Scholarly Research Journal for Humanity Science & English Language,
Online ISSN 2348-3083, SJ IMPACT FACTOR 2021: 7.278, www.srjis.com
PEER REVIEWED & REFEREED JOURNAL, AUG-SEPT, 2021, VOL-9/47

JUDICIAL ACTIVISM IN INDIAN DEMOCRACY

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Paper Received On: 25 SEPT 2021

Peer Reviewed On: 30 SEPT 2021

Published On: 1 OCT 2021

Abstract

Judicial Activism is a powerful weapon, which the judges have to wield to Sub serves the ends of justice by making the law responsive to the felt necessities of the changing times. The scope of judicial activism varies with the courts power of Judicial Review. The judicial activism is use of judicial power to articulate and enforce what is beneficial for the society in general and people at large. Supreme Court despite its constitutional Limitation has come up with flying colors as a champion of justice in the true sense of The word .JUSTICE…this seven letter word is one of the most debated one sin the entire English dictionary. With the entire world population being linked to it, there is no doubt about the fact that with changing tongues the definition does change. The judicial activism has touched almost every aspect of life in India to do positive justice and in the process has gone beyond, what is prescribed by law or written in black and white. This article covers definition, Theories of judicial activism, development of Judicial Activism in India, Judicial Activism in various periods.

***Keywords**: Judicial Activism, Supreme Court, Theories of Judicial Activism etc.,*

Introduction

"Justice is supreme and justice ought to be beneficial for the society so that the society is placed in a better-off situation. Law courts exist for the society to rise up the occasion to do the needful in the matter, and as such may sub serve the basic requirement of the society. It is a requirement of the society and the law has to respond to its need."[1]

India is the Sovereign[2], Socialists, Secular, democratic and Republic Country. Constitution is not static, it is a dynamic, living document and it is the judiciary which gives

[1] Umesh C. Banerjee, J. in *Jai Kumar Vs. State of M.P*. (1999) 5 SCC 1, para 13.
[2] Subs, by the Constitution (42nd Amendment) Act, 1976, s.2. "Sovereign, Democratic, Republic" (w.e.f.3-1-1977).

constitutional documents "a continuity of life and expression"[3] and tunes them with the social, cultural and technological developments. In judicial activism judge's ruling comes from his heart and mind. It is influenced by his emotion to provide "distributive justice", rather than to act as a neutral referee never stepping into the debate area. However, in India judicial activism has presently twined every sphere of life and sometimes has moved beyond what is written in the legal principle to provide proper justice.

"Judicial activism is a sharp-edged tool which has to be used as a scalpel by a skillful surgeon to cure the malady. Not as a Rampuri knife which can kill."(Justice J. S. Verma, 1996)[4].

The three pillars of Indian democracy are the Executive, the Legislature and the Judiciary. The Legislature frames the law which is interpreted by the Judiciary and the Executive executes it. When there are lapses on the part of the Executive and/or the Legislature, when the Legislature becomes adventurous and the Executive becomes autocratic, careless and insensible, judicial activism becomes imperative to deliver justice.

The former Chief Justice of India, A. M. Ahmadi, has rightly said, "In recent years, as the incumbents of Parliament have become less representative of the will of the people, there has been a growing sense of public frustration with the democratic process. ... This is the reason why the (Supreme) Court had to expand its jurisdiction by, at times, issuing novel directions to the executive; something it would never have resorted to had the other two democratic institutions functioned in an effective manner".[5]. In India judicial activism has become a subject of debate. To the critics it is the encroachment into the functions of the other organs of democracy, it is judicial terrorism. It is argued that judicial activism is "legislating from the bench"[6] in the name of interpreter of the law. Sometimes it is accused that the judges are giving ruling on the basis of their political affinity and personal emotion.

