

## JUDICIAL ACTIVISM IN INDIA: ASSERTION OF JUDICIAL POWER TO FILL THE LEGISLATIVE VACUUM

Written by *Aman Kumar Burnwal\** & *Shilpa Rani\*\**

\* *1st year BA LLB Student, National University of Study And Research In Law, Ranchi*

\*\* *2nd year BA LLB Student, National University of Study And Research In Law, Ranchi*

---

### **ABSTRACT**

Supreme Court of India has certain constitutional limitations, but for many times it has gone beyond its traditional role. Executive, Legislature, and Judiciary are three wings of Government with their own defined powers and duties, but there are cases when Judiciary has to fill the vacuum created by failure of other two wings. Be it the case of protecting working women from sexual harassment or be it a case of bonded labour or be it a *M. C. Mehta* case, Hon'ble Court has taken stands for protection of human rights as well as for animals and environment. These are the cases where either there were no laws to deal with the situation or the interpretation of law was required. There are contentions in opposition that judiciary is violating the principle of separation of powers. The paper tries to discuss the activist tendencies of Judiciary, it is necessary to analyze the reasons, dimensions and growth of judicial activism in Indian perspective. It contends that judicial activism has done positive justice but judiciary has to take care of sanctity of the Constitution. Various judicial decisions and many constitutional provisions have been discussed for this purpose.

### **INTRODUCTION**

Judicial system in India has come across many cases, where confining to reasonable interpretation of law do not serve the purpose of justice, and then Court takes the responsibility of framing laws. A new rule is formed not only to address and resolve current issue but also to apply broadly to all possible issues, which are not presented before the Court

at present moment but is likely to arise in near future. Judicial Activism is when Courts make a shift from its traditional role of giving decision after hearing both parties, and perform the role of legislature and make new laws, new rules, and new policies. India has a history of judicial activism. Though its origin traces back to year 1893, when seed of judicial activism were sowed by Justice Mahmood of Allahabad High Court, it developed after emergency period. Imposing emergency was seen as an attempt of Government to control judiciary. Activism is seen in different areas like interpreting provisions of Constitution, protecting interest of citizens through Public Interest litigation, performing role as guardian of fundamental rights of citizens, judicial review, binding its decision over all (Article 142 of Constitution of India) etc.

Competing rights and conflicting interest of different section of society becomes the subject matter of scrutiny and when Government fails to enact any appropriate law for public, then judiciary tries to fill the vacuum, created by inactiveness, negligence, corruption among other two organs of Government- executive and legislature and judiciary has to expand its ambit and frame policies and take their role. It can be seen as dynamism of judges, or a judicial creativity, social transformation, or as social and Cultural Revolution through judiciary. We have Vishakha guidelines in case of sexual harassment of women at workplace as an example of judicial activism; these guidelines were given by Supreme Court in case of *Vishakha v State of Rajasthan*<sup>1</sup>.

### **DEFINITION OF JUDICIAL ACTIVISM**

Upendra Baxi, an eminent Indian Jurist has defined judicial activism as the way of exercising power vested by judiciary, which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by the members of ruling class.

Black Law Dictionary has defined judicial activism as a 'philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decision'.

---

<sup>1</sup> AIR 1997 SC 3011.

Judicial activism can be seen in three ways- firstly by overturning any law as unconstitutional, secondly by overturning judicial precedents, and thirdly by interpretation of the Constitution. In simple words, judicial activism can be seen as the political role played by judiciary, just like other two-executive and legislative. Judicial activism is justified on various grounds like collapse of Government which forces judiciary to aid and make policies for public welfare. Conception of activism varies from groups to group, such groups are law teachers, executive, lawyers, police officials, administrative authorities, students etc. Any act which is regarded as activism by one group but at the same time that may become judicial inactiveness for other groups. For this reason, judicial activism is subject to many debates that have been discussed later in this article. These groups regard judge as 'activist' depending upon their ideologies, values, and perspectives. Concept of judicial activism can be regarded as synonym of judicial absolutism, judicial anarchy, judicial supremacy, and judicial imperialism. Judicial restraint, also known as judicial conservatism is used as antonym of judicial activism. Judicial activism and judicial restraints are terms used to emphasize the 'right role of Courts'.

