

JUDICIAL ACTIVISM

Justice Mr. V. G. Palshikar (Retd.)

Since the establishment of Courts as means of administering justice, law is made from two sources. The prime source is from the legislature and the second is the judge-made law, ie judicial interpretation of already existing legislation. The Constitution of India also recognized these two modes of law-making. Article 141 of the Constitution of India lays down that the law as declared by the Supreme Court of India establishes the Law of the State. It thus codifies what was hitherto an uncoded convention, namely, recognition of judge-made law.

The process of making law by judges is what I would call Judicial Activism. Judicial Activism as distinguished from Judicial Passivism means an active interpretation of existing legislation by a judge, made with a view to enhance the utility of that legislation for social betterment. Judicial Passivism, to put it very loosely and liberally is interpretation of existing legislation without an attempt to enhance its beneficial aspects, by so interpreting the existing law as to advance and progress the beneficial extent of that legislation.

The phenomenon which is now called Judicial Activism is, therefore, not one of recent origin. It originated with the firm establishment of Courts as means of administration of justice.

Several earlier examples of judicial activism can be noted in various judgments delivered by the Privy Council, the Federal Court and the Supreme Court of India in its glorious days of infancy. The recent examples from the time when Judicial Activism was recognized as a mode of legislation in modern India also require to be noticed. The first such monumental judgment is one delivered by the Supreme Court of India in the matter of *Golak Nath*¹ wherein the Supreme Court of India enunciated the Judicial Principle of 'prospective overruling', giving a wider beneficial interpretation to the Constitutional mandate contained in Article 13 of the Constitution. Article 13 mandates that any legislation which conflicts with the fundamental rights guaranteed by the Constitution of

¹ *I.C. Golak Nath and Others v. State of Punjab and Another* AIR 1967 SC 1643.

India would be void to the extent of conflict. The necessary consequence of this provision was that all legislation existing prior to 1950 and which conflicted with the provisions of the Constitution, became void from the date the Constitution was promulgated. Several questions arose regarding the legality and validity of the actions which were taken and completed prior to the Constitution under such legislation. It was after taking into consideration all these aspects that the doctrine of prospective overruling was enunciated by the Supreme Court. That is the landmark exercise of Judicial Activism collectively done by the Supreme Court of India. In a nutshell, it was laid down by the Supreme Court of India in *Golak Nath's case* that legislation which is void by reason of application of Article 13 of the Constitution will stand overruled prospectively. Such interpretation was necessary to prevent actions taken under such legislation prior to the enforcement of the Constitution of India being declared illegal retrospectively.

While dealing with this aspect, the Supreme Court observed thus:

‘Between 1950 and 1967 the Legislatures of various States made laws bringing about an agrarian revolution in our country—zamindaris, inams and other vested rights were created in tenants... All these were done on the basis of the correctness of the decisions in *Sankari Prasad's case* ([1952] SCR 89), and *Sajjan Singh's case*, ([1965] 1 SCR 933) namely, that the Parliament had the power to amend the fundamental rights and that Acts in regard to estates were outside judicial scrutiny on the ground that they infringed the said rights. The agrarian structure of our country has been revolutionized on the basis of the said laws. Should we now give retrospectivity to our decision, it would introduce chaos and unsettle the conditions in our country. Should we hold that because of the said consequences the Parliament had power to take away fundamental rights, a time might come when we would gradually and imperceptibly pass under a totalitarian rule. The learned counsel for the petitioners as well as those for the respondents placed us on the horns of this dilemma, for they have taken extreme positions — learned counsel for the petitioners

want us to reach the logical position by holding that all the said laws are void and the learned counsel for the respondents persuade us to hold that the Parliament has unlimited power and, if it chooses, it can do away with fundamental rights. We do not think that this Court is so helpless. As the highest Court in the land we must evolve some reasonable principle to meet this extraordinary situation. There is an essential distinction between the Constitution and statutes. Comparatively speaking, Constitution is permanent, it is an organic statute; it grows by its own inherent force. The constitutional concepts are couched in elastic terms. Courts are expected to and indeed should interpret, its terms without doing violence to the language to suit the expanding needs of the society. In this process and in a real sense they make laws. Though it is not admitted, the said role of this court is effective and cannot be ignored. Even in the realm of ordinary statutes, the subtle working of the process is apparent though the approach is more conservative and inhibitive. In the constitutional field, therefore, to meet the present extraordinary situation that may be caused by our decision, we must evolve some doctrine which has roots in reason and precedents so that the past may be preserved and the future protected.'

