



# AN ANALYTICAL STUDY OF JUDICIAL ACTIVISM IN INDIA AND ITS ROLE IN PROTECTION OF HUMAN RIGHTS<sup>1</sup>

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## **I. INTRODUCTION**

Judicial activism is today one of the most misused constitutional terms. India practices constitutional democracy with emphasis on constitutionalism. This comes with it to high rates of political activities with misuse of political powers granted in the Constitution by the political actors. Naturally, the court is called upon to wear its active posture and interpret the Constitution as it affects the political class. However, each decision of the courts interpreting the constitution against the political class is met with cries of “judicial activism” from one side of the political spectrum or the other. The other cry seems to be that the courts are encroaching into the domain of the political class thereby violating the doctrine of political questions which is essentially a function of separation of powers. Over the last few years with various controversial decisions, judges of the Supreme Court as well as various High Courts have once again triggered off the debate that has always generated a lot of heat. But still, what the term “judicial activism” actually connotes is still a mystery. From the inception of legal history till date, various critics have given various definitions of judicial activism, which are not only different but also contradictory. This is an attempt to bring out the exact connotation of “judicial activism” and to find out its effects on today’s changing society. The Indian constitution which was drafted in 1950 is one of the well compiled and well planned constitutions. It is a constitution which defined powers and functions of the organs of the government, which are meant for a safe and fair indirect parliamentary democracy in India. Hence supremacy of parliament is the essential feature of our political system. The Supreme Court acts as the guardian and the protector of the constitution. It prevents parliament from enacting any legislation against the spirit and letter of the constitution. Courts in India respected reputation for creatively and genuinely discharging their assigned duty carefully. The Indian constitution consists of all essential requisites for the exercise of judicial review – as a written and rigid constitution, federation having division of powers and fundamental rights. The power of judicial

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review enables the Supreme Court to review the acts and the orders of the legislative and executive wings of the government. They are directed to act within their ambit for fair and smooth administration. A complete harmony between judicial review and parliamentary supremacy is an outstanding achievement of the architects of the Indian constitution. Both U.S and U.K adopted the extremes of supremacy of American judiciary and supremacy of British parliament, whereas Indian constitution has adopted a golden mean between the two. No supreme court can stand in judgement of sole will of the parliament, representing the will of the entire community. But when there is a question regarding the future of the community, judiciary can pull up that sovereign power. Today judicial activism has touched almost each and every aspect of life ranges from human rights issues to maintenance of public roads. Judicial activism means the power of the Supreme Court and the high court to declare the laws as unconstitutional and void, if it infringes or if the law is inconsistent with one or more provisions of the constitution. To the extent of such inconsistency while declaring a law as constitutional and void the courts do not suggest any alternative measures. The judicial activism is use of judicial power to articulate and enforce what is beneficial for the society in general and people at large. Supreme Court despite its constitutional limitation has come up with flying colors as a champion of justice in the true sense of the word. JUSTICE... this seven letter word is one of the most debated ones in the entire English dictionary. With the entire world population being linked to it, there is no doubt about the fact that with changing tongues the definition does change. The judicial activism has touched almost every aspect of life in India to do positive justice and in the process has gone beyond, what is prescribed by law or written in black and white. Only thing the judiciary must keep in mind is that while going overboard to do justice to common man must not overstep the limitations prescribed by sacrosanct i.e. The Constitution.

## **II. CONCEPT AND MEANING OF JUDICIAL ACTIVISM**

One basic and fundamental question that confronts every democracy, run by a rule of law is what is the role or function of a judge. Is it the function of a judge merely to declare law as it exists-or to make law? And this question is very important, for on it depend the scope of judicial activism. The Anglo-Saxon tradition persists in the assertion that a judge does not make law; he merely interprets. Law is existing and eminent; the judge merely finds it. He merely reflects what the legislature has said. This is the photographic theory of the judicial function. It has long held the field in England and its most vigorous exposition is to be found in a speech made by Lord Chancellor Jowett at the Australian Law Convention where he said, "*The function of a judge is merely to find the law as it is. The lawmaking function does not belong to him, it belongs to the legislature.*" This judicial view hides the truth of the judicial process. This theory has been evolved in order to insulate judges against vulnerability to public criticism and to preserve their image of neutrality, which is regarded as necessary for enhancing their credibility. It also helps judges to escape accountability for what they decide. They can plead helplessness by saying that it is a law made by the legislature and they have no choice but to give effect to it. The tradition of the law and the craft of jurisprudence offer such judges plenty of dignified exits from the agony of self-conscious wielding of power. And hence the incredibly persistent attempt on the part of lawyers and judges to convince the

people about the truth of the lie that judges does not make law. There can be no doubt that judges do take part in the law making process.

