

CHAPTER-VII

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CHAPTER-VII

CONCLUDING OBSERVATIONS – JUDICIARY AND SOCIAL JUSTICE IN INDIA

(A) SOCIAL JUSTICE AND SOCIAL CHANGE

Justice can be understood as an “equal participation of all sections of society in political and public matters. The liberals have viewed justice with legal and political equality including in it rule of law, equality before law, equal protection of laws. With the development of industry, economic dimension of justice has also been advanced by the Socialist, Syndicalist and Anarchist, to whom justice meant establishment of a just social order. Social justice, in a recent phenomenon – is associated with an egalitarian order, with social ownership of major means of production. Justice can be viewed from legal, political, social, economic perspective. In ordinary sense, justice means just treatment to all citizen. Social justice means the “rights for the human cause”. With the passage of time, social justice has acquired different meaning. During the French Revolution – the ultimate goal of social justice was liberty, equality and fraternity. In the Medieval period of European History, radical changes in political and social structure has been viewed in the process of Renaissance, from where the man first learnt his own rights & dignity. Equality is the determining element of social justice which the socialist thinkers has considered. Equality means the “equality before the law”. Political equality means – universal suffrage. The quest for social justice starts in a situation in which some sections of the society are placed more or less permanently in a disadvantaged and the under privileged position vis-à-vis other sections so that they are constantly oppressed and exploited so long as the situation continues.

Soon after independence, the members of the Constituent Assembly involved in a strong debate with regard to the structure of Indian traditional society. The acute problem of caste hierarchy, poverty, exploitation, loomed large on the down trodden masses. The mechanical ruling of Parliamentary democracy insufficient to bring changes in the society unless the roots of social and economic democracies are recognized. Dr. Ambedkar, the chief architect of Indian Constitution, who took up the cause of the oppressed, vulnerable groups who belonged to the lower strata of the society. Since the ancient Hindu Society has been governed by the Shastras, the shastras codified, specific rights and privileges to the Brahmins and others who belong to low and middle class – were not entitled to receive such privileges.

The weaker section consist of untouchables, Shudras and the women who suffered from the different kind of disabilities. By and large all of them were assigned low status and non lucrative occupations. After independence, all these disabilities were removed by the Constitution of free India. Article 15(2) of Indian Constitution removed the disability of the untouchables, regarding that (a) access to shops, restaurants, hotels and places of public entertainment and (b) the use of wells, tanks, roads and places of public resort, untouchability was abolished and its practice in any form was forbidden according to Article 17. Article 25(2) threw open, the Hindu religious institution of public character to all classes and section of Hindus.

Basic Rights – Article 14 of the constitution, provides right to equality before law, where Article 15, 16 and 19 deal with various specific rights to equality to the citizens. Article 15(1) prohibits, the state from the discriminating against any citizen on the grounds of religion, race, caste, sex or place of birth. Article 16(1) states that there shall be equality of opportunity for all citizens, regarding

employment or appointment, to any office under the state. Article 29(2) deals with educational rights of the citizens and states that no citizen shall be denied admission to any educational , institutions, maintained by the state or receiving aid out of the state funds on the ground of religion, race, caste, sex of Language. Right from the ancient period till today the inequality and social injustice persist. So long as the economic inequality continues – social justice would remain a distant dream. A just order can be established only if the hierarchy based on ongraded inequality is total rejected. The constitution has adopted a basic principles (ideals) for restructuring the egalitarian society.

They are laid in the form of Directive Principles of State Policy. According to the provision of Article 37, though these principles are not enforceable by any court nevertheless, the are fundamental in the governance of the country and it shall be duty of the state to follow these principles in making laws¹.

Special Measures:

The constitution provided special priviledges and safeguards to the weaker sections specially the Scheduled Casts, Scheduled Tribes, the Backward Classes and the women. Article 46 of the constitution provides the state that should promote with special care the education and economic interests of the weaker sections in general and particularly the Scheduled Castes and Scheduled Tribes, and protect them from social injustice and all forms of exploitation. Article 330 and 334 makes provisions for reservations of seats in Parliament and State Assemblies for Scheduled Castes and Scheduled Tribes respectively.

The term social change is used to indicate the changes that take place in human interactions and interrelations, Society is a web of relationships' and 'social change' obviously means a change in the

system of social relationships where, a social relationship is understood in terms of social processes and social organisations. It includes alterations in the structure and functions of society.² “Social change is a term used to describe variations in, or modifications of any aspect of social process, social pattern, social interactions or social organization. According to M.E. Jones”. According to Kingsley Davis, Social change is meant only such alternations as occur in social organisations, that is structure and functions of society. S. N. Srinivas – opines that Sanskritization, Westernization, Caste Mobility, Secularization, the change in value structure that the country has witnessed etc. can be seen as the examples of social change. The noted Sociologist Max Weber has also observed that “social action” is a form of human conduct consisting of an internal or external attitude which is expressed by acting or refraining from action. It is action when man assigns a certain meaning to his conduct and the action is social when by the meaning he gives it, relates to the behaviour of other persons and is oriented towards their behaviour.³ Then in the opinion of sociologists we find that the law is an effective medium or agency instrumental in bringing about social change in the country or in any region in particular.

Taking clue from the Minerva Mills Case⁴ – “a harmonious balance between fundamental rights and directive principles, the Supreme Court ensured the enjoyment of subsistence rights, by warding off social and economic threats and then evolved a new jurisprudence. He further noted that reinforcing the character of a welfare state through the newly formed concept of public interest litigation, the court has enabled the citizens to march towards the goals of socio-economic justice. In Ashoka Kumar Gupta Vs State of UP, (1997) 5 Sec 201, Court played a pivotal role in Social change. The case related to challenge made against the promotion of certain respondents in the public works Department of the State of U.P. It is

not the out core of the case that is pertinent for our analysis but the obiter of the court made to justify the stand it took while protecting the deprived and the underprivileged. The court observed it is, but the duty of the court to supply vitality, blood and flesh to balance the competing rights by the interpreting the principles to the language or the words contained in the living and organic constitution, broadly and liberally. The judicial function of the court is to build up the judicial statement and judicial review under rule of law with a continuity of the part to meet the dominant needs and aspirations of the present. The court is not bound to accept any interpretation which retards the progress and impedes social integration through principles as laid in Part III and Part IV of the constitution. The court is empowered to ensure the social justice. Protective discrimination is a weapon of distributive justice.

(B) JUDICIARY AND SOCIAL JUSTICE IN INDIA

(a) Protection of the Backward Classes:

The Supreme Court had witnessed a continuous tussels between the upward classes and the backward classes period Devoid from practical realities, Supreme Court has secured the devices for the upliftment of the backward classes. The Case of state of Madras Vs Champakam Dorairajan (AIR1951SC226) reflects the ideology of Supreme Court. The communal Government order of 1951, which provided for reservation in Medical Colleges on lines of caste, was challenged in this case as being violatative of fundamental rights under Article 15(1) and Article 29(2) where in the right not to be discriminated in Government admission on multifarious considerations was guaranteed. The court did not agree to the justification given by the state that Article 46 as Directive Principle, mandated the state to make provisions for the promotion of the educational and economic interests of the Scheduled Castes and

Scheduled Tribes. The court opined that being a directive principles Article 46 could not override the fundamental rights under Article 15 and 29 and therefore, the government order was declared ultra vires the constitution. Therein, thus the court took a positivists stand and ensured that the backward classes were not promoted at the cost of the other well to do classes. The opinion of a seven judge, however was otherwise when the issue of reservation was again before them in the illustrious case of *Indira Sawhney Vs Union of India* (AIR-1993SC477) where in the concept of reservation was not only validated but in fact was permitted upto 50% i.e. the fact that half of all the government seats and posts could be set aside for the portion of population not more than 15% of the entire population, of the country, was approved by the court. Thus the zeal to bring to the parity in the people, both in terms of opportunity and also instilling the ability to exploit the opportunity made the court think in terms of applying the “pull-up theory” when ‘push up’ theory was already at work under the constitution. The present trend is that even if one post that is sought to be filled and the Government applies 40 point Roster in filling that post, which may even amount to 100% reservation and the total exclusion of the general category, it is not considered to be violative of Article 14⁵. Thus the intent of the court to ensure the upheaval of the backward classes can be evenly witnessed even though there has been constant opposition to the same given the challenge of creamy layers and other issues.

