



## JUDICIAL ACTIVISM IN INDIA

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### **ABSTRACT:**

*The Indian Constitution while recognizing the thesis of separation of powers envisages a tripartite system of Legislature, Executive and Judiciary and it is said that for an efficient functioning of the government it is necessary that each of these organs should act within their own sphere. The judiciary embraces a dynamic part under the Indian Constitution. Judiciary at times plays an active role during the process of dissemination of justice. When the judiciary steps over the line of power given to it, in the name of judicial activism, it becomes judicial overreach. Even though, the concept of judicial activism persists before years the recent development we have witnessed in the concept of judicial activism is tremendous. The concept of 'public interest litigation' or 'social interest litigation' is considered to be the corner stone of judicial activism in India. The article enumerates evolution of judicial activism in India, landmark judgments in which opinion of the Judges created a huge impact among the policy makers and the society at large and public interest litigations encompassed with judicial activism. It further accentuates the measures that could be adopted in order to avoid incongruities between three organs of the Indian democratic system through the medium of judicial activism.*

### **INTRODUCTION- DEFINING THE UNDEFINED:**

The term 'Judicial Activism' has not been defined anywhere in the Indian Constitution or in any statute. In Black's Law Dictionary Judicial Activism is defined as "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find Constitutional violations and are willing to ignore precedent". The theory of separation of powers enunciates that the edifice of any democratic government rests on three pillars – the legislature, executive and judiciary. Under the Indian Constitution, the prime responsibility of the state is to secure justice, liberty, equality and fraternity in the country, which is envisaged in the preamble of the Constitution itself. The state is under the obligation to protect the fundamental rights of each individual and implement the Directive Principles of State Policy. In order to hamper the state from escaping its responsibilities, the Indian Constitution has conferred inherent powers, of reviewing the state's action, on the Courts. In these circumstances, the Indian judiciary has been considered as the sentinel of the Constitution. Even though the judiciary acts as a savior of the Indian Constitution, indubitably the law-making power is vested within the legislature and implementing those laws vest with the executive. Therefore, for the welfare of the nation, it is essential to note that all three wings of the state must function coherently and with harmony.

Judicial activism mainly deals with the precedents that are pronounced by the judges who take into account the spirit of the law along with the changing times. In the arena of judicial activism, Judges play an active role in rectifying any unfairness especially when the other established bodies are tenuous. The



scintilla of judicial activism in India was instigated due to the qualitative and alluring public interest litigations filed before the constitutional Courts of India.

### **ORIGIN AND EVOLUTION OF JUDICIAL ACTIVISM:**

The label 'Judicial Activism' was introduced by Arthur Schlesinger Jr. in an article 'The Supreme Court: 1947' in a January 1947 Fortune Magazine. The postulation of judicial activism found its roots in the English concepts of "equity" and "natural rights". On American soil, the first landmark case in this regard was the case of *Marbury v. Madison*.<sup>1</sup> In the instant case, the U.S. Supreme Court manifested the principle of judicial review by which the federal Courts can declare the unsavory acts done by the legislature and executive unconstitutional. This is the pioneer case of judicial activism at the transnational level.

The Provisions of the Indian Constitution come in consonance with Judiciary while taking important decisions in most of the sensational matters which are related to public policy. Article 13 of the Indian Constitution enables the court to declare any law unconstitutional if it violates any fundamental rights enshrined in the Constitution. Any person whose fundamental rights have been infringed can surmount his rights by approaching Supreme Court under Article 32 or any High Court under Article 226 by invoking the writ jurisdiction. The case of *Hussainara Khatoon (I) vs. State of Bihar*,<sup>2</sup> is one of the landmark judgments that augment the concept of judicial activism in

India. In the instant case, an article published in one of the prominent newspapers stated the repercussions faced by the under-trial prisoners who were detained in prisons even after the completion of their maximum tenure of imprisonment without even being charged for the offense. A writ petition was filed by an advocate before the Supreme Court of India. The Court accepted the writ petition as it involves public interest and held that the right to the speedy trial is a fundamental right guaranteed under Article 21 of the Indian constitution. The Court directed the state to provide free legal aid facilities to the under-trial prisoners so that their right of '*audi alteram partem*' can be duly exercised and they would get bail or be released from the custody.

