A JURISPRUDENTIEL ANALYSIS OF JUDICIAL SWING: FROM ACTIVISM TO OVERREACH

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Abstract

In our constitutional scheme the judiciary alone has been entrusted with the power and responsibility to test the constitutional validity of legislative provisions and the legitimacy of administrative actions. The superior courts are enabled to declare a statute ultra vires the constitution and to nullify an executive action as unconstitutional. This power should not be construed as superiority of judiciary or its Primus inter pares or Imperium in imperio status. Separation of powers, though not explicitly enshrined in the constitution yet present in its spirit, demands observance of non-interference by one branch of government in the functioning of other branches and expects at the same time that they would work in tandem. Supreme Court is the custodian of fundamental rights and final interpreter of the constitution and has performed excellently in the past by using its power to the fullest. Superior Courts are expected to exercise self-restraint to the extent of not transgressing its own constitutional mandate and trespassing into others.

This article closely scrutinizes the judicial law-making, its need, extent and probity and also suggests some solutions.

Keywords: Judicial Activism, Judicial overreach, P.N. Bhagwati, Separation of Powers

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"Once it is recognized that the judges do make law, though not in the same manner as the legislature, it will immediately become apparent why judges can and should adopt an activist approach. There is no need for judges to feel shy or apologetic about the law creating roles."

- *P.N. Bhagwati*[*]

I. Introduction

At the very outset it would be convenient to draw distinction between the following words: judicial review, judicial activism, judicial overreach and judicial restraint. These words have not been clearly defined, so their meanings are not yet settled. Understanding of these words varies from jurist to jurist and judge to judge. It will become clear presently.

The definition of "judicial activism" is an intense on-going debate and discussion. According to Merriam-Webster's Dictionary of Law, judicial activism is "the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to the supposed constitutional or legislative intent". The Harper Collins Dictionary of American Government and Politics depicts judicial activism as the "making of new public policies through the decisions of judges." Black's Law Dictionary defines it as a "[j]udical philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate judges."

There are various reasons for hazy definitions of 'judicial activism'. Some of them are: 1. there are thousands of law journal articles on judicial activism 2. In case laws it is used frequently but is seldom defined 3. Lack of specificity 4. Courts, Sociologists, Historians, Political scientists are debating on its meaning frequently 5. Positivists and Realists tend to define it differently according to their respective schools of law.

Fortunately, this mass of literature on the subject has been analysed -- by Keenan Kmiec, in a 2004 Comment in the California Law Review, "The Origin and Current Meaning of 'Judicial Activism." According to him, the meanings of judicial activisms as includes: 1. Invalidated an arguably constitutional action by another branch 2. Failed to adhere to precedent 3. Legislated from the bench 4. Departed from accepted interpretive mythology 5. Engaged in result-oriented judging.

[*] Justice Bhagwati's clarion call to action, in a speech he delivered at the University of Wisconsin, Madison.

Contrast adds to the problem of unspecificity of the word. It takes on different meanings and connotations in each of the following cases: judicial activism vis-à-vis judicial restraint, judicial activism vis-à-vis judicial overreach and judicial activism vis-à-vis judicial review. For this reason J. Srikrishna's judicial review is 'proper' and judicial activism 'improper'[2] as he juxtaposes judicial review against judicial activism leading to ascription of wide negative connotation to judicial activism. For P.N. Bhagwati judicial activism is wide, necessary and important as he see it vis-à-vis judicial overreach.

For the purposes of this article and according to common understanding: The difference between judicial review and judicial activism is that in judicial review a judge merely checks the validity of legislation and amendments[3] in the light of constitution and strikes down those provisions which are violative of Constitution, whereas in judicial activism a judge plays an active role and uses constitutional powers vested in his office to the fullest in the interest of justice. In judicial activism a judge though uses his power within his constitutional mandate whereas in judicial overreach he goes beyond it and encroach the constitutional mandate of other two wings of the government.