(b) Abolition of Untouchability:

Article 17 of the constitution abolishes untouchability. Caste acted as a stigma and deprived a particular section from the main stream of the society. Though the constitution prohibited untouchability in any form, its enforcement was not an easy task. Recently in a case “*N Adithayan Vs Travancore Devadasan Board and Others*”⁶, a question arose before the Supreme Court was whether a

person appointed who is not a Malayala Brahmin can worship in Kangoripilly Neerikode Siva Temple at Alangad Village in Ernakulam District, Kerala State, which is violative of the constitutional and statutory rights of the appellant. It was contended that only Namboodri Brahmins alone were allowed to perform poojas or daily rituals by entering into the Sanctum Sanctorum of Temples in Kerala, particularly the Temple in question, and that has been the religious practice and usage all along and that customs cannot be thrown over by the Travaneove Devadaswan Board, which was responsible for the administration of the temple. Since worshipping in a temple has become a secular aspect, the petitioner could not contend that becoming a part of pujari in a temple was an exclusive right of a particular class – because people belonging to other class were not permitted in the temple, - means - practice has already been abolished under 17 and discrimination of any sort would not be tolerated in any form expressed or implied.

In similar case, a complaint was lodged against the respondent who resist the Harijans from taking water from the well as they were “Mahras” and a separate well was laid for the Harijans who insisted on taking water from their well would bring sorrow away the people. This was dismissed by the High Court on the ground that “Untouchability has been practiced, under Article 17 untouchability has been prohibited and under the projection of Civil Rights Act, 1955, the thrust was to liberate society from the blind superstitious beliefs of the people. Several provisions has been laid to annihilate the untouchability and efforts to bring Dalits and Tribes under same footing – right to equality abolishing the social discrimination.

(c) Standing for the Dignity of Bonded Labour:

For the protection of the destitute and have not the Supreme Court has witnessed in *Bandhwa Mukti Bandhwa Mukti Morcha Vs*

Union of India⁷. that the strict adherence to the adversarial procedure cannot bring any justice to the parties since they are not economically and socially strong since they do not possess adequate social and material resources, they are left at the mercy of the judges. The inability to produce the relevant evidences do not provides the judges to give the proper judgement. The adversarial procedures – followed in their cases – does not enable the deprived sections to enforce their fundamental rights. Then Supreme Court is advised to take technical devices through which they can ensure justice to the people.

(d) Standing for the Progress of Nation:

Bank Nationalisation Permitted

Supreme Court has taken a positive approach in the case of “R.C.Cooper Vs Union of India” – AIR-1970, SC564 – where in the court not only permitted the Central Government to acquire and undertake certain banking compares but also held that there was violation of fundamental rights of the petitioner. Progress of Nation is the utmost priority held by the court. Court permitted nationalization of public banks.

(e) Standing Tall for the Welfare of the Child:

Preventing the youth of the nation from falling pray to exploitation, the Supreme Court has played a pro-active role in changing their position from the weak and unconscious stand point to a strengthened one. The Labourers working on Salal Hydro Projects Vs State of Jammu & Kashmir⁸ the court directed that whenever the Central Government undertakes a construction project, is likely to last for a considerable period of time, it should endure that children of the construction workers who are living near the project – site are given facilities for schooling. The Court also specified that this may be done either by the Central Government itself, or if the Central Government entrusts the project work or any part there of to a contractor,

necessary provision must be effective alongwith with the contractor. Further in the case of Sheela Barse Vs Secretary, Children Aid Society⁹ the Supreme Court, observed, “if there is no proper course for children of today, then the future of the country will be dark. It is obligatory for every generation to bring up children, who will be citizen of tomorrow, and who will hold the country’s banner high and maintain the prestige of the nation. Every society must therefore devote full attention to ensure that children are properly cared for and brought up in proper atmosphere, where they could receive adequate training, education and guidance in order so that they may be able to have their rightful place in the society when they grow up.

However, contrary to this judgement, in M.C.Mehta Vs State of Tamil Nadu¹⁰, the court allowed children to work in a prohibited occupation such as manifestation of fire works. According to Ranganath Mishra J and M.H.Kania J., the provision of Article 45 in the Directive Principles of State Policy will remain a far cry and though according to this provision all children upto the age of 14 years are supposed to be in the school, economic necessity forces grown up children to seek employment. Children can therefore be employed in the process of packing but packing should be done in an area far from the explosion and accident.

The court has made some progressive advancement in public interest litigation and child jurisprudence in this case. The decision has attempted to tackle the problem of child labour. A writ under Article 32 was filed by Mr. M.C.Mehta, contending that the fundamental rights of the children against exploitation were being grossly violated in match and fireworks industries in Sivakasi where in children were employed. The court therein noted that the manufacture process of matches and fireworks is hazardous giving rise to accidents including the total cases. Therefore keeping in view the provisions contained in Article 39(f) and 45 of the constitution. It

gave directions as to how the quality of life of children employed in the factories could be improved.

Declaring the secular status of the country, the court granted Muslim women maintenance under Sec 125 of the Code of Criminal Procedure, also despite their right of Mehr, in the case of Mohd., Ahmed Khan Vs Shah Bano Begum. (1985)¹¹. Though the essence of the judgement was eroded by the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and the rules framed thereunder, yet the progressive role of the court bringing equality in despite the religious decide can be ignored. An attempt towards the social change the mentality of the traditional Indian folk that girl child is not a bane to the family as has come to be understood in the present era.

Next understanding the plight of the workers, the court in Chandra Bhawan Boarding and Lodging, Bangalore Vs State of Mysore¹², held that the provisions of the Minimum Wage Act, 1948 were not arbitrary and in fact had to be sustained in a country like India, where in, the living wage was the target but on account of the general level of the wages in the country, and the industries and also the capacity of the industry to pay, a certain quantum of wages had to be determined as minimum wages which may sustain the worker in a reasonable manner, i.e. that wage which is sufficient to cover the bare physical needs of a worker and his family.

Thus, the Court – had played as pro-active role in ensuring social justice. Certain norms have been deleted and certain wages have been practised for articulating social rights.

History Decision by UN Committed on the Elimination of Racial Discrimination to draft General Recommendation of Caste Based Discrimination – Legal News and Views, Dec. 2002.

