

## EXPLORING JUDICIAL ACTIVISM: ASSESSING ITS IMPACT ON INDIA'S LEGAL LANDSCAPE

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### Abstract

This article delves into the concept of judicial activism and its implications within the Indian legal system. It examines the judiciary's role in shaping social, political, and legal discourse, particularly in India's diverse and dynamic society. This study analyzes landmark judicial decisions and their consequences and evaluates how much judicial activism has influenced legal development, public policy, and governance in India. Additionally, it explores the challenges and criticisms associated with judicial activism, including concerns regarding judicial overreach and its impact on the separation of powers. By critically examining these issues, this article aims to provide a comprehensive understanding of judicial activism and its significance in the Indian context.

**Keywords:** Judicial activism, India, Legal landscape, Judiciary, Legal development, public policy, Governance, Separation of powers, Landmark decisions, social impact.

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### Introduction:

Judicial activism, a term often evoking both admiration and skepticism, holds significant sway within India's legal framework. As a nation founded on the principles of democracy, justice, and the rule of law, India's judiciary plays a crucial role in safeguarding the rights and liberties of its citizens. However, the concept of judicial activism, characterized by courts taking an active role in interpreting laws and shaping public policy, has sparked debates regarding its impact on governance, democracy, and the separation of powers.

In recent decades, the Indian judiciary has witnessed a remarkable transformation, marked by landmark decisions that have reshaped the nation's socio-political landscape. From safeguarding fundamental rights to addressing environmental concerns and promoting social justice, courts have increasingly assumed a proactive stance in addressing pressing issues facing Indian society. Yet, this proactive approach has not been without its controversies and critiques.

This article endeavors to delve into the intricate dynamics of judicial activism within the Indian context. Through a nuanced examination of key judicial pronouncements and their ramifications, it seeks to unravel the complexities surrounding this phenomenon. By exploring the historical evolution, theoretical underpinnings, and practical manifestations of judicial activism, this study aims to provide insights into its implications for legal development, governance, and societal transformation in India.

Against this backdrop, it becomes imperative to critically assess the role of the judiciary in shaping public policy, balancing competing interests, and upholding constitutional values. While judicial activism has undoubtedly played a pivotal role in advancing justice and promoting accountability, questions linger regarding its potential encroachment on the domains of the executive and legislative branches. Moreover, concerns persist regarding the judiciary's accountability, legitimacy, and capacity to address systemic challenges facing the Indian legal system.

By engaging in a comprehensive analysis of these issues, this article endeavors to contribute to a deeper understanding of judicial activism and its impact on India's legal landscape. Through a balanced exploration of its merits and demerits, this study seeks to foster constructive dialogue and informed discourse surrounding this critical aspect of India's democracy and governance.

### **Judicial activism Concept and Characteristics**

Wisdom or political affiliation that do not go rigidly within the text of the statutory passed by legislature and the use of judicial power broadly to provide remedies to the wide range of social wrongs for ensuring proper justice. Paul Mahoney narrated that, “Judicial activism exists where the judges modified the law from what was previously stated to be the existing law which often leads to substituting their own decisions from that of the elected representatives of the people.” Technically, the concept is related broadly to the constitutional interpretation and statutory construction. The Supreme Court hereafter referred as “SC” by means of interpretation enlarges the scopes of exercising its power. As directive principles are inserted into the constitution, the SC refers to, besides restraining upon the executive power, direction and guidance.<sup>3</sup>The jurisdiction relating judicial interpretation is exercised for sustaining social order, integrating the people, elongating the constitutional rights and confirming the enjoyment of those rights by all people. The activist judges, on the way of inculcating soul and fluid into the dry skeleton provided by the legislature, create a living entity appropriate and adequate to fulfill the social demands.

### **Historical Development of the Concept of Judicial Activism**

The concept “judicial activism” is pronounced much more in the scholastic realm of legal and political studies. Its root is founded intrinsically in the English concepts of “equity” and “natural rights”. At the very beginning, the court declared void Virginia Statute for Establishing Religious Freedom 1786 because it violated a 1783’s peace treaty with Great Britain. The concept can be traced back in USA to the case of *Marbury v Madison*<sup>1</sup>, where Mr. Chief Justice Marshall laid down the foundation of judicial activism besides judicial review. After that, in the modern era, the Arthur Schlesinger introduced the term “Judicial Activism” to the public Schlesinger’s article to characterize several judges as activists.<sup>8</sup> From the very beginning, the people of Bangladesh have held the judicial authority in very high esteem. Before the liberation war, the Constitution of Pakistan 1962 was silent regarding the matters of judicial review. But, this concept was introduced through the judicial activism in the case of *Jubendra Kisore v East Pakistan*<sup>2</sup> and afterward in the case of *Mustofa Ansari v Deputy Commissioner*<sup>3</sup>, the court struck down a provision in the Chittagong Hill Tracts (Regulation) Rules 1960. After the independence of Bangladesh, the first wind of judicial activism was felt in the case of *A. T. Mridha v State*<sup>4</sup> concerning the legality of detention under the Bangladesh Scheduled Offences Special Tribunals, where the Court pronounced that its constitutional supervisory power could not be ousted by a sub-constitutional legislation. After that, there several cases have been relating to the matter of fundamental rights decided on the basis of judicial activism.<sup>5</sup>

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<sup>1</sup> 5. US 137 (1803)

<sup>2</sup> (1957) 9 DLR 21 (SC)

<sup>3</sup> (1965) 17 DLR (Dacca) 553 (HCD)