[3] Benjamin N. Cardozo, 'The Nature of the Judicial Process' (1927) at 91-93.
[4] Manoj Mitta, 'A strong arm is needed to make the executive work', India Today (March 15, 1996), available at http://indiatoday.intoday.in/story/the-court-has-grown- stronger-in-keeping-with-the-need-of-the-times- justice-j.s.-verma/1/280953.html. Last seen on 03/10/2021.
[5] Justice A.M. Ahmadi, Dr Zakir Husain Memorial Lecture On The Problems and Prospects of Indian Democracy : An Evaluation of its working for Designing the Processes of Change for Peaceful Transformation, SCC(Jour) 2(1996) at 1, available at http://www.ebc-india.com/lawyer/articles/96v2a1.htm.
[6] Brian Tannebaum, 'Governments hatred of judges' (July 14, 2005), available at http://criminaldefenseblog.blogspot.in/2005/07/governments-hatred-of-judges.html. Last seen on 03/10/2021.

Some are decrying that judiciary is destroying legislature "step by step, brick by brick" (Jaitley, May, 2016)[7].

Meaning of Judicial Activism

The term 'judicial activism' is very slippery and difficult to define. Various groups differ in their conception of activism Webster's dictionary assigns the meaning being active to the term 'activism'. In this sense every judge is, or at least should be, an activist so long one decides, in whatever way one may choose to decide Justice Krishna Iyer once remarked that every judge was an activist either on forward gear or on the reverse gear.[8]

Judicial Activism is the search for the spirit of the law when the latest of the law appears to be deficient for justice in the cause. The exercise, however, is difficult and delicate and requires great skill to ensure that the result achieved is within the legal framework and amounts to development of the law and it does not erode the credibility of the legal process because of uncertainty or adhocism. There must be an underlying discernible principle in the decision to provide a precedent for future application in similar situations. It must develop the law by giving it a new dimension to justify its treatment as a judicial decision.[9]

The judges have been given a heavy responsibility to evolve law in consonance with the changing needs and aspirations of the society and to serve the cause of social justice. Judicial activism is the founding stone of this approach. Recognizing this justice Bhagwati observed: "Judicial activism is now a central feature of every political system that vests adjudicatory power in a free and independent judiciary".[10]

Justice J.S. Verma has been more emphatic in laying down the exact norms of sufficient activist criterion. The learned judge has remarked:

"Judicial Activism is required only when there is inertia in others. Proper judicial activism is that which brings about results with the least judicial intervention. If everyone else is working we do not have to step in".[11]

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[7] M. Vijapurkar, M., 'Don't decry 'judicial activism': Courts help those whom the system disowns', Firstpost (May 17, 2016), available at http://www.firstpost.com/india/dont-decry-judicial-activism-courts-help-those-whom-th-system-disowns-2785108.html. Last seen on 03/10/2021.

[8] Lakshminath, A., op cit p. 59.

[9] Verma, J.S., *New Dimension of Justice*, Universal Publication, New Delhi, 2000, p. 70.

[10] Lakshminath, A., "Judicial Activism: Retrospect and Prospect", Banerjea D. (ed.) *Judicial Activism Dimensions and Direction,* Vikas Publishing House Delhi, 2002, p. 59.

[11] *Indian Express,* January 28, 1998.

Theory on Judicial Activism

Supreme Court with its present activist approach has now instilled the concept of rationalism to overcome the shortcomings of the traditional approach. With the development of new conceptions many neglected aspects of the judicial process are now properly addressed.

Judicial activism is guided by the following two theories:

(i) Theory of vacuum filling

(ii) Theory of Social Want.

THEORY OF VACUUM FILLING

According to this theory inactivity, laziness, incompetence, indifference, indiscipline, lack of integrity, corruption, greed and disrespect of law by the legislature and/or the executive create a power vacuum. Nature never allows vacuum to continue and it becomes necessary for the remaining organ i.e. the judiciary to widen its purview and to fill in the vacuum. In this regard it is again pertinent to quote the statement of Benjamin Cardozo. "He (the judge) legislates only between gaps. He fills the open spaces in law. How far he may go travelling beyond the walls of interstices cannot be staked out for him on a chart"[12].

THEORY OF SOCIAL WANT

This theory affirms that when the current legislation fails to address the problems of the society and cannot provide alleviation, the judiciary has to undertake the task of societal transformation to administer justice to the aggrieved. "Thus where legislature falters, the judiciary corrects."[13]

Development of Judicial Activism in India.

Law is originated from two sources. The primary source is through legislature and the secondary source is the judge-made law through judicial interpretation of the existing legislature. Judicial activism emerges out of these judge-made laws.

