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Judicial Activism

The concept of judicial activism originated and developed in the USA. This term was first coined in 1947 by Arthur Schlesinger Jr., an American historian and educator.[1]

In India, the doctrine of judicial activism was introduced in mid-1970s. Justice V.R. Krishna Iyer, Justice P.N. Bhagwati, Justice O. Chinnappa Reddy and Justice D.A. Desai laid the foundations of judicial activism in the country.

Meaning of Judicial Activism

Judicial activism denotes the proactive role played by the judiciary in the protection of the rights of citizens and in the promotion of justice in the society. In other words, it implies the assertive role played by the judiciary to force the other two organs of the government (legislature and executive) to discharge their constitutional duties.

Judicial activism is also known as "judicial dynamism". It is the antithesis of "judicial restraint", which means the self-control exercised by the judiciary.

Judicial activism is defined in the following way:

1. "Judicial activism is a way of exercising judicial power that motivates judges to depart from normally practised strict adherence to judicial precedent in favour of progressive and new social policies. It is

commonly marked by decision calling for social engineering, and occasionally these decisions represent intrusion in the legislative and executive matters".[2]

2. "Judicial activism is the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent, or are independent of, or in opposition to supposed constitutional or legislation intent".[3]

The concept of judicial activism is closely related to the concept of Public Interest Litigation (PIL). It is the judicial activism of the Supreme Court which is the major factor for the rise of PIL. In other words, PIL is an outcome of judicial activism. In fact, PIL is the most popular form (or manifestation) of judicial activism.

Justification of Judicial Activism

According to Dr. B.L. Wadehra, the reasons for judicial activism are as follows:[4]

(i) There is near collapse of the responsible government, when the Legislature and Executive fail to discharge their respective functions. This results in erosion of the confidence in the Constitution and democracy amongst the citizens.

(ii) The citizens of the country look up to the judiciary for the protection of their rights and freedoms. This leads to tremendous pressure on judiciary to step in aid for the suffering masses.

(iii) Judicial Enthusiasm, that is, the judges like to participate in the social reforms that take place in the changing times. It encourages the Public Interest Litigation and liberalises the principle of 'Locus Standi'.

(iv) Legislative Vacuum, that is, there may be certain areas, which have not been legislated upon. It is therefore, upon court to indulge in judicial legislation and to meet the changing social needs.

(v) The Constitution of India has itself adopted certain provisions, which gives judiciary enough scope to legislate or to play an active role.

Similarly, Subhash Kashyap observes that certain eventualities may be conceived when the judiciary may have to overstep its normal jurisdiction and intervene in areas otherwise falling within the domain of the legislature

and the executive:[5]

(i) When the legislature fails to discharge its responsibilities.
(ii) In case of a 'hung' legislature when the government it provides is weak, insecure and busy only in the struggle for survival and, therefore, unable to take any decision which displeases any caste, community, or other group.
(iii) Those in power may be afraid of taking honest and hard decisions for fear of losing power and, for that reason, may have public issues referred to courts as issues of law in order to mark time and delay decisions or to pass on the odium of strong decision-making to the courts.
(iv) Where the legislature and the executive fail to protect the basic rights of citizens, like the right to live a decent life, healthy surroundings, or to provide honest, efficient and just system of laws and administration.
(v) Where the court of law is misused by a strong authoritarian parliamentary party government for ulterior motives, as was sought to be done during the emergency aberration.
(vi) Sometimes, the courts themselves knowingly or unknowingly become victims of human, all too human, weaknesses of craze for populism, publicity, playing to the media and hogging the headlines.

According to Dr. Vandana, the concept of judicial activism can be seen to be reflecting from the following trends, namely,: [5a]

(i) Expansion of rights of hearing in the administrative process.
(ii) Excessive delegation without limitation.
(iii) Expansion of judicial control over discretionary powers.
(iv) Expansion of judicial review over the administration.
(v) Promotion of open government.
(vi) Indiscriminate exercise of contempt power.
(vii) Exercise of jurisdiction when non-exist.
(viii) Over extending the standard rules of interpretation in its search to achieve economic, social and educational objectives.
(ix) Passing of orders which are *per se* unworkable.

Activators of Judicial Activism

Upendra Baxi, an eminent jurist, has delineated the following typology of

social / human rights activists who activated judicial activism[6]:

1. **Civil Rights Activists:** These groups primarily focus on civil and political rights issues.
2. **People Rights Activists:** These groups focus on social and economic rights within the contexts of state repression of people's movements.
3. **Consumer Rights Groups:** These formations raise issues of consumer rights within the framework of accountability of the polity and the economy.
4. **Bonded Labour Groups:** These groups ask for judicial activism is nothing short of annihilation of wage slavery in India.
5. **Citizens for Environmental Action:** These groups activate an activist judiciary to combat increasing environmental degradation and pollution.
6. **Citizen Groups against Large Irrigation Projects:** These activist formations ask the Indian judiciary the impossible for any judiciary in the world, namely, cease to and desist from ordering against mega irrigation projects.
7. **Rights of Child Groups:** These groups focus on child labour, the right to literacy, juveniles in custodial institutions and rights of children born to sex workers.
8. **Custodial Rights Groups:** These groups include social action by prisoners' rights groups, women under state 'protective' custody and persons under preventive detention.
9. **Poverty Rights Groups:** These groups litigate issues concerning draught and famine relief and urban impoverished.
10. **Indigenous People's Rights Groups:** These groups agitate for issues of forest dwellers, citizens of the Fifth and Sixth Schedules of the Indian Constitution and identity rights.
11. **Women's Rights Groups:** These groups agitate for issues of gender equality, gender-based violence and harassment, rape and dowry murders.
12. **Bar-based Groups:** These associations agitate for issues concerning autonomy and accountability of the Indian judiciary.
13. **Media Autonomy Groups:** These groups focus on the autonomy and accountability of the press and instruments of mass media owned by the State.
14. **Assorted Lawyer-Based Groups:** This category includes the critically

influential lawyers' groups which agitate for various causes.

