EVALUATING THE ACTIVIST ROLE OF JUDICIARY ON MIGRANT ISSUE DURING PANDEMIC TIME

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Abstract

In the recent pandemic of COVID-19 we have witnessed a number of situations where migrant workers were returning to their home town by walking on the roads without having any money or even food for days. This was clearly the violation of their basic fundamental rights like right to food, right to get minimum wages and most importantly right to live with dignity etc. Due to this sudden and unpredictable pandemic outbreak it became necessary to put an unplanned lockdown to control the situation. But these difficulties were faced by people because of failure on part of government to tackle the situation rightly. To deal with the situation apex court took many step like holding virtual courts through videoconferencing to hear urgent matters on this issue and reviewing the step by government and made them accountable to the public. The role played by the judicial body is very timely and progressive in protecting the rights of migrants and to make sure that they get minimum resources to survive. But at the same time there were some deficiencies also on the part of judiciary. In this paper author tries to evaluate the role of judiciary and the observable deficiency on the part on government and judiciary in accomplishing the goal of constitution.

KEY WORDS- constitution, judicial activism, pandemic, migrant issue, government.

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INTRODUCTION

“A Constitution states or ought to state not rules for the passing hour, but principles for an expanding future”.-Benjamin N. Cardozo

The society is dynamic. It changes and adapts as per the changing norms and needs. But to maintain the law and order and peace and prosperity in the society, there is need of disciplined and strict rules which could prevent the wrongdoers to commit any wrongful activity. That is where law comes to play. In every country, there is a supreme and sovereign law. In India, that is the Constitution of India which is regarded as the supreme and the sovereign law. The other laws draw the basic ideas of sanctions from the supreme law of the land.

Under the Constitution of India, the Preamble states that it is the duty or the prime obligation of the State to ensure the justice, liberty, equality, and fraternity in the country. For accomplish this purpose Judiciary has a very unique and prominent position. Our constitution maker specified a special responsibility on the shoulder of judiciary that is to protect the right of the citizens. Judiciary is considered as an independent and impartial authority in solving the dispute among individuals or between state and centre or among various states. In India we have integrated judicial system where Supreme Court is the apex court below it we have high court of respective states and at the lower level district court.

It is very wisely said by William E. Gladstone, “Justice Delayed is Justice Denied.” This statement states that justice is one of the most important dimension to secure the foundation stone to ensure welfare and progress of the society. To secure the tenets of justice, judiciary has a important role to play. But they are considered mere interpreters of laws and not as law makers. But with the changing dynamics of the society, it is highly required that judiciary plays a more creative role in getting into judicial activism to promote and protect the interests of justice.

Pandemic was a very unprecedented situation. While most of us were safe and secure in our homes and had a roof over our heads and food at our tables every day and we were not so much affected by this lockdown while this lockdown has proved to be a nightmare for many. In first wave when this pandemic hit us badly Migrants were helpless and due to sudden lockdown they were not having any source of earning so they started walking back to their homes and this was the only way to reach their native places upon the complete shutdown of transport facilities. There were events that made us dumbfounded was the video of a 2-year-old child trying to wake up his dead mother who died due to hunger and illness, at a railway platform, or another video

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4 Preamble of the Indian Constitution
5 From the website; https://www.forbes.com/quotes/9805/#:~:text=Justice%20delayed%2C%20is%20justice%20denied,Gladstone%20%20Forbes%20Quotes%20visited%20on%2029.01.2021%20at%2011:20%20am
where a lady was trying to drag her child where he was lying over a suitcase. There was another video where a husband was pulling his pregnant wife in a cart made by him.

There are thousands of such stories of struggle, obliviousness and utmost cruelty, which they have faced and even facing. In the month of April 2021 again the virus become deadly and this time the main concern was the lack of oxygen and other life surviving drugs. It has affected millions of lives and many have lost their love ones. In both the waves of this global pandemic the worst part was the lack of management on the part of government as medical facilities were not properly accessible to the many people. Moreover, some of the deaths are the direct consequence of virus but some are the consequences of lack of efficient and prompt supply of drugs or the mismanagement on the part of administrative authority whether it is hospital, government of any other authority.

