

Judicial Activism in India

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Introduction

Under the Indian Constitution, the State is under the prime responsibility to ensure justice, liberty, equality and fraternity in the country.¹ State is under the obligation to protect the individuals' fundamental rights and implement the Directive Principles of State Policy. In order to restrain the State from escaping its responsibilities, the Indian Constitution has conferred inherent powers, of reviewing the State's action, on the courts. In this context, the Indian judiciary has been considered as the guardian and protector of the Indian Constitution. Considering its constitutional duty, the Indian judiciary has played an active role, whenever required, in protecting the individuals' fundamental rights against the State's unjust, unreasonable and unfair actions/inactions.

Black's Law Dictionary defines judicial activism as: "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent".

Constitutional powers of the Supreme Court and High Courts in India

Judicial activism happens when the courts have power to review the State action. Article 13 read with Articles 32 and 226 of the Indian Constitution gives the power of judicial review to the higher judiciary to declare, any legislative, executive or administrative action, void if it is in contravention with the Constitution. The power of judicial review is a basic structure of the Indian Constitution.²

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¹ The Constitution of India, 1950, the Preamble.

² L. Chandra Kumar v. Union of India, (1997) 3 S.C.C. 261.

Article 32 of the Indian Constitution gives right to every individual to move directly to the Supreme Court of India for the enforcement of his or her fundamental right. Article 32 confers power on the Supreme Court to issue any order or writ for the enforcement of any of the fundamental rights. The Supreme Court in *Fertilizer Corporation Kamgar Union v. Union Of India*³ held that the power of the Supreme Court under Article 32 is an integral part of the basic structure of the Indian Constitution “because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated.” It cannot be suspended even during emergency. An appropriate writ/order under Article 32 for the enforcement of Articles 17, 23 and 24 can be passed against a private individual also.⁴

Increasingly, the Supreme Court has interpreted Article 32 in a very liberal manner in many cases in order to enforce fundamental rights even against the private entities performing public functions.

Article 226 of the Indian Constitution gives power to the High Courts to issue any appropriate order or writ for the enforcement of fundamental right and other legal rights. In this context, the jurisdiction of High Court under Article 226 seems wider than the jurisdiction of Supreme Court under Article 32. Both Articles 32 and 226 are basic structure of the Indian Constitution. Article 227 further gives power of supervisory control to the High Court over the subordinate courts, special courts and tribunals.

Furthermore, the Supreme Court has power to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed by any court or tribunal under Article 136 of the Indian Constitution confers special power on. The Supreme Court exercises its special power in those cases where gross injustice happens or substantial question of law is involved.

Power under Article 136 is discretionary one and can be exercised to decide the case on justice, equity and good conscience.⁵ However it should be used with proper care and caution. In *Pritam Singh v. The State*,⁶ the Supreme Court said that wide discretionary power under Article 136 should be exercised

³ A.I.R. 1981 S.C. 344.

⁴ People's Union for Democratic Rights v Union of India, (1982) 3 S.C.C. 235.

⁵ Union of India v. C Damani and Co., 1980 Supp. S.C.C. 707.

⁶ A.I.R. 1950 S.C. 169.

sparingly and in exceptional cases only. In *Tirupati Balaji Developers Pvt. Ltd. v. State of Bihar*,⁷ the Supreme Court said that Article 136 does not confer a right of appeal on a party but vests a vast discretion in the Supreme Court meant to be exercised on the considerations of justice, call of duty and eradicating injustice.

Again, curative petition has been invented by the higher judiciary in order to prevent abuse of process or to cure gross miscarriage of justice. It is also maintainable in case of violation of the principles of natural justice.⁸ The apex court in *Rupa Hura* judgment in 2002 said that the Bench considering curative petitions should have the three top judges of the Supreme Court.

One of the most important constitutional provisions giving extraordinary power to the Supreme Court is Article 142 of the Indian Constitution. This provision empowers the Supreme Court to pass suitable decree or order for doing complete justice in any pending matter before it. Despite the fact that the law-making power in India lies primarily with the Parliament only, the Supreme Court is able to legislate under Article 142 of the Indian Constitution. This provision is responsible for the judicial legislation in India. However, the judicial legislation is being done only when there is vacuum in law on the concerned subject-matter. The directions or rules issued by the Supreme Court under Article 142 would remain into force until the Parliament makes proper legislation on the subject matter. It means that the court understands the fact that appropriate law-making body is the Parliament only. For Parliament has more resources the Supreme Court to pass suitable legislation on the subject-matter.

