

Judicial Activism In India: Means For Attaining Good Governance

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Introduction

The issue of good governance, and the role that judicial activism plays in it, is of great significance in a democratic political system like that of India. Good governance, as a principle, has assumed great significance recently since unfortunately most governments today have become sluggish organisations preoccupied with opportunism and subject to political manipulations.

A State which has proclaimed itself a welfare State seeks to perform this role by passing laws to usher in socio-economic reforms and to provide relief programmes. Those who enact such laws are, however, not the same as those who implement them. The implementation of these laws has, of necessity, to be left to the governmental machinery. The bureaucratic apathy and administrative callousness of those who man this machinery compel the beneficiaries of such legislation to resort to the courts to ensure that these benefits are made available to them. The courts have not been slow to respond to this demand made upon them and to mould their remedies to meet new situations and have increasingly come to direct the method of implementing such reforms and to supervise the working of these programmes.¹

It is in these areas of constitutional and public issues that the judiciary comes in conflict with the legislature and the executive for in these type of cases it is not one private individual ranged against another private individual but the citizen pitted against the State or one of its myriad agencies and undertakings and it is between them that the courts have to decide. Their decisions if in favour of the former naturally prove irksome to the bureaucracy and the executive and it is in these quarters, therefore, that we find criticism of judicial activism most vocal and vociferous. The resentment of the bureaucracy at judicial dictates in the matter of how it should function and carry out its task is understandable but not logical for it conveniently forgets that had the administration carried out the will of the legislators, there would have been no occasion for the courts to intervene. Those academicians who would rather that the courts follow only the well-trodden and beaten path are out of touch with reality for they overlook the fact that if there has to be change and progress, it is better that they are brought about by forensic battles in court-rooms rather than by pitched battles in the streets.²

However, judging the judges, never an easy task, stands aggravated beyond reason when judicial power acquires quicksilver quality.³ Recent times have witnessed the Judiciary play intrusive roles in areas constitutionally reserved for the other branches of government.⁴ Issues in judicial activism arise, when governance is apparently done by 'Mandamus'.

¹ Madon, D.P., Conference Paper, the Third International Conference of Appellate Judges, at p.207.

² Madon, D.P., Conference Paper, the Third International Conference of Appellate Judges, at p.207.

³ Sathe, S.P., Judicial Activism in India: Transgressing Borders and Enforcing Limits, Oxford University Press, 2005 edition, (Preface) p.xiii.

⁴ For instance, the recent events in the States of Goa and Jharkhand

Good Governance: Meaning

'Governance' is defined as "the action, manner or fact of governing" and "the function or power of governing" while 'govern' is *inter alia* defined as "rule with authority, conduct the policy, actions, and affairs of (a State, subjects), constitutionally or despotically".⁵ Governance, thus, refers to a process or the act or function of exercising (usually legitimate) authority to regulate the affairs of men in a given territory, generally a State.

While governance as a process denotes a value-free dispensation, good governance being an adjectivated expression, connotes certain value-assumptions.⁶

Good governance moves around citizens to improve quality of life, administrative system, efficiency in delivering services and to establish greater efficiency, legitimacy, citizen-caring and responsive administration. It comprises activities of those manning the political system of a country having necessary authority and responsibility to govern, directed towards the maximum good of the maximum number.⁷

Vivek Chopra defines good governance as unambiguously identifying the basic values of society and pursuing these.⁸

Minocha⁹ defines the criteria of good governance as "political accountability, availability of freedom, law abiding, bureaucratic accountability, information available transparently, being effective and efficient, and cooperation between government and society".

Good governance may, thus, be defined as a function of installation of positive virtues of administration and elimination of vices of dysfunctionality. In short, it must have the attributes of an effective, credible and legitimate administrative system – citizen-friendly, value-caring and people-sharing.¹⁰ Good governance, therefore, may be said to be a system which is accepted as good.

Judicial Activism: Meaning

Judicial Activism does not carry any statutory definition. It connotes that function of the judiciary which represents its active role in promoting justice.