<sup>4</sup> (1973) 25 DLR 335 (HCD)

<sup>5</sup> A. Lakshminath, *Judicial Process and Precedent*, Eastern Book Company p. 23-24 (4 Edn. 2017)

### **Transformation of Judicial Activism in Judicial Overreach**

Just opposite concept of judicial activism is judicial overreach or judicial over-activism, but it is very difficult to determine a median line between these two concepts. When the judiciary crosses over the power by interfering the proper functioning of the legislature or executive organs of the government and by causing a grave breach of the doctrine of separation of powers, the judicial activism becomes judicial adventurism, which is popularly known as judicial overreach. As Mr. Chief Justice J. S. Verma stated that, "Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial adhocism or judicial tyranny." the supervisory power is not vested with unlimited prerogative to correct all types of hardship and it must be restricted to the cases of grave dereliction of duty and flagrant abuse of fundamental principles of law and justice. Thus, in the name of interpretation of the Constitution and the laws, the judiciary cannot create new laws or amend the existing laws. More specifically, the court's duty is to interpret the law and not to intervene in policy-making. And, the judiciary must exercise self-restraint to preserve balance of powers among three organs entrusted by the Constitution. For better understanding, the US Supreme Court has laid down a pragmatic test in the case *Baker v Carr*<sup>6</sup> for judicial intervention in the matter with a political hue which determination is the precondition for judicial intervention, that the controversy before the court must have a justifiable cause of action and it should not merely suffer from lack of judicially discoverable and manageable standards to resolve. However, judicial activism should not be used to lead to the Constitutional principles of separation of powers getting eroded.

### **Methods of Judicial Activism**

The judiciary occupies a crucial role under the norm of constitutionalism, as it has been given the function to interpret the laws framed by the legislature and directed the executive in failure of execution of laws. Thereby, there is no suspicion that the judiciary deviates from its traditional way to the activist form for participating actively with the changing crises of the society. On the legal point of view, the judicial activism is applied to the court system through subsequent ways.<sup>7</sup>

### **Judicial Review**

The concept of "Judicial Review" refers to a mode of court's proceeding by which the judges act for eliminating unlawful and unruly decisions or actions by a public official exercising public duties to protect the constitutional rights and to protect the laws of the land, where there is no other efficient remedy to challenge. The court's power of judicial review neither be legally barred nor be subject of amendment and it have "hands off" command to the legislature. The general grounds, upon which an action is subject to control by judicial review, are illegality (i.e. the decision makers must understand correctly the law and give effect to it), irrationality (i.e. unreasonableness) and procedural impropriety (i.e. inconsistency with the rules of natural justice or violation of statutory rules). The court should take under consideration several matters relating to the question of illegality; these are the ultra vires (i.e. beyond the powers), error of law, violation of natural justice and abuse of power. Mr. Justice A. S. Anand stated that, "The judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive do not equally guard the Constitution. For the progress of the administration, however it is imperative that all the three parts of the State function in complete harmony." The judicial scrutiny of parliamentary powers cannot

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<sup>6</sup> 369 US 186 (1962)

<sup>7</sup> *id*

stop especially when breach of other constitutional provisions has been alleged and the court can use its power against any such violations. That's why the higher judiciary can be recognized as "Savior of the Constitution". On the contemporary context, most of the cases relating to the judicial review, the judges provide directive opinions, which are not necessary part of the court's decision, going beyond the requirement of the particular case and this is a very traditional form to exercise the judicial activism by the Court. It is necessary for the interest of judicial uniformity and judicial discipline that all the inferior Courts must accept as binding the obiter dicta. But, if the obiter dictum is on a question, which did not arise for determination by the Supreme Court, it is considered as an expression of opinion given by the way. Synchronously confusion is raised as to the identification among Obiter Dictum, Ratio decidendi (i.e. reasons for decision) and Stare decisis (i.e. stand by things decided). In recent situation, the binding effect of the Obiter Dictum is observed and that renders the judicial activities in questionable position. For example, in Bangladesh Bar Council v Darul Ihsan Trust and Others case, the Court has provided several guidelines to the private universities as to the admission process and as to the number of the students seeking law degree, though controversy was relating to the legality of the Darul Ihsan University.

### **Public Interest Litigation**

Though the theory of Public Interest Litigation (hereafter referred as "PIL") is the result of judicial activism, it raises up as efficient way of the higher judiciary to entertain judicial activism. It was introduced in Bangladesh as an outcome of the case *Kazi Moklesur Rahman v. Bangladesh* (hereafter referred as "Berubari Case") in which the concept of locus standi was raised and hereafter, the concept was finally settled in the case *Dr. Mohiuddin Farooque v. Bangladesh & others*<sup>8</sup>. Apparently, PIL indicates a legal action for indemnifying common interest or for protecting from civic grievance in which individuals have interest and by which their legal rights are infringed. As PIL allows any person without being actually aggrieved to activate the judicial method, it should be considered as device by which public participate in judicial review of administrative action. Even though the court can take PIL case on suo moto role and can entertain its duties through judicial activism.<sup>9</sup>

