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Judicial Activism in India

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ABSTRACT

The study is an effort to examine the concept of judicial activism and to structure the stages of its evolution across the judicial systems of various countries. The work puts into perspective, the concept being practised in India through the provisions of the constitution and its origination through prominent judgements. A detailed study on the tool developed for active judicial activism in India i.e. Public Interest Litigation has also been done. The political/legislative implications of judicial activism are also dealt with. This is weighed against the benefits rendered to the common citizenry by such practice and the extent to which it has been successful in achieving the purpose. The situation is highlighted when the noble practice of judicial activism transcends into judicial overreach. The future prospects of it are forecasted and some suggestions are provided to streamline and make the theory more effective & robust. This work is a result of scrupulous research done through a wide range of secondary sources such as books by various authors, research papers, journals, online sources, etc. apart from the observation of the functioning of the judicial system. The project tries to maintain objectivity throughout and also not to digress from the relevant substance at any time.

Keywords: *Judicial Activism, Public Interest Litigation, Judicial overreach, Judicial restraint, Separation of powers, Judicial Activism in India.*

I. INTRODUCTION

The Indian constitution is the longest written constitution of the world and is unique in certain ways. The reason for it being so lengthy is that the framers of the constitution wanted to address all the issues that plagued India at that point of time and would do in the future. It envisages India as a democratic nation with the ultimate sovereign being the people of India and in fact, recognises its creation by the people of India for themselves and not some authoritative law imposed on the subjects. The constitution among other things, delineates the concept of separation of powers and defines the functions of the three organs of the state- the legislature, the executive & the judiciary. The judiciary has a unified structure in India with the Supreme court at the apex of it. The Supreme court has been made the guardian of the constitution and along with the high courts, has the responsibility to protect the rights and liberties of the citizens

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of India. In furtherance of its functions, the judiciary has evolved the concept of judicial activism which gives it the power to do the needful, even if it involves interference with functions of other wings or deviating from the precedence or the usual judicial practises. Though, the three organs are distinct and independent, the role of the judiciary bestows upon it a critical power of transgressing over the other two wings. This has granted great prominence to the judiciary among the masses which look towards it when they are affected by the state. There has of course, been certain criticisms of the courts over this transgression and its constitutionality. The project is an effort to expand over the concept of judicial activism, its evolution and importance in India its criticisms, and the future progress of it.

(A) Research questions

The study tries to answer certain questions during its course through research work over the topic. The prominent questions are:

- What is judicial activism?
- How was judicial activism born around the globe?
- What are the various methods to exercise judicial activism?
- How was judicial activism evolved in India?
- What is public interest litigation and how it gained prominence in India?
- What are some of the lacunas of judicial activism?
- What do the terms judicial overreach and judicial restraint mean?
- How should judicial activism be used by courts in future so that the sacrosanctity of the constitution and the courts are not hampered?

(B) Research objectives

The objectives of this study include:

- Understanding the concept of judicial activism
- Understanding the inception of judicial activism
- Understand the concept of PIL & its impact on Indian society
- Understanding the concepts of judicial overreach and judicial restraint
- To evaluate how the concept has fared in India and to formulate suggestions for the regulation and better implementation for the benefit of the citizens

(C) Research methodology

For the study of this kind, analytical and descriptive method has been used. Data is collected from secondary sources like books, websites and journals. Empirical research has been done

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for the completion of this work. The study relies on critical examination and review of the secondary sources.

II. JUDICIAL ACTIVISM: THE CONCEPT

The Common Law system recognises the adversarial system of courts rather than an inquisitorial one. The notion about the role and extent of powers of the Judges in the court originates here. The counsels present arguments and facts in the court, each trying to substantiate their claim and invalidating the theory of the other party. The judges are expected to remain detached and pass the judgements entirely based on the evaluation of the cases put forward by the counsels, and not to themselves go out of their way for ensuring justice. Thus, the impression of a judge in the common law system, is of a neutral umpire who is more concerned about the procedures being followed to reach the decision rather than the achievement of justice itself. Every time, a judge tries to go beyond this defined role, to ensure justice, the discussion upon terms like judicial activism, judicial overreach and judicial restraint surface.

