CHAPTER 7

CONCLUSION AND SUGGESTIONS

Judicial Activism: Support and Criticism

There appears to be no unconditional support to the judicial activism of the apex courts. Very few scholars argue for a total support to the judicial activism. Others doubt the effectiveness of the concept, assessing from the view point of the long term impact and implementation of the decisions given by the court. This debate about the justification or otherwise of judicial activism is not unique to India alone. In USA also, there is a cleavage of opinion on this aspect even among the judges of the Supreme Court. Forceful and persuasive argument can be made for both activism and restraint. For instance, advocates of restraint have good philosophical grounding to argue, as they do, that in making constitutional interpretations, the justices must bind themselves to the specific intention of those who framed the relevant constitutional provisions. One such advocate is Raoul Berger, who argues that touchstone of activism is a failure to interpret the e constitution according to the intent of the drafters.[176]

An American scholar, while apparently recognising the principle that the judges do in fact do something more than discover law by making it interstitially by fitting in with judicial interpretation, the vague, indefinite, or generic terms of the statutory or constitutional law, argues that we must reduce the public's expectations of the court and that the court must reduce its expectations of itself.[177] He further declares that the Supreme Court of the USA wields a sobering amount of power in American life and that *"Nine men, elected by nobody, qualified by nothing but... a law degree and a friendship with the President, exercise the*

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[176] Raoul Berger, *"Government by Judiciary. The Transformation of the 14th Amendment"* (Cambridge: Harvard University Press, 1977).

[177] Richard Y. Funston, *"Constitutional Counter Revolution: The Warren Court and the Berger Court: Judicial Policy making in modern America"* (N.Y: London: Sydney: Toronto, 1977) at p. 213.

power to nullify and void the pronouncements and actions of the people's elected representatives"[178] Probably the same argument may not hold good cent percent to the Indian context in view of the different mode of appointment of judges under the Indian Constitutional scheme.

The opponents of judicial activism are naturally the supporters of judicial self-restraint. In the history of the U.S.Supreme Court, four justices stand out as leading advocates of judicial restraint. They are justices Oliver Wendell Holmes, Louis Brandies, Harlan F.Stone and Felix Frankfurter. They argued through their judgments that the power of the Supreme Court to declare laws unconstitutional should be used sparingly and that justices of the court must accord maximum respect to legislative acts. They repeatedly expressed the opinion that the political process was the best method to resolve disputes where values conflicted, and that it was a contradiction in democracy for Oligarchic Court to set itself against the elected legislature or to act in its stead.[179] The philosophy of judicial restraint is reflected in one of the early dissents of Justice Holmes, who summed up the essence of judicial self restraint in propounding his "reasonable man" thesis. He said, "*The court should nullify legislative acts, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our laws".*[180]

The opposition to judicial activism also comes from the difficulties created in implementation of the directives given by the court, in the form of some affirmative action. This so- called affirmative activism may require the court to supervise continuous action which affects large number of individuals. Consequently, it often produces extensive administrative responsibilities for the court. In the process, the courts formulate controversial programs of affirmative action requiring detailed administration for protracted periods of time under constant judicial supervision. In India, the continuing monitoring of the "Jain- Hawala- Diaries

[178] Richard George.
[179] Charles M. Lamb, *"Judicial Restraint of the Supreme Court"*.
[180] Lochner v. New York, 198 U.S.45 (74) (1904)

Scam", investigation by the Supreme Court in *Vineet Narain v.Union of India,* by forging a new writ called *"continuing mandamus"* and the series of positive directions pertaining to shifting of polluting industries causing damage to *Taj Mahal* and their closure[181] and the banning of the plying of 15 years old and more than 15 years old commercial vehicles in the National Capital Region of Delhi[182] demonstrate this kind of judicial administration which is continuous. This judicial attitude raises both pragmatic and jurisprudential questions about the limits of the judicial power.

Similarly, in the matter of expansion of the scope and ambit of Article 21 of the Constitution, by liberal judicial interpretation, there is a criticism that the Supreme Court has gone beyond its jurisdiction. The main reason for such a criticism is that thanks to the judicial activism of the Supreme Court, Article 21 right now, guarantees and contains almost 30 different kinds of implicit fundamental rights. The Right to life and personal liberty implicitly contains the right to privacy, right to health, right to free legal aid, right to pollution free environment, right to livelihood, right to shelter and right to gender justice etc. Even though, most of these rights are guaranteed as legal right. Under different legislations, some of them are too impracticable for their enforcement. These rights include the right to livelihood, the right to shelter, the right to speedy trial and the right to development. Their enforcement cannot be ensured by the judiciary. In fact, this would be the case in case of almost all the implicit rights read under Article 21.In the absence of an existing and enabling legislation, a person whose, such implicit fundamental rights are violated, has to approach the court for enforcing the same. It is too lengthy a process and very time-consuming, apart from being quite expensive. In the absence of any independent enforcement machinery, these directives or orders of the court have to be, necessarily implemented by the executive. Thus in the ultimate analysis, even the judiciary also must rely upon the other political branches of the government for the implementation of its directives. The same proposition holds good for the

[181] M.C. Mehta v. Union of India, AIR 1997 SC 734.
[182] M.C. Mehta v. Union of India, AIR 1998 SC 186; AIR 1998 SC 2340.

implementation of the Directive Principles construed as fundamental rights by the Supreme Court. Finally it is the State alone which can implement them, however expansive, the use of judicial power may be.

