

“JUDICIAL ACTIVISM IN A DEMOCRACY- A BOON OR A BANE”

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INTRODUCTION

Judicial activism is the judicial rulings based on the personal or political considerations rather than on the existing laws. The question of judicial activism being closely related to the Constitutional interpretation, statutory construction and separation of powers, legal academics often describe the judicial invalidation of legislative enactment as “judicial activism” Judicial activism is basically any occasion where the court intervenes and strikes down a piece of duly enacted legislation. In India the judicial activism has gained more importance due to the existence of the public interest litigation. Prof. Lino Graglia states that judicial activism is quite simply and specifically the practice by the judges¹ where they disagree to the policies made by the Government officials and other institutions when it reaches beyond the clear mandates of the Constitution. Constitution being the supreme law of the land any policy choices which is unconstitutional will be stroke down by the Judges under “Judicial activism” the concept of judicial activism is an older concept which was prevalent from 1970s, before the twentieth century many prominent scholars took positions on either side of the debate, Judicial activism is not been defined anywhere in the Constitution of India nor in any Indian statute,² therefore due to the absence of a definite definition many scholars lawyers, judges have interpreted and defined the term judicial activism with their own view or expression.

DEFINITION OF JUDICIAL ACTIVISM

Black’s Law dictionary defines the term judicial activism as a philosophy of judicial law making whereby the judges allow their personal views about the public policy,

¹ Lino A. Graglia, It’s not Constitutionalism, it’s Judicial Activism, 19 Harv. J.L. & Pub. Pol’y 293, 296 (1996)

² <https://ijrdo.org/index.php/ssbr/article/download/354/322/>

among other factors to guide their decisions.³ Therefore judicial activism means an active role played by the judiciary in order to promote justice, judicial activism to define broadly is the assumption of an active role on the part of the judiciary.

According to Merriam-Webster's dictionary of law judicial activism is the practice in the judiciary of protecting or expanding individual rights through decisions that depart from the established precedent or are independent of or in opposition⁴ to supposed Constitutional or legislative intent. Further Justice J.S. Verma defines that judicial activism is one which must necessarily exist where it means the active process of implementation of the rule of law essential for the preservation of the fundamental democracy.⁵ Hence from this definition given by Justice J.S Verma we can understand that to protect the basic functions and democracy judicial activism is very important. The concept of judicial activism may on the outside look as tiny as a needle in the haystack, small in size but it is very essential, the existence of this concept of judicial activism gives power to the judges so that they can safeguard the rights and interest of the people and to render justice which is the sole purpose of the judiciary. Most of the cases and issues go unnoticed by using this concept of judicial activism various Judges and Activists have⁶ brought in remarkable changes which is to maintain the peace and order in the society and ultimately which is of benefit for the people, whereby their interests are not affected and that their basic fundamental rights are guaranteed to them irrespective of the caste, creed economic and social status.⁷

A BOON OR A BANE

The definition given by Upendra Baxi is that judicial activism is an ascriptive term where it means that it can be defined and interpreted⁸ by different people in different ways, it means different things to different people, while some may exalt the term by describing it as judicial creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of

³ Black's Law Dictionary, 7th ed., (St. Paul, Minnesota: West Group, 1999).

⁴ Merriam- Webster's Dictionary of Law, (Springfield, Massachusetts: Merriam – Webster, 1999).

⁵ shodhganga.inflibnet.ac.in/jspui/bitstream/10603/207059/13/13_chapter%207.pdf

⁶ shodhganga.inflibnet.ac.in/bitstream/10603/32340/11/12_chapter%206.pdf

⁷ Manidranath, Dr. Deka Swapna. Judicial Activism in Post-Emergency Era. Notionpress.com. 2015.

