach of other constitutional provisions has been alleged. There are a number of instances where the court has to use its power against violation of any constitutional provisions. That is the sole purpose for calling it to be the Saviour of the Constitution.

The gradual development of Independent India's Judiciary can be classified in to two stages. First stage was the technocratic role given to the judiciary with limited power to review during Nehruvian Period. This stage led to number of criticism where Judiciary was totally favourable to the legislature and the legislature was able to mould judiciary at its whims and fancies. This stage was also called as Positivist court where the court interpreted the law on the basis of the letter of law "What the law is" and not considering any other principles. The Case of *A.K Gopalan v. State of Madras*<sup>14</sup> where the Court exactly acted as a positivist Court. Over the last fifty years the Indian Supreme Court has evolved from a positivist court to activist court over the last fifty years because of a number of lacunas that existed between the government and the people. This activism is classified on the basis as positive activism and the judiciary at some instances has also used this power on its own favour which is termed as negative activism. Judicial activism has to operate within its limits. These limits are drawn by the limits of Institutional viability, legitimacy of judicial intervention and resources of the court<sup>15</sup>. Since, through Judicial activism, the court changes the existing power relations, judicial activism is bound to be political in nature. Through, judicial activism, the constitutional court becomes an important power centre of the democracy instead of the legislature which is in gross violation of the theory of separation of power.

---

<sup>10</sup> CAD Vol.7, p.700(Official Report Printed by the Loksabha Secretariat, New Delhi)

<sup>11</sup> CAD vol.7,p.953.; B. Shiva Rao, *The framing of India's Constitution: A Study*, vol.v.p.311(The Indian Institution of Public Administration, New Delhi,1968)

<sup>12</sup> 15 US (1 Cranch) 137 (1803).

<sup>13</sup> (2007) 3S.C.C. 124

<sup>14</sup> *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27

<sup>15</sup> Stephen Holmes, 'Precommitment and the Paradox of Democracy' in Douglas Greenberg et. al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993) at p. 195-240

## TECHNOCRATIC MODE OF JUDICIAL REVIEW

In the first round of cases, Parliament could silence the Supreme Court through the device of constitutional amendment. This forced the judiciary to adopt the technocratic model in which judges had to hold a law invalid if it is ultra vires the power of the legislature. This was a circumlocutory endeavour made by the legislature to hold control over the Judiciary. The Nehru govt. was supported by a large majority in each house of parliament. Therefore, parliament could easily get the constitution amended by the special majority prescribed by Article 368. In Gopalan's Case, the court took a highly conservative view of personal liberty. It gave a restricted meaning to the expression personal liberty and viewed it as anti-thesis of physical restraint or coercion. The definition of personal liberty was not being subjected to any form of physical restraint or coercion without the sanction of law and not mere freedom to move to any part of the Indian territory. The majority of the judges opined that the detenu could not claim procedural fairness as fundamental right as Article 19(1)(d) of the Constitution was entirely different from the right to personal liberty referred to in Art. 21. Therefore as both the articles are mutually exclusive they could not be read together. In the case of A.D.M Jabalpur v. Shivkant Shukla, the judges had adopted a complaisance attitude. J. Chandrachud said that "Counsel after counsel expressed the fear that during emergency, the executive may whip and strip and starve the detune and if this be our judgement, even shoot him down. Such misdeeds have not tarnished the record of Free India and I have a diamond bright, diamond-hard hope that such things will never come to pass".<sup>16</sup> Despite the optimistic hope of Indian Judiciary, various atrocities<sup>17</sup> were committed during the emergency regime. Although the Indian judiciary by and large was considered to be impartial and principled, it's jurisprudence had been essentially of the property owners, princes, political leaders and most of the civil servants. The political opposition also had not much confidence in court's jurisprudence. The common man looked it as luxury that could be afforded by the rich. These decisions concluded that Court is after all a weak institution. Jefferson said that a court was the weakest organ of the government because it had control over neither sword nor purse.

## JUDICIAL ACTIVISM – AN ACT OF SELF-LEGITIMIZATION

From Gopalan to Shivkant Shukla, the dissenters had not received its sympathetic consideration. The legal positivism attitude of the court had helped political institution against the dissenters and to suppress their rights. Further the courts had realised that high public esteem itself would enable itself to withstand the intolerance of hegemonic executive. The liberal and broad interpretation of article 14 and 21 lead to basic rule of judicial process with a view to make it more accessible and participatory. It was an attempt to refurbish the image of the court which was tarnished by a few emergency decisions.<sup>18</sup>

Judge Frank Easterbrook opened with an ostensibly safe sentence; every one scorns judicial activism, that notoriously slippery term. Yet even this observation cannot go unqualified. Most would agree that judicial activism is indeed slippery. But some scholars have suggested that in some contents, it is not always a bad thing. This is the problem: one can scarcely make an observation about judicial activism today without appending definitions, provisions, and qualifications.<sup>19</sup>

In India judicial Activism has become a buzzword amongst the legal jargons. Judicial activism can be coined as judicial creativity, judicial craftsmanship, judicial law making, imaginative sharing of passion, look beyond the law, activist justicing, etc. However, in recent years judiciary is criticized in respect of its activist role. This criticism voices

---

<sup>16</sup> AIR 1976 SC 1207, 1349.