### **Original Understanding and Constitutional Interpretation**

It is no doubt that today the judicial activism is shaped as a boulevard for the judiciary to maintain its function as fortification of justice. To act as the interpreter of the constitution, the judges enfold candor different from their ideological approach. Thus, multiple justification systems of the constitutional interpretation are introduced as more democratic. The judge may show their judicial intellect to interpret that might go against the contexts or contents of the legislature, though judicial words have no self-enforcing powers. For interpreting the statutes, the judges have forced by objectives and by discernible sources. On the basis of jurisprudential view, the methods of judicial interpretation are not straightforward. The judges always endeavor to find out the intent of the legislature and must proceed to fill hiatus of the legislation, even though it may be introduced a new judicial view. Particularly, if the court depends solely on literalism mode of interpretation, it will lose the border context of the statute. As Bangladesh is a common law country, the courts have merged with the doctrine of purposive approach (i.e. purposive construction and

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<sup>8</sup> (1997) 49 DLR 1 (A.D)

<sup>9</sup> DR. G.B Reddy, Judicial Activism In India, Geogia Law Agency, P. 64 (2 Edn. 2018)

interpretation). Here, the basted power of judicial review is the source of purposive construction. If the plain construction fails to uphold the purposes of the legislature, the court is in the position to contribute for fulfilling the lacunas. Nevertheless, the judiciary cannot construct the new laws by virtue of judicial interpretation and its function is *jus dicere* (i.e. to explain the law), not *jus dare* (i.e. to declare the law).

### **Accessing International Statutes to Ensure Constitutional Rights**

International statutes in constitutional interpretation signify that how constitutional interpretation is influenced by international norms, customs and laws. International conventions and norms consistent with the harmony and with the spirit of fundamental rights can be read into it for interpreting in order to promote the object to constitutional guarantees and the advancement of the interest of justice. For instance, in the case of *Professor Nurul Islam v Bangladesh*<sup>10</sup>, the court had relied upon the World Trade Organization resolution to explain the rights to life and in support of its stand taken against the advertisements of tobacco in Bnagladesh. Furthermore, in *Vishaka v State of Rajasthan*<sup>11</sup> case, the Court set forth new regulations for enforcing the Convention on the Elimination of All Forms of Discrimination against Women (hereafter referred as “CEDAW”), to which the India was a signatory member and hence, narrated that sexual harassment violated the right of gender equality and the right to life and liberty under the Constitution.

### **Supervisory Power**

The roles of higher judiciary have many facets such as protection of fundamental rights, scrutiny of laws, monitoring discretionary powers, providing equal justice for all, giving judicial remedies, exercising supervisory power, exercising of advisory jurisdiction and so on. The apex court can intervene in the functioning of the subordinate courts in several circumstances, such as want of jurisdiction, failure to exercise jurisdiction, violation of procedure, the disregard of principles of natural justice, findings based on lack of materials and orders resulting in manifest injustice.

### **Contemporary Scenario of the Judicial Activism and their Reaches**

In the recent years, the judiciary has pronounced many landmark verdicts concerning unlawful imprisonment, environmental matters, health related problems, rights of children and women, minority affairs and issues of human rights by interpreting the procedural rules and various statutes for a better regime of communal justice of what is known as judicial activism.

### **Resolution of Disputes**

The dispute resolution is the primary duty of the judiciary and is served through twelve means, i.e. judicial stability, judicial interpretation, majoritarianism and autonomy i. interfering with policy decisions or providing solutions to the government), judicial reasoning i. analyzing the pronouncement regarding procedural grounds and sustentative grounds, threshold activism . whether observation depends on rules of locus, delays, justifiability and so on , judicial remit enlarging the scopes of judicial review, rhetoric having persuasive effect, obiter dicta , views beyond the specific question, reliance on comparative sources, judicial voices, extent of decision, legal background .Determine the statutes whether unambiguous or vague or deficient.

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<sup>10</sup> (2000) 52 DLR 413 (HCD)

<sup>11</sup> (1997) 6 SCC 241

The judiciary is reliance that the power relating the interpretation upholds the public order by stretching the constitutional rights and their implementation, not on strict juristic sense and keeping in the mind the technical issues and issues of policy. Question relates to the constitutionality of the law, the court deals with the constitutionality and the person aggrieved and provides the observation only in concrete cases. Thus, the prime function of the judiciary is to construe the objective of the framer through the concept of construction and Justice Dawson considered this as „anything at all“ due to the absence of parliamentary law making process.

The apex judges give notices and monitor the manner of performing duties of the executive. Here, the judicial activism is not as unguided missile. Interestingly, the judge is not in law making position, but technically the process of resolving the disputes makes law. 56 Indisputably, the judicial activism offers the judges to go beyond the formalism and to hold a rational approach for ensuring proper justice.<sup>12</sup>

### **Judge-Made Laws**

Under the “Directory Theory” the Judge’s function is not merely applying the existing law rather than faces in some circumstances, where such law is not applied previously. But, the reality is that judges are continually applying the existing statutes to new factual situations and thus, creating new laws. According to Lord Radcliffe, „There was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does.“ The development of the judicial system can be categorized into two ways, such as, strict sense i.e. coherence between the changing socioeconomic relations and the corresponding unchanged legal regulation) and the broad sense i.e. fetching the already regulated and unchanged legal norms. Consequently, judicial advancement through construction is called as analogia legis and iuris. On performing the judicial function, when judges go over through the historical, social and legal context, it should be considered as activism and it should become law themselves. For the proper application of human rights, the judiciary can provide guidelines, which should be considered as law until the enactment of the new law by the parliament, and additionally, they may apply the rule of natural justice by applying judicial craftsmanship. On that way, judicial activism stands in the mesne of juridical transgression and judicial passivity. Technically, there is no strict separation of powers and the court’s duty not to eternize the wrong rather than ascertain indispensable way to protect public interest. In this context, judges should be wary of passing judicial remedies and of doing changes and they should deal with solely legal issues rather than social policies.

