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Judicial activism in India

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Abstract
The Supreme Court of India has emerged as the most vigorous organ of State and amongst the foremost constitutional courts in the world through the instrument of Public Interest Litigation (PIL), the exercise of writ jurisdiction and the expansive interpretation of fundamental rights guaranteed by the Constitution of India. Judicial activism impinging on every facet of governance has become the norm in recent times. This paper traces the evolution of judicial activism since independence through pronouncements of the Supreme Court. The paper illustrates through judgements of the Supreme Court that the instrument of the PIL and the exercise of writ jurisdiction by the Supreme Court go beyond the traditional postulates of judicial processes and also the scheme of judicial activism under the Indian Constitution.

Keywords: judicial activism, supreme court, PIL

Introduction
"It is true that on some occasions, courts have overstepped their limits. But, by and large, judicial activism has done a great service to society [1]."
The goal of the Indian Constitution, articulated by our worthy founding fathers in its Preamble, is to secure to the people of India "Justice — Social, Economic and Political; Liberty of Thought, Expression, Belief, Faith and Worship; (and) Equality of Status and [of] Opportunity." For attaining this goal, the Constitution has created three state organs, the Legislature, the Executive and the Judiciary, besides autonomous institutions such as the Election Commission, and the Comptroller and Auditor-General. One must say Parliament and the State Legislatures have, by and large, discharged their duty fairly satisfactorily; they have enacted many laws touching upon and regulating activities in the social, economic, educational and health spheres — certainly all activities touching the lives of the citizens, particularly the weak and vulnerable sections.
It is, however, common knowledge that the Executive has not come up to scratch, in a large measure, to implement these laws in letter and in spirit. The result is that various laws and schemes in the social and economic sectors have remained mere declarations of good intentions. A visit to any government school, government hospital, a fair price shop or primary health center is sufficient to bring home this platitude. In such circumstances, if a complaint is brought before court — mainly the High Courts and the Supreme Court — that a particular law or provision or scheme is not being implemented properly and a direction is asked for its implementation, what should it do? Should the court say the matter is none of its concern, that the administrators know their duty and are expected to do it, or call upon the authorities concerned to perform the functions entrusted to them by the law? After all, the judiciary is also an organ of the state conferred by the Constitution to achieve the goals set out in the Preamble and Parts III and IV. But when such directions are made, it is called an instance of 'judicial activism' in a deprecatory sense.
The other type of 'judicial activism' is the branch of interpretation of fundamental rights, in particular the right to equality (Articles 14 to 16), the several freedoms in Article 19 and the right to life and personal liberty in Article 21. While interpreting these Articles, there is freedom for judges to read their personal philosophies into the provisions.
It is quite true that on some occasions, the courts might have trespassed their limits. For example, orders directing the construction of roads or bridges, orders seeking to lay a timetable for the running of trains, orders directing beautification of a railway station and so on. But these again are mere delusions. To repeat, one must view at the generality of the picture and not draw conclusions from a few wrong examples. Judged from this point, judicial activism has done a great service to society.

Meaning and definition of judicial activism
The term 'Judicial Activism' has been first devised by Arthur Schlesinger Jr. in his article "The Supreme Court: 1947," published in Fortune magazine in 1947. Judicial Activism has not been defined in any statute or by judiciary. In simple words, it means indicating that function of the judiciary, which represents its active role in promoting justice. Judicial activism, in general, is the assumption of an active role on the part of judiciary.
It has been defined by different scholars in different ways. Some of which are listed below:
According to Justice P.N.Bhagwati judicial activism is —

> *"The judge infuses life & blood into the dry Skelton provided by legislature & creates a living organism appropriate & adequate to meet the needs of the society. The Indian judiciary has adopted an activist goal oriented approach in the matter of interpretation of fundamental*

rights. The judiciary has expanded the frontiers of fundamental rights and the process rewritten in some part of the Constitution through a variety of techniques of judicial activism. The Supreme Court of India has undergone a radical change in the last few years and it is now increasingly identified by the justice as well as people's last resort for the purpose bewildered [2]*."*

According to Justice J.S.Verma, Judicial Activism means "*The active process of implementation of the rule of law is essential for the preservation of a functional democracy* [3]*."*
According to former Chief Justice of India A.M.Ahamadi, —"*Judicial activism is a necessary adjunct of the judicial function since the protection of public interest as opposed to private interest happens to be main concern* [4]."