<sup>17</sup> In kaka yam police camp, an engineering student was murdered by police torture; Seervai, Emergency, Future Safeguards, supra n.7, p.1.

<sup>18</sup> Upendra Baxi, "Taking Suffering Seriously :Social Action Litigation in the Supreme Court of India' in Dhavan, Sudarshan and Salman Khursid (ed.), The Judicial Power, pp.289,294 (Tripathi, Sweet-Maxwell, 1985)

<sup>19</sup> Keenan D. Kmiec, The Origin and Current Meaning of "Judicial Activism", 92 CALIFORNIA LAW REVIEW 1441, 1441-1477 (2004).

against the increasing tendency on the part of the judiciary to transgress into the fields of other organs such as the legislatures and the executive. Judicial Activism is inherent in judicial review. Whether it is positive or negative activism depends upon one's own vision for social change. Judicial activism is not an aberration but is a normal phenomenon and judicial review is bound to mature into judicial activism<sup>20</sup>.

Even the constitution makers seem to have envisioned the law making role of the judiciary. The judges have been advocating and protecting the rights of the people. In the case of Sajjan Singh v. State Of Rajasthan, J. Hidayatullah in a dissenting judgement had held that fundamental rights should not be a play thing of the majority. In Golaknath v. State of Punjab, the court by majority of six against five judges held that parliament had no power to pass any amendment that would have effect of abridging or taking away any of the fundamental rights guaranteed by the constitution. It flew in the face of the theory that a constitution was a grundnorm (highest norm) and did not have to be validated. Its validity was sui juris.<sup>21</sup> Parliament also passed the Twenty-fifth Amendment, which further restricted right to property and the twenty-sixth which abolished privy purses, along with these amendments the twenty-fourth amendment was challenged before the court. There the question arose was if the parliament had no power to amend the constitution to abridge the fundamental rights, how could it empower itself to do through a constitutional amendment?

A bench of thirteen judges sat to hear this case and the court by a majority of seven against six over-ruled the golaknath case and held that power of parliament was unlimited. The parliament's constituent power under article 368 was constrained by the inviolability of the basic structure of the constitution. These basic structures could not be destroyed or altered beyond recognition by a constitutional amendment. As long as parliament did not violate the basic structure of the constitution, its constituent power was subject to no limitation<sup>22</sup>. In another case<sup>23</sup> where the parliament by insertion of art.323-A(2)(d) excluded the jurisdiction of the high court. The court held that the power of the High Court under article 226 of the constitution was part of the basic structure of the constitution. In a different case<sup>24</sup> the court observed that the freedom of speech and expression within the house formed part of the basic structure of the constitution.

The overuse as well as under use of the doctrine is likely to delegitimize it. A court should never appear to be acting as a super legislature, but it should not be trivializing the basic structure doctrine as the doctrine is not exhaustive. So it seems that while the horizon of the basic structure doctrine may expand to include legislative as well executive actions. The court must act as a censor of the exercise of the constituent power to preserve the most enduring values of the constitution. It also must allow legitimate changes in the constitution but prevent the erosion of those enduring values that constitute the essence of constitutionalism.

## PUBLIC INTEREST LITIGATION

Study of Judicial Activism in India can never be concluded unless Public Interest Litigation is added in it. It is a kind of constitutional adjudication in pursuit of constitutional justice, promoting the concept of Welfare State.<sup>25</sup>

"Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.<sup>26</sup>" The origin and evolution of Public Interest Litigation in India can be traced from realization of constitutional obligation by the Judiciary towards the vast poor and marginalized sections of the society. Prior to 1980s the aggrieved party could only have locus standi and any other person who was not personally affected was not having

<sup>20</sup> S. P. Sathe, "Judicial activism in India" p. 6, Oxford University Press

<sup>21</sup> P.K Tripathy, 'Golaknath: A Critique' In some Insights in to Fundamental rights, p.1(Tripathi, 1972)

<sup>22</sup> Minerva Mills v. Union of India, AIR 1980 SC 1789.

<sup>23</sup> L.Chandra Kumar v. Union of India, (1996) 3 SCC 261.