### **Actor in Constitutional Dialogue**

Under the concept of constitutional dialogue“, the scholars take part in contest to either sustain or circumvent the majoritarian difficulties with the strength of judicial review. Stratagem of constitutional dialogue is not used only by lawgivers, rather than every form of decision makers, such as, legislators, judges, regulators and across traditional constitutional branches. By the appraisal of judicial decision, sequel can be traced that it will be the final word on specific point or it will not be deemed as direct participant on constitutional dialogue. Consequently, it will not be pointed as activist, if the verdict is accepted by the people and in case of vice versa, it will be contemplated as activism. There are four factors to evaluate the judicial craftsmanship such as reaction of the legislature, administrative or executive response reaction by the judiciary and lastly, voxpopuli , examined on the basis of public reaction

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<sup>12</sup> *id*

### **Judiciary as a Protector of the Core Constitutional Value**

Judiciary has been not only taken dynamic part on the issue of civic rights, but also obstructed the ruin of the constitution. With the norms of the custodian of constitution, the judiciary acts for public justice and security to discharge the constitutional obligations and hence, it affects institutional shape and powers of the branches and levels of government. The duties of judges not only prevent the contravention of the constitution, but also provide necessary direction and guidance to ensure proper constitutionality.

### **Sustentative Due Process**

Substantive due process, which is different from procedural due process, ensures the related and unrelated procedural rights. Acts of the governmental bodies contrary to the communal norms are not considered as proper use of power. If it is inferred that the political personnel does not act rationally, the court envisages the socioeconomic supportive aspects. In a broader perspective, a fair trial in a fair tribunal is a crucial requirement of due process and this fairness includes a fair and impartial adjudicator. On that way, exorcisms of judicial aphorism have maintained their fidelity.

### **Judicial Activism impact**

At present, it is observed that the judges have shown their true color for ensuring proper justice by applying judicial creativity and consequently and inchmeal judicial activism has touched almost every aspects of life. The impacts of the judicial activism can be described in following several heads.

### **Judicial Creativity**

In recent years, the judiciary has been denounced for its aptitude to surpass the boundaries of other constitutional bodies. The judges have applied the judicial creativities as judicial mariners to form the laws by departing from previous decisions or impose the extant principles in new complexion, because they are not merely imitative. For solving controversy, the judges use literal interpretation and the sequel is seemed as unjustified and unfairness, then they take support of judicial activism and introduce a different dimension of laws. Latterly, it is observed that the judiciary has taken aid and applied the nonbinding dispensations to resolve some environmental issues, criminal matters and so on, which are contrary to the domestic laws.

### **Filling the Legislative Gaps**

The concept of judicial activity is upraised as a new instrument for the judiciary, since the neoteric society is progressive and the legislative body fails to foresee the upcoming problems and it may reluctant or unable to deliver laws. Judges can give directions to fulfill the statutory lacunas and these will be effective till the proper steps are taken by the legislator. For example, judiciary has solved several environmental cases, where there is no specific law or the existing laws fail to provide proper redress and it has also recommended several directions to the proper authority.

### **Enthusiasm of Individual Actors**

There are many factors and parties play active roles for judicial activism, but this collective venture's basement is framed by the judiciary. The Apex Court is deemed as guardian of the constitution and this role remains in two forms for maintaining constitutionalism i.e. the constitutional as formal and the political as informal. As a matter of constitutional law, the role of

the court is shaded by the facts relating statecraft and the informal role of the constitution within the political arena, which are characterized as reciprocal relationships.

### **Public Confidence in the Judiciary**

The public reliance and faith are the ideal advantages and potential resistances to the judiciary for maintaining prompt and proper justice. The judiciary is the last resort to the public at general to maintain tranquility and it delivers mandate with the explanation of legal queries and consequently, ameliorates the society. Besides this, conduct contrary to the public confidence would be detrimental to the efficacious judicial process. Thereby, public confidence has a great importance for making the judiciary truly effective and functional.

### **Collapse the Responsible Government**

Undeniably, the constitutional structure has provided enough opportunity for judicial activism. When the State's organs cannot maintain their responsibilities, entrusted by the constitution, it causes collapse of the good governance which is prerequisite for democratic constitutionalism and hence, the justification for the judicial activism comes from the crisis. In this connection, seeking assistance compels the judiciary giving political or policy making judgments. Judicial activism signifies that the judiciary, being aware of existing socio-economic realities, voluntarily implements social goals and makes government more responsible, accountable and efficient. For instance, the judiciary has been issued ruling to check against the abuse of due process of law. Inevitably, judicial activism copes the judiciary with the communal changes, but this undefined powers has gradually turned in judicial overreach.<sup>13</sup>

### **Perils of the Judicial overreach and its probable solutions**

The concept of judicial activism is the polar opposite of judicial overreach, but these two terms narrate the ideology and dictation behind judicial decision. Violation of the Doctrine of Separation of Powers The State's powers should be entrusted among three branches (i.e. legislature, judiciary and executive) with proper checks and balances mechanism. The court solely depends on textual base of laws<sup>98</sup>, even if text fails to provide sufficient relive and the court does not interfere the function of the other organs.<sup>99</sup> Judicial activism are created the scope for judge-made laws and that is clearly abuse of the constitutional power. It is imminently illicit, when the judiciary takes step for formatting laws with little or no perceptible origin in the words or design of the Constitution. Eventually, the parliament is entrusted for making laws solely and the judiciary does not encroach the power of the legislator. Moreover, court may invalid legislation but not constitutional amendment. <sup>103</sup> Most importantly, the judge's decision is affected by the several social and political factors<sup>104</sup> that render it in questionable state.

