

Judicial Activism
A Theory Of Judicial Philosophy

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In order to understand the true meaning of expression – “Judicial Activism”, for discussion, I think, it would be appropriate to consider various terms usually spoken of in context to administration of justice.

2. The tem ‘Judicial’ is an adjective from French word ‘Judex’ meaning a Judge, it means or pertaining or appropriate to the administration of justice or courts of justice or a Judge thereof or in the proceedings therein”. The right to pronounce a definitive judgment is considered the sine quo non of a Court. [See Sec. 19 Indian Penal Code by Ratanlal & Dhirajilal. 20th Edn.]

3. The word “Court of Justice” denotes a Judge who is judge empowered by law to act judicially as a body, when such judge or body of judges is acting judicially. The word “Judiciary” again is explained to mean the Judges of a State Collectively. [Concise Oxford Dictionary, New Edition for 1990’s]

JUDICIAL ACTIVISM

4. The term judicial activism is explained in Black’s law Dictionary, Sixty Edition, [Centennial Edition (1891-1991)] thus, “Judicial philosophy which motives judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate Judges. It is commonly marked by decisions

calling for social engineering and occasionally these decisions represent intrusions in the legislative and executive matters.”

5. Though it is the legislature, which makes the Law, the Judgments rendered by the Supreme Court and High Courts give the Law a concrete shape, which the people understand better as the Law. Hence, there is importance of the decision making process. In the Common Law, development is permitted, if not expected in Stature law, there must be at least a presumption that Parliament has on the topic it is dealing with, said all that it wanted to say, Justice V. R. Krishana Iyer, the greatest activist Judge, India has so far seen, feels, judicial activism is a device to accomplish the cherished goal of social justice. He said,

“ After all, social justice is achieved not by lawlessness process, but legally tuned affirmative action, activist justicing and benign interpretation within the parameters of Corpus Juris”.

[In Search of Social Justice, page.8]

LAW

6. Salmond defined “Law” in terms of its purposes. According to him, law is a body of principles recognized and applied by the State in the administration of justice.

Roscoe Pound’s essential contribution to jurisprudence is that law should be used as an instrument of social control. He coined the phrase “social engineering” as a description of the problems of the legal order in balancing individual wants and social interests.

LAW AND JUSTICE

7. It may be emphasized here that, Law and justice are, however, two distinct concepts. No doubt, they are interrelated but each has distinct sphere of its own. The concept of Justice is even older than that of law. Justice is the legitimate end of law. It must, therefore, necessarily precede law because people thought of law as they wanted justice. Justice is a social value. Therefore, it is said that "it is not the words of law but the internal sense of it that makes the law. Letter of law is nobody, sense and reason of law is the sole." These, in my view, are the established principles in judicial philosophy.

ACTIVISM AS OLD AS LINCOLN

8. Abraham Lincoln has pointed out,

“ Have we not lived enough to know that two men may honestly differ about a question, but both be rights? In this paradox lies the secret of judicial process. There are areas where the judges must be activists and there are areas where they must be passivists. In which areas they should be activist and in which areas they should be passivists can be gathered from the knowledge we get by experience.”

9. No one will dispute that judiciary has to perform an important role in the interpretation and enforcement of human rights inscribed in the fundamental law of the country. Therefore, it is necessary to consider what should be the approach of the judiciary in the matter of constitutional interpretation. An approach must be a creative and purposive approach in the interpretation of various rights embodied in the Constitution. With a view to advancing human rights jurisprudence and social justice. I stress the aspect because I believe social justice approach is the command of the Constitution of India.

10. It reminds me what Chief Justice Ahmedee [as he then was] has said in his interview of the week to The Sunday observer dated April 20-26, 1997. The

query was “ There is much talk about judicial activism. What does that mean? How far should it be carried in democracy?” to which he answered.

“ I have always disapproved of this label of judicial activism because it gives the impression that the Court was earlier passive, which is incorrect. What is known as activism is where the judiciary takes decisions in sensitive cases, which are sensationalized by the media. When the media highlights the case of an influential person, it often gets referred to as activism. But the role of the court is limited.

