

# Instruments of Judicial Control: Judicial Review & Judicial Activism and Need for Judicial Restraint in India

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## Introduction: Judicial Activism in India

The active role of the Indian judiciary, particularly of Supreme Court and High Courts has been widely appreciated both within as well as outside India. The independence ensured through the constitutional provisions in favour of the judiciary and subsequently strengthened by the judicial interpretation has definitely contributed to the present status of independent, powerful and impartial status of the Indian judiciary.

Yet, in this sphere of judicial activism, there are also a few coexisting misconceptions that need to be understood in order to appreciate the activist role of the judiciary in India.

Traditionally, the primary function of judiciary in India has been to adjudge the cases which are put before the court, according to the prevailing law of the land. However, the traditional scenario transformed since 1970s, when Jurists and judicial experts began realizing that judiciary should be more active and sensitive to social causes.

The soul of the constitution must be protected through positive and constructive interpretation.

It is also a fact that if the other two organs of the government, *Legislature and Executive*, would have responded to social needs and been sensitive to public interest, perhaps Judicial Activism in India might not have appeared as it is appearing today.

There has been phenomenal change in the India judicial system during last 30 years. The nature, size, functioning, behaviour, jurisdiction and objectives of judiciary are revolutionary transformed during these years.

Today, one of the prime motives of judiciary is to establish Social Justice along with individual justice. Today Judiciary is not only imparting justice, but also stepping into the roles of an Administrator, Reformer, and Decision Maker. In other words, it can be said that today Judiciary is doing all those works, as well, which are, supposedly, to be done either by Legislature or Executive.

The use of this extra-Jurisdictional power is termed as Judicial Activism. Judicial

activism, in brief, can be defined and explained as a process, where judiciary acts actively to regulate social and administrative activities.

*Arthur Schlesinger Jr. introduced the term "judicial activism" in a January 1947 Fortune magazine article titled "The Supreme Court: 1947".* Judicial activism is a dynamic process of judicial outlook in a changing society. Judicial activism is an approach to the exercise of judicial review, or a description of a particular judicial decision, in which a judge is generally considered more willing to decide constitutional issues and invalidate legislative or executive actions. In recent years, law making has assumed new dimensions through judicial activism of the courts. The case of *Vishaka vs State of Rajasthan*<sup>1</sup> clearly discusses the need for judicial activism. The Supreme Court stated that due to the absence of enactment with regards to enforcement of gender equality laws against sexual harassment, it has become imperative for the court to lay guidelines to be followed at all workplaces to observe proper treatment to women. After that, the judiciary decided to use immense powers in their hands that could modify certain ill deeds taking place in society.

There are multiple factors responsible for the growth of judicial activism in India: like arbitrary behaviour of bureaucracy and political leadership, People's growing hopes with judiciary, efforts by NGOs and impartiality shown by Judges. Globalization, increasing level of awareness and Consumer protections have also been influential factors, **but the most prominent factor in India has been the apathetic and**

**insensitive attitude of legislature and executive towards social and human issues.**

**Public Interest litigation (PIL)**, a manifestation of judicial activism, has introduced a new dimension regarding judiciary's involvement in public administration. The sanctity of locus standi and the procedural complexities are totally side-tracked in the cases brought before the courts through PIL. It is a fact that PILs have been quite instrumental in putting the governmental machinery on right track, but there has also been demand now from various corners to put restrictions on PILs due to overwork load on judiciary and misuse of the PILs.

**Legitimacy of judicial review** (the power of courts to decide the legality of the actions of other organs of government) in a democratic polity has always been debated. The critics have observed that the Indian Supreme Court has transcended the legitimate boundaries of the counter-majoritarianism, intended with judicial review, and has usurped power vested in the legislature. The way Indian Judiciary has intruded in the jurisdiction of executive has been criticized by one section of Jurists themselves. *Justice Tuljapurkar*, for example, in one of its lecture said, "*If independent judiciary is said to be the heart of a republican government, then the Indian Republic is suffering from serious heart disease.*"<sup>2</sup> A common criticism we hear about Judicial Activism and Judicial Review is that in the name of interpreting the provisions of the Constitution and legislative enactments, the judiciary often rewrites them without explicitly stating so and in this

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process; some of the personal opinions of the judges metamorphose into legal principles and constitutional values. One other facet of this line of criticism is that in the name of judicial activism, the theory of separation of powers is overthrown and the judiciary is undermining the authority of the legislature and the executive by encroaching upon the spheres reserved for them. Critics openly assert that the Constitution provides for checks and balances in order to pre-empt concentration of power by any branch not confided in it by the Constitution.

