



## The contours of judicial activism: An appraisal

DK JHA

Second in Command, CRPF Range Hiranagar, Jammu Kashmir, India

### Abstract

Judicial activism has ensured that Hon'ble Supreme Court & Hon'ble High Courts can truly act as sentinel on qui vive. Judicial activism ensures that Constitutional Courts remain vigilant & proactive. At the same time care must be taken to ensure that judicial activism in turn does not lead to judicial overreach. Courts are a creature of Constitution and must perform its function & duties without usurping the function of any another organ of the state. This paper is directed towards tracing out the various contours of judicial activism.

**Keywords:** judicial activism, supreme court, separation of power

### 1. Introduction

The Hon'ble Supreme Court of India as early as in 1973 identified the separation of power as the basic feature of the constitution in the celebrated judgment of *KesavanandaBharati v. State of Kerala* <sup>[1]</sup>. In *Ram Jawayakapur vs. State of Punjab* <sup>[2]</sup>, in his leading opinion B.K. Mukherjea, C.J. beautifully observed that the Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the State, of functions that essentially belong to another. It follows that the discussion upon judicial activism will also draw parallels from the concept of judicial restraint. This research paper is directed towards following objectives:

- a. What is the meaning of and requirement for judicial activism?
- b. Does it goes against the concept of separation of power between legislature, executive and judiciary?
- c. What are the classical instances of judicial activism?
- d. Are there any limitations upon judicial activism?

### 2. The edifice of judicial activism

Under our constitutional scheme no authority is supreme, it is in fact our constitution which is supreme and all the authorities function under the supreme law of the land <sup>[3]</sup>. India is a democratic and republican State having a written Constitution which is supreme and no organ of the State (Legislature, Executive or Judiciary) can claim sovereignty or supremacy over the other. However the Supreme Court and High Courts have jurisdiction to decide legality of the legislative and executive action authorities and that power cannot be taken away from judiciary. The constitution itself recognizes this power of judicial review and it has been held to be one of the 'basic features' of the Constitution and, as such, it cannot be taken away by Parliament, even by an amendment of the Constitution <sup>[4]</sup>. But in a numerous cases courts may deem it fit to read a remedy into the law which has not been provided in law in per se, for the same may be necessary to meet the ends of justice. In essence the courts

will have to remain proactive and it will in turn lead to judicial activism.

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, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent <sup>[5]</sup>. The strict & literal interpretation of the word judicial activism will largely attribute negative connotation which is neither desirable nor acceptable. It becomes important to segregate legitimate judicial activism from illegitimate judicial activism. When Judges by judicial decisions lay down a new principle of law of the nature specifically reserved for the legislature, they legislate, and not merely declare the law and thereby it will be an illegitimate exercise of power and will be bad in law. Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature. Binding directions can be issued for enforcing the law and appropriate directions may issue, including laying down of time limits or chalking out a calendar for proceedings to follow, to redeem the injustice done or for taking care of rights violated, in a given case or set of cases, depending on facts brought to the notice of Court. This is permissible for judiciary to do. But it may not, like legislature, enact a provision akin <sup>[6]</sup>.

### 3. Classical instances of judicial activism

Judicial activism has its own pros and cons. However it can be stated without any pale of controversy that judicial activism has ensured that rights and duties are not mere empty formality. It has filled the void in areas left unoccupied by legislation and thus it becomes incumbent to chalk out the most notable instances of judicial activism, the same has been briefly discussed herein under:-

- a. Judicial activism has paved the way for expansive and beneficial interpretation of Article 21 of the Constitution. The Hon'ble Supreme Court has read right to live with dignity <sup>[7]</sup>, right to education <sup>[8]</sup>, legal aid <sup>[9]</sup>, speedy trial <sup>[10]</sup>, right to clean environment <sup>[11]</sup>,

- right to privacy <sup>[12]</sup>, right to die with dignity <sup>[14]</sup> under Article 21.
- b. The landmark case of *Vishaka v. State of Rajasthan* <sup>[15]</sup> further depicts the utility of judicial activism. In this case the Hon'ble three judge bench of Apex court issued plethora of guidelines to ensure the prevention of sexual harassment of women. It goes without saying that Parliament enacted a law on this point almost two decades later in 2013 <sup>[16]</sup>.
  - c. In 1996 in *D.K. Basu v. State of West Bengal* <sup>[17]</sup>, the Hon'ble Supreme court laid down the duties of police officer while making the arrest. The court recognized numerous rights of arrested persons which were not there in the statute. These duties and rights were incorporated in the Code of Criminal Procedure, 1973 by the Act 5 of 2009.
  - d. Prior to the judgment of *Rupa Ashok Hurra v. Ashok Hurra* <sup>[18]</sup>, the last resort to supreme court was by way of review as contemplated in Article 137 of the Constitution. However to prevent the miscarriage of justice, the summit court invoked the concept of curative petition as a means of last resort. In his powerful concurring judgment U.C. Banerjee, J. observed that *In my view, it is now time that procedural justice system should give way to the conceptual justice system and efforts of the law Court ought to be so directed. Flexibility of the law Courts presently are its greatest virtue and as such justice oriented approach is the need of the day to strive and forge ahead in the 21st century.*
  - e. It will not at all be wrong to contend that public interest litigation <sup>[19]</sup> is a facet of judicial activism. To a certain extent even basic structure stems from the concept of judicial activism. The act of reading the doctrine of reasonableness <sup>[20]</sup> and absence of arbitrariness <sup>[21]</sup> in the Article 14 of the constitution of India also derives authority from judicial activism. Right of press <sup>[22]</sup> has been recognized as a part of freedom of speech and expression and the same validates the necessity of judicial activism.