Judicial activism is when courts do not confine themselves to reasonable interpretations of laws, but instead create law. Alternatively, judicial activism is when courts do not limit their ruling to the dispute before them, but instead establish a new rule to apply broadly to issues not presented in the specific action. "Judicial activism" is when judges substitute their own political opinions for the applicable law, or when judges act like a legislature (legislating from the bench) rather than like a traditional court. In so doing, the court takes for itself the powers of parliament, rather than limiting itself to the powers traditionally given to the judiciary. In this regard, judicial activism is a way for liberals to avoid the regular legislative means of enacting laws in order to ignore public opinion and dodge public debate.<sup>2</sup>

The term judicial activism despites its popularity to amongst legal experts, judges, scholars and politicians has not until recently been given an appropriate definition of what the term should mean so that it will not be subject to abuse.<sup>3</sup> The effect of this has been a misconception about what the term is all about.<sup>4</sup> This therefore creates series of definitions about the concept. Although definitions are usually products of individual idiosyncrasy and its often influenced by the individual perception or world view, a combination of various definitions gives a description of the concept. The Judicial Activism as innovative, dynamic and law making role of the Court with a forward looking attitude discarding reliance on old cases, and also mechanical, conservative and static views. It is the creative thought process through which the court displays vigour, enterprise, initiative pulsating with the urge of creating new and refined principles of law. It means when the Court plays a positive role the court is said to be exhibiting the "Judicial Activism". *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.*" Judicial activism means active role played by the judiciary in promoting justice. Judicial Activism to define broadly is the assumption of an active role on the part of the judiciary.<sup>5</sup> According to Prof. Upendra Baxi, Judicial Activism is an inscriptive term. It means different things to different people. While some may exalt the term by describing it as judicial creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of public duties etc., others have criticized the term by describing it as judicial extremism, judicial terrorism, transgression into the domains of the other organs of the

<sup>2</sup>Available at [http://www.conservapedia.com/Judicial\\_activism](http://www.conservapedia.com/Judicial_activism)

<sup>3</sup> See for instance some of the work that is on judicial activism without really defining the term. Chad M. Old father, "*Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*" (2005) 94, Geo. L.J. 121, 122

<sup>4</sup> Keenan D. Kmiec, "*The Origin and Current Meanings of 'Judicial Activism,'*" (2004) 92, Cal. L. Rev., 1441, 1442; See also Bradley C. Canon, "*A Framework for the Analysis of Judicial Activism*" in Stephen C. Halpem & Charles M. Lamb eds., "*Supreme Court Activism And Restraint*" 1982, 385.

<sup>5</sup> Chaterji Susanta, "*For Public Administration' Is judicial activism really deterrent to legislative anarchy and executive tyranny*" The Administrator, Vol. XLII, April-June 1997, p9, at p11

State negating the constitutional spirit etc. Judicial activism implies going beyond the normal constraints applied to jurists and the Constitution, which gives jurists the right to strike down any legislation or rule against the precedent if it goes against the Constitution. Thus, ruling against majority opinion or judicial precedent is not necessarily judicial activism unless it is active. In the words of Justice J.S Verma, Judicial Activism must necessarily mean *“the active process of implementation of the rule of law, essential for the preservation of a functional democracy”*.

Judicial activism is the view that the Supreme Court and other judges can and should creatively (re)interprets the texts of the Constitution and the laws in order to serve the judges' own visions regarding the needs of contemporary society.<sup>6</sup> 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.

### III. ORIGIN OF JUDICIAL ACTIVISM

The simplest and the greatest example of judicial activism is *Marbury v. Madison*<sup>7</sup> which is landmark case in the United States of America. It formed the basis of judicial activism in America. This conflict raised the important question of what happens when an Act of Congress of United States of America conflicts with the Constitution. Chief Justice Marshall answered that Acts of Congress that conflict with the Constitution are not law and the Courts are bound instead to follow the Constitution, affirming the principle of judicial review. In support of this position Marshall looked to the nature of the written Constitution—there would be no point of having a written Constitution if the courts could just ignore it. "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" Chief Justice Marshall also argued that the very nature of the judicial function requires courts to make this determination. Since it is a court's duty to decide cases, courts have to be able to decide what law applies to each case. Therefore, if two laws conflict with each other, a court must decide which law applies. Finally, Chief Justice Marshall pointed to the judge's oath requiring them to uphold the Constitution, and to the Supremacy Clause of the Constitution, which lists the "Constitution" before the "laws of the land."<sup>8</sup> Thus in the first time in the modern history it was recognized that judicial activism makes the law as the living law. Judicial activism is nothing more than judicial creativity which emphasises upon evolving new juristic principles for the development of law remaining alive the reality.