The term "Judicial Activism" has been constructed, to explain a theory that precedes it by years. It has evolved over time and has been described by legal luminaries according to the period and society to which they belonged.

(A) The earliest uses of the term Judicial Activism

The idea of Judicial Activism has always been there in a free democracy, in some or the other way. The outlook of the jurists towards it however, has changed over time. The concept of judges venturing beyond their domain, was not appreciated much by legal scholars before the twentieth century.

Jeremy Bentham was of the view that such actions by the judges, are an appropriation of the functions of the legislature by the judiciary. His student, John Austin did not concur with these views and supported a form of *judicial legislation*. During the early twentieth century, there were deliberations and discussions around the concept and the experts of the field took either side fervently. The discussions intensified in the United States of America during the Lochner era when the courts were alleged of purposefully striking down economic regulations adopted by the state, for want of proper procedures, to help the capitalists.

The concept though, in dispute over the ages, the term *Judicial Activism* was mentioned at no place.

It was in 1947, that the term was first used in an article in a popular magazine. The renowned

historian Arthur Schlesinger Jr. used the term for the first time in his article in the Fortune magazine. He used the term while classifying the then judges of the American Supreme Court as Judicial Activists, Champions of Self Restraint and judges positioned in between the two sections.

Later, it was used in numerous occasions, but the first use of it in a court by a judge was in the American case of *Theriot v. Mercer* in 1959. Judge Joseph C. Hutcheson used it while opposing a dissent judgement in a related case. He disapproved of judicial activism and the result it seeks to achieve.

The usage also hints towards the change in connotation that took place in the mid-1950s. The term judicial activism was seen more as an encroachment by some judges. The term since its very early usage has been as contentious as it is in the present world.

(B) Definitions of Judicial Activism

Judicial Activism should be distinguished from the purpose for which the judiciary has been founded. It is required to be specified that judicial activism is not the regular performance of duties by the courts, which include the settling of disputes between parties, penalising of criminal acts and interpretation of the laws of the land. It is when the courts transcend this confined domain that judicial activism commences.

Judiciary in some instances, goes out of its way to ensure the rights of the citizens against the state. This endeavour requires an interference by the judiciary in the province of the legislature and the executive.

Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions."

Judicial activism is an approach where the judiciary perceives an inaction on the part of the executive or vacuum with respect to legislations on a matter, and proceeds to compensate for the same. Also, the judiciary deviating from precedents and interpretations provided by itself earlier in time, qualifies as judicial activism. Thus, judicial activism is a form of activism which is substantiated by the powers of a proactive judiciary which wants to utilise its constitutional authority for the betterment of the society and the functioning of its institutions.

SP Sathe, the celebrated legal academician had observed that a court giving a new meaning to the provision to suit the changing social or economic conditions or expanding the horizons of the rights of the individual is said to be an activist court.

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To explain it in simple terms, when a judge bases his judgements and orders not in accordance with the established structure, but uses the court's power to adjudicate to fulfil an ulterior motive of addressing the social and political problem, it is known as judicial activism.

(C) The evolution of Judicial Activism

The theory of judicial activism evolved through the method of judicial review in the United Kingdom. The constitution of Britain is an example of unwritten constitution and that provided for the flexibility required for judicial activism. The unwritten constitution imparted the prospect for judicial review during the times of Stuart (1603-1688) and the judicial activism was birthed.

In 1610 Justice Edward Coke paved the way for judicial review. He pronounced in the *Thomas Bonham v College of Physicians* [2]case that any law by the parliament, if it is in contravention of the *common law* or *reason* can be reviewed and declared void by the courts. Sir Henry Hobart, who succeeded Sir Edward Coke as the Chief Justice of the Court of Common Pleas, in 1615 affirmed this theory of judicial review and thus judicial activism.

In the *Marbury vs Madison* [3](1803) case, the US Supreme court struck down the portions of the Judiciary Act 1801 which were unconstitutional. This was first such instance in the USA where a legislation was invalidated by the court. The court held that federal courts have the power to strike down laws not in consonance with the constitution and since then judicial review got recognition in the USA.