The concept of judicial activism and public interest litigation are connected. This started in the Seventies. The legal aspect of PILs is the waiver of the rule of locus standi. The normal rule is that only the aggrieved party can move the court. But the court found in certain cases that the aggrieved party was so placed because of economic constraints or lack of awareness of rights that it could not move the court. So the court said that even if a third party moved it, the locus standi rule would be waived, if the petition had substance. In a situation where a mass of people would benefit, the court may not insist upon the locus standing rule. Then it becomes public interest litigation. This is sometimes described as activism or assertive action.”

11. In this context, it would be appropriate to recall the words of Dr. B. R. Ambedkar in context of the Constitutional provisions touching to the core of the role of the Supreme Court.

On the day of the adoption of Constitution of India, Dr. Ambedkar said,

“.....Constitution of our country would be found to be bulky.....It would be difficult for those who have been through it to realize its silent and special features.”

Speaking about Article 32 of the Constitution, Dr. Ambedkar said,

“.....If I was asked to name any particular article in this constitution, as the important as one, without which this constitution would be nullity, I would not refer to any other article except this one.....”

He further said,

“It is the very sole of the Constitution and very heart of it.....”

12. Other aspect, which I would like to mention at this stage is from the answers given by Dr. Ambedkar to various amendments suggested by the members in the Draft Constituent Assembly, in regard to the provisions contained in part IV Directive Principles of State Policy.

13. It was criticized by several members in the Constituent Assembly that the directive principles are superfluous or mere guidelines or pious principles or instructions. They are ineffective as they are non-justiciable, that they are apt to land us in a dilemma, and that they may be out of date. In this speech Dr. Ambedkar answered:

“ What are called directive principles is that they are instructions to the Legislature and the Executive. Wherever there is grant of power in general terms for peace, order and good government that it is necessary that it should be accompanied by the instructions regulated its exercise.”

Dr. Ambedkar further said,

“ It is said that the Directive principles have no legal force.....I am prepared to admit it, but I am not prepared to admit that they have no sort of binding force at all. Nor am I prepared to concede

that they are useless because they have no binding force in law.....” [See Constituent Assembly Debets].

It is not the Constitutional vision of Dr. Ambedkar, which has been inspired from judicial philosophy?

14. What part III (Fundamental Rights) outlines for the individual, Part IV outlines for the entire fabric of society in which the individual is but a component part. Ordinarily there can be no conflict between the two but if it arises, it is capable of resolving the conflict, if only it is remembered that the Directives are there to tame the wild extravagance of assertion of the individual regarding his fundamental rights. The latter are the present irreducible minimum of rights of individual in a free democracy while the Directive Principles are the character for the further welfare of the State. Part IV can in no sense be considered as subordinate to Part III. The gist of superiority cannot be split out of the test of justiciability. To correctly put it if the Directive Principles are made non-justiciable, it is simply because courts are not suited to administer them. They are nevertheless legal principles, law in face but only they have to be adhered to by the State in its functions as an administrative and legislative agency. Article 37 enjoins them as fundamental in the governmental rights are subject to reasonable restrictions in the interests of the general public. In interpreting those rights the courts will be obliged to lay down canons for determining what is reasonable and it is impossible that a restriction should be reasonable if it offends against the directive principles.

15. Considering the scope and extent of Article 32[2] of the Constitution of India, the Supreme Court in clear terms observed that the court has power under Article 32[2] to issue whatever direction. Order or writ that may be appropriate in a given case for the purpose of enforcement of a fundamental rights. It is not confined only to issuing the high prerogative writs, which are hedged in by strict conditions differing from one writ to another. This is clear from the words “in the

nature of “ in clause [2]. The Court has direction to evolve a procedure appropriate in the circumstances of given case for the purpose of enabling it to exercise its power to issue such direction, order to writ. There is no constitutional compulsion to follow the adversarial procedure only. The court can adopt such procedure as it thinks fit in exercise of its new jurisdiction created to enforcement of the fundamental rights. In entertaining the public interest litigation, the Supreme Court is merely assisting in realization of the Constitutional objectives [Bandhua Mukti Morach Vs/ Union of India (1984) 3 SCC 161].

16. It is also undisputed that where the Court finds, on being moved by an aggrieved party or by any public spirited individual or social action group, that the executive is remiss in discharging its obligations under the Constitution or the law, so that the poor and the underprivileged continue to be subjected to exploitation and injustice or are deprived of their social and economic entitlements or that social legislation enacted for their benefit is not being implemented thus depriving them of the rights and benefits conferred upon them, the Court certainly can and must intervene and compel the executive to carry out its constitutional and legal obligations. [State of H.P. Vs. A Parent of a Student, (1985) 3 SCC 169].

