Page 1567 - 1578 **DOI:** *https://doij.org/10.10000/IJLMH.112109*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 5

2021

Judicial Activism in India

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ABSTRACT

Judiciary in India plays an important role to protect the rights of Indian citizen. The Constitution of India has constituted three important organs of the state and defined their powers. Though the Supreme Court of India has some constraint in term of using its power but sometimes it has to cross that limit to fill the vacuum created by the other two organs and to protect the fundamental rights of people. From protecting the rights of women at the workplace, rights of prostitute's children, rights of education to implementing the basic features of sustainable development- the judiciary has come across a long way in terms of 'Judicial Activism' by protecting human rights and the environment. This situation arises when there is no law or there is requirement for interpretation of the law. The judiciary has approached every aspect of human life and proven to be a boon for poor people by shifting from the principle of locus standi to PIL. This paper tries to find the evolving dimensions of judicial activism through various constitutional provisions and case laws.

I. INTRODUCTION

The three organs of the government- legislature, executive and judiciary have been created by the constitution to achieve the meticulously articulated goals as enshrined under the Preamble of the Indian constitution. It is the prime obligation of the state to ensure justice, liberty, equality, and fraternity; and implementing the Directive Principles of State Policy while ensuring the fundamental rights of each citizen as given in Part III of the Indian constitution. The constitution has given immanent powers to the judiciary of reviewing the state's action in order to inhibit the state from getting away with its responsibilities. The laws or policies made by legislatures are constantly failing due to the inaction of the executive in implementing these schemes and laws. Due to this dereliction, when the executive or the legislature endangers the lives of a vulnerable group of the society, the judiciary interferes to give commandment for the rights of an individual in the form of judicial activism. Moreover, when interpreting the law or legislation does not tend to serve the objective of justice, the court frames the law or guidelines for the same. The guidelines given in the case of ***Vishakha* v. *State of Rajasthan***[2] by the apex court is one of its examples. When a certain vacuum is created by the legislation and also the

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[2] AIR 1997 SC 3011.

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state fails to enact any law, the judiciary tries to fill the gap created by inaction, corruption, and negligence among two important organs- legislature and executive. Judiciary at this time has to expand its ambit to frame guidelines or policies which can be seen in the form of creativity of judiciary, judge's dynamism, social transformation, or cultural and social revolution. The lapse on the part of legislature and executive makes the concept of Judicial Activism incumbent.

II. JUDICIAL ACTIVISM DEFINITION

The ambit of judicial activism is so vast that there is no precise definition of it. It has no statutory definition as every jurist or scholar defines it in a different manner. In the Black Law Dictionary, it has been defined as a creed of making a judicial decision where judges while making their decisions considers their personal opinion with other factors about public policy. Judicial activism can also be broadly defined as the hypothesis of the active role played by the judiciary.[3] Nowadays, judicial activism can be interpreted as a remedy of irregularities in legislature and executive, which is done through the power vested by the Indian constitution to the judiciary. It is often said that judicial activism is something beyond the traditional role of judges where they act as individual policymaker on behalf of the people of the country for the welfare of them. It can be seen in the form of- declaring any law unconstitutional, or overruling the precedents, or in the form of interpretation of the legislation.

The act of judicial activism for someone may be judicial inactiveness for others and therefore the subject is always open for debate. The idea of judicial activism is contrary to that of 'Judicial Restraint' but both of them describe the assertiveness of the judiciary. Judicial activism is often called 'judicial absolutism', 'judicial supremacy', 'judicial liberalism', and 'judicial anarchy' etc. It can be said that the concept of judicial activism is open for interpretation as it has a different meaning for different individuals.

III. CONSTITUTIONAL FRAMEWORK OF JUDICIAL ACTIVISM

Judgements given by the court have primarily two sources- judicial precedents and legislation enacted by parliament. The concept of judicial activism takes place when the judiciary is given the power to review the act done by states. These power are drawn from the constitution of India which empower them to play an effective task by asserting themselves.

Article 13 r/w article 32 for Supreme Court and article 226 for high court allow the higher

[3] Chaterji Susanta, "'*For Public Administration' Is judicial activism really deterrent to legislative anarchy and executive tyranny? ", The Administrator*, Vol XLII, April-June 1997, p9.