In *Vishaka v. State of Rajasthan*,⁹ the Supreme Court held that in the "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."

⁷ A.I.R. 2004 S.C. 2351.

⁸ *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 S.C.C. 388.

⁹ A.I.R. 1997 S.C. 3011.

Considering the importance of Article 32 read with Article 142, it becomes necessary for the judiciary that it should perform its constitutional obligation where there is no legislation on the certain field and implement the rule of law.¹⁰ Again, the Supreme Court in *Kalyan Chandra Sarkar v. Rajesh Ranjan*,¹¹ acknowledged the importance of Article 142 of the Indian Constitution and said that the court has power under Article 142 to issue directions and guidelines for implementing and protecting the fundamental rights in the absence of any enactment. The court reiterated that any such direction, filling up the vacuum of legislation, is the law of the land. However, the Parliament has power to replace such directions e.g. the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 replaced the *Vishakha* Guidelines for prevention of sexual harassment issued by the Hon'ble Supreme Court of India in the year of 1997.

Judicial activism and shift from *locus standi* to public interest litigation

Access to justice is a fundamental aspect of rule of law. If the justice is not accessible to all, establishment of the rule of law is not possible. The individuals fail to reach justice system due to various reasons including lack of basic necessities, illiteracy, poverty, discrimination, privacy, poor infrastructure of the justice system, etc.

The Supreme Court of India has recognised in many landmark judgments that access to justice is a fundamental right.¹² Indian Judiciary has played an active role in ensuring access to justice for the indigent persons, members belonging to socially and educationally backward classes, victims of human trafficking or victims of beggar, transgender, etc. Since Independence, the Courts in India have been adopting innovative ways for redressing the grievances of the disadvantaged persons. In many cases, the Supreme Court exercised its epistolary jurisdiction¹³ and took *suo motto* actions on mere postal letters disclosing the human rights violations in society. Human rights violations, which published in the newspapers, were taken into judicial consideration. The court entertains the petitions which are being filed by the public spirited persons in the public interest. By doing so, the superior courts have liberated themselves from the shackles of the principle of

¹⁰ *Vineet Narain v. Union of India*, A.I.R. 1998 S.C. 889.

¹¹ A.I.R. 2005 S.C. 972.

¹² *Imtiyaz Ahmad v. State of Uttar Pradesh*, A.I.R. S.C. 2012 642.

¹³ *Sunil Batra v. Delhi Administration*, (1978) 4 S.C.C. 494.

locus standi and given the birth to the Public interest litigation in India.

The shift from *locus standi* to public interest litigation made the judicial process “more participatory and democratic.”¹⁴ S.P. Sathe says: “The traditional paradigm of judicial process meant for private law adjudication had to be replaced by a new paradigm that was polycentric and even legislative. While under the traditional paradigm, a judicial decision was binding on the parties (*res judicata*) and was binding *in personam*, the judicial decision under public interest litigation bound not only the parties to the litigation but all those similarly situated.”¹⁵

The Supreme Court in *People's Union for Democratic Rights v. Union of India*¹⁶ held that public interest litigation is different from the traditional adversarial justice system. The court said that public interest litigation is intended to promote public interest. Public interest litigation has been invented to bring justice to poor and socially or economically disadvantaged sections of the society. The violations of constitutional or legal rights of such large number of persons should not go unnoticed.

In *Fertilizer Corporation Kamgar Union v. Union of India*,¹⁷ the court held that public interest litigation is part of the participative justice.

Furthermore, the Supreme Court in *Bandhua Mukti Morcha v. Union of India*¹⁸ has justified the public interest litigation on the basis of “vast areas in our population of illiteracy and poverty, of social and economic backwardness, and of an insufficient awareness and appreciation of individual and collective rights”.