The evidence of judicial activism in India can be traced back in 1893. Allahabad High Court judge S. Mahmud held that the pre-condition for hearing a case would be accomplished

[12] Supra 2.

[13] Shailja Chander, 'Justice V.R.Krishna Iyer on Fundamental Rights and Directive Principles', Deep and Deep Publications, New Delhi.(2003), at 223.

only when someone speaks. In the case, the under trial was not in a position to afford a lawyer[14] .

Constitutional basis of the judicial review has been provided by Article 13 as it entrusts the Supreme Court and the High Court's the power to interpret the pre-constitutional laws and to settle whether they match with the values and principles of our present constitution. If there is any conflict they become deemed ineffective until their adoption through amendments. But they must be constitutionally compatible; otherwise any deviation makes them void (Article 13)[15].

Indian Constitution has conferred extensive powers to the Supreme Court under Articles 32, 141, 142 and 144 to pass necessary orders to fill up the vacuum till legislature becomes active or the executive properly discharges its responsibility (Vineet Narain v. Union of India, 1998)[16].

PRE EMERGENCY JUDICIAL ACTIVISM (1950 TO 1975)

The Supreme Court of India started as a technocratic Court when traditions of British courts were followed but gradually started following the path of activist court. The first landmark case in this regard is the A.K. Gopalan v. State of Madras (Gopalan case, 1950)[17]. The contention of the writ was to ascertain whether detention without trial (under Preventive Detention Act 1950) was not violation of fundamental rights under Articles 14, 19, 21 and 22. Preventive Detention Act was held valid by four judges but two judges inferred contrary conclusions. The challenge failed but this case set up a new legal trend which was noticeable in subsequent years.

In fact, in early 1950s Court legitimized government actions and observed judicial restraints. The only conflict between the Court and the Parliament at that time was related to right to property. But the inconvenient decisions that were taken by the Supreme Court were circumvented by Constitutional amendments. The 1st (1951), 4th (1955), and the 17th (1964) amendments wiped out several property related legislations from the scope of judicial review.

[14] 'Evolution & Growth Of Judicial Activism In India', Shodhganga at 79, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/32340/8/09_chapter%203.pdf (Last accessed on 03/10/2021).
[15] Article 13, Constitution of India
[16] A.I.R. 1998 S.C. 889.
[17] A.I.R. 1950 S.C. 27.

Thus when Supreme Court was humbled it started interpreting the Constitutional provisions more liberally to widen the rights of the people.

In 1962, in ***Sakal Newspapers Pvt. Ltd. v. Union of India case***[18] government wanted to regulate the number of pages vis-à-vis price of the newspaper as per Newspaper Act of 1956, and the Daily Newspaper Order of 1960. The Supreme Court expanded the scope of freedom of speech guaranteed by Article 19(1) (a) of the Constitution and held that newspaper could not be regulated like other business as it was a carrier of thought and information.

In 1963, in Balaji v. State of Mysore case[19] the Supreme Court rationally concluded economic backwardness as the basis of social backwardness. Court held that backwardness should not be assessed by caste alone and differentiated caste from class. It was also held that reserved category should not exceed fifty per cent in all. It was held that Article 15 and 16 being species of Article 14 must be in conformity with this Article. In 1964, ***in Chitralekha v. State of Mysore*** case[20] the Court imposed similar restrictions on reservation.

Supreme Court became more active in late sixties. In 1967, in ***Goloknath v. State of Punjab case***[21] Supreme Court in a thin six against five majority held that the Parliament could not "take away or abridge" the fundamental rights by amending the Constitution. In retaliation the Parliament passed 24th amendment. This amendment was challenged in the landmark ***Kesavananda v. State of Kerala case***[22]. The apex Court with its largest bench of 13 judges held that Parliament could amend every constitutional provision but the basic structure of the Constitution could not be altered. This is the best example of judicial activism which established supremacy of the non-elected judiciary over the elected Parliament.