A hot discussion was carried by the United Nation Committee, on Geneva, where the members of UNCERD actively participated. The issue was, “the practice of untouchability still practiced in the country eventhough, it has been abolished by the constitution. Special schemes are taken for the economic welfare of Scheduled Castes and Schedule Tribes. The caste based discrimination has to be abolished, in any form. There has been unanimity to take the issue of Caste”. Within the members of UNCERD. Rajendra Prasad who was representative of the Permanent Mission of India to the United Nation stated that the thematic discussion has turned into debate of the situation, allegedly pertaining to a particular country¹³. The chairperson of CERD, Ion Diaconu said what the General Recommendations will attempt to identify specific areas which the government can follow and hope this will contribute to the resolution of the emerging human problems. Most of the Non governmental Organisation of Africa and Asian Continents have made presentations in the discrimination based on descent. In all, there were 23 presentations registered with the secretariate Mr. Paul Divakar of the National Campaign on Dalit Human Rights approached the chairperson.

The statements were collected from 26 NGO's (International Dalit, Solidarity Network), National campaign on Dalit Human Rights, India, National Federation of Dalit Women, centre for Dalit Human Rights, Rajasthan, A.P.Jogini Vyvastha, Vyathsika Porata Sangathan, Human Development Organisation – Sri Lanka. SAFRAD – Somali Association, Timidria-Nigeria; Centre Minority Rights Development (Kenya).The NCDHR Delegation consist of five persons N. Paul Divakar, National Convener and other member bodies – Mrs. Ruth

Manorama, convener of the National Federation of Dalit Women, Mr. P.L.Mimroth Convener of the Centre for the Dalit Human Rights, Rajasthan M.S.Najamma an activist among Devadasi Women and working with the A.P.Jogini Vyvastha, Vythireka Sangathan. These NGO's expose the "changing pattern of the discrimination based on caste system in the country and condemned the inhuman practice of caste system which affected the millions of people". After a historic decision taken by UN Committee for the Elimination of Racial Discrimination (UNCERD) a general recommendation was made on the caste based discrimination. This implies that caste based discrimination will directly addressed with clear guidelines of monitoring by the state within their respective countries, as well as reporting to the CERD in its deliberation. The caste based discrimination will be addressed by the UN Communities – would work within its own parameters to identify the caste based discriminator. UN Sub-commission for protection and promotion of Human Rights who had participated in the UNCERD Thematic discussion on 8th August. They paid that while agreeing to the progress in countries like India on setting the standards in constitution and laws for the protection and promotion of Scheduled Castes and Tribes; they disagree with the position taken by India that Caste based discrimination does not fall under descent based discrimination. Professor Hampson said that the discrimination felt by the Dalits – humiliation, distinction and exclusion violates the basic right to equality irrespective of race, colour gender, religion and descent mentioned in all the human rights charters. The Members of the sub-commission are seriously considering the extension to the study on discrimination related to work and Descent. NCDHR delegates feel that floodgates are now in the process of being flung open for addressing the caste based discrimination at the United Nation in its various bodies for deliberation and consideration. They

feel this will pressurise the government in India to take the issues for enforcement more seriously. The real work continues to be in the thousands of villages and all the states in India as well as at the national level. NCDHR will continue to work with many Dalit movements, activists, academics and organizations to mirror the decrying gap between the Acts and implementation between the constitution and its enforcement, it will work towards building a positive mindset in the Civil Society to the rights and concerns of the Dalit women, children and men and communities. It aims to bring the many MPs and MLA's and floor leaders of the political parties in India to take seriously the agenda of protection and promotion of dalit human rights and its enforcement in the country. NCDHR will also simaltenously work with many communities around the globe particularly in Asia and Africa which are discriminated on the issue of caste based discrimination to collectively address this issue at the United Nations and related multilateral organisations.

(C) HUMAN RIGHTS AND THE SUPREME COURT IN INDIA

The concept of Hūman Rights was first originated in England, during the reign of King John. He violated some of the natural rights of the individuals, the ancient laws and customs by which England had been governed, his subjects forced him to sign the Magna Carta which enumerates the concept of human right. The human rights include the right of the church to be free from governmental interference, the rights of all free citizens to own and inherit property and be free from excessive taxes. The human rights also contain the provisions forbidding bribery and official misconduct. In 1776 the American war of Independence created a new revolution based on political and religious liberty of the individuals. In the U.S. Declaration of Independence we hold these truths to be self

evident. That all men are created equal, that they are endowed by their creator with certain unalienable rights that among these are life, liberty and the pursuit of happiness". In 1789 the French overthrew their monarchy and established the 1st "Declaration of Right of man". The Universal Declaration of the Human Rights in 1948 in a dynamic concept has been widely accepted throughout the nations since it marks the landmark progress in the human civilization. The Human Rights covers the scope of social, economic and cultural rights of the individuals at national regional and international levels. The preamble to the charter of United Nations reaffirms fundamental human rights, the dignity and worth of the human being, equal rights of men and women at both national and international level. The Universal Declaration of Human Rights in its preamble emphasis on the recognition of the inherent dignity of all human beings as foundation of freedom, justice and peace in the world. Universal Declaration of Human Rights" is been accepted by India. Though the Government of India did not execute any affirmative actions to promote the regime of human rights. The Supreme Court – utilized the constitutional provisions to wider the human rights. Article 21 guaranting the right to life, and personal liberty, and article 14 guaranting the right to equality" was properly been safeguarded during the emergency period by the Supreme Court. The Preamble to the charter of United Nations reaffirmed faith in the fundamental human rights, in the dignity and worth of human persons in equal rights of men and women and of nations large and small.

Here lies some of the landmark decisions made by the Supreme Court – with regard to the protection of human rights.

1. In Ahmedabad Municipal Corporation, Versus Nabab Khan Gulam and others the apex Court¹⁴ considered the provisions of Article 19, 1(e) and Article 25(1) of the Universal Declaration of Human Rights declaring that every one has

the right to acquire adequate standard of living condition including food, clothing housing and shelter.

2. In Chameli Singh Vs State of UP¹⁵..... the Supreme Court held that right to shelter is a fundamental right available to every citizen. Shelter for the human being is not a mere protection of his life and limbs but it is house where he has opportunity to grow physically, mentally intellectually and spiritually “.....All human being have the right to life which includes, the right to food, water, education medical care and shelter”.
3. In Prabhakaran Nayyer Vs State of Tamil Nadu¹⁶ the Supreme Court held that shelter is a fundamental right and a proper enquiry must be taken on the urgent basis by the competent authority and the state, Right to shelter has been emphasized by the Supreme Court in M/s Shanti Star Builders Versus Narain Khimel Totame and others¹⁷.
4. In M.C. Mehta Versus State of Tamil Nadu¹⁸ the Supreme Court issued directions to the State Government regarding fulfillment of legislative intendment behind section 3 of the Child Labour (Prohibition and Regulation Act, 1986. The court interpreted the Provisions of Article 39(c) 39(f), 41 and 47 of the constitution and held that the tender age of the children should not be abused and they should have enough opportunities and facilities to develop in a healthy manner. The court also observed that India was a party to the International Covenant of the Right of Child – 1989, which affirms that the children’s right require special protection and it aims not only to provide much protection but also to ensure the continuous improvement in the situation of the children all over the world as well as their development and

education in the condition of peace and security. Article 31 of the said covenant provides that the state, should it, recognize the right of child which is to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, not to be harmful to the child's health, physical, mental, spiritual, moral or social development.

“The statutes like section 67 of the Factories Act, 1948, section 24 of the Plantation Labour Act, 1951 Section 109 of the Merchant Shipping Act 1951, Section 24 of the Bidi and Cigar Works Act 1956, Section 21 of the Motor Transport Workers Act 1986, banned the Child Labour in any forms.