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judiciary to declare any law or executive action void or unconstitutional if it is found to be in contravention of the fundamental rights given under Part III of the Indian constitution. In the case of ***Fertilizer Kamgar Union* v. *UOI,***[4] it was held that power given under article 32 to the Supreme Court is part of the basic structure doctrine as Part III of the Indian constitution would be of no use if there is no antidote available for the enforcement of fundamental rights. Article 32 has been progressively interpreted by the Supreme Court as writ under this article can also be passed against the private entity for the enforcement of articles 17, 23 and 24 and order can also be passed against a private individual if he is performing the public function.[5]

The Supreme Court can also grant Special Leave Petition (SLP) under article 136 of the constitution to appeal any judgement from the lower court or tribunal court. In the case of ***UOI* v. *C Damani & Co.,***[6] the court held that judgement by the Supreme Court under article 136 can be discretionary base on the principle of justice, equity, and good conscience. However, this discretionary power should be used with due care, caution and only in exceptional cases.[7] The right under article 136 is not a right of a party to appeal but it is a right available to the judiciary on the foundation of discretionary power and call of duty for annihilating injustice.[8]

Further, in the case of ***Rupa Ashok Hurra* v. *Ashok Hurra,***[9] the concept of the curative petition was invented by the apex court while discussing whether the aggrieved person has any right for some relief even after the final verdict given by the Supreme Court.

The most significant provision regarding judicial activism in the Indian constitution is article 142 which empowers the apex court to make an order for doing complete justice in the matter at hand. The recent example of such an order is the judgement delivered in the noted case of ***M Siddiq (D) Thr Lrs* v. *Mahant Suresh Das & Ors***[10] (also known as Ram Janmabhoomi/Babri Masjid case) where the Supreme court overruled the judgement given by Allahabad High court (2010) under article 142 of the Indian constitution. In India, the power to make laws originally lies with the Parliament but the Supreme court has the power to legislate through the power vested by article 142 of the Indian constitution. But it should be noted that this article can be invoked only when there is a vacuum in law, or the order is in the public interest.[11] The order will remain until the parliament made a law regarding the same.

[4] AIR 1981 SC 344.
[5] People's Union for Democratic Rights v. UOI, AIR 1982 SC 1473.
[6] AIR 1980 SC 1149.
[7] Pritam Singh v. The State, AIR 1950 SC 169.
[8] Tirupati Balaji Developers Pvt. Ltd. v. State of Bihar, AIR 1997 SC 3011.
[9] AIR 2002 SC 1771.
[10] Civil Appeal Nos 10866-10867 of 2010.
[11] Kalyan Chandra Sarkar v. Rajesh Ranjan, AIR 2005 SC 972.

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This shows us that the judiciary construes the fact that parliament is still the Supreme body to make laws. This scenario can be witnessed in the case of ***Vishakha* v. *State of Rajasthan*[12]** in which guidelines were passed by the Supreme Court for prevention of sexual harassment cases under article 32 r/w articles 141 and 142. These guidelines issued in 1997 were replaced by the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act of 2013.

IV. CONSTITUTIONAL ASSEMBLY DEBATES AND JUDICIAL ACTIVISM

Dr B.R. Ambedkar, Chairman of the Drafting Committee of Indian Constituent Assembly, depicted judicial review as the "***heart of the Constitution***". But constituent assembly debates shows that drafting members wanted the scope of judicial review to be limited. The Judicial review can be in a technocratic model where the role of judges is of technocrats to held law invalid if it *ultra vires* the provisions of the constitution related to powers of the legislature. The other model is of liberal interpretation where provisions are interpreted dynamically through liberal interpretation in the light of constitutional spirit.

Thousands of printed pages on constituent assembly debates throws the light on the genesis of ideas laying constitutional provisions. Much reliance on the historical material is not played by the courts to interpret the provisions of the constitution. In ***Ashwini Kumar* v. *Arabinda Bose***[13], the apex court observed that the Drafting Committee reports or Constituent Assembly debates can be emphasised only when there is some ambiguity related to the concerned provision. The reason for not relying on much is that speech made during the debate is only indicative and is subjective of the intention of the speaker where the mental idea behind the majority vote is not articulated in the assembly debates. Where there is two interpretation of the same thing then the court can rely on historical materials.[14] Justice VR Krishna Iyer in ***Samsher Singh v. State of Punjab*[15]** decided that President is the constitutional head of the state by referring to Constituent Assembly debates.

