

# Judicial Activism Vs. Judicial Adventurism

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## Abstract

In democratic countries, the judiciary is given a place of great significance. They act as the protector and guardian of the supremacy of the constitution by keeping all authorities- Legislative, executive, administrative, judicial or quasi judicial within legal bounds. The judiciary scrutinizes governmental action in order to assess whether or not they conform to the constitution and the valid laws made there under. In a constitution having provisions guaranteeing fundamental rights of the people, the judiciary has power and obligation to protect the people's rights from any undue and unjustified encroachment by any organ of the state. In a country having a federal system, The judiciary acts as the balance wheel of federalism. The concept of judicial review is the most miraculous provision in Indian social and judicial domain. It is the key to open the lock legal injustice prevalent in the society and to interpret the minds of the law makers in a justifiable way. Even till today we are not able to create a perfect legislation which can profitize the society and is able to be implemented by the court of justice without making it better. It is the only provision of the constitution which also has the power and ability to protect. The constitution itself as done by it in various cases including the famous I.R. Cohelo's care. Through this paper I want to attract the minds of all eminent jurists and common man to help me in appreciating the true concept of judicial activism vs. Judicial adventurism.

**Keywords** Judicial activism, Judicial review, Rule of Law, social justice, federalism.

### Introduction

The phrase 'judicial activism' carries more than one implication. The common law tradition conceives of courtroom litigation as an adversarial process where the onus is on the pleaders to outline the overall course of the proceedings through their submissions. In this outset, the role of the judge is cast in a passive mould and the objective is to analytically evaluate the arguments made by both sides. However the actual experience of a courtroom clearly bears witness to the propensity on part of some judges to pose incisive questions before the practitioners. This may have the consequence of proceedings being judicially-directed to a certain degree. While this factual understanding of activism from the bench may have its supporters as well as detractors, the focus of my presentation will be on another understanding of 'judicial activism'. In the Indian context, there has been a raging argue on the proper scope and limits of the judicial role especially of that played by the higher judiciary which consists of the Supreme Court of India at the Centre and the High Courts in the various States that form the Union of India.

Judicial Activism has not come through act of God. Now it has been found its birth in the constitution itself when the constitution makers have very unwittingly and for genuine reasons conceived as independent judiciary, having the power of Judicial review as a prominent feature of our constitution. In fact, the judicial activism is an offspring of judicial review in one form or the others. There are of course divergent opinions of such interpretation, but the fact remains that this cannot be ruled out outright.

### Meaning of Judicial Activism

Judicial Activism is the process by which new juristic principles are evolved to update the existing law, to bring it in conformity with the current needs of the society, and thereby, to sub-serve the constitutional purpose of advancing public interest under the Rule of Law. It is, therefore, obvious that judicial activism, rightly understood and practiced with Judicial restraint is the felt need of the present times; and it has gained acceptability of the people, the ultimate sovereign, because it sub-serves the constitutional purpose of public good public interest.

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Judicial Activism as a means of evolving new juristic principles of the development and growth of law is long established part of the role of judiciary.

Judicial Activism operates, broadly stated, in two ways. Firstly, in the interpretation of ordinary statutes and secondly in the interpretation of the Constitution.

Judicial Activism is a phenomena in other democracies also. The situation in U.K. and U.S.A. shows a similar trend which indicates that judicial activism is a global phenomena. There is a similar pattern in all democracies. It appears that judicial activism as an effective mode of implementation of Rule of Law has received global acceptance. Its expansion is marked more by distrust of the executive than distrust of the Judges. According to Justice Stephen Sedley<sup>[1]</sup>, another reason for the more frequent exercise of judicial review, "the culture of judicial assertiveness" is to repair dysfunctions in the democratic process. It is on account of failure of the executive to discharge its functions. Our Constitution makers have avoided the extreme viz, judicial supremacy which is nothing but logical outcome of an overemphasis on judicial review, as experienced in U.S.A. However we have adopted a median between the American system of judicial supremacy and The English principle of Parliamentary supremacy by conferring the power to the judiciary to declare any law unconstitutional, if it is found to be beyond the powers of the legislature under the constitution or it is found to be violative of the fundamental rights or any other statutory provision of the constitution.