### **EVOLUTION AND GROWTH OF JUDICIAL ACTIVISM**

Law comes primarily from two sources- legislative enactments and precedents or judicial decisions, the making of laws by judges. Many provisions of Constitution enable judiciary to play an active role by asserting itself. Article 13 empowers Court to declare any law unconstitutional if it violates any fundamental right of citizens guaranteed by Constitution. Aggrieved person can approach Supreme Court under Article 32 or any High Court under Article 226. Article 19 enables Supreme Court to determine whether restrictions imposed on fundamental right are reasonable or not. Article 131 upheld the federal principle. Supreme Court is the highest Court of appeal in all criminal, civil, and constitutional matters<sup>2</sup>, it enjoys advisory jurisdiction<sup>3</sup> and has rule making power<sup>4</sup>. It has authority to make final declaration

---

<sup>2</sup> From Article 132 to Article 137, Constitution of India

<sup>3</sup> Article 136, Constitution of India

<sup>4</sup> Article 142, Article 145, Constitution of India

as to validity of law and all its judgments are binding on all other Courts in India except itself.<sup>5</sup>

From above stated constitutional provisions, it is clear that constitutional framework has given enough scope for judicial activism as judiciary, and especially Supreme Court enjoys unique position. The emergence of judicial was because of trends like expansion of power of judicial review over administration, extending the scope of its interpretation to achieve economic, social and educational objectives, and excessive delegation without limitation etc. Other additional reasons are also there, that are well accepted.<sup>6</sup>

- Near collapse of responsible Government.
- Pressure on Judiciary to step in aid.<sup>7</sup>
- Judicial enthusiasm to participate in social reform and change.
- Vacuum created by legislative inactivity.
- The constitutional scheme.
- Role of judiciary as guardian of fundamental rights.
- Authority to make final declaration as to validity of a law.
- Public confidence in the judiciary etc.

The term 'Judicial Activism' was introduced by Arthur Schlesinger Jr. in an article 'The Supreme Court: 1947' in a January 1947 Fortune Magazine.<sup>8</sup> Courts are established for administration of justice and it plays an active role to enhance the utility of legislative enactments for betterment of society and greater welfare. History of judicial activism traces back to year 1983, it was a case of under-trial who could not afford a lawyer and a question was raised whether the court would decide merely by looking at papers. In that case Justice Mehmood of Allahabad High Court held that pre-condition of the case being 'heard' would be fulfilled only when somebody speaks. Thus widest possible interpretation was of relevant

---

<sup>5</sup> Article 141, Constitution of India

<sup>6</sup> Omdutt 'Role of Judiciary In Democratic System of India'(Judicial Activism Under the Supreme court of India): Golden Research Thoughts( September; 2012).

<sup>7</sup> T. R. Adhyarujina 'Judicial Activism and Constitutional Democracy in India' (Bombay, 1992) at p. 9

<sup>8</sup> Kmiec, Keenan D. 'The Origin and Current Meanings of Judicial Activism'(2004).

laws were given and with that founding stone of judicial activism in India was laid down. Some incidents of judicial activism took place from time to time but that were scattered.