In 1975, in ***Indira Gandhi v. Raj Narain*** case[23] Supreme Court struck down the 39th constitutional amendment on the ground that it was complete refusal of right to equality preserved in the Article 14 of the Constitution. It was held that free and fair election being the essential feature of democracy could not be violated. This decision legitimated the basic

[18] A.I.R. 1962 S.C. 305.
[19] Balaji v. State of Mysore, A.I.R. 1963 S.C. 649
[20] Chitralekha v. State of Mysore A.I.R. 1964 S.C. 1823.
[21] A.I.R. 1967 S.C. 1643.
[22] A.I.R. 1973 S.C. 1461.
[23] A.I.R. 1975 S.C. 2299 **6**

structure concept. In order to save the democracy, it is counter majoritarian check on democracy[24].

DECLARATION OF EMERGENCY AND JUDICIAL SURRENDER

Emergency was declared by Indira Gandhi on 26th June, 1975. Supreme Court of India though graduated into the all-powerful apex Court but its institutional fragility was evident in the ***A.D.M. Jabalpur v. Shivakant Shukla*** (1976) case[25]. The judgment exposed the darkest chapter in the history of Supreme Court when the Court, by a majority of 4:1, held that there was no mala fides entangled in the presidential promulgation suspending fundamental rights guaranteed by Article 19. The Court held the basic principle of law but could not declare the Presidential order issued under Article void on the ground that eliminated one basic feature of the Constitution. It was unfortunate that the argument established in the ***Kesavananda Bharati*** case and concluded in the ***Indira Gandhi v. Raj Narain*** case could not be conjured against the Presidential proclamation prohibiting appeal to courts for the imposition of the rule of law.

POST-EMERGENCY JUDICIAL ACTIVISM

Prime Minister Indira Gandhi in 1977 advised the President to hold election dissolving the Lok Sabha. The election was held, Indira Gandhi was defeated and her party, Congress, lost massively and Janata Party formed the government. The new government amended the Constitution (44th amendment). This amendment made the declaration of emergency difficult and preserved the rights given in Article 20 and 21.

However, Supreme Court in the post emergency period tried to regain its esteem lost in the ***Jabalpur* case**. Professor Baxi rightly stated "judicial populism was partly an aspect of post-emergency catharsis. Partly, it was an attempt to refurbish the image of the court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power" (Baxi, 1980)[26]. Judicial activism in post emergency period showed liberal interpretation of Articles 14 and 21.

A major development was noticed in the ***Maneka Gandhi v. Union of India*** (1978) case[27]. Mrs. Maneka Gandhi's passport was impounded. She challenged the action as it

[24] Ronald Dworkin, 'Taking Rights Seriously', Gerald Dvekworth & Co. (1977).
[25] A.J.R. 1976 S.C. 1349.
[26] Upendra Baxi, 'The Indian Supreme Court and Politics", (1980) at 79-120
[27] A.I.R. 1978 S.C. 597

violated her personal liberty. The Court held that impounding of the passport was unconstitutional as it did not follow the rules of natural justice *(i) 'nemo judex in causa sua'* and *(ii) 'audi alterum partem'* and therefore, void. This verdict of the apex Court overruled the *Gopalan* case and ensured the validity of personal liberty under Article 21 and 19. This exhibits a fine example of interpretive stability dimension of judicial activism.

In ***Charles Sobraj v. Superintendant*** of Central Jail (1978)[28] and in ***Sunil Batra v. Delhi Administration*** (1978)[29] cases the apex Court held that the prisoners could not be stripped of their fundamental rights.

In ***Minerva Mills Ltd. v. Union of India*** (1980) case[30] in order to maintain harmony and balance between Part III (fundamental rights) and Part IV (directive principle) the Supreme Court ruled the sections 4 and 55 of the 42nd amendment unconstitutional.

Daniel Latifi's case (2001)[31] is the best instance of judicial activism where five judges bench of the Supreme Court interpreted only the section 3(1) (a) of the Muslim Women's (Right to Divorce) Act that obliged the husband to pay maintenance and future provisions within the period of iddat and thus saved the deviation of the Act from the Articles 14, 15 and 21.

The Kedar Nath Yadav v State of West Bengal and Others (Singur case 2016)[32] is a good example of judicial activism when the apex Court cancelled the acquisition of land and ordered to revert back to the farmers as it was not for public purpose.

