

Judicial Activism in India: With Special Reference to Judicial Despotism

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ABSTRACT

Judicial review is an essential part of our constitution's basic structure, but it has lovers and haters, depending upon whether they are in government or in opposition, while the court should not often use its powers to provide "complete justice" calling Article 142 a nuclear missile terms into criticism of the constitution itself. The greatest criticism against the judicial review is in the name of democracy, as unelected judges ideally should not have power to quash laws passed by democratically elected governments. However, quashing of laws or striking down of governmental decisions happens once in a blue moon. In most cases during the Present Government, Supreme Court has gone with the Government. All three organs of the government must remain within their allotted spheres. Holders of these organs do take an path to bear true faith and allegiance to the constitution.

1- INTRODUCTION

A court is established for administering justice on the law made. There are two sources of law like the Legislature & Judge-made law which is also called judicial interpretation of existing law/legislation. Constitution of India has recognised these sources of law making. Thus, Article 141 of the Indian Constitution provides that the law as declared by the Apex Court of India establishes the law of the State. The Judge-made-law is also called uncodified law. The making of law by Judges of the Supreme Court of India may be called judicial activism. Judicial Activism means enhancing the applicability of the particular legislation for social betterment and also to bring improvement in the concerned State machinery.

As to its meaning, Judicial Activism is not a distinctly separate concept from usual judicial activities. The word 'activism' means 'being active', 'doing things with decision' and activist is the 'one' who favours intensified activities. Justice Krishna Iyer observed 'every judge is an activist either on the forward gear or on the reverse' judicial policy making can be either an activity in support of legislative and executive policy choices or in opposition to them. But the latter one is usually referred to as judicial activism. The essence of true judicial activism is the rendering of decision which is in tune with the temper and tempo of the times. Activism in judicial policy making furthers the cause of social change or articulates concepts such as liberty, equality or justice. It has to be an arm of the social revolution. An activist judge activates the legal mechanism and makes it play a vital role in socio-economic process.¹

Judicial activism refers to the proactive role taken by the judiciary to safeguard rights, uphold justice, and ensure good governance by interpreting laws in ways that reflect changing societal values and addressing gaps left by the legislative and executive branches. Unlike judicial restraint, where the courts strictly interpret the law as it is, judicial activism allows judges to look beyond the written law to enforce justice in broader societal and moral contexts. In India, judicial activism has evolved into a significant feature of the judicial system, especially through Public Interest Litigations (PILs) and the courts' efforts to protect fundamental rights. This approach empowers the judiciary to address pressing social, environmental, and political issues, often when other branches of government have failed to act. The early cases of judicial activism in India are significant milestones in the country's legal landscape. These cases reflect the judiciary's proactive role in interpreting and safeguarding constitutional principles. Here is an overview of some landmark cases on judicial activism in India.²

2- AN ANALYSIS ON JUDICIAL ACTIVISM

The term of judicial review is not explicitly mention in the Indian Constitution but is inferred from Article 13. The Article 13 states that any law inconsistent with the Constitution is void, which implies the power of judicial review. Judicial review was inserted to ensure the Constitution's supremacy although constitutional courts could have exercised this power even without its explicit mention. The Judicial review is a key component of the rule of law and part of the basic structure of the Indian Constitution. Though judicial activism and judicial review are distinct concept they are closely related both are tools through which the judicially safeguards constitutional rights. It is a part of the Indian Constitution this is a branch of fundamental right and the judicial activism the should work within own judiciary and judiction like laxman rekha. Whether the judicial review has gone too far with concerns about its accountability and its impact on governance. There are varying opinions on judicial review with some supporting its necessity, while others critique its overreach.

The term judicial review has not being used in over constitution but it is can easily be inferred from Article 13. To overcome the crises of legitimacy for its pro-government decisions during the emergency, the Supreme Court revolutionised Doctrine of locus standi and initiated the PIL. The court her misused its powers under Article 142 it now more asks petitioners what right of their has been violated but whether whose right has been violated.