Initially the unseasonable judicial decisions, even by Supreme Court were overcome by constitutional amendments. The 1<sup>st</sup>, the 4<sup>th</sup>, and the 17<sup>th</sup> Amendment Acts curtailed the court's power of judicial review, various property legislations were removed from purview of judicial review. The question about parliament's power of amending Constitution under Article 368 and to abridge fundamental rights were first raised in case of *Shankari Prasad v. Union of India*.<sup>9</sup> The Court held that constituent power was not subjected to any restrictions. Question was again raised in case of *Sajjan Singh v. State of Rajasthan*<sup>10</sup>. In case of *Golak Nath v. State of Punjab*<sup>11</sup>, it was held that parliament cannot amend the Constitution so as to abridge any fundamental right. After case of *Keshavananda Bharti v. State of Kerala*<sup>12</sup>, court has endowed itself with power of determining validity of constitutional amendment acts. In this case largest constitutional bench of 13 judges has decided the case, validity of 24<sup>th</sup> Amendment Act was upheld and decision of Supreme Court in case of *Sajjan Singh* was upheld. It was decided that basic structure should remain the same.

### **IMPLICATION OF JUDICIAL ACTIVISM IN INDIA**

The extensive view of recent Supreme Court ruling has some exciting perceptivity into the transfiguration of judicial activism in India; judicial activism in India has now taken a provoking face for the citizens. The Indian Supreme court's gaze has now gone beyond for the protection of the socially and economically downtrodden and into the realm of public administration. However, its opinions often resemble aspirations rather than adhering pronouncements. The first major judicial activism case occur through the social action litigation was the Bihar under trial case. In 1980 it came across in the form of writ petition under article 21, by few professor of law breaking out the barbaric conditions of detention in the Agra protective home, earlier there were many cases from where one can easily deduced

---

<sup>9</sup> AIR 1951 SC 458.

<sup>10</sup> AIR 1965 SC 845.

<sup>11</sup> AIR 1967 SC 1643

<sup>12</sup> AIR 1973 SC 1461

the acting of judicial activism in the country. Here with the help of few examples to show the working of judicial activism in the territory.

- 1) In case of *Sakal Newspaper Private Ltd v. Union of India*<sup>13</sup>, a company and a reader of the newspaper filed a writ petition challenging the daily newspaper (price and page) order, 1960, under Art 19(1)(a) laid down how much a newspaper could charge for a number of pages was being violation of freedom of press. The Court also conceptualized a doctrine of giving preferred position to freedom of speech and expression, which includes freedom of the press, over the freedom to do business. The supreme court held that the newspaper was not only a concept of business; it was a platform of to express ones thought and information in the form of writing therefore could not be regulate like a business.
- 2) In the well known *Keshavananda Bharti* case, two years before the proclamation of emergency, the Apex Court declared that the executive has no right to fiddle with the constitution and alter its fundamental characteristics. But it could not deflect the emergency declared by Mrs. Indira Gandhi and it was only at the end of it that the Supreme Court and the Lower courts began to ceaselessly intervene in executive as well as legislative areas.
- 3) When we look to the post emergency activism, we would see the Apex court outstripping from legal positivism. The supreme court with the help of liberal interpretation of the constitutional provision expand the rights of the people as per the situation and condition regarding right to equality and right to personal liberty. Gave the expansive meaning to the word life, liberty and personality contained in Article 21 of the constitution of India.
- 4) In the case of *Balaji v. State of Mysore*<sup>14</sup> the Supreme court held that Backward Classes are entitled to get reservations and such reservations should not contradict the concept of right to equality and equal protection of law. The judgment given by the judges that backwardness could not be determined by the caste itself it also include

---

<sup>13</sup> AIR 1962 SC 305.

<sup>14</sup> AIR 1963 SC 649.

other criteria too that is poverty, socially and economically backward and many others and caste will be one of them.