The other modern democracies followed the lead and the power of judicial activism became sine qua non for the existence of an independent judiciary in nations which upheld the rule of law.

(D) Methods of judicial activism

The prominent forms of judicial activism practises that prevail around the world are:

- Judicial Review
- Public Interest Litigations (*as known in India*)
- Judicial legislations
- Creative interpretation and drafting

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[2] *Thomas Bonham v College of Physicians*, 8 Co. Rep. 107 77 Eng. Rep. 638

[3] *Marbury vs Madison*, 5 U.S. 137 (*more*) 1 Cranch 137; 2 L. Ed. 60; 1803 U.S. LEXIS 352

- International precedence

(E) Significance of judicial activism

Judicial activism fills the lacunas present in the established system of a nation. The significance of it can be summarised in a few points:

- It checks the state institutions for any excesses or inaction
- It addresses the issues which are recent or have surfaced recently and no law exists to deal with them
- The corruption, inefficiency and apathy in the executive wing are dealt through this
- The laws, though passed by a majority in parliament, which are unconstitutional and strike at the roots of the constitution are invalidated because a majority in election does not confer the right to alter the values of the nation
- It prevents either of the three wings of the state from becoming authoritative in nature

III. JUDICIAL ACTIVISM IN INDIA

The constitution of India establishes a parliamentary form of government in India. It distinctly defines the powers shared among the three organs- legislature, executive & judiciary. But the parliament is not supreme in India like most other countries. In fact, it is the constitution which is supreme. This signifies that all the three organs are on the same footing and prevent the supremacy of parliament over the judiciary. The Supreme court & the High courts have the responsibility to safeguard the rights & liberty of the citizens. Although, the functions of all the organs are clearly delineated, this role of courts as guardians, often provide them with occasions where they can encroach upon the purview of others. The judiciary has utilised this potential in the recent years with increasing frequency. This has made the executive and the legislature suspicious of the unrestrained power of the judiciary. Thus, the Supreme court has been alleged more & more of judicial overreach in the past. The judgements of the courts of law, however, have remained relatively sacred and thus the sanctity of the courts have remained untouched despite these reservations about overreach and hence judicial activism thrived in the Indian scenario.

(A) Evolution of Judicial Activism in India

The courts in India were of a technocratic nature in the initial years after independence. The judiciary focussed more on abiding by the procedures which is expected of it, but the aim of justice occasionally did not resonate with this elementary functioning of the courts. Most judges of the time, so to say, were not so creative and did not bother enough to find ways to

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fulfil the purpose of justice for which they held the offices that they did.

There were occasions when some judges in the British as well as in a recently independent India, did went out of their ways to pass judgements that could now be classified as a primary form of Judicial Activism.

In 1893, J. Sayed Mahmood of the Allahabad High Court, dissented and criticised the rule of dismissal of appeals just on the grounds of the appellant not being able to pay the cost for translating and printing the record into English. This was a sort of activism and sought to protect the under trials who were severely affected by the rule. Though it didn't go well with the English judges on the bench and for showing approaches like this in the court, J. Mahmood had to retire early.

The Supreme Court established the concept of judicial review for the very first time in 1950 in the *A.K. Gopalan v. State of Madras*. The bench held that the power was inherent in the constitution. Article 13(2) prevented the state from formulating any law which is in violation of the fundamental rights, and hence the court had the power to strike down such laws.

The judiciary thus, bestowed upon itself the task to interpret the constitution and scrutinise the executive and legislative acts for being in agreement with the constitution.

The judgements in the emergency era, validated this scrutinising power of the judiciary and the need for it was emphasised.

In *Sajjan Singh v. State of Rajasthan,* the dissenting judges raised doubts about whether the fundamental rights of the citizens could become a plaything of the legislature and in their views, the courts had the power to strike down laws violating fundamental rights.

In the much-celebrated case of *Keshvananda Bharti v. State of Kerala*[4], J. H.R. Khanna had noted that judicial review had become the integral part of our constitution, and any statute in violation of articles of the constitution can be held to be void by the Supreme Court & the High Court. This was also manifested in the *basic structure* doctrine that was laid down in this judgement.