<sup>24</sup> P.V Narsimha Rao v. State, (1998) 4 SCC 626.

<sup>25</sup> ROIL, Public Interest Litigation, §1.1, 5 (Universal Law Publishing co. pvt. Ltd., 2011).

<sup>26</sup> Stephen Holmes, 'Precommitment and the Paradox of Democracy' in Douglas Greenberg et. al. (eds.), Constitutionalism and Democracy: Transitions in the Contemporary World (Oxford University Press, 1993) at p. 195-240

the locus standi. This led to scarcely any connection between the rights and the laws made by the state because of massive illiteracy.

The trend of Judiciary changed which made PIL to be the potent weapon for enforcement of public duties; in the case of *S.P. Gupta v. Union of India* wherein it was held that “any member of the public or social action group acting bonafide” can invoke the Writ Jurisdiction of the Courts seeking redressal against violation of a legal or constitutional rights of persons who due to social or economic or any other disability cannot approach the Court. In numerous instances, the Court took suo moto cognizance of matters involving the abuse of prisoners, bonded labourers and inmates of

mental institutions, through letters addressed to sitting judges. This practice of initiating proceedings on the basis of letters has now been streamlined and

has come to be described as ‘epistolary jurisdiction’.

In *Bandhua Mukti Morcha v. Union of India*,<sup>27</sup> the Supreme Court’s attention was drawn to the widespread incidence of the age-old practice of bonded labour which persists despite the constitutional prohibition. Among other interventions, one can refer to the *Shriram Food & Fertilizer case*<sup>28</sup> where the Court issued directions to employers to check the production of hazardous chemicals and gases that endangered the life and health of workmen. It is also through the vehicle of PIL, that the Indian Courts have come to adopt the strategy of awarding monetary compensation for constitutional wrongs such as unlawful detention, custodial torture and extra-judicial killings by state agencies.<sup>29</sup>

An important step in the area of gender justice was the decision in *Vishaka v. State of Rajasthan*<sup>30</sup> the petition in that case originated from the gang-rape of a grassroots social worker. In that opinion, the Court invoked the text of the Convention for the Elimination of all forms of Discrimination against Women (CEDAW) and framed guidelines for establishing redressal mechanisms to tackle sexual harassment of women at workplaces. Though the decision has come under considerable criticism for encroaching into the domain of the legislature, the fact remains that till date the legislature has not enacted any law on the point. It must be remembered that meaningful social change, like any sustained transformation, demands a long-term engagement. Even though a particular petition may fail to secure relief in a wholesome manner or be slow in its implementation, litigation is nevertheless an important step towards systemic reforms. In the realm of environmental protection, many of the leading decisions have been given in actions brought by renowned environmentalist M.C. Mehta. He has been a tireless campaigner in this area and his petitions have resulted in orders placing strict liability for the leak of Oleum gas from a factory in New Delhi,<sup>31</sup> directions to check pollution in and around the Ganges river<sup>32</sup> the relocation of hazardous industries from the municipal limits of Delhi,<sup>33</sup> directions to state agencies to check pollution in the vicinity of the Taj Mahal<sup>34</sup> and several afforestation measures. A prominent decision was made in a petition that raised the problem of extensive vehicular air pollution in Delhi. The Court was faced with considerable statistical evidence of increasing levels of hazardous emissions on account of the use of diesel as a fuel by commercial vehicles. The Supreme Court decided make a decisive intervention in this matter and ordered

---

<sup>27</sup> (1984) 3 SCC 161

<sup>28</sup> (1986) 2 SCC 176

<sup>29</sup> See observations justifying the payment of compensation for human rights violations by state agencies in the following decisions: *Bhim Singh v. State of Jammu and Kashmir*, (1985) 4 SCC 677; *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746; *D.K. Basu v. Union of India*, (1997) 1 SCC 416; Also see: Lutz Oette, ‘India’s International obligations towards victims of human rights violations: Implementation in domestic law and practice’ in C. Raj Kumar & K. Chockalingam (eds.)

