

# Judicial Activism: A Relative Interpretation



**Manroop Singh Meena**

Principal,  
Government Girls' College,  
Dholpur, Rajasthan

## Abstract

Law is the foundation of a social system which allows the society in a way that the interests of the individual are protected. For it there are the session courts, high courts and the Supreme Court wherein the judges in various capacities administer law and impart justice to the people. For every wrong there are laws with the degree of punishment according to the nature of the crime with which the offenders are to be punished. The classical judicial thinkers demand the judges to act rigidly on the existing laws and not to violate them or go against them while administering justice, but it makes the judicial process too typical. In many cases, the victims fail to get justice during lifetime because of the entangling legal procedure.

The people have faith in judiciary and depend on the courts and the judges working therein for the justice. Whenever any wrong is committed to them, they move to the various courts demanding justice at the earliest possible. There are laws on every aspect of wrongs, and the judges are allowed to decide the cases only on the basis of the prescribed laws. It keeps the judges away from their own opinions and discretions. In many cases they know that the decision is being made in favour of the person who does not deserve it, but they remain helpless because law does not allow them to set aside the legal provisions in the concerning cases.

Therefore, judicial activism is now taken as a reform on the traditional mode of imparting justice as it allows the judges to administer justice applying their own opinions. However, it too has certain weaknesses, such as, corruption, personal favours and disfavour, violation of the spirit of law, arbitrariness etc. All this, however, needs to be checked delimiting the discretionary powers of the judges so that the judicial activism can help the people get speedy justice and judicious decisions.

The paper is a theoretical study on the need and relevance of judicial activism in the world, as it is only through the freedom to the judges to decide the cases using their personal opinion that speedy justice can be granted to the people.

**Keywords:** Judicial Activism, Controversial, Freedom Of Judges, Speedy Trial And Decision, Existing Laws, Orthodox Legal Thinkers, Irrelevant Laws

## Introduction

Judicial activism refers to judicial rulings that are suspected of being based on personal opinion, rather than on existing law. It is sometimes used as an antonym of judicial restraint<sup>1</sup>. Arthur Schlesinger Jr. introduced the term "judicial activism" in a January 1947 Fortune magazine article titled "The Supreme Court: 1947".<sup>2</sup> The phrase has been controversial since its beginning. An article by Craig Green, "An Intellectual History of Judicial Activism," is critical of Schlesinger's use of the term; "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."<sup>3</sup> Even before this phrase was first used, the general concept already existed. For example, Thomas Jefferson referred to the "despotic behaviour" of Federalist federal judges, in particular Chief Justice John Marshall.<sup>4</sup> 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."<sup>5</sup> There had been examples of the judges who exercised their own personal opinions while interpreting laws, but the phrase came in limelight with the use of the phrase by Arthur Schlesinger Jr. These days judicial activism is a popular term all over the world, and in many cases, the judges decide the

cases on the basis of their personal opinion. No doubt, it is good and demand of time as some of the existing laws are irrelevant, but the concept keeps facing controversy as the judges exercising judicial activism go against the written laws and give their own opinion while dealing with a case. The question of judicial activism is closely related to constitutional interpretation, statutory construction, and separation of powers. The concept is controversial because the favourers to the freedom to the judges while dealing with a case support it, while the orthodox do not support it as they find it being against the existing written laws.

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.

Political science professor Bradley Canon has posited six dimensions along which judge courts may be perceived as activist:<sup>6</sup> majoritarianism, interpretive stability, interpretive fidelity, substance/democratic process, specificity of policy, and availability of an alternate policymaker. Kermit Roosevelt III has argued that "in practice 'activist' turns out to be little more than a rhetorically charged shorthand for decisions the speaker disagrees with";<sup>7</sup> likewise, the solicitor general under George W. Bush, Theodore Olson, said in an interview on Fox News Sunday that "most people use the term 'judicial activism' to explain decisions that they don't like."<sup>8</sup>

#### **Scenario of Judicial Activism in India**

The Supreme Court of India is the highest judicial forum and final court of appeal of India established under Constitution of India, as per which Supreme Court is the highest constitutional court and acts as the guardian of Constitution. India follows the integrated and yet independent judiciary.<sup>9</sup> Since independence, judiciary has been playing a very active role in dispensing the justice since A K Gopalan vs State of Madras case (1950) followed by Shankari Prasad case, etc. However, judiciary remained submissive till 1960s but its assertiveness started in 1973 when Allahabad High Court rejected the candidature of Indira Gandhi and introduction of PIL by Justice V.R. Krishna Iyer further expanded its scope.<sup>10</sup> Chief Justice Mr. Lahoti in Inamdar Vs Maharashtra state dispute holds, 'When the two organs of the government, namely, the Executive and the Legislation fail to do their respective work, the Judiciary has to be active'.

