

Public Interest Litigation and Judicial Activism

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ABSTRACT:

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 colours as a champion of justice in the true sense of the word justice... which is one of the most debated ones. 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. Only thing the judiciary must keep in mind is that while going overboard to do justice to common man must not overstep the limitations prescribed by the Constitution. 'Judicial Activism' is a layman's term for the role of Judiciary in initiating the policies to dispense justice. It is usually through the PIL, but the Supreme Court from time to time has given directions, passed writs and issued orders to redress the injustice either on the request or by its own.

Keywords: Judiciary, PIL, Constitution, Supreme Court.

INTRODUCTION

Judicial Activism in India can be witnessed with reference to the review power of the Supreme Court under Art.226 of the Constitution particularly in public interest litigation cases. The Supreme Court played an important role in formulating several principles in public interest litigation cases¹

Constitution of India obligates the State the prime responsibility of ensuring justice, liberty, equality and fraternity. State is under the obligation to protect the individuals' fundamental rights and implement the Directive Principles of State Policy. In order to restrain the State from escaping its responsibilities the Indian Constitution has conferred inherent powers of reviewing the State's action on the judiciary. In this context, the Indian judiciary is considered as the guardian and protector of the Indian Constitution. Indian judiciary has played an active role, in protecting the individuals' fundamental rights against the State's unjust, unreasonable and unfair actions and inactions.²

Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law. The question of judicial activism is closely related to constitutional interpretation, statutory construction, and separation of powers.³

Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Judicial activism means active role played by the judiciary in promoting justice. Judicial Activism to define broadly is the assumption of an active role on the part of the judiciary.

According to Prof. Upendra Baxi, Judicial Activism is an inceptive term. It means different things to different people. While some may promote the term by describing it as judicial creativity, dynamism of the

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² <https://www.defactolaw.in/post/pil-and-judicial-activism>

³ http://en.wikipedia.org/wiki/Judicial_activism

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.

In the words of Justice J.S Verma, Judicial Activism must necessarily mean “the active process of implementation of the rule of law, essential for the preservation of a functional democracy”.

The concept of judicial activism which is another name for innovative interpretation was not of the recent past; it was born in 1804 when Chief Justice Marshall, the greatest Judge of the English-speaking world, decided *Marbury v. Madison*.⁴ *Marbury* was appointed Judge under the Judiciary Act of 1789 by the U.S. Federal Government. Though the warrant of appointment was signed it could not be delivered. *Marbury* brought an action for issue of a writ of mandamus. By then, Marshall became the Chief Justice of the Supreme Court having been appointed by the outgoing President, who lost the election. Justice Marshall faced the imminent prospect of the Government not obeying the judicial fiat if the claim of *Marbury* was to be upheld. In a rare display of judicial statesmanship asserting the power of the Court to review the actions of the Congress and the Executive, Chief Justice Marshall declined the relief on the ground that Section 13 of the Judiciary Act of 1789, which was the foundation for the claim made by *Marbury*, was unconstitutional since it conferred in violation of the American Constitution, original jurisdiction on the Supreme Court to issue writs of mandamus. He observed that the Constitution was the fundamental and paramount law of the nation and "it is for the court to say what the law is". He concluded that the particular phraseology of the Constitution of the United States confirms and strengthens the principle supposed to be essential to all written Constitutions. That a law repugnant to the Constitution is void and that the courts as well as other departments are bound by that instrument. If there was conflict between a law made by the Congress and the provisions in the Constitution, it was the duty of the court to enforce the Constitution and ignore the law. The twin concepts of judicial review and judicial activism were thus born.⁵

In a modern democratic set up, judicial activism should be looked upon as a mechanism to curb legislative adventurism and executive tyranny by enforcing Constitutional limits. That is, it is only when the Legislature and the Executive fail in their responsibility or try to avoid it, that judicial activism has a role to play. In other words, judicial activism is to be viewed as a “damage control” exercise, in which sense, it is only a temporary phase. Recent times have seen judiciary play an intrusive role in the areas of constitutionally reserved for the other branches of governments. Issues in judicial activism arise, when governance is apparently done by Mandamus.