Origin of judicial activism in India

For a very protracted time, the Indian judiciary had taken an orthodox attitude to the very concept of judicial activism. However, it would be wrong to say that there have been no occasions of judicial activism in India. Some scattered and random incidents of judicial activism took place from time to time. But they did not come to the limelight as the very concept was not known to India. However, the history of judicial activism can be traced back to 1893 when Justice Mehmood of the Allahabad High Court delivered a dissenting decision which sowed the seed of activism in India. It was a case of an under-trial who could not have wherewithal for engaging a lawyer. So the question was whether the court could decide his case by barely looking at his papers. Justice Mehmood held that the prerequisite of the case being heard (as opposed to merely being read) would be fulfilled only when somebody speaks. So he has the broadest possible interpretation of the relevant law and laid the foundation stone of judicial activism in India.

The Supreme Court of India started off as a technocratic Court in the 1950's but slowly started gaining more power through constitutional interpretation. In fact the roots of judicial activism are to be seen in the Court's early averment regarding the nature of judicial review. In A.K.Gopalan v. State of Madras [5], although the Supreme Court conceived its role in a narrow manner, it asserted that its power of judicial review was inherent in the very nature of the written constitution. The Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment to the extent it transgresses the limits, invalid. The posture of the Supreme Court as a technocratic Court was slowly interchanged to an activist Court.

In Sakal Newspapers Private Ltd. v. Union of India [6], it held that a price and page schedule that laid down how much a newspaper could charge for a number of pages was being violative of freedom the press. The Court also conceived a doctrine of giving preferred position to freedom of speech and expression, which includes freedom of the press, over the freedom to do business. The Supreme Court held that at a newspaper was not only a business; it was a vehicle of thought and information and therefore could not be regulated like any other business.

In Balaji v. State of Mysore [7], the Supreme Court held that while the backward classes were entitled to protective discrimination, such protective discrimination should not negate the right to equality and equal protection of law. It held that backwardness should not be determined by caste alone but by secular criteria though caste could be one of them, and that the reserved seats in an educational institution should not exceed fifty per cent of the total number of seats. In Chitralekha v. State of Mysore [8], similar restrictions were imposed on the reservation of jobs in civil services. These are examples of judicial activism through which it originated in India.

Recent legislations enacted through judicial activism

Judicial activism has done a great service to society which can be inferred through following decisions:

Sexual intercourse with own wife below 18 years: Rape

In Independent thought v. Union of India (11th october2017) [9] the Supreme Court criminalized sexual intercourse by a husband with his wife who is below 18 years of age. It will henceforth will be considered as rape. In effect, the Judgment has done away with the protection that husbands enjoyed under Section 375 exception 2 of the Indian Penal Code that allows husband to have sexual intercourse with a minor wife, provided that she is not below 15 years of age.

Right to privacy – A fundamental right

In Justice K.S.Puttuswamy v. Union of India and others (24th august 2017) [10] the Supreme Court has declared that the Right to Privacy is protected as a fundamental right under Articles 14, 19 and 21 of the Constitution.

Declaring instant triple talaq invalid

In Shayara Bano v. Union of India (22nd august 2017) [11] the Supreme Court has declared the practice of "triple talaq" (talaq-e-biddat) as unconstitutional by 3:2 majority.

Passive Euthanasia – making of living wills

In Common Cause v. Union of India (9th march 2018) [12] the 5 constitutional bench while recognizing passive euthanasia, the Supreme Court has allowed "advance directive or living will", by which patients can spell out whether treatment can be withdrawn if they fall terminally ill or are incompetent to express their opinion.

Right to marriage – Fundamental Right

In Shakti Vahini v. Union of India and others (27th march 2018) [13] the Supreme Court held that the consent of the family or community is not necessary once the two adult individuals agree to enter into a wedlock. It is their fundamental right to marry of their own choice.

NCMEI has jurisdiction to grant minority status to institutions

In Sisters of st. Joseph of cluny v. State of west Bengal (18th April 2018) [14] the Supreme Court declared that National Commission for Minority Educational institutions (NCMEI) has original jurisdiction to determine which institution should be granted minority status.