For Srikrishna J. it seems that judicial review is the strict interpretation of constitutional text with slightest possible departure from precedents where judges merely tests legislation and amendments in this restricted sense only. For him judicial review is proper whereas activism is mostly[4] improper. He considers judicial review is exception to the concept of separation of powers[5]. It can also be considered as a tenet of checks and balances.

Justice Dr A S Anand, former Chief Justice of India, while addressing on "Judicial review – judicial activism – need for caution" expressed his views about judicial review in the following words:

> A judicial decision either 'stigmatises or legitimises' a decision of the legislature or of the executive. In either case the court neither approves nor condemns any legislative policy, nor is it concerned with its wisdom or expediency. Its concern *is merely to determine whether the legislation is in conformity with or contrary of the provision of the Constitution. It often includes consideration of the rationality of the statute.* Similarly, where the court strikes down an executive order, it does

[2] B.N Srikrishna, *Skinning a Cat*, (2005) 8 SCC J-3.
[3] Golaknath v. Punjab, AIR 1967 SC 1643 and Keshvanda Bharti v. State of Kerala, AIR 1973 SC 1463 brought amendments in the purview of judicial review.
[4] He has approved the judicial activism in *Keshvananda Case*.
[5] B.N Srikrishna, *Skinning a Cat*, (2005) 8 SCC J-3.

> so not in a spirit of confrontation or to assert its superiority but in discharge of its *constitutional duties* and the majesty of the law. In all those cases, the court discharges its duty as a judicial sentinel.[6]

Having completed the preliminary clarification of the terminology author shall now move forward to jurisprudentially analyse the concepts of judicial activism.

II. Jurisprudential Analysis

Francis Bacon[7] in his famous Essay "Of Judicature" (1612) wrote that:

> … office of the judge is *jus dicere* and not *jus dare*; to interpret law, and not to make law, or give law. Else will it be like the authority claimed by the Church of Rome, which under the pretext of exposition of Scripture doth not stick to add and alter; and pronounce what they do not find; and by show of antiquity to introduce novelty.[8]

It can reasonably though respectfully be argued that legal system has underwent a sea of change since the time of Bacon (1561- 1626) and it is now an accepted fact that judges do legislate law by way of interpretation. The traditional view that judges simply declare law and do not make law is no longer valid. The vexed question is regarding the extent to which judges can make law. For this, it is imperative to know the reasons and theories contributing to emergence and development of this concept.

i. Theory of logical Plenitude of Law

In a broad sense, it means that a judge cannot refuse to decide a case on the ground that there is no precise authority in point.[9] It states that law is not a mere collection of detailed rules, but an organic body of principles with an inherent power of growth and adaptation to new circumstances. According to this theory all questions are capable of being disposed of according to law, all it requires is that the result should be logically true and help of custom and prevalent social conscience can be taken in this regard for

[6] A.S Anand, Extempore Speech Delivered at the First Judiciary-Executive Conference at Ranchi on 1st July, 2001, 2001 PL WEBJOUR3.

[7] Francis Bacon was an English philosopher, statesman, scientist, jurist, orator, and author. He served both as Attorney General and as Lord Chancellor of England.

[8] Francis Bacon, Of Judicature (1612).

[9] G.W. PATON, A TEXTBOOK OF JURISPRUDENCE, 4th Ed., p. 198. Thus, Article 4 French Civil Code lays down that a judge who refuses to decide a case on the ground that the law is silent or obscure is guilty of a denial to justice. This doctrine may be called the prohibition of *non liquet*.

we cannot conceive of the whole body of the common law descending from heaven and containing, even implicitly, the developed modern distinctions.[10]

ii. Freirechtslehre Theory

It is a dangerous theory politically, for these jurists have anticipated in theory what became reality in the administration of justice under National Socialism: the judge is free to apply what he regards as the will of the Leader[11]

iii. Crypto-Sociological Method of Interpretation

It means that the judgment on its face expresses a perfect chain of logical reasoning but conceals the real reasons for the decision – the case is decided 'on the merits', and then the court searches feverishly for legal authorities which will justify this result.[12]

iv. Free Law Movement (FLM)