⁸ etheses.lse.ac.uk/1417/1/U084680.pdf

public duties etc.. whereas on the other hand many have criticised the term by describing it as judicial extremism, judicial terrorism and judicial transgression,⁹ due to a lack of a definite definition there will be both for and against for this concept of judicial activism. Hence forth the debate will keep continuing, as any concept or law proposed will have both negative and positive impact on the society, the concept of judicial activism is no exception.¹⁰ Due to the lack of permanent parameters as to what cases needs to be taken under the concept of judicial activism the debate of for and against is a never ending one. Each case whether if it falls under judicial activism needs to be decided based on the facts and its impact on the society, therefore judicial activism can be both boon and a bane, it is a boon because it is the only way by which the unreported cases can be taken by the Judges and a solution can be obtained, judicial activism plays a major role in bringing about revolution in the field of human rights and social welfare¹¹. But many have criticized it as judicial extremism, the work of the judiciary is to here both the sides of the argument and to give a judgement which is fair and just henceforth they state that judicial activism is judicial extremism, seeing it the other way round as justice is the inevitable part of the judiciary, having the concept of judicial activism,¹² in many issues justice has been obtained, as the saying goes delayed justice is a denied justice, if judicial activism or judicial intervention does not prevail in most of the cases justice will be denied, therefore judicial activism is very important to protect and to render justice. In spite of many criticisms stating that judicial activism is judicial extremism, judicial terrorism etc... Having judicial activism is of more benefit to the society than its negative impact; therefore justice being the epicentre judicial activism is essential to achieve justice.¹³ Judicial activism in India is a progressive movement where it allows access to justice to pro bono public that is public spirited individuals and organizations on behalf of lowly and lost or underprivileged who on account of constraints of money, ignorance, and illiteracy have been bearing the pains of excesses without access to justice.¹⁴ From all this it is clear that judicial activism is an inevitable one. The phrase judicial activism carries more than one connotation.

⁹ https://www.academia.edu/.../Judicial_Activism_A_Present_Trends_to_Color_the_Ind..

¹⁰ <https://academic.oup.com/icon/article/11/3/585/789372>

¹¹ www.academia.edu/.../JUDICIAL_ACTIVISM_IN_INDIA_MEANING_AND_IMPLI

¹² <https://www.britannica.com/topic/judicial-activism>

¹³ <https://ijrdo.org/index.php/ssbr/article/download/354/322/>

¹⁴ <https://ijrdo.org/index.php/ssbr/article/download/354/322/>

VARIOUS THEORIES

As far as the origin and evolution of judicial activism go, there are various theories behind this whole concept of judicial activism.

The Theory of Vacuum Filling

As per the Indian democratic republican scenario, the whole power is categorised into three wings or organs which are the legislature, executive and the judiciary. These three wings have their own powers and separated works so as to regulate the democracy,¹⁵ but when the two wings either the executive or the legislature if one of them become passive or inactive to deploy or continue its part, then the judiciary has no other choice but to intervene in such a scenario so as to protect the rights of the people and to maintain peace and order in the society, for a democratic country like India independent judiciary is considered as the heart and soul by which the democratic and republican situation shall be maintained, but as the main aim of the judiciary is the well-being of its citizens it is necessary for judiciary to intervene and expand its horizons so as to fill up the gap created by the legislature and the executive.

THEORY OF SOCIAL WANT

As it was seen in the theory of vacuum filling when any of the two organs fails to do its duty due to its incompetence, disregard to law, negligence, corruption, indiscipline then the judiciary comes¹⁶ into picture with the choice of amplification of its determined horizons by the Constitution to solve the disputes, but the question may arise as to why the judiciary does so? The answer is simply for a social want which is to protect the interests of the people and such that to see no one is deprived of their fundamental rights. When any of our organs fail or starts dis-functioning we transplant it, the same applies to the executive and legislative functions also, and when they are incompetent the judiciary extends its horizon so that the epicentre which is social want and justice is never lost. The Judicial activism emerged due to the failure of the existing legislations to cope up with the existing situations and problems in the country,¹⁷ thus it becomes incumbent upon

¹⁵ <https://oll.libertyfund.org/titles/vile-constitutionalism-and-the-separation-of-powers>

¹⁶ <https://racollegal.com/transgressing-borders-through-judicial-activism-an-indian-pers...>

¹⁷ <https://www.dsausa.org/about-us/what-is-democratic-socialism/>

the judiciary to take on itself the problems of the oppressed and to find a way to solve them, hence to protect the oppressed the judicial activism emerged.