In the famous *ADM Jabalpur v. S.K. Shukla*[5], we perceive the famous dissent by J. Khanna as a brilliant example of judicial activism. He held the rights of the citizens even though knowing that showing such activism could cost him the position of Chief Justice of India, which it eventually did. It is because of judges like him that judicial activism as a concept exists in India

[4] *Keshvananda Bharti v. State of Kerala,* (1983) 4 SCC 225; AIR 1973 SC 1461
[5] ADM Jabalpur v. S.K. Shukla,AIR 1976 SC 1377

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and the generation of judges to follow, possessed the courage to advance with it.

In the *Minerva Mills v. UOI*, the apex court prevented an attempt by the government to annul the judgement of the Kesavananda Bharti case and usurp an unlimited power to amend the constitution as per its liking. The court in doing so declared that judicial review is a part of the basic structure and the Parliament can't use the limited powers given to it to convert them into unlimited powers.

Justice P.N. Bhagwati, the father of Judicial Activism in India, through his various judgements like *Hussainara Khatoon v. Home Secretary, State of Bihar* [6]*& Khatri v. State of Bihar*[7]*,* strengthened and gave the final shape to the concept and paved way for it to be used as a weapon to ensure complete justice in the hands of the judges.

The evolution of judicial activism in India can thus, be classified into three broad phases:

- 1950-1970: The period of classical judiciary which didn't indulge in any kind of activism.
- 1970-2000: The phase in which judiciary and judges through creative judgements established the concept of judicial activism and it gained popularity.
- 2000-till now: Judicial activism flourished and touched various aspects but also infested by judicial overreach.

(B) Public Interest Litigation

The judiciary during the period of emergency conceived a tool to ensure justice to the marginalised and deprived sections of the society and to make justice more accessible to the citizens. This tool was Public Interest Litigation & J. V.R. Krishna Iyer & J. P.N. Bhagwati were in the vanguard of this movement.

Justice Iyer termed law as a social auditor and someone with public interest could ignite it. Justice Bhagwati in one of his judgements promulgated that the courts should find new methods in order to make justice accessible to the majority that are denied human rights. The justices were of the view that the citizens were often denied access to justice through the established system. The socially and economically downtrodden were unknown to the legal rigmaroles, could not afford a lawyer to represent them and were intimidated by the formidable judicial process. The learned judges hence advocated that if fundamental rights of a citizen are infringed, then *any* person could approach the apex court. They substantiated their view by

[6] Hussainara Khatoon v. State of Bihar, 1979 AIR 1369, 1979 SCR (3) 532
[7] Khatri v. State of Bihar, 1981 SCR (2) 408, 1981 SCC (1) 627

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article 32 which gives the right to citizens to approach directly the highest court in case of violation of fundamental rights.

The practice of taking the matters of public importance to the highest court directly, started with the 1976 case of *Maharaj ji Singh v. State of UP*[8]. In this case the court endorsed that where a wrong is done against a community, no legal standing will not be a reason to dismiss the case. Justices Bhagwati & Iyer in the *Fertilizer Corporation Kamgar Union v. Union of India* [9]case of 1981, used the term PIL as well as epistolary jurisdiction for the first time. The later denotes approaching the court through letters.

In the *SP Gupta v. Union of India,* the court further took note of the disadvantaged position of many citizens and affirmed that any individual having sufficient interest and a bona fide intention could approach the court on the behalf of such citizens. They asserted that procedures are nothing but the hand maiden of justice and that could not be refused on just the basis of technicalities and the court would consider letters as writ petitions and act upon them accordingly.

The efforts of the eminent judges were steadily realised and PIL developed as a procedure in the coming years and the mean to address various problems across all the three organs that were not being looked upon. The judges for devising such an adequate response to the inaction of the state are considered as champions of the rights of citizens and are known as father of PIL as well as judicial activism in India.

