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JUDICIAL ACTIVISM IN INDIA – A BRIEF ANALYSIS

By D Chandu

Introduction.

India is the largest democratic nation in the world. The judiciary in India protects the Indian Constitution and the rights of the citizens from the arbitrary actions of the Executive and the Legislature. Indian judiciary plays important role in protecting the fundamental rights of the citizens. The judiciary is the watchdog of the Indian Constitution. The present Article throws light on the concept of Judicial Activism in India and its evolution. This paper discusses about the features, criticisms and justification of judicial activism in India in view of various landmark judgements and recent decisions pronounced by the Hon'ble Supreme Court and High Courts. The Judicial Activism is very much important as it protects interest of the people and rights of the citizens whenever the other organs encroach the rights of the citizens.

In India legislature makes law. The executive implements the law and makes policy decisions. The judiciary interprets the law and if the laws are contrary to the constitution then they declare them to be null and void. The Legislature makes the law and the executive should execute it, and the judiciary should settle disputes in accordance with the law. This is called the doctrine of separation of powers.[1]

Objectives:

To discuss the concept of Judicial Activism in India.

To analyze the evolution of Judicial Activism in India.

To critically analyze the Judicial Activism with various case laws.

To study the recent Judgments on Judicial Activism.

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[1] https://www.legalserviceindia.com/legal/article-4789-doctrine-of-separation-of-power.html

Research Methodology.

The present paper **"Judicial Activism in India – A Brief Analysis"** is based on both primary and secondary data collected from various sources. The Primary data was collected from Indian Constitution and other Constitutions. The Secondary sources include judgements of the Hon'ble Supreme Court and High Courts, books, research articles, reputed journals and news papers. The research method used is doctrinal method.

What is Judicial Activism.

Judicial activism means the exercise of the power of judicial review to set aside government acts. Judicial activism is a judicial philosophy holding that the courts can and should go beyond the applicable law to consider broader societal implications of its decisions. Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision making whereby judges allow their personal views about public policy, among other factors, to guide their decisions."

David A. Strauss has argued that judicial activism can be narrowly defined as one or more three possible actions: overturning laws as unconstitutional, overturning judicial precedent, and ruling against a preferred interpretation of the constitution. Judicial activism is when a judge decides on a case in conformist with the effect of his personal views on public policy. If the judge detects or observes constitutional violations and may not agree with the principles as laid by the constitutional courts. Judicial Activism is the proactive role by the judiciary in protecting the rights of the citizens by declaring the laws which are inconsistent with the fundamental rights.

The expression Judicial Activism implies the decision of a court on the basis of a judge's personal understanding or political perceptiveness, which does not firmly agree with the statutes ratified by the legislature and utilization of judicial capacity widely to offer remedies to the broad spectrum of social violations for providing equitable justice.

The Supreme Court of America for the first time propounded the doctrine of Judicial Review. The Constitution does not contain any provision for judicial review but in historic case of the Supreme Court of United States in Marbury vs Madison[2] Chief Justice Marshall observed that "the constitution is either superior paramount law, unchangeable by ordinary means or it is on a

[2] Marbury vs Madison

level with ordinary legislative acts and like other acts is alterable when the legislature shall please to alter it ….Certainly all those who framed written constitutions contemplate them as forming the fundamental and paramount law of the nation and consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void… It is emphatically the province and duty of the judicial department to say what the law is." Judicial Review means the power of the judiciary to verify and confirm the constitutionality of laws or executive actions. The Constitution of India contains Articles 32 and 226 which explains about the power of judicial review. The Apex court held that judicial review is the basic feature of the Indian Constitution.

Judicial Activism is a process in which judiciary steps into the shoes of legislature and comes with new rules and regulations, which the legislature ought to have done earlier. Justice J.S. Verma of Supreme Court "The role of the judiciary in interpreting existing laws according to the needs of times and filling in the gaps appears to be the true meaning of "Judicial Activism."

Evolution of Judicial Activism.