17. Now, it is clear that the fundamental rights and directive principles constitute the conscience of our constitution. The purpose of the Fundamental Rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for or all. The purpose of the Directive principles is to fix certain social and economic goals for immediate attainment by bringing about nonviolent social revolution. Through such a social revolution the Constitution seeks to fulfill the basic needs of the common man and to change the structure of our society. It aims at making the Indian masses free in the positive sense. Without faithfully implementing the Directive principles, it is not possible to achieve the welfare State contemplated by the

Constitution. Therefore, the Supreme Court has now removed the wall between Part III and Part IV of the Constitution by holding that the 'Directive Principles are also fundamental and they must be read in the part III.

18. The democratic ideal rests on the foundation of the equality, liberty and ultimate control of the Government. In case of *Kasturi Lal Vs. State of J & K* [AIR 1980 SC 1992] directive principles are held as reasonable restriction in the public interest on the fundamental rights. The Supreme Court while interpreting the Constitution also explains what the law is as it is constitutional obligation upon it to see that while interpreting any provisions of law those enunciated in the part are kept in view that the people be given main focus.

19. In case of *Nilabati Behera Vs. State of Orissa* [(1993) 2 SCC 746] the Supreme Court has evolved 'new tools' and moulded remedy to provide redressal in case of deprivation of fundamental right like that under Article 21, especially for habeas corpus.

20. It is therefore, clear that lack of care by the executive or the legislature has given rise to new form of litigation namely, 'public interest litigation'. Realising its constitutional obligation towards public, the judiciary has to adopt aggressive form, which has been termed by some as "judicial Activism" in common parlance. Judiciary has brought forward an ingenious device to bring justice to the people. Namely public interest litigation. It has not only protected rights of children and women but others also the landmark judgments have been delivered by the Supreme Court which justify the progressive and inherent judiciary to do justice to the people as per the mandate of the constitution of India. It is in this sense of the term that the true meaning of activism is the theory of judicial philosophy.

21. It will not be out of place to mention what our beloved and revered the Honourable Chief Justice Dr. A. S. Anand while delivering the Justice Krishna

Rao memorial lecture at the National Law School at Bangalore has said, and to quote.

“.....The courts must not shy away from discharging their constitutional obligations to protect and enforce human rights”.

He further added,

“ While acting within the bound of law they must always rise to the occasion as guardians of the Constitution, criticism of judicial activism notwithstanding”.

At the same time, he has observed that while expounding and expanding the law, judicial enthusiasm and judicial restraint are two sides of the same coin and with a view to see that judicial activism does not become judicial adventurism and lead a judge going in pursuits of his own notions of justice and beauty the Honourable the Chief Justice Dr. Anand has cautioned that we should not ignore the limits of law. The bounds of his jurisdiction and binding precedents in dealing with public interest petitions. “ It should develop on a consistent and firm path” he added.

In other words, according to him,

“ ...Judicial authoritarianism cannot be permitted. The Courts have to be very careful to see that their exercise of judicial creativity for attaining social change is not allowed to run amuck and every court functions within bounds its own prescribed jurisdiction.....”

22. Supporting the judiciary’s role in intervening wherever its support was needed to get certain directives implemented for the public good, the Honourable the Chief Justice Dr. Anand Said,

“ ..Intervention in such areas is because of the peoples perception that Judicial interventions is perhaps the only feasible correctional remedy available.”

23. Judicial approach is increased partially in every walks of life, cleaning up from politics to environment. There cannot be any dispute that the courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy, which forms integral part of fundamental rights as per the Constitutional wisdom.

24. To conclude, judicial activism is justice personified. What is inherent in the body of the Judiciary has come on surface, to do justice and to stop miscarriage of justice. It has shed its shyness of adolescence and has learnt to face bravely the odds put by the Establishment. It has realized that it has a Third Eye of Lord Shiva to burn what is injustice. For that, every constitutional judge must be active and never passive or negative. Judicial activism is a blood - cell of the Judiciary. Therefore, the phraseology "Judicial activism" is nothing but a new facet and expanded meaning to judicial interpretation and its implementation within permissible limits cannot be termed as a mere fiction inasmuch as with passage of time basic meaning do not change, but expansions are given new colour to the meaning.
