

Judicial Activism

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Abstract – There is no limited scope for judicial activism. It is used to look at the issues and to implement what is good for society as a whole. This is important to the fact that Justice, 'rich or poor, strong or weak,' is for all, that Karma even has been assigned to the King and Queen with the responsibility to bring righteousness. The research paper concentrates on the expansion in Indian democracy of judicial activism. In order to offer good justice, the judicial activism in India had touched practically all aspects of life. Often the right to judicial review and legal activism serves to defend the weaker sector of society by simply filling up social interest lawsuits or public interest disputes. Judicial action in executive and legislative matters has given society the upper hand in obtaining justice on several occasions. Judicial system is a way to provide 'justice' to everyone and to take all appropriate measures to preserve the JUSTICE interest. Legal basis of judicial activism for inclusion into fundamental rights into the Indian constitution. The preservation of the role of the judiciary is one of the important ways of safeguarding human rights. Judicial standards have an important beneficial effect on people's lives and on achieving the goals of the government. These standards can also ensure that people and their government, on the other hand, and the members of the international community, have a better knowledge of the relationship they have. Furthermore, big countries, such as the United States, are highly responsible for promoting human rights by virtue of their international weight and technical progress. In cases where citizens in the Middle East are willing to help promote human rights and demonstrate real intents to spread peace and stability, large countries should play an active part. They must also play an active role.

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INTRODUCTION

India is a union of states. Part IX of the constitution specifies distribution of powers between legislative, executive and judiciary. Judiciary – the third main organ of Indian democracy had 8 major functions. These are as following:

1. To act as guardian of the constitution and can declare any act invalid, if it is against and / or violates the basic structure of the constitution.
2. To protect the civil rights of the citizens.
3. To decide the cases.
4. To act as custodian of fundamental rights.
5. To interpret the laws.
6. To decide the conflicts of jurisdiction between the state and central governments being the federating units.
7. To give advice on legal matters when asked for by the President (President Late Dr. Rajendra Prasad took advice of Supreme Court on Kerala Education Bill & Hindu Code bill).

8. To render miscellaneous functions, such as registration of bills, approval of civil marriages, grant of naturalized citizenship, adoption, issue licenses, appeals relating to elections etc.

SCOPE OF JUDICIAL INTERVENTION

Besides the above mentioned functions, the courts can intervene in any of the following matter:

1. Abuse of power
2. Lack of jurisdiction
3. Error of law
4. Error in fact finding
5. Procedural error

Judicial activism, in fact, is not a different concept from judicial activities. The expression activism denotes being active i.e. doing things, action. Judicial rulings become judicial activism when it is based on the personal opinion and choice rather than based on the existing law of the land. When the judiciary usurps the power of executive and the legislature by overreaching beyond its domain, it can be bracketed as judicial activism, which sometimes

requires restraint i.e. when the judiciary encroaches into the arena of legislature and executive and tries to bring far reaching changes because the legislature and executive have failed to discharge their duties & responsibility, then the judiciary steps in and usurps the power to bring the just social order & equitable society.

The term judicial activism has its roots and origins in the USA. In India, looking at the vastness and multi-cultural society having poverty & depravity well entrenched, it is not within the reach of a large section of society to approach/knock the door of the judiciary to seek justice. With passage of time, the idea / model of PIL has evolved because of the pioneering efforts of Justice P.N. Bhagwati in the 1970s. The past experiences of the functioning of the courts and the Supreme Court. The highest judicial forum – the final court of Appeal in this regard goes to show that even a postcard received by the court has been taken up as PIL and also the courts take *suo moto* cognizance of a news item if it affects public at large or it pertains to public interest. Thus, the idea / model of PIL can very well be categorized as judicial activism with positive approach and outlook.

For example, in the transport sector whether diesel is to be used or CNG in motor vehicles, is not the job of the judiciary. Such matters are public policy issues, should have been taken up by the two organs of government (Legislature and Executive) however the Supreme Court stepped in and decided in future, from a particular date, in public transport CNG has to be used, that is called judicial pro-activism and/or judicial overreach.

In India even the constitution while establishing an independent judiciary, made it responsible to act as guardian of constitution and custodian of citizen's fundamental rights, thereby giving judiciary scope to play active role in protecting citizen rights, and to render and promote justice in the society e.g. (euthanasia & right to live).

It is also believed that law can be misused by a government with a thumping majority, therefore government may be afraid of taking honest and hard decisions. Even the legislative vacuum i.e. absence of law, non-availability of data, the Constitution of India, itself allows judiciary sufficient scope to play active role, e.g. (Triple Talaque) protection of rights of citizens and in advancement of justice in society, is also known as judicial dynamism. In the Indian continent the history of judicial activism or dynamism is a recent phenomenon. Till 1960 it played a submissive role, and from 1973 onwards, the assertiveness started when Allahabad High Court unseated Mrs. Gandhi's by cancelling her election on the ground of electoral malpractices. The introduction of PIL by Justice V.R. Krishna Iyer, lead to increased scope of judicial activism. After emergency attempts perpetrated by the government in order to control the judiciary, by superseding the senior judges and appointed Justice

Ajit Nath Ray as chief justice of Supreme Court thus introduced the concept of committed judiciary.