<sup>30</sup> (1997) 6 SCC 241; See D.K. Srivastava, ‘Sexual harassment and violence against women in India: Constitutional and legal perspectives’ in C. Raj Kumar & K. Chockalingam (eds.), *Human rights, Justice and Constitutional empowerment* (OUP, 2007) at p. 486-512

<sup>31</sup> *M.C. Mehta v. Union of India*, (1987) 1 SCC 395

<sup>32</sup> *M.C. Mehta v. Union of India* (1988) 1 SCC 471

<sup>33</sup> *M.C. Mehta v. Union of India*, (1996) 4 SCC 750

<sup>34</sup> *M.C. Mehta v. Union of India*, (1996) 4 SCC 351; Also see Emily R. Atwood, ‘Preserving the Taj Mahal: India’s struggle to salvage cultural icons in the wake of industrialisation’, 11 *Penn State Environmental Law Review* 101 (Winter 2002)

government-run buses to shift to the use of Compressed Natural Gas (CNG), an environment-friendly fuel.<sup>35</sup>

PIL can also allow the court to act as a catalyst for democratic pressures to develop to make recalcitrant governments act. Instead of trying to act as a substitute for government with PIL decisions being regarded as a means for a hierarchical transfer of power, PIL's strength could lie in the court encouraging democratic deliberation in place of interest bargaining. The court will need to avoid capture by dominant political interests and seek to act as a facilitator by attempting to structure the judicial process to be flexible and dynamic enough to continue the conversation (between the judges, government and the public) for finding the most effective way to secure constitutional rights guarantees. The court can thus serve to energize the political process in cooperation with other state agencies and create structures which remain responsive to a range of issues and manage implementation in a way that produces outcomes through a participative ethic ensuring that those most affected by the decision have a role in shaping and monitoring it.

### JUDICIAL REVIEW AND SEPARATION OF POWER

Judiciary being one of the pillars of the democracy has always played an important role in imparting justice. The Constitution, under various provisions, has clearly drawn the Line of Control for both the Legislature and the Judiciary to maintain their independence in their respective functioning. Where Articles 121 and 211 forbid the legislature from discussing the conduct of any judge in discharge of his duties, Articles 122 and 212 on the other hand preclude the courts from sitting in judgment over the internal proceedings of the legislature. Article 105 (2) and 194(2) protect the legislators from interference of the Courts with regards to his/her freedom of speech and freedom to vote. It is evident from the various Articles of the Constitution which enable the judiciary to play a correctional role on the decisions of the other two branches of the State. The doctrine has been broadly held to be a basic feature of the Indian Constitution.<sup>36</sup> In *I. R. Coelho v. State of Tamil Nadu*<sup>37</sup> the court has reemphasized the importance of the separation of powers and the check and balances in the constitution. It observed that for preservation of liberty and prevention of tyranny the doctrine of separation of powers is absolutely essential. It was held that separation of powers constitutes one of the basic features of the Indian constitution. The Judiciary has been empowered with this power to protect three types of minorities: (1) racial minorities<sup>38</sup>; (2) socially condemned persons<sup>39</sup>; and (3) the political dissenters<sup>40</sup>. Therefore, judicial review is therefore essentially a counter-majoritarian device for protecting unpopular or minority rights.

### THE RATIONAL OF JUDICIAL REVIEW

The rational of judicial review apart from its constitutional foundation and legitimacy is the creativity and mobility adapted to meet the changing needs of a society, persistence failure of the legislature and to render justice to the disadvantaged citizens<sup>41</sup>. The non-judicial parliamentary remedies like ombudsman, inquiries, tribunals etc. are more suited to maintain the quality of administrative justice. It is quite evident from the last semi-centennial parliamentary justice is proved to be ineffective and time consuming. To avoid a vacuum in which the citizen would be left without protection against misuse of executive powers, the courts have had no option but to occupy the dead ground in a manner which could not be resisted by the parliament.<sup>42</sup>

---

<sup>35</sup> See decision in *M.C. Mehta v. Union of India*, (1998) 8 SCC 648; Also refer: Armin Rosencranz & Michael Jackson, 'The Delhi Pollution case: The Supreme Court of India and the limits of judicial power', 28 *Columbia Journal of Environmental Law* 223 (2003)

<sup>36</sup> *Indira Nehru Gandhi v. Raj Narain*, (1975) Supp. S.C.C. 1

<sup>37</sup> AIR 2007 SC 861

<sup>38</sup> *Brown v. Board of Education*; 347 US 483 (1954):98 L. Ed. 873.

<sup>39</sup> *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494

<sup>40</sup> *Liversidge v. Anderson*, (1942) AC 206

<sup>41</sup> *Supra*, 44, at p.9.

<sup>42</sup> Mark Elliott et al, Beatson, [Mathews and Elliott's *A(1) m'r'r'r'r'r'r'r'r'r'r'e Law — Text and Materials*, Oxford University Press, London (3'd ed.), p.8.

It has been argued by the common law lawyers that judicial review is judicial creation applying the standards of a higher order of law that is logically prior to the command of the legislature<sup>43</sup>. Some jurist view it as judicial creativity as co-operative endeavour in consonance with and not in conflict with legislative intent.<sup>44</sup>

### LODHA COMMITTEE-IS IT JUDICIAL OVER-REACH?

Cricket was in turmoil. It was about losing its spirit because of repeated number of corruptions<sup>45</sup>, scandals<sup>46</sup>, red tapes and abuse of power by the board<sup>47</sup>. To put a stop to these, the Supreme Court had formed "The Lodha committee" in January, 2015 by the Supreme Court after Mudgal committee who gave the report on IPL Scandals<sup>48</sup>. Before analysing the constitutionality of this committee it is necessary to understand what is BCCI?