According to Alexander Hamilton<sup>[2]</sup>, judicial activism is for legislative adventurism and executive tyranny. In fact, reason successful owing to change in moral values changes in political scenario and resurgence of public interest litigation. The people from intellectual community and public minded persons have made of lot of contribution in the growth of judicial activism. These activist have worked in public interest and for the common people for protection of ecology, hygiene setting up of health standard and also for encroachment of rights and liberties of the citizens.

Judicial activism not only to protect the fundamental rights and legal rights of the depressed community or an other class of people or marginalized group in public interest litigation with missionary zeal, but also to try to implement the socio-economic rights as envisaged in Part IV of the Constitution as Directive principles of state policy. According to the provision of the constitution, the directive principles are not enforceable by the court of law and do not to create any justifiable right in favour of individuals. But once there is a legislation to implement any directive a person can approach the court in case of its violation. Therefore, it is the duty of legislature to enact laws to carry out the policy laid down in the directive principles. Although the S.C. has so far restraint itself in issuing a clear-cut mandate to the legislature to enact laws for implementation of any directive principles on the ground that, whether a law should be made embodying the directive principles depends upon the legislative will determining the choice of priorities in a matter of policy and "when and how a particular directive principle should be implemented is a matter of government policy to be decided upon from time to time taking various factors including economics or other constraints into account," and depending upon the intensity of the political will of any particular issue, the court has issued certain directives to the government in such matters in a number of public interest litigations especially pertaining to Uniform civil Code, environment, primary education, public health and other socio-economic rights. Such direction in matters of directive principles of state policy are not envisaged in our constitution indicate another facet of Judicial Activism.

#### **Judicial Activism – Some Relevant cases**

In India the present Judicial system is adversarial of justice in which the aggrieved party only has the 'locus standi' to file the case but this system has totally failed to deliver justice to the poor and the indigent. By the emergence of PIL goals behind the part III and IV convert into the reality. PIL stands for group of cases filed by social activist or voluntary and civil liberty organizations to focus the denial of fundamental rights of a class of

persons determinate or indeterminate or helpless on indigent individual In S.P. Gupta Vs. Union of India<sup>[1]</sup> was a case in which the court authoritatively defined PIL, in the Indian context and held that it would relax the rule of 'locus standi' and certain cases by the third persons if the petition was in public interest, the court held' "It may now be taken as well as established that where a legal wrong of legal injury is caused to a person or to be determinate classes of persons by reason of violation of any constitutional or legal provision or with our authority of law or any such "Legal wrongs or legal injury of illegal burden is threatened and such person or determinate class of persons by reason of poverty, helplessness is disability or socially and economically disadvantaged position unable to approach the court for relief, any appropriate direction, order or writ in the H.C. under Art. 226 and in the case of any breach of fundamental right of such person or determinate classes of persons in this court under Art. 32 of constitution seeking judicial redress for the legal wrong or injury caused to such persons or determinate class of persons. In People's Union for Democratic Rights Vs. Union of India<sup>[1]</sup> The Supreme Court held that the non-payment of minimum wages to the workers employed in various Asid project in Delhi was denial to them of their right to live with basic human rights with human dignity and violative of Art. 21 of the Constitution Bhagawati J. speaking in this case that for the majority held that the right and benefits conferred on the workmen employed by a contractor under various labour laws etc. are clearly intended to ensure basic human dignity to workmen and deprived of any of these rights and benefits, the would rights and benefits, that would clearly be violation of Art. 21. The Supreme Court has been made the guardian and protector of the Constitution. The Constitution has assigned if the role to ensure rule of law including the supremacy of law in the country. For the purpose it has been conferred wide power of judicial review. Judicial activism may be taken to mean the movements of the judiciary to probe into the inner functioning of the other organs of the Government (i.e. the executive and legislature). The judicial activism is, no doubt, the result of inactiveness on the part of the executive and Legislature. It is the function of the legislature to make law and of the executive to implement the law but both the organs have failed to discharge their functions satisfactory. In such circumstances it is not the power but duty of the Court to uphold the Constitution and compel the other organs of the Government to discharge their functions properly. In Neerja Chaudhary v. State of M.P.<sup>[2]</sup> the Supreme Court has made it clear that the bonded labours should not only be identified and released but also rehabilitated after the release. In case of M.C. Mehta v. State of Tamil Nadu<sup>[3]</sup>, the Court has held that children below the age of 14 years cannot be employed in any hazardous industry or mines or other work. In this case the Supreme Court has issued several directions in the Directive Principles of State Policy. In the case of Lakmi Kant Pandey v. Union of India<sup>[4]</sup>, writ petition was filed complaining that in the guise of adoption Indian children of tender age had to face the dreadful journey to distant foreign countries at the great risk of their lives and they were not provided and shelter and relief homes and in course of time they were to become beggars or prostitutes. The Court laid down certain principles which should be followed in determining whether or not a child be allowed to be adopted by foreign parents. In Sheela Barse v. Union of India<sup>[5]</sup> the Supreme Court directed the State to enforce the provisions of the Children's Act effectively.