- 5) Supreme Court issued guidelines in 2006 to reform the police administration – which is a state subject on which only state assemblies can legislate.
- 6) In recent orders, the Apex court has addressed the most complex engineering of completes rivers in India.<sup>15</sup> The court passed an order of complete ban on use of tinted plastic films disregarding of the degree of visibility on windscreens and another glass panels of vehicles throughout the territory.<sup>16</sup> Another notice given by Apex court to Baba Ramdev being coercively forced out from Ramlila grounds by Delhi Administration and reprimanded it<sup>17</sup>. The Supreme Court passed an order abstracted the ban on tourist activist in the core areas of tiger reserve forests. All these grapple exercises by the court are adverted on the doubtable jurisdictional succeed in obtaining a position of enforcing fundamental rights under Article 32 of the Indian constitution. In originality, no fundamental rights of somebody or any legal issue are at all demanded in such cases. The court for that type of situation moved to better brass, governance and administration, which were not involving any particular or any proper judicial functions.
- 7) According to the doctrine of creative interpretation of the constitution of India, the Supreme Court took away the constitutionally bestowed the power to the president of India to appoint judges after consultation with the chief justice, and conquered this power in the chief justice of India and a collegiums of four judges.<sup>18</sup> This shows the working of judicial activism in the territory as nowhere in the world has the power to select and appoint judges conferred on the judges themselves.

### **DIMENSIONS OF JUDICIAL ACTIVISM**

---

<sup>15</sup> Available at: <http://www.thehindu.com/opinion/lead/disturbing-trends-in-judicial-activism/article3731471.ece> (last visited on 26-06-16).

<sup>16</sup> Available at: <http://m.indiatoday.in/story/delhi-sc-ban-on-tinted-black-film-car-glass-may-4/1/186536.html> (last visited on 26-06-16).

<sup>17</sup> Supra, Note 15.

<sup>18</sup> Available at: <http://indianexpress.com/article/opinion/columns/in-defence-of-the-collegium/> (last visited – 26- 06- 2016).

Concept of judicial activism is multidimensional, however there cannot be universal application of these dimensions; they vary according to constitutions and ideologies. Political Science Professor Bradeley C. Canon had observed judicial behavior in leading democracies and considered six important dimensions<sup>19</sup>- Majoritarianism, Interpretive Stability, Interpretive Fidelity, Substance Democratic-Process Distinction, Specificity of Policy, and Availability of Alternative Possible Maker. Now whether they are applicable to the Indian judicial scenario or not can be understood by analyzing them in light of judicial decisions.

1. **Majoritarianism:** While exercising power of judicial review, Court gives preferences to its own policy than legislative enactment. Majoritarianism is violated when any legislative enactment is declared unconstitutional by Court.
2. **Interpretive Stability:** This is to measure the extent to which Supreme Court upheld or overrules any precedent or any judicial doctrine. An important example can be variance in interpretation of ‘personal liberty’ under Article 21, from *A. K. Gopalan v. State of Madras*<sup>20</sup> to *Maneka Gandhi v. Union of India*<sup>21</sup>.
3. **Interpretive Fidelity:** This is to measure the judicial activism while interpreting the provisions of Constitution, when general meaning is ignored and a new meaning is assigned to it in accordance with the changing social and economic scenario of the society. More importance is given to the spirit of provisions than to its literal meaning, and in case of provisions having some contradictions a harmonious construction of meaning is emphasized. An important example can be Basic Structure Doctrine<sup>22</sup> that was propounded with an intention to have judicial control over amending power of Parliament.<sup>23</sup>
4. **Substance Democratic-Process Distinction:** This includes court-made policies to regulate non-political activities of some institutions. In Indian scenario, we have examples like reservation for oppressed classes and its extent, the theory of creamy layer, doctrine of legitimate expectation etc.

---

<sup>19</sup> Bradeley C. Canon ‘Defining the Dimensions of Judicial Activism’ *Judicature*, 66.6, 1983

<sup>20</sup> AIR 1950 SC 27

<sup>21</sup> AIR 1978 SC 597

<sup>22</sup> Basic Structure Doctrine was given in case of *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC 1461

<sup>23</sup> The 24<sup>th</sup> Constitutional Amendment Act was intended to affect the meaning of ‘Law’ under Article 13 and Article 368.