During this time when people are struggling for every single breath the only ray of hope for them is our Judiciary. In order to cope up with the situation the judges played a very pro-active role in order to control the situation and time to time took many actions for controlling the situation. The author in this paper analyse the step taken by the judiciary to deal the situation and also review the hindrance which faced by the judiciary.

**CONCEPT OF JUDICIAL ACTIVISM**

The term judicial activism has nowhere been defined. The general meaning of the term would indicate that the proactive role of the judiciary to promote and secure the ends of justice. Judicial activism, to define broadly, is the assumption of an active role on the part of the Judiciary. In one sense, one can say that the court displays —activism, whenever it affords a Positive relief. In more simple terms, it means to provide a specific relief under certain terms and conditions where there is no statutory law made and court finds a scope to give certain guidelines which would be essential to fill that void.

Judicial activism refers to the proactive role played by the Judiciary in the protection of the rights of the citizens and in promotion of justice in the society. It is the positive role played by the adjudicatory branch or organ which forces law making and the law executing organ to discharge their functions and duties. In order words, it is an antithesis to the concept of judicial restraint whereby the adjudicative body exercises self-control over its actions and does not try to interfere in the functions of the executive and the legislature.

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To understand the true meaning of the said term, it is necessary to find the genesis of the words. The term judicial is derived from a French term “Judex” which means a judge or the courts of justice. The word judiciary again is explained to mean the judges of the state collectively. The purpose of law is towards the betterment of the society. To attain that there are three organs have various functions to discharge. It is the role of the legislature to make laws and it is merely the role of the judiciary to interpret the laws. But there are certain gaps which are always left unfilled by the judiciary due to time constraint, less educational qualifications, etc. So to fill the gaps judiciary uses its idea of craftsmanship and that concept is known as judicial activism.

In the words of an eminent Indian Jurist, “Judicial Activism is that way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes.” It is the way of exercising judicial power that motivates the judges to depart from normally practiced strict adherence to the judicial precedent in favor of progressive and new social politics. It is commonly marked by decision calling for social engineering, and occasionally these decisions represent intrusion in the legislative and executive manners.

Though the legislature is the policy maker, but the shape to that particular policy or the law is given by Courts of law and they make the law easier for the common people to understand. In the words of Justice V. R Krishna Iyer, “Social justice is not achieved by lawlessness process but legally turned affirmative actions.” The decisions by way of judicial activism refer to the decisions taken by the court to make certain laws where they find no statutory law prevailing. It is generally an idea of legislating from the bench.

Judicial activism by and large can be said as the active process of rule of law which is necessary for the protection and implementation of judiciary. It is the practice of judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of, or in opposition to supposed constitutional or legislative intent. It is the process of law making by the judges which means an active interpretation of existing legislation by a judge, made with view to enhance the utility of that legislation for social betterment. It is a procedure to evolve new principles, concepts, maxims, formulae and relief to do justice and

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10 UpendraBaxi, Courage Craft and Contention - The Indian Supreme Court in the Eighties (Bombay : 1985) P.10
13 Justice A D Mane Judge, _High Court of Bombay, Bench at Aurangabad: Judicial Activism: A Theory of Judicial Philosophy_, http://www.nigerianlawguru.com (last accessed on 14th January, 2021)
14 From the website: http://www.wisegeek.com/what-is-judicial-activism.htm (last accessed on 14th January, 2021).
expand the standing of the litigant and open the doors of the courts for the needy or entertain litigation affecting the entire society or section of it.\textsuperscript{17}

According to Justice P.N.Bhagwati, judicial activism is: “The judge infuses life & blood into the dry Skelton provided by legislature & creates a living organism appropriate & adequate to meet the needs of the society. The Indian judiciary has adopted an activist goal oriented approach in the matter of interpretation of fundamental rights. The judiciary has expanded the frontiers of fundamental rights and the process rewritten in some part of the Constitution through a variety of techniques of judicial activism. The Supreme Court of India has undergone a radical change in the last few years and it is now increasingly identified by the justice as well as people’s last resort for the purpose bewildered.”\textsuperscript{18}

