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JUDICIAL ACTIVISM IN ACTION: POLICE, PRISONERS AND UNDERTRIALS

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Judicial activism which is implicit in judicial review is made explicit in the hands of an activist court. Its aim is social justice, not merely enforcement of law. It permits the court to project the personal views of its members on questions of public policy, without manifestly violating the provisions of law, but often deviating from precedents and standard practice. According to Justice V.R. Krishna Iyer, Judicial activism is "legally tuned affirmative action, activist justicing and benign interpretation within the parameters of Corpus Juris."

Black's Law Dictionary defines judicial activism as "The Philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies, which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions in the legislative and executive matters".

The impact of judicial activism in protecting and promoting social interest can be seen in almost every area of governance, notably, the following:

- a. Police, prisoners and undertrials
- b. Women and children
- c. Poor, indigent and homeless persons.
- d. Urban development, health and hygiene.
- e. Upliftment of weaker sections of society.
- f. Environment and pollution.

POLICE, PRISONERS AND UNDERTRIALS

Judicial activism first splashed the radar of national media in the reports regarding the blinding of more than 30 notorious criminals in police custody during the period Oct. 1979-Nov. 1980. Presumably with the knowledge, consent or connivance of the administration.¹

Bihar blinding case

Writ petitions filed in the Supreme Court during the period 1980-81 disclosed a series of lapses on the part of Police, District Administration and even judicial Officers. These lapses were serious violations of the Constitutional guarantees held out in Articles 20 to 22.

It was apparent that the prisoners were subjected to inhuman treatment in police custody. The police has them even blinded and reported that was the result of injuries sustained by the accused.

The judicial magistrate did not bother to enquire as to how these injuries were caused.

No legal service was provided to the blinded persons. The magistrate did not care to tell them that they has a right to free legal service. The accused were not presented before a magistrate within 24 hours of their arrest, as required under Article 22.

The court painfully noted the state of affairs in Bihar Jails and ordered that the blinded undertrials be shifted to Delhi and the cost of their stay there should be borne by the state of Bihar.² Since no medical or surgical treatment could restore eyesight to those prisoners, the Blind Relief Association, New Delhi should house those people and the expenses should be borne by the state of Bihar.

The association showing inability to take them, the court suggested in its order³ dated Jan. 14 1981 that other relief centers be found for them.

The court directed the state to ensure treatment of these prisoners, who had been bailed out, in the AIIMS, at the cost of the state of Bihar. The court in its order dated 14.1.81 directed the investigation into blinding of prisoners should be completed and charge sheets, if any, were to be filed within three months. The respondent state was directed to take responsibility for the lodging, board and vocational training of those prisoners, and was ordered to provide them with

warm clothing. The state was directed to ascertain the method and manner in which prisoners were blinded.⁴

¹ Sulary, Dec.21. 1980. pp.20-37

² Khatri and others vs State of Bihar and others, under daioed 3/12/80nreported in (1981) 1 SCC 623

³ Ibid,635

⁴ (1981) 1 SCC 635

These directions show the concern of the Supreme Court at the failure of the local administration and the judiciary to work within the framework of law and at the violations of constitutional provisions. It is doubtful if they can be treated as judicial intrusions into the executive spheres. Even if they are, are they not necessary to keep the executive within the bounds of law and to ensure justice?

In the Guntaben gang rape case, the Supreme Court appointed its own commission of inquiry with a senior police officer from outside the state (Gujarat), K. V. Joseph and Ela Pathak, a social worker, as commissioners. The report of C.B.L. investigation having not been received in spite of two extensions the court directed the report to be produced within ten days

The court on receiving the report described the attitude of the state government is not taking action against the six policemen named as responsible for the rape and its subsequent cover up as disclosing "a pathetic state of affairs."

The court noted that nearly two years after the incident had taken place and despite two investigation commissioner identifying the culprits, the state government had failed to take any action

It further ordered the Gujarat government to bring all original records of the case to the court and to have submitted to the Supreme Court any charge sheets issued to the policemen held responsible.

