

CHAPTER II

JUDICIAL ACTIVISM AS PART OF JUDICIAL PROCESS

The term Judicial Activism refers to judicial creativity. Judicial activism is a part of judicial process and marks a creative activity of the judiciary. Judicial activism is not an aberration. On the other hand, it is labeled as judicial terrorism. It is an essential aspect of the dynamics of a constitutional court. It is counter-majoritarian check in democracy. The Supreme Court of India started off as a technocratic court in 1950 but slowly started acquiring more power through constitutional interpretation. The years since 1977 have been years of intense judicial activism; the Court has innovated, developed new techniques, discovered and applied new remedies for transgression of fundamental rights, and attempted to fill the vacuum resulting from executive and legislative inaction. The constitutional foundation for the new jurisdiction was established by a dilution of the doctrine of *locus standi*, notably after *S. P. Gupta*.¹

Its transformation into an activist court has been gradual and imperceptible. In fact the roots of judicial activism are to be seen in the court's early assertion regarding the nature of judicial review in *A.K. Gopalan v. State of Madras*.² More than twenty five years

¹ *S.P. Gupta v Union of India*, AIR 1982 SC 149.

² AIR 1950 SC 27.

later, the Supreme Court overruled *Gopalan*³ holding that ‘the procedure’ prescribed by the law could always be scrutinized by courts and any procedure which was arbitrary or unreasonable would not pass muster under Article 21.⁴

In *Nilabati Behera v. State of Orissa*⁵ a letter was treated as a Writ Petition under Article 32 and dealt with as such. The prayer was for award of compensation for deprivation of life guaranteed under Article 21 in a case where the petitioner’s son aged 22 years was picked up by the police, the court gave a direction to the District Judge in Orissa to hold an inquiry into the matter and submit a Report. As a result of the findings in the Report the Court held that the petitioner’s son died as a result of injuries inflicted on him while he was in police custody. The Court ultimately held that the petitioner could claim damages in public law based on strict liability for violation of the Fundamental Right namely right to life.⁶

³ *Ibid*

⁴ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

⁵ (1993) 2 SCC 746.

⁶ The decision rendered in *Nilabati Behera v. State of Orissa* has been mentioned in the Judgment of Cooke J. in *Simpson v. Attorney-General* (Baigent’s case) (1994) 3 NZLR 667, where a Court of Appeal in New Zealand held that despite the absence of a remedy clause in New Zealand’s Bill of Rights, 1985, the Judiciary had power to grant pecuniary compensation for contravention of the rights guaranteed under the provisions.

The Supreme Court of India is the guardian and watchdog of the Indian democracy and democratic rights. The judgments delivered in public interest litigation cases have far reaching consequences to the public in general for protection of Human Rights such as right to life, liberty, environmental protection, etc. Judicial Activism is nothing but the review of legislative and executive action. The judiciary in India is kept under obligation to balance the scale of justice for protecting Human Rights in general and the rights of the weaker sections and women in particular. The Indian Supreme Court has evolved from a positivist court into an activist court over the last fifty five years. It has not, as is generally believed, suddenly become activist in its approach during the last two decades. It has taken longer than that for the Court to acquire its present stature and it has had to go through many stresses and strains. The Indian judiciary is presently the most powerful organ of the State.⁷

Social Justice

The concept of a 'welfare State' wherein the Government's tasks have been increased several folds, setting up various

⁷ Bhurelal, *Judicial Activism and Accountability*, Siddartha Publications, New Delhi, 2004, at 19.

administrative agencies to carry out the objectives of a 'social welfare State' centers around the problems concerning 'social justice' and more particularly, the necessity to balance 'private and 'social' interests. The bulk of the legislation related to 'social justice', as 'too many people, still lack the simplest necessities of life and too many are deprived of the most basic human rights'. The urgent need for mankind is not the recognition and declaration of fundamental human rights, but their protection by the international community. In India 90% of social legislations pertain to the realm of human rights, and thus 'social justice' found active support at the hands of the judiciary besides other human rights champions such as the press and electronic media. The Indian judiciary has left no stone unturned in promoting the cause of 'social justice' and has devised new tools such as 'public interest litigation' to secure benefit to a class or group of persons, either victim of exploitation, or oppression or whose constitutional rights are violated but cannot access justice through courts because of their ignorance or poverty.⁸

One of the major problems concerning 'social justice' is the one relating to enforcement of laws. In England, an ordinary citizen can

⁸ AIR 1996 Journal section, at 49-53.

seek the enforcement of law for the benefit of all, as against public authorities in respect of statutory duties.⁹ A similar right has been conferred in Indian cases, such as the one relating to enforcement of a law restraining child marriage in Rajasthan, abolition of bonded labour, eradication of untouchability, child welfare, award of compensation in accident cases, right to livelihood, social and economic justice in industrial adjudication, protective discrimination in favour of backward classes, securing the liberty of women and children detained, women welfare in cases of loss of life of bread-winners, damages for administrative lapses, suitable educational opportunities to mentally impaired children, and in several other cases of far reaching constitutional significance. The courts in the country have done everything possible to help the poor, and to break every procedural barrier to deliver justice to the poor.¹⁰

Menace of Ragging

The judiciary, has in many instances, even directed that the state should legislate to ban ragging of fresh students, as for instance in *State of H.P v. Parent of student, Medical College, Simla*.¹¹ Ragging

⁹ Lord Denning, *The Discipline of the Law*, Butterworths, London, 1982, at 133.

¹⁰ AIR 1996 Journal section, at 50.