### **VARIOUS PARADIGM OF JUDICIAL ACTIVISM:**

The concept of judicial activism was well known in India only after the proclamation of emergency in the year 1975. Many landmark judgments were also given by our courts after this period, which resulted in *sui generis* changes in India. The upcoming are the few exemplars of judicial activism in India. The Hon'ble Supreme Court while hearing the *pro bono* litigation filed by the petitioner in the case of *Shyam Narayan Chouskey vs. Union of India*,<sup>3</sup> reversed its earlier decision in the same case and made playing of national anthem in cinema halls before the screening of movies optional. In *Arjun Gopal vs. Union of India*,<sup>4</sup> a writ petition was filed in order to curb the air pollution due to the bursting of crackers at Delhi- the National Capital Region. The Court in this case applied precautionary principle and laid down rules and regulations on the bursting of crackers

<sup>1</sup>5 U.S. (1 Cranch) 137, 177-79 (1803) (federal law).

<sup>2</sup>AIR 1979 SC 1360.

<sup>3</sup> (2018) 2 SCC 574

<sup>4</sup> 2018 SCC OnLine SC 2118.



across the country. The Supreme Court in *Subash Kashinath vs. State of Maharashtra*,<sup>5</sup> upheld the amendment which inserted section 18-A in The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989 which took a serious view against those persons who transgress the act which was enacted in favour of SCs and STs. In *Rajesh Sharma vs. State of Uttar Pradesh*<sup>6</sup> the Court stated that the family members of the husband are being roped into the proceedings without proper ground and Section 498A of IPC was being misused. Therefore the Court held that only after a detailed inquiry, family member of the husband can be accused.<sup>7</sup> In the year 2006, the Indian Young Lawyers Association filed a public interest litigation before the Supreme Court challenging the Sabrimala Temple's custom of abstaining women between the age group of 10-50 from entering the temple. In the year 2017, the Court ruled that by the majority opinion of 4:1, refraining women from entering into the temple violates their fundamental rights and struck down Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry Rules, 1965) as unconstitutional. Justice Indu Malhotra in her dissenting opinion articulated that in a secular polity the Court shall not interfere in the religious practices and beliefs of the people and it must be decided by those who are subservient to the religion. This Judgment had created a large amount of confusion, disturbance and caused law and order issues in the state of Kerala.<sup>8</sup> Justice R. Mahadevan in a writ petition filed by S. Rajarathinam, a 70-year-old retired Commercial Taxes Officer from

Tuticorin district mandated that every student in Tamil Nadu must study Thirukkural.

### **JUDICIAL ACTIVISM AND PUBLIC INTEREST LITIGATION:**

Public interest litigation emerged as an innovative and powerful mechanism in the Indian Judiciary. The term 'Public Interest Litigation', emphasizes those litigations that are filed for protecting the public interest and socially disadvantaged parties. Public interest litigation is an armament that has to be used with great care and caution. Judiciary has to watch coherently the hideous private malice, vested interest and publicity-seeking is not lurking behind the beautiful veil of public interest litigation. If Courts find any such petitions it must be dismissed at the portal with exemplary costs.