Judicial activism and the constitution

There are some provisions in the Indian Constitution which directly or indirectly related to Judicial Activism:

- **Article 13**: Power of "Judicial Review" and its effect thereof. The justifiability of fundamental rights and the source of "Judicial Review" can be found under Art. 13 which are regarded as a key provision as it gives teeth to the fundamental rights cannot be infringed by the state either by enacting a law to that effect or through an administrative action. It declares that all pre-constitution laws shall be void to the extent of their inconsistency with the fundamental rights [15] and expressly provides that the State shall not make any law which takes away or abridges the fundamental rights and a law contravening a fundamental right is, to the extent of such contravention is void [16]. Essentially, it is crucial provision dealing with the post-constitution laws and if any such law violates any fundamental right, it becomes void-ab-initio. In effect, it makes the constitutional courts of India, the sole guardian, protector, and the interpreter of the fundamental rights. It is the function of these courts to access individual laws against the fundamental rights to ensure that no such law infringes these rights.
- **Article 32**: Writ Jurisdiction of Supreme Court.
  This provision, for the want of better purposive expression, is called as the right to constitutional remedies and confers express powers on the Supreme Court to carry out the obligations declared under Article13, that is, to act as a protector of fundamental rights. It constitutes one of the major constitutional safeguards against the state tyranny and can be said to confer ample scope for judicial activism on Supreme Court which is evident from a catena of pronouncements made by it while giving a contemporary meaning to the fundamental rights and thereby creating new rights and obligations from time to time.
- **Article 226**: Writ Jurisdiction of High Court.
  This provision signifies an essential aspect of Indian Constitution since it confers writ jurisdiction on high courts as well, with a much wider scope as compared to what is enjoyed by the Supreme Court under Articles 32. Consequently, it can possibly be understood in the sense of arming the judiciary with enormous power to act in an activist manner.
- **Article 131**: Power to decide Inter-governmental disputes.
  Since Indian Constitution sets up a federal polity where intergovernmental disputes often arise, Article 131 takes care of such instances by providing a mechanism for settling such disputes quickly at the highest judicial level. Under this provision, the Supreme Court has exclusive original jurisdiction in any dispute between the center and the state, or the center and state on one side and a state on the other side, or between two or more States. A dispute to be justifiable under this article should involve a question of law or fact on which the existence or extent of legal right depends. That is to say that the dispute must involve assertion or vindication of a legal right of Government of India or a state. Questions of political nature not involving any legal aspect are excluded from the Court's view [17]. Supreme Court's jurisdiction under this provision is limited by two fold fetters, that is, as to the parties and as to the subject matter.
- **Article 132**: Constitutional Appellate Jurisdiction.
  The Supreme Court primarily being a court of appeal enjoys extensive appellate jurisdiction in various jurisdictions. Under this provision, an appeal lies to the Supreme Court from any judgment, decree or final order, whether civil, criminal or other proceeding, of a high court of it certifies that the case involves a substantial question of law as to the interpretation of the Constitution [18]. On obtaining such a certificate any party in the case may appeal to the Supreme Court on the ground that any such question has been wrongly decided [19]. However, only those questions can be agitated for which the high court has granted leave [20] unless permitted by the Supreme Court [21]. A very broad power is thus conferred on the Supreme Court to hear appeals in constitutional matters.
- **Article 133**: Civil Appellate Jurisdiction.
  Under this provision, an appeal lies to the Supreme Court from any judgment, decree or final orders in a civil proceeding of a high court if it certifies that the case involves a substantial question of law of general importance and that in the opinion of the high court, the said question needs to be decided by the Supreme Court [22].
- **Article 134**: Criminal Appellate Jurisdiction.
  This provision regulates the criminal appeals to the Supreme Court and is so designed as to permit only important criminal cases to come before it. It confers a limited criminal jurisdiction on the Supreme Court [23] as the court hears appeals only in exceptional criminal cases where justice demands the intervention of the apex court.
- **Article 136**: Power to grant special leave to appeal.
  Over and above all the constitutional provisions expressly declaring and regulating the power of the Supreme Court in various capacities, this provision empowers the Supreme Court to grant, in its discretion, special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India [24]. It however, excludes from its scope any judgment or order passed by a tribunal functioning under a law relating to the Armed Forces. An outstanding feature of this provision is that it empowers the Supreme Court to hear the appeals not only from courts but also from tribunals in any cause or matter.
- **Article 141**: Authority to make final declaration of law.
  Under this provision, the Supreme Court has the power to declare any law and the said declaration has the force of an authoritative precedent, binding on all other courts in India, of course except the Supreme Court itself. Such a final authority which the Supreme Court claims to possess includes power to decide the validity of a law and to interpret it. Such a claim gives the court an unbridled discretionary power without any accountability whatsoever and the consequent development is the judicial activism.
- **Article 142**: Power to do complete justice.
  The Supreme Court, in exercise of the power conferred under this provision, is entitled to pass any decree, or make any orders, as is necessary for doing complete justice in any cause or matter pending before it [25].