The President's move to seek clarity arose from an April 8 Judgment of a Bench of Justices J.B. Pardiwala and R. Mahadevan in a petition filed by the Tamil Nadu government challenging the Governor's delay in clearing 10 re-passed Bills. The immunity enshrined in Article 361 of the Constitution does not preclude or prohibit the courts in any manner from

looking into the actions of the Governor which by necessary implication would include his actions under Article 200 as will. The court had held.

On the other hand, Judicial Passivism means ordinary judicial interpretations of existing legislation by Judge without an attempt to enhance its social aspects and benefits. Words “Judicial Activism” are not of a recent origin but it can be noted in various decisions/Judgements delivered by the Privy Council, the Federal Court and also by the Supreme Court of India. Now the Judicial Activism is recognised by the Courts in India and also in abroad. In India the words “Judicial activism” was explained and recognised by the Supreme Court in Golaknath’s case.

3- THE CASE FOR COMPLETE JUSTICE

The constitutional law debates there have always being lovers and haters of judicial review. At times they do change their stand depending upon whether they are in government or oppositions. How every the term article 142 as nuclear missile is to strong statement and is basically criticism of the constitutions and should have been avoided by the vice president of India. The Supreme Court has neither used judicial activism nor its constitutional power under article 142 as an unguided missile. Had the court order restoration of the Babri mosque, probably there would have been a situation of the religious bar but looking at the sentiments of the millions of people, the court preferred peace over justice.

The Supreme Court has neither used judicial activism nor its constitutional power under Article 142 as an unguided missile. As a repository of people trust in it, it has, barring few exceptions, lived up to their expectations and not betrayed their trust. Had the court ordered restoration of the Babri mosque, probably there would have been a situation of religious bar but looking at the sentiments of the millions of people, the court preferred peceover justice.

Similarly, a judgement against the abrogation of Article 370 may have created a law and order situation in Kashmir, CJI Sanjeev Khanna’s Interpretation of the proviso of Article 370 has been severely criticised and the court’s refusal to determine the constitutionally of a State being downgraded to a Union Territory was not liked by the constitutional law experts.

4- DEMOCRACY DEBATES

The opposition is well within its right to criticise the Vice-President but it must remember its tallest leader, Nehru too had spoken almost identical language in the constituent assembly on 10/09/1949, “Within limits no judge no Supreme Court can make itself a third chamber No Supreme Court and No Judiciary can stand in Judgement over the sovereign will of Parliament..... The whole constitution is a creature of Parliament.”

The greatest criticism against the judicial review is in the name of democracy, as unelected judges ideally should not have power to quash laws passed by democratically elected governments of course, the government would be formed based on the majority in popular House, yet the constitution does not permit it to become majoritarian. Similarly the Governor or the President cannot exercise their discretionary powers arbitrarily in assenting Bills because they too should respect the will of the democratically elected State Assemblies.

In fact, most scholars reject this democratic objection in cases of judicial review on questions pertaining to federal provisions, legislative procedure or fundamental rights, as democracy can be the best means of resolving political disputes except in issues of fundamental rights and preservation of constitutional supremacy. Unlike the United Kingdom, we do not have the supremacy of the Parliament but the supremacy of the constitution. Our Parliamentarians must keep it in mind. The Vice-President too should not assert supremacy of the Parliament.

5- INDIAN JUDICIARY AND GOVERNMENT

Generally, the Supreme Court upholds the decisions of the government and the laws enacted by the Legislature. The quashing of laws or striking down of governmental decisions happens once in the blue moon. The Supreme Court has a duty to speak against the misgovernment; if it fails to do so, it would be falling in its constitution duty of protecting the constitution and upholding people's rights.

To say that Parliament be shut down as the court itself is making laws too is an unfair criticism. As a matter of fact, lately, the liberals have been saying that our judiciary has become more executive minded than the executive itself. The only big setbacks for the government were in cases against the electoral bond scheme, National Judicial Appointments Commission (NJAC), and President's rule in Arunachal Pradesh. In the recent verdict on Tamil Nadu Government's petition against its Governor, the court has merely interpreted the expression 'as soon as possible' in Article 200. The only problematic part that may qualify as judicial activism is the suggestion to President to seek the court's advisory opinion if a State law looks patently unconstitutional; the court has said "it would be prudent" (Paragraph 434). This too was to save the President from the allegations of bias, arbitrariness and mala fide.

