



Judicial activism and social justice under the Indian constitution: A critical study

Shashank Tyagi¹, Shubham Singh Tomar²

¹ Assistant Professor in Law, Law College Dehradun, Uttarakhand University Dehradun, Premnagar, Dehradun, Uttarakhand, India

² BALLB Xth Sem Law College Dehradun, Dehradun, Uttarakhand, India

Abstract

In India, It is very difficult to find out the origin of judicial activism. Since the judiciary has come to be recognized as an independent under the government of India act, 1935 and at that movement it is also considered as separate organ of the Government. After 1950, the Constitution of India reflected the judiciary is separate from other organ in art 50; it would be far-sighted to probe the period consequent to 1935 for tracing the origin. In India, we can see the judicial activism may be positive as well as negative.

Through judicial activism, the court moves beyond its normal role of a mere adjudicator of disputes and becomes a player in the system of the country, laying down principles and guidelines that the executive must carry out. Supreme Court of India started off as a technocratic court in the 1950s but slowly started acquiring more power through constitutional interpretation. Its transformation into an activist court has been gradual and imperceptible. In fact the roots of judicial activism are to be seen in the court's early assertion regarding the nature of judicial review.

Some other situations that lead to judicial activism are follows

In failure of legislation

- To discharge its responsibilities.
- To fail to perform its actions.
- To protect the fundamental or basic rights of human being.
- To protect the human rights.
- To misuse the power of party in respect of courts of Law.
- To misuse the power in case of Emergency period.
- To maintain the proper administration.
- To provide a good governance, efficient and justice system of law.

In a developing country like India, where the parliament is adjourned most of the time due to political reasons, the executive branch fails to implement the laws and police and other authorities often misuse their power, the active action by the judiciary is very much needed, though some amount of judicial restraint should be exercised from time to time to prevent vexatious and frivolous cases.

Keywords: judicial review, judicial activism, judicial restraint, independent of judiciary

Introduction

In India, It is very difficult to find out the origin of judicial activism. Since the judiciary has come to be recognized as an independent under the government of India act, 1935 and at that movement it is also considered as separate organ of the Government. After 1950, the Constitution of India reflected the judiciary is separate from other organ in art 50; it would be far-sighted to probe the period consequent to 1935 for tracing the origin. In India, we can see the judicial activism may be positive as well as negative.

Through judicial activism, the court moves beyond its normal role of a mere adjudicator of disputes and becomes a player in the system of the country, laying down principles and guidelines that the executive must carry out. Supreme Court of India started off as a technocratic court in the 1950s but slowly started acquiring more power through constitutional interpretation. Its transformation into an activist court has been gradual and imperceptible. In fact the roots of judicial

activism are to be seen in the court's early assertion regarding the nature of judicial review^[1].

Some other situations that lead to judicial activism are follows:

In failure of legislation

- To discharge its responsibilities.
- To fail to perform its actions.
- To protect the fundamental or basic rights of human being.
- To protect the human rights.
- To misuse the power of party in respect of courts of Law.
- To misuse the power in case of Emergency period.
- To maintain the proper administration.
- To provide a good governance, efficient and justice system of law.

In the case of A.K. Gopalan V/s. State of Madras^[2]. The Hon'ble Court interpreted fundamental rights enlisted in the

constitution including Article 19 & 21. In this case the court held that the law of preventive detention was a reasonable restriction as per the five clauses of Article 19(2). Further, there are some very important cases where judicial activism plays an important role like Bhopal gas tragedy and the Jessica Lal Murder case^[3].

Further, it is also defined by the Black's Law Dictionary, "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions^[4]."

Constitution & judicial activism

Articles 13, 32, 226, 141, 142 of The Constitution of India plays significant role in the development of judicial activism.

Article 13 conferred wide power of judicial review to the Apex court. In the exercise of the power of judicial review it can examine the constitutionality of executive or legislative act^[5].

The High Court's also have the same power in **Article 32**, It makes the Supreme Court as the protector and guarantor of the fundamental rights^[6].

Article 141 specified the power of the Supreme Court is to declare the law and not enact it, but in the course of its function to interpret the law, it modifies the law^[7].

Article 142 enables the Supreme Court in exercise of its jurisdiction to pass such order or make such order as it necessary for doing complete justice in any cause or matter pending before it^[8].