After the end of British Raj, the executive has always looked upon the judiciary as a hostile branch of the State as executive started to rot itself into a system for personal and not public gains. Another reason can be traced into the

<sup>6</sup>Available at <http://definitions.uslegal.com/j/judicial-activism/>

<sup>7</sup> 2 L Ed 60 (1803)

<sup>8</sup> Andhyarujina, T.R. "Issues of Judicial Independence" Hindu, 10th September, 2009.



*Theory of Social Wants*.<sup>9</sup> Masses were oppressed beyond imagination by the unbridled actions by Money power, Muscle power, Media power and Ministerial power, which compelled judiciary to provide relief. Judiciary couldn't wait for the parliament to take some action as it takes far too long for social patience to suffer. With the framing of the Constitution of India, the three wings of effective governance came into being, namely the legislature, the executive and the judiciary. The Constitution provides for separation of powers and hence demarcates the powers and areas of all these three machineries. However sometimes with the failure of the legislature and the executive, the separation of power remains a theory only in the text book and the third wing of governance, the judiciary assumes powers unprecedented for under the name and guise of judicial review, which is a very basic feature of the Constitution of India. The line that demarcates the power of all three organs in an indirect democracy like India is very thin. One question that arises before the judiciary after every judgement is to whether to put any new guidelines and norms for the executive and legislature for further protection and up to what extent. When judiciary lays down the guidelines, they move a step closer in getting involved in the public administration. It has over the period of time changed from a mere spectator to a proactive player. This is what one calls as judicial separation in general terms.

The Indian judiciary has taken upon itself the task of ensuring maximum freedom to the masses and in the process, to galvanize the executive and the legislature to work for public good. However, this changing stance of the judiciary from moderate to active role has invited wrath. The Indian judiciary has taken upon itself the task of ensuring maximum freedom to the masses and in the process, to galvanize the executive and the legislature to work for public good. However, this changing stance of the judiciary from moderate to active role has invited wrath from some sections of the society, criticism from some others and support and cheers from still other sections. Some political scholars feel that the judiciary is usurping powers in the name of public interest while according to others, judicial activism and interference is actually preventing the executive from going astray.

Therefore, in the historic case of *Mumbai Kamghar Sabha v. Abdul Bhai*,<sup>10</sup> the Apex Court introduced the doctrine of judicial activism, though without the nomenclature. The significant feature of Indian Constitution is partial separation of powers. -The doctrine of separation of powers was propounded by the French Jurist, Montesquieu. It is partly adopted in India since the executive powers are vested in the president, Legislative powers in the Parliament and the judicial powers in the Supreme Court and subordinate courts. The role of separation of powers in India is simple. The three organs of the Government viz. the Executive, Legislature and the Judiciary are not independently independent but inter-dependently independent. The Judicial Activism in India can be witnessed with reference to the review power of the Supreme Court and High Court under Art. 32 and 226 of the Constitution particularly in public interest litigation cases. The Supreme Court played crucial role in formulating several principles in public interest litigation cases.

<sup>9</sup> B. S. Tyagi, *Judicial Activism in India*, Srishti Publishers & Distributors, New Delhi, 2000, pp 80

<sup>10</sup> AIR 1976 SC 1465

In India the concept originated after a public interest litigation was filed before the supreme court when the then Chief justice P N Bhagwati took an unknown case directly from the public who did not had any involvement in the case but it was just for the public welfare and also was related to public in large. Justice P N Bhagwati has said that *“One basic and fundamental question that confronts every democracy, run by a rule of law is, what is the role or function of a judge. Is it the function of a judge merely to declare law as it exists-or to make law? And this question is very important, for on it depends the scope of judicial activism”*. The Anglo-Saxon tradition persists in the assertion that a judge does not make law; he merely interprets. Law is existing and eminent; the judge merely finds it. He merely reflects what the legislature has said. This is the photographic theory of the judicial function”. It is for the judge to give meaning to what the legislature has said and it is this process of interpretation which constitutes the most creative and thrilling function of a judge. In the initial years of 1950-67, the Supreme Court adopted the attitude of judicial restraint in which the court gave a strict and literal interpretation of the constitution. Judicial review in India was provided for expressly in the Constitution. Article 13, clause (1) says that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions containing the fundamental rights, shall, to the extent of such inconsistency, be void. Clause (2) of that article further says that the State shall not make any law that takes away or abridges any of the fundamental rights and any law made in contravention of the above mandate shall, to the extent of the contravention, be void. The Constitution also divides the legislative power between the Centre and the states and forbids either of them to encroach upon the power given to the other. Who is to decide whether a legislature or an executive has acted in excess of its powers or in contravention of any of the restrictions imposed by the Constitution on its power? Obviously, such function was assigned to the courts.