The concept of judicial activism in India began in the early years of 1960 when Mrs. Indira Gandhi was the prime minister. The then prime minister initiated progressive socialistic procedures as a means to accomplish the popular phrase "Garibi Hatao" by putting an end to the Privy Purses and benefits to the former kings and princes of the royal provinces of pre independent India and nationalizing the fourteen important banks in order to assist the cause of the impoverished sections of the society but the judiciary did not approve it and held that the legislation as unconstitutional. The Supreme Court judgement on the nationalisation of banks was regarded as 'judicial overreach' by Indira Gandhi and the response was powerful and unequivocal. The senior most judges of the apex court who were involved in the major part of the judgement in those cases were disregarded for the nomination to the position of the Çhief Justice of India. The judge in discord and dissension with the judgement, Mr. A.N. Ray, who was fourth in order of seniority was selected and this led to the resignation of the three senior most judges, Justices Shelat, Grover and Hegde. This incident led to the beginning of the theory of

'Judicial Activism' which really ensured from the conflict and deadlock between judiciary and the executive.

The period 1950-1970 judiciary mainly focused upon the constitutional validity of laws and associated with the limited functional domain. The period between 1970-2000 is the phase of judicial activism and it continues till date. The Judiciary pronounced landmark judgments over the above said period. The first case of judicial intervention through social action litigation was Hussainara Khatoon vs State of Bihar[3] case. In the said case the Supreme Court held that speedy trial is an essential and integral part of the fundamental right to life and liberty enshrined in Art 21.

The Supreme Court in Bandhu Mukti Morcha vs Union of India[4] has held that the provisions conferring on the Supreme Court the power to enforce fundamental rights in the widest possible terms show the anxiety of the constitution makers not to allow any procedural technicalities to stand in the way of enforcement of fundamental rights. It is not at all obligatory that an adversary procedure must be followed in proceedings under Art 32 for the enforcement of fundamental rights. There is no such compulsion in clause (2) of Art 32 or in any other part of the constitution. Public interest litigations for the enforcement of fundamental rights is very much included in Art. 32. Judicial activism has set right a number of wrongs committed by the states.

In Sunil Batra vs Delhi Administration[5] it has been held that the writ of habeas corpus can be issued not only for releasing a person from illegal detention but also for protecting prisoners from inhuman and barbarous treatment. In D.S. Nakar Vs Union of India[6] it has been held that registered society, non political, non profit making and voluntary organisation is entitled to file a writ petition under Art 32 for espousing the cause for the large number of old infirm pensioners who are unable to approach the court individually.

In M.C Mehta vs State of Tamil Nadu[7] it has been held that the children cannot be employed in match factories which are directly connected with the manufacturing process as it is a hazardous

[3] AIR 1979 SC 1369.
[4] 1984 SC 802
[5] AIR 1980 SC 1759
[6] 1983 1 SCC 304
[7] AIR 1991 SC417

employment within the meaning of Employment of Children act 1938. In Sheela Barse Vs Union of India[8] the Supreme Court directed that the children's acts enacted by various states must be brought into force and their provisions be implemented vigorously. It is desirable that Parliament should pass a Central Legislation on the subject.

In D.C Wadhwa vs State of Bihar[9] the petitioner challenged the practice followed by the state of Bihar in repromulgating a number of ordinances without getting the approval of the legislature. The court held that the petitioner as a member of public has sufficient interest to maintain a petition under Art 32. Every citizen has right to insist that he should be governed by laws made in accordance with the constitution and not laws made by the executive in violation of the constitutional limitation.

The Supreme Court has also played an active role in protecting the environment pollution and ecology. In Rural Litigation and Entitlement Kendra vs State of U.P[10] the court ordered the closure of certain lime stone quarries on the ground that there were serious deficiencies regarding safety and hazards in them. In Shriram food and fertilizer case M.C. Mehta vs Union of India[11] the Supreme Court directed the company manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in its neighbourhood, to take all necessary safety measures before reopening the plant.

In a significant judgement in Parmanand Katara vs Union of India[12] the Supreme Court has held that it is paramount obligation of every member of medical profession private or government to give medial aid to every injured citizen brought for treatment immediately without waiting for procedural formalities to be completed in order to avoid negligent death.