Of course, the supporters of judicial activism counter the above criticism by arguing that the Supreme Court and the High Courts being *courts of record* can invoke their power to punish for contempt, in ensuring the implementation of their directions. If any authority ignores neglects or wilfully disobeys the directions of the court, it would be liable to be punished for contempt of court. However the moot question is who would punish the contemnor? Is it not the same executive which committed the contempt of court? Regarding the interpretation of any unwritten and non-existent rights as part and parcel of the enforceable fundamental rights the supporters of judicial activism vehemently argue that the Supreme Court can, even in the absence of any enabling legislation, invoke the constitutional power under Article 142, to make judicial legislation which would have the force of a law, till the competent legislature makes the law in that direction. The Supreme Court has started invoking Article 142 regularly, in cases like *Vishakha v.State of Rajasthan*[183] for punishing persons found guilty of sexual harassments of working women and *Vineet Narain v. Union of India,*[184] for regulating the appointment of the Central Vigilance Commissioner, the Chief of Central Bureau of Investigation and the Chief of Enforcement Directorate. The ultimate aim of the Supreme Court in the above cases appears to be to render "*complete justice*" in the given matters.

Another factor, which justifies judicial activism of the present day, is that unlike in the past, now there are more cases before the court from wide variety of branches which emerged newly, more specialised areas, a large section of litigants crying for justice and an altogether new set of challenges before the court. Thus the judiciary can never remain a silent spectator, to the changing needs of time, when its active participation is required to meet the ends of justice. An apostle of activism, can quite reasonably assert that the Constitution

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[183] (1997) 6 SCC 241.
[184] 1998 Cri. L.J. 1208.

must be a living and flexible document designed to endure to meet the needs of the future generations, so too the courts also should be prepared to be as vibrant and flexible as the Constitution. Even pronounced critics of the judicial role also do not challenge the presence and authenticity of judicial review *per se,* but they challenge its application in specific categories and instances.

The judicial activism of individual judges is supported by even staunch advocates of judicial restraint like Felix Frank further, who said,- *"Judges are men, not disembodied spirits; as men they respond to human situations*[185] The learned Judge went on to add that the *judges do not reside in a vacuum and that they are "not dummies, unspotted by human emotions".*[186] A former Chief Justice of the United States Supreme Court, warren stated thus:

"Our judges are not monks or scientists, but participants in the living stream of our national life, steering the law between the dangers of rigidity on the one hand and formlessness on the other."[187]

Concluding Observations

The Supreme Court plays a vital role in Indian democracy. It is the highest court in the Indian judicial system and one of the three co-equal branches of the national government. It has primary, though not exclusive, responsibility for interpreting the Indian Constitution and lot defining the scope and content of its key positions. As a principal guardian of the constitution, the court is frequently called upon to assess the validity of statutes passed by legislative majorities. The Supreme Court however is, quite distinct from other policy making institutions of Indian government. Specifically, the Judges of the Supreme Court are not elected, nor are they in any other way directly accountable to the Indian people. The fact that the Indian Republic is governed by a written constitution offers a third alternative for

[185] As quoted in Henry j Abraham: The Judicial Process: An Introductory Analysis of the courts of the U.S., England and France, 3rd Edition (New York, 1980) p. 321.
[186] Ibid.
[187] In his article, "The Law and Future", Fortune, 52 (Nov, 1955) at p. 106.

reconciling the Supreme Court's power of judicial review with fundamental principles of majoritarian democracy.

Despite its unusual characteristics, therefore, the Supreme Court is a vital and integral part of the complex system of democratic self-government under which we live. It fulfils an essential governmental function by assuming primary responsibility for enforcing the counter majoritarian provisions of the constitution.