¹¹ AIR 1985 SC 910.

means any disorderly conduct whether by words spoken or written or by any act which has the effect of teasing, treating or handling with rudeness any other student, indulging in rowdy or undisciplined activities which causes or is likely to cause annoyance, hardship or psychological harm or to raise fear or apprehension thereof in a fresher or a junior student or asking the students to do any act or perform something which such student will not do in the ordinary course and which has the effect of causing or generating a sense of shame or embarrassment so as to adversely affect the physique or psyche of a fresher or a junior student.¹²

The incidents of ragging especially in the institutions of professional courses are on the rise. We are living in an era of human rights and trying for their enforcement. The reported incidents of ragging have crossed the limits of decency, morality and humanity. The fundamental rights enshrined in the Constitution of India and certain fundamental rights and freedom contained in some international instruments, have been made use of to curb the menace of ragging. Some of the states have enacted Legislations making ragging as cognizable and punishable offence.

¹² *Vishwa Jagarity Mission v. Central Government*, (2001) 6 SCC 577.

Ragging is not confined to the ragging of the male student. Incidents suggest that it has become a common problem for both the genders. Such incidents do occur in the educational institutions every year. The question is whether our laws are sufficient to curb the ragging? Or is there any other law to curb the menace of ragging? Or whether PIL alone would be sufficient to curb the menace of ragging?

The Supreme Court of India in the exercise of powers under Articles 32 and 142 of the Constitution has issued a number of guidelines, but still the menace of ragging has not come to an end. The menace of ragging hampers the progress of the society as well as prospect of education. The parents are much worried. The progress of any nation depends on the well being of the people namely men, women and children for whom we live and without whom we cannot progress an inch forward.¹³ The Supreme Court in *Unnikrishnan v. State of A.P* ¹⁴ has held that 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.

¹³ Biswajit Chatterjee, 'Curbing the Menace of Ragging through Public Interest Litigation & other means: An Analysis', Indian Bar Review, Vol. XXXI (3&4), the Bar Council of India Trust, 2004, at 387.

In *Vishwa Jagrity Mission v. Central Government*¹⁵ the apex court has issued guidelines against ragging in educational institutions and the directions issued by the Supreme Court under Art.32 have the force of law. These directions remain in force till the legislature enacts a suitable law. The general directions¹⁶ issued by the court are, thus, *quasi-legislative* in nature for they bind not only the parties to the specific dispute before the court but even others. Breach of these directions would amount to contempt of court. This decision of the court would go a long way to curb the menace of ragging. There is a constitutional duty on the State to see that the tender age students are protected from every kind of abuse.¹⁷ The court also made it clear that the police should remember that they are dealing with a student who is accused of ragging and not a criminal. The action of the police should never be violent and should be always guided by a correctional attitude. The disease of ragging cannot be prevented only by legislative and judicial effort, in the absence of co-operation by all the concerned and a change of the mindset.

¹⁴ AIR 1993 SC 2178.

¹⁵ (2001) 6 SCC, at 577.

¹⁶ *Lakshmi Kant Pandey v Union of India*, AIR 1984 SC 464; *Supreme Court Advocates-on-Record Association v Union of India*, AIR 1994 SC 265; *Vineet Narain v Union of India*, AIR 1998 SC 889; *Vishaka v State of Rajasthan*, AIR 1997 SC 3011; and *Common Cause v Union of India*, AIR 1996 SC 929.

¹⁷ Article 39(f).

Likewise the Supreme Court has issued directions in the following cases:

(a) *Lakshmi Kant Pandey v. Union of India*,¹⁸

(b) *Supreme Court Advocates-on-Record Association v. Union of India* ¹⁹

(c) *Vishakha v. State of Rajasthan*,²⁰

(d) *Vineet Narain v. Union of India*, ²¹

(e) *Common Cause v. Union of India*, ²²

Right to Move the Courts

Article 32 is the heart and soul of the Constitution as it provides remedies against the infringement of fundamental Rights. It guarantees the right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by Part III of the Constitution. Article 13 voids every pre and post constitutional law to the extent it abridges or takes away any of the rights conferred by Part III of the Constitution. Articles 32 and 226 empower the judges to declare any law null and void, if it was found to be against any of the fundamental rights enshrined in the

¹⁸ AIR 1984 SC 464.

¹⁹ AIR 1994 SC 265.

²⁰ AIR 1997 SC 3011.

²¹ AIR 1998 SC 889.

²² AIR 1996 SC 929.

Constitution. Article 141 of the Constitution authorizes the Supreme Court to lay laid down the law for the country in its decisions.

Judicial activism keeps the judiciary active to remove the inertia of Government in fulfilling the constitutional goals. The judicial activism in India is much more superior to the American counterpart taking into account the social conditions in India. No doubt judicial activism in India results in policy making. However, it is used only for the purpose of enforcing the constitutional rights of affected persons. At the same time, the other organs of the government should take this activist role of the judiciary as a positive step to render justice rather than as usurpation of power. Justice Holmes had once remarked that the 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts. But, if the legislature itself violates or abridges the rights, the people can move only the courts and not the legislatures'. Thus, judicial activism, if properly used, can protect the interest and the rights and liberties of the individuals against the arbitrary actions of the Government.