The Supreme Court of India in *Sheela Barse v. Union of India*¹⁹ said: “The compulsions for the judicial innovation of the technique of a public interest action is the constitutional promise of a social and economic transformation to usher-in an egalitarian social-order and a welfare-State”. While passing any order under public interest litigation, the intention of the court is to enforce constitution and rule of law in the society.²⁰

¹⁴ S.P. Sathe, *Judicial Activism in India* (Sixth Indian Impression, OUP 2010) 17

¹⁵ *Id.* at 18.

¹⁶ (1982) 3 S.C.C. 235.

¹⁷ A.I.R. 1981 S.C. 344.

¹⁸ A.I.R. 1984 S.C. 802.

¹⁹ (1988) 4 S.C.C. 226.

²⁰ *State of Himachal Pradesh v. A Parent of a Student of Medical College*, (1985) 3 S.C.C. 169.

One of the landmark cases relating to the public interest litigation was *Hussainara Khatoon (I) v. State of Bihar*.²¹ A series of articles exposing the plight of under trial prisoners in the State of Bihar was published in a prominent newspaper. Many of the under trial prisoners had already served the maximum sentence without even being charged for the offence. A writ petition drawing the Court's attention to the issue was filed by an advocate. While accepting it as public interest involved, the Supreme Court held that right to speedy trial is a fundamental right under Article 21 of the Indian Constitution. The court directed the State to provide free legal facilities to the under trials so that they could get bail or final release.

In another case of *Sheela Barse v. State of Maharashtra*,²² a letter alleging custodial violence of women prisoners in jail was addressed to the Supreme Court. The letter was written by a journalist who had interviewed some women prisoners in jail. Treating the letter as a writ petition, the Supreme Court took cognizance and issued directions to the concerned authority. Similarly, epistolary jurisdiction was exercised by the Supreme Court in *Sunil Batra v. Delhi Administration*²³ when a prisoner's letter was treated as writ petition. The prisoner alleged in the letter that Head Warder brutally assaulted another prisoner. The Court said that the technicalities cannot stop the court from protecting the civil liberties of the individuals.

In *Municipal Council, Ratlam v. Vardichand*,²⁴ the Court admitted the writ petition filed by a group of citizens who sought directions against the local Municipal Council for removal of open drains. The Court said that if the "centre of gravity of justice is to shift as indeed the Preamble to the Constitution mandates, from the traditional individualism of *locus standi* to the community orientation of public interest litigation, the court must consider the issues as there is need to focus on the ordinary men." Similarly, a petition seeking court's directions for protecting the lives of the people who made use of the water flowing in the river Ganga, was accepted as public interest litigation by the Supreme Court of India in the case of *M.C Mehta v. Union of India*.²⁵ In this case, the court directed the local bodies to take effective measures to prevent pollution of the water in the river Ganga.

²¹ (1980) 1 S.C.C. 81.

²² A.I.R. 1983 S.C. 378.

²³ (1978) 4 S.C.C. 494.

²⁴ (1980) 4 S.C.C. 162.

²⁵ A.I.R. 1988 S.C. 1115.

In *Parmanand Katara v. Union of India*,²⁶ a writ petition seeking court's directions, in order to provide immediate medical treatment to the persons injured in road or other accidents without going through the technicalities of the criminal procedure, was filed by an advocate. The Supreme Court accepted the application of the advocate and directed the medical establishments accordingly.

Another good example of public interest litigation is *S.P. Gupta v. Union of India*.²⁷ In this case, the court recognized the locus standi of bar associations to file writs by way of public interest litigation. It was said that questioning the executive's policy of arbitrarily transferring High Court judges is in the public interest. Explaining the significance of public interest litigation, the court observed that: "It must now be regarded as well-settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke the assistance of the court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go un-redressed and justice is done to him."²⁸

However, the public interest litigation should not be abused by anyone.²⁹ It cannot be allowed to be used for creating nuisance or for obstructing administration of justice.³⁰

Judicial activism and fundamental rights jurisprudence

In India, the judiciary has developed the fundamental rights jurisprudence while giving the liberal interpretation to the 'right to life and personal liberty'. In its landmark judgments, the Supreme Court recognized prisoners' rights including access to court and legal facilities,³¹ right to meet his or her family relatives and

²⁶ A.I.R. 1989 S.C. 2039.