Then the Supreme Court went on to observe the necessity of the doctrine of prospective over-ruling. It observed thus:

'It is a modern doctrine suitable for a fast moving society. It does not do away with the doctrine of stare decisis, but it confines it to past transactions. It is true that in one sense the court only declares the law, either customary or statutory or personal law. While in strict theory it may be said that the doctrine involves making of law, what the court really does is to declare the law but refuses to give retroactivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds law and that it does make law. It finds law but restricts its operation to the future. It enables the court to bring about a smooth transition by correcting its errors without disturbing the impact of those errors on the past transactions. It is left to the discretion of the court to prescribe the limits of the retroactivity and thereby it enables it to mould the relief to meet the ends of justice.'

The Supreme Court was definitely alive to its own limitations. It therefore, observed as under:

‘As this court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions:

- (1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest court of the country ie the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it.’

In 1973, the entire Supreme Court again reassembled. This time 13 Judges, to consider the correctness of the judgment in *Golak Nath's case* while deciding the writ petition in *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and another*.² By majority view, the Supreme Court overruled the decision in *Golak Nath's case* in so far as it held that Article 368 does not entitle the Parliament to amend the Constitution. However, the application of the doctrine of prospective overruling was not touched. The Supreme Court went on to hold by a majority that the basic structure of the Constitution or the frame-work of the Constitution cannot be amended by recourse to Article 368 by the Parliament. Reading of limitations on the power of the Parliament to amend the Constitution is undoubtedly an exercise in Judicial Activism. In fact a minority view expressed in *Kesavananda Bharati's case* opined that there are no limits on the power of amendment under Article 368. It will, thus be seen that the Supreme Court has very consciously dealt in Judicial Activism. A perusal of the judgment in *Golak Nath's case* as also in *Kesavananda Bharati's case* will thus demonstrate that Judicial Activism has its own limits and is to be exercised in the matter of interpretation of

² AIR 1973 SC 1461.

the Constitutional law and to an extent over statutory law, strictly for the purpose of expanding the beneficial application of that law in a fast moving and changing society like ours. In *Kesavananda Bharati's case* the Supreme Court has enunciated in most clear terms as under:

‘The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same.’

The basic structure may be considered to consist of the following features:

- (1) Supremacy of the Constitution;
- (2) Republic and democratic form of the Government;
- (3) Secular character of the Constitution;
- (4) Separation of powers between the Legislature, Executive and the Judiciary; and
- (5) Federal character of the Constitution.

Dissenting from the majority, Justice H R Khanna, has very wisely observed that unanimity obtained without sacrifice of conviction commends the decision to public confidence. Unanimity which is merely formal and is obtained at the expense of strong personal convictions is not desirable in a court of last resort. Way back in 1976, Justice Khanna spoke of an appeal to the brooding spirit of law to maintain the independence of the future day in relation to the laying down of Judge-made law. In my opinion, it is a word of caution sagely given by a great Judge. The principle of Judicial Activism is not to be used for seeking popularity at the cost of bartering necessary protection of law. No court can, by taking resort to Judicial Activism, take upon itself, functions squarely enjoined upon some other Institution by the Constitution. Investigative power cannot be assumed by any Court and it is in this regard that the question regarding limitations on the powers of Judicial Activism require close scrutiny.

