



Judicial Activism With a Difference

By

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This brochure gives briefly the arguments for and against Judicial Activism and analyses the factors that have led to it. It also discusses certain un-answered questions and suggests how we can have rule of law and realise the goal of Art. 21 of the Constitution and also other rights.

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Judicial Activism of a Different Kind

In recent times, the Supreme Court has been so much in the headlines in newspapers and periodicals that it became a generally shared perception of the people that the apex court is running the country. Though the public-interest litigation had come into its own in 1980s, yet the Supreme Court made so many pronouncements on widely-ranging matters and against bureaucrats and police officers and also others that compelled some to think that the court has become over-active and has started interfering into what was traditionally viewed as the domain of the High Courts or the executive wing of the Republic. There were also strong judicial orders in the exercise of contempt jurisdiction. *There has thus developed the nagging worry that politically sensitive and difficult issues might be conveniently passed on to the apex Court and some judges, with the temptation to take populist postures, might take to “aggressive” judicial activism or might get involved in matters relating to rights that should be enforced by political and administrative processes rather than by judicial intervention.* **This has, therefore, led to a serious debate on the true role and function of the highest judiciary of the land which has so significantly influenced the nation not only by its famous rulings in Golak Nath (1967) and Kesavananda Bharti (1973) cases, but also by intervening in many cases seeking to protect individual rights and collective economic and social rights.**

In this debate, those who endorse the activism of the court say that the court has been compelled to take this stance because of the decline in the role played by the other two institutions of the State. *They say that the lack of concern by the legislature for some pressing problems of the people, and the lack of responsible governance by the executive, made people restless and they looked on the Supreme Court as the Saviour instead of as sentinel and as ‘the authority of the last resort’ and, so, the Supreme Court had to enforce the rights of citizens through ‘innovative’ strategies.* **They argue that, even at the height of its present activism, the Court has not exceeded its powers and usurped those of the other organs of the State. They say that, what the Court did with cases relating to environmental pollution, the scandals concerning allotment of government accommodation or the hawala issue, is in keeping with its duty to uphold the constitu-**

tional rights — the right of life and liberty and equality.

Resurgence of Activism

Those who had spoken or written against a hyperactive court, have questioned the judges' role as 'super-administrator' or as 'super-cop'. They say that they agree that there is need for a strong and independent judiciary with a commitment for social causes but the recent role of the apex court, giving directives to a Municipal Commissioner for removal of garbage or to the CBI as to how it should carry the investigations in the hawala case or the allotment of government accommodation, is a bit too activist. They are surprised that the same Supreme Court which pulled-up the Chief Election Commissioner for stepping out of his limits, should step into the domain of the other wings of the State. **They say that the Constitution never envisages that citizen's complaints about maladministration should be addressed by the highest court. They had expected and also expect now that the fine balance between the domain and powers of different wings of the state, as envisaged by the Constitution, shall be maintained.**

A section of lawyers feels that the Supreme Court has, due to its high-flying zeal, crossed the limits defined in Article 32 of the Constitution which confers, on the citizen, the right to move the Supreme Court for any of the fundamental rights. In contrast to this, Article 226 empowers the High Courts to issue various kinds of writs for the enforcement of fundamental rights and also "for any other purpose". These two Articles define the limits between the apex court and the High Courts. While the High Courts can issue directions in order to prevent or set right the administrative excesses or wrongs, the Supreme Court may do so only in the case of an appeal. But, it seems that, recently, the tendency has been to erase this distinction.

Populist Posture

They point out that some, at the apex court, recently seemed to have been tempted to strike a populist posture, as for example, in the matter of Uniform Civil Code. This subject comes under the Directive Principles of State Policy and, thus, like other matters that come under that part of the Constitution, it is not enforceable by any court. The words, used especially in this case, are: The State shall 'endeavour' to secure such a code throughout the country. These indicate the discretionary power of the Govern-

ment and are not mandatory in their nature. And yet a two-judge bench castigated the legislature and the Executive for failing to enact such a code and directed the Government to file an affidavit to explain the steps taken to secure it.

Judicial Restraint under all Circumstances

Those who are against an overactive and over-zealous court say that the argument that all this has happened because of a weak Government and irresponsive legislature is untenable. They contend that the prevalent political conditions portend that, in the foreseeable future also, the political parties, who come to power, may have a fragile majority or we may have a hung Parliament or a weak coalition or there may be deadlocks in the Parliament and, under these circumstances, the Government may not do governance. That should be no excuse for the judiciary to step in. No doubt, the courts must, in that situation, exercise vigilance and protect life and liberty but they must observe judicial restraint and refrain from making sweeping pronouncements against the internal arrangement of institutions and their reasonable autonomy. They must allow the Press, the Platform, the Public opinion and the legislature to have full play in the making and unmaking of policies without resorting to the excessive judicial intervention in controversial matters, else its credibility will get gradually eroded and there may ensue judicial tyranny.