²⁷ A.I.R. 1982 S.C. 149.

²⁸ *Id.* at 162.

²⁹ Dattaraj Nathuji Thaware v. State of Maharashtra, A.I.R. 2005 S.C. 540.

³⁰ Common Cause (A Regd. Society) v. Union Of India and Others, decided on 11 April, 2008 by the Supreme Court of India.

³¹ M.H. Hoskot v. state of Maharashtra, (1978) 3 S.C.C. 544.

friends,³² freedom of speech and expression,³³ right to compensation,³⁴ mental privacy,³⁵ etc.

The judiciary in India is again responsible for the fundamental right to live in healthy environment,³⁶ implementing Precautionary and Polluter Principles as basic features of the sustainable development,³⁷ the application of doctrine of public trust for the protection and preservation of natural resources,³⁸ etc.

The Supreme Court recognized the fundamental right to education to children. In *Bandhua Mukti Morcha v. Union of India*,³⁹ the Supreme Court held that right to education is implicit in and flows from the right to life guaranteed under Article 21.

The Hon'ble Supreme Court of India in *Mohini Jain v. State of Karnataka*⁴⁰ said that the cumulative effect of Articles 21, 38, Articles 39 (a) and (b), 41 and 45 bind the State to provide education to all of its citizens.⁴¹ The Supreme Court declared that the right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. Finally, the Court announced that the State Government is under an obligation to make endeavor to provide educational facilities at all levels to its citizens.⁴²

The Constitutional validity of right to education was again discussed by the Supreme Court in *J.P. Unnikrishnan v. State of A.P.*⁴³ The Supreme Court held that the right to education under Article 21 must be read with the directive principles in Part IV of the Indian Constitution. The Court said that right to education means: "(a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes the age of 14 years, his right to

³² Francis Coralie v. Union Territory of Delhi, A.I.R. 1981 S.C. 746.

³³ Prabha Dutt v. Union of India, (1982) 1 S.C.C. 1.

³⁴ Rudal Shah v. State of Bihar, A.I.R. 1983 S.C. 1086.

³⁵ Selvi v. State of Karnataka, (2010) 7 S.C.C. 263.

³⁶ Rural Litigation and Entitlement Kendra, Dehradun v. State of U.P., A.I.R. 1985 S.C. 652.

³⁷ Vellore Citizens Welfare Forum v. Union of India, A.I.R. 1996 S.C. 2715.

³⁸ M.C. Mehta v. Kamal Nath, (1997) 1 S.C.C. 388.

³⁹ A.I.R. 1984 S.C. 802.

⁴⁰ A.I.R. 1992 S.C. 1858.

⁴¹ *Id.* at 1863.

⁴² *Id.* at 1864.

⁴³ A.I.R. 1993 S.C. 2178.

education is circumscribed by the limits of the economic capacity of the State and its developments.”⁴⁴

By the Constitution (Eighty-sixth Amendment) Act of 2002, three new provisions i.e., Article 21A, new Article 45 and 51-A(k) were inserted into the Indian Constitution. Currently, Right of Children to Free and Compulsory Education Act, 2009 enforces fundamental right to education in India.

Due to judicial intervention only, the government was directed to rehabilitate the children of prostitutes.⁴⁵ It was ordered that the children of prostitutes should not be allowed to live with their mothers in the undesirable surroundings of prostitute homes. They require accommodation and rehabilitation in reformatory homes. Increasingly, the Supreme Court of India in *Vishal Jeet v. Union of India*,⁴⁶ again issued directions to the government to rehabilitate such children.

In *Bachpan Bachao Andolan v. Union of India*,⁴⁷ the Supreme Court directed the government to prohibit the employment of children in circuses in order to implement the fundamental right to education. The government was ordered to raid in these circuses to free children. The court directed the government to provide shelter and rehabilitation to all rescued children at care and protective homes until they attain the age of 18 years.

Judicial activism or judicial intervention

At many places, the Parliament has accused the judiciary on the ground of judicial intervention. Parliament has said that the judiciary overreaches its constitutional power.

In *Prakash Singh v. Union of India*,⁴⁸ the petitioners sought directions against the Union of India and State Governments to constitute various Commissions and Boards laying down the policies and ensuring that police perform their duties and functions free from any pressure and also for separation of investigation work from that of law and order.

