JUDICIAL ACTIVISM IN INDIA

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Introduction

“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)²

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.

In this context, 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”. (Ahmadi, 1996)³. 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” (Tannebaum, 2005)⁴ 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. Some are decrying that judiciary is destroying legislature “step by step, brick by brick” (Jaitley, May, 2016)⁵.

To the defenders it is judicial dynamism and creativity. To them constitution is not static, it is a dynamic, living document and it is the judiciary which gives constitutional documents “a

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continuity of life and expression” (Cardozo, 1927) 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.

CONCEPT OF 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”. (Cartdozo, 1927).

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

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7 Ibid
transformation to administer justice to the aggrieved. “Thus where legislature falters, the judiciary corrects.” (Chander, 2003)⁸.

**REASONS FOR JUDICIAL ACTIVISM**

It is an uphill task to identify clear-cut reasons for judicial activism. Moreover, universal acceptance of all these reasons may not be guaranteed. But the following reasons are well accepted under Indian conditions which enforce judiciary to become hyper active during execution of judicial functions.

(i) Judicial enthusiasm  
(ii) Legislative vacuum  
(iii) Moral pressure on judiciary  
(iv) Near collapse of responsible government  
(v) The Constitutional provisions  
(vi) Guardian of Fundamental Rights  
(vii) Public confidence  
(viii) Enthusiasm of the individual players.

The above reasons are indicative and not exhaustive. There may be so many other reasons based on the prevailing situation which alert the judiciary to become catalyst of change.

**ORIGIN AND 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 only when someone speaks. In the case, the under trial was not in a position to afford a lawyer (Justice Mahmud, 1893)⁹.

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The power of judicial review has been expressly provided in the Article 13 of the Indian Constitution. Article 13 of the Indian Constitution prevents legislatures to make any law which “may take away or abridge the fundamental rights” guaranteed by the Constitution. Any law is declared as void if it is “inconsistent with or in derogation of the fundamental rights”.

Constitutional basis of the judicial review has been provided by Article 13 as it entrusts the Supreme Court and the High Courts 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)

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).

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). 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

10 Article 13, Constitution of India
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. 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\(^\text{13}\) 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\(^\text{14}\) 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 *Chitrakleka v. State of Mysore* case\(^\text{15}\) the Court imposed similar restrictions on reservation.

Supreme Court became more active in late sixties. In 1967, in *Goloknath v. State of Punjab* case\(^\text{16}\) 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\(^\text{17}\). 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\(^\text{18}\) Supreme Court struck down the 39th constitutional amendment on the ground that it was complete refusal of right to equality.

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18 A.I.R. 1975 S.C. 2299
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 structure concept. In order to save the democracy, it is counter majoritarian check on democracy (Dworkin, 1977)\textsuperscript{19}.

**DECLARATION OF EMERGENCY AND JUDICIAL SURRENDER**

Emergency was declared by Indira Gandhi on 26\textsuperscript{th} 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\textsuperscript{20}. 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 (44\textsuperscript{th} 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

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of judicial power” (Baxi, 1980). 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. Mrs. Maneka Gandhi’s passport was impounded. She challenged the action as it 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) and in Sunil Batra v. Delhi Administration (1978) 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 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) 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 recent Singur case (2016) 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.

Public Interest Litigation (PIL) – After Effect of Maneka’s Case

21 Upendra Baxi, “The Indian Supreme Court and Politics”, (1980) at 79-120
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)\(^{28}\). 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 properly may be sufficient. *Hussainara Khatoon v. State of Bihar* (1979)\(^{29}\), *Gupta v. Union of India* (1981)\(^{30}\), *Azad Riksha Pullars Union v. state of Punjab* (1981)\(^{31}\), *PUDR v. Union of India* (1982)\(^{32}\), *Bandhu Mukti Morcha v. Union of India* (1984)\(^{33}\) 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 1\(^{st}\) stage concentrated mainly on providing protection of the underprivileged of the society, the 2\(^{nd}\) 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\(^{34}\); Subhash Kumar case, 1991\(^{35}\); Oleam Gas Leak case, 1987\(^{36}\); Mehta Series cases, 1987\(^{37}\), 1988\(^{38}\), 1996a\(^{39}\), 1996b\(^{40}\), 1996c\(^{41}\), 1998\(^{42}\); Ganga River case, 1988\(^{43}\); Taj Mahal case,

\(^{29}\) A.I.R. 1979 S.C. 1360.
\(^{31}\) 1981 AIR 14, 1981 SCR (1) 366
\(^{34}\) Attakoya Thangal v. Union of India 1990 (1) KLT 580.
\(^{38}\) (1988) 1 SCC 471.
\(^{39}\) (1996a) 4 SCC 750.
\(^{40}\) (1996b) 4 SCC 351.
\(^{41}\) (1996c) 5 SCC 281.
1997 etc.), sexual harassment at the workplace (*Vishaka case*, 1997), reallocation of industries (World Saviors case, 1996; *Hariram Patidar* case, 1996; D P Bhattacharyya case, 1996; *Tarala case*, 1997), right to education (*Gourav Jain case*, 1997), good governance (Kapoor case, 1990; *Khet Mazdoor Samity case*, 1996; *Pandit case*, 1997; etc.), corruption free administration (*Vineet Narain case*, 1996; 1998; *Fodder Scam case*, 1999) and general accountability of the government (Common Cause case, 1992; 1996a, 1996b). In the second 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.

