

# 16

## JUDICIAL ACTIVISM

### 16.1 INTRODUCTION

In the previous lessons you have read that the Indian Constitution provides for an independent judiciary. The judiciary in India is responsible not only for settlement of disputes among people or punish the violators of law. It has also been given powers to defend the Constitution and protect the rights of the citizens. You have already read in the last lesson that for this purpose the judiciary can even declare any act of legislature or executive as unconstitutional or void.

In a parliamentary democracy, generally, the parliament is supreme. But in India the Constitution is somewhat ambiguous on this point. The judiciary can override the powers of the Parliament through judicial review. The Constitution does not specifically mention the power of "judicial review". At the same time it provides that any act which is violative of the fundamental rights can be declared as unconstitutional. It is from this that the judiciary has derived the power of judicial review. To begin with, this power was limited to checking the acts or decisions of the government affecting the fundamental rights. But slowly the judiciary has also started expressing its concern in matters relating to social, developmental and environmental issues as also working of democratic institutions. This expression and concern is generally described as Judicial Activism. During recent years this role of judiciary has become a subject of debate. Being students of Political Science, as also concerned citizens of India you would like to know about this debate as also the meaning and importance of Judicial activism. In this lesson we will tell you about these.

### 16.2 OBJECTIVES

After going through this lesson, you will be able to :

- explain the meaning of judicial activism;
  - recall the background and development of the phenomenon of judicial activism in India;
  - recognise the principles and relevance of Public Interest Litigation;
  - describe the system of Lok Adalats and assess its importance; and
  - explain the introduction of Legal Aid Programme and its utility.
-

## 16.3 JUDICIAL ACTIVISM : MEANING AND FEATURES

16.3.1 You have already read in the previous lesson that broadly speaking, Judicial Review means the power of the courts to pronounce upon the validity of the acts of public authorities, both executive and legislative. Obviously, it is a far reaching power. In Britain with the theory of the supremacy of the parliament the judiciary does not have this power. In the USA, under the doctrine of limited or constitutional government this power has become very important. Making use of this power and as the protector of the Constitution, the Supreme Court in USA started making efforts to provide legal help to groups who had remained deprived the legal process. These included not only the poor and the disadvantaged but ordinary citizens who, because they could not afford lawyers to represent them; lacked access to courts, administrative agencies and other legal forums. This came to be known as Judicial activism.

**Limited government :** It means that the powers of the government are restricted and it cannot exercise unlimited powers over citizens. The powers are limited by the Constitution which describes the powers that government can exercise.

In India also courts had started entertaining complaints from, and on behalf of, poor and deprived and on matters concerning social interest in general. With regard to this the Supreme Court and the High Courts have modified the prescribed procedures and enlarged their jurisdiction by interpreting the constitutional provisions.

Judicial Activism thus means the Judiciary's pronouncements in matters of general social interest or welfare even though these may not be considered in its jurisdiction according to the traditional understanding of law. For this, the judiciary also may not necessarily follow the established or prescribed procedures of litigation.

### 16.3.1 Judicial Activism: Negative to Positive

As it has already been explained to you, that the expression Judicial Review does not find a place in the Indian Constitution. The courts have acquired this power from the principle of justiciability of fundamental rights and the power to interpret the Constitution. Since the Constitution does not lay down any principle guidelines for constitutional interpretation to be followed by the courts, it provides a vast scope for the judiciary to exercise judicial discretion.

To begin with, the power of Judicial Review was used primarily to interpret the written words of the Constitution. In that the fundamental rights were declared to be almost sacrosanct. The courts, therefore, observed that the directive principles were subsidiary to fundamental rights. The right to property was particularly considered significant. The courts insisted on payment of adequate compensation for private property acquired by the State even for social welfare programmes like land reforms. The judiciary's concern for private property became too high when in 1967 the Supreme Court, in Golaknath's case, declared that the parliament has no power even to amend the Constitution as far as restrictions on the fundamental rights are concerned.

The judiciary's frequent pronouncements on the parliament's powers on the grounds of infringement of individual's rights not taking into account the social interests and directive principles came to be called Judicial Activism, in a negative sense of the term.

**Right to Property:** Until 1978 the Constitution of India in Article 31 contained that no person could be deprived of his property except by the authority of law and without payment of compensation. The courts interpreted

compensation as payment of market price of the property acquired. This right has been deleted from the Constitution by the 44th Amendment in 1978.