According to Black’s dictionary judicial activism is, “A philosophy of judicial decisions where by judges allows their personal views about public policy among other factors, to guide their decisions with suggestions that adherent of this philosophy tend to find violations and they are willing to ignoble precedent.”\textsuperscript{19}

According to former Chief Justice of India A.M. Ahamadi, “Judicial activism is a necessary adjunct of the judicial function since the protection of public interest as opposed to private interest happens to be main concern.”\textsuperscript{20} One of the meanings of judicial activism is that the function of the court is not merely to interpret the law but to make it by imaginatively sharing the passion of the Constitution for social justice.\textsuperscript{21}

According to Prof. Upendra Baxi, “Judicial Activism is an accretive term. It means different things to different people. While some may exalt the term by describing it as judicial 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 criticized 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.”\textsuperscript{22}

There are two kinds of judicial activism:

Positive Judicial Activism: The interpretation by the adjudicatory body which provides a positive relief refers to positive judicial activism. The affirmative or positive

\textsuperscript{17}GuruwayurDevaswom Managing Committee v. C. K Rajan (2003) 7 SCC 546


\textsuperscript{19} From the website: http://www.h.cour.gov.au/speeches.kerby.indialt.htm,(last accessed on 22nd January2021).

\textsuperscript{20}A.M.Ahamadi , Judicial Process: Social Legitimacy and Institutional Visibility (1996) 4 SCC (Jour) pp.1-10

\textsuperscript{21}SheelaBarse v. Union of India (1986) 3 SCC 596.

\textsuperscript{22} From the website: http://www.scribd.com (last accessed on 22nd January 2021).
Negative Judicial Activism: The interpretation which provides a negative relief or restrains a particular activity which may be essential for securing the ends of the justice would refer to negative judicial activism.

The concept of judicial activism draws its basic sanction from the facet of Justice mentioned in the Preamble, Article 38, Article 39A and Article 142 of the Constitution. The term justice in the Preamble embraces three distinct forms—social, economic and political which are secured through the various provisions of Fundamental Rights and Directive Principles of State Policy under the Constitution of India. The ideas of all types of the Justice has been taken or derived from the Russian Revolution in the year 1917.

Social justice in the Preamble means that the Constitution wants to create a more equitable society based on equal social status. It denotes the equal treatment of all citizens without any social distinction based on caste, colour, race, religion, sex and means absence of privileges being extended to any particular section of the society and improvement in the conditions of the backward classes and women.

JUDICIAL ACTIVISM AND MIGRANT ISSUE

Due to this sudden and unpredictable lockdown the small workers who usually earn on daily basis suffered the most due to unanticipated order of government to shut everything which was the need of time they started walking to their native places as they were left with no money even to have food. The migrant workforce includes domestic workers (who either work part-time or live-in either middle class or elite homes), rickshaw pullers, security guards, taxi drivers, delivery boys, toilet cleaners, construction industry workers (brick-kilns, stone quarries and mines), small-scale industry (leather accessories diamond cutting, garment factories, textiles, jewellery-making etc.), and agricultural workers (sugarcane cutting, chilli factory, crop transplanting, rickshaw-pulling, food processing (including fish and prawn processing), salt panning, sex work, small hotels and roadside restaurants/tea shops, beauty parlours, saloons, and street vending and others. These people are basically the hand to mouth kind of people as their earning is so minimal and that too on daily basis so they don’t have much savings in their hands. In this regards, the State has no reliable data as to how many workers migrated from one area to their native places. There are various instances of mismanagement which was evident in the Anand Vihar Bus Depot in March 2020. This incident was one of the narratives which showed us the need of the proactive role to be taken by Judiciary to protect the rights of the migrant workers. Fundamental Rights like Article 14, 19 and 21 was remain as a laughing stock only for such purpose and for protecting the basic feature of constitution apex court time to time came