The Constitution was criticized by some members of the Constituent Assembly for being a potential lawyer's paradise. **Dr. B.R. Ambedkar** defended the provisions of judicial review as being absolutely necessary and rejected the above criticism. According to him, the provisions for judicial review and particularly for the writ jurisdiction that gave quick relief against the abridgement of fundamental rights constituted the heart of the Constitution, the very soul of it. The nature and scope of judicial review was first examined by the Supreme Court in *A.K. Gopalan case*<sup>11</sup> where it accepted the principle of judicial subordination to legislative wisdom. But on the whole it limited itself and exercised judicial restraint. The second phase unfolded with the Golaknath case which resulted in on open conflict between the judiciary and legislature. The parliament asserted its supremacy and the Supreme Court asserted its power of Judicial Review, which resulted in a series of constitutional amendments in which the parliament tried to limit the power of Judicial review. In the Emergency of 1975-77, the judiciary was made subservient to the legislature and executive. In *Golaknath case*,<sup>12</sup> the Supreme Court gave an unprecedented judgment, which was clearly a case of Judicial Activism. The reason of imposing emergency was the decision of Allahabad High Court setting aside the election of Prime Minister Indira Gandhi to the Lok Sabha. The 42nd

<sup>11</sup> AIR 1950 SC 27

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

constitutional Amendment Act was also passed which put new limitations on the judiciary. After the emergency the 44th constitutional Act was passed which restored the judiciary's position as it had existed before the emergency. In *Minerva Mills case*<sup>13</sup> the Supreme Court declared judicial review as part of the basic structure. Since 1980's we saw the emergence of Judicial Activism as a powerful tool in Indian Polity.

Thus now we find that the Supreme Court is no longer exercising judicial restraint. But in fact, it has taken up Judicial Activism so much. A court giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the right of the individual is said to be an activist court. Thus has given birth to Judicial Activism. In the words of Justice J. S. Varma "*The role of the Judiciary in interpreting existing laws according to the needs of the times and filling in the gaps appears to be the true meaning of Judicial Activism.*"

#### **IV. CONSTITUTION OF INDIA AND JUDICIAL ACTIVISM**

The classic statement of Montesquieu has become one of the cardinal principles of governance in a modern constitutional democracy. While formulating the above proposition, however, Montesquieu was not clear about the inherent salient features that are the pre-requisites for a cohesive and hassle-free governance structure. These inherent salient features includes:-

- (i) A written constitution which establishes its supremacy over any institution created under it;
- (ii) Distribution of powers among the three organs of the State; and
- (iii) The co-equal status, along with the coordinating powers of each of the three organs.

With regard to the judiciary, the noted constitutional scholar Prof. D.D. Basu explains the essence of the doctrine of separation of powers thus:-

"So far as the courts are concerned, the application of the doctrine may involve two propositions: namely

- (a) That none of the three organs of Government, Legislative Executive and Judicial, can exercise any power which properly belongs to either of the other two;
- (b) That the legislature cannot delegate its powers.

The Constitution of India envisages a system of governance based on the separation of powers, even though the Constitution does not expressly mention it. For instance, Article 53(1) expressly vests the executive power of the union in the President, and Article 50 clearly states that the State should take necessary steps to separate judiciary from the executive. In the Indian Context, 'Separation of Power' is one of the basic features of the Indian

<sup>13</sup> (1980) 3 SCC 625

Constitution, which has been rightly declared by the Supreme Court of India in the matter of *State of Bihar v. Bal Mukund Shah*<sup>14</sup>.

In post-independence India, the inclusion of explicit provisions for 'judicial review' were necessary in order to give effect to the individual and group rights guaranteed in the text of the Constitution. Dr. B.R. Ambedkar, who chaired the drafting committee of our Constituent Assembly, had described the provision related to the same as the 'heart of the Constitution'. Article 13(2) of the Constitution of India prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void. While judicial review over administrative action has evolved on the lines of common law doctrines such as 'proportionality', 'legitimate expectation', 'reasonableness' and principles of natural justice, the Supreme Court of India and the various High Courts were given the power to rule on the constitutionality of legislative as well as administrative actions. In most cases, the power of judicial review is exercised to protect and enforce the fundamental rights guaranteed in Part III of the Constitution. The higher courts are also approached to rule on questions of legislative competence, mostly in the context of Centre-State relations since Article 246 of the Constitution read with the 7th schedule, contemplates a clear demarcation as well as a zone of intersection between the law-making powers of the Union Parliament and the various State Legislatures. Hence the scope of judicial review before Indian courts has evolved in three dimensions – firstly, to ensure fairness in administrative action, secondly to protect the constitutionally guaranteed fundamental rights of citizens and thirdly to rule on questions of legislative competence between the centre and the states. The power of the Supreme Court of India to enforce these fundamental rights is derived from Article 32 of the Constitution. It gives citizens the right to directly approach the Supreme Court for seeking remedies against the violation of these fundamental rights. This entitlement to constitutional remedies is itself a fundamental right and can be enforced in the form of writs evolved in common law. Besides the Supreme Court, the High Court's located in the various States are also designated as constitutional courts and Article 226 permits citizens to file similar writs before the High Courts.