A dislike of the result of *strictum ius* has led to the movement for free law.[13] The main aspects of this movement were briefly explained by Upendra Baxi. FLM accepted the idea of 'gaps' in the legal order which can only be filled by judicial interpretation.[14] The movement arose as a reaction against positivism and in a frank recognition that a normative legal order may have gaps.[15] It casted a correspondingly on judges to make law to interpret law to avoid such gaps in it.[16] Hermann Kantorowicz asserted that the sphere of 'formal' or 'authoritative' law always coexisted with the sphere of 'free law', as 'nascent', 'potential' or 'inchoate' law.[17] The emphasis that the real sources of judicial decisions 'lie outside the law' is the quintessential to the FLM; so is its emphasis on 'the social and legal consciousness' for interpretation of law.[18]

v. Geny's Theory of Free Scientific Research

Geny's theory of free scientific research should not be confused with broader doctrines of free law, for Geny would limit his method to cases where definite

[10] Ibid at p. 199
[11] Ibid at p. 231, footnote 1, also see W. Friedman, Legal Theory (5th ed.) 343.
[12] Ibid at p. 234.
[13] Ibid at p. 233.
[14] Upendra Baxi, Farewell to Adjudicatory Leadership?: Some Thoughts on Dr Anuj Bhuwania's Courting the People: Public Interest Litigation In Post-Emergency India, In Memoriam: Justice Prafulchandra Natwarlal Bhagwati, *NLUD* STUDENT LAW JOURNAL Vol 4.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.

authority is lacking. Where no help can be found in sources, Geny advocates a study of moral conscience and of social facts in order in that a judge may understand the real nature of the problem. In discussing the end of law, it has been pointed out that Geny considers that natural law does provide universal objective principles which will curb arbitrary caprice.[19]

vi. Argument in favour and against of Judicial Activism

If we consider interpretation of law as mere logical deduction from the text of law then justicing would end up as solely mathematical exercise and we would deprive the law of all power to develop, and the dead hand of the past will crush its growth. The basic difference between task of a scientist and a judge is that scientist is only concerned with *what it is* whereas judge must prescribe *what it ought to be.*[20] Had *stare decisis* been interpreted in a narrow fashion as meaning that no decision could be given unless a clear precedent could be discovered, it is clear that our modern common law could not have been created.[21]

In dealing with the maintenance and champerty, Danckwerts J. stated: 'A doctrine which was evolved to deal with cases of oppression should not be allowed to become an instrument of oppression, which it must be if humble men are not allowed to combine or to receive contributions to meet a powerful adversary.'[22] Devlin J. also noted the importance of recognizing when obsolescence leads to absurdity.[23] It should be borne in mind that 'law is a living thing, moving with times and not a creature of dead or moribund ways of thought.'[24]

One reason put forwarded to justify freedom in the interpretation of a written constitution is that the amendments are not easy and a single decision might cause unforeseen practical difficulties.

One argument against judicial legislation is the problem of retrospective effect. It is mainly in torts cases for example in *Oleum Gas Leak case*[25]. Act occurs before the invention or extension of law. In such cases certainly of law is questioned. It would be beneficial to make clear that 'certainty' of law really means a possibility of

[19] G.W. PATON, A TEXTBOOK OF JURISPRUDENCE, 4th Ed., p.234.
[20] Ibid at 201.
[21] Ibid at p. 119
[22] Martell v. Consett Iron Co. Ltd., [1954] 2 All E.R. 339 at 349.
[23] Winchester v. Fleming, [1957] 3 All E.R. 711.
[24] G.W. PATON, A TEXTBOOK OF JURISPRUDENCE, 4th Ed., p.222.
[25] M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 1086

accurate prediction and although an unchanging system is more certain than a developing one, nevertheless flexibility does not always mean uncertainty[26], if the direction of the development can be clearly foreseen.[27]

III. Separation of Powers

"There is no liberty where judicial power is not separated from both legislative and executive power. If judicial and legislative powers are not separated, power over the life and liberty of citizens would be arbitrary, because the judge would also be a legislator. If it were not separated from executive power, the judge would have the strength of an oppressor."[28]

This classic statement is of Montesquieu, the great political philosopher who propounded the theory of separation of powers. At the core of it lies an attempt to avoid concentration of power and preservation of human liberty.