The constitutional fiction of political questions beyond judicial remit cannot tie the hands of judges in exceptional situations like the one in Tamil Nadu. Its Governor's action being found mala fide warranted such timelines. The timelines suggested by the court do not amount to amendment of the constitution at all. No court in future is going to initiate contempt proceedings against the President or even the Governors for not strictly complying with these timelines. If

there is undue delay without any reason, timelines can be used to evaluate arbitrary or non-arbitrary nature of the Governor's action/inaction.

In *Qaiser e Hind* (2001), Justice Dorairajan had observed that “the assent of the President envisaged under Article 254(2) is neither an idle or empty formality nor an automatic event” It is an exercise of constitutional power. The Indian President too is under the constitution and not above it. Her actions too are amenable to judicial review. Even the Supreme Court is not supreme despite its nomenclature; it too must work under and within the constitutional limits.

An opinion by the Supreme Court under a Presidential Reference is not binding, says senior advocate Kapil Sibal; Justice Kaul, former SC judge says the President had raised point of law and he was expecting something like this to happen. If you do not like a Supreme Court Judgement, you seek a review, if the review gets dismissed, you file a curative petition. That is the only way to set aside a judgement ...the President is bound by a direction to decide on a will within a specific period of time. This is really by passing the legal process. According to Indian constitution article 143 Power of President to consult the Supreme Court sub.(1) the recently President of India refers 14 constitutional question to Supreme Court.

6- CAUSES OF JUDICIAL ACTIVISM

The following trends were the cause for the emergency of judicial activism – expansion of rights of hearing in the administrative process, excessive delegation without limitation, expansion of judicial review over administration, promotion of open government, indiscriminate exercise of contempt power, exercise of jurisdiction when non-exist; over extending the standard rules of interpretation in its search to achieve economic, social and educational objectives; and passing of orders which are not workable besides the above mentioned factors, there are some other situations that lead to judicial activism. When the legislature fails to discharge its responsibilities. In case of a hung parliament where the government is very weak and unstable. When the governments fail to protect the basic rights of the citizens or provide an honest, efficient and just system of law and administration, When the party in power misuses the courts of law for ulterior motives as was done during the Emergency period, and Finally, the court may on its own try to expands jurisdiction and confer on themselves more functions and powers.

7- COURSE OF JUDICIAL ACTIVISM

In the first decade of independence, activism on part of the judiciary was almost nil with political stalwarts running the executive and the parliament functioning with great enthusiasm, judiciary went along with the executive. In the 50s through half of the 70s, the apex court wholly held a Judicial and structural view of the constitution. In the famous *Keshavananda Bharati* case, two years before the declaration of emergency, the Supreme Court declared that the Executive had no

right to tamper with the Constitution and alter its fundamental features. But it could not avert the emergency declared by Mrs. Gandhi and it was only at the end of it that the apex court and the lower courts began to continuously intervene in executive as well as legislative areas. The first major case of judicial activism through social action litigation was the Bihar under trials case. In 1980 it came in the form of a writ petition under article 21, by some professors of law revealing the barbaric conditions of detention in the Agra Protective Home, followed by a case against Delhi Women's Home filed by a Delhi law faculty student and a social worker. Then three journalists filed a petition for the prohibition of the prostitution trade in which women were bought and sold as cattle. Taking cognizance of custody deaths Supreme Court ordered the police not to handcuff a man arrested purely on suspicion, not to take a woman to the police station after dusk. High Court judges visited the prisons to check the living conditions of prisoners, in the year 1993, in just a month the apex court proclaimed judgment protecting the rights of innocents held in Hazaratbal mosque in Srinagar, defining the constitutional powers of the Chief Election Commissioner, threatening multi-crore rupees industries with closure if they continued to pollute the Ganga and Taj Mahal and brought all government and semi government bodies under the purview of the Consumer Protection Act. In a 1994, judgement it asked the Chief of Army Staff to pay Rs. 6, 00,000 to the widow and two children of an army officer who died due to the callousness of the authorities concerned some 16 years before.