5. In Rama Murthy Versus State of Karnataka¹⁹ the Supreme Court directed for the immediate trial of those prisoners in jail who are detained for a longer period. Jail Reforms are also to be made prohibiting the torture and ill treatments to the under trial prisoners. The age old Prison Acts must be replaced the proper medical facilities and proper hygienic conditions within the jail should be given to the under trials. In Charles Shobhraj Versus Superintendent, Central Jail, Tihad²⁰, Sunil Batra Versus Delhi Administration²¹, case the Supreme Court has directed to recognise the rights of prisoners – under “the sphere of human rights”. Article 21, was made available to the prisoners who would read and write in Jails. In Legal Aid Committee Versus Union of India²², the court expressed its concern with the detention of a large number of persons in jail in connection with various offences under Narcotic Drugs and Psychotropic Substances Act, 1985 and issued directions to release the undertrials prisoners who had been in Tamil for long period. The judgement was approved and was followed in Shaheen

Welfare Association Vs Union of India and others²³. The court adopted a pragmatic approach to release detainees under TADA on bail (since they have been detained for a long period and the judgement is been delayed. The court has directed to the authorities of Tihad jail to release the undertrials, on bail, depending upon the type of offences the prisoners have involved, on the term of completion of period as mentioned in the judgement.

Physical assault to the prisoners should be prohibited. In Madhav Hyawadanya Hoskot Versus State of Maharashtra²⁴ the Apex court held that Jail Manual must be updated to include the mandate of Article 21 of the Constitution which would be guaranteed to the prisoners. In Sunil Batra Versus Delhi Administration, the Court held that even a life time convict is entitled to his fundamental rights, guaranteed in Article 21 of the constitution. In Shamir Solhan Sanyal Versus Tracks Trading Pvt. Ltd.²⁵ the apex court held that dispossession of tenant without due process of law was violative of Article 21 of the constitution. In Vellore Citizen Welfare Forum Versus Union of India, and others²⁶, the court has issued direction to the Pollution Control Board to make the environment pollution free, which is considered as the fundamental right. In M.C.Mehta Versus Union of India²⁷, the Appex Court issued directions to stop the tanneries discharging affluent in Ganga – and take precautionary measures to purify the water of Ganges. In Kehar Singh Versus Union of India and others²⁸ the Constitutional Bench of the Supreme Court observed that imposition of dealt sentences is an exception for which the special reasons must be given as enshrined under Article 21 of the constitution of India. In Madhu Mehta Versus Union of India²⁹, the court committed the death sentences to the life imprisonment for the reason that the convict had suffered mental agency of living under the

shadow of the death for long. Delay in the execution of death sentence was barbaric.

In Malpewishwaneth, Acharya and other Vs State of Maharashtra³⁰, the Supreme Court held that every law must be examined and reviewed periodically. If the law is found arbitrary or unreasonable with the passage of time than it is liable to be struck down violating Article(14) the provisions as laid in Article 14 of the constitution. There are certain cases where the Supreme Court – insisted on changing the law which can be declared as dead law. In Amarnath Ashram Trust Society Versus Governor of UP³¹ the court declared that though the administration, is under trustee, it cannot violate Article 14 of the constitution which is mandatory. In Basudeo Tewari Versus Sido Kanhu University³² the Supreme Court held that Article 14 – provides that state must be fair, just and reasonable in the procurement of natural justice, though it is not mentioned in the Statutes. The Supreme Court considers the Right to Privacy as one of the ingredients of fundamental rights. Article 21 of the constitution of India is guaranteed even to child of 14 years – ensuring the right of basic education (Unnikrishnan Versus State of Andhra Pradesh³³. The Right to education is concomitant to fundamental rights as enshrined in Part III of the constitution. The similar judgement was given in Bandhuwa Mukti Morcha Versus Union of India³⁴, where the Solemn duty of the state is to provide basic education to the children who are working in different industries and factories. The court has also directed the government to take proper steps to educate all children – residing in the industrial areas and to protect them from all kinds of exploitation. It is obligatory on the part of the state to provide free legal aid to those who cannot afford to engage the counsel and bear the expenses of education.

(D) PROTECTION OF HUMAN RIGHTS IN INDIA

Human Rights are recognised only after the 1st World War. The concept of Human Right, is mainly in respect of the human dignity. This Right has undergone series of stages – which can be traced from “Magne Carta of England, the Bill of Rights in the U.S. constitution and the Delegation of Rights of Man in France. In order to protect the life, liberty and freedom of all individual, International Labour Organisation was first recognised in the Philadelphia Declaration. After signing the Treaty of Versailles in 1919, ILO of 1946 became an autonomous part of League of Nations. The Universal Declaration of Human Rights was first occurred in the United Nation Charter 26th January 1945. The Universal declaration of Human Right was adopted in the 10th December 1948 by the General Assembly of the United Nation where the basic human rights are guaranteed and fundamental freedoms are recognized to which all men and women, are equal irrespective of the race, colour, sex, language, religion, place of birth. Some of the conventions which are made mandatory – (1) The convention against the discrimination in education, 1960, The United Nations Declaration on the elimination of all forms of Racial Discrimination, 1960. The international convention on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights in 1965. The International Convention on suppression and punishment of the Crime of Apartheid 1973. The decade for Action to Combat Racism and Racial Discrimination (1973 to 1983). The Declaration on Race and Racial Prejudice 1978, Implementation of the programme for the Decade for Action to Combat Racial and Racial Discrimination 1983. International Convention against Apartheid in Sports 1985. International Conference on Sanction Against South Africa 1981. Convention on the Rights of the Child, 1985. The Declaration on Rights of Persons belonging to the National or Ethnic,

Religious and linguistic Minorities adopted on 18th December 1992, is a landmark in the protection of minorities³⁵.

The various efforts of International organisations are the result of the realization for the welfare of the individuals. In spite of the humanitarian work of the United Nation, abuse of the Human Rights still persists in the International level. The Human Rights are fairly recognized by the Indian Constitution in the form of fundamental Rights. Part IV of the constitution provides the directives to the state to enforce the social, economic, cultural, civil and political rights. Article 43 directs the state to secure for workers a living wage, decent standard of life and social and cultural opportunities. The Lok Sabha has established National Human Right Commission in December 1993 to govern the military personnel to combat the terrorism and communalism. Certain laws are provided to safeguard the rights of the individuals – like right to life, personal liberty according to Article 21. The Right to enforce the Human Rights provided in the Indian Constitution is protected through the certain provisions. Article 226 of the constitution empowers High Court to issue directions, orders, writ in the nature of Habeas Corpus, Quo Warranto, Mandamus and writ to Certiorari. These writs are used for the enforcement of fundamental Rights. Article 226 lays the powers of the High Court which is constitutional. Its jurisdiction is divided into two – (1) legal, constitutional and administrative. The Right to move to the Supreme Court is itself a fundamental right. Article 32, invest the Supreme Court with the power of the Judicial Review for the enforcement of the fundamental rights with the power to issue directions like Habeas Corpus, Quo Warranto, Mandamus, Certiorari. Today the judicial activism has extended in a wide spheres –