It has so long that as objection has been raised by arguing that judiciary is entering into the normal administrative setup of the country, which is not the mandate of the constitution. To understand the mandate of the Indian constitution, we really need to think and apply the intentions of the makers of the constitution and that cannot be done without the effort of the best legal minds of the country. Various contradicting judgments have been passed by Supreme Court of India throughout our legal history. The first instance where judicial activism was denied by the Supreme Court was the case of *A. K Gopalan v. State of Madras*<sup>15</sup> wherein the issue was about the meaning of the word law in the phrase "due process of law" as used in Art 21<sup>16</sup> of Indian constitution and court held that law

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<sup>14</sup> (2000) 4 SCC 640.

<sup>15</sup> AIR 1950 SC 27

<sup>16</sup> Article 21 of the Indian Constitution states that "No person shall be deprived of his life or personal liberty except according to



means law declared by legislature and judiciary cannot interfere in that. Court gave a widest ambit of the constitutional provisions in the case of *Kesavanda Bharati case*<sup>17</sup> in which supreme court held that the basic structure of the constitution cannot be amended in any case even by the enactment of the legislature. It was succeeded by *Maneka Gandhi v. Union of India*<sup>18</sup> in order to protect the human rights and liberties of the citizens which are continued till date.

When judiciary starts rendering ‘complete justice’ as guaranteed under article 142<sup>19</sup> of the Indian constitution, the areas where substantial evidences are required for inviting judicial attention and in some other areas no such evidences is required and free judiciary has intervened *suo motto* or on the basis of PIL , are corrected. A bare reading of article 142(1) does not lead to a conclusive proposition. The words in the clause are “.... may pass such degree or make such order for doing complete justice in any cause or matter pending before it.” If one construes these words in isolation, the effect is enormous, perhaps to the extent where other repositories of judicial power under constitution are rendered unnecessary. One can even question the necessity for Article 32 and the writs under it, in the light of the fact that the Supreme Court can pass any order to complete justice in exercise of its power under article 142. Unless the jurisdiction of the article 142 is limited, the power under article 142 becomes co-extensive with or even greater than that under article 32. Even though judicial accountability is nowhere directly contemplated in the constitution of India, is very evident from the judicial practices in the past a decade or so.

The current judicial process which has given rise to the debate on judicial activism is merely a continuation of the justice delivery system which has been prevalent in this country all along. In India the case is different from that of US and UK because the credit of initiation of judicial activism goes to PIL. PIL passed a wave of new hope among the deprived citizens of the country which ensured judicial participation in the public administration, a manifestation of judicial activism. After initial restrictions, 25<sup>th</sup> amendment Act, 1971 was passed and the subject matter of PIL was widened to the extent that judiciary started giving procedural and directory guidelines to the executive in terms of compliance and enforcement of directive principles. With the advent of Public Interest

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procedure established by law.

<sup>17</sup> AIR 1973 SC 1461

<sup>18</sup> AIR 1978 SC 597

<sup>19</sup> Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc ( 1 ) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

Litigation (PIL) in recent decades, Article 32 has been creatively interpreted to shape innovative remedies such as a ‘continuing mandamus’ for ensuring that executive agencies comply with judicial directions. In this category of litigation, judges have also imported private law remedies such as ‘injunctions’ and ‘stay orders’ into what are essentially public law-related matters.<sup>20</sup>

Beginning with the first few instances in the late-1970’s, the category of Public Interest Litigation (PIL) has come to be associated with its own ‘people-friendly’ procedures. The foremost change came in the form of the dilution of the requirement of ‘locus standi’ for initiating proceedings. Since the intent was to improve access to justice for those who were otherwise too poor to move the courts or were unaware of their legal entitlements, the Court allowed actions to be brought on their behalf by social activists and lawyers.<sup>21</sup> In numerous instances, the Court took suo moto cognizance of matters involving the abuse of prisoners, bonded labourers and inmates of mental institutions, through letters addressed to sitting judges.

