JUDICIAL ACTIVISM IN INDIA

Nitu Mittal And Tarang Aggarwal*

1. INTRODUCTION

The term" judicial activism" was coined for the first time by Arthur Schlesinger Jr. in his article "The Supreme Court: 1947" published in Fortune magazine in 1947.

[1] Wharton's Concise Law Dictionary defines Judicial Activism as a philosophy of Judicial decision whereby judges allow their personal views about public policy, among other factors, to guide their decisions usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedents (Black's Law Dictionary, 7th edition p 850).

The definition of Judicial Activism has been differently stated by different people. Those who favour Judicial Activism say that it is a legitimate form of Judicial Review. However, Thomas Jefferson calls it "Despotic Power" of Federal Judges.[2] V.D. Kulshrestha says that when the judiciary is accused of actually participation in the law making process and so to say becomes a key player in the law making process, then such move on the part of Judiciary is termed as Judicial Activism.[3] Upendra Baxi widens this concept by saying that *"In a sense, the power to interpret law is the power to make them; and the power to manipulate the interpretation process is also the power to make law."*[4]

There is no end as to how one can define and interpret Judicial Activism. Over the last few years there have been several controversial decisions given by the judges of the Supreme Court and the

* Nitu Mittal and Tarang Aggarwal III Year, B.B.A.LLB (HONS.) Symbiosis Law School, Noida

[1] Jha K., "*Judicial Activism in India*", (23 February 2012), Retrieved on 9 August 2014 http://lawthing.blogspot.in/2012/02/judicial-activism-in-india.html

[2] Haines & Sherwood, "The Role of the Supreme Court in American Government and Politics", Vol. 1, University of California Press, pp.209, Retrieved on 2 September 2014, http://books.google.co.in/books?id=qWlMgSqhRv4C&pg=PA254&lpg=PA254&dq=%22despotic+branch%22+jefferson+adams&source=bl&ots=kjs0wYo4d1&sig=IBv5ditYQw7_M0vY1Ul48cpcquM&hl=en&sa=X&ei=027uTqLzHcjc0QGErXQCQ&redir_esc=y#v=onepage&q=%22despotic%20branch%22%20jefferson%20adams&f=false

[3]Kulshrestha,V.D, "*Landmarks in Indian Legal and Constitutional History*", Lucknow, Eastern Book Company, Ninth Edition, 2009, pp. 491

[4]Baxi,Upendra, "*Law, Struggle and Change: An agendum for activists*", *Social Action,1985,* Vol 35

High Courts which have triggered off the debate and has generated a lot of heat. But still, what the term "Judicial Activism" actually connotes is still a mystery.[5]

2. History of Judicial Activism in India

The transformation of Indian Courts from a restraint one to an activist one has been a long and a complex process. In the beginning the role of Judiciary was so conservative that it interpreted the Fundamental Rights and the Constitution in a static and traditional colonial manner and ignored the Directive principles.[6] This could be seen in several cases.[7]

Upendra Baxi said that before 1967 the Indian courts were a centre of Political power. In his book he writes that "The home truth is that The Indian Supreme Court is a centre of political power, even though a vulnerable one. It is a centre of political power simply because it can influence the agenda of political action, control over which power politics is in reality all about."[8] He further added that this was of no help as the Supreme Court still remained vulnerable.

The Court had no consistency in the sense that politicians had. He concluded that the result of this would be negative. By this he meant that when the court would be in crisis, there is no assurance that there would be anyone to support it. That would be the time when even the legal profession would get divided.