1. Prominent PIL judgements

The Public Interest Litigations present appropriate examples of judicial activism by the courts of India. They cover a wide ambit ranging from human rights violations, corruption, labour conditions to even environmental degradation. The PILs provide an overview of the functioning of pro-active courts in India that seek change in the society.

In *Hussainara Khatoon v. State of Bihar*[10], a petition was filed before the Supreme court after reports appeared in newspapers about the conditions of under trials in prison. Some of these under trial prisoners had even surpassed the maximum punishment defined for the crime under which they were booked. The cases remained pending for years before an overburdened

[8] Maharaj ji Singh v. State of UP, 1976 AIR 2602, 1977 SCR (1)1072

[9] Fertilizer Corporation Kamgar Union v. Union of India, 1981 AIR 344, 1981 SCR (2) 52

[10] *Hussainara Khatoon v. State of Bihar*, 1979 AIR 1369, 1979 SCR (3) 532

judiciary and these under trials couldn't arrange bails as they didn't have enough money to pay as bonds and sureties. The petition was accepted as a writ. Justice Bhagwati and other judges on the bench ordered the release of such under trials on personal bonds if they couldn't arrange the bail amount. They held that speedy trial was a fundamental right and that could not be denied for monetary reasons. The court also held that free legal aid was a part of the right to life and personal liberty. Through this judgement, a defective system was corrected by the judiciary and thousands of such under trials have been granted bail since then.

The cases of fake encounters have also been brought before the courts through PILs by human rights activists. The court has tried often to terminate the *instant justice* pretence but the menace still persists in modern India. The police claim to deter crime through these actions but in reality, no real justice is done through them. In *Chaitanya Kalbagh v. State of UP*[11], the court forced the government to investigate the encounter with due diligence. The determined pursuit by the court resulted in the prosecution of the officers involved and led to a precedence that such violations of human rights would not be tolerated. The court through its powers, ensured that justice is done and did not content itself by passing orders for investigation.

The problem of bonded labour had been plaguing the nation since early times and even continued in independent India. The poor took loans at high rates from the money lenders who would on non-payment of such debts, make them work for free on their farms and residence and often indulged their family and future generations into the same. The government came up with *the Bonded Labor (Abolition) Act 1976*, which declared such bondages as illegal but was of little practical significance. The impoverished section of the society was still being subjected to such inhumane contracts by the alliance of a corrupt bureaucracy and avaricious moneylenders. Bandhua Mukti Morcha approached the court to save such bonded labourers. In the *Bandhua Mukti Morcha v. Union of India*[12], the Supreme court formed its own commission to look into such matters. The government was opposed to this but the court utilised its special powers. Through the intervention of judiciary, many cases opened, and a large number of such labourers were recognised and rehabilitated to a better life. An ineffective law and a corrupt executive were thus compensated by an empathetic & compassionate judiciary.

A subject which is habitually neglected by the legislature and the bureaucracy is the environment and its continuous degradation caused by the pollutants. The lack of interest of the general public towards the same is the reason for such negligence. But for a watchful

[11] *Chaitanya Kalbagh v. State of UP*, (1989) 2 SCC 314
[12] *Bandhua Mukti Morcha v. Union of India*, 1984 AIR 802, 1984 SCR (2) 67

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judiciary and some motivated environmentalists, the most vital factor for existence would remain overlooked. MC Mehta was one such motivated petitioner, who used PILs frequently to raise questions of degradation of the environment. His PIL led the court to order closure of tanneries which released effluents into the Ganges and polluted the holy river. His petition also indicated the court to look into the yellowing of Taj Mahal. The court thus ordered enquiry and on recommendation of expert commissions ordered strict compliance with the pollution control guidelines and further many industries were closed. The courts in the nation have continually dealt with pollution related matters in a pre-emptive manner and with a strict approach. The constant vigilance by the judiciary has played a critical role in protecting the environment.

Thus, it can be observed that the activism by the courts across various domains have led to betterment of the established system and in increasing the efficacy of the existing institutions and also acts as a check on the state and its organs so as to prevent them from becoming authoritative, corrupt or incompetent.