At the High Court level, Article 226 provides for such remedies for the protection of fundamental rights. Justice Patanjali Sastry observed that even the first generation of Judges of the Supreme Court were conscious of the activist role of the Court.²³

The Courts in India have evolved the concept of public interest litigation in the 1980s primarily by relaxing the rule of '*locus standi*'. The normal rule is that only the 'person aggrieved' could approach the court. The primary reason for relaxation of this rule was that the weaker sections of the Society, due to their poverty, ignorance illiteracy and exploitation, were not able to assert their rights. Yet, the Courts have encountered delays in getting access to evidentiary records or official papers as they have the adversarial system to work with.

Judicial Review

Judicial review is an essential component of the Rule of Law, which is a basic feature of the Indian Constitution. The Supreme Court as an independent authority has been mandated to decide disputes between the Union and the States or between the various States. As a guardian and interpreter of the Constitution it has to

²³ *State of Madras v.. V. G. Row*, AIR 1992 SC 196.

consider the constitutional validity of any law and even constitutional amendments passed by the Parliament. An independent judiciary is essential for ensuring human rights and protection of democracy.

Democracy cannot exist without justice and justice cannot exist without an independent Judiciary. The Judiciary is identified as the last bulwark against arbitrariness. Judiciary being the neutral wing of Government unlike the legislature and the executive is trusted with the responsibility to check unconstitutional behaviour and enforce the constitutional mandate. Judicial activism has both merits and demerits. It ensures speedy justice protecting peoples' right through public interest litigation. At the same time, it leads to unhappy relationship with the Executive and legislature. The following are some of the circumstances, which have lead to judicial activism:

1. The judiciary has been able to command the respect and confidence of the people particularly after the emergency in the country, in which period people got the necessary protection from judges only.

2. The power of the Court to punish for its contempt has been a powerful weapon in the armory of the Court although it uses this power sparingly.
3. The fractured poll verdicts which have created an atmosphere of uncertainty to carry a Government for the full term, invites judicial activism and the executive and legislature find it as a friendly measure and a shield for themselves.
4. The crux of the problem is that people have no confidence in the efficiency of the legislature.

The Indian Supreme Court is the only court in world history to have asserted the power of judicial review over amendments to the Constitution. Its strongest move was in announcing the 'Basic Structure' limitations to the amending power.²⁴ The strong affirmation it gave to the limitation of the amending power in the *Minerva Mills case* ²⁵ has served to strengthen the guarantees of the fundamental rights beyond fundamental assail by the shifting political winds and transient majorities in the legislatures. Following the affirmation of the basic structure the court has proceeded to identify several components of the Basic Structure as

²⁴*Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845; *Golak Nath v. State of Punjab*, AIR 1967 SC 1643; and *Keshvanada Bharati v. State of Kerala*, AIR 1973 SC 1461.

ingrained in Article 14, which article itself was lifted beyond amendability by recognising it as part of the basic structure.²⁶ Alongside, the Rule of Law was identified as part of the Basic Structure, so was natural justice. The fundamental rights and Directive Principles are equally important components of the Basic Structure. In this exercise it has held out a hope for the citizenry of the protection against arbitrary exercise of political power. It's placing a question mark on the Ninth Schedule ²⁷ which was to be insulation against judicial scrutiny has served to check impulsive political actions and to make the political actors more responsible in the making of policy choices. Judicial Activism is an inherent feature of Judicial Review which is enforced as a result of several factors. As the policy becomes more complex and new challenges are thrown up, the Judiciary has to be taking on a more proactive role to interpret the laws and in cases where laws do not exist. For example, interpretation of fundamental rights to include sexual harassment of women at work place, gender justice, cyber crimes etc. In *Inamdar*, ²⁸ a case filed by private institution offering professional courses, to avoid Government interference in the form

²⁵ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

²⁶ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299.

²⁷ *Waman Rao v. Union of India*, AIR 1981 SC 271.

²⁸ *P.A. Inamdar & Ors. v. State of Maharashtra & others*, AIR 2005 SC 3226.

of reservations, the Supreme Court passed an order doing away with quota system in admission. On the other hand, the Government considered the ruling as a stumbling block in their path to bring in social justice.

In the early eighties a new class of litigation has developed which differ from traditional litigation, inasmuch as, there are no plaintiffs or defendants nor State/complainant versus accused, it is less expensive and more efficacious and is known as 'Public Interest Litigation' (PIL) or 'Social Action Litigation' (SAL).

In the case of PIL, the collective rights of the public are affected and redress is sought for such injury. There may be no direct specific injury to any member of the public as such.²⁹ In the case of SAL, the petitions are made for the enforcement of the specific rights of a determinate class or group of people who are primarily injured by the impugned action. The injury suffered by members of this class is direct and redress is sought on their behalf because they are unable to approach the Court on account of indigence, illiteracy, social and economic disability, for e.g. Workers in stone-

²⁹ *Shri Ram Foods and Fertilizer (Oleum gas leakage case)*, and *M. C. Mehta v. Union of India*, (1986) 2 SC 176.

quarries,³⁰ inmates of Care Homes, under trial prisoners in Jails. In the case of *ABSK Sangh (Rly) v. Union of India*,³¹ the Supreme Court has held that an un-registered association could maintain a writ under Article 32 for redressal of common grievance.

In *S P Gupta & Ors v. President of India & Others*,³² Justice Bhagvati held that 'it could be grave lacuna in our system of public law if a pressure group or even a single public spirited citizen were prevented by outdated technical rules of *locus standi* from bringing a matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped'. And in *Peoples Union for Democratic Rights v. Union of India*³³ the Supreme Court has held that accepting less than minimum wages due to the economic compulsion comes under forced labour, and the Court directed the Government to take necessary steps for punishing the violation by private individuals of the fundamental rights of citizens guaranteed by Article 23.