The SC pressure resulted in departmental inquiries being commenced against various officers and compensation of Rs. 50,000/- directed to be paid to Gutaben.⁵

In the Kojrajar village gang rape case, involving rape of women from Bodo-tribe by policemen, the state government, soon after receiving the court notice appointed a judicial commission, and a day earlier to the final hearing, arrested eight of the policemen."⁶

Rudal Shah v/s State of Bihar

As Chief Justice V.Y. Chandrachud pointed out in his judgment, this case discloses a sordid and disturbing state of affairs in the prisons of Bihar. It brings to light the case of one Rudal Shah, who in spite of his acquittal by the sessions court on June 3, 1968 lingered on in the jail for fourteen years. The court noted that the records did not explain why he was detained and who was responsible for his illegal detention for such a long time. It was contended by the respondent state that the petitioner was insane at the time of the acquittal, and was, therefore, detained further. The court did not believe this story and thought that it was an after thought, and the jailer was made a scapegoat.

⁵ P. Rethinam vs Union of India, 1993(235)scale (Supreme Court Almanac) 126 (631)

⁶ (1988) 1 Guwa LR (489)

It burst heavily on the administration and said, we hope (and pray) that the higher officials of the state will find time to devote their personal attention to the breakdown of prison administration in the state and rectify the grave injustice which is being perpetrated on helpless persons."⁷

The Supreme Court asked the High Court of Patna to examine this matter and call for statistical data from the Home Department of the government of Bihar and then release those who had been unlawfully detained.

AFFIRMATIVE ACTION

The court also ordered the state of Bihar to pay Rs. 30,000/- as an interim payment as a token compensation. This amount was in addition to the Rs.5,000/- already paid by the state as exemplary costs. The court added that its award would not prevent the petitioner from bringing a suit for damages against the state and its erring officials.

The action of the court in awarding token compensation to Rudal Shah was obviously an extension of judicial power resting on no provisions of constitution, but simply the discretion of the court.

This discretion was seen in two other cases, **Deoki Nandan Prasad v/s State of Bihar**⁸ and **Sebastian M. Hangrey v/s Union of India**.⁹

In the first case Supreme Court awarded compensation of Rs. 25,000/- to the petitioner who was not paid his pension for twelve years despite the Mandamus issued by the Supreme Court

In the second case the Supreme Court awarded Rs. One lakh each to the wives of two persons as compensation for mental torture and harassment. Their husbands had been arrested by the Army in Manipur and the state had failed to produce them before the Supreme Court in spite of a Habeas Corpus writ on Nov. 24, 1983.

Clearly the award of compensation in such circumstances was an executive decision which the court had taken upon itself in discharge of its duty to uphold fundamental rights.

In another case, **Paschim Banga Khet Majdoor Samity**¹⁰ the court awarded compensation, while acknowledging that its order may have wide-reaching financial implications.

⁷ Rudal shah v/s state of Bihar AIR 1983 SC 1086

⁸ AIR 1983 SC 1134

⁹ AIR 1984, SC 1026

¹⁰ Sonjeeta Aluja, People, Law and Justice. Vol.1, Orient-Longman, 1997, p.25

Another aspect of affirmative action is the court's intrusion into the legislative sphere, In **Sunil Batra (II) case** the court pointed out the need to amend the Prisons Act and the need to overhaul the Prison Manual.

In **Kishore Singh Ravinder Dev** the Supreme Court stated that the rules governing prisons were incongruous with the constitution.

In **Gurudev Singh v/s Himachal Pradesh**¹¹ the court held that the government should undertake comprehensive jail reforms within a year by appointing a high powered committee comprising men from the jail administration, social workers and criminologists to advise the state government in the field. The court itself appointed a committee to look into the possibilities of starting open air institutions with provisions of adequate work and different correctional institutions for young prisoners and hardened criminals, and education and vocational training for prisoners and the provision for after release guidance and help.