### **Rule of Court**

Dicey's concept "La Principe de Legality" (i.e. rule of law) has distinct features, such as supremacy of the law, equality before the law and individual constitution is the result of the ordinary law of the land. Here, the rule of court indicates the judge's ruling that is over the law and that is clearly a sharp blow over the separation of powers. Judicial activism is an active method for execution of the rule of law and when the Court is swayed or when it overreaches itself, it should be considered as judicial populism. It should be kept in mind that, Judicial activism should neither be judicial ad

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<sup>13</sup> SUPRA NOTE 3

holisms nor judicial tyranny. Judges do not create law but merely ascertain its true meaning and it should motivate turmoil, if they show propensity to make the laws. It is be deemed as naked penetration of the parliamentary function. There must be reciprocal respect and adjustment among the branches of the State. The apex court is not benevolent authority beyond the arena of procedural irregularity and it has no discretionary authority to disdain statutory instructions. Indeed, it is the sacred obligation of the judiciary to abstain from overactive approach.

### **Lack of Accountability**

It is a general tendency that the person with great power performs his dominance so long as obstruct by certain boundary. The extended jurisdiction of the judiciary sparks flame in judicial mind that might be caused abuse of power. Accountability and transparency are crucially important for democratic regime, for that reason the judiciary also should be accountable and transparent. But, unfortunately the constitution fails to bind the judiciary as accountable even to the sovereign people and gradually it damages the checks and balances mechanism. Hypothetically, judicial activism is fallen with question of legality.

### **Probable Solutions of Controlling Judicial Overreach**

Judicial activism is like a fresh wind of democratic system of the government. But, it should be maintained with proper filtering mechanism, without this, it should cause tumultuous situation. There should have proper guidance to control judicial overreach for ensuring effective balance of powers among the branches of the State.

### **Judicial Restrain**

Judge functions to resolve the legal issue compliance with the original intention of law-maker and the judicial precedent and in this connection, judicial restraint strict constructionist is a concept that confines the judges within the constitutional power. Even though, the constitution does not make the judiciary as superior over other organs and there should have balance among reforms, developments and implantation. The judges had been exercised judicial restraint keeping in mind the doctrine of separation of powers and prevented themselves from issuing rule in compliance with the administrative instruction and for want of political inquiry. As the concept of judicial activism infers grandiose thought, it is extremely perplexing to draw a strain between appropriate judicial intervention and judicial overreach. Only where justifiable causes of action, having judicially discoverable and manageable standards, are observed, the court should intervene on it. Though it is seemed the judge's aims and functions are quite reverse, the judges cannot arrogate the powers of the executive or the legislature. The Court functions under certain self-imposed limitations as a matter of prudence and policy and hence, self-denial indicates not to do the act, which is condemned previously.<sup>14</sup>

### **Applying Cohn and Kremnitzer Model**

By indicating three functions of the judiciary dispute resolution, participation in the public sphere and upholding certain core values, Cohn and Kremnitzer have suggested a methodology for the construction of a straight parameter between the judicial activism and overreach. They provide seventeen factors in this regard, such as judicial stability, interpretation, majoritarianism and

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<sup>14</sup> Chaterji Susanta, For Public Administration' Is judicial activism really deterrent to legislative anarchy and executive tyranny , Vol XLII, ,p9, 1997

autonomy, judicial reasoning, threshold activism, judicial remit, rhetoric, obiter dicta, comparative sources, judicial voices, extent of decision, legal background, legislative reaction, administrative reaction, judicial reaction, public reaction and value-content.

### **Judicial Activism in India**

The Constitution of India operates in happy harmony with the instrumentalities of the executive and the legislature. But to be truly great, the judiciary exercising democratic power must enjoy independence of a high order. But independence could become dangerous and undemocratic unless there is a constitutional discipline with rules of good conduct and accountability: without these, the robes may prove arrogant. Judicial activism is the view that the Supreme Court and other judge's can and should creatively (re)interpret the texts of the Constitution and the law in order to serve the judges' own visions regarding the needs of contemporary society.

Judicial activism believes that judges assume a role as independent policy makers or independent "trustees" on behalf of society that goes beyond their traditional role as interpreters of the Constitution and laws. The concept of judicial activism is the polar opposite of judicial restraint. Failure on part of the legislative and executive wings of the Government to provide 'good governance' makes judicial activism an imperative. Delivering justice to a population of over a billion does not sound like and never will be an easy task. It however becomes increasingly difficult in a country like India. The Executive, the Legislature and the Judiciary are the three wings of the Indian democracy.