³⁰ *Bandhua Mukti Moracha v. Union of India*, AIR 1984 SC 803.

³¹ AIR 1981 SC 298.

³² AIR 1982 SC 149.

³³ AIR 1982 SC 1473.

Article 32 of the Constitution of India forms part of the constitutional system on the basis of two major grounds: (i) that the distribution of legislative and the executive powers between the centre and the states cannot function smoothly without resort to judicial review of legislation whenever necessary; and (ii) that the regional and linguistic diversities in India make it desirable to have an independent and impartial judiciary in order to protect the fundamental rights of the individuals and the minorities.

The Constitution of the United States of America does not provide for judicial review in the text. However, the U.S. Supreme Court has evolved this power in 1803 through its famous decision in *Marbury v. Madison*.³⁴ Since then, the judiciary has been, to a large extent, protecting the rights of citizen against the executive actions of the State.

Nature of Judicial Activism in India

The judiciary aims to extent the benefit of the constitutional set up to the entire citizenry and not only a group or class. Social justice is the constitutional promise, the prominence of which assigns an

³⁴ (1803) 1 Cranch 137.

activist role to the court and this is a radical departure from the conventional judicial function of the British and even the American judges.³⁵ The entire constitutional promises including that of social justice, to the extent of the function assigned, is an irrevocable obligation on the judiciary. Enforcing the constitutional promises is the sole and the only role assigned to it. To fulfil the promise, even departing from the traditional judicial functioning would be necessary. The system need not be assessed keeping in mind fallibility of individual judges.

According to Justice Krishna Iyer the meaning of judicial activism is that the 'function of the court is not merely to interpret law but to make it by imaginatively sharing the passion of the Constitution for social justice'.³⁶ Justice Iyer said that 'in being activist, the Judge has to see with his eyes where justice lies. In being legalist, he has to see through the eyes of law'.³⁷ This sets up tug of war between legalism and activism, as if they are stepsisters. Justice Iyer maintains that judicial activism gets its highest bonus when it wipes out some tears from some eyes. The principal object to entertain PIL petitions is to maintain the rule of law and prevent

³⁵ Justice V.R.Krishna Iyer . '*Law, society and collective consciousness*', at 8.

³⁶ Journal, Indian Law Institute. Vol.28 (3), at 338.

³⁷ Journal, Indian Law Institute, Vol 30 (3).

abuse of law and its authority and render social justice to the millions of poor, weaker, slum-dwellers and down-trodden . Justice Iyer said that 'law and justice as delivered by the Court could never see the suppressed and tortured Indians who were below the vision'.³⁸

The former Chief Justice of India P. N. Bhagwati has said that judicial activism is now the central feature of every political system that vests adjudicatory power in a free and independent judiciary. The scope of judicial activism increases considerably where the power of judicial review extends not only over executive action as in the United Kingdom, but also over the legislative action as in the United States and even over constitutional amendments as in India. In India the extension of power of judicial review over constitutional amendment itself is exercise of judicial activism on the part of the Supreme Court. Although the courts decided only a few cases during the first three decades of the constitutional practice, an element of judicial activism was present in some decisions. But during the last two decades there has been a tremendous growth of judicial activism. The developments that had

³⁸ 30 JILI (1988), at 281.

taken place in India can be broadly classified, for convenience, into two different areas.

In the first place, judicial activism pertains only to the substantive laws, which ultimately resulted in the extension of the existing rights, establishment of new rights and in the interpretation of constitutional provisions. The scope and content of Article 21, which speaks about the protection of life and personal liberty, has been expanded by the Supreme Court in *Maneka Gandhi v. Union of India*,³⁹ and in subsequent cases. A landmark judgment was delivered in *Golak Nath v. State of Punjab* ⁴⁰ on the point of judicial review of constitutional amendments. A logical fallacy in this decision was corrected in *Keshvananda Bharati* ⁴¹ and the power of review was affirmed in *Minerva Mills v. Union of India*,⁴² and clauses (4) and (5) of 368 (4) and (5) seeking to oust judicial review of constitutional amendments which had been inserted by the Constitution (Forty Second Amendment) Act, 1976, were declared as unconstitutional. In 1981 the Supreme Court in *A.B.S.K.Singh (Railway) v. Union of India*,⁴³ held that even an unregistered

³⁹ AIR 1978 SC 597.

⁴⁰ AIR 1967 SC 1643.

⁴¹ AIR 1973 SC 1461.

⁴² AIR 1980 SC 1789.

⁴³ AIR 1981 SC 298.

association could maintain a writ petition under Article 32 of the Constitution for the redressal of a common grievance. In deciding this case Justice V. R. Krishna Iyer declared that access to justice through 'class actions'. PIL and 'Representative Proceedings' is the present constitutional jurisprudence in India. Thus judicial activism has come to occupy an important position and status in the judicial process. The second area of judicial activism is more important than the first one in many respects. The second area of judicial activism has made a greater impact in the ordinary life of the citizen of India. In other words, the Supreme Court started relaxing various rules of procedure to enable the ordinary common man in protecting his fundamental rights.

The courts in India started relaxing various procedural requirements by taking *suo motu* action in a few cases. Letters were treated as writ petitions and granted immediate relief. In *Sunil Batra v. Delhi administration*,⁴⁴ the Supreme Court converted a letter into a habeas corpus petition. In the second stage of development of judicial activism, a procedural aspect, the '*Locus standi*' rule was relaxed to the maximum possible extent.

⁴⁴ AIR 1980 SC 1579.