The Board of Control for Cricket in India (BCCI) is the national governing body for cricket in India. The board was formed in December 1928 as a society, registered under the Tamil Nadu Societies Registration Act. It is a consortium of state cricket associations and the state associations select their representatives who in turn elect the BCCI officials. It organises national events and selects the team to represent at international levels<sup>49</sup>. The board does not depend upon the government for its finances. Due to the love for the game of cricket in India it has a huge fan base, which in turn acts a revenue creator for the board. It has sponsors such as Nike as official kit sponsor and Air Sahara and many others<sup>50</sup>.

Due to a number of lacunas the Lodha committee suggested sweeping reforms in restructuring the body and to bring back the spirit of the game. It recommended a structural reform 9 member apex council to replace the existing BCCI working committee. These office bearers have a term for three year and can contest for maximum three terms. They cannot hold the office consecutively and there should be mandatory cool-off period in between the terms. For efficiency in governance it segregated governance in to two parts as cricketing and non-cricketing. The non-cricketing management will be headed by 6 professional managers headed by a CEO and the selection of players, coaching, performance are to be left to players. The government servants are excluded from the purview of office bearers. The committee also made mandatory one association & one vote per one state.

It recommended separate governing bodies for the IPL and BCCI. There should be a 15-day gap between IPL season and national calendar. It made a strong recommendation to lawmakers to legalise betting in cricket for all except cricket players, officials and administrators. The players and others banned officials should disclose their assets to BCCI in a measure to ensure that they do not bet. The committee said that match and spot-fixing should be made a criminal offence. One individual hold only one post in cricket administration. The office-bearers would have to choose between positions in respective state associations and the parent body. It recommended that the Legislature must seriously consider bringing BCCI within the purview of the RTI Act. A former High Court judge should be appointed as ethics officer by the BCCI to administer issues relating to conflict of interest, misdemeanour and corruption. A former Supreme Court judge should be appointed ombudsman to resolve internal disputes. It focused on raising player's voice by setting up a players association to safeguard the interest of cricketers. The women's cricket committee to be formed for paying attention to women cricketers. The proposed measures could radically alter the way the BCCI functions as well as vastly improve its public image and impart

---

<sup>43</sup>Jeffrey Jowell, "Of vires and vacuums : The Constitutional Context of Judicial Review" In Mark Elliot, The Constitutional foundation of judicial review, Hart Publishing, Oxford (2001),p.327

<sup>44</sup> See Mark Elliott, "Legislative Intention Versus Judicial Creativity"? Administrative Law as a Cooperative Endeavour", in Mark Elliott, The Constitutional Foundations of Judicial Review, Hart Publishing, Oxford, (2001), p. 341.

<sup>45</sup><http://www.hindustantimes.com/cricket/bcci-incapable-of-handling-corruption-cases-says-iodha-commission/story-MRYYqsASzxwv1FL5ZCQM3J.html>

<sup>46</sup> <http://www.thehindu.com/news/national/ipl-spot-fixing-scram-csk-rr-suspended-for-two-years/article7421211.ece>

<sup>47</sup> <http://www.thehindu.com/news/national/rs-52crore-penalty-slapped-on-bcci-for-abuse-of-position/article4393922.ece>

<sup>48</sup> <http://www.thehindu.com/news/national/ipl-spot-fixing-scram-csk-rr-suspended-for-two-years/article7421211.ece>

<sup>49</sup> <http://www.bcci.tv/about/2016/history>

<sup>50</sup> Air Sahara wins cricket team sponsorship to shell out Rs 313.80 cr for 4-year period". The Hindu Business Line. 20 December 2005

much-needed credibility. There has been a separate allegation made by the jurists such as Former Supreme Court judge J. Katju, it to be an act of judicial over-reach.

The term Judicial Overreach can be understood as being closely associated with its predecessor philosophy of Judicial Activism in the sense that it begins from the point where legitimate activism ends. According to Justice Verma, if the court starts doing a job not supposed to be his, then other than the problem of lack of expertise, it leaves the aggrieved party with no forum to ventilate his grievances. Whenever courts take over the function of other bodies or experts, it amounts to overreach; when they adjudicate a legal issue and the decision has a juristic basis, it is legitimate judicial activism and is justified<sup>51</sup>. He further clarifies that Judicial Activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial ad-hoc nor judicial tyranny. These constitute the broad parameters for testing the propriety and legitimacy of judicial interventions<sup>52</sup>.