Public Interest Litigation which evolved a liberal interpretation of the fundamental right of life and liberty guaranteed by Article 21 to include the right to live with dignity and, therefore, to enjoy the enjoy the basic amenities of life such as food, water, shelter, basic education, health care and even the right to a healthy environment. Simultaneously, the court declared that they could and should direct the executive to provide these amenities to citizens who were denied these.<sup>22</sup>

The frequent use of this concept has led to several instances where courts have directed actions that were hitherto considered to be exclusively in the domain of the executive. Examples are the orders to convert commercial vehicles in Delhi to natural gas fuel, shutting down of polluting industries around the Taj in Agra and the dismantling of all structures on the ridge running through Delhi. While these orders have generally upheld the citizens’ rights to life and liberty, they have led to fears regarding ‘judicial over reach’. As such, it may be appropriate to suggest that the limits of judicial intervention should be discussed in non-judicial for and should be defined by law. Also, it is for consideration whether judges should be held accountable for any attempt to exceed their powers and to encroach on the territory of the executive.

## **V. JUDICIAL ACTIVISM: NECESSITY AND LIMITATIONS**

<sup>20</sup> See: Ashok H. Desai and S. Muralidhar, *Public Interest Litigation: Potential and Problems*’ in B.N. Kirpal et. al. (eds.), *Supreme but not Infallible – Essays in Honour of the Supreme Court of India* (OUP, 2000) at p. 159-192; Also see K.G. Balakrishnan, ‘Growth of Public Interest Litigation in India’, Fifteenth Annual Lecture, Singapore Academy of Law (October 8, 2008), Text available from <www.sal.org>

<sup>21</sup> See Susan D. Susman, ‘Distant voices in the Courts of India: Transformation of standing in Public Interest Litigation’, 13 Wisconsin International Law Journal 57 (Fall 1994)

<sup>22</sup> Aruna Roy, Jean Dreze and Nikhil Dey, “The Right to Transparent Governance”, *Combat Law*, Vol. 6, Colin Gonsalves (ed.), Issue 2, March-April 2007, p.90.

Justice is the bread of the nation- it is always hungry for it. And, it is well known that justice delayed is justice denied. The role of judicial activism in India has been to provide a safeguard to the common man and indigent against an insensitive system. This noble task, taken upon it by the courts, has provided succor, **relief** and requisite legal remedies to the needy and deprived, over the past few years of judicial intervention and cementing. The hallmark of a great nation is its institutions. The stronger the ability of these institutions to uphold and preserve fundamental values, the greater the nation would be. When India's founding fathers wrote the Constitution, they created three arms — Parliament, Executive and the Judiciary — of the state that together were to be the keepers of the ideals of the nation as enshrined in the Constitution. Over the past several months, however, the Parliament has become dysfunctional, the Executive has abdicated its duties and the Judiciary is cracking the whip. An active judiciary is one that takes its task of defending the fundamental rights of the people and their liberties against the onslaught of the state, earnestly. As far as judges are concerned, it is a matter of mindset. One judge could say that policy formulation is the job of the Executive and Judiciary does not need to intervene while another could believe that even in policy formulation, the Judiciary would need to step in to guard fundamental rights. The occasion for this often arises when the Executive fails to discharge its statutory, constitutional obligations. As a result of this failure, the fundamental rights of the people are violated. For instance, there are laws to prevent children from working in hazardous occupations. Now there are parents who willingly let their children work because of economic necessities. The factory owners fix the inspectors and the laws that are supposed to protect the children are not implemented. In such cases, a court hearing a complaint from a bonafide NGO can order the state to enforce the laws because by not implementing them it is violating the children's fundamental right to a healthy life. That is activism in the right sense. Judicial interpretations are based on the realities of the situation. Every country has to work out its Constitution according to its problems, needs and demands. As Justice Krishna Iyer once said *"Every new decision, on every new situation, is a development of the law. Law does not stand still. It moves continually. Once this is recognised, then the task of the judge is put on a higher plane."* The courts cannot remain mute spectators when laws are not enforced and consequently, fundamentally rights are violated. If the Judiciary does not intervene, it would be an inactive Judiciary.

