

JUDICIAL ACTIVISM — THE ENFORCEMENT OF HUMAN RIGHTS IN INDIA

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Abstract

The most conspicuous feature of the Indian legal system is judicial activism and almost institutionalization of government by the judiciary. This activism is often assisted by activist lawyers, social activists, journalists and several others. The Supreme Court of India through innovative exercise of judicial power was fairly successful in protecting and promoting human rights and this process of creative exercise of judicial power is termed as judicial activism. The means and methods by which the judiciary expands its role is through public interest litigation (PIL). This paper is aimed at incisive analysis of judicial activism and PIL in promoting human rights of the weak and the vulnerable.

Keywords: *judicial activism, fundamental rights, locus standing, PIL.*

Introduction

The radical transformation of judicial role in modern welfare societies is attributed to the presence of democratic checks and balances, to effectively realize Bill of Rights or fundamental freedoms and to ensure the welfare of the oppressed and the marginalized.² Despite constitutional incorporation of the above principles, governments often become despotic and make the life of the powerless miserable. In recent years, the responsibility of maintaining constitutional checks and balances and of upholding the dignity of the citizens against overwhelming government led the judiciary to assume activist role. Nevertheless, legitimacy of such an activist role has been often objected on the grounds of democratic ideals such as representation and accountability.³ Further, it has been pointed out that the courts suffer from institutional incompetence as the judiciary is ill suited to make laws and take certain decisions.⁴

The judiciary during the formative period of Indian constitutionalism, attached importance to political neutrality and being a conservative institution attached primacy to individual fundamental rights rather than to the welfare of the poor and the marginalized.⁵ The government committed to general welfare sought more powers to curtail fundamental rights through constitutional amendments aimed at limiting judicial scrutiny.⁶ The powers of the parliament and the government increased and abuse also increased culminating in 1975-77 Emergency and political despotism.⁷ Then the people lost their faith in democratic institutions and slowly started approaching the Court and the Court started responding by assuming the activist role.

Judicial Activism: Growth and Development

Judicial activism may be characterized as expansive exercise of judicial power or daring use judicial power to effect social change through policy making. Initially activism was generally understood to be the

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²M. Capelleti, *Judicial Process in Comparative Perspective*, (Oxford: Clarendon Press, 1989) p.4. Sir Garfield Barwick, "Judiciary Law: Some Observations thereon", 33 *Current Legal Problems* 241 (1980). Arther S. Miller, *Judicial Activism and American Constitutionalism: Some Notes and Reflections*, in J.R. Pennock and J.W. Chapman (eds.) *Constitutionalism NOMOS*, Vol. XX, (New York: New York University Press, 1979), p.333.

³Micheal J.Perry, *The Constitution, the Courts and Human Rights*, (New Delhi: Willey Eastern Ltd, 1982) pp 9-36.

⁴Lord Devlin, *Judges as Law Makers*, 39 *MLR* 1, 16 (1976).

⁵Upendra Baxi, "Taking Suffering Seriously; Social Action Litigation in the Supreme Court of India", in Upendra Baxi (ed.) *Law and Poverty: Critical Essays* (Bombay: N.M. Tripathi, 1988) pp 388-89.

⁶*Id.*, at 390.

⁷Upendra Baxi, "Judicial Activism: Usurpations or Re Democratization", in Jagga Kapur (ed.) *Supreme Court on Public Interest Litigation*, Vol.3 (New Delhi: LIPS Publication, 1999) pp A-131-144.

practice of judges to overrule legislative enactments on the ground of inconsistency with the provisions of written constitution which was subject to sharp critique over the years. Generally the constitutional structure including the separation of powers, checks and balances, federalism, bicameralism, representation, independent judiciary and judicial review forms the bases of judicial activism. Judicial activism is sometimes characterized as progressive exercise of judicial power or use of judicial power to effect socio economic and political changes through policy making.⁸

Activism at the Commencement of the Constitution

The constitutional articulation of judicial role in India appears to be between the courts in England and in United States because the conception of individual rights constituting a limitation on the powers of the government was discouraged by vesting Parliament with the power to amend Part III of the Constitution. But the legalist and conservative Supreme Court, at the formative period, invalidating some progressive legislations aimed at realizing social justice invited the criticism that the courts are a major stumbling block in the process of socio-economic transformation of the Indian society.⁹ This was so in spite of judicial acceptance of relative supremacy of the Parliament and judicial application of three principal limitations on the power of judicial review, namely, constitutional limitations, intrinsic limitations and self imposed limitations.

At that time it was observed that the judiciary was more active in protecting fundamental rights particularly right to equality and property which led the courts to issue stay orders against implementation of Zamindari abolition laws on the ground of violation

of Article 14 of the Constitution.¹⁰ Similarly, the Court declared Madras Reservation scheme as unconstitutional.¹¹ These paved the way for first amendment to the Constitution providing for insulation of certain laws from judicial scrutiny. While introducing the first amendment, Nehru made the remark that the “magnificent” edifice of the Constitution is being “purloined” by the judges and lawyers.¹² These constitutional amendments drastically curtailed judicial powers and therefore the assertion “ours is the only Constitution in the world that needs protection against itself.”¹³ Fortunately, Nehru effectively resisted the urge to attack judiciary by adherence to constitutional values and democratic principles.

During this first phase of judicial activism, the Supreme Court, drawing a distinction between foundational rights and the directive principles on the ground that the former is justiciable while the latter non-justiciable relegated the directives to the background.¹⁴ By this the Court incurred the wrath of the political establishment and it is observed that in the Indian context such distinction would adversely affect governmental effort to ameliorate the misery of the poor and the oppressed. This approach prevailed until the decision in *Keshavananda*,¹⁵ which gave pride of place to the directive principles also. The conflict between the judiciary and the political establishment by virtue of courts emphasis on fundamental rights and the regime’s commitment to the welfare of the poor resulted in the several constitutional amendments curtailing judicial review.

After Nehru era, elements not committed to basic constitutional values and democratic principles began to operate the system as the democratic structures easily allows them to do so. The political establishment in the name of securing general welfare and social justice and capitalizing on relatively flexible procedure

⁸*Ibid.*

⁹*Id.*, at 133.

¹⁰*Kameshwar Singh Vs. State of Bihar*, AIR 1952 SC 252.

¹¹*State of Madras Vs. Champakam Dorairajan*, AIR 1951 SC 226.

¹²Upendra Baxi, “Judicial Activism: Usurpation or Re-democratization?”, in Jagga Kapur (ed.) *Supreme Court on Public Interest Litigation* (New Delhi: LIPs Publication, 1991)., Vol.1 A 132-133.