Mrs. Maneka Gandhi's case opened the Pandora's Box and several judgments followed the principle of judicial activism. This ultimately gave birth to Public Interest Litigation (PIL). Before 1980 the aggrieved parties who had the *locus standi* i.e. legal standing could file a case. But Justice V. R. Krishna Iyer and P. N. Bhagwati made the history by recognizing the access of the poor and exploited people to justice by relaxing the rules of *locus standi* (Cooper, 1993)[33]. Court held that any public having genuine intention and interest possesses the right to approach the court for justice. A letter or a telegram written

[28] A.I.R. 1978 S.C. 1514
[29] A.I.R. 1978 S.C. 1675; A.I.R. 1980 S.C. 1579.
[30] A.I.R. 1980 S.C. 1789.
[31] Daniel Latifi v. Union of India (2001) 7 SCC 740.
[32] SCC OnLine, SC, at 885.
[33] Jeremy Cooper, 'Poverty and Constitutional Justice: The Indian Experience', Mercer Law Review 44 (1993) at 611, 614–615.

properly may be sufficient. ***Hussainara Khatoon v. State of Bihar*** (1979)[34], ***Gupta v. Union of India*** (1981)[35], ***Azad Riksha Pullars Union v. state of Punjab*** (1981)[36], **PUDR v. Union of India** (1982)[37], **Bandhu Mukti Morcha v. Union of India** (1984)[38] were some of the initial PIL petitions on behalf of distressed people who were declined human rights.

However, PIL passed through three stages of development; the 1st stage concentrated mainly on providing protection of the underprivileged of the society, the 2nd stage was in 1990s when PIL cases were more commissioned, the length and the breadth of the cases expanded enormously – starting from environment protection (Attakoya case, 1990)[39]; Subhash Kumar case, 1991[40]; Oleam Gas Leak case,1987[41]; Mehta Series cases, 1987[42], 1988[43], 1996a[44], 1996b[45], 1996c[46], 1998[47]; Ganga River case, 1988[48]; Taj Mahal case, 1997[49] etc.) , sexual harassment at the workplace (**Vishaka case**, 1997)[50], reallocation of industries (World Saviors case, 1996)[51]; ***Hariram Patidar*** case, 1996[52]; D P Bhattacharyya case, 1996[53]; ***Tarala case***, 1997[54]), right to education (***Gourav Jain case***, 1997)[55] , good governance (Kapoor case,1990)[56]; **Khet Mazdoor Samity case**, 1996[57]; **Pandit case**, 1997[58]; etc.), corruption free administration (***Vineet Narain case***, 1996[59], 1998[60]; Fodder Scam case,

[34] A.I.R. 1979 S.C. 1360.
[35] (1981) Supp. SCC 87.
[36] 1981 AIR 14, 1981 SCR (1) 366
[37] A.I.R. 1982 S.C. 1473, 1476.
[38] A.I.R. 1984 S.C. 802, 816.
[39] Attakoya Thangal v. Union of India 1990 (1) KLT 580.
[40] A.I.R. 1991 S.C. 420.
[41] A.I.R. 1987 S.C. 965.
[42] (1987) 1 SCC 395.
[43] (1988) 1 SCC 471.
[44] (1996a) 4 SCC 750.
[45] (1996b) 4 SCC 351.
[46] (1996c) 5 SCC 281.
[47] (1998) 8 SCC 648.
[48] A.I.R. 1998 S.C.C. 471.
[49] A.I.R. 1997 S.C. 734.
[50] A.I.R. 1997 S.C. 477
[51] A.I.R. 1996 S.C. 32.
[52] A.I.R. 1996 S.C. 13.
[53] A.I.R. 1996 S.C. 41.
[54] A.I.R. 1997 S.C. 5.
[55] (1997) 8 SCC 114; AIR 1997 SC 3021.
[56] (1990) SCR (3) 697.
[57] (1996) SCC (4)37, JT (1996) (6) 4990 AIR 1923.
[58] A.I.R. 1997 Ker. 152.
[59] A.I.R. 1996 S.C. 3386.
[60] A.I.R. 1998 S.C. 889.