3. Judicial Activism- A part of Judicial Review

The public debate over judicial review primarily revolves around denunciations of judicial 'activism'. The term does not have any clear content but some basic notion of activism underlies the normative scholarly debate over judicial review as well.[9] All those who support Judicial

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[5]Saha,Arpita, "*Judicial Activism in India: A Necessary Evil*",2008, July Retrieved on September 20, 2014 fromhttp://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156979&http://www.google.co.in/url?sa=t&rct=j&q=cases+solved+by+judicial+acctivism&source=web&cd=6&ved=0CEUQFjAF&url=http%3A%2F%2Fpapers.ssrn.com%2Fsol3%2FDelivery.cfm%3Fabstractid%3D1156979&ei=EBFaUIzrAc_trQfah4CwBA&usg=AFQjCNFunn5AZMCu6dJU39GinqFhrsWEEg

[6]Kulshrestha,V.D., "*Landmarks in Indian Legal and Constitutional History",* Lucknow, Eastern Book Company, Ninth Edition, 2009, pp. 492

[7]*Sri Sankari Prasad Singh Deo* v. *Union of India*,1951 AIR 458, 1952 SCR 89; *Sajjan Singh* v. *State of Rajasthan*,1965 AIR 845, 1965 SCR (1) 933 ;*ADM Jabalpur* v *Shivkant Shukla* (1976)2 SCC 521

[8]Baxi,Upendra, "*The Indian Supreme Court and Politics*", Eastern Book Company", Law Publishers and Booksellers,pp.10

[9] Whittington , K.E.(2011), "*Theories of Judicial Review*", Princeton University, Department of Politics, 240 Corwin Hall, 258-3453, Retrieved on September 7, 2014 http://www.princeton.edu/~kewhitt/judicial_review.pdf

Activism say that it is nothing but a legitimate form of Judicial Review. The emergence of judicial review gave birth to a new movement which is known as judicial activism.[10]

Justice (Retd.) Janardan Sahay, at the inaugural session of a conference on *"Judicial activism in India: Prospects, challenges and threat"* said that "Judicial activism means expansion of judicial review in both administrative and legislative domains." These words acquired new meaning with changing times and context. Thus, the emergence of Judicial Activism has been possible only due to review power of Judiciary and unless any Judiciary climbs the ladder of Judicial Review, it can never try upon Activism as it will face immense opposition.

Though there is no article which specifically mentions the term Judicial Activism and it is still a debated issue. However, Article 142 of the Indian Constitution[11] is considered as one of the most splendid articles in Indian Constitution that favours Judicial Activism.

4. KESAVANANDA BHARTI CASE- ACTIVISM IN REVIEW

Famously known as the "*Basic Structure Doctrine"*[12] this case is one of the landmark cases in the Indian history. The question raised was that whether the Parliament had the power to take away the fundamental rights of the citizens granted under the articles 25, 26,14 and 19(1)(f) by way of amendment as mentioned under 368 of the Constitution of India. This was not for the first time that such a question had been raised. It was first raised in Sri *Sankari Prasad Singh Deo v. Union of India*[13] and then in *Sajjan Singh v. State of Rajasthan*[14]. In both the cases the power to amend was upheld by Article 368. The same case was again raised in *Golaknath v State of Punjab*[15]. Here it was stated that:

- Amendment in the constitution came within the ambit of law as defined Article 13.
- Article 13 prohibits the state from passing laws which "take away or abridge" the Fundamental Rights.

[10] "*Judicial Activism in India*", Thursday 23, February 2012, Retrieved on September 7, 2014 http://lawthing.blogspot.in/2012/02/judicial-activism-in-india.html
[11] Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc
[12] *Kesavananda Bharti* v. *State of Kerala*, (1973) 4 SCC 225:AIR 1973 SC 1461
[13] 1951 AIR 458, 1952 SCR 89
[14] 1965 AIR 845, 1965 SCR (1) 933
[15] 1967 AIR 1643, 1967 SCR (2) 762

- Article 368 does not give legislature the power to amend the constitution but only provides for the procedure.

- Amendments which "take away or abridge" the Fundamental Rights provisions cannot be passed.

It was finally in Kesavananda Bharti that the Hon'ble Supreme Court said that the Parliament by way of amendment could not take away the fundamental rights of citizens or amend the basic structure of constitution. This move of the Supreme Court showed activism on its part. Baxi says "In the sense in which we use the notion of judicial activism, the assertion of judicial reasoning over the amendatory power is the remarkable feature of judicial activism, unparalleled in the history of world constitutional adjudication. The Indian Supreme Court is probably the only court in the history of human kind to have asserted the power of judicial review over the amendments to the constitution".[16]

The courts had been known for reviewing and invalidating executive and administrative action, they also reviewed laws made by the legislatures but this had happened first time in the history that courts had assigned themselves the task of judging and invalidating and amendment to the text of constitution.