III.A. **Separation of Powers and Indian Constitution**

Article 50 of Directive Principles requires the State to take necessary steps to separate judiciary from the executive. It specifically mentions that the executive power of Union rests with the President.[29] Article 121 restrains Parliament from discussing the conduct of any judge of the superior courts. Similar restriction is on the State legislatures.[30] Article 122 puts a limitation on Courts by prohibiting Court's inquiry into the proceedings of Parliament.[31] Article 361 states that President and Governor shall not be answerable to any court in the exercise and performance of powers and duties of his office. Article 74(2) restricts courts from inquiring into the advices tendered by ministers to the President. These provisions are illustrative enough to conclude that the Indian Constitution inherently adopts separation of powers. It was declared as one of the basic features of constitution in *State of Bihar* v. *Bal Mukund Shah*[32]. But Supreme Court has observed this very early in *L. C. Golak Nath & Ors.* v. *State of Punjab & Anr.*[33] and said that: "The constitution creates Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their

[26] In re Wigzell, [1921] 2 K.B. 835 at 859, per Scrutton L.J.
[27] G.W. PATON, A TEXTBOOK OF JURISPRUDENCE, 4th Ed., p. 231.
[28] B.S. Chauhan, The Legislative Aspect of the Judiciary: Judicial Activism and Judicial Restraint.
[29] Article 53(1) of Constitution of India, 1950.
[30] Article 211 of the Constitution of India, 1950.
[31] Article 212 puts similar limitation on courts with respect of state legislature.
[32] (2000) 4 SCC 640. It was reiterated in by apex court State of West Bengal & Ors. v. Committee for protection of Democratic Rights, West Bengal & Ors., AIR 2010 SC 1476:
[33] AIR 1967 SC 1643.

respective powers without overstepping their limits. They should function within the spheres allotted to them"[34]

Doctrine of separation of powers is not explicitly mentioned in the constitution of India but constitution framers has taken every possible measure to have a robust form of separation of powers, thereby safeguarding the independence of each organ of state and at the same time keeping the mechanism of 'Checks and Balances' intact so as to uphold the flag of Rule of Law.[35]

IV. Law Making Role of Judges

The Anglo-Saxon legal tradition has insisted that the judge only reflects the law regardless of the anticipated consequences, considerations of fairness or public policy.[36] He is simply not authorised to legislate law. This was the effect of the doctrine of separation of powers.

But it is true that finite generalities of law do not- and cannot- anticipate the infinite vagaries of life.[37] Furthermore, there are in inevitably some cases- unique concoctions of facts- to which, by no stretch of the imagination can any pre-existing generality of law can apply incontrovertibly.[38] For these reasons it is now accepted that certain degree of legislative activity is inherent in the process of judicial interpretation. The celebrated Justice Holmes of the US Supreme Court recognised "without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions".[39]Justice Homes had approved filling of gaps in constitution but not going beyond it.

There are two broad approaches towards the interpretation of law. One is that the courts must 'apply' the law in a way that makes sense in the temporal nature of our reality. The other is the conservative approach that the judiciary should interpret constitution and statutes according to the will of constitution makers and legislators respectively. This was articulated by Raul Berger[40]. Here, it can be argued that intention of each of the constitution maker or legislator is different because beauty lies in the eyes of beholder.

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[34] Ibid.
[35] B.S. Chauhan, The Legislative Aspect of the Judiciary: Judicial Activism and Judicial Restraint.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] *Southern Pacific* v. *Jensen*, 244 U.S. 205 (1917).
[40] Professor, at The University of California at Berkeley and Harvard University School of Law.