Deciding whether the Supreme Court plays an appropriate role in Indian democracy is not an easy task. The issues that have been raised and the material that has been examined provide a solid foundation for reaching the following conclusions:-

- Clearly the courts of the land are vested with heavy responsibility. The judiciary in India is one of those few institutions which have survived despite the great pressure of change and circumstances suffered generally by other institutions of the government.
- The new jurisprudence that has emerged in the recent times has undoubtedly contributed in a great measure to the well-being of the society. People, in genera now firmly believe that if any institution or authority acts in a manner not permitted by the Constitution, the judiciary will step in to set right the wrong.
- The Supreme Court is regarded by the people of India as the greatest institutional watchdog of people's fundamental rights and the most assertive organ that the nation possesses. This perception of the people has caused a spate of politico-legal issues to come to Court for adjudication. These mainly come through the pipeline of *public interest litigation* which helped the helpless to get easy access to justice.
- When citizens raise grave constitutional issues and exercise their fundamental rights in invoking its jurisdiction, the Supreme Court is left with little choice but to act in deference to its constitutionally prescribed obligation. This is the reason why the Court has had to expand its jurisdiction by, at issuing novel directions to the Executive; something it never have resorted to had the other two democratic

institutions functioned in an effective manner. However, by virtue of the fact that the present situation is a corrective measure, the phenomenon of judicial activism in its aggressive role will have to be a temporary one. 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.

- Even though the critics of judicial activism argue that the Supreme Court has over played its role under the Constitution in the garb of judicial activism, as long as it resulted in making the government more responsible to the governed, the judicial activism is unexceptionable.
- The modern judiciary throughout the world at present not only finds the law but also makes the law to meet the needs of the changing times. The Indian Supreme Court is not an exception to this global trend. The catena of decisions it has rendered in the last two decades stand testimony to the same.
- There is no evidence to show that the Supreme Court has been trying to achieve judicial Supremacy at the cost of the legislature and the executive, in general. In fact the court has been acting as a catalyst to activate them in discharging their Constitutional obligations
- Judicial Activism appears to be a temporary phenomenon because it has never been consistent anywhere in the world. The present day activism of the Supreme Court may recede into background once there is a strong government and responsible legislature.
- The Judicial activism of the Supreme Court has contributed immensely for the development of specific areas in constitutional law after 1980 which ultimately helped the weaker sections, downtrodden and oppressed sections of the society in the long run; and

- It is a fact that the judiciary led by the Supreme Court has at times made forays into the typical political arena but it has retracted to its own jurisdiction because of self realisation and public outcry.

Suggestions

This study revealed that the Supreme Court has by and large played its constitutional role very well and has always upheld the principle of constitutionalism. It has been in the forefront of rendering Justice- social, economic and political, on par with the other political branches of the government. However in view of the dangers that could be posed by an imperial and over-activist judiciary the following suggestions are made in order to protect the efficacy and efficiency of the judiciary in India led by the Supreme Court:-

- The Honourable Judges of the Supreme Court and High Court must always remind themselves the statement of Mr. Justice Jackson of the U.S.Supreme Court that – "*We are not final because we are infallible, but we are infallible because we are final.*"[188] Constitutional democracy implies that the ultimate interpreter of our fundamental law is not an autonomous judiciary but the interactive understanding of the people, their representatives and the judges together. Judicial power and judicial pronouncements should therefore be subjected to the same active, but respectful, scrutiny for their legitimacy as the actions of the political branches are subjected to.
- *The Judiciary may remind itself that under no Constitution can the power of courts go far to save the people from their own failure.* There are too many dangers to the judiciary itself from an *omnipresent* and rescuing judicial review. In its own interests the Indian judiciary may sooner or later have to propound a policy of judicial non intervention in defined areas. Such a policy is not a sign of weakness or abdication by the judiciary but only a recognition of the fact the Constitution did not make the

[188] Brown v. Allen, U.S. 443-540 (1944).

judiciary a substitute for the failure of the other branches of government and that judicial power has its limitations.

- The society has placed judges on a very high pedestal. Therefore the courts must justify that position remembering forever that the constitution does not give unlimited powers to anyone including the judges of all levels.
- Judicial creativity even when it takes the form of judicial activism should not result in rewriting the constitution or any legislative enactments. The active judiciary would do well to remember that fidelity to a political or social philosophy not discernible from the constitutional objectives in the discharge of judicial functions is not judicial activism: It is subversion of the constitution and any such judicial act which is politically suspect, morally indefensible and constitutionally illegitimate must be curbed.
- As a former Chief Justice of India rightly pointed out it is expected that judiciary would keep everyone within the bounds indicated by the Constitution that does not mean that the judges are left free to move wherever they like. The bonds are equally applicable to the judges as the Constitution has entrusted the additional task to not merely keep everyone else within bounds but also to remain within bounds themselves.
- The courts must stay-off from political arena by not donning the political role. They should remember that the court cannot save the country but they may be able only to buy the time necessary for revitalisation of other institutions of government. Even if the nation is obsessed with judicial salvation, the judiciary itself should not believe in the same.
- Though it is a very well established fact that the judicial activism of the Supreme Court has helped in enforcing the rights and interests of the citizens, and also in keeping the other branches of the government within their Constitutional boundaries, the judiciary should constantly remind itself that the need of the hour is

the Supremacy of the Constitution and not the supremacy of the judiciary. As the judiciary has, invariably to rely upon the other institutions for implementation of their orders and directions, unless there is an equal public faith and confidence in all the three organs of the State, the principle of Constitutionalism cannot prevail. Therefore the judiciary has to be active for noble causes but not at the cost of degrading the other organs of the State.