PRISONERS WELFARE MEASURES

It was held that prisoners have a right to society (family etc.) but it is subject to search and other security criteria. The District Magistrates were directed to visit prisons in their jurisdiction personally or through surrogates, so that prisoners could relate their grievances. Grievance boxes were to be maintained for prisoners and opened as frequently as deemed fit. A wall paper was to be put up for the prisoners to write upon, to reduce stress.

The state was directed to take steps to keep up to the standard minimum rules for the treatment of prisoners as recommended by the U.N., specially those relating to work and wages, treatment with dignity, community contact and correction strategies.

In **Hussainara Khatoon** case based on a habeas corpus petition by an advocate on the basis of news reports in the Indian Express on 8-9/2/79 the court held that all undertrials must be informed of their entitlement to bail and that they must be released if they had been undertrials for longer than the maximum possible sentence.

The court held that each accused person who cannot engage a lawyer on account of poverty, indigence or incommunicado situation has a constitutional right to free legal services provided by the state.

The court directed the jail authorities and social welfare department to make suitable arrangements for the care of women and children released on personal bond. The state government was directed to immediately release women held in "protective custody" and put them in welfare centres to be opened by the state.¹²

¹¹ AIR 1992 HP. 76

¹² **Hussainara Khatoon and Others v/s Home Secretary, State of Bihar** (1980) 1 SCC 81, 93, 98, 108, 115

ACTIVIST MEASURES

The Supreme Court played an active role in highlighting the conditions prevailing in the prisons and the plight of their inmates. It noted the lack of adequate basic amenities such as water and clothing in the prisons and found that the majority of inmates belonged to economically and socially disadvantaged sections of the society, to scheduled castes and scheduled tribes, vulnerable to intimidation and harassment by officials.

I. Delay in trial

It noticed delays in trials and stated that speedy justice is a fundamental rights and that the rights of undertrials were violated by delays and procedural difficulties.

Anyone charged of the multiple offences who had been in prison for more than the total maximum period possible for all the offences was to be released. Where the period in prison was less than the total maximum period possible but more than the maximum if the sentences were to run concurrently, such undertrials were to be released on a personal bond of Rs. 50/- without surety.¹³

In one case, it was alleged that almost 73% of entire jail population was found to be that of undertrials.¹⁴

In this context Mr. Joginder Singh, former Director C.B.I., records, "The most disturbing aspect of Indian prisons is the presence of undertrials. They constitute, 75% of the country's prison population. In many jails, they constitute about 90% of the prison population."¹⁵

In **state of Punjab v/s Ajaib Singh**¹⁶ a need to increase strength to clear backlog or devise some mechanism for early disposal of criminal appeals was stressed upon.

II. Torture of Prisoners

The court held that the prisoners could not be held in fetters or tortured.

In **Kadra Phadiya and others v/s State of Bihar**¹⁷ four boys aged 18 to 22 years were allegedly kept in leg irons in the Pakud sub-jail in the Santhal Parganas, Bihar. At the time of their arrest they were no more than 9 to 11 years old, but because of the delays in the sessions court they had not been tried.

¹³ Order dated 4/5/79 by Bhagwati and Chinnappa Reddy Reported (1980) 1SCC 115

¹⁴ RD. Upadhyay v/s State of AP. (2000) 10, SCC 255

¹⁵ "Jail Breaks, Riots and Escapes", South Asia Politics, Feb. 2008, Vol.6, No. 10

¹⁶ (1995) 2SCC 486

¹⁷ AIR 1981 SC 939

The court directed the removal of leg, irons from the boys and ordered the state to begin the trial immediately and provide legal assistance to the accused.

The court directed the superintendent of Tihar jail to ensure that no more corporal punishment or physical violence was meted out to Sunil Batra.

In **Prem Shankar Stukla v/s Delhi Administration** a telegram sent by an undertrial prisoner of Tihar jail said that despite court orders in Sunil Batra (1), handcuffs were forced on him and other prisoners. The court noted that general advice had been issued by the Delhi administration to the effect that ordinary Indian undertrials shall be routinely handcuffed during transit between jail and court but the better class of prisoners shall be so confined only if reasonably apprehended to be violent. The court said, "we lay down as necessarily implicit in Articles 14 and 19 that when there is no compulsive need to fetter a person's limbs, it is sadistic, capricious, despotic and demoralizing to humble a man by manacling him."