In many quarters of society the new role of judiciary has been severely criticised as '**Judicial adventurism**'. But the issue is:

- (a) Is judiciary a panacea?*
- (b) Can it set the entire system right?*
- (c) Have the big fish ever been taken to task?*
- (d) Has the relief actually come to the common man?*
- (e) Or is the judiciary riding a high horse?*

All these and many other related questions have been tried to be discussed in the present paper.

### **Narration and Discussion**

The new jurisprudence that has emerged in the recent times in India has undoubtedly contributed in a great measure to the well-being of the society. People, in general, now firmly believe that if any institution or authority acts in a manner not permitted by the Constitution, the judiciary will step in to set right the wrong. Judicial activism characterized by moderation and self-

restraint is bound to restore the faith of the people in the efficacy of the democratic institutions which alone, in turn, will activate the executive and the legislature to function effectively under the vigilant eye of the judiciary as ordained by the Constitution. In fact, the interaction of government, law and politics profoundly shapes and constrains policy and practice in every facet of public and private life. Judicial activism characterized by moderation and self-restraint is bound to restore the faith of the people in the efficacy of the democratic institutions which alone, in turn, will activate the executive and the legislature to function effectively under the vigilant eye of the judiciary as ordained by the Constitution.

The Judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. They try to undo the harm that is being done by the legislature by the legislature and the executive and also they try to provide every citizen what has been promised by the Constitution under the Directive Principles of State Policy and otherwise. All this has been possible, thanks to the power of judicial review. All this is not achieved in a day, it took almost 70 long years. Judiciary has been facing the brunt of many politicians, technocrats, academicians, lawyers etc. Few of them being genuine concerns, and one among of them is the aspect of corruption and power of criminal contempt.

The rule of law is the bedrock of democracy, and the primary responsibility for implementation of the rule of law lies with the judiciary. This is now a basic feature of

every constitution, which cannot be altered even by the exercise of new powers from parliament. It is the significance of judicial review, to ensure that democracy is inclusive and that there is accountability of everyone who wields or exercises public power. *As Edmund Burke said: "all persons in positions of power ought to be strongly and lawfully impressed with an idea that "they act in trust," and must account for their conduct to one great master, to those in whom the political sovereignty rests, the people"*<sup>3</sup>.

India opted for parliamentary form of democracy, where every section, at any level, is involved in policy-making and decision making, so that every point of view is reflected and there is a fair representation of every section of the people in every such body. In this kind of inclusive democracy, the judiciary has a very important role to play. That is the concept of accountability in any republican democracy, and this basic theme has to be remembered by everybody exercising public power, irrespective of the extra expressed expositions in the constitution.

The principle of Judicial Review became an essential feature of written Constitutions of many countries. **Seervai in his book Constitutional Law of India**<sup>4</sup> noted that the principle of judicial review is a familiar feature of the Constitutions of Canada, Australia and India, though the doctrine of Separation of Powers has no place, in strict sense, in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the

Government could not usurp the functions of another.

The power of judicial review has, in itself, the concept of separation of powers as an essential component of the rule of law, which can be taken as basic feature of the Indian Constitution. Every State action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by the reason of a doubt raised on that behalf, by the courts.

This important power of power of Judicial Review is incorporated in **Articles 226 and 227** of the Constitution in so far as the High Courts are concerned. In regard to the Supreme Court **Articles 32 and 136 of the Constitution**, the judiciary in India has come to control by judicial review every aspect of governmental and public functions.