- Even though, the judicial activism in Constitutional interpretation and in expansion of 'personal liberty' is a healthy trend, the courts should realise that in a system of limited Government like India, the delicate balance between the three organs of the State should not be overloaded in favour of any one of them beyond tolerable limits.[189] The judiciary should not be an exception to this cardinal principle of Constitutionalism.
- As regards the appointment of judges, instead of vesting the power to recommend the appointment and transfer of judges of the Higher Judiciary, in the Chief Justice of India and four other senior most judges, it would be better, if such a task is entrusted to a committee of Judges, Government Representatives, and senior Advocates. Then, the collegiums of the recommendatory body would be representing a larger section of interested groups and, the appointments would be more transparent.
- It is said that the judiciary in India is independent but the judges are not independent. Probably, this statement has been made, from the view-point of the vulnerability of the individual judges, some of whom could not isolate themselves from their caste, religion and other extraneous influences, in discharging their official duties. Therefore, the ugly face of casteism and minoritism should not be a deciding factor for the appointment of judges but only the merit and honesty of the individuals.

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[189] As Prof. S.K. Agarwala suggests in his "Public Interest Litigation in India - A Critique" (Bombay, N.M. Tripathi...) at p. 40.

- The judiciary should be made financially independent to cope up with the heavy backlog of cases and it should be made a planned item. Such a financial independence would be necessary to add speed to the justice delivery system by having adequate number of judges in the Supreme Court, High Courts and the subordinate judiciary.
- There must be greater judicial accountability of the judges. While ensuring that the Legislature and the Executive are accountable to the Constitution, the judges should remember that they are also equally accountable to the Constitution and ultimately to the people. The courts must respond and be responsive.
- The courts must exercise self-restraint in certain defined areas where the political organs of the State have an exclusive role to play. What is necessary today is the judicial activism of the courts coupled with judicial self restraint. As judging the judges is a difficult and risky proposition, what, is necessary is an application of the theory of 'judicial self-automation' by the judiciary itself.
- The Supreme Court led Indian Judiciary should not be unduly over sensitive to any criticism provided the same is made by well meaning people with *bonafide* intention. The power of Contempt of Court should be used very sparingly that too only in the cases where the institution of judiciary is attacked with *malafide i*ntention by any one.

In the end, it must be stated that the judiciary in India particularly the Supreme Court has played the role of catalyst in providing justice to the people by keeping the other wings of the Government diligent and awake to the needs and challenges of the time. The judiciary has justified the faith and trust reposed by the Constitution. The position of the judiciary is akin to that of a trustee. The judges of the higher judiciary should always remember the golden words of Justice H.R.Khanna, who said:

> "When the other agencies or wings of the State overstep their limits, the aggrieved parties can always approach the courts and seek redress against such transgression.

When, however, the courts themselves are guilty of such transgression, to which forum would the aggrieved parties appeal? If mankind while passing through the successive stages of political consciousness has done away with despotism of kings and dictators, it would be puerile to expect it to put up with despotism of judicial wing of the State. Of the different types of despotism, the judicial despotism is not only inexcusable, it is also most irrational."[190]

It is to be admitted that judges are in fact human beings and are fallible just like other humans. They are bound to have their predilections which influence their judgments. It is only by way of exercising 'judicial restraint' admixed with the feeling of respect which the judiciary ought to have for other organs and by not being swayed by public adulations, an *inter se* harmony between the organs of governance can be achieved. If the Indian judicial system is to be saved from a sheer collapse, the need of the day is to propound a policy of judicial non-intervention in defined areas. Such a policy-making would not be a signification of weakness or abdication by the judiciary but would only be recognition of the fact that the Constitution did not make the judiciary a substitute for the failure of other branches of government and that judicial power has its limitations.

To sum up the judicial activism in India, it will be very appropriate to quote the words of eminent jurist, Nani Palkhiwala:

> "NO, WE DON'T WANT JUDGES WHO BEHAVE LIKE EMPERORS!
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> *What we want is those – whom the lust of office doesn't kill; whom the spoils of office cannot buy; who possess opinion and will; who have honour; who can stand before a demagogue and damn his treacherous flatteries without winking; who lie above the fog in public duty and private thinking."*

- Nani Palkhiwala

[190] Justice H.R. Khanna: Judiciary in India and Judicial Process (Tagore Law Lecture) (Calcutta, S.C.Sarkar & Sons, 1985) p.43.