### Defending Lodha Panel

Extreme positivists rely on an assumption that the legal order was gapless. According to the analytical school of Austin, which is still strongly entrenched in England, Parliament, and not judges make law. Nonetheless it was a fiction as a contrary was adopted in number of judgements by the courts in England<sup>53</sup>.

Despite a number of criticisms on the theory of separation of powers and the encroaching the rights of the legislature. The researcher submits that Judicial legislation is to some extent unavoidable in the modern era for two reasons: (1) Since modern society is dynamic, the legislature cannot possibly conceive of, and cater to, all the developments which may take place in the future. Hence there will be gaps in the statutory law which have to be filled in by judges<sup>54</sup> (2) The Legislature may often be unwilling or incapable of making a modern law which is of pressing need, and then this job has sometimes to be done by the court<sup>55</sup>.

Roscoe Pound, who is the most outstanding figure in sociological jurisprudence in America, propounded his "instrumentalist" approach, which would allow the judge a greater flexibility. He believes that "justice without law" has its advantages such as greater adaptability to the social dynamic, etc. It is more capable than any other of resolving a problem which he regards as basic and which he formulates as follows: "Law must be stable and yet it cannot stand still"<sup>56</sup>. In this way Pound seeks to bring law into harmony with the dynamism of social life.

Justice Cardozo of the U.S. Supreme Court in his book 'Growth of Law' tried to reconcile the contradiction between a stable legal order and the social dynamic by propounding his "principle of growth". Continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of engendering security. Thus, the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of change no less than principles of stability"<sup>57</sup>.

The Indian Supreme Court in *Sarojini Ramaswami v. Union of India*<sup>58</sup>, observed that "It used to be disputed that judges make law. Today, it is no longer a matter of doubt that a substantial volume of the law governing the lives of citizens and regulating the functions of the State flows from the decisions of the superior courts. This itself clearly substantiates that Judiciary also plays an integral part in the formation of law.

---

<sup>51</sup> J.S.Verma, —The Indian Polity: Separation of Power,35 Indian Advocate 36(2007)

<sup>52</sup> Ibid

<sup>53</sup> *Rylands v. Fletcher* (1866), created the law of strict liability which is coming more and more into prominence in recent times Similarly *Donoghue v. Stevenson*, 1942 AC 562, created the law of liability for negligence, which has had a powerful impact all over the modern world.

<sup>54</sup> See Heck's 'The Jurisprudence of Interests'

<sup>55</sup> Geny's *Methode d'interpretation des sources en droit prive positif*

<sup>56</sup> Pound, Roscoe. *Jurisprudence*. St. Paul, Minn.: West Publishing Co., 1959. Five volumes. Reprinted 2000 by The Lawbook Exchange, Ltd.

<sup>57</sup> *The Nature of the Judicial Process*, by Benjamin N. Cardozo. LL.D

<sup>58</sup> AIR 1992 SC 2219, (Paragraph 2)



As judicial activism is necessary in judicial review, the same goes it is merely an extension of the activism which was highly necessary The Lodha Panel was constituted by the Supreme Court because of lack of any specific law to govern BCCI, often taken arbitrary decisions had lead to abuse of power and they were not answerable to anyone. As mentioned above that the failure of the legislature to possibly conceive of or to failure to legislate or wherein they are unwilling to legislate because of certain pressures of society. Then the Judiciary steps in to this power to protect the interests of the society. As judicial activism is necessary in judicial review, the same goes it is merely an extension of the activism which was highly necessary at this juncture to restore back the image of the game which was at stake.

### Conclusion

Judicial review has laid down its solid foundation on the reasoning that it is the constitution, constitutionalism and rule of law that are being protected by the judiciary, it acts as a safety valve on moments of crisis created by conflicting interests in the society, so as to ease societal tension and to avoid civic conflicts. It is for the judiciary to ensure that the interpretations that they give are in public interest and for public good. Exercise of the power of the judicial review can be done only when there is a clear casus omissus i.e. gap in statute the court can fill it in<sup>59</sup>, in absence of a law<sup>60</sup> or else failure on behalf of the legislature to implement<sup>61</sup>, after the enactment of a law still there lies lacuna where in the Supreme Court can give directions<sup>62</sup>. The exercise of this power under above mentioned conditions is an act of Positive Activism. These actions help filling up the gaps which persisted between the society and the law. It felt that for these acts the Judiciary cannot be challenged with Judicial over reach. Nonetheless, there has been some negative judicial activism where in Supreme court ignores a statutory or constitutional order and substitutes it by its own order. In Second judge's case<sup>63</sup>, the court in effect ignored the provisions of Article 124 for appointing Judges to the Supreme Court, and substituted its own procedure i.e. the collegiums system. The trend should develop to curb this negative activism instead of alleging all the social welfare activities of judiciary to be over reach.