Judicial activism, to define broadly, is the assumption of an active role on the part of the Judiciary.¹¹ In the words of Justice J.S. Verma, Judicial Activism must necessarily mean "the active process of implementation of the rule of law, essential for the preservation of a functional democracy".

The jurist, speaking of judicial activism in the modern context, explores how justice to the individual or group of individuals or to the society in general is ensured through the active participation of the court, particularly as against public agencies.

According to Prof. Upendra Baxi, Judicial Activism is an ascriptive term. It means different things to different people. While some may exalt the term by describing it as judicial

⁵ *New Shorter Oxford English Dictionary*, Vol. 1; Clarendon Press, Oxford; 1993 Edition.

⁶ An observation to the same effect in, Dey, Bata K., "Defining Good Governance", *Indian Journal of Public Administration*, Vol. 44, July-Sept 1998, p.412 at p.412.

⁷ Mishra, Yatish, "Extra governmental organizations and good governance", *Indian Journal of Public Administration*, Vol. 44, July-Sept 1998, p.609 at p.610.

⁸ Kashyap, Subash C. (ed.), *Crime, Corruption and Good Governance*, New Delhi, Uppal, 1997, p.113.

⁹ Minocha, O.P., "Good Governance", *Management in Government*, Vol.XXIX, No.3, 1997.

¹⁰ Dey, Bata K., "Defining Good Governance", *Indian Journal of Public Administration*, Vol. 44, July-Sept 1998, p.412 at p.414.

¹¹ Chaterji, Susanta. " 'For Public Administration': Is Judicial Activism Really Deterrent to Legislative Anarchy and Executive Tyranny?", *The Administrator*, Vol.XLII, April-June 1997, p.9 at p.11.

creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of public duties etc., others have criticised the term by describing it as judicial extremism, judicial terrorism, transgression into the domains of the other organs of the State negating the constitutional spirit etc.

Judicial Activism as a Means for Good Governance

The Indian republic, in principle, has broadly accepted the Montesquian anatomy of State as a trinity of instrumentalities consisting of the Legislature, the Executive and the Judiciary. Following the theory of separation of powers, organs of a modern government – Legislature, Executive and Judiciary – are entrusted with three different functions, viz. policy-making, policy-implementation, and policy-adjudication respectively. But there is a harmony of purpose among the instrumentalities, as outlined in the Preamble to the Constitution. The *modus vivendi* is comity, not rivalry.

The Administration is required to implement the will of “WE THE PEOPLE OF INDIA”, as reflected in the Constitution of India, in accordance with the laws and policies adopted thereof. For the attainment of the constitutional goals the Administration must essentially be responsive to the needs and aspirations of the people and sensitive to the demands of the rule of law. Open government, democracy, transparency and accountability are some of the significant values that should inform the democratic institutions of the contemporary polity. However, other contrary outcomes may result if any one or more of the three organs come to be divested or robbed of the original ideology. When value-erosion or operational aberration takes place, mismatch follows and cracks surface; governance strays off its orbit resulting in goal-derailment and administrative disaster.¹² That is why, the Judiciary, in any system of good governance, is entrusted with the power of judicial review of administrative actions as ‘sentinel in *qui vivé*’.

The realist school of jurisprudence exploded the myth that the judges merely declared the pre-existing law or interpreted it and asserted that the judges made the law. It stated that the law was what the courts said it was.

Theoretically, though, the Judiciary is expected to adjudicate or evaluate the policies promulgated by the Legislative or Executive wing of the government, it, equally importantly, checks excesses committed by the other two branches and enforces the rights of the people in case of default or distortion by the Legislature and Executive in the discharge of duties, using the power of judicial review.

The Judiciary is looked upon today, perhaps more than ever before, for removal of the maladies in public life. One reason may be the general disenchantment of people for the other limbs of government. While the Legislature and Executive in a parliamentary form of government are exposed to the pulls and pressures of the electoral forces, the judiciary well performs the entrusted task of holding the scales of justice even and aloft.