The power of judicial review by the court was tried to be curtailed through the 1st, 4th, and 17th amendment acts. The question was raised in ***Shankari Prasad v. UOI*[16]** and ***Sajjan Singh v. State of Rajasthan*[17]** in which the court held that constituent power is not subjected to any

[12] *Supra* note 2.
[13] AIR 1952 SC369.
[14] See FAZL ALI, J., in SP Gupta v. UOI, AIR 1982 SC 304-14.
[15] AIR 1974 Sc 2192.
[16] AIR 1951 SC 458.
[17] AIR 1965 SC 845.

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restriction. However, in the case of ***Golak Nath v. State of Punjab,***[18] it was held that parliament cannot amend Part III of the Indian Constitution. In the landmark judgement of ***Kesavananda Bharti v. State of Kerala***[19], the 13 judges bench overruled the Golak Nath case and held that legislature can amend the Part III of the constitution, but the basic structure of the constitution should remain intact.

In the case of ***SP Sampath Kumar v. UOI***[20], the apex court upheld the validity of article 323A which is taking away the right of power of judicial review by High Courts but in the case of ***L Chandra Kumar v. Union of India,***[21] this decision was overruled as it observed that power to judicial review is part of the basic structure of the constitution.

V. JUDICIAL ACTIVISM: A SHIFT FROM 'LOCUS STANDI' TO PIL

The Supreme Court of India had determined the principle of *locus standi* so as to adjudicate whether the person filing the petition has the capacity or right to appear in a court or to bring an action. This principle is generally considered to protect the judiciary from spurious or sham petitions. Petitioners had to show that it is them who are adversely affected by impugned action. The exception to this case is the writ of *habeas corpus* in which a petition can be filed by any person to liberate the aggrieved person from unlawful detention as there might be a situation where a person is not in a condition to move to the court.

Access to justice has been held as a fundamental right of people. Many times, it has been witnessed court taking *Suo moto* cognizance merely based on epistolary jurisdiction about various violations such as human rights violation.[22] The court has looked into the matter of public interest.

Although the traces of judicial activism in India can be traced in the judgement of 1893 by Justice Mahmood of Allahabad High court in the matter where under trial person could not afford a lawyer and held that precondition to be heard is when "somebody speaks".[23] But in independent India, the cradle for judicial activism can be found from an emergency era when Justice PN Bhagwati and VR Krishna Iyer initiate the phenomenon of Public Interest Litigation (PIL). In ***SP Gupta* v. *President Of India & Ors.***[24]**,** Justice Bhagwati propounded the need for new innovative methods to provide justice to a large section of the society. By this move, the

[18] AIR 1967 SC 1643.
[19] AIR 1973 SC 1461.
[20] AIR 1987 SC 386.
[21] AIR 1997 SC 1125.
[22] Imtiaz Ahmad v. State of Uttar Pradesh, AIR 2012 SC 642.
[23] "Evolution & Growth Of Judicial Activism In India", Shodhganga p79, Reviewed at http://shodhganga.inflibnet.ac.in/bitstream/10603/32340/8/09_chapter%203.pdf
[24] AIR 1982 SC 149.

higher judiciary has liberated themselves from the rule of *locus standi* and has given birth to the concept of PIL. Following account have been considered while shifting from the principle of *locus standi* to PIL:

i. to empower the judiciary to reach the most vulnerable section of the society i.e., marginalised poor people who have been continuously denied their fundamental rights,
ii. to empower people to file the petition of common concern which can arise due to inefficiency of government or executive, and
iii. to amplify the participation of the general public in the judicial or constitutional adjudication process.

According to SP Sathe, the conventional paradigm of the judicial process has to be changed by a new paradigm that is more polycentric in nature.[25] The conventional paradigm was based on the principle of *res judicata* i.e., was binding *in personam* but the judgement in PIL is also binding on other persons.

In ***Sheela Barse* v. *UOI***[26], the apex court said that the intention of the court while passing under PIL should be to enforce the constitution and implement rule of law. This new innovation compulsion is because of the constitutional promise of transforming the society into an egalitarian welfare state. In the case of ***Hussainara Khatoon (I)* v. *State of Bihar***[27] which is also one of the landmark judgement, a writ petition was filed highlighting the plight of prisoners who have not even charged with an offence. The Supreme court held that speedy trial is the fundamental right of the person and direct the state to provide free legal aid to the undertrials prisoners.