### BIBLIOGRAPHY

Given below is the list of major standard literature referred exclusively for the purpose of this research:

#### List of Important Books and Articles referred-

1. K. Bag, Judicial Activism vis-à-vis Public administration, The Administrator, Vol. XLII, April-June 1997, p. 167.
2. Judicial activism: Its impact on Public administration, The Administrator, Vol. XLII (2), April-June 1997, p. 179. 4.
3. P.M. Bakshi, Judicial activism. Some reflections, The Administrator, Vol. XLII (2), April- June 1997, p.5. 5.
4. K. L. Bhatia, Judicial review and Judicial activism: A comparative study of India and Germany from an Indian perspective, Deep and Deep Publishers, New Delhi, 1997, p.116.
5. Fali S. Nariman, Judges vs. Judges, The Tribune, December 17, 2007.
6. G.R. Bhattacharjee, Judicial Activism. It's Message for Administrators, The Administrator, and Vol.42 (2), April-June 1997, p.39.

<sup>59</sup> D. Velusamy v. D. Patchummal

<sup>60</sup> Vishaka vs. State of Rajasthan, AIR 1997 S.C. 3011; In University of Kerala vs. Councils of Principals of Colleges (2010) 1S.C.C. 353; L.K. Pandey v. Union of India, AIR 1986 S.C. 272

<sup>61</sup> McGee v. The Attorney General and Revenue Commissioner, 1973 IE SC 2

<sup>62</sup> M.C. Mehta vs. Union of India (1997) 8 S.C.C. 770; Vineet Narain v. Union of India AIR 1998 S.C. 889\

<sup>63</sup> Supreme Court Advocate of Record Association v. Union of India

7. V.R. Krishna Iyer, *Judicial Activism and Administrative Autonomy*, *The Administrator*, Vol. 42(2), April-June, 1997, p. 1. 32. Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, New Delhi, Oxford, 1999.
8. N. Sanjaoba, *Judicial Activism: Politics of Power and Judicial Supremacy*, *The Administrator*, Vol. XLII (2), April-June 1997, p.162.
9. Upendra Baxi, 'The Supreme Court under trial: Under trials and the Supreme Court', (1980) *Supreme Court Cases (Journal section)*, at p. 35
10. Deshpande, V.S., *Judicial Review of Legislation (1975)*, Eastern Book Company, Lucknow.
11. Dr. Jha, C.D., *Judicial Review of Legislative Acts*, (II Edition, 2009), Lexis Nexis Butterworths Wadhwa, Nagpur.
12. Bhandari Renu, *Judicial Control of Legislation in India and USA (2001)*, Vol. I &II, University Book House Pvt. Ltd., Jaipur.
13. Justice Fazal Karim, *Judicial Review of Public Actions (2006)*, Vol. I & II, Pakistan Law House, Karachi, Pakistan.
14. Sir Michael Supperstone, James Goudie, Sir Paul Walker, *Judicial Review (2010)*, IV Edition, Lexis Nexis, Delhi.
15. Prof. Jain, M.P., *Indian Constitutional Law (V Edition, 2008)*, Wadhwa and Company, Law Publishers, New Delhi.
16. Singh, M.P., Shukla V.N.'s *Constitution of India (XI Edition, 2008)*, Eastern Book Company, Lucknow.
17. Dr. Pandey, J.N., *Constitutional Law of India (XXXXIII Edition, 2006)* Central Law Agency, Allahabad.
18. Sharma Kanahaiyalal, *Reconstitution of the Constitution of India (2002)*, Deep and Deep Publications Pvt. Ltd., New Delhi.
19. Gurram Ramchandra Rao, "Judicial Review in India", "[Http://Vlex.In/Vid/Judicial-Review-India-29344398](http://Vlex.In/Vid/Judicial-Review-India-29344398)", September 23, 2010
20. Research Article- Jindal Sunny (2011), *Supreme Court of India and judicial Review*, Nalsar University of Law, Hyderabad.
21. .M. Jariwala, *Poorman's Access to Judicial Justice: A Reality or Myth*, *Indian Journal of Public Administration*, Vol. XLV, No. 3, July-September 1999, p.336.
22. .Judiciary Made to Measure, N.A Palkhivala(ed.) (M.R. Pai ,1973).
23. .James M. Beck, *The Constitution of United States (1922 cited from Raoul Berger Government by the Judiciary: The Transformation of the Fourteenth Amendment*, p.2 (Harvard University Press, Cambridge, Massachusetts and London, 1977).
24. C. Fariman, "Does the Fourteenth Amendment Incorporate the Bill of Rights"; Alexander Bickel, 'The Original Understanding and the Segregation Decision',69 *Harv. L.R.*, p.1 (1955).
25. CAD Vol.7, p.700(Official Report Printed by the Lok Sabha Secretariat, New Delhi)
26. CAD vol.7,p.953.; B. Shiva Rao, *The framing of India's Constitution: A Study* , vol.v,p.311(The Indian Institution of Public Administration, New Delhi,1968)
27. Stephen Holmes, 'Precommitment and the Paradox of Democracy' in Douglas Greenberg
28. et. al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993) at p. 195-240
29. .Seervai,Emergency,Future Safeguards,supra n.7,p.1.
30. Upendra Baxi, "Taking Suffering Seriously :Social Action Litigation in the Supreme Court of India' in Dhavan,Sudarshan and Salman Khursid (ed.),*The Judicial Power*,pp.289,294 (Tripathi, Sweet-Maxwell,1985)
31. .Keenan D. Kmiec, *The Origin and Current Meaning of "Judicial Activism"*, 92 *CALIFORNIA LAW REVIEW*1441, 1441-1477 (2004).
32. .S. P. Sathe, " *Judicial activism in India*" p. 6, Oxford University Press

