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## **A COMMENT ON THE SHIFTING PARADIGM OF THE TRADITIONAL FUNCTIONS OF THE JUDICIARY IN INDIA**

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### **ABSTRACT**

The article provides the comment on the changing functions of the Indian judiciary. It encapsulates the different traditional functions of the judiciary by discussing the doctrine of separation of powers, as provided by Montesquieu and how this doctrine has been adopted in Indian context. Following this, it discusses the power of judicial review exercised by the Indian courts as provided under Article 13 of the Indian Constitution. Thereafter it deals with the emergence of the concept of Public interest litigation also known as the Social litigation for providing justice to the masses and how it has acted as an instrument by making justice more accessible and affordable.

## CONCEPT & PRINCIPLE

In the modern time court has outreached itself from traditional and classical function to a new function i.e., Judicial Activism which has, indeed, proved to be a pivotal for the better and smooth functioning of the courts in the present time. Judicial Activism is described as the “*philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions*”<sup>1</sup>. It is a right or perhaps we can term as intrusion, into the executive and legislative functions which is contrary to the Montesquieu’s principle of strict distinction between the functions of the three pillars of democracy i.e., Judiciary, Legislature and Executive which is popularly known as the *Doctrine of Separation of Powers*. In the present day, courts are not only restricted to striking down a law but has stepped ahead in its traditional functions by issuing orders and decrees directing the remedial actions. In this context Public Interest Litigation (PIL) has proved to be an effective instrument in performing this function of Judicial Activism.

In addition to Judicial Activism, another function bestowed to the Indian Courts is known as the Judicial Review which has enhanced the role of Indian Courts. This function is provided under Indian constitution to the Supreme Court under Article 32 and to the High Court under Article 226. It is emphasized that this function of the Courts was not traditionally considered as the primary function of the Courts. But with the passage of time, Indian Courts through various pertinent judgements had expressed that judicial review is a fundamental feature of Indian Constitution and an important function of the Indian Courts. With the evolution of the Courts traditional functions the power of judicial review is now not subject to amendment and through various judgment Indian Courts had explicitly declared that the power of judicial review was “*hands-off*” from the legislature. In general terms “judicial review is understood to be a revision decree or a sentence of an inferior court by the superior court”<sup>2</sup>. However the traditional function of the courts can be described as:

*“a forum to resolve disputes and to test and enforce laws in a fair and rational manner. The courts are an impartial forum, and judges are free to apply the law without regard to the government's wishes or the weight of public opinion. Court decisions are based on what the law says and what the evidence proves; there is no place in the courts for suspicion, bias or*

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<sup>1</sup>Black’s Law Dictionary, 7th Edition.

<sup>2</sup>R Shunmugasundaram, *Judicial Activism and overreach in India*; Amicus Curiae, Issue 72, Winter 2007 retrieved from [http://sas-space.sas.ac.uk/1719/1/Amicus\\_Curiae\\_2007\\_Issue\\_72,\\_22-28.pdf](http://sas-space.sas.ac.uk/1719/1/Amicus_Curiae_2007_Issue_72,_22-28.pdf).

*favouritism. This is why justice is often symbolized as a blindfolded figure balancing a set of scales, oblivious to anything that could detract from the pursuit of an outcome that is just and fair”.*<sup>3</sup>

## EVOLUTION OF THE TRADITIONAL FUNCTIONS OF THE INDIAN COURTS

Initially, the traditional functions of the courts was confined only to the interpretation of the Statutes and then adjudicate the matter accordingly. This can be observed in the initial judgments of the post-independence period wherein the judiciary had restricted itself only to the performance of its traditional functions. Under this, the role of judge was only to cast in a passive mould and the objective was to dispassionately evaluate the arguments made by both sides<sup>4</sup>. During this phase, judicial approach was aimed at strictly adhering to the doctrine of separation of powers. In case of *State of Bihar v. Bal Mukund Shah*<sup>5</sup>, Supreme Court held that ‘separation of power’ as the basic feature of the constitution. The doctrine of separation of power became the cardinal principle of governance in a modern constitutional democracy<sup>6</sup> wherein it provided the following functions essential for the democratic governance:

- a) a written constitution establishing its supremacy over any institution created under it;
- b) distribution of powers among the three organs of the State; and
- c) the co-equal status, along with the coordinating powers of each of the three organs.

In a nutshell, this doctrine provided a mechanism wherein all the three organs of democracy will work in the watertight compartment and wherein no organ will attempt to overlap the functions of another.