5. **Specificity of Policy:** This category includes policies for taking over the management of schools, hospitals, and other institutions, and also includes the policies that specify behavior to be followed the government agencies. We have judicial decisions like shifting of polluting industries around Taj, stopping of aquaculture, code of conduct for trial of pending criminal case etc.
6. **Availability of Alternative Possible Maker:** This include the cases when Court frame policies at the place of some another agency which is supposed to do so. Though Supreme Court in India does not play much active role but we have instances of judicial policy making. Supreme Court has framed policies regarding shifting of industries<sup>24</sup>, policies to eradicate child labour and payment of compensation to child labour by their employers<sup>25</sup>, guidelines regarding sexual harassment of women at workplace<sup>26</sup> etc.

These dimensions of judicial activism cannot be isolated from each other. They are applicable to the Indian scenario as well.

### **EXAMPLES OF JUDICIAL ACTIVISM IN INDIA**

There are many path breaking judgments which made various changes in Indian social and economic scenario. Before emergency in 1975, there was rare exhibition of any activism. It cannot be ignored that initially judiciary used by elite groups for their own interest and to serve their purpose, law favoured them. Judiciary was not progressive<sup>27</sup> and main reason behind this was the same class of persons constituting legal machinery- lawyers, judge etc. Many constitutional expert regarded Supreme Court of that time as 'rich man's court'.<sup>28</sup> We have cases in which land reforms were challenged. We have outstanding judgments in cases of *Shankari Prasad v. Union of India*<sup>29</sup>, and *Sajjan Singh*<sup>30</sup>. These cases showed the slight changes in judicial system for the betterment of country. We have Bank's Rationalization

---

<sup>24</sup> *M. C. Mehta v. Union of India* (1988) 1 SCC 471

<sup>25</sup> *M. C. Mehta v. Union of India* (1996) 6 SCC 756

<sup>26</sup> Supra, Note 1

<sup>27</sup> Lyakar Ali Justice, Judiciary and Judicial Activism, (Legal views and News, New Delhi, Feb 1998) p.26

<sup>28</sup> Mohd. Gouse 'The Two Faces of Judicial Activism' (1990)

<sup>29</sup> AIR 1951 SC 458

<sup>30</sup> AIR 1965 SC 845

case, *R. C. Cooper v. Union of India*<sup>31</sup>, in which Banking Companies (Acquisition and Transfer of Undertakings) Act of 1969 was challenged and Court declared those acts as invalid as it discriminate against 14 banks that were to be nationalized. Then we have *Keshavananda case*<sup>32</sup>, popularly known as Fundamental Rights case, in that case decision of *Golak Nath*<sup>33</sup> was overruled and Basic Structure Doctrine was given and Court retains the power to check the validity of constitutional amendments. Many basic features were chosen including federal character of the Constitution<sup>34</sup>, fundamental freedoms<sup>35</sup>, mandate to build a welfare state and egalitarian society<sup>36</sup>, and any of the fundamental rights<sup>37</sup>. Between 1950 and 1978, in *A. K. Gopalan* and *Maneka Gandhi*, Supreme Court gave judgments that expanded the scope of Article 21 of Indian Constitution. There are cases like *Govind v. State of M.P.*<sup>38</sup>, in which Court contemplated right to privacy in the right to personal liberty.

During 1980's, two major developments- broadening of scope of constitutional laws and judicial activities through public Interest Litigation provided a strong drive for growth of Judicial activism in India. More scope was given to citizens and different groups. Importance of Directive Principles was shown in case of *Minerva Mills Ltd. v. Union of India*<sup>39</sup>. Equal importance should be given to both Part III (Fundamental Rights) and Part IV (Directive Principles) of Constitution otherwise harmony and balance will be disturbed. While giving its decision, Supreme Court envisaged judicial and quasi judicial bodies to change their earlier decision after impartial hearing. A new dimension was given to the legal requirement of audi alteram partem.

