

The limits of judicial activism

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Today, everything from river pollution to the selection of the cricket team has become the purview of judicial activism. Is it time to put the genie back in the bottle and confine the courts' public interest jurisdiction to its original purpose of ensuring justice to the poor and exploited?

All judges have subjective opinions. Their views have a bearing on judgments delivered. So, regardless of the appearance of neutrality, the values and beliefs of the judiciary play a major role in the life of the nation. In that sense, the judiciary actively pushes things in a certain direction. For example, immediately after Independence the courts' approach was one of protection of the rights of property, and this led to the striking down of land reform legislations.

There has always been a tussle between Parliament and the judiciary, leading to various constitutional amendments that, in turn, have been challenged in the courts.

However, the genesis of 'judicial activism' lies in the evolution of public interest litigation. Under the Indian Constitution, the Supreme Court and high courts can be approached in case of a violation of fundamental rights. However, it was the person whose rights had been directly affected who could petition the court. This rule, prohibiting the filing of cases on behalf of other individuals, was followed for almost three decades.

In 1979, a small news item in the *Indian Express*, describing the plight of undertrial prisoners who had been languishing for periods longer than the maximum punishment prescribed, led an advocate to file a petition in the Supreme Court. The court entertained this petition on behalf of the prisoners, and various directions to provide relief were given in the Bihar undertrials case.

Thereafter, the court entertained a number of representative petitions in the areas of custodial death, prisoners' rights, abolition of bonded labour, condition of mental homes, workers' rights, occupational health and related issues. The rationale was that fundamental rights remained on paper for a large number of marginalised sections of society that were not in any position to come to court. Therefore, public-spirited persons could file petitions on behalf of these poor and exploited classes of people. Even letters describing the plight of the dispossessed were entertained, and relief given.

Public Interest Litigations (PILs) evolved as an innovative departure from the rules, in tune with the socio-economic condition of our society. Even in the field of environmental jurisprudence, in cases like the Sriram oleum gas leak incident in 1985, in Delhi, the court evolved principles of corporate liability and awarded compensation to the injured workers and people living around the factory. Those were the heydays of judicial activism, with socially-oriented judges like Krishna Iyer, P N Bhagwati and Chinnappa Reddy.

Gradually, however, the court began entertaining public interest petitions that were not solely on behalf of the exploited sections. Some of the petitions dealt with social ills like corruption and the criminalisation of politics. Others were about the protection of ancient monuments like the Taj Mahal, the tombs of Zauq and Ghalib. River pollution, destruction of forests, waste management and environmental conservation began to constitute another huge chunk of PILs.

People turned to the judiciary as a panacea for all ills, and the courts seem to have accepted their own omnipotence. Cases like the hawala, Bofors and fodder scam are all household names today. And yet, corruption is prevalent in the courts themselves, and the apex court has not been able to cleanse its own backyard while attempting to root out corruption from the entire country.

Today, PIL is an ever-expanding universe. Any and everything, from the selection of the cricket team to the construction of a flyover, falls within its domain. Simultaneously, a large number of funded and non-funded CSOs, in the shape of committees, centres and human rights networks with the primary objective of filing PILs, have mushroomed and are part of the litigating constellation.

From the PIL's humble beginnings as champion of the poor and exploited, public interest litigation is moving in a diametrically opposite direction. There was a time when the courts would provide relief from the harsh, arbitrary actions of the executive, reflected in, say, the grant of a stay on the demolition of slums on grounds of lack of a rehabilitation plan or hardship of the monsoons, or school examinations. Today, slum demolitions are being directed on orders from the courts. In fact, the tables have turned. Today, it's the executive and legislature that are trying to put a relief and rehabilitation scheme in place before such demolitions. The courts, on the other hand, are declaring that demolitions should be carried out immediately, rendering scores of people homeless.

A similar trend is reflected in a large number of PIL areas. Thus, in the decision to shift heavy industries out of Delhi, the court heard public interest litigant M C Mehta, the owners of the industries, and the government, but denied the opportunity to be heard to the workers whose right to life and livelihood was going to be affected by the decision.

Protection of the environment is an area in PIL where the people versus environment paradigm has been constructed. But in cases such as the ongoing Godavarman case, the judiciary issued directions to evict tribals and other villagers from sanctuaries, national parks and tiger reserves. The right to life and livelihood of thousands of people residing in these areas does not find much place in the developing environmental jurisprudence.

The declining authority of the legislature and executive has led to ever-increasing activism by the judiciary in these areas. The role of the judiciary was understood to be interpreting the laws made by the legislature. However, the Supreme Court evolved the doctrine that in areas where no law had been made by the legislature, the judiciary could create a law to address the problems and issues raised in petitions. For instance, in the absence of legislation, the court laid down guidelines and mechanisms with respect to sexual harassment in the workplace, in the famous Vishakha judgment.

In the sphere of environmental jurisprudence, the Supreme Court created the five-member Central Empowered Committee (CEC) which functions like a judicial body and gives recommendations. Generally, appointment to statutory bodies created under legislation is a prerogative of the executive. However, on the recent issue of appointments to the Forest Advisory Committee, the judges reacted with indignation to the environment ministry's rejection of the names suggested by the CEC and endorsed by the court.

The Supreme Court has been, and remains, a political institution. The role it plays varies with the nature of the polity, the strength and stability of the Centre, and the prevalent mood in the country. Today, in an era of coalition politics, a weak and wilting Centre, and the eroded credibility of the legislature and executive, the judiciary has taken centre stage. But is it time to put the genie back in the bottle and confine the courts' public interest jurisdiction to its original purpose of being permissible solely on behalf of the poor and exploited?

(Rakesh Shukla is a Supreme Court lawyer)

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