However, many times the right to file PILs are abused by people. PIL should not be allowed for administrating justice and creating a nuisance.[28] The recent example of one such PIL is where the Apex Court dismissed the PIL filed by Waseem Rizvi (former chief of the Shia Waqf Board), seeking deletion of certain verses from the Quran (Holy book of Muslims) and the court termed it as 'frivolous' petition while imposing a fine of ₹50,000.[29]

VI. FUNDAMENTAL RIGHTS JURISPRUDENCE VIS-À-VIS JUDICIAL ACTIVISM

Fundamental rights jurisprudence has been developed by the judiciary by interpreting Article

[25] S.P. Sathe, Judicial Activism in India (Sixth Indian Impression, OUP 2010).
[26] (1988) 4 SCC 226.
[27] AIR 1979 SC 1369.
[28] Common Cause (A Regd. Society) v. Union Of India, AIR 2008 SC 2116.
[29] Syed Waseem Rizvi v. Union of India, https://www.barandbench.com/news/litigation/supreme-court-dismisses-plea-seeking-deletion-certain-verses-quran.

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21 i.e., right to life and personal liberty liberally. In ***M.H. Hoskot* v. *State of Maharashtra***[30], the rights of prisoners were recognised by the Apex court to have access to legal facilities and court. Displaying judicial activism rights like the right to compensation[31], the right to meet friends and family members[32] and the right to mental privacy[33] have been held as fundamental rights by the Supreme Court. In ***Gaurav Jain* v. *UOI***[34], the apex court intervened to direct the government for rehabilitating prostitute's children. Such children should not be allowed to live in an undesirable atmosphere with their mothers and hence requires rehabilitation. In the case of ***Bachpan Bachao Andolan* v. *Union of India***[35]**,** the apex court prohibit the employment of children in circuses to protect the fundamental right of education and directed the government to provide rehabilitation shelter to these children after raiding circuses till such children attain the age of 18 years. In J.P. Unnikrishnan v. State of Andhra Pradesh[36], it was held by the Supreme court that Article 21 also include the right to education which should be read with Directive Principles of State Policy given in Part IV of the Indian Constitution. The cumulative effect of article 21, article 38, 39(a) & (b), and article 41 and 42 forced the government to provide basic education to all its citizens.[37] There are many other things like the right to a healthy environment, implementing the basic features of sustainable development, etc. which have been the result of judicial activism as these rights have not been provided in the Indian Constitution explicitly.

VII. JUDICIAL ACTIVISM: A JUDICIAL INTERVENTION?

Many times, the judiciary itself has been accused of judicial intervention by the parliament and intellectuals. In the case of ***Swaraj Abhiyan-(I)* v. *UOI & Ors*[38].**, the Supreme Court directed the Agricultural Ministry to set up a National Disaster Mitigation Fund within the time frame of three months. However, the then Finance Minister Arun Jaitley expressed his concern over the judicial overreach and creating the third fund other than NDRF and SDRF while keeping in mind the appropriation bill is being passed and there is also a budget constraint in setting up of such fund.[39] Even after its own decision that BCCI (Board for the Control of Cricket in

[30] (1978) 3 SCC 544.
[31] Rudal Shah v. State of Bihar, AIR 1983 SC 1086.
[32] Francis Coralie v. Union Territory of Delhi, AIR 1981 SC 746.
[33] Selvi v. State of Karnataka, (2010) 7 SCC 263.
[34] AIR 1990 SC 292.
[35] AIR 2011 SC 3361.
[36] AIR 1993 SC 2178.
[37] Mohini Jain v. State of Karnataka, AIR 1992 SC 1858.
[38] AIR 2016 SC 2929.
[39] Five cases of judicial activism that has put govt. in a spot, Business Standard, Mumbai May 17, 2016, available at https://www.business-standard.com/article/current-affairs/five-cases-of-judicial-activism-that-has-put-govt-in-a-spot-116051700587_1.html.