Cases of *Bandhua Mukti Morcha*<sup>40</sup> and *Mukesh Advani v. State of Madhya Pradesh*<sup>41</sup> were focused on problem of bonded labour. In case of *National Workers Union v. P. R.*

---

<sup>31</sup> AIR 1970 SC 564

<sup>32</sup> Supra, Note 11

<sup>33</sup> Supra, Note 10

<sup>34</sup> Per Sikri, C.J.

<sup>35</sup> Per Shelat and Grover, J.J.

<sup>36</sup> Per Hedge and Mukherjee, J.J.

<sup>37</sup> Per Jagmohan Reddy, J.

<sup>38</sup> AIR 1975 SC 1378

<sup>39</sup> AIR 1980 SC 1789

<sup>40</sup> AIR 1984 SC 802

<sup>41</sup> AIR 1985 SC 1363

*Ramakrishnan*<sup>42</sup>, Court held that law should adopt itself with changing society, and its role is dynamic in social transformation process. In case of *M. C. Mehta v. Union of India*<sup>43</sup>, apex Court held that when any law does not fit in current scenario, it is duty of court to evolve a new law. Judicial review was held to be the heart and soul of this constitution in case of *Debu v. State of maharashtra*<sup>44</sup>. Judiciary is the final interpreter of constitution, it has to determine the extent and scope of the powers conferred by constitution on each wing of Government to ensure that no one crosses its limits.

Recent examples of judicial activism are 2G Spectrum<sup>45</sup> and commonwealth scam cases,<sup>46</sup> Noida land acquisition case, case relating to 2002 Gujarat riot, and the order to convert the Auto rickshaw to CNG to reduce Delhi's smog problem.

### **CONCLUSION**

Definition of judicial activism is not easy, it means different to different persons. Those who oppose this activism argue that it curtails the power of elected branch of Government, and damages rule of law and democracy. However many says that is a legitimate form of judicial review and that interpretation of law should change with changing needs of society. Judicial activism is good when it is for benefit and development of under-advantage sections of society, but it should not interfere with the policy making power of government, if it converts into a supervisory power to correct policies and government actions, public authorities, then citizens will rush to the Supreme Court and 24 High Courts. Now if defense of failure of other branches of government is taken, the question can be raised about results of failure of judiciary to meet expectations, and also about its inefficiency. By the same logic, they will take over the functions of judiciary. Justice J. S. Verma said that judicial activism is a sharp tool which has to be used by a skillful surgeon and not as a knife to kill.

---

<sup>42</sup> AIR 1983 SC 75

<sup>43</sup> AIR 1987 SC 1086

<sup>44</sup> (2000) 8 SCC 437

<sup>45</sup> Available at <http://m.thehindu.com/opinion/lead/disturbing-trends- in-judicial-activism/article3731471.ece> (last visited – 26-06-2016).

<sup>46</sup> Available at <http://www.insightsonindia.com/2016/01/26/2-unrestrained-judicial-activism-india-unmoored-sound-principles-disservice-governance-country-damaging-economic-growth-prospects-agree-statement/> (last visited- 26-06-2016)

It cannot be ignored that this socio-economic movement of court has increased the hope of people for justice. This is necessary for democratic set-up and establishment of rule of law. Because of judicial inertia common people are denied justice. Judicial activism will have to remove such tardiness. This activism should be accompanied with honesty and should win confidence and inspire faith in the minds of public. There were many laws which are insufficient to interpret by the judiciary hence for this particular reason there must be the existence of judicial activism in the country to have a good grip on the issues raised by the citizens. Judicial activism is an essential aspect of the dynamics of the constitutional court. It must work for the benefit of citizens but within the boundary or within the limits of judicial process. Court has to learn from its experience, adopt itself with social, economical, and cultural changes. While being active, Court has to keep the scales in balance while deciding any dispute.