The highest watermark of this negative activism was the decision of the Supreme Court in Keshavanand Bharati Case in 1973. The Court then held that parliament could not amend the Constitution so as to destroy its basic features or temper with its basic structure. This decision of the Court became an issue of substantial debate. Those who thought that the implementation of the directive principles was most important for the socio-economic development and transformation of the country were very critical of this activism neglecting the directive principles.

Another criticism of the judicial system in India was its costliness and time consumption. The normal judicial process in India is so costly that the poor just cannot enter the courts. It is so cumbersome also that it takes years to get justice. Thus both the doctrine of superiority of fundamental rights over directive principles and the costly judicial system favoured only the rich and blocked the problems of the poor being taken care of by the judiciary.

### 16.3.2 Pressures for Reforms

As the consciousness of social justice spread through India's multi-layered social order, the Courts began to come under increasing pressure from social action groups on behalf of the underprivileged and deprived sections of society for the fulfilment of their aspirations.

The judiciary in India could not remain insensitive to above criticisms. Various commissions appointed by the government for reforms in the judiciary and the legal system also expressed concerns for costly and slow judicial process. After the declaration of internal emergency in 1975 there also emerged strong Human Rights movement in the country. Within the Supreme Court some judges started questioning the limited understanding of the spirit and philosophy of the Constitution. They expressed that along with fundamental rights, democracy and social justice were also the hallmarks of the Constitution. And if these principles are integrated parts of the Constitution, then the courts, which are the protectors of the Constitution, must also be the participants in the process of the implementation of the directive principles and democratic norms. This realisation gave rise not only to a new judicial activism in its positive sense as also processes of reforms in the judicial system. The significant outcomes of these developments were the systems of Public Interest Litigation, Lok Adalats and Legal Aid. Before we tell you more about them, you may check your understanding of the lesson you have read so far.

## INTEXT QUESTIONS 16.1

Put a tick mark (✓) against the correct statement.

1. In its negative sense Judicial activism protected:

- (a) Fundamental Rights
- (b) Social Justice
- (c) Directive Principles
- (d) Supremacy of the Parliament

2. In India Justice for the poor has been ineffective because of
- (a) Denial of rights to poor people by the Constitution.
  - (b) Expensive Court procedures.
  - (c) Absence of Courts in the districts.
  - (d) Absence of independent judiciary.
- 

## 16.4 PUBLIC INTEREST LITIGATION

You have read that in view of the emerging social consciousness there also emerged a new attitude in judiciary's orientation. Some judges in particular expressed concern for social welfare and redressal of the grievances of the poor and the deprived. The Supreme Court, from the early 1980s, started reforming its own procedural and jurisdictional rules. The purpose was that the cases of the poor, who lacked both resources and awareness, could be brought to the courts for redressal. This concern gave birth to the system of Public Interest Litigation.

### 16.4.1 Meaning and Features

Public Interest Litigation means that where the poor who, on account of their poverty, social disability or lack of awareness, cannot approach the courts in case of the denial of their rights, any member of the public or a social action group can approach the court on behalf of them. For this, a regular *writ* petition is not required to be filed through a lawyer. It may be done even by addressing a letter to a judge of the court.

Whatever the court fee may also not be required to be paid.

Public Interest Litigation can also be filed by any member of the public even in such cases where public injury is suffered by the society in general as a result of breach of public duty, or a constitutional provision, or a law.

It means that Public Interest Litigation can be filed by any member of the public or any organisation even though he/she himself or herself is not a victim or sufferer in these cases:

- a) When the victim is poor or deprived on account of his social, economic or educational inability. A petition can be filed even if the victim himself does not ask for that. The petitions filed for the release of persons detained illegally, justice for those killed in mob violence due to government's inaction, protection of children engaged in labour, etc. are some such examples.
- (b) Where the victim or sufferer is not a particular person or a specific identified section of the society but the society or the major part of the society as a whole. The petitions in cases like of this gas leakage, pollution of river waters, encroachment of public land, etc. are some of the examples.

In the 1990s the courts have gone a step further. They themselves have started taking note of certain issues on the basis of newspaper reports or their own information. This means that even when no one has filed a petition or approached the court, the court itself initiates a case, pronounces a decision and directs the appropriate authorities to act accordingly.