(C) Addressing issues overlooked by Judicial Activism

The courts of law in India have been instrumental in ensuring justice to the citizens as is clear from the above sections. The actions of the court have exhibited its intention and vision for the betterment of the lowest section of the society and to ensure a dignified life for all living beings. The activism by courts have no doubt improved the conditions of the nation and the nationals. Yet there exist some lacunas which need to be discussed that question the effectivity of the whole practice of judicial activism and its practical significance.

Judicial activism in India has been observed to be a concept that targets small symptoms and ignores the bigger problem per se. Upendra Baxi demonstrated it with some examples. He notes that while small tanneries were closed on the pretext of jeopardising health of individuals and tampering nature, the same action was not taken against mega irrigation projects and the nuclear power projects which are a bigger threat. Similarly, in the *Vishakha v. State of Rajasthan* [13]case, guidelines were laid down against sexual harassment at work place which was a commendable effort on the part of the judiciary. Yet, the court fails on the issue of protection of victims of such harassments and rapes.

The other such problem with judicial activism is the lack of opportunity provided to the actual victims to provide inputs. These lost suggestions could help in formulating a more appropriate solution to the problem which is ameliorating as well as feasible. The dearth of first-person experiences and suggestions lead to a detached authoritative order rather than a liberating

[13] VISHAKA & ORS. V STATE OF RAJASTHAN & ORS., (1997) 6 SCC 241

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solution. In cases such as the Vishakha case[14], everyday victims of such acts were not consulted before passing of a judicial legislation.

The conduct of Supreme Court & High Courts varying depending upon the petitioner is questionable. Since, the PILs and judicial activism in general, is not a matter of right of a petitioner but is the discretion of the court, a great degree of inconsistency has been observed in the same. The courts seem to be more acceptable of the more established and well-structured organisations filing PILs rather than the solo organisations. The attitude has developed over time due to frivolous PILs being filed. However, this can't be an excuse to have a prejudiced mind against some solo organisation or individual approaching the courts genuinely to reinstate the violated rights.

The judiciary has also been hesitant to take strict actions against corruption in judiciary itself. The courts have pro-actively dealt with corruption charges against the executive and the legislature. But have taken no significant step towards dealing with corruption and misdemeanour by judges in the higher judiciary. In the absence of specific legislation about the same and a near impossible impeachment process, the judiciary itself has the power to check such acts. The judicial activism needs to be exercised by judges in order to prepare guidelines. Such checks and balances by the judiciary upon itself through judicial activism will certainly increase the confidence of common people upon the practice of such activisms by the courts.

IV. JUDICIAL ACTIVISM TO JUDICIAL OVERREACH & JUDICIAL RESTRAINT

Judiciary has of late been subjected to the criticism of practising judicial populism in the name of judicial activism. It has been contended often that judiciary uses the tool of judicial activism to appropriate an important position with respect to the other organs of the state in the view of the general public. The separation of power that is hindered by the practice, is looked down upon and criticised by the members of the executive and the legislature frequently and occasionally the questions are raised from within the judiciary as well.

(A) Disturbance of Separation of Powers

The constitution in most democratic countries today, specifically demarcates the functions and associated powers that are granted to the various organs of the state. The principle developed since the early days of polity and has gained acceptance as one of the basic features of a republic. The purpose that it seeks to fulfil is the prevention of consolidation of powers in the

[14] Ibid.

hands of one individual which earlier was the monarch who was at the head of all the three wings. To avert a despotic dictatorial rule, the powers were thus distributed among different institutions.

These institutions are supposed to work independently and a minimal interference is supposed to be ideal. A complete detachment is a near impossible objective. Interestingly, a complete separation is not even pursued as the three organs work as a check upon each other's action and also the inactions.

The doctrine is not mentioned explicitly in the constitution of India as such but the functions are differentiated adequately so as to essentially establish the concept in India. In fact, in the much-celebrated *Raj Narain v. Indira Gandhi* [15]judgement, it was held that separation of powers is a part of the basic structure of the constitution.

Judicial Activism and a specific form of it- Judicial Review disturb this separation. Judicial review also finds no mention in the constitution but has received legitimacy through interpretation. The courts have the power to review the laws passed by the legislature and the actions taken by the executive and can invalidate them for being unconstitutional.