A letter addressed by two professors of law on behalf of the inmates of a protective home run by the State of U.P. was accepted as a writ petition by the court. In *Kadra Pahadiya v. State of Bihar*,⁴⁵ a letter written by a social science researcher about the plight of several under trial prisoners kept without being tried for more than five years was accepted as a writ petition. These are a few examples to illustrate the active role played by the judiciary in India with respect to the rules of procedure. In the Judges transfer case the court further relaxed the concept of *locus standi*.

The third stage of development of judicial activism in India has resulted in the Supreme Court using Commissions or Committees to investigate into certain matters to enable it to decide the case. In *Bandhua Mukti Morcha v. Union of India*,⁴⁶ the Supreme Court appointed a Commission to investigate and report on the facts of the case, and on the basis of its report decided the case. In *Hussainara Khatoon v. State of Bihar*,⁴⁷ the Supreme Court directed the state government to prepare an actual census of under-trials kept as prisoners as on October 31 of each year, and submit it to the High Court. Thus the Supreme Court asserted

⁴⁵ AIR 1982 SC 1167.

⁴⁶ AIR 1984 SC 802.

⁴⁷ AIR 1979 SC 1360.

itself that it could appoint a Commission for making an inquiry or an investigation into facts relating to a complaint in a public Interest Litigation of violation of fundamental rights, and also held that it had the power to do so in the interest of justice. This power was again invoked by the court in December, 1985 when the court appointed an expert committee to submit a report on the safety aspects of the working of the chlorine unit of a Delhi factory in the Delhi Gas Leak case.⁴⁸

Participatory Justice

The concept of Public Interest Litigation (PIL) was initiated in India by Justice Krishna Iyer in *Mumbai Kamgar Sabha v Abdulbhai*.⁴⁹ In this case standing was granted to an association to claim bonus on behalf of individual workers.

In *Fertilizer Corporation Kamgar v. Union of India*,⁵⁰ the labour Union, its president and two workers employed in the Sindri Fertilizer Factory were allowed to challenge the legality of the sale of plant and equipment.

⁴⁸ (*Shriram Food and Fertilizer*) *M.C .Mehta v.Union of India*, (1986) 2 SCC 176.

⁴⁹ AIR 1976 SC 1465.

The last nail in the coffin of the traditional rule of *locus standi* was struck in *S. P. Gupta v. Union of India*,⁵¹ popularly known as judges appointment and transfer case. Several petitions were filed in various High courts under Article 226, raising significant questions, by lawyers practicing in the High Courts. The petitioners claimed to be vindicating the public interest in assuring the freedom of judiciary from political influence even though they claimed no personal injury. The Supreme Court overruled the contention of the Government on the point of *locus standi* and entertained the petitions.

Bonded Labour

In *People's Union for Democratic Rights v. Union of India*,⁵² popularly known as the Asiad Labour case, the Supreme Court accepted the view that the social workers, an organisation formed for the purpose of protecting democratic rights are entitled to file petition on behalf of the aggrieved person. The Supreme Court's activist thrust continued and it allowed the social action groups to take up cudgels on behalf of the underdogs. In *Bandhua Mukti*

⁵⁰ AIR 1981 SC 344.

⁵¹ AIR 1982 SC149.

⁵² AIR 1982 SC 1473.

Morcha v. Union of India,⁵³ the Supreme Court entertained a petition seeking release of bonded labourers employed as quarry workers, filed by an organisation dedicated to the release of bonded labourers and challenging the governmental inaction in not implementing the provisions of Bonded Labour System (Abolition) Act, 1976 in Haryana.

Speedy Trial

In *R. D. Upadhyaya v. State of A.P.*,⁵⁴ a PIL was filed alleging that almost 73% of entire jail population was found to be under trials. Supreme Court viewing the matter as one of serious concern directed counsel appearing for various States and Union Territories to convince the State Governments and the Union Territory Administrations to take effective steps within six weeks from date of order for filing reports particularly in cases involving petty offences, in respect of which under trails have been in jail for some time. Similarly in *State of Punjab v. Ajaib Singh*,⁵⁵ the Apex court directed the State to increase strength of judges to clear backlog of criminal appeals.

⁵³ AIR 1984 SC 802.

⁵⁴ (2000) 1 SCC 639.

⁵⁵ (1995) 2 SCC 486.

Adoption

Justice Bhagawati, the then Chief Justice and R.N. Misra, in *Laxmi Kant Pandey v. Union of India*,⁵⁶ issued clarifications and directions in respect of the principles and guidelines for evolving procedure to prevent illegal sale of babies. These clarifications and directions were issued in response to various applications filed by several social organizations such as Indian Council of Child Welfare, Karnataka State Council for Child Welfare, Delhi Council of Child Welfare, Church of North India, Holy Cross Social Service Centre, complaining of illegal sale of babies despite the court's directions in an earlier case.⁵⁷

This decision constitutes a valuable piece of judicial legislation making special provisions for children contemplated under Article 15 (3) and 39 (f) meaningful. Some of the important directions issued by the apex court are as follows:

1. When the court makes an order appointing a foreign parent as guardian of a child with a view to its eventual adoption in the foreign country, the court will provide that such amount shall be paid to the scrutinizing agency for the services as the court thinks reasonable. The same principle will apply mutatis mutandis in cases when an Indian parent makes an application for appointing himself or herself as guardian of a child or a Hindu parent applies for permission to adopt a child under the Hindu Adoption and Maintenance Act, 1956.
2. All nursing homes and hospitals coming across abandoned or

⁵⁶ AIR 1987 SC 232.