5. EMERGENCY AND JUDICIAL ACTIVISM (TUSSLE BETWEEN LEGISLATURE AND JUDICIARY)

The political dominance over the Judiciary could be seen in the Emergency period which marked the darkest side in the entire history of Indian Judiciary. It is considered to be the first phase of Judicial Activism. This entire process began with the famous case *Indira Nehru Gandhi* v *Raj Narain*[17]. The case was filed by Raj Narain who challenged Indira Gandhi's Election on the grounds of fraud. The matter was taken to the Allahabad High Court wherein Justice Jagmohan Lal Sinha by his courageous judgment held Indira Gandhi's election to be void and barred her from contesting elections for the next 16 yrs.

The matter was taken to the Supreme Court where Indira Gandhi moved the Supreme Court to grant an "Absolute Stay" on the order of High Court. Justice Iyer refused to grant the stay and

[16] Baxi, Upendra, '*A pilgrim's progress: The Basic Structure Revisited*', *Indian Bar Review- Vol. 24(1&2) 1997, 53.*
[17] 1975 Supp SCC 1: AIR 1975 SC 2299

refused the Prime Minister the right to vote; permitting her to only to address both the houses of Parliament and draw her salary in her capacity as Prime Minister. The next day of the judgment was followed by the imposition of Emergency by Indira Gandhi under Article 352 of the Indian constitution.

5.1 EMERGENCY PERIOD: THE THREE PHASES

The Emergency Period has been divided by Upendra Baxi into three phases in his book "The Indian Supreme Court and Politics"[18].

The first phase lasted from June to December 1975.It was during this phase that the 39th Amendment to the constitution was passed and Article 71 dealing with election of President and Vice President was amended to validate the election of Indira Gandhi and the Supreme Court was to pronounce its decision on the validity of all these retroactive changes in the electoral law. This showed that the Supreme Court had to surrender in front of the politics played by Indira Gandhi.

The second phase lasts from January to June 1976.This period is marked by the search of a new Constitutional census and a general assault on the power of the courts, especially the writ jurisdiction. Sixteen High court judges were transferred in this period without their consent. It was in this period that the famous Habeas Corpus case[19] was heard. The judiciary like the other organs of the government was at the verge of falling in line with Indira Gandhi's concept of "committed judiciary" but Justice Khanna's minority judgment in this case saved it.

The third phase lasts from June 1976 to March 20-24 1977.The crucial aspect of this phase was the supersession of Justice Khanna (due to the Judgment given by him in *ADM Jabalpur* by appointment of Justice Beg as CJI).

The three phases of Emergency showed the powerlessness of the Indian Judiciary. The High Court judge's image was even worse. Baxi says that:

The High Court judges are made of such stuff that they panic at the whiff and whisper of being transferred to another court, they feel readily threatened by the circulars issued by a Law minister; they tremble with fear at every utterance of the Prime Minister of India or some irate Chief

[18]See Baxi, Upendra, "*The Indian Supreme Court and Politics*", Eastern Book Company", Law Publishers and Booksellers, "*THE TWILIGHT OF LEGITIMACY:THE SUPREME COURT AND THE EMERGENCY*"
[19]*ADM Jabalpur* v *Shivkant Shukla* (1976)2 SCC 521

Ministers of States or by assorted politicians; the additional judges of the High court regard themselves as civil servants litigating over their appointments and promotions.[20]

This however was not the destiny of the courts of India. The good times came for the judiciary when the Janata Dal government headed by Moraji Desai came into being and did away with the antidemocratic set up of replacing the highest judicial tribunal by a non- judicial body. By the 44th amendment all the powers of the courts were restored in the same manner as they were previously exercised. Several landmark judgments were given by the Supreme Court. One such included the famous case of *Maneka Gandhi v Union of India*[21]. This was the first move of Supreme Court to transform itself into an activist one.