15. **Assorted Individual Petitioners:** This category includes freelance activist individuals.

Apprehensions of Judicial Activism

The same jurist Upendra Baxi also presented a typology of fears which are generated by judicial activism. He observes: "The facts entail invocation of a wide range of fears. The invocation is designed to bring into a nervous rationality among India's most conscientious justices". He described the following types of fears[7]:

1. **Ideological fears:** (Are they usurping powers of the legislature, the executive or of other autonomous institutions in a civil society?)
2. **Epistemic fears:** (Do they have enough knowledge in economic matters of a Manmohan Singh, in scientific matters of the Czars of the atomic energy establishment, the captains of the Council of Scientific and Industrial Research , and so on?)
3. **Management fears:** (Are they doing justice by adding this kind of litigation work load to a situation of staggering growth of arrears?)
4. **Legitimation fears:** (Are not they causing depletion of their symbolic and instrumental authority by passing orders in public interest litigation which the executive may bypass or ignore? Would not the people's faith in judiciary, a democratic recourse, be thus eroded?)
5. **Democratic fears:** (Is a profusion of public interest litigation nurturing democracy or depleting its potential for the future?)
6. **Biographic fears:** (What would be my place in national affairs after superannuation if I overdo this kind of litigation?)

Judicial Activism vs. Judicial Restraint

Meaning of Judicial Restraint

Judicial activism and judicial restraint are the two alternative judicial philosophies in the United States. Those who subscribe to judicial restraint contend that the role of judges should be scrupulously limited; their job is

merely to say what the law is, leaving the business of law-making where it properly belongs, that is, with the legislators and the executives. Under no circumstances, moreover, should judges allow their personal political values and policy agendas to colour their judicial opinions. This view holds that the 'original intent' of the authors of the constitution and its amendments is knowable, and must guide the courts.[8]

Assumptions of Judicial Restraint

In the USA, the doctrine of judicial restraint is based on the following six assumptions[9]:

1. The Court is basically undemocratic because it is non-elective and presumably non-responsive to the popular will. Because of its alleged oligarchic composition the court should defer wherever possible to the 'more' democratic branches of government.
2. The questionable origins of the great power of judicial review, a power not specifically granted by the Constitution.
3. The doctrine of separation of powers.
4. The concept of federalism, dividing powers between the nation and the states requires of the Court deference toward the action of state governments and officials.
5. The non-ideological but pragmatic assumption that since the Court is dependent on the Congress for its jurisdiction and resources, and dependent on public acceptance for its effectiveness, it ought not to overstep its boundaries without consideration of the risks involved.
6. The aristocratic notion that, being a court of law, and inheritor and custodian of the Anglo–American legal tradition, it ought not to go too far to the level of politics—law being the process of reason and judgment and politics being concerned only with power and influence.

From the above, it is clear that all the assumptions (except the second dealing with the judicial review) hold good in the Indian context too.

Supreme Court Observations

While delivering a judgement in December 2007, the Supreme Court of India called for judicial restraint and asked courts not to take over the functions of

the legislature or the executive, saying there is a broad separation of powers under the Constitution and each organ of the state must have respect for others and should not encroach on others' domain. In this context, the concerned Bench of the court made the following observations[10]:

1. The Bench said, "We are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. This is clearly unconstitutional. In the name of judicial activism, judges cannot cross their limits and try to take over functions which belong to another organ of the state".
2. The Bench said, "Judges must know their limits and must not try to run the government. They must have modesty and humility, and not behave like emperors."
3. Quoting from the book 'The Spirit of Laws' by Montesquieu on the consequences of not maintaining separation of powers among the three organs, the Bench said the French political philosopher's "warning is particularly apt and timely for the Indian judiciary today, since very often it is rightly criticised for 'overreach' and encroachment on the domain of the other two organs."
4. Judicial activism must not become judicial adventurism, the Bench warned the courts Adjudication must be done within the system of historically validated restraints and conscious minimisation of judges' preferences.
5. "The courts must not embarrass administrative authorities and must realise that administrative authorities have expertise in the field of administration while the court does not."
6. The Bench said, "The justification often given for judicial encroachment on the domain of the executive or the legislature is that the other two organs are not doing their jobs properly. Even assuming this is so, the same allegations can be made against the judiciary too because there are cases pending in courts for half-a-century."
7. If the legislature or the executive was not functioning properly, it was for the people to correct the defects by exercising their franchise properly in the next elections and voting for candidates who would fulfil their expectations or by other lawful methods, e.g., peaceful demonstrations.
8. "The remedy is not in the judiciary taking over the legislative or the

executive functions, because that will not only violate the delicate balance of power enshrined in the Constitution but also (because) the judiciary has neither the expertise nor the resources to perform these functions."

9. The Bench said: "Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the state. It accomplishes this in two ways: first, judicial restraint not only recognises the equality of the other two branches with the judiciary, it also fosters that equality by minimising inter-branch interference by the judiciary. Second, judicial restraint tends to protect the independence of the judiciary. When courts encroach on the legislative or administrative fields almost inevitably voters, legislators, and other elected officials will conclude that the activities of judges should be closely monitored.

Notes and References

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10. *The Hindu*, "Don't cross limits, apex court asks judges", December 11, 2007.