#### **Causes of Judicial Activism:**

The following trends were the cause for the emergence of judicial activism —

1. Expansion of rights of hearing in the administrative process
2. Excessive delegation without limitation, expansion of judicial review over administration, promotion of open government, indiscriminate exercise of contempt power
3. Exercise of jurisdiction when non-existent; over extending the standard rules of interpretation in

its search to achieve economic, social and educational objectives

4. Unworkable passing of orders
5. Tendency of indifference of the political parties to the common people and their interests
6. The failure of system and the situation of incompetency caused in the Executive and the Legislation
7. Corruption in the political and administrative system

#### **Examples of Judicial Activism in India**

The first major case of judicial activism through social action litigation was the Bihar under trials case. In 1980 it came in the form of a writ petition under article 21, by some professors of law revealing the barbaric conditions of detention in the Agra Protective Home, followed by a case against Delhi Women's Home filed by a Delhi law faculty student and a social worker. Then three journalists filed a petition for the prohibition of the prostitution trade in which women were bought and sold as cattle.

1. Judicial activism is the practice going beyond the normal law for the jury. There are some very important cases where judicial activism plays an important role like Bhopal gas tragedy and the Jessica Lal Murder case are among the top two. Money and muscle power tried to win over the good. But lately, it was with the help of judicial activism that the case came to at least one decision.
2. In the famous Keshavananda Bharati case, two years before the declaration of emergency, the Supreme Court declared that the Executive had no right to tamper with the Constitution and alter its fundamental features. But it could not avert the emergency declared by Mrs. Gandhi and it was only at the end of it that the apex court and the lower courts began to continuously intervene in executive as well as legislative areas.
3. In a 1994, judgement it asked the Chief of Army Staff to pay Rs. 6, 00,000 to the widow and two children of an army officer who died due to the callousness of the authorities concerned some 16 years before.
4. The controversial 27% reservation of jobs in Central Government and public sector undertakings was referred to the Supreme Court by the Rao Government. The court decision favoured 49% of jobs for backward castes and class but the 'creamy layers' were exempted from this reservation. Similarly the court put a curb on the operation of capitation fee in colleges in Karnataka.
5. A recent PIL filed for reducing the price of stents by Birender Sangwan, is one such prominent case of Judicial Activism, through which the price of stents has been cut by around 84%.
6. Striking down of **NJAC** Bill by the Supreme Court. National Judicial Appointments Commission was proposed by the body which would have given it powers to appoint judges to higher judiciary.
7. The Supreme Court set up Mudgal committee and the Lodha Panel to investigate the betting

charges and suggest reforms. Now, the Supreme court has dismissed BCCI officials for not adhering to the suggested reforms.

8. The Supreme Court ordered the UPA government to set up an SIT to probe black money. The UPA government did not take action on this judgement. The NDA government has now fulfilled the task
9. Inspired by the USA, the cases relating to the public welfare were decided exercising judicial activism. It started with the settlement of the cases of the prisoners under trial in the Bhagalpur jail in Bihar. The other cases that were settled exercising the concept of judicial activism in India include the Agra Protection Home case, the case of the footpath dwellers in Mumbai, Sunil Batra Vs Delhi Administration Police drivers, the case of the labourers in Tilonia in Ajmer district in Rajasthan
10. The Havela case was looked into by the Supreme Court of India exercising the judicial activism
11. The Bihar Fodder scandal was looked into by the Patna High Court.

#### **Objectives of the Study**

1. To go through the Constitution of India and to focus on the powers of State
2. To trace out the powers of Judiciary
3. To keep an eye on the judicial scenario in the world
4. To put insight into the judicial scenario in India
5. To be familiar with the legal implications about the powers and discretions of the judges and courts
6. To pay heed to the legal procedural modes of hearing and decisions in the courts
7. To find out the reasons of the delay in justice and the pendency of cases
8. To make focus on the concept of judicial activism brooding over all its related aspects
9. To explore the cases in India which refer to judicial activism
10. To find out the causes and effects of the judicial activism in India
11. To make the cause-effect relationship of the issue of judicial activism

#### **Review of Literature**

Pal Ajay Singh (2015) comments as follows-

1. A number of cases are of very elementary nature (Cheque bounce etc) and hence the system should try to encourage to opt for arbitration rather than litigation.
2. The infrastructure and human capacity to serve such a big country is not sufficient, for example the Chandigarh high court which serves as a high court for Punjab, Haryana and UT Chandigarh
3. Looking for a quick fix may not be feasible and any solution which does not address the problems causing the logjam will not work.