Furthermore, the founding fathers, by the incorporation of Article 141, empowered the Supreme Court to declare the law of the land. Expounding on Article 141, in Nand Kishore v. State of Punjab[41], the Court held:

> "Their Lordships decisions declare the existing law but do not enact any fresh law, is not in keeping with the plenary function of the Supreme Court under Article 141 of the Constitution, for the Court is not merely the interpreter of the law as existing, but much beyond that. *The Court as a wing of the State is by itself a source of law. The law is what the Court says it is."*
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> (emphasis supplied)

In Supreme Court Advocates-on-record Association & Ors. v. Union of India[42], a nine-judge bench of the Supreme Court laid down the guidelines and norms for the appointment and transfer of Judges creating a collegium, though the same has not been provided for under the Constitution.

V. Analysis of Judicial Activism in India

Judicial Activism[43] can be analysed under following heads:-

1. Protection of Constitution

In 1967, the Supreme Court held in *Golaknath v. Punjab*[44], the apex court held constitutional amendment falls within the ambit of judicial review under Article 13 (2). They did not desire that Parliament's power to amend the Constitution should be unlimited and that the Fundamental Rights should be at the mercy of the special majority of members of Parliament required for Constitutional amendment. *Golaknath* marks a watershed in the history of Supreme Court of India's evolution from a positivist court to an activist Court. The doctrine of 'basic structure' once sounded by Justice Mudholkar in *Sajjan Singh*[45] case became formalised with *Keshvanand Bharati v. State of Kerala*[46]. The court held that if the Constitution is to stand amended, obviously it cannot be totally repealed or disfigured. It must retain its basic structure. In *Keshavanand* majority said that in order that the Constitution shall stand amended, it must be a Constitution that has a definite identity, and that identity

[41] (1995) 6 SCC 614.
[42] (1993) 4 SCC 441.
[43] Particularly in India.
[44] AIR 1967 SC 1643.
[45] Sajjan Singh v. Rajasthan, AIR 1965 SC 845.
[46] AIR 1973 SC 1463.

was its basic structure. This judgment is the *raison detre* of the Constitution to this date. It saved the sanctity of constitution from falling into political hands.

2. Public Interest Litigation (PIL)

PIL was initiated in *Akhil Bhartiya Shoshit Karmachari Sangh (Railway) v. Union of India*[47], wherein an unregistered association of workers was permitted to institute writ petition under Art 32 of the constitution for redressal of common grievances. Bhagwati J. along with Krishna Iyer J., in *S.P. Gupta v. Union of India*[48] case firmly established the validity of the Public Interest Litigation.

PIL is a step to ensure that no technicalities impede the access to justice. The purpose of PIL was that the ignorant, illiterate, deprived, discriminated and marginalized sections of society can have access to justice. *In People's Union for Democratic Rights & Ors. v. Union of India & Ors.*[49], the Supreme Court defined `Public Interest Litigation' as follows: "Public interest litigation is a cooperative or collaborative effort by the petitioner, the State of public authority and the judiciary to secure observance of constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society." [50]

The saga of PIL in India can be divided into three phases. First phase involved the cases leading to expansion of rights under Article 21, second phase mainly dealt with environment and ecology protection and third phase mainly focused on various facets of good governance like integrity, probity and transparency in governance mechanism. Second and third phases have led to tensions between judiciary and other two branches of government.

Eminent jurist Dr Upendra Baxi draws distinction between Social Action Litigation (SAL) and Public Interest Litigation (PIL).[51] Social Action Litigation is the litigation done for the people who cannot file case themselves due to economic, social or other disabilities. It is more concerned with social engineering. Whereas, Public Interest Litigation is filed in the interest of public at large and is usually filed in cases of executive

[47] AIR 1981 SC 298 (the *Soshit Karmchari* case).
[48] AIR 1982 SC 149.
[49] (1982) 3 SCC 235.
[50] Ibid.

[51] Upendra Baxi, *Farewell to Adjudicatory Leadership?: Some Thoughts on Dr Anuj Bhuwania's Courting the People: Public Interest Litigation In Post-Emergency India, In Memoriam: Justice Prafulchandra Natwarlal Bhagwati, NLUD* STUDENT LAW JOURNAL Vol 4.

inaction or cases involving violation of procedures under law or for environmentalism. While the former is simple in the sense it lacks the possibility of being misused whereas latter need to be admitted cautiously as it may camouflage political and private motives.