### **Importance of Judicial Review and Control in a parliamentary democratic System**

It has been said that judicial freedom is one of the inherent values of the Indian constitution, that the judiciary plays a very important role so far as it keeps the government organs within legal control and protects the citizens against abuse of power by them. And so, it is extremely necessary that the judiciary is free from government pressure and influence. In the '*SC Advocates on record Case*'<sup>5</sup>, the Supreme Court has laid great emphasis on the independence of judiciary in a democratic society. 'Independence of Judiciary' has been characterised as a part of the basic structure of the constitution. Emphasizing of the independence of judiciary in a democracy the Supreme Court has observed

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in **Shishir Patil** case, *“In a democracy governed by rule of law, under a written constitution, judiciary is the sentiment to the qui vive to protect the fundamental rights and posed to keep the scales of justice between the citizens or the state or the states inter se. Rule of law and judicial review are the basic structure of the constitution. As an integral feature to the constitution independence of judiciary is an essential attribution to the rule of law. Judiciary must thus be free from pressure and influence from any quarter the constitution has secured to them independence”*

### **Judicial activism vs. Judicial restraint:**

The difference between judicial Activism (loose constructionist) and Judicial restraint (strict constructionist), these are ways of interpreting the Constitution. A judge who is a strict constructionist might rule in cases in a way that reads the Constitution very literally or relies on the original intent of the framers. A judge that is a judicial activist might rule in a very broad manner.

Recently, retiring Delhi HC Chief Justice, Justice DN Patil, stressed the need for a balance between judicial activism and judicial restraint. He has observed that There is always a gap between justice and law. Merely because the law is enacted, there is no guarantee that justice will be done. If there is any gap, a judge has to fill up the gap. In the absence of law, it is for the executive to draft the policy as per the bifurcation of the power and the Constitution.

**The points of difference between the two are as follows:**

1. Judicial activism is the interpretation of the constitution to advocate contemporary values and conditions. On the other hand, judicial restraint is limiting the powers of the judges to strike down a law.
2. In the judicial restraint, the court upholds all acts of the center and the state legislatures unless they are violating the constitution of the country. In judicial activism, the courts generally defer to interpretations of the constitution .
3. Judicial activism and judicial restraint have different goals. Judicial restraint helps in preserving a balance among the three branches of government, judiciary, executive, and legislative. In this case, the judges and the court encourage reviewing an existing law rather than modifying the existing law. Judicial activism gives the power to overrule certain acts or judgments.
4. Judicial restraint Judges should look to the original intent of the writers of the Constitution. Judicial activism judges should look beyond the original intent of the framers.

### **Trends in Judicial Restraint in India:**

Judicial Restraint is a theory of judicial interpretation that encourages judges to limit the exercise of their own power. It asserts that judges should hesitate to strike down laws unless they are obviously unconstitutional. Judges should s try to decide cases on the basis of :

- (i) The original intent of those who wrote the constitution.
- (ii) Precedent – past decisions in earlier cases.
- (iii) The court should leave policy making to others.

One of the examples of judicial restraint is the case of *State of Rajasthan v Union of India (1977)*<sup>4</sup>, in which the court rejected the petition on the ground that it involved a political question and therefore the court would not go into the matter.

*In S.R. Bommai v Union of India (1994)*<sup>6</sup>, the judges said that there are certain situations where the political element dominates and no judicial review is possible. The exercise of power under Art.356 was a political question and therefore the judiciary should not interfere. The court held that it was difficult to evolve judicially manageable norms to scrutinize the political decisions and if the courts do it then it would be entering the political thicket and questioning the political wisdom, which the court must avoid.

*In Almitra H. Patel Vs. Union of India (1998)*<sup>7</sup>, where the issue was whether directions should be issued to the Municipal Corporation regarding how to make Delhi clean, the Court held that it was not for the Supreme Court to direct them as to how to carry out their most basic functions and resolve their difficulties, and that the Court could only direct the authorities to carry out their duties in accordance with what has been assigned to them by law.

It is pertinent to mention here that Under **Article 121** the Parliament is

restricted to discuss the conduct of any judge of the Supreme Court or any High Court. Under *Article 212*: The Courts are restricted to inquire into the legislative proceedings under Article 212.