Judicial activism, however, came into its own only in the last couple of years. In his Dr. Zakir Hussain Memorial Lecture, Former Chief Justice of India A.M.Ahmadi said, "In recent years, as the incumbents of Parliament have become less representative of the will of the people, there has been a growing sense of public frustration with the democratic process. This is the reason why the (Supreme) Court had to expand its jurisdiction by, at times, issuing novel directions to the executive." Many are critical of judicial activism as an exercise of judicial powers, which displaces existing laws or creates more legal uncertainty than is necessary, whether or not the ruling has some constitutional, historical or other basis. Judicial activism can be considered as "legislating from the bench." Some have even gone to the extent of calling it judicial tyranny. This implies that a judge is ruling on the basis personal political convictions or emotions. Declaring that the judiciary has a vital function to protect minority rights in a pluralist society, former Attorney General of India Soli J Sorabjee said judicial activism has contributed to the protection of fundamental human rights.<sup>15</sup>

### **Impact**

When serious issues like environmental pollution crop up and the statutory bodies take no action and the people suffer, the courts have to step in to alleviate human suffering, he added. Calling upon the judiciary to evolve a jurisprudence of compassion, Mr Sorabjee said the institution of public interest litigation, PIL had helped to secure "fundamental rights as a living reality for some sections of society." However, the senior Supreme Court lawyer cautioned that PIL "could not be treated as a pill for every ill" and said that some had sought to use it as an instrument of blackmail

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and oppression. The judiciary had to be vigilant against personal, political and publicity-oriented litigation masquerading as PIL, he added.

### **Abuse**

However, the abuse of PIL was not a ground for its abolition or restriction as it had played an important role in securing justice to suffering sections, ranging from under-trial prisoners to children working in hazardous occupations and workers treated as slaves in quarries and kilns. Lauding Justice (Retd.) V R Krishna Iyer for his judgments upholding rights of prisoners, Mr Sorabjee said torture was rampant in Indian prison cells. By giving judgments against solitary confinement and handcuffing of prisoners, Justice Krishna Iyer had upheld basic human dignity. Judicial activism might sound, for a lay man, a heavy-duty term but in the simpler manner is quite easy to comprehend. We can say in simple words that judicial activism is a practice by the judges that does not involve the balance of law, instead it hampers it. In judicial activism, the judge places his final decision with his heart and mind, which is emotionally handled. It, at times, works in our favour to save from the wrong decision to take place but at times it also backfires on us. In other words we can easily say that judicial activism is the practice going beyond the normal law for the jury. There are some very important cases which come in the talk whenever we discuss about judicial activism in India.

### **Bhopal Tragedy**

Bhopal gas tragedy and the Jessica Lal Murder case are among the top two. The latter was an open and shut case for all. Money and muscle power tried to win over the good. But lately, it was with the help of judicial activism that the case came to at least one decision. The two most prominent figures in the Bar Council of India whose names are the most inter related with judicial activism are Justice Prafullachandra Natwarlal Bhagwati and Justice Vaidyanathapura Rama Krishna Iyer. The Golak Nath case is an example of judicial activism. The Supreme Court by a majority of six against five laid down that the fundamental rights as enshrined in Part-III of the Constitution are immutable and beyond the reach of the amendatory process. The power of parliament to amend any provision in Part-III of the Constitution was taken away. In Kesavananda Bharati case by a majority of seven against six, the Supreme Court held that by Article 368 of the Constitution, Parliament has amending powers. But the amendatory power does not extend to alter the basic structure or frame work of the Constitution. The basic features of the Constitution being:

- (i) Supremacy of the Constitution
- (ii) Republican and Democratic form of government
- (iii) Secularism
- (iv) Separation of powers between the legislature, the executive and the judiciary
- (v) Federal character of the Constitution.

Supremacy and permanency of the Constitution have thus be ensured by the pronouncement of the summit court of the country with the result that the basic features of the Constitution are now beyond the reach of Parliament. After making these observations certain reasons can be generalized which lead to judicial activism.

The following are some of the well accepted reasons which compel a court or a judge to be active while discharging the judicial functions assigned to them either by a constitution or any other organic law

- .Near Collapse of responsible government.
- Pressure on judiciary to step in aid.

- Judicial enthusiasm to participate in social reform and change.
- Legislative vacuum left open.
- The constitutional scheme.
- Authority to make final declaration as to validity of a law.
- Role of Judiciary as guardian of fundamental rights.
- Public confidence in the judiciary etc. <sup>16</sup>

### **Conclusion:**

In conclusion, the discourse on judicial activism in India reflects a complex interplay of constitutional principles, institutional dynamics, and societal imperatives. Over the years, the judiciary has emerged as a formidable guardian of fundamental rights, a catalyst for social change, and a check on governmental overreach. Through bold and innovative interpretations of the law, courts have addressed myriad issues ranging from environmental degradation to gender equality, leaving an indelible mark on the nation's legal landscape.

However, the phenomenon of judicial activism is not devoid of challenges and controversies. Critics have raised concerns regarding judicial overreach, the erosion of institutional boundaries, and the potential dilution of democratic principles. Moreover, questions surrounding judicial accountability, transparency, and effectiveness persist, underscoring the need for continuous scrutiny and reform.

As India marches forward in its quest for justice, equality, and progress, the role of the judiciary will remain pivotal in navigating the complexities of governance and upholding the principles enshrined in the Constitution. It is imperative for stakeholders, including the judiciary, the executive, the legislature, civil society, and the citizenry, to engage in constructive dialogue and collective action to address the evolving challenges facing the legal system.

Moving forward, a judicious balance must be struck between judicial activism and institutional restraint, ensuring that the judiciary remains responsive to the needs of the people while respecting the constitutional ethos of separation of powers. Moreover, efforts should be made to enhance judicial transparency, accountability, and efficiency, thereby bolstering public trust in the legal system.

In essence, the journey of judicial activism in India is characterized by a delicate dance between idealism and pragmatism, between activism and restraint. As we reflect on the achievements and limitations of judicial activism, let us reaffirm our commitment to the values of justice, equality, and the rule of law, ensuring that the judiciary continues to serve as a beacon of hope and justice for generations to come.