India) is a private body another surprising opinion of the apex court was when it propounded that the court is trying its best to improve the BCCI.[40]

Another example is of ***NJAC judgement***[41] in which the Supreme court by 4:1 held the 99th Constitutional Amendment void as violating judicial independence. The NJAC was brought to end the opacity in judicial appointment through a two-and-a-half-decade collegium system. In many liberal democracies, judges do not have the power to appoint judges. The then-Attorney General of India, Mukul Rohatgi called the judgement 'flawed' as the act was unanimously passed by the parliament and have received the full support of the people in the largest democracy of the world. In the NJAC commission which was supposed to have an equal member of the judiciary and non- judiciary members the question arises hoe would it have compromised the judicial independence. This judgement delivered was one of the most serious face-offs between judiciary and legislature as the constitution envisaged the principle of separation of power. In ***IR Coelho* v. *State of Tamil Nadu***[42], the court reemphasised that separation of power is essential to prevent tyranny and preserving liberty. However, it should be noted that the apex court propounded the need for an update in the present collegium system and has welcomed the full-fledged debate on the same.

There is no oppugn that the judiciary should self-restraint itself. In the case of ***Divisional Manager, Aravalli Golf Course v. Chander Haas***[43], the same view was observed by the Supreme Court that judges should not cross their limit and must not try to take over the government by running it. The separation of powers must be respected and each organ of the State i.e., legislature, executive and judiciary must not intrude in each other's domain and should respect each other. The court warned that 'Judicial Activism' should not become 'Judicial Adventurism" and observed that 'judicial intervention' or 'judicial encroachment' or 'judicial activism' is often justified by saying that legislature and executive are not doing their job properly so the same can be said about the judiciary as cases are still pending in various courts for half-a-century. The courts should restrain themselves in order to complement the balance of power among the three organs of the State.

VIII. PROS OF JUDICIAL ACTIVISM

Judicial activism puts some sort of restriction on the enjoyment of power by different governmental organs. And one of the key aspects of the concept of judicial activism is creativity

[40] *Ibid*.
[41] Supreme Court Advocates-on-Record-Association v. Union of India, (2016) 5 SCC 1.
[42] AIR 2007 SC 81.
[43] (2008) 1 SCC 683.

and innovation in the field of law. Such practices work in a way to bring about a balance in terms of law where the law in itself purports to imbalances. Moreover, it results in speedy redressal of public grievances by applying judicial wisdom in order to put a check on the misuse of legitimate power given to the government.

IX. CONS OF JUDICIAL ACTIVISM

Sometimes, judicial activism violates the constitutional provision through the act of overriding legislation under the process of judicial review. Judicial activism can be influenced by the judge's own interest or an ideology under which they deliver such judgements which are not free from the vices of biasness. Moreover, under the influence of judicial activism, courts may end up disrupting the legislative process which erodes the very basis of any democratic country and also, the court's activism may result in putting a severe restriction on the law-making powers of the legislature.

X. CONCLUSION

Judiciary in India has laid down a strong foundation of the constitution. The ambit of judicial activism is so vast that there is no precise definition of it. The powers for judicial activism or review are drawn from the constitution of India which empower them to play an effective task by asserting themselves. The Supreme Court of India had determined the principle of *locus standi* so as to adjudicate whether the person filing the petition has the capacity or right to appear in a court but by interpreting the law liberally and dynamically judiciary has approached every aspect of human life and proven to be a boon for poor people by shifting from the principle of *locus standi* to PIL. However, it is an important point to note that when the judiciary become over-enthusiastic and cross its line it can create repercussions. Therefore, the principle of 'Separation of Power' must be respected. Judicial restraint is a complement to the separation of power among three organs of the state. Judicial restraint fosters equality among different branches while protecting the independence of the judiciary. Judiciary should not override the functions of the legislature as neither they have any resources nor any expertise in performing these functions. The role of the judiciary is to the interpretation of legislation and serve the people of the country to maintain the welfare society and not making the law itself. While being active, the court must remember to maintain the balance of power.

However, it should be noted that judicial activism has given people hope for justice. The judicial activism must be accompanied by the intention to serve people. Sometimes, it is difficult to interpret the laws and the main reason which forces the court to perpetrate judicial activism is due to the inaction and insufficiency of the legislature and executive in

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implementing schemes and laws. Therefore, to safeguard the constitutional values and the issues described, the existence of judicial activism is necessary.

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