Yet another example of Judicial Activism is the judgment of the Supreme Court in the case of *Minerva Mills Ltd. v. Union of India*.³ It was held by the Supreme Court of India in this *Minerva Mills* case that in cases of extreme urgency and public importance it may be necessary for an authority, judicial or quasi-judicial or executive, to act quasi judicially to make immediate orders in which circumstances it may not be possible to implement the maxim *audi alteram partem* in its true spirit. It was held that such order would be valid if followed by a post order hearing or post decision hearing. By this judgment the Supreme Court envisaged the quasi-judicial or judicial authorities to be so fair, fearless and confident as to change their earlier decision on patient and impartial hearing after the decision is rendered. It has given yet another dimension to the age old legal requirement of *audi alteram partem*.

The most controversial judgment of the Supreme Court involving Judicial Activism is one delivered in the case of *ADM Jabalpur v. Shivkant Shukla*⁴ wherein Article 21 which provides that no person shall be deprived of his life or personal liberty except according to procedure established by law was discussed. The majority of the Bench deciding *ADM Jabalpur's case* held that in cases of dire emergency as were existing between 1975 and 1977, a procedure can be established by law, following which even human life can be taken away. Justice Chandrachud who wrote the judgment came under heavy fire for writing a pro-Government judgment but the proposition of law as propounded by him was an excellent example of Judicial Activism. Justice Chandrachud has so interpreted Article 21 and upheld the validity of legislation which require acceptance to maintain the sovereignty of the Country in case it is threatened either by internal aggression or external invasion.

Yet another example of amplifying the law to enhance personal rights and fundamental rights is the judgment of the Supreme Court in *Mrs. Maneka Gandhi's Passport case*⁵. There, the legislation governing grant of

³ AIR 1986 SC 2030.

⁴ AIR 1976 SC 1207.

⁵ *Mrs. Maneka Gandhi v. Union of India and Another* AIR 1978 SC 597.

passport was interpreted in a manner so as to enhance the rights of personal freedom and personal liberty.

The judgment in *the Hawala Scam case*⁶ or the directions issued therein, is nothing but a roving probe or a fishing expedition undertaken by the Supreme Court of India. None of the Articles mentioned in Part IV of Chapter IV of the Constitution of India empower the Supreme Court of India or any of its Judges to issue such directions as have been issued in the *Hawala Scam case*. A Bench of the Supreme Court has virtually taken over the function of Investigating Agency in this case. Orders were issued to the extent of naming the Director of the Central Bureau of Investigation, naming the Officers who should be brought back after retirement, laying down the manner in which investigation shall be undertaken. I for one, could not see any provision of law which empowers the court to issue such directions in the matter of investigation, prior to filling of a *challan* and beyond the powers given by the Criminal Procedure Code. The Supreme Court is, no doubt, supreme but the supremacy is within the limits spelt out by Chapter IV of Part IV of the Constitution. The directions of the kind given in this case cannot be said to be directions under Article 142 of the Constitution, as such directions, of necessity, require existence of a valid *lis* before the Supreme Court, which has been decided by the Supreme Court and for execution of which order, further orders can be made under Article 142 of the Constitution.

Similar are the directions issued by the Supreme Court of India in the matter of Smt. Sheela Kaul and Capt. Satish Sharma.⁷ The Supreme Court has without trial and without giving them any adequate opportunity to defend themselves or prove their innocence held them guilty of certain misconduct and penalised them with a fine of Rs. 50 lakh. I for one, do not see any provision in the Constitution of India empowering the Supreme Court to impose a fine in such a manner. I see no machinery to recover this penalty if factually not paid by these persons. These persons have been deprived of their regular trial by a Sessions Court and a further appeal from order of conviction if any to the High Court and ultimate right to approach the Supreme Court. Judicial Activism cannot be used

⁶ *Central Bureau of Investigation v. V. C. Shukla and Others* [1998] 1 SCR 1153.

⁷ *Common Cause, A Regd. Society v. Union of India and Others* (1996) 6 SCC 593.

to destroy the statutory rights existing in individuals and distort of the Constitution of India. That, with deepest respect, may amount to misuse of judicial activism.