The difference in the opinion of the court from the Gopalan *case*[22] was commendable and showed activism of the court. The famous case of *S.P. Gupta v Union of India and others*[23] further uplifted the judiciary. The case was known as "*Judges Transfer Case"* in which the issue of transfer and appointment of additional judges of High court (along with other issues) was raised. The decision made by the judges was commendable. Justice Gupta, a member of the minority stated that:

"The independence of the judiciary depends to a great extent on the security of tenure of the Judges. If the Judge's tenure is uncertain or precarious, it will be difficult for him to perform the duties of his office without fear or favour."

This was just the beginning. After this many remarkable judgments were passed by the judges which strengthened the Indian judiciary and made it as powerful as it is today.[24]

6. Rise of Judicial Activism in India

6.1 Public Interest Litigation

After independence though situations improved for the Indians, however still a large section of population lied below the poverty line. In such a situation, it was natural that the courts and the notion of justice could be used only by the well to do sections. This led to the birth of Judicial

[20]Baxi,Upendra, "*Judiciary at the Crossroads",* Journal of Bar Council of India*,* 1982, Vol. 9(2)
[21](1978) 1 SCC 248
[22]*A.K.Gopalan* v *State of Madras*, AIR 1950 SC 27 :1950 SCR 88
[23]AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365
[24]See, *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556 : 1985 SCC (Cri) 245;*Ram Gopal Sharma* v *Sukhdev Raj Rudra,(*2001)9 SCC 201;*Bank of India* v. *O.P. Swarnakar*,(2003) 2 SCC 721; *Zee Telefilms* v. *UOI*, (2005)4 SCC 649.

Activism in India which enabled the High Courts to reach large masses and thus provide justice to the poorest of the poor. The assumption of judicial activism and liberalization of the doctrine of *locus standi* opened the doors of court for large sections of disadvantaged people to seek justice through what is called **Public Interest Litigation** (PIL).[25]

The emergence of PIL was important in many ways. Firstly, it made justice available to a large section of people. Under this, any person could move approach for any matter regarding public welfare by filling a petition in the Supreme Court under article 32 and High Court under article 226 of the Constitution of India. The seeds of this concept of public interest litigation were initially sown in India by Justice Krishna Iyer in 1976 in *Mumbai Kamagar Sabha vs. Abdul Tha*i[26].

It was initiated in *Raihvaiy v Union of India*, wherein an unregistered union of workers was permitted to file a writ petition under Art.32 of the Constitution for the redressal of their disputes collectively. Krishna lyer J. enunciated the reasons for liberalization of the rule of Locus Standi in *Fertilizer Corporation Kamgar vs. Union of India*[27] and the ideal of 'Public Interest Litigation' was blossomed in *S.P. Gupta and others vs. Union of India*[28] . Several new principles have been propounded by the Supreme Court in public interest litigation cases.

For instance, the principle of **'absolute liability'** was propounded in *Oleum Gas Leak case*[29]. The '**Public Trust Doctrine'** was propounded *in Kamalnath Case*[30]. Further, the Supreme Court has given variety of guidelines with respect to filing of PIL in various cases like Ratlam Municipality Case, Oleum Gas Leak Case and Ganga Pollution Case etc.

However, this was not the only positive aspect. Baxi in *Law, Struggle and Change* says that PIL led to pro-people renovation of judicial process and led to the rejuvenation of a special kind of confidence in the judiciary in its unequal battle with administrative deviance and crystallization of informed consensus on the need for fundamental reform of the legal system. This shows how

[25]Menon,N.R, "*Law and Justice: A look At The Role and Performance of Indian Judiciary*", pp 8 retrieved on September 20, 2014 from http://indiandemocracy08.berkeley.edu/docs/Menon-LawANDJustice-ALook%20.pdf
[26] AIR 1976 SC 1455; 1976 (3) SCC 832
[27]AIR 1981 SC 149; 1981 (2) SCR 52
[28]AIR 1982 SC 149
[29]AIR 1987 SC 1965
[30] 1998 I SCC .388

Judicial Activism strengthened the judiciary and become its backbone by making people believe in judiciary and rise for it whenever it needed.