Clarification by Mr. Justice A.M. Ahmedi

It is good that Mr. A.M. Ahmedi, the Chief Justice of the Supreme Court, in order to allay the fears of those who were questioning the judges' role as 'super-cops' or 'super-administrators', spelt out the position of the Supreme Court in his '*Zakir Hussain Memorial Lecture*' which was later published as an article in *The Times of India*. He clarified that *the growing frustration with an inactive Parliament has led a more aware and demanding public to seek the court's intervention, leading it to provide 'novel directions to the executive'*. In his this lecture, he described the court's action as a *corrective measure* and said that the judicial activism, in its current '*aggressive role*' is a temporary one. He further stated in clear words that "fears of judicial tyranny are really quite unfounded because judges themselves are aware of the fact that the non-elected judiciary is neither meant nor equipped to act as a policy-making body." This has had sooth-

ing effect on those who were talking of the Court's 'judicial arrogance' and usurpation of the territory of other organs of the State. So far so good.

Un-answered Crucial Questions

But there are some crucial questions which have been left unanswered or which have not even been touched in this debate. Some of these are as follows:

1. India has, to-day, a population of about 950 millions. In order to have a well-knit *civil society*, we should have a large number and a vast variety of institutions without which the citizens will not be able to mediate with the Government or have an inter-action with people spread far and wide and having different activities. There have to be educational, social, economic, political, cultural, financial and a large variety of other institutions and associations. But we find that there is erosion of values in almost all institutions and there is degeneration all-round. There may be only a few exceptions in every field. In his Zakir Hussain Memorial lecture, Mr. Justice A.M. Ahmedi has referred to the President's address on The Republic Day this year, in which the President of India "*identified corruption, criminalisation, communalism and casteism as the primary evils that have afflicted our nation.*" These four evils, in fact, imply loss of *all* values, including honesty, tolerance, non-violence, co-operation, love, humanism, proper understanding, broad-mindedness, etc. **In other words, the prevalence of these evils means the sway of greed, dishonesty, injustice, hatred, jealousy, violence, selfishness, attachment, etc. on the mind of the people. The Chief Justice has expressed his agreement with this view of the President of our nation. The Chief Election Commissioner also has given the same diagnosis of the ailment of our society. The Hawala Case, the case relating to allotment of government accommodation, the case concerning some MPs of Jharkhand Mukti Morcha, who are alleged to have received bribes for enabling the party-in-power in the Parliament to prove its majority, and such other cases confirm the diagnosis.**

2. So, the question arises: who will stem this moral rot and how? We may give to these maladies the names 'corruption', 'criminalisation', etc. but, at the root of these all is the loss of values and this question has been left untouched in the debate as to how our society will become value-based?

3. Mr. Justice Ahmed has said in his afore-said lecture, that “**Inevitably, the process of degeneration of Parliament’s conduct has had its effect on the functioning of other democratic institutions**”. He has said that “**the elected representatives stall or prevent effective discussion in Parliament. This is a cause for concern as it is totally undemocratic. It has the effect of eroding people’s faith in democracy**”. He has, therefore, emphasised that “**this calls for soul-searching and *correctional action without further loss of time.***” But he has not touched the heart of the matter. He has not pointed-out what *correctional action* he has in mind and who will effect that correction. **He has stressed that “The need to examine and study the relation between politics and these evils (*corruption, criminalisation, etc.*) have assumed urgency because of certain disturbing developments that have taken place in recent years.**

Now, if the degeneration has acquired such proportions that it poses a grave threat to the unity and solidarity of our nation, how is one justified to say that “the phenomenon of judicial activism, in its aggressive role, will have to be a temporary one”? **How long is ‘long’ and how short is ‘temporary’? How long does a ‘temporary’ phase last? What is the guarantee that it will end in a year or two? The Supreme Court says that its aggressive role will soon end; will things come back to normal on their own? Mr. Ahmed** himself has said that “**it is the province of elected representatives to communicate directly with the masses and address their immediate problems**”. He has added an important ‘*if*’ to it. He has said that “**if our democratic institutions of the day do not perform their constitutionally assigned functions, the vigilant citizen cannot be expected to wait for the system to correct itself; he will and can be expected to take upon himself the task of enforcing the rights granted to him by the Constitution**”. **Earlier, he has said in his same lecture that “when the sensitive issues remain unattended and unresolved, people become restive, they seek to achieve their objectives through the judiciary”. “They do this by approaching public-spirited organisations and bodies, who, in turn, file public interest cases”.** So, the fact remains that, because of the aforesaid evils (*corruption, criminalisation* etc.), the legislature will continue, for quite some time, to be derelict in discharging its constitutionally assigned functions and will remain irresponsive and the people will continue to be disenchanted and restive and the public-spirited bodies will continue to file public-interest cases and, as the Chief Justice has said, the Supreme Court will be compelled to take “*the*

expanded role” and, therefore, this “aggressive role” will not be a *temporary* one. Isn't it?