To discuss PIL and its implications minutely and comprehensively is beyond the scope of this paper. All that worth mentioning here is that PIL undoubtedly enlarged the scope of and access to justice, it at the same time brought with itself the problems of Judicial populism and symbolic justice. It should be kept in mind that judiciary has neither purse nor sword. It is largely dependent on other two branches of government on implementation of its guidelines. It is true that court does not have adequate recourses and time to supervise implementation of its own directions leave supervision of the functions of other two branches. The tools of 'continuing mandamus' and 'contempt of court' have their own limitations. If they continue to be used often, they may lose their effect.

3. Law as a tool of Social Engineering

One of the best uses of judicial activism in India is its employment by the court for social engineering. It fits in the Realist school of thought which believes that "if a judge entirely ignore the questions of social interests, of expediency and practical convenience, however, any system of law would become unendurable."[52] Judiciary focuses law to achieve social goals. Judges takes aid of natural law to some extent to achieve these goals. Recognition of transgender as third gender[53], recognition of live-in-relationship[54], entry of women in temples, abolition of triple talaq, removal of creamy layer and maximum limit of reservation[55], banning ragging[56] etc. are some classic examples of social engineering. To this extent, no doubt that judicial activism is beneficial.

4. Creation and Development of Rights

Human rights in the Indian Constitution are divided into two separate parts. Part III of the Constitution houses the "Fundamental Rights", which include the right to life, the right to equality, the right to free speech and expression, the right to freedom of movement, the right to freedom of religion among others, which in conventional human rights language

[52] G.W. PATON, A TEXTBOOK OF JURISPRUDENCE, 4th Ed., pp. 1-45.
[53] National Legal Services Authority (NALSA) v. Union of India &Ors[53]. [Writ Petition (Civil) No. 400 of 2012]
[54] Indra Sarma v. V.K.V Sarma, 2013(14)SCALE448.
[55] Indra Sawhney and Others vs. Union of India and Others (1992).
[56] Vishwa Jagriti Mision v. Central Governments JT 2001 (6) SC 151.

may be termed as civil and political rights.[57] Part IV of the Constitution contains the directive principles of State policy, which include all the social, economic and cultural rights, such as the right to livelihood, the right to health and housing, the right to environment and others. These can be termed as second and third generation rights as they include socio-economic and solidarity rights.

Directive principles are non-justiciable by virtue of Article 37 of the Constitution. Supreme Court has been reaffirming that both the fundamental rights and the directive principles of State policy must be interpreted harmoniously—thus laying the foundations for the principle that social rights are complementary to, interdependent on and indivisible from civil and political rights and therefore also justiciable.[58]

Right from the late 1970s starting with Maneka Gandhi case[59] the Supreme Court started expanding the guarantee of the right to life in Article 21 to include the whole gamut of social rights[60] such as the right to clean environment[61], food[62], clean working conditions[63], the right to emergency medical treatment[64], the right to free legal aid[65], the right to be released from bonded labour[66], etc. Supreme Court has also banned smoking in public places by considering it as part of right to health under right to life.[67]

Judiciary has created a number of rights by way of its interpretation of constitutional text. Rights like right to shelter[68], electricity[69] etc. are quite impractical in the sense that even though they are considered under Article 21 as a fundamental right they are not as enforceable as other fundamental rights are, for in case of violation the Supreme Court neither has means to provide these things itself nor has time to take up such cases frequently. Constitution makers have deliberately not included a few rights in fundamental rights and mentioned them separately under directive principles because