¹³Hidayatullah, *Right to Property and the Indian Constitution* (Calcutta: Calcutta University Press, 1983) 143.

¹⁴*Ibid.*

¹⁵*Keshavananda Bharathi Vs. State Kerala*, AIR 1973 SC 1461.

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of amending the Constitution enacted several constitutional amendments to curtail the constitutional authority of the courts and to reduce the significance of fundamental rights. This process culminated in 1975-77 internal emergency and its consequences were the widespread violation of civil liberties, increasing governmental lawlessness and the tyranny of the majority party.

Post Emergency Judicial Activism

The 1975-77 Emergency saw the political elites utter contempt for the sanctity of the constitution and the disintegration of the Congress party due to it becoming a heaven for political opportunists interested in government jobs institutionalized corruption and governmental lawlessness.¹⁶ State committed to the welfare of the people perpetuated injustice. Hundreds of thousands of people incarcerated in jail as under trial prisoners, young persons were castrated and sold as eunuchs, women and children were bought and sold and prisoners were blinded. Welfare benefits did not reach the poor but middlemen became rich. Bonded labour continued and minimum wage laws were not enforced.¹⁷

The people disillusioned with the democratic institutions slowly moving toward courts with grievances against lawless government through public interest litigations. The courts started playing a dominant role in exposing the lawless state and also the courts tried to legitimize this process of judicial activism. The post emergency activism which was inaugurated with rigorous enforcement of rights of prisoners and other disadvantaged groups was slowly extended to enforcement of socio economic rights enshrined in part IV Directive principles of the Constitution. It was further extended to uphold constitutional values and political morality.

(a) Rigorous Enforcement of Fundamental Rights

The first phase of post emergency activism was concerned with rigorous enforcement of fundamental

rights of the poor and the marginalized through Public Interest Litigations (PIL) and through expanding the scope of Article 21, the right to life and personal liberty. This process started with the decision in *Bihar Undertrial Case*¹⁸ where the Supreme Court passed series of orders relating to bail to the indigent and poor accused, jail reform and recognition of a fundamental right to speedy trial. The Court in the mean time recognized a series of unenumerated fundamental rights through progressive interpretation of fundamental rights in general and Article 21 life and liberty in particular. Thus the Court in several cases created rights of prisoners which included prohibition of hand cuffing and solitary confinement without sufficient causes, rights of the inmates of protective homes to decent conditions of living, right to legal aid for the poor criminal defendants, the right to speed trial, right against cruel and unusual punishment which include delay in execution of death sentence, the rights of the bonded labourers to release and rehabilitation, the right to compensation against illegal and arbitrary detention and finally democratic right to know. The Supreme Court and some High Courts could do so with the help of social activists, activist journalists and some members of the bench and the Bar.

(b) Realization of Directive Principles

The second phase of judicial activism addressed the problem of enforcement of moral rights associated with directive principles which are essential to ameliorate the misery of the masses. At the close of 1975-77 Emergency many promises of the establishment remained unfulfilled and people knew that the courts have constitutional power of intervention which can be invoked to ameliorate their miseries arising from repression, governmental lawlessness and administrative deviances.¹⁹ Thus bonded and migrant labourers, womens and children who are bought and sold, slum dwellers and pavement dwellers and many more groups now folk to the Supreme Court seeking justice.²⁰

¹⁶ *Supra* n.4, at 386.

¹⁷ *Ibid.*

¹⁸ *Hussainara Khatoon Vs. Home Secretary, Bihar AIR 1979 SC 1360.*

¹⁹ *Supra*, no.4, A-91.

²⁰ *Ibid.*

The non-justiciable nature of the directive principles virtually prevented, to a certain extent, the courts from ensuring general welfare through creating and enforcing welfare rights so that it can advance remedies to the poor and the oppressed. The court therefore had to read the directive principles into fundamental rights so as to enforce individual entitlements to public assistance in certain cases. The Supreme Court relied on Article 21 of the Constitution, which guarantees individual the fundamental right to life and personal liberty to enforce the claims of the poor and the oppressed on the ground that the right to life implies right to live with human dignity and free from exploitation.²¹ The Court also asserted that this right to live with human dignity derives its life breath from the directive principles. Thus the Court has attempted to recognize and enforce new fundamental rights gradually erasing the distinction between part III and IV of the Constitution. The social, economic and cultural rights guaranteed under directive principles are continually made enforceable as integral part of declared fundamental rights. The Supreme Court has actually legislated new fundamental rights some of which were, expressly, after deep deliberations, excluded from part III of the Constitution by the makers. These rights included positive welfare rights such as right to food, shelter, livelihood, work, education, health, clean air, wholesome environment and the like.²²

The Court by diluting the distinction between part III and Part IV of the Constitution and through extensive reading of directive principles into fundamental rights recognized several new rights which are now integral part of Indian constitutional jurisprudence. These new rights were made enforceable as part of the declared fundamental rights. The rights so recognized include the right to health, right to literacy, right to speedy trial, right to food, right to drinking water, right to minimum wages, right to free legal aid, right to be rehabilitated from bondage and a host of others.²³

The judiciary in India has to struggle hard to bring law into the services of the poor and the oppressed as the democratic process utterly failed to deliver the goods. With the active assistance of social activists and public interest litigators, judiciary is promising innovative remedial attention of the governmental commitment to welfare and relief of the oppressed. Former Chief Justice P.N. Bhagwati rejecting “bureaucratic tradition” of mechanical and rule bound adjudication declared that while interpreting the Constitution the Court is neither bound by doctrines of literal meaning, or original intent, nor constrained to read into it any formal rights and liberties. He also pointed out that the text of the Constitution can be read as vibrant with socio economic ideology gleaned to the goal of social justice and it can also be infused with principles that transcend mere formal quality, and transform legal rights into positive social entitlements.²⁴ Accordingly, the Supreme Court in *Olga Tellis Vs. Bombay Municipal Corporation*²⁵, declared that positive action is required “if the theory of equal protection of the laws to take its place in the struggle for equality, and that in these matters, the demand is not so much for less governmental inference but for positive governmental action to provide equal treatment to the neglected segment of the society”. The courts for the purpose of ensuring realization of directive principles and new found rights adopted the method of public interest litigation (PIL) which will be discussed in the next part of the paper.

(c) Judicial Recognition and enforcement of constitutional values and political morality

Recently the courts have gone one step ahead of enforcing fundamental rights of the disadvantaged to upholding of political morality and constitutional values. The supreme executive discretion was brought under judicial scrutiny and the Court took cognizance of petitions seeking to expose political corruption and abuse

²¹Bandhua Mukti Morcha Vs. Union of India, AIR 1992 SC 38.