The concept of Judicial Activism seems to be a liberating experience for a free society as it keeps in check the state from infringing upon the rights of any citizen. But it can have serious repercussions as it becomes counterproductive when the judiciary becomes repressive. A judiciary in the name of judicial activism can invade the sphere of the legislature and the executive without having bona fide intentions. Courts can do so for the establishment of an authoritative judiciary which is as damaging as a dictatorial government. It can do so in collusion with the government i.e., the executive, seeking an authoritative regime as was experienced during the 1975 emergency in India. Or, such breaches can be done by some judges merely for the sake of gaining popularity.

The legislature which is an elected body often expresses its dissatisfaction with such powers vested in the judiciary. According to the legislature it is absurd that a law framed by the majority of elected representatives can be struck down by a court which is essentially an undemocratic institution with no representatives of the people. The laws according to them should be those acceptable to the public and not imposed, and the legislature is a body appropriate to decide it as they are responsible to the citizenry. The executive also condemns judicial activism as a trespass over its authority. The executive asserts that the judiciary has no

[15] Raj Narain v. Indira Gandhi, 1972 AIR 1302, 1972 SCR (3) 841

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right to interfere with policy decisions in the garb of checking constitution validity.

Hence, the tussle between the other organs on one side and the judiciary on another over the separation of powers is amply clear. The executive and legislature consider the activism as an impediment in their functioning unnecessarily put up by the judiciary. The judiciary on the other hand presents it as the most noble deed of judicial system to protect the values and ethics of the nation.

(B) Judicial overreach

Judicial overreach is the term used for judicial activism when the court goes beyond all reasonable limits. Judicial overreach happens when the courts intrude into the domain of the legislature & the executive arbitrarily, excessively and repeatedly.

The difference between judicial activism and overreach is minute but the affects they have on society are opposite. The intention in judicial overreach is not bona fide, contrary to the requirement of judicial activism. The overreach hinders the functioning of the institutions of a healthy democracy.

CJ J S Verma had specified, *"Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial adhocism or judicial tyranny."*

The recent striking down of the National Judicial Appointments Commission by the Supreme court was termed by the legal luminaries as high handedness and overreach on part of the judiciary where an act invoking regulations on the judiciary was struck down by judiciary itself even though it was passed through proper procedures in the Parliament.

Judicial overreach breaches many fundamental principles of constitutionality. It obviously violates the separation of powers without any reasonable explanation. It is against the rule of law which states law to be above all. Instead, the court assumes a position above law and employs as per its whims. It also is a blow to the principle of accountability in the democracy. In a democracy, accountability is fixed for all the acts made, policy decisions and the executive action/inaction. But, when the court starts interfering into these spheres, there simply exists no accountability of any sort because courts are not accountable to anyone in their functioning.

The US Supreme court in the *Baker v Carr* [16]judgement had formulated a test for determination of the legitimacy of such judicial interventions. According to it, the matter should have a reasonable cause to intervene and just the non-existence of legal methods to settle it cannot be a reason for the same.

16 Baker v Carr, 369 U.S. 186

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(C) Judicial Restraint

The burgeoning number of cases involving judicial overreach initiated a discussion around the preventive measure of it- judicial restraint. Judicial restraint is the opposite of judicial activism and overreach.

Judicial restraint is a concept that expresses that judges deciding the case will implement self-control while deciding issues brought to them and will respect the extent and scope of powers vested in them.

Judiciary can't be allowed to take over governance & legislation of a nation for the sake of ensuring justice. A balance between such activism and the non-interference is sought without jeopardising the independence of the judiciary. This is achieved through judicial restraint.

Markandey Katju & AK Mathur JJ. had stated in a judgement that judiciary should exercise restraint as intrusion into the legislative and the executive is bound to have a reaction and the independence and powers of the judiciary might be curbed in response by the politicians. The court has also held that the justification that the other two organs are not functioning properly can be used against the judiciary itself as there are cases pending for decades and the legislature might enact a law interfering and imposing the disposal of all such cases within a small-time frame.

