

Judicial Activism in India

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Judicial decisions are commonly characterized along the dichotomy of activism and self restraint. Those who make such classifications seldom define these terms. It is very difficult to give a exact definition to these terms due to inconsistency and imprecision attached to them. Though, one should always remember that the question of activism or self restraint arises only when there is discretion. If a judge gives a decision on the basis of what is given in the statute, he exercises neither activism nor restraint.¹

Feeley and Rubin define activism as the impact of the decision on the society or non government institutions, whether or not there is textual basis on which the decision rests.² In general terms it can be said that activism is when a judge gives something of his own in the decision as there is no law to guide him on that point.

A judge when gives a decision based on the values and beliefs recognised by the society and his reasoning and understanding of the facts leading to the development of a new law he is said to exercise activism.

Judicial activism cannot be defined in terms of changing the existing law or giving a decision which is opposite to something written in the statute books as such decisions would be counted as illegitimate and not activist or restrained. So, if there is a existing law on a particular point, a judge cannot exercise activism.

Judicial self restraint encompasses the opposite qualities. It is the judicial tendency conscious or unconscious to achieve the balance between conflicting social values by preserving existing law rather than creating new law.³

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¹ Sharma Moolchand, raju Ramchandran, Constitutionalism, Human Rights and Rule of Law :Essays in Hounour of Soli J. Sorabjee, Ahron Barak, Activism and Self Restraint, Universal Law Publishing, 2008P. 223

² Sankaran S., Scaling Justice, Oxford Publication 2005, pg.171

³ Sharma Moolchand, raju Ramchandran, Constitutionalism, Human Rights and Rule of Law :Essays in Hounour of Soli J. Sorabjee, Ahron Barak, Activism and Self Restraint, Universal Law Publishing, 2008,P. 231

Judges have been given a heavy responsibility to evolve law in consonance with the changing needs and aspirations of the society and to serve the social cause of justice. Judicial activism is the founding stone of this approach.

The need for judicial activism arises when the legislature and executive are not able to perform their functions properly and the judiciary needs to step in their shoes to impart justice to the society. Judiciary as custodian of the Constitution has been given the responsibility to keep legislature within the bounds of the constitution and hence judicial activism becomes necessary.

If we look at the various provisions of the Constitution of India, it becomes clear that Indian judiciary has been given exorbitant powers.

The Supreme Court in particular, has vast powers under the Constitution of India. As per Article 13, the judiciary is empowered to review the validity of any law on the touchstone of Fundamental Rights and to declare the same as void if it contravenes any of the Fundamental Rights. The power is generally referred to as the power of Judicial Review. The reason for this is not to make the judiciary supreme but only to provide a system a checks and balances between legislative and executive by which mistakes committed by one are corrected by another.

Generally, In such cases Supreme Court don't have any guidelines or statutes on which they can rest their decisions apart from broadly stated fundamental rights , the meaning of which tend to change with the changing needs of the society. This gives the judges abundant opportunity to exercise their activism to provide justice to the people of India.

As protectors of the Constitution of India our judiciary has made very wise use of the powers granted to them. We have some wonderful where the Supreme Court of India has exercised judicial activism.

The Supreme Court of India has assumed to itself the power to determine the validity of even a constitutional Amendment effected under Article 368, in the aftermath of ***Keshavanand Bharti v. State of Kerala.***⁴ Probably, no court in the world under any form of constitutional

⁴ AIR 1973 SC 1461.

government exercises such power. Thus it can be cited as the best example of judicial activism in India.

The Supreme Court has refused to exercise its advisory jurisdiction under Article 143 of the Constitution in the matter of **Ayodhya controversy**.⁵ Such a refusal itself is an example of judicial activism, exhibited in that area probably for the first time in India.

The Supreme Court has broadened the scope of Locus standi in the matter of enforcement of fundamental rights of the citizens, by developing the concept of Public Interest Litigation. The credit for this welcome development goes to Justice P.N. Bhagwati, Justice V.R. Krishna Iyer.

PIL was initiated in *Akhil Bhartiya Shoshit Karmachari Sangh (Railway) v. Union of India*,⁶ 1981 case, wherein an unregistered association of workers was permitted to institute writ petition under Art 32 of the constitution for redressal of common grievances.

Justice Bhagwati, in *S.P. Gupta v. Union of India*,⁷ case firmly established the validity of the Public Interest Litigation. The development of the concept of PIL lead to some of the most beautiful activist judgements given by our courts. Court has amply broadened the scope of Article 14 and 21 by using the weapon of PIL.

Decisions like *Maneka Gandhi v. UOI*, are result of the concept of PILThe development of PIL have gave the power to courts to decide on every matter under the sun and hence this power is to be used with great care and caution.

Another most conspicuous constitutional area where the Supreme Court has exhibited judicial activism is the way the court has interpreted the Directive principles of State policy contained in Part IV of the Constitution, which are non-justifiable, as justifiable in the garb of fundamental rights. The Court has stretched itself too far when it directed the Union of India to enact a Uniform Civil Code.⁸

⁵ In *Ismail Farrouqui v. Union of India* (1994) 6 SCC 360.

⁶ *Akhil Bhartiya Shoshit Karmachari Sangh (Railway) v. Union of India*, (AIR (1981) SC,298

⁷ *S.P. Gupta v. Union of India*, (AIR 1982SC 149)

⁸ Under Art.44, a Directive Principle of State Policy.

The independent Indian Judiciary is protecting not only the fundamental rights but also working hard to maintain the supremacy of the constitution and faith of people on the Constitution of India by providing political, social and economic justice.

It has played a creative and constructive role by evolving doctrines like basic structure and public interest litigation (PIL). There are various reasons for judicial activism gaining so much popularity in India and one of them is ever growing corruption and the politicians who look for their benefit in everything.

In these circumstances judicial activism has played an important role in not only maintaining the Indian democracy but also in reposing the faith of the citizens of India on our constitution.

While applauding the merits of activism we should not forget that primary function of the judges is to interpret and express law and not to declare it. Judicial activism is something that should be rarely used when required.

Judiciary has been given authority to demarcate the functions of the three organs of the government and if judiciary will transgress on the power of another organ, people may lose faith on judiciary. The judiciary is having certain limitations, it has to act according to statutes which are framed by the legislature. Judiciary becomes strong only when people repose their faith on it and consistent activism and the zeal of the judges to perform the of another may make judiciary lose its sanctity.

To conclude I would like to reiterate the observations by Hon'ble Dr. Justice A.S. Anand, former Chief Justice of India :

"Courts have to function within the established parameters and constitutional bounds. Decisions should have a jurisprudential base with clearly discernible principles. 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. Policy matters, fiscal, educational or otherwise, are thus best left to the judgment of the executive.

The danger of the judiciary creating a multiplicity of rights without the possibility of adequate enforcement will, in the ultimate analysis, be counter productive and undermine the credibility of the institution. Courts cannot "create rights" where none exists nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles.

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 is imperative to preserve the sanctity and credibility of judicial process. 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."⁹

⁹ Common Cause (A Regd. Society) vs Union Of India And Others, WP 580/2003