The 3rd stage of 21st Century i.e. in the current stage anyone could file a PIL for any purpose. This caused unprecedented increase in workload in the higher Courts and they are busy with the works which do not involve finer points of law. However, 2G Spectrum and Commonwealth Scam cases are good examples showing corruption can be checked in the administration.

51 (1990) SCR (3) 697.
56 1999 (1) BLJR 347.
58 (1996a) 6 S.C.C. 530.
59 (1996b) 6 S.C.C. 558.
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)60.

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)61.

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)62.

Supreme Court is trying to reform Board of Cricket Control of India (BCCI) as per Lodha Committee recommendation (Espn cricinfo, 2016)63. 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 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)64.


61 Swaraj Abhiyan vs Union of India and Ors on 13 May, 2016; available at https://indiankanoon.org/doc/19199787/.


JUDICIAL ACTIVISM – SOME CRITICISMS

Counter majoritarian opinion or ruling against the judicial precedents cannot be called judicial activism unless it is active in constitutional terms. In many cases judicial activism has caused undue interference in the political and social arena, overdependence on the international laws, personality driven adjudication, illogical use of institutional resources, have resulted in legal uncertainty, delay, backlog and overall loss of institutional credibility. Overenthusiasm shown in the Jharkhand Legislative Assembly case could be avoided by remaining aloof as proceedings of the legislature should ideally be left free to deal as per the provisions of the Article 212.

Incorporating the ideologically grounded concepts like “Hindutva” in the judgments of Sarla Mudgal (1995) case\(^\text{65}\), Ramesh Yeshwant (1996) case\(^\text{66}\), Manohar Joshi (1996) case\(^\text{67}\), Ramchandra G Kapse (1996) case\(^\text{68}\), the Supreme Court had taken conflicting opinions while explaining the meaning of “Hindtva” and “Secularism”. These could be avoided by circumventing ideological references. Similarly in the famous Shah Bano (1985) case\(^\text{69}\) reference to the non-legal, unfamiliar source of *Holy Quraán* and generalizing it could be avoided by providing legal reasoning to avoid unnecessary political controversies.

The shocking and stunning judgment given by the Supreme Court in the Ashok Hurra (2002) case\(^\text{70}\) truly crushed the backbone of appeal.

Supreme Court order in a military operation in 1993 (The Indian Express, 2016)\(^\text{71}\) or interference in the peace treaty (Shiva Kant Jha Case, 2002)\(^\text{72}\) are best examples of judicial overreach in the name of judicial activism. Judiciary should maintain the spirit of activism while flexing muscles.

The conflicting precedents and throwing of traditional principles bring about countless difficulties for the High Courts and the subordinate courts leading to judicial anarchy and

\(^{65}\) (1995) 3 S.C.C. 635; (Cri) 569.
\(^{67}\) (1996) 1 S.C.C. 169.
\(^{68}\) (1996) 1 S.C.C. 206.
\(^{69}\) (1985) 2 S.C.C. 556.
\(^{70}\) (2002) 4 SCC 388.
\(^{72}\) (2002) 256 ITR 563 (Del.).
indiscipline in the legal system. Moreover, personality driven judgment rather than “justice according to law” paved the way for “forum shopping” by appellants and lawyers.

CONCLUSION

Judiciary is the weakest organ of the State. Judges do not have the power of the sword or the purse. Their strength rests on the public confidence, public faith. This faith establishes the constitutionality of the court and judicial activism. It is not the judicial governance but it is working within the limits of Constitution to authenticate the reasonableness or unreasonableness of the functions of the other organs of the government with an aim to provide justice to the common people. In doing so the judiciary must be fair, faceless, impartial, impassive and humble interpreter of law.

But the problem arises when the judges become overactive and overenthusiastic to invade into the peripheries which are no pasaran for them and this has become a fashion in recent times. Exceptional powers should be retained for exceptional occasions, overuse devalues its efficacy and results in incongruous effect.

There must be fine line between the judicial activism and judicial overreach. If activism becomes overreach institutional balance is bound to be destabilized. Courts are not for running the country; it is the job of the other wings of the government. Courts must be sympathetic to the people into every decision of the government. The apex Court should draw the attention of the other wings to solve the problems rather than it emerging as a single savior of the entire society.