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## A Review on Judicial Activism

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**Abstract:** *Judicial Activism is not a result of general development of judicial procedure. It is an essential aspect of the dynamics, derivatives and independent findings of the courts. It is a specific judicial interest about the issues. Judicial Activism does not mean governance by the judiciary. Judicial Activism must also function within the limits of judicial process. Within those limits it performs the function of stigmatizing, as well as legitimizing, the actions of the other bodies of the Government- more often legitimizing. The judiciary is having certain limitation according to statutes which are framed by the legislature. It becomes strong only when people repose faith in it. Such faith constitutes the legitimacy of the Court and of judicial activism. Courts do not have to bow to public pressure, but rather they should stand firm against public pressure. Such inarticulate and diffused consensus about the impartiality and integrity of the Judiciary is the source of the Court's legitimacy. It is an essential aspect of the dynamics of a constitutional court, in modern India, the judicial activism may develop through many aspects and it will play an important role to future challenges of the democratic India.*

**Keywords:** *Judicial Activism, fundamental rights, Directive, Principles, Judgment*

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### I. INTRODUCTION

Arthur Schlesinger Jr. introduced the term "judicial activism" in a January 1947 Fortune magazine article titled "The Supreme Court: 1947". Schlesinger's original introduction of judicial activism was doubly blurred: not only did he fail to explain what counts as activism, he also declined to say whether activism is good or bad. "A network Judicial activism refers to judicial rulings suspected of being based on personal or political considerations rather than on existing law. It is sometimes used as an antonym of judicial restraint. Its specific decisions are activist, is a controversial political issue, particularly in the United States. The question of judicial activism is closely related to constitutional interpretation, statutory construction, and separation of powers. Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Political science professor Bradley Canon has posited six dimensions along which judge courts may be perceived as activist: majoritarianism, interpretive stability, interpretive fidelity, substance/democratic process, specificity of policy, and availability of an alternate policymaker. David A. Strauss has argued that judicial activism can be narrowly defined as one or more of three possible actions: overturning laws as unconstitutional, overturning judicial precedent, and ruling against a preferred interpretation of the constitution.

### II. JUDICIAL ACTIVISM IN INDIA

India has a recent history of judicial activism, originating after the emergency in India which saw attempts by the Government to control the judiciary. The Public Interest Litigation was an instrument devised by the courts to reach out directly to the public, and take cognizance though the litigant may not be the victim. "suomotu" cognizance allows the courts to take up such cases on its own. The trend has been supported as well criticized. India's judges have sweeping powers and a long history of judicial activism that would be all but unimaginable in the United States. In recent years, judges required Delhi's auto-rickshaws to convert to natural gas to help cut down on pollution, closed much of the country's iron-ore-mining industry to cut down on corruption and ruled that politicians facing criminal charges could not seek re-election. Indeed, India's Supreme Court and Parliament have

openly battled for decades, with Parliament passing multiple constitutional amendments to respond to various Supreme Court rulings.

Fundamental Rights as enshrined in the Constitution have been subjected to wide review, and have now been said to encompass a right to privacy, right to livelihood and right to education, among others. The 'basic structure' of the Constitution has been mandated by the Supreme Court not to be alterable, notwithstanding the powers of the Legislature under Article 368. This was recognized, and deemed not applicable the High Court of Singapore in *Teo Soh Lung v. Minister for Home Affairs*. Recent examples quoted include the order to Delhi Government to convert the Auto rickshaw to CNG, a move believed to have reduced Delhi's erstwhile acute smog problem (it is now argued to be back) and contrasted with Beijing's.

### **III. EARLY CASES OF JUDICIAL ACTIVISM**

The following Supreme Court cases provide a useful insight into the growth and development of judicial activism in independent India.

In the Privy Purse case *Madhav Rao Jivaji Rao Scindia Union of India* the broad question was whether the President rightly exercised his power in de-recognising the princes. In this case, the court ruled that by virtue of Article 53 of the constitution, the executive power of union vested in the President must be exercised "in accordance with law". That power was intended to be exercised in aid of, not to destroy, the constitution. An order merely "de-recognizing" a ruler without providing for the continuation of the institution of his rule an integral part of the constitutional scheme was therefore plainly illegal.