The transition from the colonial administration to the administration of a welfare state has generated onerous responsibilities for the Administration for securing and promoting the legitimate interests of the people. Today, the government has to undertake multifarious political, social and economic activities in discharge of its constitutional responsibilities and in the process exercise of a large measure of discretionary powers becomes inevitable. The increase of administrative power is fraught with the danger of its abuse.

¹² Dey, Bata K., “Defining Good Governance”, *Indian Journal of Public Administration* , Vol. 44, July-Sept 1998, p.412 at p.419.

Failure to use, as well as abuse, of its powers by the Administration is sure to disturb the heart-beat of social aspiration, thereby, necessitating appropriate correctional therapy. The judiciary operates as a mechanism of this correction and judicial activism serves as potent pacemaker to correct, as far as possible, malfunctioning in violation of the constitutional mandates and to stimulate the State organs to function in the right direction. Balanced judicial activism is, therefore, indispensable for imparting the needed vitality to the rule of law in a welfare state.¹³

Failure on part of the legislative and executive wings of the Government to provide 'good governance' makes judicial activism an imperative. The illustration of a few rulings of the Supreme Court of India evolving new dimensions of public law having implications for public administration would bring out the impact of judicial activism.

In a series of path-breaking pronouncements, for instance, ***S.P. Gupta v. Union of India***¹⁴, the Supreme Court of India, through public interest litigation, has granted access to persons inspired by public interest to invite judicial intervention against abuse of power or misuse of power or inaction of the government. Not only was the requirement of *locus standi* liberalized to facilitate access but the concept of justiciability was widened to include within judicial purview actions or inactions that were not considered to be capable of resolution through judicial process according to traditional notions of justiciability. Most of these cases had witnessed gross and callous failure or neglect on the part of public functionaries or administrative authorities in the discharge of their public duties. The Supreme Court of India has come to the rescue of grossly under-paid workers,¹⁵ bonded labour,¹⁶ prisoners,¹⁷ pavement dwellers,¹⁸ under-trial detainees,¹⁹ inmates of protection homes,²⁰ victims of Bhopal gas disaster²¹ and so on and so forth.

By many landmark judgements, for instance, ***Ratlam Municipality v. Viridichand***²², the Apex Court has activated the administrative machinery when they failed to perform their legal obligation. The judicial process has achieved not merely initiation of action in case of inaction, but also monitored and channelised the action in the proper direction.

The Supreme Court had demonstrated that it is truly a sentinel on the *qui vive* in petitions relating to scandals involving the high and the mighty and gave necessary directions to the investigating agencies. In ***Vineet Narain v. Union of India***²³ the Apex Court took upon itself the task of monitoring the investigations pertaining to the Hawala transactions.

One of the known means for getting clean and less polluted persons to govern the country is their exposure to public scrutiny. The Court ruled that voters' right to know antecedents of

¹³ Bhattacharje, G.R., "Judicial Activism: Its Message for Administrators", *The Administrator*, Vol. XLII, April-June 1997, p.31 at p.32.

¹⁴ AIR 1982 SC 149.

¹⁵ People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1473.

¹⁶ Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.

¹⁷ Sunil Batra v. Delhi Administration, AIR 1978 SC 1675.

¹⁸ Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545.

¹⁹ Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1360.

²⁰ Upendra Baxi v. State of U.P., (1983) 2 SCC 308 : (1986) 4 SCC 106.

²¹ Union Carbide Corporation v. Union of India, (1991) 4 SCC 584.

²² AIR 1980 SC 1622.

²³ AIR 1996 SC 3386.

contesting candidates is a facet of Art. 19(1)(a) and that such disclosure is necessary for survival of true democracy.²⁴

In ***Common Cause v. Union of India***²⁵ the Supreme Court cancelled the allotment of petrol pumps made by the then Minister of State of Petroleum and Natural Gas, Capt. Satish Sharma on the ground of nepotism and malafide and passed severe strictures against the minister.

The activist thrust of the Supreme Court for ensuring good governance and probity in public life is brought to light by the above-mentioned illustrative cases.

The above decisions indicate a demonstration of ad hocism due to the deficiency of the institutions (the Legislature and Executive). The Courts by taking resort to judicial activism are encroaching upon the exclusive domain of the other instrumentalities inasmuch as the goal of the Court is to render justice.

