



## Judicial governance: A new era

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### Abstract

In a constitutional democracy, power is divided so that the legislature makes the laws, the executive authority enforces and carries them out, and the judiciary operates independently. No one branch can control all power in a democratic system. This is referred as the Separation of Powers. Among the foundational objective of our polity, the founding fathers accorded the highest place to Justice. The Preamble to the constitution spoke of to resolve to secure justice social, economic, and political to all its citizens. It is natural that the people turn to judiciary as the bastion of hope forgetting protection against injustice. The judiciary is referred to as the custodian of the constitution and protector of fundamental rights. It is the supreme authority responsible to punish the violators of fundamental rights and civil liberties. In this regard, it also has the power to review the decisions of the executive as mandated by Article 13. Further, under Article 142, it can pass any order for doing complete justice.

This activism has been widely used during the 21<sup>st</sup> century era. It was mainly to direct the government towards a more citizen-centric path. However, some experts call it an act of judicial governance. In this paper, the researcher has described the pros and cons of judicial governance. Further, some suggestions has also been provided to direct the future course of action.

**Keywords:** Judicial governance, democratic system

### Introduction

It has been nearly six decades that we inherited a well-entrenched system of judicial administration besides the elaborate and codified, substantive and procedural laws from Britishers. These laws had generally stood the test of time. Therefore, we adopted them with suitable corrections wherever required. Over the years, we have fine-tuned the judicial administration so as to meet the needs of changing times and aspirations of the modern India.

In order to guarantee that the rule of law would inure to, and for, everyone and the promises made by the Constitution would not remain merely on paper, the Constitution makers made provisions for independence of the judiciary.

The judiciary plays an important role in upholding and promoting the rights of citizens in a country. The active role of the judiciary in upholding the rights of citizens and preserving the constitutional and legal system of the country is known as judicial activism. This entails, sometimes overstepping into the territories of the executive. It has also played active role in ensuring better public governance. There may be a plethora of regulations, rules and procedures but when disputes arise, they have to be settled in a court of law. There is no area where the judgments of Supreme Court have not played a significant contribution in the governance, whether it be – environment, human rights, gender justice, education, minorities, police reforms, elections and limits on constituent powers of Parliament to amend the Constitution<sup>[3]</sup>.

### Judicial Activism

The Constitution being the fundamental law of the land every legislative enactment, whether of the Union or of States must conform to it. The higher Courts in India are endowed with powers of Judicial review of legislation.

Article 13<sup>[4]</sup> of the Constitution of India declares all laws inconsistent with or in derogation of fundamental rights to

be void to the extent of inconsistency. However, while reviewing the legislative enactment sometimes, certain eventualities may be conceived where the Judiciary may sometimes overstep its normal jurisdiction and intervene in areas otherwise then in the realm of the Legislature, what has come to be called "judicial activism". It was born as a corrective to in action for failure of the executive and legislature to provide clean competent and citizen friendly governance. Judicial activism may also be looked at as a facet of Judicial review. According to the former Chief Justice of India Justice J.S. Verma, if implementation of rule of law which is the bedrock of democracy, is the basic responsibility of the judiciary, then it is the obligation of judiciary to see that every aspect which is essential for proper interpretation of rule of law is taken care of. The obligation of Judiciary is to ensure that not only Judiciary does it work but also every agency or instrumentality which is involved in the interpretation of law, function effectively. Judicial activism must necessarily mean the active process of implementation of rule of law, essential for the preservation of a functional democracy.

The term judicial activism was coined by historian Arthur Schlesinger, Jr. in 1947. Judicial activism is a ruling issued by a judge that overlooks legal precedents or past constitutional interpretations in favor of protecting individual rights or serving a broader political agenda. The term may be used to describe a judge's actual or perceived approach to judicial review.

As per Black Law's Dictionary, Judicial Activism is a "judicial philosophy which motivates judges to depart from the traditional precedents in favor of progressive and new social policies".

It is a pro-active role of Judiciary in the field of interpretation in order to afford complete justices to the individuals when the other organ of the Government fails to do so.

## Judicial Activism and PIL

While determining access to justice as a fundamental rule of law, Indian Judiciary has played a pro-active role in ensuring the same for the indigent persons, members belonging to socially and educationally backward classes, victims of human trafficking or victims of beggar, transgender, etc. by liberating themselves from the shackles of the principle of locus standi and given the birth to the Public interest litigation in India. <sup>[5]</sup> The shift from locus standi to public interest litigation made the judicial process “more participatory and democratic.”