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23 M. Laxmikanth- Indian Polity 6th Edition 2020, Chapter 28- Judicial Activism, p.5 at p.4.3.
24 From the website www. Jagranjosh.com (last accessed on 25th January 2021)
25 M. Laxmikanth- Indian Polity 6th Edition 2020, Chapter 28- Judicial Activism, p.6 at p.4.3.
26 From the website, www.researchgate.com, “Covid 19 and India’s Labour Migrant Crisis” at p.2 of p.244.
forward and put a complete check over the decision and activity of government. Apart from the constitutional framework we have a separate legislation as well to deal with migrant issues which is Inter State Migrant Workmen Act 1979. This act specifically talks about welfare of migrant workers and also prevents their exploitation. But all these legislation remained as just the piece of paper. On the other hand the ground reality was different people were walking to their home towns without food, women carrying her child on her waist, men carrying her pregnant wife on a wooden cart, small children were also following their parents bare foot and starving with hunger etc. These visuals raise questions on the arrangements made by the law enforcing agency. This show the clear incompetency of the government towards the migrant workers who were left all alone stranded in heat wave without food, water, wages or shelter.

**Incapability on part of government to handle the situation**

Various NGOs, celebrities, a 12 year old kid came forward to help the migrant workers. The Government under the Constitution of India has an obligation to ensure that all the citizens be protected. But during the Pandemic, the Government somehow failed to mitigate with the plight of the migrant workers. The government was not over all competent and certain different measures could have been adopted to secure that.

Prime Minister of India, Narendra Modi, announced a three-week nationwide lockdown with only 4 hour short notice which was so unplanned and also shocking for the citizen. People got panic and started accumulating the basic essentials for their homes which created so much chaos. The worst part was putting complete lockdown was the only panacea left with government to break the chain of virus but government didn’t prepare any strategy to deal with the coming challenges. Government should have taken into consideration the fact that in our country major part of population are the daily bread earners. There were no plans and policies on the part of government that how will they provide the basic facilities to the citizen and protect the Article 21. Government were not having the long term plans and strategy to deal with the situation for long like how the food grains and pulses will be given, how medical facility will be provided and most importantly how such migrants will survive because they had to pay the rent expenses as well and without work how will they pay. Failure on part of government has put many question marks on the fundamental rights of migrant workers.

Moreover, on June 11, 1979 to regulate the employment of inter-state migrant workmen and to provide for adequate and approved conditions of service. The Act provides for all contractors and businesses that employ five or more inter-state migrants to obtain a license from the state, or states, to which the workmen belong as well as from the state in which they have been employed.

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or are proposed to be employed\textsuperscript{28}. According to the requirement of this act government should have the data of inter-state workers with them and should have taken the measures to protect these workers but as this act is not implemented in true sense government was having no accurate details till the date. The primary reason for non-compliance with the requirement is that act not only provide for equal wages but also deals with maintaining other social condition like health, accommodation etc which make their employment more costly then the intra-state worker. If these provision had implemented in letter and spirit than the responsibility might be shared by the employers as well and the impact lockdown wouldn’t have so dangerous.

WHO declared this as a global pandemic lock back and from the end of January flights and other export activities have also stopped by the government but after the lockdown when migrant started walking towards their home and no transport facilities were given to them on this note government took the defence that they have deficit of financial resources due to they can’t arrange the transport facility. But this defence is not acceptable to hide the failure of government as government also somehow had an idea about the coming challenges and they should have thought about this issue and planned accordingly.

**ROLE OF JUDICIARY IN PANDEMIC**

In the traditional concept of judiciary, the judge is depicted by an image, where the eyes of the judge are covered by dark cloth with hands holding the balance. This obviously means that the judges are supposed to have a very open mind on every issue with the eyes closed i.e. without having any personal opinions at all. Further, this also implies that the judges would not allow themselves to be influenced by the events happening around them. Traditionally, it was thought that the judges should live in some sort of isolation, so as to preserve a mind that will be open and remain unprejudiced under any circumstances.