It is the primary duty of the Executive to provide a fair and just government. It is not for the Courts to function as an extended arm of the Executive.²⁶ However, as has rightly been observed, judicial power or activism is inversely proportional to the political process. The weaker the political process, stronger is the judicial power; the reverse is true in part. By means of judicial activism, the Judiciary merely assists in the process of governance; it does not take over the functions of the Executive wing of the government.

The aforesaid judicial activism has alone led the public administration to be conscious and conscientious of public interest as its goal.

Judicial activism is not just a matter of serial affirmation of judicial power over other domains and instrumentalities of state power; it is as much a narrative of evolution of new constitutional cultures of power. No panacea for the nation's constitutional ills, it offers a kind of chemotherapy for the carcinogenic body politic. And even the therapeutic uses of judicial power change with the changing contexts of domination and resistance.²⁷

Judicial activism has made a number of salutary, wholesome and beneficial effects on the public administration to make it effective and participative. But one must not be overenthusiastic in thinking that courts can remedy all the ills in public life.

Government by Mandamus a cause of concern

Judicial activism, however, does not mean governance by the judiciary. The political process having been found deficient, the judiciary has, at times, taken over the governance of the country by default. The Court has overstepped its limits on certain occasions²⁸, when it issued directions in matters, which were administrative in nature, and in respect of which the Court did not possess the required expertise. This is what is sometimes referred to as aggressive activism or government by Mandamus.

²⁴ *Peoples Union for Civil Liberties v. Union of India*, AIR 2003 SC 2363.

²⁵ AIR 1996 SC 3538.

²⁶ Palkhiwala, Nani, "Role of Judiciary: Government by the Judiciary", *CMLJ*, Vol. 31, Oct-Dec 1995, p.193.

²⁷ Prof. U. Baxi, Preface to Sathe, S.P., *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Oxford University Press, 2005 edition, at p.xvi.

²⁸ For instance, the recent events in the States of Goa and Jharkhand (2005). Not only did the Court order the legislature to conduct a vote of confidence but also laid down in detail how the proceedings of the legislature should be conducted in this regard. Similarly, the Supreme Court decided that its order shall be taken as notice for the session of the State Assembly and ordered that the proceedings of the House be video-recorded and produced before the Court for review.

The court has clearly transcended the limits of the judicial function and has undertaken functions that really belonged to either the legislature or the executive. Its decisions clearly violated the limits that the doctrine of separation of powers had imposed on it. A court is not equipped with the skills and competence to discharge functions that essentially belong to the other co-ordinate organs of the government. Its institutional equipment is not adequate for undertaking legislation or administrative functions. Its actions in these areas are bound to be symbolic.²⁹

Unlike independence of the judiciary, judicial activism is not a universally accepted value in the justice system. The question is often raised if, without a judicial fiat or Mandamus, governance could not be done effectively. The governance of the country by Mandamus rather seems an aberration than a sincere effort, aimed at re-engineering the constitutionalism and its institutional structure.

Directing the Executive and the Legislature to perform their statutory obligations is one thing but it is a different matter if the courts were to decide the modalities, the time frame and the budget for doing that and then to monitor the progress of implementation. Judicial management of executive and legislative functions is not in consonance with the spirit of the Constitution.

There is substance in the philosophy that the judiciary upholds the executive accountability. However, the accountability of the co-ordinate institution can not and should not be confined merely to the Executive and the Legislature. It should equally be a concern of the judiciary. The judiciary itself must also evolve mechanisms for its own accountability and transparency.

In ***K.K. Vasant v. State of Karnataka*** it has been held that the Court should not intervene in the routine state Administration.³⁰ Similarly, ***Rural Litigation v. State of U.P.***³¹ and ***Sachidananda Pandey v. West Bengal***³² among others up hold that there should be limited judicial intervention in the field of Governance.

It must be recognised that, in a polity like that of India, constitutional governance is possible only if the autonomy of each organ of the government is respected and the delicate balance of power maintained. Diversion from the traditional course must be made only to the extent necessary to activate the concerned public authorities to discharge their duties under the law and to catalyse the process, but not to usurp their role.