The Constitution of India operates in happy harmony with the instrumentalities of the executive and the legislature. But to be truly great, the judiciary exercising democratic power must enjoy independence of a high order. But independence could become dangerous and undemocratic unless there is a constitutional discipline with rules of good conduct and accountability: without these, the robes may prove arrogant.⁶

Many are critical of judicial activism as an exercise of judicial powers, which displaces existing laws or creates more legal uncertainty than is necessary, whether or not the ruling has some constitutional, historical or other basis. Judicial activism can be considered as “legislating from the bench.” Some have even gone to the extent of calling it judicial tyranny. This implies that a judge is ruling on the basis personal political convictions or emotions. Declaring that the judiciary has a vital function to protect minority rights in a pluralist society, former Attorney General of India Soli J Sorabjee said "judicial activism has contributed to the protection of fundamental human rights."⁷

⁴ <https://supreme.justia.com/cases/federal/us/5/137/> and <https://www.ourdocuments.gov/doc.php?flash=true&doc=19>

⁵ Judicial Activism in India ,<https://www.lawyersclubindia.com/articles/JUDICIAL-ACTIVISM-IN-INDIA-604.asp>

⁶ <http://www.thehindu.com/opinion/lead/article3785898.ece>

⁷ <http://news.oneindia.in/2008/11/15/sorabjee-defends-judicial-activism-1226761401.html>

Judicial activism was made possible in India, thanks to PIL (Public Interest Litigation). Generally speaking before the court takes up a matter for adjudication, it must be satisfied that the person who approaches it has sufficient interest in the matter. Stated differently, the test is whether the petitioner has *locus standi* to maintain the action. This is intended to avoid unnecessary litigation. The legal doctrine '*Jus tertii*'⁸ was holding the field both in respect of private and public law adjudications until it was overthrown by the PIL wave.

PIL, a manifestation of judicial activism, has introduced a new dimension regarding judiciary's involvement in public administration. The sanctity of *locus standi* and the procedural complexities are totally side-tracked in the causes brought before the courts through PIL. In the beginning, the application of PIL was confined only to improving the lot of the disadvantaged sections of the society who by reason of their poverty and ignorance were not in a position to seek justice from the courts and, therefore, any member of the public was permitted to maintain an application for appropriate directions.

The shift from *locus standi* to public interest litigation made the judicial process "more participatory and democratic." S.P. Sathé observes: "The traditional paradigm of judicial process meant for private law adjudication had to be replaced by a new paradigm that was polycentric and even legislative. While under the traditional paradigm, a judicial decision was binding on the parties and was binding in personam, the judicial decision under public interest litigation bound not only the parties to the litigation but all those similarly situated."⁹

Ensuring green belts and open spaces for maintaining ecological balance, forbidding stone-crushing activities near residential complexes, earmarking a part of the reserved forest for Adivasis to ensure their habitat and means of livelihood, compelling the municipal authorities of the Delhi Municipal Corporation to perform their statutory obligations for protecting the health of the community, compelling the industrial units to set up effluent treatment plants, directing installation of air-pollution-controlling devices for preventing air pollution, directing closure of recalcitrant factories in order to save the community from the hazards of environmental pollution are some of the significant cases displaying judicial activism.

The *Golak Nath case*¹⁰ is an example of judicial activism. The Supreme Court by a majority of six against five laid down that the fundamental rights as enshrined in Part-III of the Constitution are immutable and beyond the reach of the amendatory process. The power of parliament to amend any provision in Part-III of the Constitution was taken away. In *Kesavananda Bharati case*¹¹ by a majority of seven against six, the Supreme Court held that by Article 368 of the Constitution, Parliament has amending powers. But the amendatory power does not extend to alter the basic structure or framework of the Constitution. The basic features of the Constitution being: (i) Supremacy of the Constitution; (ii) Republican and Democratic form of government; (iii) Secularism; (iv) Separation of powers between the legislature, the executive and the judiciary; and (v) Federal character of the Constitution. Supremacy and permanency of the Constitution have thus been ensured by the pronouncement of the summit court of the country with the result that the basic features of the Constitution are now beyond the reach of Parliament.

In the 1980's two remarkable developments in the Indian legal system provided a strong impetus to judicial activism in India. There was a broadening of existing environmental laws in the country and judicial activity through public interest litigation. These two developments gave more scope to citizens and public interest groups.

⁸ Implies that no one except the affected person can approach a court for a legal remedy.