In Vishaka vs State of Rajasthan[13] the Supreme Court has laid down exhaustive guidelines for preventing sexual harassment of working women in place of their work until legislation is enacted for this purpose. In Union of India vs Association for Democratic Reforms[14] the

[8] 1986 3 SCC 596
[9] AIR 1987 SC 579
[10] 1985 2 SCC 431
[11] 1986) 2 SCC 176
[12] AIR 1989 SC2039
[13] AIR 1997 SC3011
[14] AIR 2002 SC 2112

petitioners for Democratic Reforms filed a Public Interest Litigation and for direction to implement the recommendation made by the Law Commission in its 170th report on March2, 2002 the Supreme Court directed the Election Commission to issue a notification making it compulsory for those contesting elections to make available information about their educational qualification, assets, liabilities and criminal antecedents at the time of nomination for the benefit of voters.

In Vineet Narain vs Union of India[15] the Supreme Court has issued directions to make the CBI independent agency so that it may function more effectively and investigate crimes and corruptions at high places in public life which poses a serious threat to the integrity, security and economy of the nation and to take necessary measure to prosecute the guilty.

Evolution of Basic structure theory.

The basic question raised has been whether the fundamental rights were amendable so as to dilute or take away any Fundamental Rights through a Constitutional amendment. Since 1951 number of amendments have been made to the Fundamental Rights. The constitutional validity of these amendments has been challenged a number of times before the Hon'ble Supreme Court.

In Shankari Prasad vs Union of India[16] the first case on amenability of the constitution, the validity of the constitution first amendment act 1951 curtailing right to property guaranteed by Article 31 was challenged. The Supreme Court upheld the validity of the first amendment by adopting literal interpretation. The apex court rejected the contention and limited the scope of Article 13 by ruling that the word 'law' in Article 13 would not include within its compass a constitution amending law passed under Article 368.

After Shankari Prasad case the same question was raised again in 1964 in Sajjan Singh vs. Rajasthan[17] when the validity of the constitution (seventeen amendment) Act 1964 was questioned. The said amendment affected adversely the right to property. By the said amendment a number of statutes effecting property rights were placed in the ninth schedule and were thus immunized from court review. The conclusion of the Supreme Court in Shankari Prasad case as

[15] 1998 SC 889
[16] AIR 1951 SC458
[17] AIR 1965 SC845

regards the relation between Art 13 and 368 was reiterated by the majority. It felt no hesitation in holding that the power of amending the constitution conferred on Parliament under the Art 368 could be exercised over each and every provision of the constitution. The majority refused to accept the argument that Fundamental Rights were "eternal, inviolate, and beyond the reach of Art 368."

In the year 1967 again in GolakNath vs State of Punjab[18] case the constitution validity of the constitution (seventeenth amendment) act was challenged. The majority of judges overruled the earlier cases of Shankari Prasad and Sajjan Singh that the Fundamental Rights were non amendable through the constitutional amending procedure set out in Art 368, while the minority upheld the line of reasoning adopted by the Court in the two earlier cases. The majority of judges sought to make the Fundamental Rights inviolable by constitutional amendment by ruling that Parliament could not under Art 368 amend any Fundamental Right. In Golak Nath Vs the State of Punjab case the Apex court held that the Constitutional rights under part III of the constitution could not be altered or revised.

Kesavananda Bharati Case.

The constitutional validity of XXIV and XXV amendments are challenged in the Supreme Court through an Art 32 writ petition in Kesavananda Bharati vs State of Kerala[19] by Swami Kesavananda Bharati, a mutt chief of Kerala. The matter was heard by a bench consisting of all 13 Judges of the Court because Golaknath, a decision by a Bench of 11 Judges was under review. The court now held that the power to amend the constitution is to be found in Art 368 itself. It was emphasized that the provision relating to the amendment of the constitution are some of the most important features of any modern constitution. It was asserted that the constitution makers did not use the expression "Law" in Art. 13 as including "constitutional law." This would thus mean that Art. 368 confers powers to abridge a Fundamental Right or any other part of the constitution. To this extent, therefore, Golaknath case was overruled.