Our Constitution contains checks and balances, which require all the three wings to work harmoniously. It has created a separation of powers between all the three branches or wings though the separation, it is now well accepted, is not as rigid as it is under the American Constitution. No person, however high, is above the law. No institution is exempt from accountability, including the judiciary. Accountability of the judiciary in respect of its judicial functions and orders is vouchsafed by provisions for appeal, reversion and review of orders. What is the mechanism for accountability for serious judicial misconduct, for disciplining errant judges. Our Constitution provides for removal of a judge of the Supreme Court or the high court for proved misbehavior or proved incapacity, by what is popularly called the process of impeachment, where under two thirds of the members of each House of Parliament may vote for the removal of the judge. So far, only one impeachment proceeding has been initiated against a Supreme Court judge. It failed because Congress abstained from voting and consequently

two- thirds majority was not available. It is now generally accepted that the present impeachment process is cumbersome, time consuming and tends to get politicised. It needs to be reformed urgently. For Supreme Court and other lesser court judges it is ideal to refrain themselves from reading commentaries, policy references or judge's philosophies because it may construe the law wrongly or biased. It is very necessary to harmonise the judicial restraint. In the case of *Kumar Padma Prasad v. Union of India* which discussed on the viability of the probing to be done in the administrative action in reference to the public interest litigation registered by the judges of the high court. It was held that *Suo Motto* assuming of judicial jurisdiction to probe in the administrative matter relating to the high court was not justifiable. Supreme Court recently gave a judgment against smoking at public places, *Murli S Dewara v. Union of India* reflects as if the courts have taken the work over the legislating the statutes, which is not treated to be good sign for democratic functioning. One of the views of that society, which postulates judicial activism as a wrong practice is that it has a detrimental effect on our democratic order. The judiciary has also flaws and loophole in its administration system, so in case of an autocratic decision by the judiciary, there is no recourse. The misuse of PIL to achieve political ends is another curse that looms around Indian judiciary. Red-tapism, corruption, changing governments, lack of legal-awareness, weight of arrears of cases, has contributed to weakening of the implementing mechanism of the executive which has lead to some orders to remain on paper only. This is due to the lack of effective feed back system. Judiciary despite having the best intention is not able to deliver the goods well in time.

Rising judicial activism was hindering governance in the country and impacting growth in Asia's third largest economy, finance minister P Chidambaram said.

*"Nowhere in the world would we see ideal balance between legislature and judiciary. But in India, we have seen intensifying judicial activism, which had impacted the balance of governance,"* Chidambaram said at The Economic Times Awards for Corporate Excellence. *"The balance in India has swung away from the executive and the parliament,"* he said. *"The judiciary has taken an upper hand. Unless the executive has a final say, we cannot have sustained high growth rate. Countries like China, Brazil and Mexico, with a stronger executive authority, have exhibited better growth trajectory,"* he argued. *"Judicial institutions cannot take over governance. We must rediscover the balance between our institutions and we have to reassert the balance between reforms, development and institutions,"* Chidambaram said. Sounding a note of caution on judicial activism, The President of India Mr. **Pranab Mukherjee** said judicial pronouncements must respect the boundaries that separate the legislature, executive and judiciary. Making his first visit outside the national capital after assuming the office of President on July 25, Mukherjee also said that everything must be done to protect the independence of judiciary from any form of encroachment. Addressing the valedictory function of the 150th anniversary celebrations of the Madras High Court, he urged judiciary to keep reinventing itself through a process of introspection and self-correction at the same time. In his address, Mukherjee touched upon various issues that dominate legal discourse including judicial accountability and the appointment of judges. The President referred to judicial activism and

said the judges through innovation and activism have contributed enormously to expanding the frontiers of justice and providing access to the poorest of the poor. The Supreme Court in an order has said that the judiciary must refrain from encroaching on legislative and executive domain otherwise it will boomerang in the form of political class stepping to clip their wings. A bench comprising Justice AK Mathur and Justice Markandey Katju said, *"If the judiciary does not exercise restraint and over-stretches its limit there is bound to be reaction from politicians and others. The politicians will then step in and curtail the powers or even independence of the judiciary. The judiciary should, therefore, confine itself to its proper sphere, realizing that in a democracy many matters and controversies are best resolved in a non-judicial setting."* The court said that justification often given for judicial encroachment into the domain of the executive or legislature is that the other two organs are not doing their jobs properly. Even assuming this is so, the same allegation can then be made against the judiciary too because there are cases pending in courts for half-a-century, bench said. If they are not discharging their assigned duties, the remedy is not judicial interference as it will violate delicate balance of power enshrined in the constitution, remarked the court.

## **VI. CONCLUSION**

One of the views of that society, which postulates judicial activism as a wrong practice is that it has a detrimental effect on our democratic order. The judiciary has also flaws and loophole in its administration system, so in case of an autocratic decision by the judiciary, there is no recourse. The misuse of PIL to achieve political ends is another curse that looms around Indian judiciary. Red-tapism, corruption, changing governments, lack of legal-awareness, weight of arrears of cases, has contributed to weakening of the implementing mechanism of the executive which has lead to some orders to remain on paper only. This is due to the lack of effective feedback system. Judiciary despite having the best intention is not able to deliver the goods well in time.