Thus, the Supreme Court appears to be very active for the child welfare. The Public Interest litigation has provided it opportunity to compel the State to enforce the laws enacted for child welfare. In Gaurav Jain v. Union of India<sup>[6]</sup>, the Supreme Court has delivered important judgment at the inst once of a public interest litigation. In this case the Supreme Court has issued several directions for rescue and rehabilitation of child prostitutes and children of fallen women. The Court has observed that it is the duty of the State and all voluntary Non Governmental Organizations and public spirited persons to come into their aid to retrieve such women from prostitution and public spirited persons to come into their aid to retrieve such women from prostitution and rehabilitate them with a helping hand to lead a life with dignity of person, self-employment through provisions of education, financial support, developed marketing facilities as some of major avenues in this

behalf. Marriage is another object to give them real status in society. Acceptance by the family is also important input to rekindle the faith of self-respect and self-confidence In Indian Council for Environ-legal Action Vs Union of India<sup>[7]</sup>, "the Supreme Court directed for the prevention of industrial pollution. The Supreme Court has given the following directions-"The Central Pollution Control Board and the Andhra Pradesh State Pollution Control Board shall jointly prepare a scheme of Action for containing the industrial pollution and for disposal of industrial waste as also for reclaiming the polluted lands and the polluted water supply. The scheme will contain immediate steps to be taken by the State of Andhra Pradesh or by the industries concerned giving particulars thereof setting out the goal to be achieved every four months as also the steps to be taken on a long term basis for prevention of industrial pollution and the stages by which these long term measures have to be completed so that every four months both the pollution Control Boards can give both the State Pollution Control Board as well as the Central Pollution Control Board have now become fully familiar with the problems of the area, such proposals be furnished on or before 9th May 1998 for further directions on 12th May, 1998."

In Shiv sagar Tiwari v. Union of India<sup>[1]</sup> the validity of the allotment made by the then Minister for Housing and Urban Development, Government of India. Mrs. Sheela Kaul was challenged through Public Interest Litigation. The Supreme Court held that the allotment was arbitrary, mala-fide and unconstitutional as it was made without following any policy.