The court held that even a detainee is entitled to minimum freedom under Art. 19, and no class differentia was permissible. On the question of handcuffing the court directed the **Union of India to frame rules**,¹⁸ or guidelines within three months.

In Sept. 2008, the Punjab and Haryana High Court issued directions to the Police authorities in Punjab, Haryana and Chandigarh that no undertrial is handcuffed without prior permission of the court. The court also directed all the magistrates of Punjab, Haryana and Chandigarh to verify from every undertrial produced before them if they were handcuffed by the police.¹⁹

In Sunil Batra (II), Anil Yadav and Khatri the court acknowledged the need to punish the officials responsible for the torture, but did not record any punishment. Of course the police officers concerned were arrested but those who disclosed the facts were victimized and the Superintendent of the jail who admitted that the torture had been meted out was suspended.

III. The right of a prisoner not to be put in solitary confinement unnecessarily (Sunil Batra (II)).

In Kishore Singh, Ravinder Dev etc. Vs. Rajasthan, (3.10.80) prisoners had been kept in solitary confinement in fetters for more than eight months.

The court held solitary confinement to be justified in extreme cases only and that the infliction of physical torture violated Art. 21.

IV. Overcrowding in the jails

¹⁸ 1988, 4 SCC54, Aeltemash Rein v/s Union

¹⁹ The Hindu,30, Se.2008

In a letter written by A K.Chakraborty to the Deputy Registrar of Patia High Court (Sept 1988) in Ranchi it was stated that while the jail (Ranchi) capacity was for 325 prisoners. contained over 1,100 prisoners. There were only 12 wards for all the inmates, 70 unflushed lavatories.

Confirming overcrowding in jails, the former Director of CB.L. Mr. Joginder Singh writes. "Bihar has a total of 54 jails including the six central prisons, which house over 42,000 prisoners against the total capacity of 19,000.

In Beru jail. Patna alone there are over 2,600 prisoners against a capacity of 1,400 In Meerut. NHRC found that against the authorized capacity of 650 prisoners there were 3,000 prisoners and 90% of them were undertrials.²⁰

It was reported that in the Lakhimpur Kheri district Jail there were nearly 1800 prisoners including about 1,650 undertrials, while the jail has the capacity to accommodate only 500 prisoners. The jail authorities have limited beds as well as limited budget to attend to the ailments of the jail inmates.²¹

Expressing concern over the overcrowding and shabby conditions in the jail, the Allahabad High Court in a recent order held that the court should modulate their policies of sentencing accordingly and it is time they look around for other punishments besides imprisonment in prison, like community service and other assignments of similar nature "It is the time the state considers the feasibility of providing such punishments in the statute, the court added.²²

Justifying this suggestion Justice Barkat Ali Zaidi said, "The other perspective which the courts have to keep in mind is that our jails are over populated, and the prisoners are being maintained in jails, without necessary facilities. It has already been pronounced by the Supreme Court that a prisoner does not loose a right to basic necessities of decent living. While undergoing sentence in jail. It is not a secret that conditions in our jails are shabby and shoddy."

V. Bail Procedures

Bail procedures were relaxed for the poor and helpless. The bail system was described as oppressive and discriminatory against the poor, so the court held that the buckground of the accused should be examined and lower courts should not imist on bail with sureries. in the Hussainara Khattoon the court held that Art. 21 incorporated the right to speedy trial and again in this case, as in others like Khatri, the right to free legal aid was stressed.