Tanuj Warjurkar (2016) observes the issue saying that judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law. 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. Supreme Court despite its constitutional limitations has come up with flying colors as a champion of justice in the true sense of the word. Judicial activism is the view that the Supreme Court and other judges can and should creatively (re)interpret the texts of the Constitution and the laws in order to serve the judges' own visions regarding the needs of contemporary society.

Murali Manohar (2017) comments both the good and the bad aspects of judicial activism. He says that there are both good and bad instances of Judicial activism. If we look at good aspects, the most important outcome of judicial activism is the concept of Public Interest Litigation. Secondly, judicial activism has acquired more significance with rising instances of failing standards of legislature and executive. Thirdly, it gave rise to today's some of the most successful civil rights movements, environmental protection groups, rights of child and women groups, media autonomy groups etc. However on the flip side in recent times we also saw excessive Judicial interference in legislative and executive domain, such as, its firm decision to conduct National Eligibility-cum-Entrance Test (NEET), court wanting to discuss on the issue of licences for dance bars in Maharashtra, SC ordering the Central government to create new drought policy to tackle droughts across various States etc. Except in some odd occasions, judicial activism is found to hold good in the Indian context in most of the times and also when Judiciary maintained a reasonable restraint on its part. So the key here is how effectively broad separation of powers granted in the Constitution for each organ are given its due respect and maintained appropriately.

Himanshi Thakur(2017) comments that it is good as long as it highlights the major issues in the social system of the country and seeks to solve them alongwith checking legislative and executive misuse or inefficiency of laws and regulations. It cannot overstep its boundaries and cannot enter the areas of legislature and executive.

Kavita Rani (2017) believes that judicial activism is very bad. Each organ in the Constitution has been assigned its duties. Judicial Activism is something that imposing one man's view on crores of people without undergoing the process of consultation with them by means of legislature. One man show does not think of Money, material and labor involved for the purpose and the objective to be attained in a phased manner. Each organ should stay within its limits as prescribed in the Holy Constitution. There are several cases, where this activism has led to failure of administration of justice even.

Kannii (April 20, 2018) observes that judicial activism is always good for administration of justice. It is a super power given to judiciary only. Judicial activism means a pro active role played by judiciary in ensuring that the rights and liberties of the peoples are protected Pro active role means interpretation of statutes .By interpretation the language of statutes is very clear and simple and everyone understand it. Some of the following cases reveal the use of judicial activism:-Keshvananda bharti vs state of kerala AIR

1973 sc 1461, Minerva mills ltd. Vs union of india AIR 1980 sc 1789 and MC mehta vs union of india AIR 2004 sc 1193.

Sudip Bhattacharya (August 4, 2018) in *Overreaching judicial activism* discusses that there are instances where the court has encroached upon the role of the legislature by way of making laws. Such cases, where the courts encroach upon the role of the executive by making rules or directives amounting to executive orders can be termed as judicial overreach. Some such cases are as follows:

**Bombay High Court orders cuts in *Jolly IIB 2*:** A few lawyers had approached the Bombay High Court to cut some scenes in the film that showed them in bad light. The court passed a judgement in their favour. This was a unique case where a court took the role of censorship for the first time.

**Reforms in cricket:** The apex court set up a Mudgal panel and the Lodha Committee to investigate the betting charges and suggest reforms. Now, the top court has dismissed the BCCI officials for not adhering to the suggested reforms.

**Striking down of NJAC Act:** The National Judicial Appointments Commission (NJAC) was proposed by the body which would have given it powers to appoint judges to the higher judiciary. Passed by both the Houses of Parliament it was termed as unconstitutional by a Constitution Bench of the apex court and now stands repealed.