In recent days, reference is made to Article 142 of the Constitution of India as the source of power for giving of such directions. A scrutiny of Article 142, as it stands in the Constitution today, will demonstrate that no such power can be attributed to Article 142. It has been enacted to give enough power to the Supreme Court of India to see that its orders in litigation which come up before it in its jurisdiction laid down by the Constitution, are properly executed, because no statutory machinery or execution of the orders of the Supreme Court not made in its civil or criminal jurisdiction, is created. The Supreme Court has original jurisdiction under Article 32. Directions for protection of fundamental rights can be issued in such cases under Article 32 and in implementation of such directions, perhaps certain further directions can be issued under Article 142. Article 142 cannot be read to empower any judicial authority howsoever high it may be to do something which cannot be done under the Constitution of India. The Supreme Court cannot under the Constitution, in my humble opinion, legislate or investigate into possible crime and issue day to day directions for such offences as are being done in the *Hawala Scam* or *Fodder Scam*. In fact Article 142 is enacted for enforcement of the decrees and orders of the Supreme Court and orders as to discovery etc. It is clearly stated in Article 142 that the Supreme Court in exercise of its jurisdiction may pass such decree or make such orders as are necessary for doing complete justice in any cause or matter pending before it. In effect, it will be seen that Judicial Activism is to be brought into operation for the limited purposes of giving enhanced beneficial meaning to existing legislation to bring about harmonious interpretation of various provisions of the legislation and to propagate cohesive interpretation of the legislation in light of Constitutional monarchy given by the Constitution. It also can be brought into play for giving beneficial interpretation to the Constitutional provisions also.

In my opinion, Judicial Activism cannot be used for usurping the powers of the Executive or the Legislature. It has been consistently laid down by

the Supreme Court of India that there cannot be a writ of mandamus from any court directing the Legislature to legislate on a given subject. The power to legislate is squarely conferred on the Legislature by the Constitution. No such legislative power is given to the Courts by the Constitution. The legislative action done by the Courts is to be derived from its Judicial Activism done in permissible limits for proper and complete interpretation of the provisions of law. Judicial Activism cannot be used for filling up the lacunae in Legislation or for providing rights or creating liabilities not provided by the Legislation. In this regard, the judgments of the Supreme Court in relation to admission to the Post Graduate education in Medicinal Science need consideration. These judgments, starting with the judgment in *Pradeep Kumar Jain's case*,⁸ and then three or four directions issued in *Dr. Dinesh Kumar's case*⁹ appear to be yet another avoidable exercise in Judicial Activism. In that period, the Supreme Court of India, under the stewardship of Justice P N Bhagwati as the Chief Justice, had practically undertaken Judicial administration of medical education in India. The Supreme Court went on to lay down the manner in which Post Graduate seats in different Post Graduate Medical Institutions in India would be filled, the manner in which the examination for filling those posts is to be conducted, the manner in which the seats are to be distributed in every discipline, and the manner in which the question of the reservation for backward classes candidates would be dealt with. All this, in my humble opinion, was clearly in the domain of the Executive administering the Department of Education. It was certainly a specialized field which ought to have been left for governing to the Specialized Bodies like the Indian Medical Council. To the same effect are cases in the matter of capitation fees dealing with education in Engineering Branches in particular. In deciding all these cases, and giving numerous directions in those cases, I in all humility, submit that the Supreme Court has transgressed the limits under the specious cover of Judicial Activism.

⁸ *Dr. Pradeep Jain and Others v. Union of India and Others* AIR 1984 SC 1420.

⁹ *Dinesh Kumar and Others v. Motilal Nehru Medical College, Allahebad and Others* AIR 1985 SC 1059.

Similarly, the recent judgment in the matter of animal protection also needs consideration. The need for animal protection cannot be exaggerated, yet, no court, can by its judgment, legislate the requirements of environmental protection. To do so is, in my humble opinion, excessive exercise of Judicial Activism. In this light, the judgment of the Supreme Court in the matter of coastal constructions deserves to be considered.