8- NEED FOR FAIR CRITICISM

Let us be fair to our judges. Fair criticism is welcome but attributing motives to judges or blaming them either for the violation of separation of powers or civil war is not acceptable. Our judges do deserve respect as they have too much of work due to poor judge-population ratio. The current CJI has not given any significant judgment. Aware of religious sensitivities, he merely tried to maintain peace through his observations on the places of worship Act. There is no stay as of now even on the The Waqf (Amendment) Act, 2025, Cannot he even ask questions anymore ? All three organs of the government must remain within their allotted spheres. Holders of these organs do take an oath to bear true faith and allegiance to the constitution. A Governor who refuses to sign Bills validly passed by the Assembly for years together basically was in violation of his own oath.

In Supreme Court Bar Association (1998), the Supreme Court had observed that the powers under Article 142 being curative do not authorise the court to supplant substantive law. It cannot build a new edifice where none existed earlier.³ It cannot make any order which is inconsistent with the constitution or statutory law. The judgment in the Tamil Nadu Government's suit has strengthened, not weakened, democracy and federalism. Justice J.B. Pardiwala has not gone against any provision of the constitution. He has indeed saved the

constitution from the despotism of unelected Governors and prevented Governors from becoming “Super constitutional figure”.

Judicial activism has been seen as essential in times of crises, like during the emergency, when the Supreme Court introduced the public interest litigation (PIL) to increase access to justice. The Supreme Court powers under Article 142 have also come under scrutiny with some arguing that it has misused this power in certain cases, such as compensating victims of custodial deaths and upholding workers rights. The Vice-President of India criticized Article 142 describing it as a “nuclear missile”, but such criticism is seen as undermining the constitutions role in safeguarding democracy. Critics argue that the judiciary has become too executive-minded, often siding with the government on major decisions. Examples include. Declining a CBI probe into Judge Loya’s death.⁴

9- CASES ON JUDICIAL ACTIVISM IN INDIA

Privy Purse Case (Madhav Rao Jivaji Rao Scindia vs. Union of India, 1970) The case revolved around the president's authority to de-recognize princes and abolish their petty purses. The Court ruled that executive power, as per Article 53 of the Constitution, must be exercised “in accordance with the law”. It could not be used to destroy the Constitution. The act of “de-recognizing” rulers without providing for the continuation of their rule was declared illegal.

R.C. Cooper vs. Union of India (1970) This case questioned the legislative competence of Parliament to enact the Banking Companies (Acquisition and Transfer of Undertakings) Act, known as the Bank Nationalization Act. The court struck down the Act due to its unreasonableness, as it effectively made it impossible for the banks to carry on any business.

Golaknath vs. State of Punjab (1971) The case dealt with the constitutional validity of the 17th Amendment to the Constitution and introduced the concept of “prospective overruling.” The court held that Parliament could not amend Part III of the Constitution or abridge fundamental rights.

Keshavananda Bharti vs. State of Kerala (1973) The case focused on the extent of the amending power under Article 368 of the Constitution. The court introduced the theory of the “basic structure,” asserting that Parliament could amend the Constitution but not abrogate its basic structure.⁵

Minerua Mills Ltd. vs. Union of India, AIR 1980 SC, 1789 Court held that such order would be valid and proper if followed by a post order hearing or post decision hearing. Thus, decision can be given before hearing.... It may amount to misuse of Judicial Activism.

This case examined the legislative competence of the state to establish special courts for high public office offences. The court upheld the validity of such courts and clarified that the “basic structure” theory applied only to constitutional amendments, not ordinary laws.

Maru Ram vs. Union of India (1981) The Hon’ble court held that “no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course”. He also observed that no constitutional power can be vulgarised by the personal vanity of the men in authority.