The counter arguments are as follows:

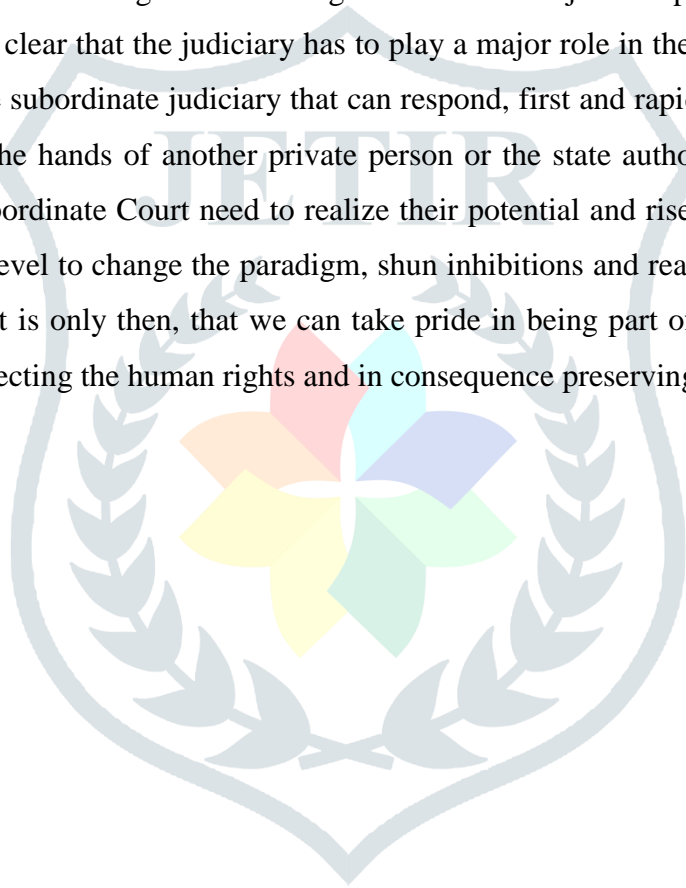
Firstly, it has become crystal clear that not only has judicial activism activated the judiciary but has activated the executive and the legislature too. Several new legislations have appeared on the scene after judiciary's efforts and directions (The Consumer Protection Act, 1986, The Environmental (Protection) Act, 1986, Protection of Human Rights Act, 1993 etc.). Judicial activism has unearthed several scams and scandals (e.g. Hawala Scam, Fodder Scam, St. Kits Scam, Illegal Allotment of Government Houses and Petrol Pumps, Fertilizer Scam etc.).

The judiciary, like the legislature, is also manned by human beings who come from the same social milieu and are subject to same human frailties and social constraints. No institution has monopoly rights to weaknesses or to making mistakes.

The apex Court itself has given cautious guidelines on the abuse of PIL in several cases (People's Union for Democratic Rights v. Union of India, Bandhua Mukti Morcha v. Union of India; M.C. Mehta v. Union of India). Recently the country has seen instances of beneficial judicial activism to a great extent. High profile politician



Shibu Soren has been convicted for a murder committed in 1994. Film world celebrity Sanjay Dutt has been convicted of offences under the Arms Act committed in 1993. Navjyot Sidhu, an ex-cricketer with a gift of the gab has been convicted for a road rage killing committed 18 years ago. Whatever be the criticisms against judicial activism, it cannot be disputed that judicial activism has done a lot to ameliorate the conditions of the masses in the country. It has set right a number of wrongs committed by the states as well as by individuals. The scope of a Court to protect human rights is of wide amplitude. The Court must realize that “Farthest from the lions is what the lambs fancy”. A person appearing before a Court is hardly there of his or her own choice. Compulsions drive a person to a Court. Infringement of a right is the basic premise of such a compulsion. Like a patient aggrieved by a disease, takes shelter of a doctor to seek remedy for it, so does a litigant seeks the shelter of a Court in search of remedy for infringement of his human right. Various legislations and the judicial pronouncements of the Hon'ble Supreme Court make it amply clear that the judiciary has to play a major role in the protection of human rights of the people. Invariably, it is the subordinate judiciary that can respond, first and rapidly, to the call of infringement of a person's human right at the hands of another private person or the state authorities like police, jail or other agencies of the executive. Subordinate Court need to realize their potential and rise to the occasion. It is time for the Courts at the subordinate level to change the paradigm, shun inhibitions and realize their role in protecting the human rights of the people. It is only then, that we can take pride in being part of an institution responsible for preserving the rule of law protecting the human rights and in consequence preserving the justice.



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