In the case of Vineet Narain V. Union of India<sup>[2]</sup>, the Supreme Court has held that there are ample-powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of the Supreme Court as provided in Article 144 of the Constitution. In a catena of decisions of the Supreme Court this power has been recognized and exercised. If need be. by issuing necessary directions to fill up the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role. As pointed out in Vishaka v. State of Rajasthan<sup>[3]</sup>, 'it is the duty of the executive to fill the vacuum by the executive orders and where there is inaction even by the executive for whatever reason. The judiciary must step in, exercise of its constitutional obligation under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover time as the legislature acts to perform its role by enacting proper legislation to cover the field.

However, it is to be noted that Supreme Court direct to the legislature to make a particular law on a particular subject. in a case the Supreme Court has made it clear that the Court cannot direct the legislature to enact a particular law which it is competent to enact or not to enact a particular law.

In Union of India v. Association for Democratic Reforms<sup>[4]</sup>, the Supreme Court has held that it is not possible for the Supreme Court to give any direction for amending the Act or the statutory rules. It is for the Parliament to amend the Act and the rules. The direction which would be contrary to the Act and Rules, cannot be issued However, when the Act or Rules are silent on a particular subject and the Authority implementing the same has Constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.

In I.R. Coelho v. State of T.N<sup>[5]</sup>, the Court has held that the Supreme Court is the ultimate interpreter of the Constitution and it is duty bound to uphold the Constitutional values and enforce the Constitutional limitations.

**When The Supreme Court can refuse to grant remedy under Article32:-**

In the case of infringement of the right to move the Supreme Court is itself a fundamental right and it is the duty of the Supreme Court to enforce the fundamental rights guaranteed by the Constitution. Ordinarily, the Supreme Court cannot refuse to grant this remedy. However, in certain conditions the Supreme Court can refuse to grant the remedy under Article 32. Such conditions may be explained under the following headings:

**Res judicata.-** The principle of res judicata applies even in the case of petition under Article 32. However, a petition under Article 32 for Habeas

Corpus is an exception to this general rule. 'The Supreme Court cannot be moved more than once on the same facts' The principle of res judicata will be applied even in such cases. It has been held by the Supreme Court that in the absence of new circumstances arising since the dismissal of the petition filed in Supreme Court under Article 32, a fresh petition under Article 32 on the same matter cannot be filed in the Supreme Court. It is to be noted that a petition filed in the Supreme Court under Article 32 and dismissed by it on suit by a speaking order will also be operative as res judicata, even though the order has been made ex parte. The Supreme Court has made it clear that "when a party had already moved to the High Court with a similar complaint and for the same relief and failed, this Court insists on an appeal to be brought before it and does not allow fresh proceedings to be started. In this connection the principle of res-judicata has been applied.

**Delay.-** The Court may refuse to grant relief where there is no reasonable explanation for the delay. However, this is not a rule of law but a rule of practice based on the Court's discretion and this discretion is to be exercised in the light of the circumstances of each case. Limitation Act does not apply to a petition under Article 32 and therefore, there is no fixed period after the lapse of which the petition under Article 32 will not be entertained by the Supreme Court. Whether or not the petition under Article 32 should be refused by the Supreme Court on the ground of delay is an issue which is determined in the light of the circumstances of each case where the petitioner does not give satisfactory explanation for his delay; usually the Supreme Court refuses to entertain the petition under Article 32.

In *Rabindra Nath v. Union of India*[1], the Court has observed; "Though Article 32 is itself a guaranteed right, it does not follow from this that it was the intention of the Constitution-makers that the Supreme Court should discard all principles and grant relief in petition filed after inordinate delay.'

In *M.L. Cecil D'Souza v. Union of India*[2]." a petition under Article 32 was filed in the Supreme Court so as to obtain the order of the Court quashing the seniority list in the Supreme Court so as to obtain the order of the Court quashing the seniority list in the Supreme Court so as to obtain the order of the Court quashing the seniority list in the Supreme Court so as to obtain the order of the Court quashing the seniority list prepared in 1956. The Supreme Court refused to entertain the petition on the ground of delay.

**Malicious petition.** - If the petition filed under Article 32 in the Supreme Court is found to be malicious or ill-motivated, it may be dismissed by the Supreme Court.