[57] Kurian Joseph, *Judicial Legislation*, (2016) 2 SCC J-18.
[58] Ibid.
[59] *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248.
[60] *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 : 1981 SCC (Cri) 212; *Chameli Singh* v. *State of U.P*, (1996) 2 SCC 549.
[61] *Subhash Kumar* v. *State of Bihar*, (1991) 1 SCC 598; *A.P Pollution Control Board* v. *M.V Nayudu*, (1999) 2 SCC 718; *M.C Mehta* v. *Union of India*, (1987) 4 SCC 463.
[62] *Peoples Union for Civil Liberties (PUCL)* v. *Union of India*, WP (C) No. 196 of 2001.
[63] *Consumer Education & Research Centre* v. *Union of India*, (1995) 3 SCC 42 : 1995 SCC (L&S) 604.
[64] *Parmanand Katara* v. *Union of India*, (1989) 4 SCC 286 : 1989 SCC (Cri) 721.
[65] *Khatri (1)* v. *State of Bihar*, (1981) 1 SCC 623 : 1981 SCC (Cri) 225.
[66] *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 : 1984 SCC (L&S) 389.
[67] Murali S.Deora Vs. Union of India, Writ Petition (civil) 316 of 1999 .
[68] *Olga Tellis v. Bombay Municipal Corporation*, 1985 SCC (3) 545.
[69] *K. Aacharya v C.M.D.W.B.S.E. Distribution Co. Ltd.*, AIR 2008 Cal 47.

government of a developing nation with second largest population in the world may not have sufficient means and capabilities to be able to provide all necessary conditions of a standard living at a time to all people. There is no doubt that these rights help the parties involved in the case. But the decision remains lost in the ground reality where a common man deprived of his rights cannot even think of filing a suit to claim his basic rights.

5. Environment

No other Supreme Court in the world has engaged fundamental rights to the extent Indian Supreme Court has in the protection of environment. *M.C Mehta v. Union of India*[70] or as popularly known as "the Delhi CNG case", whose result was that Delhi has become the first city in the world to have complete public transportation running on CNG as Supreme Court had issued orders in this regard. *T.N Godavarman Thirumulpad v. Union of India*[71], the Court constituted an expert committee to look into the issue of depletion of forest cover and to consider questions such as to who can be allowed to use forest produce. The Court restricted the cutting of forest cover and selling of timber. In an exercise of "continuing mandamus" it closely monitored the implementation of its orders.

6. Electoral Reforms

Judiciary has brought many electoral reforms in order to bring transparency and strengthen democracy. It includes right to reject or NOTA, use of VVPATs, declaration of assets and criminal record of the candidates etc. This right though suitably belongs to legislature and ECI has acquired great legitimacy in among Indians as it strongly furthers the constitution dictate of free and fair elections.

Up to this extent it can be said that judicial activism has proved beneficial for the society. One thing that needs to be observed is that these actions are constitutionally for legislature to take but they are still considered as judicial activism and not judicial overreach, contrary to the definition of judicial activism. The reason behind this is that these actions gain legitimacy by the people of India which turns it into activism from overreach. So, one factor that needs to be included in the definition of judicial activism is 'legitimacy'. Legitimacy is acquired as:-

[70] (1998) 6 SCC 60; *M.C Mehta* v. *Union of India*, (1998) 8 SCC 648 and *M.C Mehta* v. *Union of India*, (1998) 9 SCC 589.
[71] 23 (1997) 2 SCC 267

a. Apex Court legislate law only if there is absence of pertinent legislation and it is applicable only till legislature comes up with its replacement. It is justified because usually legislature takes a lot of time to come up with new law. That's why it is does not frequently leave matters for legislature to decide.

b. There are some decisions in the interest of public, democracy and environment which require strong political will and mostly political parties are reluctant to bring such law. In such cases even if Supreme Court trespasses on the domain of other two wings it is approved by people.

c. Judiciary command high respect and confidence of public.

Since introduction of PIL the aim of judiciary is socio-economic justice. It can be deduced from following statement:

> "What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision … We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives."[72]

In this quest Supreme Court frequently invade and trespass the constitutional mandate of other branches.

According to Justice B. N Srikrishna "Judicial activism" has both a positive and a negative aspect. It involves both exceeding the judicial sphere as well as refusing to act within the judicial sphere. Habeas Corpus Case, Sajjan Singh and Suresh Kumar Koushal &Anr. v. Naz Foundation Ors. can be cited as examples of negative judicial activism.