### 16.4.2 Conditions for Public Interest Litigation

From the above, it becomes clear that Public Interest Litigation is not meant for enforcement of individuals specific rights. The Supreme Court has also held that a person filing Public

Interest Litigation should act bonafide and not for personal or private profit. Public Interest Litigation can also not be moved with political or other oblique motivation. Thus for filing Public Interest Litigation it is necessary that a personal filing a petition should not have private personal interest. It should be for general social good and not for political gains or motives. The Supreme Court has also made it clear that Public Interest Litigation is not a matter of right. It is only the discretion of the courts to admit or not to admit such a petition depending on merit of a case.

### 16.4.3 Relevance of Public Interest Litigation

The emergence of the principles of Public Interest Litigation is justified on the basis of illiteracy, poverty, social and economic backwardness, and lack of awareness of a large section of our population. These handicaps have denied millions of our countrymen access to justice. A former Chief Justice of the Supreme Court, Justice P.N. Bhagwati said that so far the courts have been used only for the purpose of indicating the rights of the wealthy and the affluent, it was only these privileged classes which were able to approach the courts. But now for the first time the doors of the courts have been thrown open to the poor, the down-trodden, the ignorant and the illiterate.

Similarly another former judge Justice V.R. Krishna Iyer observed, "It is true that judges are constitutional investigators and statutory interpreters; but they are also responsive and responsible to Directive Principles. The judiciary, in its sphere, shares the revolutionary purpose of the constitutional order.

This statement suggests that, over the years, the judiciary has come to a view point that its function is not merely to read the Constitution. It is required to implement the ideals contained in it. Accordingly, the courts have been pronouncing on social issues. Through social action litigation the legal and judicial process is becoming a vehicle for establishing the claims and demands of those who are struggling to find expression. For the first time, a large number of poor people are now looking up to the courts for the protection of their interests.

### 16.4.4 Criticism of Public Interest Litigation

In view of the above Public Interest Litigation constitutes today a significant segment of the courts' work. Some observers, however, suggest that the judiciary in India is overdoing. The critics point out that in the name of Public Interest Litigation the courts are pronouncing on issues which involve matters of policy. These are accepted as the sole prerogative of the executive and subject to scrutiny only of the legislature. Our courts are asserting powers, with general public support, over the legislature and the executive. This was not contemplated in the Constitution. Such powers are not exercised even by the Supreme Court of USA which is considered as very powerful. Over the last few years the courts in India have pronounced on all types of issues. Thus the judiciary either has been acting as the third chamber of Parliament or appropriating the powers which do not belong to it.

**Third Chamber:** There are two houses of Parliament, the Lok Sabha and the Rajya Sabha. Every bill to become a law has to be passed by both the houses. But the Supreme Court, as we know, has the power of Judicial Review and can examine the constitutionality or otherwise of a law passed by both the houses. The Supreme Court is, therefore, criticised for acting as the third chamber or the third house.

The critics also point out that in any society there are various institutions which are concerned with public affairs and social welfare. While judicial activism often steam from the best of motives, the judges are not the only persons responsible for the well-being of society. Many a time they make statements on institutions without knowing their problems and

nature. Some critics attribute political motives to judiciary. According to them, some judges try to become overactive to gain publicity and popularity. There is no doubt that the courts must exercise vigilance in general public interest, but they should refrain from intimidating other institutions by taking over the supervisory role in each and every matter.

### 16.4.5 Importance of Public Interest Litigation

In spite of the above mentioned criticism Public Interest Litigation has become very popular. Defenders of the system do not see in this any violation of the Constitution. Answering the criticism of over-active judiciary, the defendants suggest that judicial activism has in a way been forced on the courts. The judiciary is faced with the malafide and the motivated actions of politicians and the failure of the executive to enforce the laws which the Parliament has enacted. It is pointed out that in most of the Public Interest Litigation cases the courts have merely directed the government to effectively carry out what the Parliament had earlier enacted.

Defending the judicial activism, Justice Kuldeep Singh, a former Judge of the Supreme Court, has said that the judges only perform their constitutional duty to safeguard peoples' rights when there is no one to administer or execute social justice legislation.

How can you call it judicial trespass or judicial terrorism when the court intervenes to investigate innocent people being killed by law enforcing agencies or when the government is asked to have a treatment plant for the Yamuna where 75 per cent of Delhi's sewage is being dumped causing serious health hazards!