S.P. Sathe says: “The traditional paradigm of judicial process meant for private law adjudication had to be replaced by a new paradigm that was polycentric and even legislative. While under the traditional paradigm, a judicial decision was binding on the parties (res judicata) and was binding in personam, the judicial decision under public interest litigation bound not only the parties to the litigation but all those similarly situated.”<sup>[6]</sup>

The Supreme Court in the case of *People’s Union for Democratic Rights v. Union of India* <sup>[7]</sup>, held that public interest litigation is different from the traditional adversarial justice system. The court said that public interest litigation is intended to promote public interest. Public interest litigation has been invented to bring justice to poor and socially or economically disadvantaged sections of the society. The violations of constitutional or legal rights of such large number of persons should not go unnoticed. In the case of *Fertilizer Corporation Kamgar Union v. Union of India* <sup>[8]</sup>, the court held that public interest litigation is part of the participative justice. Furthermore, the Supreme Court in *Bandhua Mukti Morcha v. Union of India* <sup>[9]</sup> case, has justified the public interest litigation on the basis of “vast areas in our population of illiteracy and poverty, of social and economic backwardness, and of an insufficient awareness and appreciation of individual and collective rights”. Further, in the case of *Sheela Barse v. Union of India* <sup>[10]</sup> the Apex Court said: “The compulsions for the judicial innovation of the technique of a public interest action is the constitutional promise of a social and economic transformation to usher-in an egalitarian social-order and a Welfare-State”. While passing any order under public interest litigation, the intention of the court is to enforce constitution and rule of law in the society.

Public Interest Litigation has produced astonishing results which were unthinkable three decades ago. Degraded bonded labourers, tortured under trials and women prisoners, humiliated inmates of protective women’s home, blinded prisoners, exploited children, beggars, and many others have been given relief through judicial intervention.

The greatest contribution of PIL has been to enhance the accountability of the governments towards the human rights of the poor. It develops a new jurisprudence of the accountability of the state for constitutional and legal violations adversely affecting the interests of the weaker elements in the community. However, the Judiciary should be cautious enough in the application of PILs to avoid Judicial Overreach that are violative of the principle of Separation of Power. Besides, the frivolous PILs with vested interests must be discouraged to keep its workload manageable <sup>[11]</sup>.

## Judicial Governance

The term “judicial governance” in itself is subject to challenge as the Judiciary is not supposed to be involved in “governance”. The effort of the Indian judiciary to infuse accountability in the functioning of government institutions and the growth and development of Human Rights jurisprudence have demonstrated the central importance of Judicial Governance. Of course, there is no doubt that it has posed critical challenges to Parliamentary Accountability and Executive powers and, more important, reinforced the need for improving efficiency and effectiveness of governmental institutions <sup>[12]</sup>.

### Factors demanding judicial governance <sup>[13]</sup>

- **Failure of the legislation:** The main determining factor relative to judicial governance is application of judicial’s own conscience when legislation is silent or fails to procure access to justice. Many sensitive issues need a different perspective and care which laws don’t allow. Judicial activism allows a judge to use his personal judgment in situations where the law fails. This was seen in many cases. In the case of *Shayara Bano v. Union of India* <sup>[14]</sup>, popularly known as triple talaq case, wherein the long-standing custom, somewhat a prevalent law among Muslim Community was declared unconstitutional and violative of Fundamental Rights of the individual.
- **Fulfil the legal gap or loopholes:** In order to fulfil the gap or loopholes crafted in a statute, judicial governance set up come up as a saviour. It provides judges a personal voice to fight unjust or unreasonable issues which nevertheless important but evade the eye of the legislature. For example, the policy of the Supreme Court in the case of *Vishakha v. State of Rajasthan* <sup>[15]</sup>. In this case the court formulated the Guidelines for refuting sexual harassment against women at the workplace and open a new chapter in a matter of gender sensitivity.
- **Watchdog on Legislative and Executive Actions:** The concept of Judicial Governance is also acceptable as it provides a system of checks and balances to the other governmental organs. For example, SC laid down conditions for the imposition of Governor Rule in states in the case of *S.R. Bommai v. Union of India* <sup>[16]</sup>. This was aimed to bring objectivity in the application of the rule as Indian Constitution, itself, bestowed a duty of protector or guarantor of Fundamental Rights.
- **Social Engineering:** As per Rosoco Pound who coined the ideology of Social Engineering, which specifically offer that Law must change with the need of the society, as the fundamental work of law is to do Social Engineering i.e., to satisfy the maximum wants with minimum frictions. Judicial governance allows judges to adjudicate in favor of progressive and new social policies helping in social engineering.
- For instance, in the case of *Indian Council for Enviro-Legal Action v. Union of India* <sup>[17]</sup>, the Supreme Court adopted the polluter pays principle for environment conservation. It meant that financial costs of preventing or remedying damage caused by pollution