1999)[61] and general accountability of the government (Common Cause case, 1992[62], 1996a[63], 1996b[64]). In the 2nd stage, the petitioners appealed for the policy matter related relief not only from the executives but also from the private individuals. In response, the judiciary also worked in an unorthodox and courageous fashion. But in this stage abuse of PIL not only gained its momentum but also reached an alarming level.

JUDICIAL ACTIVISM – SOME RECENT CASES

Decision on the Supreme Court that the National Eligibility-cum-Entrance Test (NEET) would be the only test for medical and dental courses admission has created lot of confusion (NEET, 2016)[65].

Supreme Court ruling in a PIL case ordered Union government and the State governments to formulate new policy to combat drought (***Swaraj Abhiyan case***, 2016)[66]. Supreme Court issued notice to the Arunachal Governor to respond why he has recommended President Rule in the State but later recalled realizing that Governors are immune to Court (the Hindu, 2016)[67]. Supreme Court is trying to reform Board of Cricket Control of India (BCCI) as per Lodha Committee recommendation[68]. It is amazing as BCCI is private body. Since the constitution of the BCCI is as per Tamil Nadu Societies Registration Act, therefore, Supreme Court can not alter the bye laws. On 3rd November, 2015, SC invalidating the NJAC bill thwarted the authority of the parliament. On 3rd November SC upheld that it would bring more transparency in the collegium system. But till

[61] 1999 (1) BLJR 347.
[62] (1992) 1 S.C.C. 707.
[63] (1996a) 6 S.C.C. 530.
[64] (1996b) 6 S.C.C. 558.
[65] 'NEET 2016: Kerala government may move Supreme Court over medical admission', Indian Express (August 27, 2016) available at http://indianexpress.com/article/education/neet-2016-kerala-government-may-move-supreme-court-over-medical-admission/http://indianexpress.com/article/education/neet-2016-kerala-government-may-move-supreme-court-over-medical-admission/.
[66] Swaraj Abhiyan vs Union of India and Ors on 13 May, 2016; available at https://indiankanoon.org/doc/19199787/.
[67] 'Supreme Court recalls notice to Arunachal Pradesh Governor', The Hindu, (February 2, 2016) available at http://www.thehindu.com/news/national/presidents-rule-in-arunachal-pradesh-supreme-court-recalls-notice-to-governor/article8180019.ece
[68] 'Supreme Court Ruling on Lodha reforms 'unconstitutional' - former judge' Espn cricinfo, (August 7, 2016) available at http://www.espncricinfo.com/india/content/story/1043655.html.

date nothing has happened; the recent revolt of Justice J Chelameswar on the issue of lack of transparency in the collegium system clearly proved it (The Hindusthan Times, 2016)[69].

Conclusion:

Judicial activism has become a subject of controversy in India.[70] Recent and past attempts to hinder the power of the courts, as well as access to the courts included indirect methods of disciplining the judiciary, such as supersession of the judges[71] and transfers of inconvenient judges.[72] Critics of judicial activism say that the courts usurp functions allotted to the other organs of government. On the other hand, defenders of judicial activism assert that the courts merely perform their legitimate function. According to Mr. Justice A. H. Ahmadi, the former Chief Justice of India, judicial activism is a necessary adjunct of the judicial function because the protection of public interest, as opposed to private interest, is the main concern.[73] The judicial activism will have a detrimental effect on our democratic order. The people are losing their faith in their political leadership, bureaucracy and governmental mechanism. No one is spared of a serious suspicion, not even the Prime Minister of the country. This emerging ideology will prove fatal for the basic democratic norms. Moreover, the judicial

intervention in legislative or executive domain has endanger the system of checks and balances and has proved to be the main threat to the system of separation of powers in India.

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[70] S.P. Sat he, *Curbson the PIL: Evil Designs of the UF Government,* ECON. & POL. WKLY., Vol. XXXII Mar. 1, 1997, at 441.

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[72] . *See* India v. Sankalchand, A.I.R. 1977 S.C. 2328; *see generally* H.M. SEERVAI, THE EMERGENCY , FUTURE SAFEGUARDS AND THE HABEAS CORPUS CASE 119-29 (N.M. Tripathi ed., 1978).

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