⁵⁷ *ibid.*,

destitute children will immediately inform with regard to the discovery of such children to the social welfare Department of the government concerned or to the Collector of the district and copies of such intimation would also be sent to the foster care home. The department and the Collector will take care to insure that the directions given by the Supreme Court are followed by the nursing homes and hospitals within the jurisdiction.

3. No recognised placement agency shall make and process an application for a foreigner as guardian of a child with a view to its eventual adoption unless the child has been in the custody of the recognised placement agency for a period of at least one month before the making of the application and it shall not be permitted to act merely as a post office or conduit pipe for the benefit of the unrecognised agency.

4. Whenever a child is produced before a juvenile court by a recognised placement agency for a release order declaring that the child is abandoned or destitute as to be legally free for production, the juvenile court must in all such cases complete the inquiry within one month from the date of the application and proper vigilance should be exercised by the High Court for the purpose of ensuring that the directions given by the Supreme Court are complied by the juvenile court. The High Court shall call for monthly reports from the juvenile courts stating as to how many applications for release order are pending in each criminal Court, where there were filed and if they have not been disposed of within one month, what is the reason for the delay.

5. Where a child is relinquished by its biological parents or by an unwed mother under a deed of relinquishment instituted by either, it should not be necessary to go through the juvenile court or Social Welfare Department or collector to obtain a release order declaring the child free for adoption but it would be enough to produce the deed of relinquishment before the court which considers the application for appointment of a foreigner as guardian of the child. It is only when a child is found abandoned or is picked up as a destitute that the procedure of going through the juvenile court or Social Welfare Department or Collector would have to be adopted.

6. The government of India should publish once a year the list of recognised placement agencies and other associate child or social welfare agencies and send to the district Court in each district through the High Court, a list of recognised placement agencies.

These directions given by the court are still very useful to reduce the delay in the procedure to be followed in giving a child in adoption to a foreigner and to prevent illegal sale of babies. The

court's main concern is to see that there is no delay in offering such children for adoption by a foreigner or an Indian parent because it is absolutely essential that such children should be able to secure love and affection of the adopted parent at the earliest.⁵⁸

Right to Life

In *State of Himachal Pradesh v. Umedram*,⁵⁹ the apex court held that the right to life in article 21 of the Constitution embraced not only physical existence but also a quality of life and for residents of hilly areas, access to road was access to life itself.

In *Olga Tellis v. Bombay Municipal Corporation*⁶⁰, a five judge Bench of the Supreme Court entertained petitions of journalists and social groups by liberalizing concept of locus standi, in public interest, and also a series of petitions filed by pavement dwellers of Bombay, challenging the threat of forcible eviction and demolition of their dwellings by the Bombay Municipal Corporation. The apex court held that eviction of the pavement dwellers would result in deprivation of their means of livelihood. The right to life included the right to means of livelihood and therefore, if the eviction was not in accordance with the procedure established by law, it would

⁵⁸ Parmanand Singh, 'Public Interest Litigation', Annual Survey Of Indian Law, Indian Law Institute, New Delhi, 1987.

⁵⁹ (1986) 2 SCC 68.

not be just and fair.

Ecological Balance

With the object of pursuing the directive contained in Art.48-A, the Supreme Court, in recent years, has entertained various petitions regarding control of environment pollution and safeguarding of wildlife. In *M.C.Mehta (I) v. Union of India*,⁶¹ for the first time, the Apex Court had to evolve norms and principles for determining the liability of large enterprises engaged in the manufacture and sale of hazardous products and the basis on which damages, in case of such liability, should be quantified. In *M.C.Mehta (II) v. Union of India*,⁶² the Supreme Court clarified some of the conditions laid down in the previous case, and readily agreed to modify some of the conditions already laid down on the ground that their compliance would cause great hardship to the Shriram Industries group.

M.C.Mehta v. Union of India,⁶³ drew the attention of the court towards the nuisance caused to the people of Kanpur by the pollution of river Ganga. The petitioner claimed to be a person interested in protecting the lives of the people who make use of the

⁶⁰ 1985 (3) SCC 54.

⁶¹ 1986 (2) SCC 176.

⁶² 1986 (2) SCC 325.

water flowing in the river Ganga. Through public interest petition *M.C.Mehta* ⁶⁴ sought intervention of the Court to solve pertaining to environmental pollution in Delhi caused by Industries. In *M.C.Mehta v. Union of India*,⁶⁵ pertaining to vehicular pollution and chaotic condition in Delhi, the Apex Court issued time-bound direction to implement in phases, several solutions, restrictions for solving the problem of air pollution.

In *M.C.Mehta v. Union of India*,⁶⁶ it was contended that Calcutta Tanneries were discharging untreated noxious and poisonous effluents into the Ganga River polluting both land and river. The apex court held that one who pollutes the environment must pay to reverse the damage caused by his acts and directions were issued for unconditional closure of the tanneries on 30.9.1997, their relocation, and payment of compensation by them for the damage and for rights and benefits to be made available by them to their workmen. The 'Green' Bench of the Calcutta High Court was directed to further monitor the compliance with the orders. In *M.C.Mehta v. Union of India*,⁶⁷ the apex court held that mining

⁶³ (1988) 1 SCC 471.

⁶⁴ *M.C.Mehta v. Union of India*, (1996) 4 SCC 351.

⁶⁵ (1998) 5 SCC 767; (1998) 6 SCC 63; and (1998) 8 SCC 206.

⁶⁶ (1997) 2 SCC 411.