- should lie with the undertakings which cause the pollution.
- In the case of *Navtej Singh Johar v. Union of India* <sup>[18]</sup>, S.C open a new chapter for the centuries-old Indian Customs by decriminalising all consensual sex among adults, including homosexual sex.
  - In the case of *Joseph Shine v. Union of India* <sup>[19]</sup>, the Court decriminalised adultery, striking down Section 497 of the Indian Penal Code, 1860.
  - Similarly, in Sabarimala's case <sup>[20]</sup>, the Supreme Court declared unconstitutional the Sabarimala Temple's custom of prohibiting women in their 'menstruating years' from entering.

### Why Judicial Governance is not good? <sup>[21]</sup>

- **Against Separation of Power:** Judicial governance destroys the spirit of 'separation of powers' between Legislative, Executive, and Judiciary as enshrined in the constitution.
- **Expertise in a particular field:** The courts don't have expertise in the field of administration, unlike the administrative authorities. Hence, unnecessary intervention should be avoided. For instance, in one of the orders, a high court insisted on controlled re-opening of the city. And this was without even telling what constitutes 'controlled re-opening.
- **Impracticable Solutions:** The courts lack the machinery to deal with highly sensitive and technical issues. Due to this, they end up giving impracticable solutions. For instance, the Allahabad High Court's order to the UP government to consider a state lockdown was returned with the answer that yes, it was considered, but it was not needed.
- **Undemocratic Nature:** Judicial governance appears as an act of 'tyranny of unelected' in a democracy. The executive remains "accountable" to the people through a 5-year election process, but judges exercise self-regulation and are accountable only to themselves.
- **Wastage of court's time:** It is a wastage of the court's time, which can otherwise be used for adjudicating other important matters relating to public importance pending before the court. For instance, in *Bijoe Emmanuel & Ors v. State of Kerala & Ors* <sup>[22]</sup> popularly known as the National Anthem Case, the Supreme Court mandated all cinema halls to play the National Anthem before a film starts in movie halls. However, this decision was reversed later on, and it consumed a significant portion of judicial time.

However, activism must be done cautiously or else it may get converted into judicial governance.

### Conclusion

Judiciary should prevent interference in the domain and work of the executive as mandated by the concept of separation of powers. Judicial activism would be counterproductive and would fail in achieving its laudable purpose if it assumes the role of judicial governance. If judges are free to make laws of their choices, not only

would that go against the principle of separation of powers or somewhat Judicial Overreach, it could also lead to uncertainty in the law and chaos as every judge will start drafting his own laws according to his whims and fancies. It is one thing to direct the executive to perform. However, it is another thing to say "if you do not do it, we will do it ourselves". Judicial discipline has to be observed to maintain a clear balance.

Making laws is the function of the legislature. It is the duty of the legislature to fill the gap of laws and it is the duty of executive to implement it in a proper manner. So that only the interpretation remains as a work for the judiciary. Only the fine equilibrium between these organs of Government can sustain the constitutional values.

### References

1. Judicial Governance during Pandemic- FORUMIAS Available at <<https://blog.forumias.com/judicial-governance-during-pandemic-explained-pointwise>> (last accessed on 5<sup>th</sup> April 2023)
2. Indian Constitution, 1950, Article 13.
3. When Judges Legislate – Drishti IAS Available at <<https://www.drishtiiias.com/daily-updates/daily-news-editorials/when-judges-legislate>> (last accessed on 7<sup>th</sup> April 2023)
4. S.P. Sathe, Judicial Activism in India (Sixth Indian Impression, OUP 2010)
5. 1983 SCR (1) 456
6. 1981 SCR (2) 52
7. (1997) 10 SCC 549
8. JT 1986 136 1986 SCALE (2)230
9. M.P Jain, Indian Constitution Law (Eighth Edition 2019).
10. Judicial Governance during Pandemic - FORUM IAS Blog Available at <<https://blog.forumias.com/judicial-governance-during-pandemic-explained-pointwise/>> (last accessed on 5<sup>th</sup> April 2023)
11. Ibid
12. 2017 SC
13. AIR 1997 SC 3011
14. [1994] 2 SCR 644
15. 1996 SCC (3) 212
16. AIR 2018 SC 4321
17. 2018 SC
18. WRIT PETITION (CIVIL) NO. 373 OF 2006
19. Ibid
20. 1986 SCR (3) 518