²²*Supra*, n.4, at A133.

²³*Supra*; n.4 at A98.

²⁴P.N. Bhagwathi, “Judicial Activism and Public Interest Litigation” 23 *Cohem J of Trans mat L*; 561 (1985).

²⁵AIR 1986 SC 180.

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of power by high political functionaries. By this time political elite started opposing judicial activism on the ground of it being opposed to constitutionally articulated doctrine of separation of powers and undue interference into the functioning of other branches of the government.²⁶ This led to an unsuccessful attempt to enact a parliamentary legislation aimed at discouraging public interest petitions before the courts.²⁷ In spite of such an attempt to curb public interest litigation it has become an integral part of present day judicial process in India.

The public interest litigation is often resorted to uphold rule of law, democratic values and probity in public life. The following are some of the important decisions of the Supreme Court. Firstly, in *D.C. Wadhwa Vs. State of Bihar*,²⁸ Court on the basis of a research conducted by the petitioner held that bypassing legislature through repromulgating ordinances was unconstitutional and opposed to rule of law. The Court also held such practices as fraud on the Constitution. Secondly, in *Punjab and Haryana High Court Bar Association Vs. State of Punjab*²⁹ as against High Courts dismissal of a petition seeking direction to the police to investigate and prosecute culprits involved in abduction and murder of an advocate, his wife and minor child, directed the CBI to make fresh investigation of the case. Thirdly, *State of Bihar Vs. Ranchi Zila Samata Party*,³⁰ High Court ordered the investigation by the CBI of the misapplication of the public funds to the tune of 500 Crores by the Animal Husbandry Department of the State which was earlier investigated by the state police. The court now directly involved itself in controlling executive exercise of power. Fourthly, in *Shiv Sagar Thivari Vs. Union of India*,³¹ the declared allotment of Houses by Delhi Development Authority under Ministers discretionary quota as abuse of discretion on the ground of arbitrariness malafide and irrelevant considerations. Last but not the least in *Vineet*

Narain Vs. Union of India,³² the Court made series of directions on failure of CBI to carry out investigation properly in *Jain Havala* case. The Court in fact took over supervision of the investigation by the Agency which is in fact has to be supervised by the political executive.

The cumulative effect of judicial activism is that now the Court supervises every aspect of governance and many cases of scams and corruption have seen the light only, after judicial intervention. Now many cases against high political functionaries such as Ministers and IAS babus who are involved in corruption and abuse powers is really supervised by the Supreme Court whether they be Bhoosa Scam,³³ commonwealth games scam. 2G Scam, Coalgate, and the like. Now the reality is that the Court has taken over the administration of the country. The Court for the purposes of carrying out the above functions introduced new rules and procedures which are normally discussed under the heading public interest litigations.

Public Interest Litigations

The Supreme Court has expanded the frontiers of fundamental rights, insisting that the state cannot act arbitrarily but instead act reasonably and in public interest, on pain of its action being invalidated by judicial intervention. The Supreme Court has also developed the innovative strategy of public interest litigation (PIL) for the purpose of making basic human rights meaningful for the large masses of people in the country and making it possible for them to realize their social and economic entitlements. The impact of judicial activism aimed at liberating the poor and the oppressed through judicial initiative was the enormous increase in volume of public law litigation as opposed to private law suits. Public law litigation no longer concerned with resolving private disputes according to principles

²⁶ *Supra*; n.4 at 390.

²⁷ Bill No. 53 of 1996 - The Public Interest Litigation (Regulation) Bill 1996 was introduced and was also allowed to lapse for details see *supra* n.6 at A131-144.

²⁸ AIR 1987 SC 579.

²⁹ AIR 1993 SC 136.

³⁰ AIR 2006 SC 232.

³¹ (1997) SCC 444.

³² AIR 1998 SC 889.

³³ AIR 2006 SC 232.

of private law but it deals with individual or groups grievances over the administration of some public or quasi-public programme and also with public policies embodied in the governing statutes or constitutional provisions. The law suits through which grievances against the government and the administration is espoused is described as public interest litigation and now a days PIL occupies the large portions of public law litigations going on in appellate courts.³⁴

It is claimed that soon after 1975-77 emergency, a new kind of litigation entered the landscape of constitutional adjudication in India. It was referred to as PIL. “The term is American but the phenomenon that the term sought to describe was distinctly Indian”.³⁵ To emphasize its distinctiveness, it has been insisted that the correct term to describe the phenomenon is “social action litigation”.³⁶

It is heartening to note that PIL was greeted and appreciated in India by academicians, particularly legal academics, social activists and to a certain extent public at large. It has been claimed that PIL contains all the possibilities of a silent revolution, it made the courts to take suffering seriously, it created “a new juristic horizon”³⁷ in that “new jurisprudence was being developed to suit modern conditions,” it created a major breakthrough in the delivery of social justice and it was seen as “institution for the delivery of socio-economic justice in India”.³⁸

Now the debate on PIL in India is focusing on whether it is a reform or revolution. But at the same time it should be noted that some have joined the fray to attack PIL on the ground that it was a strange new development inconsistent with the rule of law as they understood it. And also a few held that PIL challenged the received tradition of judicial process, perhaps, on the ground that there exist vast difference between PIL and private legations.

Scope of Public Interest Litigations in India

PIL was inaugurated in India by some Supreme Court justices with the active co-operation of social activists interested in espousing the cause of the poor and the oppressed. It represents a sustained effort on the part of the highest judiciary to provide access to justice for the deprived sections of Indian Humanity.

The first phase of PIL in India was concerned with the conditions in which men, women and children were incarcerated in prison and other places of detention. The first typical PIL was filed by an activist advocate which was based on a series of articles in a national daily, the *Indian Express*; exposing the plight of Bihar under trial prisoners.³⁹ It has been pointed out that the final outcome of such writs did not result in the Court developing a criminal due process, even though it made rapid strides in advancing a much more rigorous review of administrative actions.

The second phase was concerned with questions of social justice and welfare. In a series of cases concerning bonded labourers, conditions of work and pay of unorganized labourers, plight of poor peasants, pavement dwellers, street hawkers and a host of others, the Court made attempts to render justice. First, for instance in *Bandhua Mukti Morcha Vs. Union of India*,⁴⁰ a concerning bonded labour, the Court directed both central and state governments to chalk out some programme to release and rehabilitate bonded labourers in accordance with provisions of the Bonded Labour Abolition Act, 1976. But at the same time observed that it has no jurisdiction to frame any scheme for the purpose of rehabilitation. However, in *Neeraja Choudhary Vs. State M.P.*⁴¹ justice Bhagwati held that Article 21 and 23 of the Constitution would not only require identification and release of bonded labourers, but also their rehabilitation on release. The directions were issued to chalk out programmes or schemes for rehabilitation

³⁴N.R. Madhav Menon, “Public Interest Litigation: A Major break Through in the Delivery of Social Justice”, 97. *B.C. I* 150 (1982).