VI. Free Legal Services

²⁰ Joginder Singh, Opcit pp. 37-45

²¹ Hindustan Times, 12Oct., 2008

²² Hindustan Times 11Oct., 2008

Over the years Indian laws and its interpretation by the Supreme Court as well as the High Courts are emphatic that an accused charged with committing heinous offences would have to be provided legal aid, irrespective of the fact whether he asks for it or not." Free legal assistance at state cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty", said a three judge bench of the Supreme Court in a landmark judgment of 1986 in *Sukhdas vs. union territory of Arunachal Pradesh*.

The legal circles have argued for providing legal aid to a terrorist such as Mohammad Ajmal Amir Kasab, the lone militant captured alive in the 26/11 Mumbai terror attacks. Such is the weak, ridiculous and pathetic situation arising from the liberal democracy.

It has been held that the right to free legal service is implicit in Art. 21 and without it the procedure in courts cannot be said to be "reasonable, fair and just".

The court recommended that the Central and State government should introduce a comprehensive legal aid programme.

VII. Physical exploitation in the form of Beggar

In judgments from the High Courts the applicability of Art. 23 of the Constitution to prison labour (Begar) was considered. The exploitation of prison labour was first referred to by the Supreme Court in *Sunil Batra (II)*. In two separate cases the High Courts of Kerala and Shimla held that Art. 23 of the constitution prohibiting forced labour or Begar was applicable to prisoners.²³

VIII. Labour Wages

Some letters were sent to the court by prisoners in various jails while others, deposited in the grievance deposit boxes maintained in the jails, had been forwarded by the High Court to the government. These letters asked that the wages of prisoners be enhanced.

The court had appointed a committee to look into these matters, to which the government had responded by nominally revising the minimum rate of wages to 50 paise and the maximum to Rs. 1.60. Another committee was then appointed by the court, which in its report, asked the government to adopt a reasonable wage structure.

The consequence is that to deny a prisoner reasonable wages in return for his work will be to violate the mandate in Article 23 (1) of the Constitution. Consequently the state could be directed not to deny such reasonable wages to the prisoners from whom the state takes work in the prisons.

CONCLUSIONS

²³ In the matter of prison reform, enhancement of wages of prisoners etc., AIR 1983, Ker, 261

This bird's eye view of important criminal cases in the Supreme Court and in the High Courts shows that the judiciary was called upon to redress wrongs and suggest suitable remedies in almost every aspect of criminology.

The court not only relieved the sufferings of the victims but also provided the necessary and valuable check to executive excesses and injustices. It helped to ensure that the executive and the subordinate judiciary worked within the framework of law and where existing law was found wanting, it did not hesitate to suggest suitable amendments and reforms. All in all, it can be said that the judiciary by its intervention has enlarged the area of justice.

The anomaly is that our police establishment is based on a piece of legislation enacted in 1861. The Indian Police Act, 1861 was in fact a tool in the hands of the colonial power to suit their imperial interests.

Mr. Prakash singh a returned high ranking police officer filed a Public Interest litigation petition in 1996 seeking directions to reform the police administration. The court found merit in his petition and in a judgment delivered in 2006 made these observations: "The commitment, devotion and accountability of the police has only to be to the rule of law. The supervision and control has to be such that it ensures that the police serves the people without any regard whatsoever to the status and position of any person while investigating a crime or taking preventive measures. Its approach has to be service oriented, its role has to be defined so that in appropriate cases, where on account of acts of omission and commission of (the) police, the rule of law becomes a casualty the guilty police officers are brought to book and appropriate action is taken without delay."

The Supreme Court also observed that there was a convergence in the views of almost all the panels, that is, the National Police Commission, the Law Commission, the Ribeiro Commission, the Padmanabhaiah Committee, the Soli Sorabjee Committee and the Malimath Committee, setup to look into issues of police reforms.

These deferent panels have uniformly recommended (a) the establishment of the State Security Commission at the state level. (b) a transparent procedure for the appointment of the police chief with a fixed tenure, (c) the separation of investigation work from law and order and (d) the enactment of a new Police Act which should reflect the democratic ethos of the society.²⁴

²⁴ The Hindu, 24th September, 2008, N.L. Rajah, "Anti terrorism laws and some imperatives."