⁶⁷ (1996) 8 SCC 463.

activities in the vicinity of tourist resorts are bound to cause severe impact on the local ecology and therefore, mining activities should be stopped within 3 kilometers of Badkal Lake and Surajkund and directions were issued accordingly.

In *M.C.Mehta v. Union of India*,⁶⁸ a PIL was filed highlighting the fact of falling ground water level due to indiscriminate drilling of bore-wells. The Supreme Court directed the Central Government to appoint a Board and take measures for regulating the drilling of bore-wells and withdrawal of underground water in the country and issue necessary regulatory directions in this regard. In *M.C.Mehta v. Union of India*,⁶⁹ the Supreme Court issued directions for checking the vehicle pollution in Delhi. The court directed the authorities to take steps to implement its earlier directions issued for this purpose. The court directed that all commercial/transport vehicles which were more than 20 years old shall be phased out and not permitted to ply in the National Capital territory of Delhi after 2nd October, 1998. However, in the year 1999 those directions were modified by the Supreme Court,⁷⁰ to mitigate hardship.

⁶⁸ (1997) 11 SCC 312.

⁶⁹ AIR 1998 SC 2963.

⁷⁰ AIR 1999 SC 291.

Public Health and Safety

In *Common Cause v. Union of India*,⁷¹ a PIL, society registered under the Societies Registration Act highlighted as to certain defects in the manner of collection, storage and supply of blood. The court directed for the establishment of a National Council of Blood Transfusion, State Councils and also for a separate legislation for regulating collection, storage, distribution and transportation of blood and operation of Blood Banks.

Women and Children

Public Interest Litigation has brought into light the plight of children and women in jails and women in protective homes through various individuals agitating for these underprivileged and unorganized people with diffused interest. In *M.C.Mehta v. Union of India*,⁷² the supreme court held that the employment of children in the match factories directly connected with the manufacturing process up to final production of matchsticks or fireworks should not at all be permitted.

Vishaka v. State of Rajasthan,⁷³ is one of the most innovative

⁷¹ AIR 1989 SC 2039.

⁷² (1991) 1 SCC 293.

⁷³ AIR 1997 SC 3011.

judgments given by the Supreme Court wherein it was held that sexual harassment of a working woman amounts to violation of right of gender equality and right to life and personal liberty.

Corruption in Public Life and PIL

The PIL has proved to be a strange and potent weapon in the hands of the court enabling it to unearth many scams and corruption cases in public life and to punish the guilty involved in those scams. Hawala scam, urea scam, Fodder scam in Bihar, St.Kits Scam, Ayurvedic Medicine scam and Illegal allotment of Government Houses and Petrol Pumps have all come to light through the public interest litigation.

Waiver of Fundamental Rights

In *Behram v. State of Bombay* ⁷⁴ the court ruled for the first time that it was not open to the accused to waive or give up his constitutional right and get himself convicted. Waiver came up directly in *Basheshamath v. Income Tax Commissioner* ⁷⁵ where again the court affirmed the doctrine of waiver as applied in the U.S.A has no applicability in interpreting the Indian Constitution.

⁷⁴ AIR 1955 SC 146.

⁷⁵ AIR 1959 SC 149.

The court held that it is not open to a citizen to waive any of the fundamental rights conferred by Part-III of the Constitution. No person can relieve the State of its constitutional obligations because large majority of the people are economically poor, educationally backward and politically no yet conscious of their rights. Therefore, it was the duty of the court to protect the rights of the people even against themselves. Waiver again came up in *Olga Tellies* and the court again affirmed non waiver. Every time there was attempt to by pass the control of Part -III, the court has prevented it.

Electoral Reform through PIL

The Election Commission in pursuance of direction given in *Union of India v. Association for Democratic Reforms* ⁷⁶ issued a notification making it compulsory for those contesting to provide information about their educational qualification assets, liabilities and criminal antecedents at the time of nomination for the benefit of voters. But the parliament amended the electoral law (RPA) and negatived the judgment and election commission's notification. The Peoples Union for Civil Liberties⁷⁷ filed a PIL before the

⁷⁶ (2002) 5 SCC 294.

⁷⁷ *Peoples' Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399.

Supreme Court challenging the validity of electoral reforms Law as being violation of citizen's right of information under Art 19(1) (a) of the Constitution. The Supreme Court held that parliament has no legislative competence to direct the state authorities to disobey the order of the court and therefore the amendment made in section 33 of the RPA was violative of fundamental right of voters to know about their representatives and hence invalid. It restored its May 2, 2002 order and directed the Election Commission to issue a fresh order. Justice Shah said the judgment was arrived at for cleansing the democracy of unwanted elements and give the country a competent legislature.

According to justice Bhagwati judicial activism in India is being used for achieving distributive justice which is otherwise labelled as 'social justice'. Judicial activism follows from the failure of the executive to adhere to law. The more responsible the executive, the lesser the judicial activism. Judicial activism flows from the judges. According to justice Anand judicial activism is an expression incapable of precise definition and activism is a word of convenience. According to Justice J. S. Verma judicial activism means access to justice to the common man and enforcement of his fundamental rights. Now-a-days the judges of higher judiciary

have to deliver judgments on the subjects touching all aspects of national life, including corruption, environment pollution, nexus between criminals, politicians and others. The objective of the judiciary is to clean out all social political and national maladies of the country. The scams like Hawala, Urea, Fodder, Housing, and Telecom are instances. Soon after the Constitution came into force in 1950, in *A. K. Gopalan v. State of Madras*,⁷⁸ the Supreme Court placed a narrow and restrictive interpretation of Article 21 of the Constitution. In 1978, after 28 years, the Court took a second look after the judgment in *Gopalan's* case.⁷⁹ In *Maneka Gandhi's*⁸⁰ case the Supreme Court held that the procedure contemplated by Article 21 must be right, just and fair and not arbitrary, it must pass the test of reasonableness and the procedure should be in conformity with the principles of natural justice and unless it was so, it would not be just procedure at all and the requirement of Article 21 would not be satisfied.