Making the point clear, Justice P.N. Bhagwati had earlier observed that Public Interest Litigation was not in the nature of adversary litigation. The Courts do not admit Public Interest Litigation in a confrontational mood or with a view to criticising the executive authority and seeking to control it. The attempt of the courts is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the havenots and the handicapped.

What is important is that people have come to believe that today only courts, particularly at higher level, are the dependable institutions. Disillusionment with politicians, disgust with governments apathy and the ability of the courts to respond, have all led to the acceptance of an enormous enlargement of the powers of the judiciary. Judicial activism, thus, has created a hope in the minds of the people that legal redressal of their grievances would be possible.

### INTEXT QUESTIONS 16.2

---

1. Which is the correct statement?
  - (a) Judicial activism has come to mean active participation of judges in politics.
  - (b) For filing Public Interest Litigation, the prescribed court-fee is to be paid.
  - (c) Public Interest Litigation can be filed by any citizen or a group of people.
2. Who has become the third chamber?

.....

---

### 16.5 LOK ADALATS

Another area of reforms in the judicial system has been the introduction of the institution of Lok Adalats. In bringing about this reform judiciary, the executive and the legislature have

acted more in cooperation. The purpose of the Lok Adalats is to make the process of dispute settlements simple and cheap.

### 16.5.1 Origin and Meaning of Lok Adalats

Lok Adalats were first introduced in Gujarat by Gujarat State Legal Aid Board. In September 1985, a two day conference of Chief Justices, Chief Ministers and law ministers recommended legislation for the establishment of Lok Adalats as also for mobile courts for rural areas. Since then many State legislatures have enacted laws and the judiciary also has extended its support in this regard.

The Lok Adalat system, in a way, is a method of settlement of disputes out of courts. In this system, the disputes which are not of very serious nature are settled by mutual agreements between the parties. The help of arbitrators who have the necessary knowledge and competence to understand and settle the disputes is made available. The arbitrators attempt to settle the disputes on the basis of facts and documents. No prescribed legal procedure is followed. The emphasis is on reconciliation. The settlement may not be strictly to the expectation of the parties. But the matters are sorted out in a short time without incurring huge expenditures involved in court litigation.

Disputes on family matters like divorce, fixation and payment of maintenance, care of children, etc. are settled by Lok Adalats in the spirit of traditional family reconciliation or village panchayats. Family courts have also been established to help settlement of family disputes more for reconciliation. Similarly, minor property disputes, insurance and accidental claims, electricity and telephone bills, etc. are being settled by the Lok Adalats.

It may be mentioned here that the Lok Adalats have not replaced the existing courts. This is an alternative and voluntary arrangements. It means that no one can be forced to accept the system of Lok Adalats. Similarly, the Lok Adalats cannot pronounce judgements and award punishments in criminal cases like thefts, dacoity, murder, etc. In brief, the distinct features of the Lok Adalat system are:

- (a) settlement of disputes out of court;
- (b) emphasis on reconciliation;
- (c) avoidance of lawyers and court fee; and
- (d) settlement of disputes concerning family matters and those of civil nature.

### 16.5.2 Importance of the Lok Adalat System

The introduction of the Lok Adalats has helped the common man in many ways. In this system the people have not to spend much time and money. They are also saved from various harassments and social tensions which are attached to litigation in our society. Through this system, relations between the contending parties do not become bitter.

Another significant advantage of the Lok Adalats is that much precious time of the courts is being saved. In the Indian courts thousands of cases have been pending for years. Due to the enormous workload in the courts, the lawyers and court functionaries exploit and harass the litigants. With the Lok Adalats taking away a substantial number of cases. The courts can devote more time and attention to important matters. The Supreme Court and the High Courts, therefore, are encouraging the Lok Adalat system.

## 16.6 LEGAL AID MOVEMENT

As a step towards making the legal system serve the poor and the deprived, the judiciary has also taken active interest in providing legal aid to the needy. As you have already read in an earlier lesson, one of the Directive Principles (Article 39 A) directs the State to provide for equal justice and legal aid. The Supreme Court has given a positive and broad interpretation of this directive.