³⁵*Ibid.*

³⁶*Supra* no. 4 at p.388.

³⁷Rajeev Dhavan, “Law as struggle: Public Interest Litigation in India”, 30 *JILI*. 306-307 (1994).

³⁸*Supra* n.23 at 150.

³⁹*Supra* n.17 at 1360.

⁴⁰AIR 1992 SC 38.

⁴¹(184) 3 SCC 243.

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and its supervision by a vigilance committee in which persons suggested by the Court were to be taken as members.⁴²

Second, *Olga Tellis Vs. Bombay Municipal Corporation*,⁴³ a case concerned with eviction of pavement dwellers and slum dwellers from the streets of Bombay. The Court while recognizing a right to livelihood asserted that, in the interest of justice, before evicting slum dwellers government must provide them alternative accommodation as far as possible or some other sort of relief should be made available to them.

Third, in *M.C. Mehta Vs. State of Tamil Nadu*,⁴⁴ through the Supervision and direction of the Supreme Court a fairly successful attempt to ameliorate the conditions of child labourers in Shivakashi match industries were undertaken.

Last, but not the least, in *Unnikrishnan Vs. State of A.P.*⁴⁵ the Court, while declaring a fundamental right to primary education gave a series of directions to improve access to higher education. Further during this phase of PIL the Court also examined the questions of legal entitlements of poor and also environmental issues and the like.

At this point PIL was regarded as directly concerned with the predicament of the poor and the disadvantaged. But Indian PIL soon transcended its earlier self imposed limitation of considering and enlarging the cause of the disadvantaged it was extended to promote a range of public causes including the manner in which High Court judges could be transferred and the corruption of politicians could be dealt with.

Nature of Public Interest Litigations

Justice P.N. Bhagwati, in *Judges Transfer case*⁴⁶ while attempting to define the nature of PIL in India observed: “Where a legal wrong or injury is caused to a person or to a determined class of persons by rea-

son of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability, or socially or economically disadvantaged position, unable to approach the Court for relief than public can maintain an application for appropriate direction, order or writ in the High Court under Article 226 and in case of breach of fundamental rights of any such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such persons or determinate class of persons”.⁴⁷

Further in another case he also observed that the court can be moved for the above purpose by a member of the public by addressing a letter drawing the attention of the Court to such legal injury or legal wrong.⁴⁸ The court would cast aside all technical legal rules or procedures and entertain the letter as a writ petition on the judicial side and take action upon it.

The above observations provide for the following elements concerning the amplitude of PIL in India. Firstly, PIL is concerned with any legal wrong or injury, legal burden caused or threatened to be caused to a person or to a determinate class of persons. Secondly, a person or determinate class of persons was by reasons of poverty, helplessness or disability or socially or economically disadvantaged position cannot himself claim relief before the courts. Thirdly any member of the public can maintain an application for appropriate directions, order or write on behalf of such a person or class of persons. Fourthly, the High Court can be moved for an infraction of any right while the Supreme Court can be moved in case of violation of fundamental rights. Fifthly, the Court can issue any direction, order or writ for the redressal of grievances

⁴²*Ibid.*

⁴³AIR 1992 SC 38.

⁴⁴AIR 1992 SC 38.

⁴⁵(1996) 6 SCC 756.

⁴⁶S.P. Gupta Vs. Union of India, AIR 1982 SC 149.

⁴⁷*Id.* at 252.

⁴⁸Peoples Union for Democratic Rights Vs. Union of India, AIR 1982 SC 1473 at 189.

and this may include directions for affirmative action and continuous monitoring. Lastly, the Court can be moved by a member of the public even by addressing a letter which the Court would convert into a writ petition.

Distinctive features of PIL in India

The judiciary led PIL in India possesses certain distinctive features each of which is not novel and in some they are may be cases contrary to the traditional legalistic understanding of judicial functions. The principal distinctive features include (a) liberalization of rules of *locus standi*, (b) procedural flexibility and adoption of non adversarial procedures and (c) remedial flexibility and supervision.

(i) The Doctrine of *Locus Standi*: Traditional understanding of litigation requires that the participants must have some real interest to promote through the suit. The American Supreme Court has repeatedly relied on standing to reject PIL suit without consideration of the merits. Unusually, narrow approach to standing has been justified by the floodgate arguments, the desire to exclude Court birds (Meddlesome interlopers) and the unwillingness or inability of the courts to adjudicate on matters that are best left to the discretion of the policy makers, attorney generals and other so called guardians of public interest. American law presumes that only someone with a personal stake can approach courts.⁴⁹

The Indian Supreme Court rejected the presumption that someone with some personal stake can approach the Court by allowing any member of the public to seek judicial redress for a legal wrong caused to a person or to a determinate class of persons who by reason of poverty, helplessness or disability or socially or economically disadvantageous position is unable to approach the Court directly. This doctrine of ‘representative standing’ has been extensively used in India to enhance access to justice to the poor and the oppressed, and to encourage social action by empower-

ing representatives to approach the Court on behalf of the poor and the oppressed.⁵⁰

The doctrine of standing articulated in *S.P. Gupta*⁵¹ (Judges Transfer case) sometimes described as a “citizen’s standing” where in any member of the public with sufficient interest in the subject matter by alleging sufficient injury to the public interest can approach the Court. The Court also said that such a rule of standing is essential to maintain rule of law and to prevent official lawlessness. Here it is said that the Indian doctrine of *Locus Standi* is much broader than American concept of class action. Another important aspect of the doctrine is that the two doctrines of standing appear to be merged into a single doctrine of ‘Public interest standing’. In this connection the Court said, “While public interest litigation is brought before the Court not for the purpose of enforcing the right of the one individual against another, as happens in the case of an ordinary litigation, it is intended to prosecute or vindicate public interest which demands that violation of constitutional or legal rights of a large number of people, who are poor, ignorant or socially and economically disadvantaged position, should not go unnoticed, unredressed for that would be destructive of the rule of law”⁵².