⁴⁴ *Id.* at 2232.

⁴⁵ *Gaurav Jain v. Union of India*, A.I.R. 1990 S.C. 292.

⁴⁶ A.I.R. 1990 S.C. 1412.

⁴⁷ In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (C) No.51 of 2006, decided on April 18, 2011, available at www.supremecourtfindia.nic.in, accessed on September 10, 2016.

⁴⁸ (2006) 8 S.C.C. 1.

Similarly, in *Vineet Narain v. Union of India*,⁴⁹ the Supreme Court invoked Articles 32 and 142 of the Indian Constitution and issued directions to the government in order to bring transparency and accountability in the Central Bureau of Investigation (CBI).

On May 11, 2016, the Hon'ble Supreme Court of India in *Swaraj Abhayan-(I) v. Union of India & Ors.*,⁵⁰ directed the Ministry of Agriculture in the Union of India to update and revise the Drought Management Manual. The apex court also directed the Union government to set up a National Disaster Mitigation Fund within three months.

Nevertheless, Finance Minister, Arun Jaitley expressed the difficulty to create a third fund outside the National Disaster Response Fund and the State Disaster Response Fund, keeping in view that the Appropriation Bill is being passed. He also raised concern about India's budget-making being subject to judicial review.⁵¹

Recently, on 16 October 2015 the Constitution Bench of Supreme Court in *Supreme Court Advocates-on-Record-Association v. Union of India*,⁵² in a majority of 4:1 declared the National Judicial Appointments Commission (NJAC) Act and the Constitutional Amendment unconstitutional as violating judicial independence. The Court said that the existing collegium system relating to appointment and transfer of judges would again become "operative." Justice Khehar said that the absolute independence of judiciary, from other organs of governance, protects the rights of the people.

The Supreme Court's rulings on National Eligibility-cum-Entrance Test (NEET) i.e., single test for admissions in medical courses, reformation in Board for the Control of Cricket in India (BCCI),

⁴⁹ (1998) 1 S.C.C. 226.

⁵⁰ In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (CIVIL) NO. 857 of 2015, decided on May 11, 2016, available at <http://supremecourtindia.nic.in/FileServer/2016-05-11_1462945782.pdf> accessed on September 10, 2016.

⁵¹ *Five cases of judicial activism that has put govt. in a spot*, Business Standard, BS Web Team, Mumbai May 17, 2016, available at http://www.business-standard.com/article/current-affairs/five-cases-of-judicial-activism-that-has-put-govt-in-a-spot-116051700587_1.html, accessed on September 10, 2016.

⁵² In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No. 13 of 2015, http://supremecourtindia.nic.in/FileServer/2015-10-16_1444997560.pdf>

filling up the judges' post, etc. have been considered as the judicial intervention by the government.⁵³

There is no dispute on the fact that the judiciary should also self-regulate itself. It should also put some restraints on its powers, whenever it is required. The Supreme Court in *Divisional Manager, Aravali Golf Course v. Chander Haas*⁵⁴ observed that: "Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like Emperors. There is broad separation of powers under the Constitution and each organ of the State-the legislature, the executive and the judiciary- must have respect for the others and must not encroach into each other's domains."

However, it is submitted that *NJAC* decision should not be read as if the judiciary has crossed its *Laxmanrekha*. The Supreme Court is also welcoming the full-fledged debate on the existing collegium system and wants it to be updated. Indian Constitution has given the special status to the Supreme Court and High Courts. Indian higher judiciary has power to review any legislative, executive and administrative action of the State. The Higher Courts in India entertain the petitions which are being filed by the public spirited persons in the public interest. Again, one should not forget that it is all because of the judicial activism that the indigent persons, members belonging to socially and educationally backward classes, victims of human trafficking or victims of beggar, transgender, etc. have somehow been provided with the adequate legal assistance in the process of the enforcement of their fundamental rights. Furthermore, Article 142 of the Indian Constitution gives the Supreme Court a power to pass suitable decree or order for doing complete justice in any pending matter.



⁵³ *Id.*

⁵⁴ (2008) 1 S.C.C. 683.