In Kesavanand Bharati case the court did not concede an unlimited amending power to Parliament under Art.368. The amending power was now subjected to one very significant

[18] AIR 1967 SC 1643
[19] AIR 1973 SC1461

qualification viz that the amending power cannot be exercised in such a manner as to destroy or emasculate the basic or Fundamental Features of the Constitution. A constitutional amendment which offends the **basic structure of the constitution** is *ultra vires*. Which means that while Parliament can amend any constitutional provision by virtue of Art. 368, such a power is not absolute and unlimited and the courts can still go into the question whether or not an amendment destroys a fundamental or basic feature of the Constitution. If an amendment does so, it will be constitutionally invalid.

42nd Amendment and Article 368: After the decisions of the Supreme Court in Keshavanand Bharati case and Indira Nehru Gandhi case the constitution 42 amendment act 1976 was passed which added new clauses clause (4) and (5) to Article 368 of the constitution. Clause (4) provided that no constitutional amendment including the provision of Part III or purporting to have been made under Article 368 whether before or after the commencement of the constitution 42nd amendment act 1976 shall be called in any court on any ground. Clause (5) removed any doubts about the scope of the amending power. It declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal of the provisions of the Constitution under this Article. Thus by inserting clause (5) it made it clear that even the "basic feature" of the constitution could be amended.

In Minerva Mills vs Union India[20] the Supreme Court by 4 to 1 majority struck down clause (4) and (5) of Article 368 inserted by the 42nd amendment on the ground that these clauses destroyed the essential feature of the basic feature of the constitution. Limited amending power is a basic structure of the constitution. Since these clauses removed all limitations on the amending power and thereby conferred an unlimited amending power, it was destructive of the basic feature of the constitution. The Judgement of the Supreme Court thus makes it clear that the constitution not the parliament is supreme in India

Recent Judgements on Judicial Activism.

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.

[20] AIR 1980 SC 1789

This is the reason why the Supreme Court had to expand its jurisdiction by, at times, issuing novel directions to the executive[21].

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 pill for every ill" and said that some had sought to use it as an instrument of blackmail and oppression. The judiciary had to be vigilant against personal, political and publicity-oriented litigation masquerading as PIL, he added. 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 judgements against solitary confinement and handcuffing of prisoners, Justice Krishna Iyer had upheld basic human dignity.

There are some very important cases which come in the talk whenever we discuss about judicial activism in India. 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[22].

It is a known fact that judicial activism has given us some very good case laws and path breaking judgements, which even led to revolutionary changes in the society[23]. The landscape of recent Supreme Court rulings offers some interesting insights into the metamorphosis of judicial activism in India.

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[21] Ariwar Alam "Judicial Activism"Gaurav Books Publication, New Delhi, pp24.
[22] Ariwar Alam "Judicial Activism" Gaurav Books Publication, New Delhi, pp26
[23] Ariwar Alam "Judicial Activism"Gaurav Books Publication, New Delhi, pp31

The guidelines have been issued increasingly in legislative spheres. Because of these opinions, at least in theory, employers must now act against sexual harassment at the workplace, banks must be prudent in their use of recovery agents, and police officers must follow procedures prior to an arrest, mildly similar to the American Miranda rights. In India, they could perhaps be called Basu rights, considering D.K Basu vs State of West Bengal 1986[24].

In recent order, the Supreme Court has directed the most complex engineering of interlinking rivers in India. The court has passed orders banning the pasting of black film on automobile windows. On other hand in its activist and controversial interpretation of the Constitution, the Supreme Court took away the constitutionally conferred power of the President of India to appoint judges after consultation with the Chief Justice, and appropriated this power in the Chief Justice of India and a collegiums of four judges. In no Constitution in the world is the power to select and appoint judges conferred on the judges themselves.