33. .P.K Tripathy, 'Golaknath: A Critique' In some Insights in to Fundamental rights, p.1(Tripathi,1972)
34. ROIL, Public Interest Litigation, §1.1, 5 (Universal Law Publishing co. pvt. Ltd., 2011).
35. Stephen Holmes, 'Precommitment and the Paradox of Democracy' in Douglas Greenberg et. al. (eds.), Constitutionalism and Democracy: Transitions in the Contemporary World (Oxford University Press, 1993) at p. 195-240
36. Lutz Oette, 'India's International obligations towards victims of human rights violations: Implementation in domestic law and practice' in C. Raj Kumar & K. Chockalingam (eds.)
37. 36.D.K. Srivastava, 'Sexual harassment and violence against women in India: Constitutional and legal perspectives' in C. Raj Kumar & K. Chockalingam (eds.), Human rights, Justice and Constitutional empowerment (OUP, 2007)at p. 486-512
38. Emily R. Atwood, 'Preserving the Taj Mahal: India's struggle to salvage cultural icons in the wake of industrialisation', 11 Penn State Environmental Law Review 101 (Winter 2002)
39. The Delhi Pollution case: The Supreme Court of India and the limits of judicial power', 28 Columbia Journal of Environmental Law 223 (2003)
40. Mark Elliott et al, Beatson, [Mathews and Elliott's A(1m'r'nirrafi1'e Law — Text and Materials, Oxford
41. University Press, London (3'd ed.), p.8.
42. Jeffrey Jowell, "Of vires and vavcums : The Constitutional Context of Judicial Review" In Mark Elliot, The Constitutional foundation of judicial review , Hart Publishing, Oxford (2001),p.327
43. Mark Elliott, "Legislative Intention Versus Judicial Creativity'? Administrative Law as a Cooperative Endeavour", in Mark Elliott, The Constitutional Foundations of Judicial Review, Hart Publishing, Oxford, (2001), p. 341.
44. J.S.Verma, —The Indian Polity: Separation of Power,35 Indian Advocate 36(2007)
45. .Heck's 'The Jurisprudence of Interests'
46. .Geny's Methode d'interpretationet sources en droit prive positif'
47. Pound, Roscoe. Jurisprudence. St. Paul, Minn.: West Publishing Co., 1959. Five volumes. Reprinted 2000 by The Lawbook Exchange, Ltd.
48. The Nature of the Judicial Process, by Benjamin N, Cardozo. LL.D

#### WEB-ARTICLES

50. <http://www.hindustantimes.com/cricket/bcci-incapable-of-handling-corruption-cases-says-lodha-commission/story-MRYYqsASzxwv1FL5ZCQM3J.html>
51. <http://www.thehindu.com/news/national/ipl-spot-fixing-scam-csk-rr-suspended-for-two-years/article7421211.ece>
52. <http://www.thehindu.com/news/national/rs-52crore-penalty-slapped-on-bcci-for-abuse-of-position/article4393922.ece>

53. <http://www.thehindu.com/news/national/ipl-spot-fixing-scam-csk-rr-suspended-for-two-years/article7421211.ece>
  54. <http://www.bcci.tv/about/2016/history>
  55. Air Sahara wins cricket team sponsorship to shell out Rs 313.80 cr for 4-year period". The Hindu Business Line. 20 December 2005
-