In *Delhi Metropolitan Workers Union vs. Municipal Corporation of Delhi*,<sup>9</sup> the Court held that the expression 'Public Interest' means the interest in which public or some interest by which their legal rights or liabilities are affected. Public interest litigation was begun in India at the end of 1970s and came into full bloom in the 1980s. Erudite of the Indian legal system, Justice V. R. Krishna Iyer and Justice P.N. Bhagwati gave a new definition to PIL through their landmark Judgments. The rule of "*locus standi*" has been considerably relaxed by the reform of public interest litigation and allows any person who is truly concerned about the welfare of the public can initiate a petition in the name of public interest litigation. The case of *Kuttysankaran Nair vs. Kumaran Nair*,<sup>10</sup> is an appeal against acquittal filed

<sup>5</sup>(2018) SCC Online (SC) 243.

<sup>6</sup>2017 SCC OnLine SC 821.

<sup>7</sup> Indian Young Lawyers Association vs The State of Kerala, 2018 SCC OnLine SC 1690.

<sup>8</sup> S. Rajarathinam vs Secretary to the Government, 2016 SCC OnLine Mad 2373.

<sup>9</sup>AIR 2001 Delhi 68.

<sup>10</sup>AIR 1965 Ker 161.



before the Hon'ble High Court of Kerala. In the instant case, the appellant was a manager in an educational institution, it was pleaded that the respondents distributed a leaflet that defamed the appellant. The Court acquitted the respondents stating that the imputation made against the appellant falls within the exceptions of section 499 of IPC and proved to be true. The Court held that the respondents intention was indisputable and for the benefit of a group of people. Therefore, the Court further articulated that any subject may become one involving public interest if the public or a section of the public becomes interested in it.

Public interest litigation which has now transpired as a cardinal gimmick in the subsistence of justice should not be publicity interest litigation or private interest litigation or politics interest litigation. It is the duty of the judge to find out whether the petitioner has approached the Court with a clean hand and mind. The person seeking the remedy in the name of public interest litigation must care for the general public. When there exists a shred of evidence to show that a petition styled as public interest litigation is nothing but a camouflage to foster personal disputes, the said petition is to be thrown out at the threshold. T.M.A. Pai Foundation vs. State of Karnataka,<sup>11</sup> is a landmark judgment which questioned Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, which laid down guidelines put forth by the government pertaining to the admissions in private colleges. The hon'ble Apex Court held that the right conferred on the minorities by Article 30 (1) of the Indian Constitution is not absolute and it has to be read subject to Article 29 (2) and other fundamental rights.

<sup>11</sup> AIR 2003 SC 355.

### JUDICIAL ACTIVISM: IMPACT ON INDIAN SOCIETY:

The Constitution of India did not articulate the judiciary to be an exclusive law-making body or a substitute for the other two organs. The law-making power and implementing the policies are considered to be the exclusive domain of the legislature and executive respectively. Judiciary shall not enter into the domain of other organs; it makes and implements laws on their own whims and fancies.

The novel tool of judicial activism has turned a new leaf by appreciating letters as writ petitions under Articles 226 and 32 of the Indian Constitution and the same is legally termed as epistolary jurisdiction. Epistolary jurisdiction comes into force under the following circumstances:-

- i) when the letter is addressed by an aggrieved person
- ii) if that letter is written by an individual who is genuinely interested in public and societal well-being or
- iii) by societal activists for enforcement of the Constitutional or the legal rights of a person under incarceration or due to poverty, disability or socially or economically disadvantaged position find it difficult to approach the Court for redress.

In 1967 the Supreme Court in Golakh Nath vs. State of Punjab,<sup>12</sup> held that the essential rights in part-III of the Indian Constitution could not be revised, despite the fact that there was no such confinement in Article 368 which just required a determination of 2/3<sup>rd</sup> greater parts in both houses of Parliament.

<sup>12</sup> AIR 1967 SC 1643.



Consequently, in *Keshavanandha Bharti vs. State of Kerala*,<sup>13</sup> a 13 judge bench of the Supreme Court overruled the *Golaknath* case yet held that the essential structure of the Constitution could not be changed. These two cases are considered to be significant cases with regard to public interest litigation.