The Indian Supreme Court comprises a galaxy of such activist judges who display their power and preferences. Justices Krishan Iyer, P.N. Bhagawati, O Chinappa Reddy and D. A Desai were the pioneers to lay the foundation of judicial activism in India through their concept of Social Action Litigation(SAL). "With the foundation of judicial activism laid, judicial figures such as Desai and Chinnappa Reddy JJ were quick to extent the realm of judicial activism to the protection of organized labours." "Subsequently, new Judicial actors like Kuldeep Singh, K Ramaswamy and J. S Verma entered the scene. Justice Kuldeep Singh displayed a rare concern for a clean and unpolluted environment, Justice K. Ramaswamy deployed judicial activism for the protection of the depressed under classes of contemporary Indian Society while Justice J. S Verma through Judicial activism strove to cleanse corruption in high places."[25]

Through judicial activism the Supreme Court has asserted its role as the ultimate interpreter of the Constitution, Such observation was made by P.N. Bhagawati J., in State of Rajasthan Vs Union of India in the following words: "This Court is the ultimate interpreter of the Constitution and to this court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch of Government, whether it is limited, and if so what are the limits and whether any

[24] Ariwar Alam "Judicial Activism" Gaurav Books Publication, New Delhi, pp37
[25] Ravi Prakash, "Constitution Fundamental Right and Judicial Activism in India", Jain Book, New Delhi pp51

action of that branch transgressed such limits. It is for this court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law."[26]

Conclusion:

The Supreme Court expanded its role as the protector of fundamental rights with the expansive interpretation given to the term 'State'. The wider the concept of 'other authority' the wider the coverage of fundamental rights. The judicial trend of expanding the horizon of other authority' began with Ramana Dayaram Shetty case. In Ramana Dayaram Shetty vs International Airport of India the Supreme Court laid down a broader test to determine as to whether a particular body is an agency or instrumentality of government. If a body whether it is a statutory corporation, a government company or even a registered society as an agency or instrumentality of government then it may be an authority within the meaning of Article 12 of the Constitution. Consequently, the action of an agency or instrumentality of the government could be subject of judicial review for violation of fundamental rights. In course of time, through judicial creativity more and more bodies have been held to be authorities within the meaning of Article 12 of the Constitution.

On the basis of the above cases one can see that while some of the cases of judicial activism are merely cases of the court interpreting the word of the legislature in a creative manner and thereby providing fair and equitable justice some of the other cases are instances in which the court has far exceeded its authority to an extent that goes beyond the legislative intent of the law and also infringes on the principle of separation of powers espoused in the constitution.

In analyzing the positive aspects of the case we find that judicial activism by the courts has, to a large extent changed the face of Indian jurisprudence for the better. While the Legislature and Executive in a parliamentary form of government are exposed to the pull and pressures of the electoral forces, the judiciary well performs the entrusted task of holding the scales of justice even and aloft. The Judiciary operates as a mechanism of this correction and judicial activism serves as potent pacemaker to correct, as far as possible, malfunctioning in violation of the constitutional mandates and to stimulate the state organs to function in the right direction.

[26] Ravi Prakash "Constitution Fundamentaal Right and Judicial Activism in India", Jain Book, New Delhi pp76.

Balanced judicial activism is, therefore indispensable for imparting the needed vitality to the rule of law in a welfare state.[27]

Failure on part of the legislative and executive wings of the Government to provide 'good governance' makes judicial activism an imperative. The illustration of a few rulings of the Supreme Court of India evolving new dimensions of public law having implications for public administration would bring out the impact of judicial activism. The Supreme Court of India has come to the rescue of grossly under paid workers, bonded labor, prisoners, pavement dwellers, under trial detenues, inmates of protection homes, victims of Bhopal gas disaster and so on so forth.

By means of judicial activism, the Judiciary merely assists in the process of governance, it does not take over the functions of the Executive wing of the government. The aforesaid judicial activism has alone led the public administration to be conscious and conscientious of public interest as its goal. Judicial activism has to be welcomed and it implications assimilated in letter and spirit. An activist court is surely for more effective than a legal positivist conservative court to protect the society against legislative adventurism and executive tyranny. When our chosen representatives have failed to give us a welfare state, let it spring from the Judiciary.

Judicial activism is not aberration. It is an essential aspect of the dynamics of a constitutional court. It is a counter majoritarian check on democracy. Judicial activism, however, does not mean governance by the judiciary. Judicial activism must also function within the limits of the judicial process.

[27] Satya Ranjan Purusottm "Judicial Activism in India" Oxford University Press, London pp 251