Rule of Law

4. A civil or a civilised society is one where there is rule of law. If there are corruption and criminalisation, etc. that afflict the nation and the legislature and the Executive have abdicated their constitutionally assigned roles and the Supreme Court does not intend to be interventionist, how can there be rule of law? **If the elected representatives stall the work of the Parliament and create pandemonium and are prepared to bribe and accept bribes in order to maintain majority in the Parliament, then there may be Rule of numbers but not of Law.** If the Members of a legislature make all efforts for occupying seats of power by any means, however foul, how can they represent the will of the people? They represent only their own selfish motives. Even those members of legislature who are honest and who have well-being of the people in their mind, have only a rudimentary knowledge of the complex system of law and legislation. So, how can this small minority, however well-meaning it might be, can make criminal-proof law and ensure and maintain the rule of law? Can the Court, tremendous though its powers be, maintain rule of law in a society that has become corrupt and criminalised and has very many divisive forces at play? There can be rule of law only in a *civilised* society and not in a society where everyone intends to circumvent law, break law or be above law. So, the question is that if the society is against ‘aggressive role’ of the judiciary and does not want judicial activism or intervention of the highest court or its involvement in public-interest cases or extension of its jurisdiction, then what other ‘*innovative*’ or ‘*novel*’ (this is the word used by Mr. Ahmedi) method does it intend to remedy the situation in order to have *rule of law* in its correct sense? In any case, a novel device, a novel strategy or a ‘novel direction’ it has to be.

Protection of Life, Liberty, Rights and Freedom

The greatest achievement of the apex court has been in protecting the fundamental rights and the freedom and liberties. This has been in the area of part III of the constitution in general and in the area of Articles 19 and 21 in particular. This has been highly applauded by even its critics. **Article 21, on protection of life and personal liberty, has been enlarged to**

include the right to privacy, the right to decent living, the right to live with dignity and the right to full development.

It would be relevant here to note that various rulings of the Supreme Court in regard to Article 21 have greatly enhanced its scope and importance. Some of these may be mentioned here below:

- 1) **By the term 'life' something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limits and faculties by which life is enjoyed. AIR 1963 SC 1295 (1302).**
- 2) **Right of life, as enshrined by Art. 21, means something more than survival or animal existence. It includes the right to live with human dignity. It includes all those aspects of life which go to make a man's life meaningful, complete and worth living. 1990 BBCJ.**
- 3) **Right to live includes right to live in peace, to sleep in peace and right to repose and health ILR (1989) 1 Ker 556:(1988) 2 Ker LT 730.**
- 4) **Right to life includes right to vindicate reputation 1987 Cr. LJ 570 (Delhi).**
- 5) **The right to life includes the right of enjoyment of pollution-free water and air for full enjoyment of life. AIR 1991 SC 420 (424).**
- 6) **The expression "life and personal liberty" includes a variety of rights, though they are not enumerated in Part III of the Constitution, provided that they are necessary for full development of the personality of the individual and can be included in the various aspects of the liberty of the individual. AIR 1978 Delhi 308 (314).**
- 7) **"Personal liberty", in Art. 21 means not merely freedom from physical restraint but includes all aspects of personal liberty except those which are specifically enumerated in Art. 19. AIR 1963 SC 1295.**
- 8) **Our Constitution accepts the individual as the focal point of all development and spiritual development as the chief concern of its various provisions. It does not treat the individual as a cog in the mighty all-powerful machine of the State but places him at the centre of the constitutional scheme and focuses on the fullest development of his personality. But all these provisions would be meaningless and ineffectual unless there is rule of law to invest them with life and force. 1982 Cr. LJ (NOC) 193: AIR 1982 SC 1325 (1336).**

Moral and Spiritual Development is essential to protection of life and liberty

A reading of the above eight paragraphs (although more cases could have been quoted) brings out the fact that it is an accepted legal view that the term ‘life’ does not imply merely *animal existence*. The protection of life, therefore, does not mean protection of the mere body of a person. As is given in para 8 above, it implies fullest development, including the spiritual development of his personality. Also, as is given in para 2 above, it includes the right to live with human dignity and also all those aspects of life which go to make man’s life meaningful, complete and worth living. Further, as is given in para 3 above, it also includes the right to live in peace and to sleep in peace and the right to repose.