The role of the judges – as quoted by P.N.Bhagwati is not only to interpret the law but also to create laws if they are not in the statutes. The Judicial Activism refers to the phenomenon of the court dealing

with issues which are traditionally not been touched. Where the constitutional rights of the people are involved the Court has its jurisdiction. The lack of concern by the legislature for some pressing problems of the people, lack of responsiveness of the government compelled the court to enforce the rights of the citizens through novel and innovative strategies to meet the needs of the time. In the case of environmental pollution, scandal, in allotment of government accommodation, Hawala Case, the Court uphold the constitutional rights. Public Interest Litigation – is often called the Judicial Activism. All laws are binded upon all the courts in India. If a particular law ultravires, the Court will decide a matter as “legal lacuna”. Justice P.N.Bhagwati ruled out that if the guidelines of compensation to victims of motor accidents, rail accidents are not enumerated in existing laws then the courts are at liberty to make the laws. What Dr. Ambedkar has enumerated was laid in Article 25 – which enforces the Fundamental Right. Sir Ivor Jennings considered the writ jurisdiction as the lawyer’s paradise. “The future evolution of the Indian Constitution depends to a large extent upon the work of the Supreme Court.....”³⁶

At present, the Supreme Court has delivered several judgements, in giving directions to government and civic agencies, depending upon the Rule of Law. Through Certiorari, the Court can dismiss the unlawfull government order and direct for the compensation, if the some damage is done to the person. Mandamus Certiorari and Prohibition – deals with wrongful action of Legislative bodies.

Though the judiciary was conceived as an arm of social revolution, its contribution towards developing a new social order remained insignificant until the development of Public Interest Litigation. Rajeev Dhawan, has opined that although the court’s

jurisprudence comes from the western sources, but certain reforms have been made ... for their conveniences.

The English Judicial technique – is more or less oriented by Judicial Jurisprudence, with the view of socio-economic status of the Indians, the judges – has to change their traditional method.

(E) PUBLIC INTEREST LITIGATION

PIL is perhaps the most wonderful gift that the apex court could offer to the people of India, in general, the down trodden, disadvantaged and marginal classes in particular. No principle of law or procedure established by the apex court in the past decades including the law laid down in Golaknath (1967) and Kesavananda (1973) is similar to what “Court has delivered in “People’s Union Vs Union of India³⁷ Bandhuva Mukti Morcha Vs Union of India³⁸ ... PIL seeks to modify the rigid rules of locus standi so that justice can reach the doorsteps of the poorest of the poor either by direct appeal or through a third party initiative. Justice Bhagwati, Chandrachud Krishna Iyer and Chinnappa Reddy are regarded as prisoners of PIL process. They have given a remarkable social justice delivery system in India. Though unique and innovative in many respects, the PIL is neither extra legal nor unconstitutional. On the contrary it is founded on the substantial provisions of the constitution as well as the ideals, objectives and values of the constitution. In particular, it is supported, first of all by Article 32 and 226 giving writ jurisdiction to the superior courts, second by the Directional Principles, regarding legal aid and equal justice in Article 39A, protection of environment and wild life in Article 48(A), 51A(g) and 51A(e) and finally by a broad construction of the Fundamental Right to life and personal liberty under Article 21. Prominent among the judges who pioneered the PIL movement are Justices P.N.Bhagawati and V.R.Kishna Iyer. Their trend settling

judgements shaping and supporting the PIL are remarkable in law as well as language and style. Justice Bhagawati popularly known as the father of PIL movement in India, describes PIL “as a strategic arm of legal and movement intended to bring justice within the reach of poor masses who constitute the law visibility once of humanity. He further stated that “the problem of the poor are qualitatively different from others and therefore they need different kind of lawyer’s skill and a different kind of Judicial approach. The courts adopted a “pro-active goal-oriented approach”. Justice Bhagawati argues that legal justification for PIL springs from proper interpretation of Article 32 of the Constitution.

Justice Krishna Iyer takes an ideological view of PIL. According to him, PIL is a weapon of people in general the poor in particular against the arbitrary executive and exploitative rich and capitalist classes. Thus he defines PIL as a people’s forensic weapon to attack executive non-teasance, malfeasance and misteasance to shoot down Big Business stratagems injuring community interests and to defend the human rights of every citizen by whomsoever they are infringed. He goes on to say if the rule of law is to be meaningful then, “the people in their numbers, who have been victims of injustice, must have free passage to the portals of justice”. Here the Locus standi must be broadened by a spacious jurisprudence of access to justice. Though the judiciary was conceived as an arm of social revolution its contribution towards developing a new social order remained insignificant until the development of PIL. Lawyers and Judges concentrate their work to their day to day work to ensure the justice in a democratic society. Law in a democracy works as a mighty weapon in the achievement of democratic ideal of socio-economic justice. The Supreme Court has adopted the English Judicial Technique – to develop the social-justice oriented industrial jurisprudence. It help to develop the human rights jurisprudence and

in this process developed its own image as “Protector of People’s fundamental Rights. The courts and the judicial process in order to redeem its pledge to act as an arm of Social Revolution, needed a Judicial Therapy to cure the unhealthy society of its ailments³⁹. Public Interest Litigation seems to cure such Judicial Therapy”.

Let’s discuss some of the cases which comes under Public Interest Litigation: -

1. Blinding of Prisoners in Bhagalpur Jail:

The barbarous practice of binding of industrial prisoners was continuing in the Bhagalpur Central Jail in Bihar. The whole thing had occurred in Prison, when Arjun Goswami, the prisoner was tortured, blinding his eyes by the jail officers, who was on duty on 28.10.1979. The victim has addressed the petition to the Chief Judicial Magistrate of Bhagalpur. After going through the application, the C.J.M.⁴⁰, has sent a Medical Board to examine the prisoners. These types of incidents have occurred several times in the jail and according to the Report of the Jail Doctor, the Chief Justice Chandrachud, Justice Chinnapa Reddy had developed a modern strategy to inquire, the jail frequently and compensation should be given to the prisoners.

2. Bonded Labours:

Bandhua Mukti Morcha is an organization, who took up the cause of releasing bonded labourers in the country. The members of this organization had filed a writ petition in the Supreme Court against the violation of Article 23 of the Constitution. Eventhough Bonded Labours System (Abolition Act) was passed in 1976, a large section of labours still working as bonded labourers in the states of Maharashtra, Madhya Pradesh, Uttar Pradesh and Rajasthan. The organization have alleged that the bonded labourers had to work under an inhuman and intolerable conditions. The contractors compel

these labourers to work in the quarries where the wages paid to them was a very small amount, which barely mitigate their subsistence living. Their little negligible earning, barely satisfies the needs of the family. They often had to live under thatched roofs. So Bandhua Mukti Morcha, asked for residential accommodation for these labourers providing medical aid in the case of accidents. According to the orders of the Supreme Court, the bonded labourers are released from hazardous places like of “stone quarries in Faridabad. The contractors did not treat them as human they were considered as serfs. The Court kept a watchful eye on “Mukesh Advani’s Case (AIR 1985 SC 1363), where the court has appointed the District Judge to inspect the State Mines of Mandsaur District of Madhya Pradesh to ascertain the existence of bonded labourers and submit report – about their living and working conditions. The court has also appointed several persons to study problems of the bonded labourers and submit the report. Bandhua Mukti Morcha is a typical instance showing apathy of the executive towards implementation of social welfare legislation. In (Bandhua Mukti Morcha V Union of India) case the judicial process which took up the cause of the social justice – to safeguard the life of the bonded labourers.