The Indian Supreme Court, while conservative in the initial years, had later a burst of judicial activism through the social philosophies of Justice Krishna Iyer, Justice P.N. Bhagwati, etc. who in the garb of interpretation of Articles 14, 19 and 21 of the Indian Constitution created a host of legal norms by judicial verdicts.

### **Trends in judicial activism in India**

In 1967 the Supreme Court in *Golak Nath v. State of Punjab (1967)*, held that the fundamental rights in Part III of the Indian Constitution could not be amended, even though there was no such restriction in Article 368 which only required a resolution of two third majorities in both Houses of Parliament. Subsequently, in *Keshavanand Bharti v. State of Kerala (1973)*, a 13 Judge Bench of the Supreme Court overruled the Golakh Nath decision but held that the basic structure of the Constitution could not be amended. As to what precisely is meant by basic structure is still not clear, though some later verdicts have tried to explain it. The point to note, however, is that Article 368 nowhere mentions that the basic structure could not be amended. The decision has therefore practically amended Article 368.

A large number of decisions of the Indian Supreme Court where it has played an activist role relate to Article 21 of the Indian Constitution. Article 21 states: No person shall be deprived of his life or personal

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liberty except according to procedure established by law.

In *A.K. Gopalan v. State of Madras (1950)*, the Indian Supreme Court rejected the argument that to deprive a person of his life or liberty not only the procedure prescribed by law for doing so must be followed but also that such procedure must be fair, reasonable and just. To hold otherwise would be to introduce the due process clause in Article 21 which had been deliberately omitted when the Indian Constitution was being framed.

However, subsequently in *Maneka Gandhi v. Union of India (1978)*, this requirement of substantive due process was introduced into Article 21 by judicial interpretation. Thus, the due process clause, which was consciously and deliberately avoided by the Constitution makers, was introduced by judicial activism of the Indian Supreme Court.

The Supreme Court in *Francis Coralie vs. Union Territory of Delhi (1981)* held that the right to live is not restricted to mere animal existence. It means something more than just physical survival. The Court held that: the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and comingling with fellow human beings.

The right to privacy which is a new right was read into Article 21 in *R. Rajagopal Vs. State of Tamil Nadu (1994)*. The Court held that a citizen has a right to safeguard the

privacy of his own, his family, marriage, procreation, motherhood, child bearing and education, among other matters.

The right to food as a part of right to life was also recognised in *Kapila Hingorani Vs. Union of India (2003)*, whereby it was clearly stated that it is the duty of the State to provide adequate means of livelihood in the situations where people are unable to afford food.

The Court has also held that the right to safe drinking water is one of the Fundamental Rights that flow from the right to life. Right to a fair trial, right to health and medical care, protection of tanks, ponds, forests etc which give a quality life, right to Family Pension, right to legal aid and counsel, right against sexual harassment, right to medical assistance in case of accidents, right against solitary confinement, right against handcuffing and bar fetters, right to speedy trial, right against police atrocities, torture and custodial violence, right to legal aid and be defended by an efficient lawyer of his choice, right to interview and visitors according to the Prison Rules, right to minimum wages etc. have been ruled to be included in the expression of 'right to life' in Article 21.

Thus we see that a plethora of rights have been held to be emanating from Article 21 because of the judicial activism shown by the Supreme Court of India.

### **Conclusion:**

Thus judicial activism has contributed to the developed interpretation of law. However, When Judges start thinking they can solve all the problems in society and start performing legislative and executive

functions (because the legislature and executive have in their perception failed in their duties), all kinds of problems are bound to arise.

Judges can no doubt intervene in some extreme cases, but otherwise they neither have the expertise nor resources to solve major problems in society. Also, such encroachment by the judiciary into the domain of the legislature or executive will almost invariably have a strong reaction from politicians and others.

It is clear that the Constitution does not see the judiciary as the substitute for the legislature or the executive upon their failure in any sense but each organ has to practice its own limited activism and monitored restraint. Indian scenario requires the creativity and application of personal minds of the judges while interpretation due to the complexity of cases in the present times.

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