Judicial activism plays a major role in enforcing the provisions pertaining to environmental laws for the welfare of the general public. In *M.C. Mehta vs. Union of India*,<sup>14</sup> the Supreme Court held that air pollution caused by vehicular emissions violates the right to life under Article 21 and directed all commercial vehicles operating in Delhi to shift to CNG fuel mode for safeguarding the health of the people. The Supreme Court also delivered a Historic Judgment in the year 1986, to protect the world-famous marble mausoleum, Taj Mahal, from deterioration due to acid rain caused by the emission of sulphur dioxide from the industrial conglomerate. The Hon'ble Apex Court in this case directed such industries to relocate without affecting the livelihood of the employees<sup>15</sup>. In *Church of God (Full Gospel) in India vs. KKR Majestic Colony Welfare Association*,<sup>16</sup> the Supreme Court observed that noise pollution leads to violation of the right to life and personal liberty of an individual which is encompassed in Article 21 of the Indian Constitution. The Court further held that rights enshrined in Articles 25 and 26 of the Indian Constitution also include 'public order, morality and health' and every individual has a right to practice his religion but it must not affect the environmental

peace. If any such case occurs then restriction regarding the religious practices is justified.

#### Legal aid:

It is also a novel reform that had been developed in the recent past. Justice V.R. Krishna Iyer and Justice P.N. Bhagwati had always been the guardian angels of the people who are socially neglected, poor and underprivileged sections of society. They have passed catena of Judgments dealing with the common man's rights and liberties. Justice P.N. Bhagwati in one such judgment, *People's Union for Democratic Rights vs. Union of India*,<sup>17</sup> while emphasizing the nature of public interest litigation articulated that "a strategic arm of the legal aid movement which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation." Legal aid is said to be a boon to the common and needy people whose legal rights would be denied otherwise if they fail to approach the Court of law. Section 2(1)(c) of the Legal Services Authorities Act, 1987 deals with legal services by providing free and competent judicial help to the weaker sections of society. The following are a few provisions pertaining to legal aid. Article 39-A of the Indian Constitution envisages free legal aid to the poor. Section 304 of the Criminal Procedure Code also deals with providing legal aid to the accused at state expense.

<sup>13</sup> (1973) 4 SCC 225.

<sup>14</sup> AIR 1987 965.

<sup>15</sup> *M.C. Mehta (Taj Trapezium case) v. Union of India*, (1997) 2 SCC 353.

<sup>16</sup> AIR 2000 SC 2773.

<sup>17</sup> AIR 1982 1473.



### **NOVEL DEVELOPMENTS IN JUDICIAL ACTIVISM:**

In the year 2020, the Hon'ble Apex Court of India took *suo moto* cognizance of the controversial tweets posted by the senior Advocate Mr. Prasanth Bhushan and levied a penalty of Rs. 1 for 'scandalising the Court'. This created havoc in the Indian judiciary and the hon'ble judges, in this case, set a precedent that no person shall defame the Indian judicial system.<sup>18</sup>

In the recent precedent regarding National Eligibility Entrance Test (NEET) the Hon'ble Supreme Court while hearing the plea of two students who were handed with different series of question papers and answer sheets, stayed the decision of the High Court of Bombay to conduct fresh exams for the two petitioners and held that future of 16 lakhs students cannot be held stake and directed the National Testing Authority (NTA) to take a further decision in favour of those students.<sup>19</sup>

#### **Modus operandi to judicial activism:**

The concept of Judicial Activism is often subjected to criticism; it is because of the superseding power exhibited by the Judiciary at times. In order to exalt the legal system and

to act in good conscience by delivering virtuous precedents for the aggrieved persons, Court must be clear and precise with the nuances of the case. Therefore, the Court may adopt the system of appointing amicus curiae in order to adjudicate the matter in a proper and fair manner.

It is an important point to be considered that an activist judge is an answer to irresponsible law suits. For instance, in this COVID-era, the Courts entered into the virtual world and the quantity of the litigations has increased, it becomes the duty of the judges to perform in an activist manner in order to dodge the frivolous litigations and expedite the process of long-pending suit and proceedings.