It has been pointed out that if there is one PIL fact on which there is virtual unanimity, is that the rule of *locus standi* is to be liberalized with change in character and function of the state, it has become necessary that any member of the public having sufficient interest could maintain an action for judicial redress of public injury, provided that the petitioner acts *bona fide* and is not moved by an oblique motivation.

(ii) Procedural Innovations: The Indian judiciary has shown willingness to alter the rules of procedure wherever necessary to render justice. Actions may be initiated not only by way of formal petitions but also by way of letters addressed to the courts or judges who may choose to treat it as petitions. Letters written by

⁴⁹Jarmie Cassels, “Judicial Activism and Public Interest Litigations in India: Attempting the impossible”, 378 *Am. J. Comp. Law* 502 (1989).

⁵⁰*Ibid.*

⁵¹AIR 1982 SC 149.

⁵²*Ibid.*

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individuals acting *pro bono publico* have been converted into writ petitions. Justice V.R. Krishna Iyer and justice Bhagwati, have used the expression “epistolary Jurisdiction” to denote this procedure. A letter written by a prisoner in Tihar Jail complaining in human torture by jail warden was admitted as a writ of *Habeas Corpus* petition under Article 32. Letters written by the Free legal Aid Committee at Haribagh were treated as writ petitions. A letter written by an organization called *Bandhua Mukti Morcha*⁵³ to one of the judges of the Supreme Court drawing attention to the inhuman conditions faced by stone quarry workers in Faridabad was converted into a writ petition.

The practice of converting letters into writ petitions and encouraging such letters by some activist judges of the Supreme Court has been objected to on several grounds. They included, (a) show of some soft corner towards some petitioners, (b) may lead to the growth of factionalism among judges, (c) may induce further docket explosion and (d) may encourage bench fixing or shopping for judges. Against such criticisms it is contended that they are based as an elitist approach and proceeds from a blind obsession with rites and rituals sanctified by an outmoded Anglo-Saxon jurisprudence.⁵⁴

Perhaps, the most visible departure from established procedure occurred in cases involving *suo moto* intervention by the Court. Justice M.P. Thakkar, as the judge of the Gujarat High Court converted a letter to the editor in a newspaper into a writ petition.⁵⁵ This practice has been appreciated by some people on the ground that it represents a major breakthrough in the delivery of social justice. But some others have objected to such practice because it has a tendency to convert justice according to law into justice according to judges discretion. Even the Supreme Court has expressed some reservations at the High Court’s exercise of *suo moto* power.⁵⁶

⁵³ AIR 1992 38.

⁵⁴ *Supra* n.34 at 526.

⁵⁵ Special Leave petition No.2785/79 quoted from S.K. Agarwale, *Public Interest Litigation: A Critique* (Bombay: N.M. Tripathy 1985, p.14).

⁵⁶ *Janatha Dal Vs. H.S. Choudary* (1992) 1 SCC 307.

⁵⁷ Clark D. Cunningham, “Public Interest Litigation in Indian Supreme Court: A study in the light of American Experience”, 28 *Journal of Indian Law Institute* 494 (1987).

⁵⁸ *Ibid.*

(iii) Non-Adversarial Procedure: The Supreme Court while disapproving adversarial procedure for PIL matters stated that traditional procedure may sometimes lead to injustice where the parties are not evenly balanced in terms of social and economic strength, firstly because of the difficulty in getting competent legal representation and secondly, because of his inability to produce evidence before the Court. It has been observed that the non adversarial procedure adopted by the Court are of two types, namely, ‘collaborative litigation’,⁵⁷ and ‘investigative litigation’.⁵⁸ In a collaborative litigation parties will reach an agreement and take necessary action. It has been pointed out that PIL as “a collaborative effort on the part of the claimant, the Court and the government or the public official that basic human right becomes meaningful for the large masses of the people. Here the Court performs three kinds of functions. Firstly, the Court as an ombudsman receives citizens complaints and bring most important ones to the attention of responsible government officials. Secondly, as a forum, the Court provides emergency relief in the form of interim orders. Lastly, the Court as mediator to suggest possible compromises and moves the parties to reach agreement.

In the second type of adversarial procedure parties do not collaborate but the Court takes active role in investigating the facts. Such investigative litigation like representative standing can enhance the poor and indigent people’s access to justice. The device used by the Court was the appointment of special commissions. These commissions seem to perform three jobs. The first is to propose remedial relief and monitor its implementation. The second is concerned with furnishing *prima facie* evidence of facts and data to the Court. Third, a commission may actually decide factual issues on the basis of authority delegated by the Court. Problems will arise where a commission uses fact find-

ing techniques rooted in disciplines other than the law and when their reports are challenged by the respondents.

(iv) Relation between Right and Remedy: As has been pointed out by Professor Abraham Chayes, one of the most important distinguishing features of PIL is the absence of clear relation between right and remedy, and in this connection he observed: “Right and remedy are purely thoroughly disconnected. The form of relief does not flow ineluctably from the liability determination, but is fashioned ad-hoc. In the process, moreover, right and remedy have been some extent transmuted. The liability determination is not simply pronouncement of legal consequences of past events but to some extent a pre condition of what is likely to be in the future. A relief is not terminal, compensatory transfer but an effort to devise a program to contain future consequences in a way that accommodates a range of interest involved”.⁵⁹

However, he himself pointed out that the above description must be read with an important qualifier that “to be sure, the purpose of the decree is to rectify a course of conduct that has been found to bridge rights asserted by the plaintiffs”.⁶⁰ Hence it is found that in PIL the Court may have extensive freedom to fashion sweeping and innovative remedies, and such remedies must be ultimately be based on two findings, (i) that such remedies are required to correct the results of the past conduct by the defendants, (ii) that such conduct had violated plaintiffs rights.