From the above it emerges that judicial activism has become a sine qua non for an independent and proactive judiciary. The merit behind judicial activism cannot and should not be out rightly rejected. The above stated instances are just illustrative and not exhaustive.

#### 4. Conclusion

In *Union of India v. Deoki Nandan Aggarwal* <sup>[23]</sup> a three Judge Bench of Apex Court took a critical view towards judicial activism. It was observed that it is not the duty of the Court to enlarge the scope of the legislation. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The Court cannot add words to a statute or read words into it which are not there. Courts shall decide what the law is and not what it should be. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities.

The purpose of any judicial legislation is to fill a vacuum. It does not preclude legislators from enacting law. Judicial activism or judicial legislation emerged on account of an existence of vacuum, and it was opined that the Supreme Court would not be constrained to fold its hands in despair

and plead its inability to help the citizen who has come before it for judicial redressal in such a situation <sup>[24]</sup>.

*"Courts have to be careful to see that they do not overstep their limits because to them is assigned the sacred duty of guarding the Constitution. With a view to see that judicial activism does not become judicial adventurism, the courts must act with caution and proper restraint. They must remember that judicial activism is not an unguided missile failure to bear this in mind would lead to chaos. Public adulation must not sway the judges and personal aggrandizement must be eschewed. It needs to be remembered that courts cannot run the government. The judiciary should act only as an alarm bell; it should ensure that the executive has become alive to perform its duties."*

Per A.S. Anand, CJ as extracted from *Divisional Manger, Aravli golf club v. chander Hass* <sup>[25]</sup>

#### References

1. [https://main.sci.gov.in/supremecourt/2019/42104/42104\\_2019\\_2\\_1501\\_18695\\_Judgement\\_26-Nov-2019.pdf](https://main.sci.gov.in/supremecourt/2019/42104/42104_2019_2_1501_18695_Judgement_26-Nov-2019.pdf)(last visited on 27/11/2019)
2. AIR 1973 SC 1461.
3. AIR 1955 SC 549.
4. IC Golaknathv. State Of Punjab, AIR 1967 SC 1643.
5. Raja Ram Pall v. Hon'ble Speaker, Lok Sabha, AIR 2007 SC 1448.
6. [http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/TPL\\_Summer14\\_Teapot.pdf](http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/TPL_Summer14_Teapot.pdf) (last visited on 27/11/2019).
7. P Ramachandra Rao v. State Of Karnataka, 2002, (4) SCC 578.
8. Francis Coralie Mullin v. The Administrator, Union Territory Of Delhi, AIR 1981 SC 746.
9. Unni Krishnan v. State of Andhra Pradesh, AIR 1993 SC 21.
10. MadhavHayawadanraoHoskot v. St of Maharashtra, AIR 1978 SC 1548.
11. HussainaraKhatoon v. Home Secretary, State of Bihar, AIR 1979 SC 1369.
12. A P Pollution Control Board II v. Prof M V Nayudu, 2001, 2 SCC 62.
13. KS Puttaswamy v. Union of India, 2017, 10 SCC 1.
14. Common Cause v. Union of India, 2018, 5 SCC 1.
15. AIR 1997 SC 3011.
16. The Sexual Harassment of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013, Act 14 of 2013.
17. (1997) 1 SCC 416.
18. AIR 2002 SC 1771.
19. Fertilizer Corporation Kamagar Union v. Union of India, AIR 1981 SC 344.
20. State of W B v. Anwar Ali Sarkar, AIR 1952 SC 75.
21. Maneka Gandhi v. Union of India, AIR 1978 SC 597.
22. Sakal Papers Ltd v. Union of India, AIR 1962 SC 305.
23. AIR 1992 SC 96.
24. District Collector, Satara v. MangeshNivruttiKashid, AIR 2019 SC 4357.
25. 2008 (1) SCC 683.