First PIL case In Karnataka High Court

In the High court of Karnataka, the Attara Katcheri case was the first PIL case. In that case the decision taken in the early 1980s to

⁷⁸ AIR 1950 SC 27.

⁷⁹ *ibid.*

⁸⁰ AIR 1978 SC 597.

demolish the Attara Kacheri (where the High Court of Karnataka has been housed) was challenged and the matter went up to Supreme Court. As per the directions of the Supreme Court, the State Government in the year 1985 re-considered the issue, reversed its earlier order and proceeded with repairs to strengthen the building.⁸¹

Curative Petition

Article 137 confers power of review on the Supreme Court to cure the defect if anything remains left and do justice. But in *Rupa Ashok Hurra v. Ashok Hurra*,⁸² a five Judge constitution bench of the Supreme Court has unanimously held that in order to rectify gross miscarriage of justice in its final judgment which cannot be challenged again the Court will 'allow' curative petition by the victim of miscarriage of justice to seek a second review of the final order of the Court. The Bench headed by Chief Justice S. P. Bharucha held that 'we are of the view that though judges of the highest Court do their best subject to the limitation of human fallibility yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice'. This judgment was given in a bunch

⁸¹ The Hindu, Bangalore Edition. Dt: 18-4-2006

⁸² AIR 2002 SC 1771.

of petitions on the question whether a petitioner could question a final judgment even after the dismissal of a review petition. Justice Quadri, writing the judgment of the court said, 'we are persuaded to hold that the duty to do justice in the rarest of rare cases shall have to prevail over the policy of certainty of judgment as though it is essential in public interest that a final judgment of the final court in the country should not be open to challenge'. The Court has laid down certain specific conditions for the court to entertain such a curative petition under its inherent power to prevent floodgates of unnecessary petitions seeking their second review, the following principles are required to observed:

- (1) Court reaffirms that litigants are barred on challenging final decisions.
- (2) But in cases of miscarriage of justice it would be its legal and moral obligation to rectify the error.
- (3) The petitioner will have to establish that there was a genuine violation of principles of natural justice and fear of the bias of the judge and judgment that adversely affected him.
- (4) The curative petition must accompany certification be a senior lawyer relating to the fulfillment of the requirements.

- (5) The petition is to be sent to the three judges of the Bench who passed the judgment affecting the petition.
- (6) If the majority of the judges on this bench conclude that the matter needed hearing before the same bench (as far as possible) which may pass appropriate order it should be listed.
- (7) They could also impose 'exemplary costs' of the petitioner if his pleas lacked merit.

Criticism of Public Interest Litigation

In spite of its beneficial effect, the use of this new strategy by the court or enforcement of various fundamental rights and other legal right is criticized by many. It is said, that by entertaining violation of fundamental rights through a letter, the court will be flooded with litigation resulting in delay in deciding many other important cases. Secondly, it is pointed out that interference by the courts through the PIL in the sphere of executive and legislature is not justified as it is likely to cause conflict between the three organs of the government. Thirdly, the court has no capacity to enforce its orders and in many cases the conditions have not changed. It contended that Justice Bhagawati (as he then was) has imposed certain conditions to prevent the misuse of Public Interest

Litigation. In spite of this, it is abused by irresponsible litigants. For example, in *Balco's*⁸³ case public interest litigation was filed challenging the Central Government's Policy decision to disinvestment its shares to private persons. In this case lot of precious time of the Apex Court was wasted, hearing was given and it had to reiterate the principles of public interest litigation and to give warning against its misuse. Thousands of cases of common litigants are pending in the Apex Court and there was no need to invent Curative Petition mechanism which is beyond the preview of the Constitution.

The judiciary is the weakest organ of the State. It becomes strong only when people repose faith in it. Such faith of the people constitutes the legitimacy of the court and of judicial activism. Courts must not only be fair, must appear to be fair. Social action groups or individuals find that the courts are more than willing to respond and the courts are the best bet against violations of their fundamental rights. People generally believe that the courts do render justice. People know that the courts can also give wrong decisions, can exceed their powers or may not always be fair but, their experience tells them that such instances are exceptional.

⁸³ *BALCO Employees' Union v. Union of India*, AIR 2002 SC 350.

With all the lapses of the judicial system, it is perceived to be better than the political process. This widely shared belief in the fairness of the courts is what has given legitimacy to judicial activism. The courts have to strive continuously to sustain and maintain such legitimacy. This effort can also be described as being accountable to the people. Since the power of the court is derived from its social legitimacy, a court sustaining its legitimacy is in effect being accountable to the people. The courts should watch against PIL being used as private interest litigation or publicity interest litigation. Courts should not reject genuine PILs on the plea of judicial self-restraint. PIL opens the door to easier access to justice in an adversarial system although it places heavier burden on the judges in the onerous task of delivering justice. In the context of a controlling Constitution guaranteeing fundamental rights and liberties and imposing limitations on the powers of the State, the Supreme Court has incrementally responded to the questions presented before it and strived to protect individual liberties to a considerable extent.