Thus, the courts must adhere to judicial restraint. The judiciary has in plethora of cases, followed judicial restraint and refused to indulge in matters that require crossing its assigned sphere.

In the famous *S.R. Bommai Vs. Union of India*[17], the court held that there are matters where much political interest is involved and no judicial review is thus possible, and the judiciary should not interfere. In *Almitra H. Patel Vs. Union of India*[18], the Supreme court denied passing orders to the Delhi Municipal Corporation as to how it should clean Delhi as it was not for the court to decide and it could only ask the body to fulfil its duties that are bestowed upon it by the law. The Supreme court has in many more decisions not interfered in the issues such as creation of services, fixation of salaries, etc. as these were administrative and legislative functions of the government and for them to decide.

The court must not interfere with the governance and policy decisions of a government as the same would imply questioning the political wisdom. The accountability is fixed before the voters for these subjects. The judiciary should only interfere and breach its confines to correct

[17] S.R. Bommai Vs. Union of India, 1994 AIR 1918, 1994 SCC (3) 1

the dilapidated system where gross violation of rights are happening and the basic structure of constitution is compromised. In other cases, the courts should respect the law and use the tools of law for the purpose of justice.

V. CONCLUSION

Judicial activism has been a contentious aspect of the judiciary and much deliberations have been done over its justifiability and the extent till which it's justifiable. The concept has been evolved over time by the courts of law in India. The process is a result of judicial creativity and legal acumen of some of the brilliant judges of the nation. It is a tool in the hands of the judiciary for correction of the issues in society and the system which are adjudged by it to be grossly wrong. It gives the courts the power to implement the changes that it desires to be brought for the betterment of the citizenry.

The critics claim the concept to be a breach of the separation of powers and thus in disagreement with the constitution. While it is true that the concept didn't face the floor of the constituent assembly, it can not be said that the concept is in violation of the spirit of the constitution in any way. Judicial activism tries to compensate for the inaction of the state and keep checks on them, which are both noble ideas, democratic and aligned with the spirit of the constitution. Judicial activism is also alleged of being a non-effective tool as the courts don't have the resources and mandate to implement the same. A law has no value until the people governed by it agree to adhere to it. But, a lack of consensus for the framing of a legislation or bringing a change is not a reason enough to let blatantly wrong practises continue. Moreover, a stand by the Supreme court over such issues certainly helps in shaping the public opinion against them in the future. Judicial activism is certainly a method to ensure justice to the downtrodden and the oppressed who but for such initiatives would be at a disadvantageous position. Judicial activism over the years has helped the judges protect the citizens against the infringement upon their rights and excesses committed by the state.

Despite such great feats, it can't be denied that courts have used judicial activism irresponsibly at times. The concept confers great powers to the courts and makes the executive and the legislature subordinate to the judiciary in certain ways. Judicial overreach is an unconstitutional menace and due to absence of a clear demarcation between activism and overreach, the courts often traverse the limits of reasonability. The courts must respect the separation of powers. It is a difficult situation when any two organs are at loggerheads and try to come over each other. The judges should understand while wielding the powerful discretionary tool that activism can't replace governance and the Parliament and the executive have the responsibility of it and

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are accountable for the same to the ultimate sovereign of the nation i.e. the people of India.

A strong judiciary is an essential of a strong democracy. Judicial activism is the extraordinary power and responsibility that the courts have vested in themselves to fulfil the larger purpose of justice. The courts have justified the mean through the ends they have achieved through it. Judicial activism has helped fight various pressing issues such as bonded labour, conditions of under trials in prison, subjugation of women, homosexuality & LGBTQ+ rights, environmental problems, inaction of institutions, and many more. Thus, there exists no question about the validity of judicial activism. The courts should however be cautious while putting the concept into use. The judges should practise self-discipline and use it for a limited purpose and the interference with the other organs should be reasonable. Judicial activism is the pinnacle of judicial creativity and a delicate subject, therefore, the skill should be used with utmost thoughtfulness so that the sanctity of the system is not defiled.

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