Judiciary is accorded a significant position in a constitutional democracy where the constitution endows it with the duty to oversee the other organs of the state so as to keep them within the Constitutional bounds\textsuperscript{29}. Judges are not elected by the people so they don’t have any fear that how their decision will impact their vote bank. In short they are free from political pressure and more accountable to people. As judges are also not bound by any ideology of any political party so they are capable of arriving at better decision. It is rightly said that justice and arbitrariness can never dwell together so while doing justice one should not be prejudice or arbitrary. Judges have no lure of votes so they are better in seeing what is right and what is wrong. Secondly, judiciary is more accountable to people as judges follow Stare decisis means they are bound to give decision on the basis of precedents or settled legal principles. Hence there is no chance that decision will be given by not following the basic rules like equality, liberty etc.

\textsuperscript{28} The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, (Act 30 of 1979)

\textsuperscript{29} For a detailed discussion, see H.M. Seervai, Position of the Judiciary under the Constitution of India (1970).
Power of judicial review makes the judiciary more powerful. During this tough time when the government machinery has failed to control the situation apex court came as blessing in disguise.

The Supreme Court reviewed the situation of migrant labourers stranded in different parts of the country, noting inadequacies and lapses in government respond to the situation.

On May 26, the Court issued an order to the central and state governments to submit a response detailing all measures taken by the respective governments for migrant labourers.

On May 28, the Court provided interim directions to the central and state/UT governments for ensuring relief to the migrant workers:

i) no train or bus fare should be charged to migrant workers,

ii) free food should be provided to stranded migrants by the concerned State/UT government and this information should be publicised,

iii) States should simplify and speed-up the process of registration of migrants for transport and those registered should be provided transportation at the earliest and

iv) the state receiving migrants should provide last-mile transport, health screening and other facilities free of cost.

Reiterating their earlier directions, on June 5 (full order issued on June 9), the Supreme Court further directed the Central and state/UT governments to ensure:

i) transportation of all stranded workers wanting to return to their native place is completed within 15 days,

ii) identification of migrant workers is immediately completed and the process of migrant registration be decentralised to police stations and local authorities,

iii) records of returning migrant labourers are kept including details about place of earlier employment and nature of their skills, and

iv) counselling centres are set-up at the block level to provide information about central and state government schemes and other avenues of employment.

The Court also directed the state/UT governments to consider withdrawal of prosecution/complaints under Section 51 of Disaster Management Act filed against migrant labourers who allegedly violated lockdown orders.
Judicial body of the nation has taken many steps like issued notice to central government and respective governments of Delhi, Maharashtra, Tamil Nadu, Gujarat and West Bengal for the deplorable situation of COVID-19 situation in those states, directed the central to issue guidelines to make free testing of Covid-19 in the private labs for people belonging to the economically weaker sections and conducted virtual courts to ensure justice during the pandemic\(^\text{30}\).

Moreover Supreme Court stayed the order which directed that no migrant will be allowed into Orissa unless at the point of boarding from the initial destination outside Orissa, such a migrant has been tested negative for COVID 19. This was impossible under the present circumstances and the Supreme Court rightly stayed it\(^\text{31}\).

**EVALUATING THE ACTIVIST ROLE OF JUDICIARY**

Every coin has two sides and every cloud has silver lining in it. Some part of society consider the role of judiciary as more active on the other hand some consider it as failure of duty on part of apex court in order to protect the basic fundamental rights of people. Those who consider as a proactive role of judiciary were not able to digest it. Some political scholars feel that the judiciary is usurping powers in the name of public interest\(^\text{32}\), while according to others, judicial activism and interference is actually preventing the executive from going astray.\(^\text{33}\)

Some says that it not judicial activism but the judicial over reach in reality. Not following the doctrine of stare decisis was also another contention by conservatives.