A question may, therefore, be asked: What the Supreme Court and the High Courts have done to make this provision meaningful in this aspect? The right to life is considered as the most fundamental of all (AIR 1950 SC 27: 51 Cr. LJ 1383 (Per Patanjali Sastri J.)); so what has been done to enforce this most fundamental right which is meaningless without full development, including spiritual development, and without human dignity as is the current judicial view? If the right to life includes the right to live in peace and also to sleep in peace, then the judicial mind should have been applied to remove the obstacles put in the way of the individual by the State and the Society so as to make it a realisable goal, else the Court should not have enlarged the scope of this Article. If it is contended, as in para (8) on page 9, that “this provision would be meaningless and ineffectual unless there is rule of law to invest them with force”, then ways and means should be discussed, finalised and adopted that can establish the rule of law.

Again, how can a person live in peace and sleep in peace and also live with dignity, if the society is not value-based and the person has neither the self-respect nor does he know the self and realise that, as a child of God, he has some respect?

Likewise, if liberty, as has been stated in para 7 above, “means not merely freedom from physical confinement but includes *all aspects of personal liberty* and all rights that are necessary for full development of the personality of the individual as contended in para 6 above, then what have the apex court and the High Courts done to assure the protection of such liberty? Various kinds of liberty must, of necessity, include the liberty of the spirit, the liberty of the thoughts from the yoke or bondage of nega-

tivity. What *novel direction* has been given to protect this kind of liberty of citizens?

Further, the Right to life includes the right to enjoy pollution-free atmosphere. This is now an accepted implication of Art. 21. The Supreme Court and the High Courts have given laudable judgements in the matter. Let us point to one or two the rulings in this regard:

- 1) “Right to life” includes the right of enjoyment of pollution-free water and air for full enjoyment of life. *AIR 1991 SC 420 (424).***
- 2) Art. 21 comprehends the right to healthy environment, and the duty of the State to protect these rights. When the degree of pollution crosses the tolerance limits, it invades the rights under Art. 21. (1990) 2 Ker LT 686 (693).**
- 3) Slow poisoning by polluted atmosphere, caused by environmental pollution and spoilation should be regarded as amounting to violative of Art. 21. *AIR AP 171 (181) 1987 MCC 471.***
- 4) Maintenance of health, preservation of the sanitation and environment, if not checked properly, goes to the slow poisoning and reducing the life of citizen. As such these rights are protected under Art. 21 of the Constitution of India. *AIR 1988 Raj 2(4): (1987) Rajasthan LR 334.***

Now, if Art. 21 does not imply protection of mere animal life but also protection of *faculties* by which life is enjoyed [See (1) on page 9], then protection of mere physical environment and health would not be enough because mental, moral and spiritual environment also must be pollution-free for full development and for full enjoyment of life and for enjoying a life in peace and sleep in peace. Then only he can live a meaningful life and a life of dignity.

Novel directions to the Executive

Mr. Justice A.M. Ahmedi has said in his lecture that, under the present conditions when the Legislature and the Executive have abdicated their responsibility and the people have become restive and have sought the help of the court, the apex court has had to issue ‘*novel directions*’ to the executive (see page 5). So, now that it is agreed that corruption, criminalisation, etc. are rampant in the society and the right to life and personal liberty, which is the most fundamental of all laws, and the provi-

sions of Art. 21 would be meaningless and ineffectual unless there is rule of law, then it is the sacred duty of the apex court, as the court of last resort and as sentinel of individual and public rights and liberties to do something in the matter. It may issue even ‘*novel directions*’ to the Executives for this purpose. This will not be considered as ‘judicial arrogance’ but a salutary role because everyone would wish that there be protection of life and liberty and the rule of law.

What can these ‘novel directions’ be? It is for the apex court to decide. But it seems pretty clear that education in values, adoption of a code of conduct and practice of Meditation is the remedy.

The court may, if it so pleases, issue the *novel directions* (if these are novel indeed) that education in values must form an essential part of teaching in schools, colleges, universities and institutions of professional training. It must give the directions that all professional bodies must voluntarily adopt a moral code of conduct that must be followed by every member and breach of that code should entail punitive action against the member. The teaching of moral values and Meditation also be introduced in jails and in other places because then only we can have a society that has rule of law. The politicians, the scientists, the youth — all must have spiritual knowledge that helps them develop their this aspect.

If, as Mr. Justice Ahmedi has said, there is grave danger to the unity and integrity of the nation because of divisive forces, then it is all the more necessary to give people the awareness of their spiritual identity because that is the only uniting factor that takes people above casteism, communalism and other kinds of discrimination based on language, geographical territory, etc. If there has to be soul-searching, as the Chief Justice has said, then let there be search for the soul and re-discovery of the self. This understanding of the real identity will enable an individual to enjoy real liberty of the spirit and give him an anchor in peace and lead to the rule of law and then there will neither be the need for ‘aggressive activism’ nor for encroachment into the domain of other wings of the State. Let this one kind of Judicial activism of a spiritual kind end any further need of other kinds of activism.