According to the Supreme Court, legal aid does not mean mere legal advice to the poor litigants. It also means:

- (i) spread of legal awareness through programmes of legal literacy;
- (ii) organisation of the poor and the exploited with a view to building up pressure for enactment and implementation of egalitarian laws;
- (iii) providing legal services to the people who are poor or handicapped;
- (iv) fighting court battles either through Social Action Litigation or through traditional forms to obtain justice for the deprived; and
- v) search and explore alternative modes of settlement of disputes so as to make inexpensive, quick and non-technical justice available to the people.

In brief, the whole purpose of legal aid is to make justice accessible to all, particularly to those who have so far been deprived of it due to the lack of resources. The Supreme Court has suggested to make legal aid a movement.

The Parliament of India has also taken note of the Directive Principle and the judiciary's concern for providing legal aid to the needy. As a result, suitable laws have been enacted in this regard. Social action groups have also been associated with the legal process in various statutes such as the Dowry Prohibition Act 1961, the Family Courts Act 1984, the Consumer Protection Act 1986, etc. Legal aid is also helping creating legal awareness. This can further be used to bring about social change leading to more just and humane society.

## INTEXT QUESTIONS 16.3

Mark the correct statement.

1. Lok Adalats :

- (a) can try various types of offences.
- (b) are the means to settle disputes out of courts.
- (c) can punish criminals.
- (d) are the only methods of settlement in some cases

2. What is the main purpose of Free Legal aid?

- (a) in Public Interest Litigation cases
- (b) in Social Action group cases

## WHAT YOU HAVE LEARNT

The Constitution of India provides for an independent and impartial judiciary. The courts have been given powers to protect the Constitution and safeguard the peoples rights. Making use of these powers the Supreme Court and The High Courts started directing the executive to implement the laws effectively or declaring the laws unconstitutional if these were in violation of the fundamental rights. This came to be known as Judicial Activism.

In the early years Judicial Activism was criticised by the democratic and socialist-minded people. They did so because the Courts acted only for the protection of fundamental rights of the individuals not bothering much about social good and the directive principles. This helped only the rich people. The poor were deprived of justice also because of costly and cumbersome judicial processes.

Slowly there emerged in the judiciary a thinking that the Constitution should be read keeping in view its spirit and philosophy. Since the aim of the Constitution was to provide justice to all and that the directive principles were its integral part, the judiciary has a duty to protect the rights of the poor as also of the society as a whole. The Judiciary thus started playing an active role in the positive sense. It encouraged the people to seek justice for the poor. For that the Supreme Court relaxed procedures substantially. Thus emerged the system of Public Interest Litigation. Through Public Interest Litigations cases can be filed by any person or organisation on behalf of the poor or illiterate people or in cases concerning society in general.

In 1990s, the courts started feeling that the executive in particular and the legislature in some cases were not performing their duties in accordance with the spirit of Constitution and for the social and public good. The Courts, therefore, have started making pronouncements which sometimes amount to the policy declaration. Some observers criticise this role of the Courts as against the normal constitutional democratic provisions. The people in general, however, are happy with this role of the courts.

Apart from Public Interest Litigation and Judicial Activism, there have also emerged other reforms in the judicial process. Two of these which aim to make justice cheap and easy are the system of Lok Adalats and the introduction of Legal Aid., they have also become handy to the poor and those who lack resources. India's judicial system, therefore, is becoming available to the common people for the protection of their rights as also for sustaining the democratic norms. But in the interest of maintenance and working of parliamentary democracy it is necessary that all three organs of government act in harmony and cooperation with one other.

## TERMINAL EXERCISES

1. What do you understand by Judicial Activism?
2. Why was the Supreme Court of India criticised as the protector of interests of the rich?
3. Describe the origin and importance of Public Interest Litigation in India.
4. What are the main features of the Lok Adalat System? Describe the utility of the system.
5. Why is the legal aid movement in India essential?

## **ANSWERS**

### **16.1 Intext Questions**

- (a) Fundamental Rights
- (b) Expensive court procedures

### **16.2 Intext Questions**

- (1) Public Interest Litigation can be filed by any citizen or a group of people.
- (2) Supreme Court

### **16.3 Intext Questions**

- (a) Are means to settle disputes out of courts.
- (b) The main purpose of free legal aid is to make justice accessible to all.

## **HINTS FOR TERMINAL EXERCISES**

- 1. Refer to section 16.3
- 2. Refer to section 16.3.2
- 3. Refer to section 16.4.1
- 4. Refer to section 16.5
- 5. Refer to section 16.6