At the same time there are some people also who said that judiciary could have played a more active role. Justice (retd.) **Madan Lokur’s** recent article criticised the Supreme Court and said F grade should be given to Supreme Court in managing the migrant crisis in country and he also said apex court has not followed the doctrine of separation of power in true sense. Therefore Apex Court was not able to keep a proper check over the working of government.

Initially the court remained silent on the issue and decided to leave the matter on functioning of government. On May 15, the Supreme Court had **refused to entertain a plea** by lawyer Alakh


\(^{32}\)RajinderSacher, Judges as Governors, —The Indian Express’, August 4 1999, p.8.

\(^{33}\)A.T.Thiruvengadam, —A case of Institutional Conflict, The Hindu, April 27, 1999, p.21
Alok Srivastava, seeking a direction to the Centre to ask all district magistrates to identify stranded migrant workers and provide shelter and food to them before ensuring their free transportation home in view of the incident at Aurangabad in which 16 workers were mowed down by a goods train\(^3^4\). After this a group of senior advocate had written to the CJI that why the court is not intervening in this matter which is involving the public health and safety. They further asked the court is it not important matter or court don’t consider it important?

During the emergency of 1975-77 many High Courts like Bombay, Karnataka, Andhra Pradesh, Gujarat etc had played a more proactive role in protecting the right of people. But this High Courts also followed the Supreme Court and remain mute spectator for a long time.

Hence being the protector of fundamental right and also having various power which is given by constitution like article 226, 32 141 and 131 judiciary could have taken a more strong charge in monitoring the government and reducing the impact of pandemic on workers.

**CONCLUSION**

These small scale workers who suffered a lot due to this sudden lockdown are the most indispensable assets which corporations and enterprises use for the growth and development of their financial resources. Without them a country won’t be able to grow. Despite of the fact this community got devoid of basic facilities during the pandemic time. Already these inter-state migrants have various cultural, language and social barriers further got more affected and deprived by the government. This issue arose because of the ill-management on the part of government and also not timely taken the step to reduce the magnitude of this unforeseen monster. There were serious flaws in the government policy in controlling the situation and furthermore it is very important to update the laws already made foe handling the disasters and specific statues should be made to cope up this kind of major pandemic.

The aforementioned instances are conclusive proof of legislative and executive inaction that deprives citizens of their basic fundamental rights guaranteed by the Constitution of India. The lack of proper policies, incompetency to implement laws and the absence of capable authorities are reasons why the Court needs to overstep their power.\(^3^5\) It can be concluded that Judiciary as the protector of the rights could have taken a more proactive approach to secure the protection of rights of the migrant workers. Though there were various steps taken by the Government, various NGOs, many social workers, film starts, etc. to deal with such an incalculable situation. The judiciary could have adopted a more active measure like they have taken during Kashmir issue, NRC/CAA issue, Delhi riots, Ayodhya dispute etc and should have given certain directions.

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\(^3^4\) https://thewire.in/law/supreme-court-migrant-workers-lawyers-letter

\(^3^5\) Saba, ‘Judicial Activism- Need of the Hour’ SCC Online (March 5 2018) <https://www.scconline.com/blog/post/2018/03/05/judicial-activism-need-hour/> (last accessed 15 January 2021.)
under the purview of judicial activism. However, the duty of the Judicial machinery still remains unfulfilled in light of the anomalous needs of current times. In times like that of a pandemic, it is the need of the hour that Courts categorically deal with the unprecedented situations that we are witnessing today. Nonetheless, there are also going to be a plethora of events faced by the society post the pandemic which is now too far-fetched to be anticipated. Given the laxity of the executive and legislative organs, coupled with the uncertainty of situations, this would again require Judicial Activism on a case by case basis. Therefore, it is extremely important in modern adjudication to introduce changes and amendments through Judicial Activism so as to render effective and necessary justice to the society during these challenging times of a pandemic. Moreover this pandemic is one of the darkest phase of history due to which responsibility should also be bigger but somehow judiciary disappointed us this time.