(v) Remedies without Rights: In India PIL, the “disconnection” of remedies from rights began with the practice of issuing major interim orders. The Supreme Court, in *Hussainara*⁶¹ passed four interim orders within four months following the filing of the writ petition which were concerned with release of under trial

prisoners. In *Bhagalpur Blinding cases*,⁶² the Court ordered the state of Bihar to provide medical and rehabilitative services to the blinded prisoners without finally deciding whether the state is liable for blinding. Similarly, in *Olga Tellis*,⁶³ the Court stayed demolition of hutments and issued extensive interim orders concerning rehabilitation and implementation of its directions. It has been pointed out that in large number of PIL cases the Court issued directions which go well beyond the relief necessary to remedy the injury alleged in the petition, indeed, sometimes the relief seems to include everything except the original relief sought. For example, in *Sheela Barse*,⁶⁴ the Court without finally determining the nature of liability of the state in respect of custodial violence issued extensive guidelines applicable to the entire state of Maharashtra which were aimed at preventing custodial violence in future. This practice was described by Prof. Baxi as “creeping jurisdiction which consists in taking over of the direction of administration in a particular case from the executive”.⁶⁵

(vi) Rights without Remedies: The attenuation of remedies from right seems to find its corollary in a recent trend where in rights are declared but no remedy is available. In *Olga Tellis*,⁶⁶ the Court found that the inability of the low wage workers in Bombay to obtain legal housing within a reasonable distance of their place of work “will lead to deprivation of their livelihood”, and consequently the violation of the right under Article 21 of the Constitution. Despite the politicians plea that the state be ordered to undertake a massive low income housing programmes in Bombay, the courts relief was limited to the unenforceable suggestion that such programmes be pursued earnestly.⁶⁷

The courts innovations in the ara of remedies, unlike its approach to *locus standi*, and *non-adversorid* litigation, have provoked comment and debate. On the

⁵⁹Abraham Chayes, The Role of Judges in Public Law Litigation, 89 *Harv. Law Rev.* 1281, 1284 (1976).

⁶⁰*Ibid.*

⁶¹*Hussainara Khatoon Vs. State of Bhhar* (1980) 1 SCC 81.

⁶²*Khatri Vs. State of Bihar*, AIR 1981 SC 928.

⁶³(1985 3 SCC 545).

⁶⁴AIR (1983(SC 126)).

⁶⁵*Supra* n.6 at 143.

⁶⁶(1985) 3 SCC 545.

⁶⁷*Olga Tellis Vs. Bombay Municipality* (1985) 3 SCC 545.

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one hand, the development of remedies without rights through ‘creeping jurisdiction’ attracted criticism that the Supreme Court had began to act as a third legislature. On the other, it is said that the Court “in the name of alleviating the grave public injury arrogate to itself the role of an administrator or an overseer looking after the management and day to day working of all non functioning or malfunctioning public bodies or institutions”.⁶⁸ But the proponents of PIL have always argued that social justice requires the Court to fill the void created by “legislative lethargy and executive indifference”.⁶⁹

Enforceability of Judicial Orders

Once, former U.S. President Jackson made a remark that “John Marshall has made a decision, let him enforce it.” This statement envisages that judicial orders are not automatically enforceable. Accordingly, it is observed that “if the state agencies are not enthusiastic in enforcing Court orders and do not actively co-operate in that task the object and purpose of PIL would remain unfulfilled.⁷⁰ The consequence of the failure of state machinery to secure enforcement of Court orders would only be to deny effective justice to the poor and disadvantaged on whose behalf particular PIL is brought, but it also would have democratizing effect and people may lose faith in the capacity of PIL to deliver justice.

The Supreme Court with a view to evolve a methodology for securing enforcement of court orders in PIL started appointing monitoring agencies. In a case concerning protection of women in police custody, the Court issued various directives and asked women judicial officers to visit police lock ups periodically and report to the High Court whether directives were being carried out or not.⁷¹ Similarly in *Bandhua Mukti Morcha*⁷² the Court gave elaborate directions and with a view to securing implementation of these directions, the Court appointed the joint secretary in the Ministry of Labour to visit stone quarries and to ascertain

whether directions given by the Court had been implemented or not.

However, it should be remembered that when formulating a scheme of affirmative action and giving directions due regard ought to be given by the Court to the potential for successful implementation and the likelihood and degree of response from the implementing agencies. Enforceability of orders, directions or judgments of the Court depends upon their nature and the rights to which they relate. It has been claimed that orders or directions relating to specific obligation can be easily enforced, where as the obligation to ensure the enjoyment of a right in continuity, eg. the enforcement of labour laws, in future, cannot be effectively enforced by the Court. Even regarding payment of legitimate minimum wages the Court was hardly in position to ensure observance of its orders, as in one case, that the jamadar should cease deducting ₹ 1/- per day. In *Bandhua Mukti Morcha*⁷³ the Court has itself recognized that the state of Haryana did not make provision for drinking water at the site of stone quarries though it had agreed to do so.

Obligation under Article 142 of the Constitution

In recent years the Court has tried to justify the issuance of a new types of orders or directions and made attempts to impress upon the legislature, the executive and, in particular, administration that there exists an obligation in them to implement the Court orders under Article 142 of the Constitution. The Supreme Court can invoke Article 142 and issue appropriate orders to mitigate injustice and to do complete justice in any case involving enforcement of fundamental rights and human rights of the poor and the disadvantaged. In a case concerning rehabilitation of prostitutes and their children from brothels, Justice K. Ramaswamy, observed: “Denial of the constitutional rights to the unfortunate women outrage the quest for justice and pragmatism of constitutional ethos which constrain me

⁶⁸Rajeev Dhawan, “Law as struggle: Public Interest Litigation in India”, 36 *JILI* 306-301 (1994).

⁶⁹*Ibid.*

⁷⁰P.N. Bhagwati, “Judicial Activism and Public Interest Litigation,” 23 *Colum. J. of Transnational Law*, 561 (1985).

⁷¹Sheela Barse Vs. State of Maharashtra, 1983 AIR SC 126.

⁷²AIR 1992 SC 38.

⁷³AIR 1992 SC 38, 136.

to avail of Article 142 of the Constitution of India to direct the Union of India as well as all the state governments to evolve in-depth discussions at Ministerial level conference, such procedures and principles or programmes, as indicated in this order, as guidance would help rescue and rehabilitate the fallen women, otherwise, the fundamental and human rights remain pious platitudes to these miserable souls...⁷⁴ The Court has pointed out that the Article 142 would be generally used to enforce final judgment or order and only in special and exceptional circumstances it can be resorted to give direction in PIL to mitigate injustice and to elongate enforcement of fundamental rights and human rights.

Sanctions for Non Enforcement of Court Directions

As has been observed, there are cases in which Court directions are not implemented or only partially implemented. The Court has made attempts to enforce its orders either by instituting contempt proceedings against individual officials in charge of implementing its orders or by awarding compensation or exemplary costs for administrative wrongs involving violations of fundamental rights. The Court is generally reluctant to institute contempt proceedings, firstly, because the Court has to directly confront the administration, Secondly, because it may prove to be diversionary and may discourage PIL petitions. The Court inaugurated the award of money compensation or exemplary costs for administrative non compliance with a *mandamus* issued by Supreme Court.