JUDICIAL ACTIVISM IN INDIAN SCENARIO

The Indian Constitution provides scope and space in itself to obtain the philosophy of judicial activism by virtue of the Articles 13, 32, 141, 142 and 226 mainly. Article 13 of the Constitution of India confers wide powers of judicial review to the Apex court, in the exercise of this judicial activism the Constitutionality of the executive and legislative acts can be examined, the high courts are also conferred with this same power. Article 32 of the Constitution of India makes the Supreme Court as the protector and guarantor of the fundamental rights, therefore it is the duty of the Supreme Court to protect the fundamental rights and see to it that no one is deprived of it, thus only by way of judicial activism¹⁸ the supreme court can protect the fundamental rights which is an inevitable part of the constitution and for the human existence. Article 141 of the Indian Constitution again indicates that the power of the Supreme Court is not only to declare and recommend new laws but in the course of the function to interpret and alter the law which the Court thinks is violative of the fundamental rights, to put it in one word the laws which are unconstitutional. Article 142 of the Indian Constitution states that it enables the Supreme Court in exercising its jurisdiction to pass any order or to make orders for rendering complete justice at any cause or of any¹⁹ matter pending; hence Judicial Activism plays a vital role in order to attain justice. It is easy to say Justice to all needs to be given in all circumstances, but how is a question unanswered, with the help of judicial activism the attainment of justice can be achieved to an extent.

Though many provisions talk about Judicial Activism for a very long time the Indian Judiciary has taken an orthodox approach to the very concept of Judicial Activism in India, it was due to the dominant position of the British on the Indian Judicial system; they did not come to the limelight as the theory of judicial activism was unknown. However, the history of Judicial activism can be traced back to the early 1890s where Justice Mehmod in the Allahabad High Court for the first time delivered a dissenting judgement by which the prior object of the philosophy of judicial activism came into focus. It was a case of under-trial who could not afford for a lawyer. So, the question was whether the court could decide his case by merely

¹⁸ <https://www.dsausa.org/about-us/what-is-democratic-socialism/>

¹⁹ <https://blog.ipleaders.in/General>

reading the papers, but it was held that the pre-condition of the case being heard would be fulfilled only when somebody speaks, where he gave the widest interpretation of the relevant law and laid the foundation of Judicial activism according to Article 141 of the Indian Constitution. The concept of Judicial Activism started gaining momentum and popularity when the bureaucracy degenerated to a system of personal and public gains and when exploitation and corruption became more prominent in the political system as a result the masses were oppressed beyond imagination therefore it was the responsibility of the judiciary to do something to provide relief to the oppressed and to the backward classes of our society, thus the only way to provide relief and to bring equality is by judicial intervention. As held in the case of *Sunil Batra vs. Delhi Administration*²⁰ Justice V.R Krishna Iyer described the situation as though the legislation is the best solution but when law-makers take too long, it is the duty of the court to interpret and carve on wood and sculpt on stone without waiting for a distant marble. Therefore in the case of *Mumbai Kamgar Sabha Vs. Abdul Bhai*²¹ the apex court introduced the doctrine of Judicial activism, Also in the case of *Menaka Gandhi Vs. Union of India*²² the theory of Judicial activism received impetus where the apex court substituted the due process in the Article 21 alone with the condition of procedure established by law in order to avoid the absolutism of the executive as well as the legislature and its interference to the individual's freedom.