Admitting all these aspects, it is acknowledged that judicial activism is welcomed not only by individuals and social activists who take recourse to it but also by governments, political parties, civil servants, constitutional authorities such as the President, the Election Commission, the National Human Rights Commission, statutory authorities including the tribunals, commissions, or regulatory bodies, and other political players. None among the political players have protested against judicial intrusion into matters that essentially belonged to the executive. Some feeble whispers are often heard but they are from those whose vested interests are adversely affected.³³

²⁹ Sathe, S.P., *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Oxford University Press, 2005 edition, at p. 251.

³⁰ AIR 1992 Kant 256.

³¹ AIR 1988 SC 2187.

³² AIR 1987 SC 1109.

³³ Sathe, S.P., *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Oxford University Press, 2005 edition, at p. 251.

Conclusion

The Trinity – Legislature, Judiciary and Executive – is an accomplished phenomenon. Harmonious existence is a theory; the differences a reality.³⁴

Justice – social, economic and political – can only be achieved if every organ of the Government functions as per the constitutional mandate.

The Constitution of India, having divided the powers of governance among different institutions, has assigned to the Judiciary a role of supervision and correction, through what is known as ‘judicial review’. Thus, under the Constitution, the Judiciary has the ultimate duty for oversight and maintenance of the rule of law in its dynamic and social justice-oriented dimension. To fail here is for the Judges to fail their Oath of Office. It has rightly been noted by D.P. Madon³⁵, “A judge who denies to himself judicial activism denies to himself his role of a judge”.

If, we are to be governed by the rule of law and not rule by men, the legislative and executive actions must remain subject to scrutiny by the Judiciary, albeit such review has to be exercised within the settled parameters.

The Court will not and cannot fold up its hands and keep quiet if the Executive defaults in doing justice and respecting the rights of citizens. It will be activated enough to render justice and right the wrong³⁶; the court will not be dysfunctional. For instance, if a Policeman rapes a woman or wrongfully confines a person in the lock-up, the Court will not fold up its hands on the ground that the Executive will give redress. On the contrary, justice shall be done in the constitutional sense; and no protest, that the Judiciary usurps the power or discretion of the Administration, will hold good. The question is of constitutional proprieties, democratic conventions and the principle of good governance.

The power of judicial review is recognised as part of the basic structure³⁷ of the Indian Constitution. The activist role of the Judiciary is implicit in the said power. Judicial activism is a *sine qua non* of democracy because without an alert and enlightened judiciary, the democracy will be reduced to an empty shell.

Judicial activism in its totality cannot be banned. It is obvious that under a constitution, a fundamental feature of which is the rule of law, there cannot be any restraint upon judicial activism in matters in which the legality of executive orders and administrative actions is questioned. The courts are the only forum for those wronged by administrative excesses and executive arbitrariness. The executive being the author of the wrong can hardly be the one to right that wrong and since the executive is the party in power and thus has the majority of votes in the legislature, an appeal to the legislature would be as futile. Any restraint on this power of the courts would sound the death-knell of democracy and pave the way for dictatorship.³⁸ To deny judicial activism to the courts is to nullify the judicial process and to negate justice. Take away judicial activism and tyranny will step in to fill the vacant space.³⁹

³⁴ Chatterjee, Susanta, “‘For Public Administration’: Is Judicial Activism Really Deterrent to Legislative Anarchy and Executive Tyranny?”, *The Administrator*, Vol.XLII, April-June 1997, p.9 at p.10.

³⁵ Madon, D.P., Conference Paper, the Third International Conference of Appellate Judges, p.207 at p.210.

³⁶ Iyer, V.R. Krishna, “Judicial Activism and Administrative Autonomy”, *The Administrator*, Vol.XLII, April-June 1997, p.1 at p.4.

³⁷ Per Ramaswamy J., in *State of A.P. v. Nikku Ram*, AIR 1996 SC 100.

³⁸ Madon, D.P., Conference Paper, the Third International Conference of Appellate Judges, p.207 at p.209.