**Misrepresentation or Suppression of Material facts.**- Where the petitioner of found to have made it clear misrepresentation as to the material facts<sup>or</sup> suppression of material facts, the Supreme Court may dismiss the petition at any stage.

**In fructuous petition.**- In fructuous means fruitless. If the petition under Article 32 is found to be in fructuous or fruitless or unfruitful it the petition under the Supreme Court on that ground. For example, if a petition under Article 32 is filed in the Supreme Court for the writ of Habeas Corpus and the detune has been released during pendency of the proceedings, the petition may be dismissed on the ground of its having become in fructuous." However, the Supreme Court has expressed the view that in a proper case the Court may decide the unconstitutionality of a law even though the immediate prohibition which has been the cause of filing the petition under Article 32 has for the time being, disappeared.

**Existence of adequate alternative remedy.**- Existence of an alternative remedy does not bar the Supreme Court to entertain a petition under Article 32." However, the Supreme Court" has held that in the case of adequate alternative remedy if may exercise its discretion to refuse to entertain a petition filed under Article 32.

In *BALCO Employees Union v. Union of India*[3] the Court has refused to entertain the writ petition filed under Article 32 on the ground of the alternative remedy available to the petitioners. The Court held that the petitioners have adequate remedy open to it under the Acts under which

notices were issued and in appropriate case, can approach the High Court under Article 226 of the Constitution.

PIL has been considered a boon, as it is an inexpensive legal remedy due to nominal costs involved in filing the litigation. But there are some problems also in the PIL cases.

There has been an increase in the number of frivolous cases being filed due to low court fees. Genuine cases got receded to the background and privately motivated interests started gaining predominance in PIL cases. In view of this, the Supreme Court has framed certain guidelines governing the PIL.

Presently the court entertains only writ petitions filed by an aggrieved person or public spirited individual or a social action group for enforcement of the constitutional or the legal rights of a person in custody or of a class of persons who due to reasons of poverty, disability, socially or economically disadvantaged position are finding it difficult to approach the court for redress.

PIL is an extraordinary remedy available at a cheaper cost. As Bhagwati J. observed in the case of *Asiad workers case*<sup>[4]</sup>, 'now for the first time the portals of the court are being thrown open to the poor and the downtrodden. The courts must shed their character as upholders of the established order and the status quo. The time has come now when the courts must become the courts for the poor and the struggling masses of our country.

The expansion of 'judicial review' (which is often described as 'judicial activism') has of course raised the admired profile of the higher judiciary in India. However, arguments are regularly made against the accommodation of 'aspirational' directive principles within the range of judicial enforcement. There are two conceptual objections against the justifiability to these affirmative obligations .

The first is that if judges create strategies to enforce the directive principles, it amounts to an intrusion into the legislative and executive domain. It is reasoned that the articulation of newer fundamental rights is the

legislature's task and that the judiciary should refrain from the same. Furthermore, it is posed that executive agencies are unfairly burdened by the costs associated with these positive obligations, especially keeping in mind that these obligations were enumerated as directive principles by the framers on account of practical considerations. This criticism mirrors the familiar philosophy of 'judicial restraint' when it comes to constitutional adjudication.

However, the second objection to the reading in of positive obligations raises some scope for introspection amongst judges. It can be argued that the expansion of justiciability to include rights that are difficult to enforce takes away from the credibility of the judiciary in the long-run. The judicial inclusion of socio-economic objectives as fundamental rights can be criticised as an unviable textual exercise, which may have no bearing on ground-level conditions. In turn the unenforceability and inability of state agencies to protect such aspirational rights could have an adverse effect on public perceptions about the efficacy and legitimacy of the judiciary<sup>[1]</sup>