S.P. Gupta vs Union of India (1983) Court held that dealing with the question of the meaning of the word “consultation” in Article 124(2) held that in the matter of the appointment of judges.

PUDR vs. Union of India, 1982, Court held that workers temporarily employed by contractors for construction implementation under Article 32.

Kamgar Union vs. Union of India, AIR 1981 SC, Pg. No. 344, The court held that sale resulting in retrenchment had not violated their rights under Article 19(1)(g) of the constitution. S.C. Advocates on Record Association vs. Union of India AIR 1994 SC Pg. 68, held that ensure judicial supremacy in the appointment of judges.

A.R. Antulay vs. R.S. Nayak, AIR 1996, SC, the court, held that dealing with the question of prior sanction for prosecution of a public servant that on MLA was not a public servant.

Indian Drugs & Pharmaceuticals Ltd. vs. Workmen (2007) 1 SCC 408, The Supreme Court held that “The Supreme Court cannot arrogate to itself the powers of the executive or legislature. There is a broad separation of powers under the Constitution of India, and the judiciary, too, must know its limits”.

A.K. Upadhyay vs. Union of India AIR 2023 SC 891, The Court held that Section 33 (7) of the Representation of the People Act, which permits contesting an election for the same office from more than one constituency, in which one seat has to be vacated if such candidate. The judiciary point out the point in judicial activism.

S. Desai vs. P.S. Government of Maharashtra AIR 2023 SC 2046, The Supreme Court held an MLA is entitled to take part in proceedings of the house even if petitions seeking is disqualification are pending. The election of the speaker by the house is not invalid due to some

MLAs. The constitutional intentment it would not adjudicate such matter in the absence of extraordinary circumstances.

Anna Mathews, vs. Supreme Court of India, AIR 2023 SC 886, The Court held while exercising its power of judicial review, the Supreme Court can not issue a writ of certiorari quashing the recommendations, mandamus calling upon the collegiums of the Supreme Court to consider its decisions.

State of H.P. vs. Y.M. Sengupta, AIR 2024 SC 859, The court held that can not assume the functions assigned to executive, the legislature or Subordinate legislature. It cannot assume a supervisory the role over the rule making power of the executive under article 309. I hope this view regarding the above said title the judicial activism.⁶

10- CONCLUSION

The Supreme Court, as the Guardian of the Constitution, must exercise judicial review to ensure that no government authority acts unconstitutionally. At the same time, its actions must remain within the framework of the Constitution, ensuring that no organ of government oversteps its limits. The Indian judiciary remains a crucial bulwark against democratic erosion and executive excesses. While concerns about judicial overreach are valid and necessary in a democracy, the current discourse must differentiate between despotism and judicial duty. The judiciary must stay within its constitutional bounds, but it must also not shy away from upholding justice and accountability.

There is a real danger that the activism of the courts may aggravate the activism of the authorities. Today, inconvenient decisions are left by the executive for the courts to take Extensive use of Judicial Powers in the administrative field may well, in the long-run, blunt the judicial powers themselves. This is not a healthy situation, “What then is the solution ? The task of the court should be to compel the authorities to act and to pass appropriate executive orders rather than substitute judicial orders for administrative ones. The Supreme Court recently noted in Indian drugs vs. workman that the Supreme Court cannot aroagate to itself the powers of the executive or judiciary, too, must know its limits. The Judicial Activism is not a result of general development of judicial processor. It is a specific judicial interest about the issues. Judicial Activism does not mean governance by the judiciary. Judicial Activism must also function within the limits of judicial process. The judiciary is having certain limitation according to statutes which are framed by the legislature. It becomes strong only when people repose faith in it. Such faith constitutes the legitimacy of the Court and of judicial activism. Courts do not have to bow to public pressure, but rather they should stand firm against public pressure. Such inarticulate and diffused consensus about the impartiality and integrity of the Judiciary is the

source of the Court's legitimacy. It is an essential aspect of the dynamics of a constitutional court.⁷

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