#### **Hypothesis**

1. The Constitution of India lays down the provisions relating to the separate powers of the State
2. The Executive, the Legislative and the Judiciary have their own separate powers
3. The judiciary relates to the administering justice to the people on the basis of natural justice theory
4. The Indian judiciary is rigid as it allows justice blindly on the basis of evidence whether true or false
5. It does not allow the judges to work following the voice of conscience or their own observation
6. Judicial activism allows the judges to expand their powers using their own opinions while judging and deciding the cases for the sake of legal reforms
7. The critics are divided over judicial activism
8. Judicial activism has both the positive and the negative aspects
9. Judicial activism can be good only so long as the judges work for legal and social reform
10. Judicial activism can be bad when the judges turn corrupt and involve in various forms of corruption for the sake of their personal interests
11. Judicial activism requires timely reviews, morality on the ground of the judges, people's faith for its success
12. Judicial activism is an effective solution to the various problems relating to the judicial procedures

#### **Methodology**

The study is all theoretical based on the author's own views on the relevance of judicial activism in India. The author's own observation and

perception as well his intellectual temperament which always forces him to keep his mind fertile through the constant thinking form the basis of the contents in the article. The steps that helped him arrive at the findings and conclusion include setting of objectives relating to the study of the various aspects of judicial activism, study of related data and content analysis, classification of the secondary data and their putting together with the main thought, systematization and presentable shaping of the thought to be presented in the paper, and findings and conclusion. The research falls in the category of qualitative research.

#### **Findings**

1. Judicial activism refers to a more active role taken by the Judiciary (within its limits) to dispense social justice.
2. When the Judiciary steps over the line of the powers given to it, in the name of Judicial Activism, then it becomes Judicial Overreach.
3. In India the emergence of judicial activism occurred when in 1893 Justice Mahmood of Allahabad High Court delivered a dissenting judgment.
4. Judicial activism has both the positive and the negative aspects
5. It is positive when it is in the interest of the common people allowing them to get justice without unnecessarily procedural delay
6. It is negative when the various forms of corruption enter it and when the judges in the name of personal opinion, spoil the spirit of law giving wrong justice to the people
7. An activist Court is surely far more effective than a legal positivist conservative Court to protect the society against legislative adventurism and executive tyranny.
8. Some of the recent cases of judicial activism in India are- the direction of the Supreme Court of India for reforms in BCCI due to huge corruption, Cancelling of 122 2G licences by Supreme Court, The order passed by the Allahabad High court making it compulsory for all Bureaucrats to send their children to govt. School which limited executive freedom., An order to conduct NEET exam by Supreme Court and Levying congestion charges in peak hours at airports, Declaring Instant Triple Talaq invalid, Right to privacy as a part of fundamental right and Declaring B.Tech degree obtained in distant mode invalid.

#### **Conclusion**

Judicial activism refers to the application of personal opinion of judges while deciding the cases, and while interpreting the existing laws emphasizing that the existing laws are silent or they are obsolete in certain cases the judges have to decide. Positively speaking, judicial activism allows the judges to ignore the existing laws and to apply their own opinion in certain cases if they find that the existing rulings are not judicious to the people. In fact, with the change in times, the requirements of the people are changed. The laws and rulings all over were made several years ago keeping in view the demands of those times. While the times and the demands of the times

are changing, the judges find much problem in deciding the cases. In many cases they find the laws and rulings either silent or obsolete or faulty and irrelevant. The pendency of the cases for a long time is probably because of all this. In such a situation when the number of the pending cases in the courts is constantly increasing fast creating problem to judges whether they should decide them being deaf to the voice of their conscience or decide them applying their own opinion in the contemporary context. The best solution that has been found out is the judges being active while settling disputes and deciding cases for the sake of speedy justice to the people. No doubt, for it they have to go beyond the existing laws, but the parties to the cases feel satisfied in getting decisions in time. Not only this, the judicial process too becomes flexible with the judicial activism. Hence, there is the utmost need of the judicial activism all over the world, and particularly in India where in the name of law, in many cases the victims fail to get justice just because the judges rigidly act upon the existing written laws and can not apply their own opinion even when they are sure that the decision to be made is not fair simply because the evidence produced before them does not testify to it.

The most prominent case of judicial activism, in my opinion, happened when the top court ordered the UPA Government to set up a SIT to probe black money stashed in foreign banks by Indians, but it failed to act. However, the first thing that the NDA Government did after assuming power was to take note of this in earnest.

However, it cannot be denied that judicial activism can bring several new problems, such as, increase in corruption, judges' arbitrariness, personal favours etc., still judicial activism is favoured as it can make the tedious and long judicial process flexible enabling the victims to get justice in time and to meet a speedy trial. As far as the judges' arbitrariness is concerned, it can be controlled by making such provisions as can prevent the judges from exploiting the common man. The judges should not be allowed to hear the cases of their own friends and relatives; there should be a provision of their transfer every year; the judges found involved in accepting bribery or showing an undue favour to someone in some case, should be punished with penalty.

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