The prescription of normative rights always carries the risk of poor enforcement. However, the question we must ask ourselves is whether poor enforcement is a sufficient reason to abandon the pursuit of rights whose fulfilment enhances social and economic welfare. At this point, one can recount Roscoe Pound's thesis on law as an agent of social change. The express inclusion of legal rights is an effective strategy to counteract social problems in the long-run. At the level of constitutional protection, such rights have an inherent symbolic value which goes beyond empirical considerations about their actual enforcement.<sup>[2]</sup> The colonial regime in the Indian subcontinent periodically made legislative interventions to discourage retrograde and exploitative social practices such as Sati (immolation of widows), prohibition of widow-remarriage and child marriage. Even though there have been persistent problems in the enforcement of these legislations, in the long run they have played an important part in reducing the incidence of these unjust customs. It is evident that in the short run even

the coercive authority of law may not be enough of a deterrent, but in the long run the very fact of the continued existence of such authority helps in creating public opinion against the same practices.<sup>[3]</sup>

In the same way the framers of our Constitution sought to depart from the inequities of the past by enumerating a whole spectrum of rights and entitlements. While the understanding of ideas such as 'social equality' and 'religious freedom' is keenly contested in the legislative as well as judicial domains, there is no doubt that constitutional rights have been an important tool of social transformation in India. The enumeration of the various civil liberties and protections against arbitrary actions by the state are now identified as core elements of citizenship and violations provoke a high standard of scrutiny both by the judiciary as well as civil society groups. The inclusion of entitlements such as universal adult franchise have greatly reduced the coercive power of casteist and feudal social structures and empowered political parties that represent historically disadvantaged sections such as the Scheduled Castes (SC) and Scheduled Tribes (ST).

### **Objective of the Study**

The broad purpose of judicial activism is social justice. Social justice is not merely upliftment of weaker sections of the society. It's sweep is much wider than that. It extends to every nook and corner of society where ever there is suffering, deprivation or neglect. Judicial activism which is implicit in judicial review is made explicit in the hands of an activist court. It's aim is social justice, not merely enforcement of law. It permits the court to project the personal views of its members on questions of public policy, without manifestly violating the provisions of law, but often deviating from precedents and standard practice. According to V.R. Krishna Iyer J., judicial activism is " Legally tuned affirmative action, activist justicing and being interpretation within the parameters of *Corpus Juris*".

### **Conclusion**

To conclude Judicial activism vs, Judicial adventurism and hence judiciary is not the weakest organ of the state even judges do not have the power of the sword or the purse. Their strength rests on the public confidence, Public faith. This faith establishes the constitutionality of the court and judicial activism. It is not judicial governance but it is working within the limits of constitution to authenticate the reasonableness or unreasonableness of the functions of the other organs of the government with on aim to provide justice to the common people. Even though practices such as un-touch-ability, forced labour and child labour have not been totally eradicated, our constitutional provisions prohibiting the same are the bedrock behind legal as well as socio-political strategies to curb the same. The Supreme Court of India has further internalized the importance of laying down clear normative standards which drive social transformation. Its interventions through strategies such as the expansion of Article 21 and the use of innovative remedies in Public Interest Litigation (PIL) cases has actually expanded the scope and efficacy of constitutional rights by applying them in previously un-enumerated settings. Furthermore, the Courts allow groups and interests with unequal bargaining power in the political sphere to present their case in an environment of due deliberation.

The dilution of the rules of standing among other features has allowed the Courts to recognize and enforce rights for the most disadvantaged sections in society through an expanded notion of 'judicial review'. Even though the framers of our Constitution may not have thought of these innovations on the floor of the constituent assembly, most of them would have certainly agreed with the spirit of these judicial interventions

### **Suggestions for the future Study**

The Judicial activism is, no doubt the result of inactiveness on the part of the executive and legislature, it is the function of the legislature to make. Law and of the executive to implement the law but the organs have to discharge their functions satisfactory. In such circumstances it is not the power but duty of the court to up hold the constitution and compel the other organs of the government to discharge their functions property.

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