### **Chapter – 5**

#### **Social Justice & Economic Justice**

India is one of the largest democracies of the world. The Indian Constitution embraces the goal of achieving social equality in express terms. The author in this research paper has elaborately discussed the scheme of social welfare as enumerated in the Indian Constitution. The Preamble of the Constitution has used the terms like “Socialist”, “Social and Economic Justice”, “Equality”, these terms indicates that the state would extensively involve in social welfare of people, and would try to establish an egalitarian society. Moreover a separate chapter each of Fundamental

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<sup>16</sup> DR. Bhure Lal, Judicial Activism and Accountability, Siddhartha Publications, P. 38-39, (1 Edn. 2017)

Rights and Directive Principles of State Policy has been devoted towards the welfare responsibilities of the government, which lays down the norms of ideal governance for people's welfare and to protect their human rights. The author has stressed that Social justice does not demand equal treatment but preferential treatment. The proper and balanced implementation of government policies is needed to ensure social justice in the society

The Indian Constitution is unique in its contents and spirit. The constitutional scholar Granville Austin, in his magisterial work<sup>17</sup>, states that probably no other Constitution in the world "has provided so much impetus towards changing and rebuilding society for the common good". Though borrowed from almost every constitution of the world, it has several salient features that distinguish it from the constitutions of other countries. Social justice is the idea of creating a society or institution that is based on the principles of equality and solidarity, that understands and values human rights, and that recognizes the dignity of every human being.<sup>18</sup> Feeling of social justice is a form of relative concept which is changeable by the time, circumstances, culture and ambitions of the people.<sup>19</sup> Social inequalities of India expect solution equally. Under Indian Constitution the use of social justice is accepted in wider sense which includes social and economical justice both. The makers of the constitution who were well known to the use and minimalist of various principles of justice wanted to search such form of justice which could fulfill the expectations of whole revolution. Social justice found useful for everyone in its kind and flexible form. Although social justice is not defined anywhere in the constitution but it is an ideal element of feeling which is a goal of constitution and it is the foundation stone of Indian Constitution.

The preamble and various Articles contained in Part IV of the Constitution promote social justice so that life of every individual becomes meaningful and he is able to live with human dignity. The concept of social justice engrafted in the Constitution consists of diverse principles essentially for the orderly growth and development of personality of every citizen. Social justice is thus an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species; Social justice is a dynamic devise to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live life with dignity of person. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation of every section of the society. In a developing society like ours which is full of unbridgeable and ever widening gaps of inequality in status and of opportunity, law is a catalyst to reach the ladder of justice.

The philosophy of welfare State and social justice is amply reflected in large number of judgments of this Court, various High Courts, National and State industrial Tribunals involving interpretation of the provisions of the Industrial Disputes Act, Indian Factories Act, Payment of Wages Act, Minimum Wages Act, Payment of Bonus Act, Workmen's Compensation Act, the Employees Insurance Act, the Employees Provident Fund and Miscellaneous Provisions Act and the Shops and commercial Establishments Act enacted by different States.

### **5.1 The preamble and social justice**

The preamble itself says: "We, the people of India, having solemnly resolved to constitute India into a sovereign, socialist and democratic Republic and to secure to all its citizens—Justice, social,

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<sup>17</sup> Austin Granville, *Working a Democratic Constitution: The Indian Experience*

<sup>18</sup> Zajda J., Majhanovich S., *Rust V. (2006) Education and Social Justice :ISBN 1-4020-4721-5*

<sup>19</sup> Krishna Iyear V.R.(1987:53) *Social Justice- Sunset or Dawn*

economic and political...." Clearly, social justice in all its forms and to all citizens was regarded as fundamental to the set-up which our founding fathers prescribed for the country; it is mentioned on top of the other equally sound concepts. The words, "Socialist"<sup>20</sup>, "secular", "democratic" and "republic" have been inserted in the preamble. Which reflects it's from as a "social welfare state." The term 'justice' in the Preamble embraces three distinct forms- social, economic and political, secured through various provisions of Fundamental Rights and Directive Principles. Social justice denotes the equal treatment of all citizens without any social distinction based on caste, colour, race, religion, sex and so on. It means absence of privileges being extended to any particular section of the society, and improvement in the conditions of backward classes (SCs, STs, and OBCs) and women. Economic justice denotes on the non- discrimination between people on the basis of economic factors. It involves the elimination of glaring inequalities in wealth, income and property. A combination of social justice and economic justice denotes what is known as 'distributive justice'. Political justice implies that all citizens should have equal political rights, equal voice in the government.

## 5.2 Social and economical justice under Indian Constitution

Under Indian Constitution the use of social justice is accepted in wider sense which includes social and economical justice both. As stated by Chief Justice Gajendragadkar, "In this sense social justice holds the aims of equal opportunity to every citizen in the matter of social & economical activities and to prevent inequalities".<sup>21</sup> The Constitution of India does not completely devoted to any conventional ideology as – Equalitarian, Utilitarian, Contractarian or Entitlement theory. Dedication of constitution is embedded in progressive concept of social justice and various rules of justice such as Quality, Transaction, Necessity, Options etc are its helping organs.