⁹ S.P. Sathé, *Judicial Activism in India* (Sixth Indian Impression, OUP 2010) 17

¹⁰ 1967 AIR 1643, 1967 SCR (2) 762

¹¹ 1975 4 SCC 225

The Court has for all practical purposes disregarded the separation of powers under the Constitution, and assumed a general supervisory function over other branches of governments. The temptation to rush to the Supreme Court and High Courts for any grievance against a public authority has also deflected the primary responsibility of citizens themselves in a representative self-government of making legislators and the executive responsible for their actions. The answer often given by the judiciary to this type of overreach is that it is compelled to take upon this task as the other branches of government have failed in their obligations. On this specious justification, the political branches of government may, by the same logic, take over the functions of the judiciary when it has failed, and there can be no doubt that there are many areas where the judiciary has failed to meet the expectations of the public by its inefficiency and areas of cases.¹²

In recent orders, the Supreme Court has directed the most complex engineering of interlinking rivers in India. The Court has passed orders banning the pasting of black film on automobile windows. On its own, the Court has taken notice of Baba Ramdev being forcibly evicted from the Ramlila grounds by the Delhi Administration and censured it. The Court has ordered the exclusion of tourists in the core area of tiger reserves. All these orders by the Court are under the jurisdictional hanger of enforcing fundamental rights under Article 32 of the Constitution. In reality, no fundamental rights of individuals or any legal issues were involved in such cases. The Court is only moved for better governance and administration.

On the other hand in its activist and controversial interpretation of the Constitution, the Supreme Court took away the constitutionally conferred power of the President of India to appoint judges after consultation with the Chief Justice, and appropriated this power in the Chief Justice of India and a collegium of four judges. The Court is made the monitor of the conduct of investigating and prosecution agencies who are perceived to have failed or neglected to investigate and prosecute ministers and officials of government. Cases of this type are the investigation and prosecution of ministers and officials believed to be involved in the Jain Hawala case, the fodder scam involving the former Chief Minister of Bihar, the Taj Corridor case involving the former Chief Minister of Uttar Pradesh, and the prosecution of the Telecom Minister and officials in the 2G Telecom scam case by the Supreme Court.¹³

The judicial power under our Constitution is vested in the Supreme Court and the High Courts which are empowered to exercise the power of judicial review both in regard to legislative and executive actions. Judges cannot shirk their responsibilities as adjudicators of legal and constitutional matters. How onerous the exercise of judicial power was very aptly stated by Chief Justice Marshall: "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other is treason to the Constitution."¹⁴

There is no dispute on the fact that the judiciary should also self-regulate itself. It should also put some restraints on its powers. The Supreme Court in *Divisional Manager, Aravali Golf Course v. Chander Haas*¹⁵ observed that: "Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like Emperors. There is broad separation of powers under the Constitution and each organ of the State -the legislature, the executive and the judiciary - must have respect for the others and must not encroach into each other's domains."

¹² <http://indialawyers.wordpress.com/2012/08/06/disturbing-trends-in-judicial-activism/>

¹³ https://www.academia.edu/2148025/JUDICIAL_ACTIVISM_IN_INDIA_MEANING_AND_IMPLICATIONS

¹⁴ Ibid

¹⁵ (2008) 1 S.C.C. 683

The role of the Judge in interpreting law has been graphically described thus: "Judges must be sometimes cautious and sometimes bold. Judges must respect both the traditions of the past and the convenience of the present. Judges must reconcile liberty and authority; the whole and its parts."¹⁶

Judicial creativity even when it takes the form of judicial activism should not result in rewriting of the Constitution or any legislative enactments. Reconciliation of the permanent values embodied in the Constitution with the transitional and changing requirements of the society must not result in undermining the integrity of the Constitution. Any attempt leading to such a consequence would destroy the very structure of the constitutional institutions. In the name of doing justice and taking shelter under institutional self-righteousness, the judiciary cannot act in a manner disturbing the delicate balance between the three wings of the State.

CONCLUSION

Judicial activist fervour should not flood the fields constitutionally earmarked for the legislature and the executive. That would spell disaster. Judges cannot be legislators - they have neither the mandate of the people nor the practical wisdom to gauge the needs of different sections of society. They are forbidden from assuming the role of administrators. Governmental machinery cannot be run by the judges. Any populist views aired by judges would undermine their authority and disturb the institutional balance.

Judicial activism has to be welcomed and its implications assimilated in letter and spirit. An activist Court is surely far more effective than a legal positivist conservative Court to protect the society against legislative adventurism and executive tyranny. When our chosen representatives have failed to give us a welfare state, Judiciary is the oasis. Judicial activism characterised by moderation and self-restraint is bound to restore the faith of the people in the efficacy of the democratic institutions which alone, in turn, will activate the executive and the legislature to function effectively under the vigilant eye of the judiciary as ordained by the Constitution.

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¹⁶ Ibid 5.