

## Judicial Activism in India

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Date of Submission: 28-02-2023

Date of Acceptance: 10-03-2023

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The concept of judicial activism originated and developed first in the USA. This term was first coined in 1947 by Arthur Schlesinger Jr., an American historian and educator. In India, the doctrine of judicial activism was introduced in the mid-1970s. Justice V.R Krishna Iyer, Justice P.N Bhagawati, Justice O. Chinnappa Reddy and Justice D.A Desai laid the foundations of judicial activism in the country.

### **What is Judicial Activism:**

Judicial activism denotes the proactive role played by the judiciary in the protection of the rights of the citizens and in the promotion of justice in the society. What the Supreme Court and the High Courts have done by entertaining cases filed by conscientious persons or public-spirited groups in the name of 'public interest' for rendering justice to the aggrieved person or party as expeditiously as possible has given birth to the trend of judicial activism in our country. In other words, it implies the assertive role played by the judiciary to force the other two organs of the government, that is, the legislature and the executive to discharge their constitutional duties.

In India, this trend became manifest when the Courts displayed zeal in entertaining petitions not only for the protection and enforcement of fundamental rights, but also to do so many things incidentally related to them, as a result of the widest possible interpretation of the provisions of Part III of the Constitution, relating to the life, liberty and equality of the people. Judicial activism, also known as judicial dynamism, is the antithesis of 'judicial restraint', which means the self-control exercised by the judiciary. In India, from the 1980s onwards, judicial activism engaged the attention of the people far and wide when they took note of the fact that the courts entertaining such petitions and directing the government and its agencies to do anything from clearing garbage off the streets for the prevention of some epidemic to immunising the polity from corruption and maladministration.

Judicial activism is a way of exercising judicial power that motivates the judges to depart from normally-practised strict adherence to judicial precedent in favour of progressive and new social policies. It is a procedure to evolve new principles, concepts, maxims, formulae and relief to do justice or to expand the standing of the litigant and open the doors of Courts for the needy or to entertain litigation affecting the entire society or a section thereof. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusion into the legislative and executive matters. The astonishing feature of this trend is that what was so far taken as the exclusive concern of the executive and the legislature has now been taken over by the Courts. Thus, the Courts have taken up matters and punished the wrong-doers in a matter relating to the unfair allotment of official flats and bungalows, or arbitrary distribution of petrol pumps and gas dealerships. It even has asked the Central Bureau of Investigation to complete investigation in a particular matter by a particular date in a particular manner, on several occasions. The Courts have directed the Union or State Governments to construct a particular dam upto a certain height, to compensate the displaced people adequately, to close down factories emitting poisonous gases or to amend outdated prison laws and the like.

Though in India, we do not have a complete separation of powers, but some demarcation is made between the three organs of the government. The legislature makes the laws; the executive implements them, and the traditional role of the judiciary is to adjudicate, hear and settle disputes. The judiciary is supposed to be apolitical. Political organs of the state are the legislature and the executive. But the judiciary cannot remain a mute spectator when so many developments are taking place in society. The judiciary is now playing a proactive role to ensure social, political and economic justice.

### **Reasons for the Rise of Judicial Activism in India:**

According to Dr. B.L Wadehra, the reasons for the rise of judicial activism in India are as follows:

- i) When the legislature or the executive fail to discharge their respective functions, there is a near collapse of responsible government. This results in the erosion of confidence in the Constitution and democracy among the citizens. Thus, when the other two organs are underactive, the judiciary becomes proactive.
- ii) Citizens of the country look up to the judiciary for the protection of their rights and freedoms. This leads to a tremendous pressure on the judiciary to step in aid of the suffering masses.
- iii) Judicial enthusiasm, i.e., when the judges like to participate in bringing about social reforms that are necessary in the changing times, it promotes judicial activism. It encourages public interest litigation and liberalises the principle of '*locus standi*'. In fact, the concept of judicial activism is closely related to the concept of public interest litigation. It is the judicial activism of the Supreme Court which is the major factor for the rise of PILs. In fact, PIL is the most popular form or manifestation of judicial activism. Public interest litigations representing the unrepresented whose voice cannot be heard, like prisoners, children, women, transgenders, are accepted and heard by the Court. Even a postcard or newspaper items are treated as PIL petitions. Public-spirited persons or organisations can file cases.
- iv) **Legislative vacuum:** There may be certain areas which have not been legislated upon. It is therefore upon the Courts to indulge in judicial legislation to meet the changing social needs. Like in 1997, the Supreme Court framed and issued the Vishakha Guidelines in Vishakha v State of Rajasthan Case. The highest court of the country said that until the Parliament makes laws, these guidelines would work as law relating to sexual harassment of women at workplace. It was only in 2013 that the Parliament passed law regarding this matter.
- v) The Constitution of India itself has adopted certain provisions which give the judiciary enough scope to legislate or to play an active role. Article 32 and 226 have given the Supreme Court and High Courts the power to issue writs to protect Fundamental Rights of citizens. Article 31 and 142 also empowers the Supreme Court to formulate laws.
- vi) As constitutional expert Subhas Kashyap observes, there are certain eventualities when the judiciary may have to overstep its normal jurisdiction and intervene in areas otherwise falling within the domain of the legislature and the executive, such as:
  - i. When the legislature fails to discharge its responsibilities or in case of a Hung Parliament, the government it provides is weak, insecure and busy, only in the struggle for survival, and is unable to take any decision which displeases any caste, community or other group. In such a situation, the Courts have taken up issues. It is obvious that the Courts have to come to the forefront when the country had weak governments.
  - ii. On many occasions, those in power, afraid of taking honest and hard decisions, for fear of losing power, may have public issues referred to the Courts as issues of law in order to mark time and delay decisions or to pass on the odium of strong decision-making to the Courts. For instance,
  - iii. Where the legislature and the executive fail to protect the basic rights of the citizens, like the right to live a decent life, healthy surroundings or to provide honest, efficient and just system of law and administration, Courts have even recognised many new Fundamental Rights as implicit in the existing ones. For instance, the right to privacy, right to health, right to education, right to be forgotten, right to speak, right to sleep etc. have been recognised by the Supreme Court as implicit rights under various other explicitly-declared Fundamental Rights.
  - iv. Directive Principles of State Policy, as enshrined in Part IV of the Constitution of India are non-enforceable due to the financial constraint of the country. But the Supreme Court observed that some of them have become part of Fundamental Rights; like the right to health is implicitly part of the Right to Life under Article 21. Article 48A of the Directive Principles of State Policy says that 'the State shall endeavour to protect and improve the environment, and safeguard and protect the forests and wildlife of the country'. According to Article 21 of the Constitution, 'no person shall be deprived of his life or personal liberty, except according to procedure established by law'. Article 21 has received liberal interpretation from time to time after the decision of the Supreme Court in Maneka Gandhi vs. Union of India. The Court has observed that a right to environment free of disease and infection is inherent in it. Right to a healthy environment is an important attribute of right to live with human dignity. This implicit right was recognised in the case of Rural Litigation and Entitlement Kendra v. State, and in M.C. Mehta vs. Union of India, the Supreme Court treated the right to live in a pollution-free environment as a part of the Fundamental Right to Life under Article 21 of the Constitution.
- vii) With the expansion of the spirit and ideology of democracy, the modern judges feel that they too have a positive role to play to protect the democracy of the country. If something is going wrong and the other two branches are doing nothing about it, the judiciary cannot remain silent. The courts should and must play a proactive role to ensure that rule of law prevails, democratic rights of the people are protected and constitutional governance ensured.
- viii) Like many proactive and spirited judges, many active lawyers filing a number of Public Interest Litigations have led to the rise of judicial activism. Lawyers like M.C. Mehta are known for taking up issues and filing PILs on matters like protection of environment, protection of biodiversity, the issue of development at the cost of environmental degradation, raising the voices of the marginalised people, the rights of the transgenders and so on.

- ix) Many NGOs have played an important role in bringing up issues before the Courts which were earlier ignored or neglected by the body polity. Certain NGOs like People's Union for Democratic Rights (PUDR), People's Union for Civil Liberties (PUCL), Palli Unnayan Seva Samiti (PUSS), Common Cause etc. have moved the courts many-a-time to ensure socio-economic justice for the deprived and marginalised in India.
- x) There are many social and human rights activists who encouraged the practice of judicial activism. There are civil rights activists, consumer rights groups, bonded labour rights groups, citizens for environmental action, citizens groups against large irrigation projects, rights of child groups, women's rights groups, media autonomy groups, custodial rights groups, poverty rights groups etc. The Indian Courts, particularly the Supreme Court of India has passed many landmark judgements touching upon many areas of concern hitherto neglected by the administration and thereby bringing to the limelight their importance. Like smoking in public places has been banned since the ruling, in 2002, that it amounts to public nuisance. Ensuring prison justice, the Court ruled that prisoners must be ensured human rights. The Court observed that while undertaking any narco-analysis or lie-detector tests, consent of the concerned prisoner must be obtained beforehand.

However positive the role of judicial activism might have been in India, there have been occasions when the judges have crossed the boundaries of our constitutional limits and faced severe criticisms. Our Constitution has expressly given the Supreme Court and the High Courts of the country the power and right of judicial review of acts of legislature and executives. However, judicial activism is not judicial review; there is a very thin line of distinction between the two. Critics argue that in the name of judicial activism, judges cannot cross the boundaries and take over the functions of the government. Judges should not try to run the government. They cannot justify their over-activism by saying that 'the others are doing nothing so we will do everything'. The Courts should only act as a catalyst for ensuring true justice. After all, the Courts are not democratically elected institutions. Besides, the question remains: who will judge the judges? In an already overburdened judicial system of the country, the Supreme Court and High Courts are adding to their workload by taking up all different kinds of PILs. The question arises: in becoming overactive, are the Courts helping in protecting and nurturing democracy, or depleting its potential for the future?

While delivering a judgement in 2007, the Supreme Court of India itself called for judicial restraint and asked Courts not to take over the functions of legislature or the executive. In this context, the concerned bench of the Court made the observations: 'we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. This is clearly unconstitutional'. The Bench further said, 'Judges must know their limits and not try to run the government. They must have modesty and humility and not behave like Emperors'. Quoting from the book *The Spirit of Law* by Montesquieu on the consequences of not maintaining separation of powers among the three organs, the Bench said, The French political philosopher's 'warning is particularly apt and timely for the Indian judiciary today since very often it is rightly criticised for overreach and encroachment on the domain of the other two organs'. Judicial activism must not become judicial adventurism, the Bench warned the Courts, Adjudication must be done within the system of historically-validated restraints and conscious minimisation of Judges' preferences.

Baisakhi Chatterjee Acharyya. "Judicial Activism in India." *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*, 28(3), 2023, pp. 01-03.