Article 226 High Court has power to issue such writs and orders as are necessary for administrative action and judicial or quasi-judicial action^[9]. Under Article 226 of the Constitution, the High Court has the power to issue not only writs of certiorari, prohibition and mandamus, but also other writs, directions and orders.

Through these Articles the Supreme Court as well as High Courts has played a significant role in fixing of several social issues, environmental issues etc.

Judicial Activism Theories

The concept of the judicial Activism was based upon the two theories i.e.

- Theory of vacuum filling.
- Theory of Social Want.

Theory of Vacuum Filling

The theory of vacuum filling states that a power vacuum is created in the governance system due to the inaction and laziness of any one organ. When such a vacuum is formed, it is against the good being of the nation and may cause disaster to the democratic set up of the country. Hence, nature does not permit this vacuum to continue and other organs of governance expand their horizons and take up this vacuum. In this case, the vacuum is created by the inactivity, incompetence, disregard of law, negligence, corruption, utter indiscipline and lack of character among the two organs of governance viz. the legislature and the executive^[10]. Hence the remaining organ of the governance system i.e. the judiciary is left with no other alternative but to expand its

horizons and fill up; the vacuums created by the executive and the legislature. Thus according to this theory, the so-called hyper-activism of the judiciary is a result of filling up of the vacuum or the void created by the non-activism of the legislature and the executive.

Theory of Social Want

The Theory of Social Want states that judicial activism emerged due to the failure of the existing legislations to cope up with existing situations and problems in the country. When the existing legislations failed to provide any pathway, it became incumbent upon the judiciary to take on itself the problems of the oppressed and to find a way to solve them. The only way left to them within the framework of governance to achieve this end was to provide non-conventional interpretations to the existing legislations, so as to apply them for greater good. Hence, the judicial activism has emerged. The supporters of this theory opine that -judicial activism plays a vital role in bringing in the societal transformation. It is the judicial wing of the state that injects life into law and supplies the missing links in the legislation. Having been armed with the power of review, the judiciary comes to acquire the status of a catalyst on change^[11]."

Different dimensions of judicial activism

These dimensions are not universally accepted because these dimensions are varying from one constitution to another. These six dimensions usually considered to be important by the American Scholars but which can be made applicable equally to the Indian context are as under.

- Majoritarianism
- Interpretive stability
- Interpretive fidelity
- Substance Democratic-Process Distinction
- Specificity of policy
- Availability of Alternative policy maker

Judicial activism is not an easy concept to define. The major criticism of Judicial Activism is that it is unconstitutional as the authority of legislative and executive is usurped by the judiciary which is not elected by the people^[12].

Judiciary is known as the temple of justice among the Indian citizens. The cost of litigation being quite high, an Indian litigant, moves to court when all other options have failed him. In this scenario, if the court would deny him relief, exercising restraint, then it would be a grave miscarriage of justice.

In a developing country like India, where the parliament is adjourned most of the time due to political reasons, the executive branch fails to implement the laws and police and other authorities often misuse their power, the active action by the judiciary is very much needed, though some amount of judicial restraint should be exercised from time to time to prevent vexatious and frivolous cases.

References

1. SP Sathe. Judicial Activism in India" Oxford University Press, 2002.
2. AIR 1950 SC 27

3. <http://www.iasplanner.com/civilservices/ias-main/gs-model-answer-what-is-meant-by-judicial-activism> last visited 05/04/2018
4. <http://lawandlibertyblog.com/nyujll/2013/10/22/hff476zw6b9mjpv9nq22ek57c2yx8>
5. PM Bakshi. *The Constitution of India 17* (14th Edition of Universal Law Publishing,2017)
6. <https://www.quora.com/What-are-articles-141-and-142-of-the-Indian-constitution-Why-are-they-included-in-the-basic-structure-doctrine-along-with-article-32-and-article-136>
7. The constitution of India
8. The constitution of India
9. The constitution of India
10. SC Kashyap. *Judiciary-Legislature Interface, p.-71* (Universal Publishing House, New Delhi, 1997)
11. Shailja Chander, *Justice V.R.Krishna Iyer, Fundamental Rights and Directive Principles*, p-223 (Deep and Deep Publications, New Delhi. 1998).
12. <http://cpr.blogspot.in/2012/12/judicial-activism-in-india-overview.html>.