Judical activism and public interest litigation

The idea of PIL came from "actio popularis" of the Roman jurisprudence which permitted court access to every citizen in the matters of public wrong [26]. Development of PIL has provided significant aid in making the judicial activism meaningful. On account of this type of litigation the court has found chance to give directions in public interest and enforce the public duties.

The strategy has brought to light many a medieval practices still predominant in India such as relief to prisoners, plight of women in protective homes, victims of the flesh trade and children of juvenile institutions and exploitation of the bonded and migrant laborers, untouchables, tribal etc. The attempt has been made to show how in taking up such cases, the Supreme Court is coming into view as the guardian of the rights and liberties of the victims of repression, cruelty and torture. Hence the Supreme Court of India in its activist role Vis-a`-Vis PIL has taken a goal-oriented approach in the interest of justice by clarifying highest technical and anachronistic procedures.

PIL has become an "industry of vested interests"

There is an abuse of PIL as large number of frivolous matters is filed before the Supreme Court like- Student and teacher strike, Shortage of buses, Lack of cleanliness in hospitals, Irregularities in stock exchange, Painting of road signs, dengue, examination and admission in universities, etc.

The Supreme Court recently on 19th April 2018 derided the Loya PIL petitions as a case in point of how public interest litigation has become an "industry of vested interests" rather than a powerful tool to espouse the cause of the marginalised and oppressed.

The essential aspect of a genuine PIL is that the person who moves the court has no personal interest in the outcome of the proceedings apart from a general standing as a citizen before the court. It is a powerful instrument to preserve the rule of law and to ensure the accountability of and transparency within structures of governance. But PIL had now become a façade for people hungry for publicity or those who wanted to settle personal, business or political scores. The true face of the litigant behind the façade was seldom unravelled.

The "avalanche of misdirected petitions" would cost the judiciary and other democratic institutions dearly. The PIL had already "seriously denuded the efficacy of the judicial system by detracting from the ability of the court to devote its time and resources to cases which legitimately require attention."

Judicial process would be reduced to a charade if nothing is done to close the floodgates of PILs. So it's time for the judiciary to do a reality check on the advent of PILs and it must be confined to cases where justice is to be reached to that section of the society which can't move to the court due to socio-economic handicap or where a matter of grave public concern is involved.

Conclusion

Judiciary has often issues various decrees and orders to address the various plights haunting the common citizens of the country. But at instances the judicial activism has resulted in difficulties on part of ministries, government departments, investigation agencies and the police. Examples of such situation are:

Banning of liquor along highways: In order to address the increasing danger of drunk and drive, the SC on 15th December 2016 ordered banning of sale of liquor along the highways. This led to problems on part of implementing agencies and policy makers. Many states had still left with the licensed period and the unexpected order by the Supreme Court brought in lot of confusions. Many bar owners chose a new approach of having diagonal pathways to show that the liquor stores were at a distance which was more than the distance specified in the order. The order also raised the livelihood concerns for thousands of people who were dependent on the liquor business for their subsistence. All these led to state of confusion with lack of clarity. This led to SC to change the specifications of the order to address the various problems arising out of the order and clarified that the ban on sale of alcohol within 500 meters of state and national highways does not apply within city limits, granting relief to the liquor and hospitality industry.

Lodha Panel to review working of the MCI: Using its powers under article 142 of constitution the SC on 2nd may 2016 set up Lodha panel to scrutinize working of the Medical council of India, a premier body relate to maintain medical education quality and standards. The working of the Lodha panel created more confusion and finally petitions were filed in the SC for its dismissal. The government recommended a new panel under the eminent medicine experts to replace the Lodha panel for addressing the crisis. On their recommendation, the committee has been replaced with a new panel of five eminent doctors.

Even though there are minor hiccups the interventions of judiciary had greatly assisted in addressing of various issues and challenges. A mechanism must be promoted to ensure that these minor hiccups are avoided through:

- Article 142 must be a weapon of last resort. Measures must be taken to ensure that there is not recurring invoking of article 142.
- A timeframe must be set for executive to act before taking route of article 142
- Government must be asked to bring a white paper to bring out the various nuances arising out of the application of the order of the Supreme Court.

There is a thin line variation between judicial activism and judicial overreach. Crossing over will result in uncertainty of governance. Judiciary must be circumspect while taking route of article 142 so that the supremacy of constitution and separation of powers are not compromised.

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