In *R C Cooper v Union of India*, the legislative competence of Parliament to enact the Banking Companies (Acquisition and Transfer of Undertakings) Act, known as the Bank Nationalisation Act, was in question. The court struck down the Act primarily on the ground of unreasonableness, explaining that the restriction imposed on the banks to carry on "non-banking business" in effect made it impossible for the banks, in a commercial sense, to carry on any business at all. In *Golaknath v State of Punjab*, the Supreme Court while dealing with the constitutional validity of the 17th Amendment to the constitution evolved the concept of "prospective overruling" and held that Parliament had no power to amend Part III of the constitution, or take away, or abridge any of the fundamental rights.

In the fundamental rights case *Keshavananda Bharti v State of Kerala*, 1973 the Supreme Court rendered a judgment that can be regarded as an important milestone in the Indian constitutional jurisprudence. While dealing the question as to the extent of the amending power conferred by Article 368 of the constitution, the court evolved the theory of "basic structure." A bench of 13 judges held by a majority of 7:6 that the Parliament had wide powers to amend the constitution extending to all articles of the constitution, but this power could not be used in an unlimited way to abridge, abrogate or destroy the "basic structure" or the "basic framework" of the constitution.

In *VC Shukla v Delhi Admin* (1980), the court while dealing with the legislative competence of the state to pass a law establishing special courts for dealing with offences committed by persons holding high public office, held such courts to be valid. It also held that the court could strike down an administrative act if bias or mala fides was proved. The court in this case clarified that the theory of "basic structure" would apply only to constitutional amendments and not to an ordinary law passed by the Parliament or the state legislature.

In the *Bhagalpur Blinding case (Khatri (II) v State of Bihar*, it was held that Article 21 included the right to free legal aid to the poor and the indigent and the right to be represented by a lawyer. It was also held that the right to be produced before a magistrate within 24 hours of arrest must be scrupulously followed.

In *Fertilizer Corp Kamgar Union v Union of India* the petitioners of a public enterprise challenged the sale of the plant and machinery of the undertaking, as it resulted in their retrenchment. The Supreme Court held that sale resulting in retrenchment had not violated their rights under Article 19(1)(g) of the constitution, and likened it to termination of employment due to abolition of posts. The court ruled that the petitioner did not have the locus standi to petition under Article 32. While reiterating that the jurisdiction of the Supreme Court under Article 32 was part of the "basic structure" of the constitution, the court violated, a petition under Article 32 was not maintainable even though one under Article 226 may be permissible.

In *T V Vaitheeswaran v State of TN*, the Supreme Court held that a delay in the execution of the death sentence for two years would entitle the prisoner to commutation of the death sentence to one of life imprisonment. However, in *Sher Singh v State of Punjab* this view was overruled. In the latter case, the delay was due to the conduct of the convict.

In the judges transfer case *S P Gupta v Union of India*, 1983, the court while dealing with the question of the meaning of the word "consultation" in Article 124(2) held that in the matter of the appointment of judges, the executive is supreme and is not bound by the views expressed by the Chief Justice of India or the other judges of the SC. However, this view has been overruled in *S C*

Advocates-on-Record Association v Union of India 1993 to ensure judicial supremacy in the appointment of judges. In the Asian Games case (People's Union for Democratic Rights v Union of India, (1982), the court held that workers temporarily employed by contractors for construction work were entitled to the benefit of the relevant labour and industrial laws and to seek for their implementation under Article 32 of the constitution. The court directed the government and the concerned authorities to ensure compliance with the laws in respect of workers connected with the construction work of the ensuing Asian Games in Delhi. In A R Antulay v R S Nayak, the court, while dealing with the question of prior sanction for prosecution of a public servant, held that an MLA was not a 'public servant' within the meaning of the relevant clauses as he was not remunerated by the fees paid by the executive in the form of the State Government.

#### **IV. AREAS OF JUDICIAL ACTIVISM**

During the past decade, many instances of judicial activism have gained prominence. The areas in which judiciary has become active are health, child labour, political corruption, environment, education, etc. Through various cases relating to Bandhua Mukti Morcha, Bihar Under trials, Punjab Police, Bombay Pavement Dwellers, Bihar Care Home cases, the judiciary has shown its firm commitment to participatory justice, just standards of procedures, immediate access to justice, and preventing arbitrary state action.