3. Protection of the Child Labourers:

In spite of statutory provisions, the employment of children in the factories, and stone quarries are still observed in nearly all over the country. They are paid less than minimum wages. A writ petition was filed by S.C. by “People’s Union for Democratic Rights” alleging that the contractors have employed workers in Asian Games at New Delhi. Most of the workers were the victims of Bhopal Gas Tragedy. Similarly, same incident occurred in Fertilizer’s Industries at Delhi. This Industry was owned by the Delhi Cloth Mill, a public limited company. On 4th December 1985, a major leakage of Oleum Gas took place from one of the units of Shri Ram Food’s Industry. A large

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number of persons both workmen and people were effected by the leakage of gas. The petitioner approached to the Supreme Court by the way of Public Interest Litigation, raising seminal questions concerning the true scope and ambit of Article 21 and 32 of the constitution requesting the Court to determine principles and norms for deciding liability of large enterprises engaged in Manufacture and sale hazardous products, prescribe the basis on which damages in each case should be quantified and lay down the law relating to other connected matters. The court adopted a novel procedure and permitted the petitioner to appoint an Expert Committee to visit the Costic Chlorine Plant and submit report regarding inadequacies, in relation to the hazards to the public. The recommendations made by Manmohan Singh Committee – was similar to the Nilsy Choudhury Committee⁴¹. The court found the similarity in the Reports submitted by the two committees. The judgement of the S.C. under the public Interest Litigation – helped to solve the problems of weaker sections who could afford to get the justice promptly. In Bhopal Gas, Peedit Mahila Udyog Sangathan and others Vs Union of India, (AIR-1989, SC 1069) the Supreme Court granted relief to the unfortunate victims of the Bhopal Gas Tragedy. The court further directed the state government of Madhya Pradesh – to provide foodgrains to the victims.

4. Ecological Imbalances and Environmental Pollution:

Rural litigation and Entitlement Kendra Vs State of UP (AIR 1985 SC 652) brings into sharp focus on the conflict between development and conservation and emphasis on the need for reconciling the two for the interest of the country⁴². The court has faced main issues relating to the in protection of the environment and to maintain the ecological balance. A Committee of expert has been appointed by the court under the chairmanship of Sri D.N.Bhargava, the Controller General of Indian Bureau of Mines, Nagpur – for the purpose of inspecting limestone quarries and report about their

working and impact on ecology. The limestone quarries have been divided into three categories (A, B and C) – The limestone quarries under in category A is has an adverse effect on the environment. While mining operation most of the workers were child labourers and women workers They were paid less than the minimum wages. The court, through the pressure of “People’s Union for Democratic Rights” forced the contractors, of the Delhi of Development Authority to observe the Labour Laws and work accordingly to the constitution. The court has also declared that wages – which are not paid in due date must be paid in form “arrears and provide adequate facilities for their healthy living. Article 24 and Article 23 is been violated by the members of Delhi Development Authority. Article 23 of Constitution states that employment of workers on less than minimum ways – is equivalent to forced labour is prohibited. At the same time non payment of equal wages to men and women labourers violates the constitutional guarantee of ‘Equality’.

Article 23 was violated in “Rajasthan Famine Relief Work’s Case (AIR 1983, SC 320) where the workers were paid less than minimum wages under a law enacted by the Rajasthan legislature. Rajasthan Government relied on Rajasthan Famine Relief Work’s Employment Act 1964 and submitted that Minimum Wages Act 1948 was not applicable and hence no question of its violations arises. Justice Bhagawati held that this Act has violated Article 23 and employment of forced labour was considered an unconstitutional. In *M.C.Mehta Vs State of Tamil Nadu* – (AIR 1991, SC 417) a complain was lodged against the owner of match factories of Shivakasi in Tamilnadu, who has employed a child labour, paying less than the minimum wages. As 39(f) and 45 of the constitution was violated by the factory owner – by not only depriving the labour from their actual wages but also exploited to them to the extreme level.

The night of 3rd Dec., 1984 witnessed the biggest and wide accident in the history at Union Carbides Plant at Bhopal, where 2500 people died and millions suffered irreparable physical injury leakage of MIC Gas at Bhopal, attracted attention of lawyers, administrators, social workers, judges and jurists all over the world. It also raised a question, if any liquid or gas escapes which is injurious to the workers and the people living the surrounding area, whether on account of negligence, or otherwise what would be extent of liability of such industry and what remedies can be devised for enforcing such liability with a view to securing payment of damages to the persons affected such leakages of liquid or gas. The Supreme Court has ordered for compensation to the victims of limestone quarries.

Category B and C has less impact on the environment. The Court however, permitted limestone quarries classified in category A, subject to rigorous observance of the provisions of Mines Act 1952, Metalliferous Mines Regulations, 1961, and other relevant statutes. The court had appointed another committee under Shri D. Bandopadhyaya, the Secretary of Ministry of Rural Development to operate the areas of limestone quarry⁴³. After examining the report of Bandopadhyaya Committee, court insisted to take precautionary steps in extracting the limestone deposits.

The Doon Valley which is famous for its perennial water streams and fertile soil and provides for important places of tourist attraction, centres of education, research and defence, was in danger because of erratic, irrational and uncontrolled quarrying of limestone. The landscape had been stripped bare of its verdant cover. Green cover today was about 10% of the area as against 70% a decade ago. There was therefore, the growing apprehension that if mining was carried on. Stage will come when there will be dearth of water in the entire belt. The court however held that it is for the Government and the nation and not for the court to decide whether the deposits should be

exploited at the cost of ecology and environment considerations or the industrial requirements should be otherwise satisfied. The court warned that Governments, both at the Centre and the state must realize and remain cognizant of the fact that stake involved in matters is large and far reaching. The evil consequences would long last if, unwanted situation sets in, the greenery of India would some day may perish, and the Thar Desert may expand its limits. The court left the matter ultimately to be decided by the Government. Article 51A(g) of the constitution emphasised on the preservation of the environment and to maintain ecological balance.

5. Cleaning Ganga from Industrial Pollution

The Public Interest Litigation was filed in 1985 – drawing attention of trade effluents into the Ganga River by evergrowing industries. The Supreme Court admitted the writ petition and directed the government to take appropriate steps to prevent water pollution, by an order dated 9th September 1985. The petition was filed by the lawyer M.C.Mehta who seek to restrain the tanneries of UP from discharging industrial effluents into the Ganga. People living near the river side, will be effected by discharge of water of the river.

The Municipalities, and the local bodies – were ordered to make proper sewerage into the river. Due to the pollution of the industries the people residing near the river find it difficult to drink and bath with such water. According to the courts order 30 tanneries in U.P. were closed down. Article 48A of the constitution which says down that the Government would protect and improve the environment. Article 51A made it the duty of every citizen to do the same. This has been enforced by the court. The Court also invoked the provision of water (Prevention and Control) Act 1974, Environment (Protection) Act, 1986 and the Proclamation adopted by the UN Conference on the

Human Environment at Stockholm in 1972 to justify the Judicial Intervention.

The Court has directed: -

In order to arouse consciousness of cleanliness of environment, the Central Government and the State Government and the Union Territories – must organize a committee to invigilate the city at once in a year.