#### **JUDGING THE JUDGES:**

Judicial Activism aids in protecting the subjects from the despotism of the executive. Despite the criticism, there can be no denial of fact that the activist precedents have made a far-reaching impact and some of them have been watershed in the area of human rights, protection of ecology, and rights of victims of crime. <sup>20</sup>Chief Minister of Andhra Pradesh, Y.S. Jagan Mohan Reddy wrote a letter to the

<sup>18</sup> Legal Correspondent, *Contempt case: Prashant Bhushan Pays Rs. 1 fine, says review petition being filed*, The Hindu, (Dec 25, 2021, 6.10 P.M), <https://www.thehindu.com/news/national/contempt-case-prashant-bhushan-pays-1-fine-says-review-petition-being-filed/article32598787.ece>.

<sup>19</sup> Kanchan Chaudhari, *Bombay HC orders special NEET exam for 2 students after invigilators goofed up*, Hindustan Times, ( Dec 25, 2021, 6.18 P.M), <https://www.hindustantimes.com/education/competitive-exams/bombay-hc-orders-special-neet-exam-for-2-students-after-invigilators-goofed-up-101634812466311.html>.

<sup>20</sup> Legal Correspondent, *Jagan Mohan Reddy vs judges- Supreme Court to hear separate pleas on November 16*, The Hindu, ( Dec 25, 2021, 6.18 P.M), <https://www.thehindu.com/news/national/supreme-court-to-hear-separate-pleas-against-jagan-on-november-16/article33102831.ece>.



Chief justice of India accusing a sitting Judge of the Supreme Court of judicial impropriety and corruption. Articles 121 and 211 of the Indian Constitution enunciate that conduct of the judges of High Courts or Supreme Court cannot be questioned in the parliament or state legislature except in case of impeachment procedures. Even though, the Chief Minister of Andhra Pradesh had not criticized the conduct of the judges in the State Legislature, he made the aspersions publicly which would amount to contempt of Court. Thus, Articles 121 and 211 of the Indian Constitution provide immunity to the judges.

In *C. Ravichandran Iyer vs. Justice A.M. Bhattacharjee*,<sup>21</sup> in a corruption charge levied against the Judge of the Supreme Court, the Court set up an in-house proceeding and asked the judge to resign from the post till he proves himself virtuous. The CJI should set up a credible inquiry committee. This will enrich the reputation of the judiciary, oust mistruths, and replenish the image of the judge concerned.

### CONCLUSION:

Even though, the role played by the activist judges can be considered as a panacea for the up-liftment of the poor, socially deprived and ignored masses of the people, Judges do not have the power of the sword to eradicate the conflicting and surreptitious legislations. The complication arises when the judge tries to invade into the boundary line of other domains which are not apportioned for them. When an unprecedented case has aroused and to control such a situation an extraordinary power must be used by the

judicial activists. The Judge should maintain a tab on their actions because overuse of the power may diminish its standard which will result in a clashing outcome. The balancing of judicial activism without intruding into other wings is also the duty of the judges. Thus the Apex Court should draw the attention of other wings to solve the problem rather than emerge as a sole sentinel of the entire society. A Supreme Court Bench comprising of Judges Markandey Katju and A.K.Mathur, while hearing the plea of the gardener to appoint him as a driver upheld the order of the trial court stating that the Courts not to take over the functions of the legislature or the executive.<sup>22</sup> The *magnum opus* of judicial activism for which the judges are the authors is a need of the hour and is the fulcrum of the concept of judicial activism judges should scrutinize that judicial activism should not become judicial overreach.

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<sup>21</sup>1995 SCC (5) 457.

<sup>22</sup>Divisional Manager, Aravali Golf Club &Anr. vs. Chander Hass &Anr., (2008) 1 SCC 683.