Prior to 1970s the view which was existing among the common mass was that the legislature is the sovereign, supreme and the independent authority for the making of law, but this view was completely changed in the case of *Kesavananda Bharathi v. State of Kerala*²³ where it was held that the legislature is not the only authority to make law, furthermore the supreme court also enunciated the doctrine of basic structure, which formed an impenetrable structure against all the despotic actions of the executive and the legislature, this is because the development shall come in the annals of the Indian Judiciary for meeting the challenges and various issues confronting our democratic republican status.

This effort of judiciary is also enlightened by applying the concept of Public interest litigation, by using this public interest litigation the judiciary has unearthed many schemes providing justice to its citizens and also to enhance their rights,

²⁰ AIR 1978 SC 1548

²¹ AIR 1976 SC 1465

²² AIR 1978 SC 853

²³ AIR 1973 SC 1641

there are many circumstances whereby the parliament and the state legislatures have failed to address the problems which affect the quality of life of the community or identifiable segments of the society, but by applying the concept of Public interest litigation which comes under judicial activism, the judiciary gradually enriches the heart and soul of the Constitution. In the case of *Hussainara Khatoon v. State of Bihar*²⁴ it was held that speedy trial was an integral part of Right to Life and Liberty guaranteed under Article 21 of the Indian Constitution another instance is where in the case of *M.C. Mehta v. Union of India*²⁵ the petitioner prayed for direction for giving whole publicity to the messages and directions issued by the courts from time to time to protect the environment and ecology, in such a case the rule of absolute liability was originated unlike the Rule of strict liability , further more in the case of *Delhi Domestic working women's forum vs. Union of India*²⁶ the supreme court issued guidelines for rehabilitation and compensation for the rape of working women, if we expect all this has to be done only by the legislatures, most of the issues will become unnoticed and the justice will be denied as the saying goes delayed justice is a denied justice, it's not blaming the legislations and the legislators but if judicial activism is removed considering it as a judicial extremism as many criticize it then most of the times justice will be denied as the process will be delayed and also many issues will go unnoticed, but on the other hand the controversy relating to separation of powers comes into picture. By acting in this way the violation of separation of powers develops, as judicial activism takes lead the separation of powers which is considered as the basic structure though not explicitly mentioned is been hampered, moreover the public interest litigation actions of the judges' part is unwarranted and it also violates the separation of powers. Thus this debate is a never ending one. But in reality having judicial activism is of much benefit to the citizens though it violates the doctrine of separation of power.

SUGGESTIONS AND CONCLUSION

Therefore to put it in a nutshell like a coin has two sides both, the doctrine of separation of power and judicial activism are important and cannot be ignored or substituted, it can be said that as Montesquieu stated the rule of complete separation of power in today's scenario cannot be worked out in a proper way , there is a need for a new and better doctrine which serves the purpose of the

²⁴ AIR 1979

²⁵ AIR 1988

²⁶ 1995 SCC (1) 14, JT 1994 (7) 183

present democratic need whether it is a parliamentary or presidential type of government, as all the organs of the Government are subject to each other's scrutiny by way of checks and balance, absolute separation of power is not possible but each organ are impliedly required to restraint their powers to the sphere which has been provided or set forth in the Constitution and therefore to undertake steps that serves the purpose for which it is there, thus a balanced separation of power is essential in order to protect the rights, liberties and freedom of the people, therefore to conclude as stated earlier both judicial activism and the doctrine of separation of power need to be balanced, judicial activism may be good for protecting the fundamental rights of the citizens, protecting their interest from vicious bureaucrats and politicians but as the saying goes too much of anything is good for nothing extreme activism will lead to overreach of judicial powers that may lead to misuse of power by the Judges leading to arbitrary decisions which is against the rule of a democratic country, so as to ensure that no arbitrariness takes place judicial activism needs to be practiced within the purview of a balanced doctrine of separation of power, checks and balances.