VI. From Activism to Overreach

In *Mohini Jain v. State of Karnataka*[73], the Supreme Court held that right to education was included within right to life. The Court, realizing the impracticability of such a proposition, tried to narrow down the dictum in *Unni Krishnan v. State of Andhra Pradesh*[74], where it said that the right to life included the right to primary education. It was untenable that Supreme Court issued policy directions calling half the seats "payment seats" and other half "free seats". It was

[72] AIR 1982 SC 149.
[73] (1985) 3SCC 545.
[74] (1993) 1 SCC 645.

parliament who was rightly competent do create such a right which it created though late by inserting article 21-A in the constitution.

In *Prakash Singh v. Union of India*,[75] a petition under Article 32 was filed in the Supreme Court asking for the issuing of directions to the Union Government to frame new Police Act on the lines of the model act proposed and suggested inter-alia by the National Police Commission in order to ensure accountability of police. Unlike *Vishakha case*, there was an act already in place but Supreme Court found the act inadequate and issued directions to centre and state governments for time-bound compliance with the recommendations of the commission including the formation of various commissions and offices pertaining to the same.

Court on its own Motion v. Union of India & Ors[76]., can be cited as a glaring example of judicial overreach where the Delhi High Court, took *suo-motu* cognizance of increasing death toll on Delhi roads enhanced the traffic fines. By doing so, it encroached upon the function of legislature.

The Supreme Court's directive to the government of Uttar Pradesh to stop using public funds to install numerous statutes of Dalit leaders including Chief Minister Mayawati herself can't be criticized. But it was judicial intervention in political affairs.

The recent decisions of BCCI, NEET and demonetization inquiry manifest the overreaching propensity of Judiciary in India.

Lord Acton's declaration: "power tends to corrupt, absolute power corrupts absolutely" is pertinent here. It is necessary for judiciary of exercise self-restraint because it checks both legislature and executive but nobody checks it. Judiciary ought to draw its own limits lest it should end up in judocracy. Bacon has rightly said that Bacon: Let judges also remember, that Salomon's throne was supported by lions on both sides, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty.

VII. The Way Forward…

If anything needs therapy it is judicial overreach and not judicial activism. Because the former is bad in the constitutional democracy and the latter is imperative for dispensation of justice. When executive and legislature will come out from their slumber and lethargy and give up their utter callousness and disregard towards societal needs and fundamental rights to work harmoniously towards the goals of social welfare and responsible government then only people will be able to build confidence over them which today seems to be sole entitlement of

[75] (2006) 8 SCC 1.
[76] 139 (2007) DLT 244.

judiciary. The other branches of government must fulfil their constitutional mandate and work actively like judiciary so that the undue pressure on judiciary can be released without compromising justice and fundamental rights. Legislature should seriously take it upon itself to bring legislation in the spheres where there is none or where it requires substantial amendment in a reasonable time and for this it can take invaluable assistance of Law Commission and guidelines issued by Judiciary. Areas such as DNA profiling, regulation of crypto currency etc. which have not come in the limelight in law yet but is likely to come up in the near future, therefore responsibly should be taken by the legislature itself to avert absence of law.

May be Bacon has well advised on this matter that: "It is an [a] happy thing in a state when kings and state do often consult with judges; and again when judges do often consult with king and state; the one, when there is matter of law intervenient in the business of state; the other, when there is some consideration of state in matter of law."

At the same time, judiciary should not be treated as panacea for whatever wrong and unjust is there in the system and society. Supreme Court should strictly guard the judicial system against politically motivated, publicity driven and private gain impelled PILs which press judiciary to take up controversial and political matters falling outside its jurisdictional and constitutional parameters. Srikrishna J. has rightly said that solutions to many socio-economic and political problems lie with Parliament and in the polling booth with people and not with judiciary. It has now become crucial for the judiciary to rebuild and uphold the confidence of Republic of India in itself and in the Constitution by rejuvenating the principles of separation of powers and checks and balances in its judicial activism so that it does not swing into judicial overreach.

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