PIL is an instrument developed by courts to reach out to the masses and take cognizance *Suo Moto* i.e. to take up cases on its own. The broad contours of cases coming within the ambit of PIL has reliance on providing just and equitable social order. All these have the force of Article 39A of the Constitution behind it, the judiciary was restricted because the Directive Principles are non-justiciable. Therefore through the instrument of PIL the apex court started rendering justice which otherwise were non justiciable.

Thus inspite of the provision of 'judicial review' in the Constitution, apprehensions were expressed as to whether justice can be rendered even while the concept of judicial review is there, B.R. Ambedkar, the founding father of the Constitution argued that writ jurisdiction could provide immediate relief against abridgement/abrogation of Fundamental Rights. The experience of last two decades has shown that executives and legislatures have utterly failed in discharging their respective role and responsibility, that had provided judiciary ample scope to step into the shoes of the above referred two organs of the government.

JUSTIFICATION FOR PROACTIVISM OF JUDICIARY

1. The Constitution of India has given scope to judiciary to play a dynamic role against the legislature (to check dictatorship).
2. The citizens of India look up to the judiciary as protector of their freedom and their right to life, right to property and promotion of just social order.
3. When legislature and executive unable to discharge their duties and functions.
4. Various civil rights activists, humanists and freelancers as well pressurize the courts to intervene.
5. Consumer Rights activists expect courts to do justice to consumers.
6. Bonded Labor Rights activists look up the courts as savior and guardian of the poor.
7. Citizens groups or environmentalist expects the court to protect environment related issues in the matter of large irrigation projects and hydro electrical projects.
8. The courts are expected to protect the Juvenile rights, the sex workers & their child rights, rights of women in jail & Women Rights groups desire for ensuring gender

equality, adequate relief and justice to the rape victims, and Poverty Rights group look up courts for protection rights against poverty.

9. The media autonomy group, the bar-based group, the civil society, the NGO, etc. expect the courts to shield their rights and to play a proactive role.

Certain scholars and few thinkers believe that the role judiciary is limited i.e. to see what the law prescribes and interpret the constitution accordingly. The courts can have check on the legislative laws & executive policy through the instrument of judicial review.

The judiciary should restraint itself so as to maintain balance of power on the following grounds:

1. Court is not elected by the people, so is not responsible and accountable to people or popular will, therefore its action may be undemocratic.
2. The doctrine of separation of powers also does not allow courts to interfere in the affairs of other organs of government i.e. the legislature or the executive.
3. The concept of federalism entails court to differentiate the action of state & the union government.
4. The power of judicial review if not defined clearly & specifically in the constitution.

THE PRO-ACTIVE ROLE OF JUDICIARY A CURRENT SCENARIO

Judicial activism refers to judicial rulings that are being based more on personal opinion rather than existing law. It has been witnessed that the judiciary has been over enthusiastic & zealot to jump on to the powers and area of functions of the legislature and even executive because these two wings of the government have utterly failed to function and discharge their respective duties.

The policy matters which are to be taken up by the legislature and executive and to frame laws to regulate the issues such as Liquor Ban on National highways, National Anthem to be sung in cinema halls, the cutting of some of the scenes of Jolly LL.B. which is the task/domain of Censor Board and the recommendations of Lodha panel on sports code and one India one test, with regard to medical entrance exam i.e. the National Eligibility-cum-Entrance Test (NEET) etc., it goes to show that the executive as well as the legislature have failed in taking timely action for redressal of the aforesaid issues, therefore judiciary stepped in and issued orders to implement the orders so given by the Apex Court from time to time on the aforementioned issues.

Similarly in the wife swapping case of navy officers, or the policy regarding issuance of licenses to dance bars in Mumbai/Maharashtra or the role of the court in deciding the confidence vote in matter of Arunachal Pradesh Assembly and even the order of the court on bad loan was unwarranted. These are the matters which come within the domain of legislature and executive but no timely decision and inaction of these two wings, has prompted the judiciary to address the important matters referred above.

It is revealing, hurting and an eye opener that, when the Parliament of India through a legislation and passed the 99th Amendment Act in 2014, on National Judicial Appointment Commission (NJAC), the judiciary responded with alacrity and the order of three judges of Apex Court scrapping the NJAC and went ahead in reinstating the collegium system and in 2015 the Supreme Court declared the 99th Constitutional Amendment as unconstitutional and also nullified the NJAC and declared it as void system for the appointment of High Court and Supreme Court Judges. It is nothing but the outcry of the judiciary to protect its own skin by totally disregarding the powers of the legislature and executive.

Justice T.S. Thukral's outburst in Vigyan Bhawan in the presence of the Prime Minister that there needs to be some process to audit the performance of the government and went on emphasizing the point that a lot needs to be done to improve the functioning of the Judiciary. However, former bureaucrat and Union Minister in Atal Bihari Vajpayee's government Sh. Jagmohan had written in his book, 'Soul and Structure of Governance in India' – 2005 that judiciary sits on the important matters related to the government policies and stalls developmental projects by mindlessly granting stay orders. He further highlighted that who will audit the functioning of the judiciary and i.e. the biggest dichotomy and dilemma of the government. It is seen and observed that whenever the legislature attempts to maintain balance between judiciary and the executive, the judiciary reacts vehemently. A careful scrutiny of the ongoing developments and the under current establishes the fact that a thin line exists between judicial activism and judicial overreach.

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