³⁹ Madon, D.P., Conference Paper, the Third International Conference of Appellate Judges, p.207 at p.210.

Whenever the political process is at fault or deficient, one wing of the government attempts to compensate the other to maintain the constitutional symmetry. In a modern democratic set up, judicial activism should be looked upon as a mechanism to curb legislative adventurism and executive tyranny by enforcing Constitutional limits. That is, it is only when the Legislature and the Executive fail in their responsibility or try to avoid it, that judicial activism has a role to play. In other words, judicial activism is to be viewed as a “damage control” exercise, in which sense, it is only a temporary phase.

Judicial activism is not an aberration. It is an essential aspect of the dynamics of a constitutional court. It is a counter-majoritarian check on democracy.⁴⁰ Judicial activism does not envisage a situation of confrontation between the Legislature, the Executive and the Judiciary; it rather visualizes greater coordination among the three, based on respect for one another. So far, so good. But while the Judiciary must be trusted with large powers, it is pertinent that, as Lord Denning has advocated, it cannot be an *imperium in imperio*. The Court is not above the Constitution and must be conscious of the conscience of the Preamble. Great self-restraint is the hall-mark of judicial discipline.

Judicial power should not remain unbridled without explicit accountability. Activism is in the dock and time has come to judge the Judges. The Judiciary cannot take over the functions of the Executive. The Courts themselves must display prudence and moderation and be conscious of the need for comity of instrumentalities as basic to good governance.

Nevertheless, demanding conformity with the Constitutional mandate cannot be characterised as intrusion into executive domain. Judicial activism has to be welcomed and its implications assimilated in letter and spirit. An activist Court is surely far more effective than a legal positivist conservative Court to protect the society against legislative adventurism and executive tyranny. When our chosen representatives have failed to give us a welfare state, let it spring from the Judiciary.

However, judicial activism is only a passing phase. In the ultimate analysis, it is not only the Judiciary that should play an activist role for upholding the rule of law in a democracy, but also the Legislature and the Executive.

The Parliament must become active and relieve the Supreme Court of its legislative function. The judicial process cannot perform legislative function in the same way as the legislature can. There is no alternative to infusing greater accountability into political institutions such as the legislature and the executive. Parliament must act to strengthen the grievance redressal systems at various levels. Reform of the mainstream judicial system is long overdue. Further, the creation of a network of regulatory agencies independent of government, providing for an ombudsmanning of the governmental authorities, and making governance transparent by giving people the right to information would go a long way towards making governments more accountable.⁴¹

The administration on its part has to keep up a meaningful existence to the fullest extent as a responsive organ of a welfare state committed to the rule of law. It will have to see that the welfare measures of state policies are scrupulously implemented, its public duties and responsibilities are properly and vigilantly discharged, public injury is prevented or redressed

⁴⁰ Sathe, S.P., *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Oxford University Press, 2005 edition, at p. 310.

⁴¹ Sathe, S.P., *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Oxford University Press, 2005 edition, at p. 310.

by it without waiting for complain and its dealings with matters involving rights and interests of persons are free from undue discrimination and arbitrariness so that there may be very few occasion for people to approach court for redress of their legitimate grievance or for protection of their interest from undue invasion or for enforcement of meta-individual collective rights and prevention of public injury. The Administration, thus, must enforce the law of the land and should never seek to shift its responsibility in the service of the people, who are the ultimate masters in a democracy.

A citizenry conscious of their rights alone can ensure full implementation of the rule of law. The voter must realise the value of his franchise and exercise it in a manner that will ensure effective governance. A responsive and responsible government is a value, a dream, a goal, which requires steady and ongoing endeavour by the State as a whole.

It has rightly been pointed out by V.R. Krishna Iyer J.⁴², “The Court can not run the Government nor the Administration indulge in abuse of or non-use of power and get away with it”. There is no doubt that the Courts are essentially meant for adjudication and certainly not for administration. Judicial Activism is *no substitute* for good governance.

⁴² Iyer, V.R. Krishna, “Judicial Activism and Administrative Autonomy”, *The Administrator*, Vol.XLII, April-June 1997, p.1.

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