Although, Indian constitution impliedly incorporates the principle of separation of powers but it is not applied *in toto*. And as a result few modifications, according to the needs, were introduced so as to ensconce this principle in the Indian governance system. And in this respect,

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<sup>3</sup>Canadian Superior Courts Judges Association; retrieved from [http://www.cscja-acjcs.ca/role\\_of\\_courts-en.asp?I=4](http://www.cscja-acjcs.ca/role_of_courts-en.asp?I=4).

<sup>4</sup>Justice K.G. Balakrishnan, Former Chief Justice of India, speech on *Judicial Activism under the Indian Constitution* in Trinity College, Dublin, Ireland made on 14 October, 2009; retrieved from [http://supremecourtindia.nic.in/speeches/speeches\\_2009/judicial\\_activism\\_tcd\\_dublin\\_14-10-09.pdf](http://supremecourtindia.nic.in/speeches/speeches_2009/judicial_activism_tcd_dublin_14-10-09.pdf)

<sup>5</sup>A.I.R. (2000) 4 S.C.C. 640.

<sup>6</sup>Dr. Justice B.S. Chauhan, Former Judge Supreme Court of India, *The Legislative aspect of Judiciary: Judicial Activism and Judicial Restraint*; retrieved from <http://www.hcmadras.tn.nic.in/jacademy/Article/BS%20Chauhan%20Speech-%20Lucknow.pdf>

Supreme Court in case of *Ram Jawaya Kapur & Ors. v. State of Punjab*<sup>7</sup> made critical observation by highlighting the diabolical status of doctrine in Indian context. Supreme Court stated that:

*“The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”*

The Supreme Court in this case held that the doctrine of separation of power is not adopted in strict sense. Following this, Supreme Court in subsequent judgement of *Golak Nath v. State of Punjab*<sup>8</sup> stated that:

*“The constitution creates Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them”.*

Following *Golak Nath* judgment, Indian Judiciary in various cases expanded the horizon of its traditional functions. And the first case in this respect was *Kesvananda Bharti v. State of Kerala*<sup>9</sup>, wherein court held that though Parliament could amend every provision of Constitution but could it not amend the basic structure of constitution. According to Sathe, *Kesvananda* judgement proved to be the most unsustainable and contrary to the theory of Judicial Review.<sup>10</sup> It was conspicuous for the first time that the Indian judiciary will not restrain itself as per predefined traditional limits of its predefined functions under the Constitution. And this led to the initiation of tussle<sup>11</sup> between the Judiciary and the Parliament.

Following the historic *Kesvananda* judgment, Supreme Court leaped from its archaic function of Judicial Review by rescuing the inviolability of equity and fairness when Mrs. Indira Gandhi, the then Prime Minister of India tried to interfere in general elections. In this precarious situation Judiciary leaded the baton by impeding the ill-intentions of Indira Gandhi through

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<sup>7</sup>A.I.R. 1955 S.C. 549

<sup>8</sup>A.I.R. 1967 S.C. 1643

<sup>9</sup>A.I.R. 1973 S.C. 1461

<sup>10</sup>S.P. Sathe, *Judicial Activism: The Indian Experience*, Journal of Law and Policy, Volume 6:29, retrieved from [http://law.wustl.edu/journal/6/p\\_29\\_sathe.pdf](http://law.wustl.edu/journal/6/p_29_sathe.pdf)

<sup>11</sup>‘Tussling’ for the supremacy of non-elected court against the elected parliament.

case of *Indira Gandhi v. Raj Narain*<sup>12</sup>. Court in this case held that the power of constitutional amendment cannot be used by the private parties to resolve the disputes as it is a legislative power. Through this judgement court conferred its legitimacy to the doctrine of basic doctrine. It was posited in this judgement that the power of constitutional amendment could not be equated with the power of making of constitution<sup>13</sup>. Through this case, Court expanded its function by limiting the scope of legislature and widening its power to look into the matters which were, before, not considered under its ambit.

This judgement of Supreme Court was subsequently followed by other judgements which contributed in expanding Courts functions wherein the case of *S.P. Gupta v. Union of India*<sup>14</sup> was significant. In this case Court specifically commented about the functions of Judiciary in changing time. It stated that:

*“Now this approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities’ justice, dalit justice and equal justice between chronic un-equals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach. The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service of social justice through a pro-active goal oriented approach. . . . What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half hungry millions of India who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives.”*

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<sup>12</sup>A.I.R. 1975 S.C.2299

<sup>13</sup>*Supra* 10

<sup>14</sup>A.I.R.1982 S.C.149

This statement by the court clearly outlined the intentions of the court to expand its role, purview and functions for the effective deliverance of justice in society. .