Conclusion:

The emergence of the PIL is the result of Judicial Activism. When the citizen does not get justice from the legislature or the executive, he is compelled to seek redress from the judiciary, the third organ of the government. Usually the three organs have their own duties and responsibilities to fulfill constitutional obligations. But when the other two organs do not pay proper attention for the fulfillment of constitutional directions and its values, the judiciary cannot remain silent, in the scheme of “constitutional democracy, the judiciary has to perform the function of watchdog. Though the legislature and the executive bear a direct responsibility of the people, as they are elected by people. They acquire large power and patronage they, misuse their trust, imposed upon them. But the Judiciary acts an indirect agent to help the citizens through the innovative technique of Public Interest Litigation. Thus PIL is a kind of legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which the legal rights or liabilities are effected. Upendra Baxi called the Public Interest Litigation as the social action litigation. The liberalised rules of ‘locus standi’ comes under PIL. Such Litigation has been against the violation of human rights, for honest and efficient governance, against environmental degradation. During the first phase of PIL the emphasis

was on human rights of the weaker sections, of the society. This included prisoners, under trial prisoners, bonded labourers – unorganized labourers or women in protective homes. The Judicial Process is so complicated and expensive that common people cannot afford to get justice. Thus through PIL the Supreme Court has been able to uphold the rights of the poor and socially disadvantaged people. It is no longer a court of landlords, princes, industrialist government servants. The court took upon itself the reality of sufferings which the vulnerable groups has to tranquil, through the judicial process. Even though the separation of powers was not only tolerated but welcomed. Right from the basic structure of doctrine till the compensation to the victims of the government arbitrariness, denial of human rights, shows the enlargement of Supreme Court Powers. Thus the court, acted as Protector of Democracy. Without changing its own structure by itself, but by acting as a “Catalyst”.

(F) REVISITING INSTITUTIONAL SUPREMACY OF SUPREME COURT:

Indian Society has witnessed phenomenal transformation during the last couple of years. These changes were due to the trends and impact of economic growth. The changes at the institutional level, political and social in nature do not receive adequate attention. To be more specific the attitudinal changes and the assertiveness that has been evident in the Judicial institutions are underestimated. They however need mentioning. This is important because legislature and the executive have failed to debunk the corrupt and criminals from political institutions⁴⁴. This is a truism that had the apex court could not given affirmative interpretations of the constitution of India. Many of its jurisprudential intricacies specially those which are related with the appointment of persons in governance would not have figured act

so vividly. The resulting effect of this decisiveness in reinforcement of the constitution of India not in absolute terms though as the Supreme document and the government are accountable and responsible to this sacred text. In spite of social turbulence and political uncertainties the role and significance of the Supreme Court of India has been unchallenged. Let us take some areas, where the Supreme Court played a decisive role in protecting rights dignity and liberty of the citizens of India as enshrined in the constitution. Supreme Court acted as a watchdog to protect these rights.

In the case of Jaya Lalita – the former Chief Minister of Tamil Nadu, the Supreme Court withheld her position since she was charged with a number of illegal misdeeds and corrupt practices in her government. A number of criminal records has been alleged against her ministers. In the same year, the Chief Justice. A.S.Anand declared that “Constitution is not a document in a solemn form, but a living framework to the government, of the people who are exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying in letters and spirit The Supreme Court in case of S.R.Choudhuri Vs State of Punjab⁴⁵ – the appointment of Tej Prakash Singh in the Punjab Legislative Assembly was challenged by the Supreme Court declaring – his appointment was invalid and unconstitutional.

In the case of B.R.Kapur Vs State of Tamil Nadu⁴⁶ Justice S.P.Bharucha upheld a similar opinion that “the constitution is Supreme lex, the permanent law of the land and there is no department or branch of the government above or beyond it “In this case the court held that a person who is convicted of a criminal offence and sentenced to imprisonment for a period of not less than two years cannot be appointed Chief Minister of a state under Article 164(1) read with (4) of the Constitution of India.

In Supreme Court, intervened into the non political matters too. The pollution in Delhi has been a serious issue, which no government so far had given importance. It is the Supreme Court that had taken the remedial measures to check pollution. In *Maneka Gandhi Vs Union of India*⁴⁷ the court has pointed that right to life and right to live with human dignity comes within the orbit of Fundamental Rights. In the similar case in *Olga Tellis Vs Bombay Municipal Corporation*⁴⁸ right to livelihood was recognized as a part of Article 21 of the constitution. In *Chameli Singh and others Vs State of UP* and another AIR(1996) 2 SCC 549 – right to shelter was recognized as a fundamental right and a part of Article 21. Right to livelihood in any civilised society means, right to food, shelter, education, proper pollution free environment, medical care etc.

The Public Interest Litigation is a spectacular weapon of the judiciary through which the court can not only interpret the constitution but can also evade “emerging threats from the, political institutions and social integrity. The PIL is thus a effective weapon to redress the grievances of National interest. Any member who has sufficient interest can maintain an action for judicial grievances, for public injury arising from any breach of public duty. So the introduction of rule of law is necessary for the realization of the objectives of the constitution. Till 1970, the Supreme Court has followed the traditional approach in discharging their function. The two organs executive and the legislative are no more performing their duties – since the members are corrupted and not trust worthy to their services. To stop the malpractice deficiencies, the Supreme Court acted as sole interpreter of the constitution. The Supreme Court is not only a guarantor of the fundamental rights of the citizen who is the protector of human rights, which are guaranteed by the international instruments of human rights. It is always accepted that judicial construction of law must comply with principles laid down in

International Conventions. In Nilabati Behera Vs State of Orissa case⁴⁹. Justice T.S.Verma had referred to Article 9(5) of the International convention on Civil and Political Rights (1966) which declares that “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”. Similarly in Vishaka Vs State of Rajasthan Case⁵⁰ the Chief Justice J.S.Verma has opined that “the fundamental rights guaranteed in the constitution emphasis on the “gender equality” – which includes prevention of sexual harassment of abuse. “Thus to promote the Human Right’s Culture, the Supreme Court is not sufficient, the two other organs, executive and legislative must also coordinate to enforce the “basic philosophy of human rights, and nation building”. Otherwise, it would remain as an elusive dream”.

(G) JUDICIAL ACTIVISM IN INDIA LEGISLATURE – JUDICIARY STAND OFF

The unique feature of the Indian Constitution is the division of powers among the three branches of government, namely the Legislature, Executive and Judiciary. The three branches work harmoniously to meet the needs and aspirations of the masses. The constitution, the Supreme Law of the land empowers the judiciary to resolve disputes which arise between the citizen and states between the states and the centre. The judiciary under the Indian constitution is the custodian of fundamental and other legal rights of the people. This empowers the court to protect individuals from the legislative and executive excesses and thereby protecting, preserving and developing the democratic system and also maintain correct constitutional balance between union and state. Therefore judiciary is assigned the task of interpreting the constitution in order to determine what is the power conferred on each branch of government. What are its limits

and whether the action of any branch of transgresses such limits. It is for the judiciary to uphold constitutional values and to enforce constitutional limitations. The court has been endowed with the power of reviewing the constitutional validity of laws passed by the legislature. The duty of interpreting constitution with an enlightened liberty falls on S.C. The S.C. is a powerful agency to control the activities of both legislature and executive.

Recently the Supreme Court has become the centre of controversy on account of the level of judicial activism. The concept of judicial activism gained popularity in 1990 and has greatly contributed to the enhancement of powers and position of Supreme Court. The expression activism mean being actions, doing things with decision. Activism is a judicial policy making which further the cause of social change or articulates such as liberty equality or justice.