Judicial Activity and Judicial Activism

The term 'Judicial Activism' having several meanings became an object of contempt as well as praise and it is sometimes argued that one reason for the confusion lies in the role played by the judges. While all judges are active and among them some may be activist. The distinction lies between judicial activity and judicial activism. Upendra Baxi tried to distin-

guish an activist judge from an active judge and that lies in the fact that an active judge regards himself, as it were, as a trustee of state regime power and authority. Accordingly, he usually defers to the executive and legislature, shuns any appearance of policy making supports patriarchy and other forms of violent social exclusion, and overall promotes 'stability' over 'change'. In contrast, an activist judge regards himself as holding judicial in fiduciary capacity for civil and democratic rights of all peoples, especially the disadvantaged, dispossessed, and the deprived. He does not regard adjudicatory power as repository of the reason of the state; He constantly reworks the distinction between legal and political sovereign, in ways that legitimate judicial action as an articulator of the popular sovereign. This opposition implies, at least, one irreducible characteristic of activist adjudication, namely, that a judge remains possessed of inherent power to mould the greater good of the society as a whole. In this sense activist adjudication becomes and remains possible only when a judge retains the power to contest a given political regime's claim to be the principal, or even the sole, articulator of the common good.⁷⁵

Prof. Baxi argued that the notion that judges should be insulated from politics and policy making stems from western democratic values and culture which is characterized by the following. There are a relatively stable two party system, mass media untainted by suspicion of direct regime control, 'high' degree of civic participation in the formation of public policies, even spread of social movement, relatively autonomous legal profession and judicial administration, relative immunity from state lawlessness and official deviance inclusive of corruption in high public places capital intensive high-tech law enforcement and public administration and over all state/law cultures of civility and human rights.

These ideal type attributes do not of course, obtain all the way in the actually existing societies of the First World. But some do, in one or the other mode. This is more than one can say of many a history of post

⁷⁴Gaurau Jain Vs. Union of India, (1997) 8 SCC 114.

⁷⁵Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of(in) Justice*, in ILI (ed). *Fifty Years of the Supreme Court* (Delhi: Indian Law Institute, 2005) 156-209.

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colonial world. The South some time enamored by the grand theses of North such as that of John Rawls, Jürgen Habermas or Ronald Dworkin regarding role of the judges in constitutional adjudication. The judges in India or the south are concerned with establishing a good society with the help of constitutional values by correcting political process.⁷⁶ But active judges often avoid such process of correction. The activist judges have to face some difficulties in promoting visions and values of a constitutionally desired just social order. The regime may appreciate judicial creation and enforcement of certain rights such as prisoners rights, right to due process, speedy trial and right against custodial violence. But may face the ire of the regime if they actively involved in protecting environment as the regime is controlled by multinational enterprises and criminal elements. Activist judges may be programmatic. But form of reactionary judicial activism is not always appreciated and therefore activism must be progressive. The reason appears to be that progressive judicial activism can extend the frontiers of that which is judicially *permissible* in time and place, both in term of political and social transformation. The limits of that which is doable stand defined by arenas, actors and constituencies of social action heavily implicated in transformation of basic structures of state power, while resolutely attacking its malformation and misfeasance. Reactionary judicial activism is an oxymoron.

Contemporary Indian experience educates us in the difficulties of drawing bright lines between that which is doable and that which is not so. This often results in symbolic activism even though marked by social responsibility of activist judiciary. For example it is argued that the Supreme Court orders concerning rights of prisoners, under trials, inmates of juvenile homes may not have any impact on overall respect of Human rights. Further, liberation of bonded labours, abolition of child labour and environmental protection cases were not able to alter the legal structure of governance. The latest being the Right to Information Act on corruption and this raises the utility of citizens char-

ter and other proposed legislative measures such as the Food Security Bill in their capacity to transform the polity. However, one outcome of activism was the judicial perception and the historic tasks have been redefined by each generation of justices since the seventies. What was characteristic in terms of law saying in the seventies is now considered almost routine, integral aspect of the everyday judicial work of the Supreme Court of India and the Indian High Courts. This itself is an amazing feat, one that defies description and prescription, furnishing a social 'meaning' to chaos.⁷⁷

Judicial activism thrives on socio-political support and will become effective only when it inform all dominant social and political institutions constitutional culture of human rights and social justice. It has to draw support from social activists and this involve activist judges to attract as well as admonish social action petitions to protect judicial self image. This naturally lead the Court to treat some petitions with much enthusiasm, particularly those supported by the Bar and it is alleged that no bar based activist petition does not receive the same importance as the former. Therefore, petitioners of some petitions relating to evil effects of globalization depriving millions of poor people of their livelihood may not receive greater attention of the courts because social activists belonging to middleclass or upper middle class may not take interest in those petitions. Thus judicial activism derives its strength from the social actors.

Actors and Constituencies

The ways in which specific constituencies of judicial activism understands its process and power are markedly different. This social understanding varies from ecstasy to euphoria to deep despair and disenchantment. Upendra Baxi, had attempted to provide a typology of social/human rights activists who activate judicial activism.⁷⁸ The following appears to be prominent ones.

- (1) *Civil rights activists*: These are organized groups such as Peoples Union of Civil Liberties - PUCL who primarily focus on civil and politi-

⁷⁶*Id.*, at 172.

⁷⁷*Id.*, at 182.

⁷⁸*Ibid.*

cal rights cases and issues. There are people's rights Activists who concentrate democratic rights including social and economic rights operate in the context of state repression of peoples movements.

- (2) *Consumer Rights Groups*: These formations like Consumer Education and Research Centre CERC, Ahmadabad and the Common Cause, raise issues of constitutional rights and freedoms within the framework of accountability of the polity and the economy, the state and market, to consumers.
- (3) *Bonded Labourer Groups*: Led by Swamy Agnivesh's *Bandhua Mukti Morcha* (Movement for the Liberation of Bonded Labours) and these groups ask for judicial activism nothing short of abolishing wage slavery in India.
- (4) *Citizens for Environmental Action*: Led primarily by an activist lawyer, M.C. Mehta, these groups activate an activist judiciary to combat increasing environmental degradation and pollution. These groups also include struggle against location of civilian nuclear power projects.
- (5) *Citizens Groups Against Large Irrigation Projects*: Primarily led by Sundarlal Bahuguan and Medha Patkar (Narmada Bacchao Andolan) these activist formations ask for the Indian judiciary the impossible for any judiciary in the world, namely, cease and desist order against mega irrigation projects, thus rightly questioning theologies of development at its very foundations.
- (6) *The Rights of the Child Group*: These focus on child labour, the right to literacy, juvenile in custody institutions, rights of children born to sex workers and related issues.
- (7) *Other rights Groups*: There are custodial rights groups concerned with prisoners rights, the poverty Rights Groups intended to ameliorate the misery of hawkers, beggars, pavement dwellers and those subject to starvation, indige-

nous peoples rights groups, women's, rights groups and the like.