## EMERGENCE OF PUBLIC INTEREST LITIGATION

Indian Courts, being aware of the technicalities involved in legal system, validated the instrument of Public Interest Litigation (PIL) or Social Litigation<sup>15</sup> in order to provide access to Justice. The main purpose of this mechanism was to provide:

- a) Legal assistance to the poor.
- b) Making legal system disenfranchised.

In case of *People's Union for Democratic Rights & Ors. v. Union of India & Ors.*<sup>16</sup>, court dwelled into the meaning of PIL wherein it stated that:

*“Public interest litigation is a cooperative or collaborative effort by the petitioner, the State of public authority and the judiciary to secure observance of constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society.”*

Indian judiciary has successfully used PIL, as an instrument, for the enforcement and protection of Fundamental Rights under Article 21. Through its judgment, Judiciary has exponentiated the horizon of fundamental rights by including right to education, healthy environment, dignified life, good governance and many more rights under its ambit. In case of *State of Uttaranchal v. Balwant Singh Chauffal & Ors.*,<sup>17</sup> Court discussed the intent of PIL in following statement:

*“This Court while exercising its jurisdiction of Judicial Review realized that a very large section of the society because of extreme poverty, ignorance, discrimination and illiteracy had been denied justice for time immemorial and in fact they have no access to justice. Predominantly, to provide access to justice to the poor, deprived, vulnerable, discriminated and marginalized sections of the society, this Court has initiated, encouraged and propelled the*

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<sup>15</sup>Supra 6

<sup>16</sup>A.I.R. (1982) 3 S.C.C. 235

<sup>17</sup>A.I.R. 2010 S.C. 2550

*public interest litigation. The litigation is upshot and product of this Court's deep and intense urge to fulfill its bounden duty and constitutional obligation."*

## COMMENT

At the time of independence, India adopted the Constitution by incorporating the principles of liberal democracy with socialist aspirations of general equality and welfare. During this period, it was considered that the role of Indian Judiciary was only to interpret the laws and regulations and provide judgements exclusively from the legal point of view. This perspective regarding the judiciary has undergone colossal change in recent times. In the present time the dynamic functioning of Judiciary has become an important catalyst for achieving the aspirations of the Constitution in letter and spirit. With the incorporation of judicial mechanisms like PIL, and enhancement from its traditional role in form of Judicial Activism and Judicial Review, there is indeed a very conspicuous proliferation of judicial functioning in the present time.

Also in the context of cases and its enunciation of doctrines there is tremendous change in the approach of the judiciary. In the early post-independence period, Judiciary's main focus was on to deliver the judgments which would harmonize the rights of State and an Individual. But with the *Kesvananda Bharti* and *Indira Gandhi v. Raj Narian* judgment, the Indian Judiciary has outreached its scope in form of the Activist.

Since then, Courts have delivered plethora of dynamic judgments which have brought changes in the modalities of traditional justice delivery mechanism. Various landmark judgments like *Bhopal Gas Tragedy*, *T.N. Godavarman v. UOI*, *Ganga Pollution case*, *Delhi vehicular case*, *SP Gupta case*, *Hussainara Khatoon v. State of Bihar*, *Sunil Batra v. Administration of Delhi* etc., illustrates the changing approach towards justice in India.

## CONCLUSION

Justice P.N. Bhagwati while commenting on the changing role and functions of the Judiciary stated that *in the last few years the Supreme Court has, through intense judicial activism, become a symbol of hope for the people of India*. This is evident from the fact that few decades back, the Doctrine of Separation of Powers was strictly followed wherein it was difficult to comprehend that judiciary through its activism could outreach its definitive powers for delivering justice under the scope of Constitution.

It is to be noted that Indian Judiciary had followed the principle of separation of powers while embracing the judicial activism. Principally court has valiantly fulfilled its primary responsibility of upholding the Constitutional goals. It is the Courts constitutional duty to enforce law for those violations which results in grave violation of rights of general public at large. In the case of grave violation of rights, no criticism of such acts as judicial overreach is sustainable in our constitutional framework. Despite being inspired by the constitutional objective of socio-economic justice, the Court has been rather cautious in its activism and has used its power sparingly in the matters which requires its interference in form of activism for protecting the rights of the public at large.