The Supreme Court of India is now extending its power of activism to the areas, which are under the executive. The former P.M. P.V.Narasimha Rao referred to the Supreme Court the most sensitive and highly controversial issues of 27 percent reservation of jobs in Central Govt. and public sector undertaking, introduced by National Front Government headed by V.P.Singh. Though the apex court found the decision of National Front Government constitutionally valid, it exempted the creamy layer from the benefit of the reservation. In the recent year, Supreme Court is also interfering in the area of higher education. For instance the Supreme Court held that unaided minority and non minority institutions have absolute rights to establish administer and admit students of their choice in medicine, engineering and other professional courses according to the act the government instance. The Court also abolished the state quota and reservation in the unaided private minority and non minority colleges. The apex Court held that imposition of state quota of seats or entering the reservation policy of the state on available seats in the unaided

professional institutions were act constituting serious encroachment on right and autonomy of private professional educational institution. On a recent ruling the SC while upholding the constitutional validity of 77th, 81st, 82nd and 85th constitutional amendment on 19th October 2006, held that the provision of reservation for the scheduled castes and scheduled tribes and other backward sections of society has to adhere to the upper limit of 50%. A five judge constitutional bench headed by former chief justice Y.K.Subharwal, handling down the ruling also said that creamy layer among the reserved category must be excluded from the benefit of reservation. The Court also said that overall efficiency of the administration must also be taken into consideration while framing the reservation policy. On 23rd May 2005 S.C. declared the presidential proclaim dissolving the Bihar Legislative Assembly as unconstitutional which was seen as a major embarrassment to the UPA Government at the centre. Intervening the Jharkhand political crisis, the S.C. ordered the protem speaker of the Jharkhand Assembly to conduct a composite floor test in Assembly ascertain to ascertain as to who enjoyed the majority, Shibu, Soren or Arjun Mandu. The apex court strongly observed if the averments of the petitioner are correct then the action of the Governor, in appointing Mr. Shibu Soren is a fraud on the constitution. The Jharkhand imbroglio gave rise to legislature. Judiciary stand off over their respective powers. More recently Lok Sabha speaker Mr. Somnath Chatterji strongly refused to allow courts to pronounce on whether the house, could expel its members on the evidence of video recording showing accepting money for asking questions in the house. Those who intervened in the area of contesting election. It held that the sentence of imprisonment awarded to a person for various offences should be taken into Account cumulatively for the purpose attracting the disqualification. If the total sentence period exceeded 2 years imprisonment if would attract the disqualification under the

section 8(3) of the representative of people Act and a convicted person could not contest the polls. The Supreme Court declared the section 33B of the Representation of the People Act 2002 as null and void. Section 33B stated that a candidate was not liable to disclose any information other than that required under the Act. This amounted to an open base on dissemination of information. According to S.C. the right to secure information about the contesting candidate is considered as an integral part of a fundamental right. Hence Right to information should be allowed to grow rather than being frozen and stagnated. The court further held his view that the voters had a fundamental right under Article 19(1) of the constitution to know the antecedents of a candidate for various reasons mainly so that they might cast their votes intelligently in favour of persons who were to govern them.

Very recently on 4th December 2007 the Supreme Court again interfered in the legislative process of the country. The court refused to suspend the operation of AIIMS Act that curtails the tenure of Dr. P. Venugopal of AIIMS Director and remove him from the service but it ordered notice to the centre, Union Health Minister and others seeking their response in two weeks. The judicial activism gave rise to legislative judiciary stand off. It has led to prosecution of a number of politicians and other public servants on various charges. Judicial Activism has been criticised by the politicians and same constitutional aspects – while it is warmly welcomed by the lawyers and the general public. On the question of judicial activism there has been divergent views one can notice in India. While some suggest that this is necessary to ensure justice and efficient functioning of policy on the other hand may criticize it in the assertive judiciary form. By resorting to judiciary activism the judges have taken the judiciary closer to the people, provided them with the speedy redressal of grievances and has served as a check on the other branches of government.

Judicial activism is good for democracy in the short term but it is harmful in the long term. When unguided, it can lead to judicial adventurism. Many times, it created multiplicity of rights without adequate means of enforcement. Unnecessary encroachment to legislative and executive domain is unwanted. The former Chief Justice of India A.M. Ahmedi held the view that phenomenon of judicial activism in its aggressive sole will have to be temporary one. It cannot become a permanent feature of jurisprudence or governance in democracy. The legislature, the executive and judiciary have their mutually reinforcing roles in our democracy none can usurp the role of other. Judicial activism should never verge on judicial adventurism. Similarly the former judge of the S.C. Krishna Aiyar says that Judicial Activism is only a passive phase. This passive phase has come as a timely device to meet the social political crisis which is the result of bureaucratic administrative inefficiency and legislature short sightedness, "The Supreme Court on 10 December 2007 called judicial restraints. The apex court has asked courts not to take over the functions of the legislature or the executive, saying there is a broad separation of powers under the constitution and each organ of the state must have respect for others and should not encroach on their domain. Further the court observed, if the Judiciary does not exercise restraints and overstretches its limit there would be a reaction from politicians and other. The politicians will then step to curtail the powers or even the independence of the Judiciary. The bench comprising Justice A.K. Mathews and Justice Markandey Katju warned the courts that Judicial activism must not become judicial adventurism. The court took strong exception to the Delhi High Courts. Recent intervention in cases like nursery admission, free beds for the poor in hospitals, misuse of ambulances, begging in public, unauthorized constructions and road accidents. The bench said, these were matters pertaining exclusively to the executive or legislative

domain. If there is a law, judges can certainly enforce it but judges cannot create a law and seek to enforced”.

The Judiciary like legislature, are the creation of constitution and have to keep within the limits of their constitutional powers. The court should stick to the spirit of constitution and there should be no contradiction between the role of the judiciary to the legislative in so far as both are expected to give practical shape to the ideals enshrined in the constitution. It is necessary that the three organs of the govt. should work in coordination to ensure the liberty and dignity of the citizens.

In the recent past the Supreme Court assumed a more active role that issued directives to various authorities, governmental and civic to discharge their assigned duties. For instance it issued a directive to civic authorities of Delhi to dispose the garbage accumulated on the roads and lanes which was posing a serious threat to the health of the people. Similarly it sought classification from the government regarding the criteria adopted for permitting certain persons to retain government accommodation after the retirement or after ceasing to hold public office. In the Hawala Case the Supreme Court issued a mandamus to the Union Government and CBI to complete inquiry to the allegations against several cabinet ministers and politicians with a stipulated period.

The Supreme Court began to take cognizance of custodial deaths, bridges burning and rape in police stations. The apex court also ordered the police not to handcuff a man arrested purely on suspicion. Similarly the Supreme Court enhanced the payment for the women who have become widow, in November 1984 in anti Sikh riots ensuring security of working women, invalidation of arbitrary decision of former ministers of a prominent political party of India, allotting government accommodation in shops, petrol, pumps and gas agencies

and asking errant ministers to recompense the government by paying heavy sum from their personnel accounts issuing of instructions to CBI as to how it should go about investigating various seams etc. Further in the field of preventing the abuse of child, labour and environmental hazard, the Supreme Court has shown commendable activism.

It is the extent and vigour and the readiness with which the court exercise the power of judicial review. Judicial activism also connotes the role played by the judiciary. Many analyst believe that “an judicial power in cases, where in the judiciary comes face, to face with legislative arbitariun or executive abuses or interference in the due course of legal proceedings. As the executive the legislative wings of the government were not is discharging their constitutional duties, the judiciary resumed more active role. Judicial activism falls in two categories –

First principle consist of new concepts, new axioms and new procedures – involving substantive and procedural law. Second priority is given to the policies programs and giving directions as to executive, when they are not obligatory and are entirely in the discretion of the executive and the legislative on the other authorities.

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