The consideration of Judicial Activism will be incomplete if the judgment of the Supreme Court of India delivered by a Bench headed by Hon'ble Dr. Justice A S Anand¹⁰ is not noticed. This judgment was delivered by a Bench of the Supreme Court on the application of the Supreme Court Bar Association seeking review of the order pronounced by the Supreme Court of India in the matter of V C Mishra¹¹, former chairman of the Bar Council of India punishing him for contempt of Court. The Supreme Court Bar Association claimed that Article 142 envisages that the Supreme Court in order to do complete justice can pass any order laying stress on the aspect of doing complete justice in any matter. I have already dealt with this aspect earlier. It is reported in the press that the Solicitor-General argued that the Court cannot create jurisdiction nor create punishment which is not permitted by law. The Supreme Court of India, has accepting these contentions, issued a notice of caution saying that the courts should be skeptical about taking over power of other statutory organs. 'The Times of India' has commented that Justice Anand's pronouncement has rightly cautioned the highest judiciary against taking over the powers of other statutory organs like the Bar Council of India. According to 'The Times of India', Justice Anand said such a course is not permissible. It will be seen from this judgment that the Supreme Court has come alive to its limitations in this regard. This was ignored by Justice J S Verma and Justice Kuldeep Singh when they were presiding officers of the senior most Benches in the Supreme Court of India.

The consideration of the process of Judicial Activism will be incomplete if we do not take into consideration the reasons for which Judicial Activism has been undertaken in the recent past. One of the prime reasons given is inaction on the part of the Executive in performing its statutory or constitutional functions requiring interference by courts to seek performance of those duties and functions by issuing appropriate directions in the nature of mandamus. It may be true that there is inaction on the part of the Executive and getting work done by the person required or

¹⁰ *Supreme Court Bar Association v. Union of India and Another* AIR 1998 SC 1845.

¹¹ *In re : Vinay Chandra Mishra (the alleged contemnor)* AIR 1995 SC 2348.

enjoined with the duty to do it may be a part of the duty of the court. However, this can be taken up only in valid litigation brought before the court by concerned persons. Even then, the courts should have necessary limitations. The manner in which orders were issued in the matters of *Hawala Scam* or *Fodder Scam* or *Environmental Protection*, it cannot be said that there was a valid exercise of judicial powers. Judicial Activism must exist within the permissible limits which have been explained by me above. Correction of an erring executive is not the function of the judiciary. Judicial Activism cannot therefore, be undertaken for such purposes.

Unfortunately, in spite of so many judgments cautioning the judiciary against excessive exercise of Judicial Activism, in the recent past the Activism has crossed all its permissible limits and restraints. In fact, the interference is so often, that the Activism has ceased to be Judicial. It has become a tool to interfere in the fields of the Executive and Legislature under the omnibus cover of public interest.

A direction issued recently by the Chief Justice of the Bombay High Court, would prove the point I wish to make. In a PIL regarding prevention of recurring injuries of substantial nature due to water logging in the streets of Bombay, the PIL Court directed the Municipal authorities to take all necessary measures to prevent recurrence of 26.7.2005 and then observed that if despite directions, water logging (exceeding six inches) occurred next year, the municipal authorities would be personally penalized. The Court probably forgot to injunct the Rain God from ordering a cloud burst over Bombay City.

It is necessary that the image of the Indian Judiciary is not allowed to be tarnished any further. The responsibility to do so lies squarely on the shoulders of both the Judiciary and the legal profession. The decline in the standards of the judiciary has direct nexus with the standard of the legal profession. The profession must stop this decline and rise back to its glorious heights. It must stop this regular erosion of justice administration and decorum, by firmly and politely pointing out to the Courts its limitations in the matters of jurisdiction whether in PIL or other litigation as was done by the Additional Solicitor General of India, Shri Vikas Singh, before the Supreme Court of India. May the breed of such lawyers increase by leaps and bounds to bring back to the Indian Judiciary its pristine glory.