- (8) Assorted Lawyer based groups consisting of activist lawyers like Indira Jaising, Rajeev Dhavan and the like.
- (9) Assorted Individual Petitioners consisting of activist individuals who may be called freelance activists.

A cursory look at social categories suggests that these represent different constituencies in the society and they act both as producers as well as consumers of judicial activism. These groups promote conflicting and contradictory claims as the interests of different group differ substantially, for example, conflict between rights group and environment groups. This produces problems for judicial activism and the judicial actors with specific interests to promote. Professor Upendra Baxi identifies different judges with social actors.⁷⁹ Firstly, Foundational judicial actors who played a significant role in developing judicial activism such as justice V.R. Krishna Iyer, P.N. Bhagwati, and others. Secondly, inaugural judicial actors, such as K. Ramaswamy and J.S. Verma in respect of corruption in high places. Third, Restraintivist Judicial Actors, R.S. Pathak or E.S. Venkataramaiah, who tried to insist on limits to public interest litigations. Last but, not the least Anti Activism Judicial Actors who tried to impose limits to judicial activism itself. Apart from the above there are retired justices who have actively involved in promoting judicial activism.

Critique of Judicial Activism

It is said that a preliminary survey of actors and constituencies shows complex and contradictory social presence and roles that shape in diverse ways the milieu of Indian judicial activism. It also carries the message that there is simply no way of constructing a master narrative of judicial activism that straddles the entire universes of expectations and attainments of diverse consumers, producers, beneficiaries and judicial actors. It is very difficult to measure activism since activism manifests itself as a wide variety of impulses,

⁷⁹*Id.*, at 186.

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attitudes, cultural and ideological reflex actions and well or not so well intentional performances whose outcome exceed the original intent. The nature and career of judicial activism raises certain worrisome questions. First, *the process of self defining* - implying how do justices are themselves as activists? What are their conceptions of an activist judicial role and its changing tendencies, propositions and limits? Second, *point of departure*, how do justices arrive at activism? in past, this is a biographical enquiry concerning the determinants, or antecedents, of a given judicial career in the making. In part, this is a question that concerns the field of social forces that empower or constrain a justice towards activism. Third, the point of arrival, how is activist judicial agendas fashioned? What social issues/ movements flourish, and which ones wither, during specific regime styles of judicial activism. Fourth, development of shared cultures, how are shared self and collective understandings concerning activist uses of judicial process and power developed across the ideological heterogeneous, and deferentially competent, judicial populace? Fifth, the formal and informal politics of social co-operation, how do justices arrive at an understanding of what activist judicial outcomes will be acceptable /unacceptable to governance regimes in specific period? Considerations of institutional dignity and efficacy pushed through formal and informal networks of politics, or at least judicial political understandings, are central to this realm. Sixth, social clientele the problems of cultivation of 'constitutional faith' in forms of judicial activism that would, despite contingent outcomes, encourage a steady flow of social movement and human rights activist inputs into the 'mainstream' of activist appellate justicing? Seventh, the issue of sustainable judicial technology how is the management of simultaneous encouraging and controlling the influx of demands by social activism to be performed, without the depletion of 'constitutional faith'. In which what ways are techniques of judicial administration and juristic technologies to be renovated.

All the above issues makes institutionalization of judicial power to advance the interests of the poor and the oppressed against overwhelming governments often met with opposition from political elite. It is the values and constitutional faith, that legitimize such activist role and it is the stories of violations of human rights also help justices to develop into an activist dispositions.

The most important consequence of activist judiciary in Indian was to use judicial power to promote legislative action and to declare laws under Article 141 of the Constitution. First, the Court suggest an amendment to article as in *Bangalore water supply case*, where the definitions of industry for the purpose of the industrial dispute Act, was expressly amended. Second, development of advisory opinion jurisdiction to enunciate legislation when asked to pronounce on the constitutional validity of a bill justices drafted provisions that would be acceptable. Third, drafting of provisions in statutes in ways that make them valid in proceedings impugning the validity of Act of parliament. Last, wholesale legislations as in *Vishaka*,⁸⁰ the Supreme Court lays down law that defines what constitutive of sexual harassment in the work place.

The case illustrate that activist justices seek many ways of production of social co-operation from the co ordinate branches of government. The nature and scope of social co-operation actually produced varies according to the actors, constituencies and arenas of activism. The cooperation exhibit the following characters. First, when policymakers are unable to absorb the national wide impact of the policies they pursue, activist judicial intervention is welcomed. Second, when abuse of constitutional powers prompts a need for national consensus on their future exercise, but when this proves in rare cases. Third, social co-operation by executive is very high when corruption in high places becomes a partisan political issue that is seen threaten legitimacy of political process as in *Jain Hawala and Antuley cases*.⁸¹ Fourth, activist

⁸⁰Vishaka Vs. State Rajasthan, AIR 1997 SC 3011.

⁸¹A.R. Antule Vs. S.R. Nayak, AIR 1988 SC 1531.

justices have to be wary of the acute short supply of government co-operation is fashioning environmental jurisprudence. Fifth, in arena's of structural reforms of the Indian legal system, executive social co-operation remains highly variable. Despite the incredibly impressive enunciation of human rights in the area of prison and 'correctional' justice, the Indian prisons, overall, continue to remain a toxic insult to judicial activism and 50 years old constitutional governance, besides leading an international scandal. Sixth, governmental social co-operation is notoriously sub-optimal for the old and new society unalterable sections of the Indian society. In this area the future of socially informed Indian judicial activism will be shaped by challenges to fashion state/civil society co-operation.

The success or failure of judicial activism in any area depends on social and political co-operation but in many areas it is very difficult to harness both and hence some disenchantment with the judicial role. It is sometimes expected too much from the court which makes the judiciary vulnerable and less effective.

Conclusion

Judicial activism has now acquired wide publicity and popularity. Whatever may be the judicial role one can say that activist judges of the Supreme Court have fairly successful in transforming Indian Society. The growth of judicial activism which was started with enforcement of human rights of the vulnerable sections of the society was extended to help the impoverished to come out of their misery. It was further extended to every areas of governance. Whatever may be the limitations of the judges to effect social transformation, they by creative use of judicial power by and large successful. However, there is one area where judiciary is not so successful but making sincere efforts i.e. good governance. The failures cannot always attributable to the judges but to the constitutional and other limitations on the judicial power. Despite the limitations the activist judiciary is successful in enhancing socio-political commitment to constitutional values which is often described as 'constitutional faith'.