To accept right to equality as an essential element of justice, Indian Constitution prohibits unequal behavior on the grounds of religion, race, caste, sex. The term 'equality' means the absence of special privileges to any section of the society, and provision of adequate opportunities for all individuals without any discrimination. The Preamble secures at all citizens of India equality of status an opportunity. This provision embraces three dimensions of equality- civic, political and economic.<sup>22</sup> But the question is how to determine inequality? In India it is not easy to determine inequality. Equality is movable concept which has many forms and aspects. It can not be tightened in traditional and principles circle. Equality with equal behavior prohibits arbitrariness in action. In view of securing to all its citizens social justice Indian Constitution provides some Fundamental rights in Part III some of which are available to all persons and some are enjoyable only by the citizens of India. Further, to realize the goal of social justice the constitution also provides some direction to the State in the form of Directive Principles of State Policy and lays down that the state shall direct its policy towards securing these objectives

In India, courts have performed a great role to make the social justice successful. In the field of distributive justice, Legislature and Judiciary both are playing great role but courts are playing more powerful role to deliver compensatory or corrective justice but these principles are known as mutually relatives not mutually opposites. Ideals and goals are to deliver social justice. Medium may be distributive or compensatory justice. The adopted type may be of quality, Necessity, Equality, Freedom, Common interest or other. The courts are now taking leading part in the design

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<sup>20</sup> *Inserted by Constitutional 42nd Amendment Act (1976).*

<sup>21</sup> *Ganendragadkar P.B. (1964:77,99), Law, Liberty and Social Justice .*

<sup>22</sup> *Laxmikanath, M. (2008:29), Indian polity.*

of administration of many state services - including services for mentally ill and retarded, for prison populations, for public welfare recipients, and for abused children and other dependent persons. With that end in view the Supreme Court of India evolved a new mechanism of public interest litigation or social interest litigation in the early eighties. In the fifties and sixties the role of judiciary more or less remained as a sober manifestation of the movement for social justice based on progressive values. While other institutions have lost their progressive shine the judiciary remains a uniquely situated instrument for social justice, perhaps the only effective force for challenging the institutions of the welfare state. The Supreme Court of India has given a principal and dynamic shape to the concept of social justice. Social justice has been guiding force of the judicial pronouncements.

The judiciary has given practical shape to social justice through allowing affirmative governmental actions are held to include compensatory justice as well as distributive justice which ensure that community resources are more equitably and justly shared among all classes of citizens. The concept of social justice has brought revolutionary change in industrial society by charging the old contractual obligations. It is no more a narrow or one sided or obscure concept. It is founded on the basic ideal of socioeconomic equality and its aim is to assist the removal of socio- economic disparities and inequalities.

This judicial activism sharing the passion of Constitution for social justice was rejuvenated with the Maneka Gandhi case in which fundamental right of personal liberty has been converted into a regime of positive human rights unknown in previous constitutional diction. Thereafter, gradually the Supreme Court, particularly some socialist justices tried to explore social justice in the Fundamental Rights and Directive Principles of State Policy. In this way the courts try to force the government to realize the new concept of social justice in the cases of Sunil Batra (right against torture); Bandhua Mukti Morcha (right against bondage); Peoples Union for Democratic rights (right against bondage); M.C.Mehta (right against environmental pollution), Upendra Baxi (right to human dignity), Sheela Barse (right to legal aid); many others. In these cases the judges maintain that in a developing society judicial activism is essential for participative justice and the bureaucrats as well as the elected representative will have to face the judicial admonition and pay the penalty if the people in misery cry for justice.

### **5.3 Social justice in Fundamental rights**

Indian Constitutional provisions ensuring Social Justice: Fundamental rights in Part III some of which are available to all persons and some are enjoyable only by the citizens of India are: -

- a) Equality before law (Art 14)
- b) Prohibition of discrimination on ground of religion, race, caste, sex or place of birth (Art 15)
- c) Equality of opportunity in matters of public employment (Art 16)
- d) Abolition of Untouchability (Art 17)
- e) Abolition of titles (Art 18)
- f) Protection of certain rights regarding freedom of speech etc. (Art 19)
- g) Protection of life and personal liberty (Art 21)
- h) Protection in respect of conviction for offenses (Art 20)
- i) Protection against arrest and detention in certain cases (Art 22)
- j) Protection of traffic in human beings and forced labour (Art - 23)
- k) Prohibition of employment of children in factories or mines or in any other hazardous employment (Art 24)
- l) Freedom of Religion (Art 25 - 28)

- m) Protection of interests of minorities (Art 29-30)
- n) Judicial remedies for enforcement of rights conferred by this Part - III of the Constitution (Art 32).

#### **5.4 Social justice in directive principles of State policy**

Chapter IV of Indian Constitution Article 36 to 51 incorporate certain directive principles of State policy which the State must keep in view while governing the nation. The most important of these directives are –

- a) Promotion of welfare of the people (Art 38)
- b) Adequate means of livelihood; equal distribution of material resources of the community; distribution of means of production to the common good and equal pay for equal work; - promotion of health and strength of workers, men and women and the children : Protection against exploitation of child hood and youth (Art 39)
- c) Equal justice and free legal aid (Art 39A)
- d) Right to work, education and to public assistance in certain cases (Art 41)
- e) Just and human conditions of work and maternity relief (Art 43)
- f) Living wages for workers (Art 44)
- g) Uniform civil code (Art 44)
- h) Free and compulsory primary education for children (Art 45)

“The principles of Policy set forth in this part are intended for the guidance of the State. While these principles shall not be cognizable by any Court they are nevertheless fundamental in the governance of the country and their application in the making of laws shall be the duty of the State.”<sup>23</sup>

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<sup>23</sup> *Shivarao (Vol. II: 175), Select Documents*