Judicial activism refers to the interference of the judiciary in the legislative and executive fields. It mainly occurs due to the non-activity of the other organs of the government. Judicial activism is a way through which relief is provided to the disadvantaged and aggrieved citizens. Judicial activism is providing a base for policy making in competition with the legislature and executive. Judicial activism is the rendering of decisions, which are in tune with the temper and tempo of the times. In short, judicial activism means that instead of judicial restraint, the Supreme Court and other lower courts become activists and compel the authority to act and sometimes also direct the government regarding policies and also matters of administration. Judicial activism has arisen mainly due to the failure of the executive and legislatures to act. Secondly, it has arisen also due to the fact that there is a doubt that the legislature and executive have failed to deliver the goods. Thirdly, it occurs because the entire system has been plagued by ineffectiveness and inactiveness. The violation of basic human rights has also led to judicial activism. Finally, due to the misuse and abuse of some of the provisions of the Constitution, judicial activism has gained significance. Besides the above mentioned factors, there are some other situations that lead to judicial activism.

#### **V. RELATION BETWEEN PUBLIC INTEREST LITIGATION AND JUDICIAL ACTIVISM AND THE EMERGENCE OF PIL IN INDIA**

Public interest litigation or social interest litigation today has great significance and drew the attention of all concerned. The traditional rule of "Locus Standi" that a person, whose right is infringed alone can file a petition, has been considerably relaxed by the Supreme Court in its recent decisions. Now, the court permits public interest litigation at the instance of the so-called "PUBLIC-SPIRITED CITIZENS"<sup>4</sup> for the enforcement of Constitutional and Legal rights. Now, any public spirited citizen can move/approach the court for the public cause (in the interests of the public or public welfare) by filing a petition:

1. In the Supreme Court under Article 32 of the Constitution of India;
2. In the High Court under Article 226 of the Indian Constitution
3. In the Court of Magistrate under Section 133 of the Code of Criminal procedure

Justice Krishna Iyer in the Fertilizer Corporation Kamgar Union case enumerated the following reasons for liberalization of the rule of Locus Standi:-

1. Exercise of State power to eradicate corruption may result in unrelated interference with individuals' rights.
2. Social justice wants liberal judicial review administrative action.
3. Restrictive rules of standing are antithesis to a healthy system of administrative action.
4. Activism is essential for participative public justice.

#### **REFERENCES**

1. Neha Lalchandani, TNN (2012-11-03). "Delhi enveloped in smog, back to pre-CNG levels". The Times of India. Retrieved 2013-12-21.
2. Stone, Geoffrey R. (2012). "Citizens United and Conservative Judicial Activism" (PDF). University of Illinois Law Review. 2012 (2): 485–500.
3. Prachi Agrawal, CNLU Patna: Judicial Activism and Constitutional Challenges in India, 2014
4. Swati Gupta: Legal essay on Judicial Activism.
5. Santosh: Essays judicial activism, 2015.
6. Hobbes, Thomas. 1651a. *Leviathan*. C.B Macpherson (Editor). London: Penguin Books (1985)
7. Locke, John. *Two Treatises of Government and a Letter Concerning Toleration*. Yale University Press (2003)
8. Rousseau, Jean-Jacques. *The Basic Political Writings*. (Trans. Donald A. Cress) Hackett Publishing company (1987)
9. Rawls, John. 1971. *A Theory of Justice*. Harvard University Press.

10. Gauthier, David. 1988. "*Hobbes's Social Contract*" *Noûs* 22: 71-82
11. Gauthier, David. 1986. *Morals by Agreement*. Oxford: Oxford University Press.
12. (2002) 4 SCC 578
13. (1986) 4SCC 632
14. AIR 1973 SC 1461
15. 1978 AIR 597, 1978 SCR (2) 621
16. 1971 AIR 530
17. 1970 AIR 564; 1970 SCR (3) 530
18. *Supra.*, note 13
19. 1980 AIR 1382; 1980 SCR (3) 500
20. 1981 SCR (2) 408, 1981 SCC (1) 627