6.2 WOMEN EMPOWERMENT

The role of Judicial Activism was not limited to PIL only. Another area where this was seen is Women Empowerment. The judiciary has taken major steps to improve the condition of women and prevent exploitation of women at workplace. In *Mohd. Ahmed Khan v. Shah Bano Begum and Others*[31], the Hon'ble Supreme Court overruled what was written in Muslim Law and extended the period of Iddat from 4 months and 10 days to provide justice to Shah Bano Begum.

This could also be seen in *Air India v. Nargesh Meerza*[32] where the Supreme Court struck down the regulation providing for the retirement of Air Hostess on her first pregnancy on the grounds that it was unconstitutional, void and in violation with Article 14 of Constitution of India. Another important judgment was given in *Vishakha v. State of Rajasthan* where the Supreme Court made guidelines to prevent sexual harassment of women at workplace.

There were many more judgments that enhanced women's status in the society and at the same time their trust in the judiciary.

Other areas include **Protection of Ecology and Environment (***M.C Mehta v/s Union of India*[33]); **Bonded Labourers** (*Democratic Rights v/Union of India*[34]); **Protection against inhuman treatment in jail** (*Sunil Batra v/s Delhi Administration*[35]); **Professional Ethics and medical men** (*Parmanand Katara v/s Union of India*[36]); **Child Welfare** (*Lakshmi Kant Pandey v Union Of India*[37]); **Fake Encounter** (*Union for Civil Liberties v/s Union Of India*[38]), etc.

7. ARGUMENTS FOR JUDICIAL ACTIVISM

1. The instances of Judicial Activism are actually instances of Judicial Review

[31]1985 AIR 945, 1985 SCC (2) 556
[32]1981 AIR 1829
[33]1986, Vol. 2 SCC 176
[34]AIR 1982 SC 1473
[35]AIR 1980 SC 1759
[36]AIR 1989 SC 2039
[37](1984) 2 SCC 244
[38]AIR 1997 SC 1203

2. It is the function of judiciary according to the doctrine of checks and balances

3. It is the function of judiciary to interpret law

4. Our constitution does not provide for the doctrine parliamentary supremacy, a doctrine applicable in England

5. In actuality the judiciary cannot help but make rules because this is inherent in the very nature of judicial activism

8. Arguments against Judicial Activism

1. Violates the doctrine of separation of powers as theorized by Montesquieu[39]

2. It undermines the doctrine of Parliamentary supremacy

3. It sometimes interprets the Constitution against the clear intentions of the Constitution drafters.

9. Problems regarding Exercise of Judicial Activism in PIL

Though the use of Activism in the form of PIL has been successful but this has been backed by several limitations. Though PILs were started solely for the purpose of public welfare, they have now been misused to fulfill private interest. In India the number of per capita judges is very less, so it is puzzling why the courts have not done enough to stop non-genuine PIL cases as it leads to wastage of judicial resources and prevents speedy justice. Often judges take up PIL cases which are popular amongst the society and undermine cases which involve an important public interest but are potentially unpopular. Often, the providing of justice to the people through PILs enables the judiciary to intervene in the powers of the executive and legislature.

10. Need for Judicial Activism in India

The most important question which has to be addressed is that why do we need Judicial Activism in India? The answer has been explained above and just needs to be summed up. One might say that Judicial Activism is necessary as per the theory of **Legal Skepticism** which says that what the

[39]Chatterjee, Somnath, "Empowerment through education- Impact on strengthening of democracy", IVth Dr. Shyama Prasad Mookerjee Special Lecture (2007)

judge says is a law; a complete opposition to Austin's theory of Law as a command of sovereign backed by sanctions.

However, this is not the case with India. In India, the law making power lies with the legislature and Judiciary can not intervene in this power. But there have been certain cases where when time required; the legislature failed to provide any law. In such cases the Judiciary may use the notion of Judicial Activism and provide justice to the people (*Vishakha case*). Also there are certain cases termed as the hard cases where the law cannot be applied the way it is. This is the point where judges have to use creativity so as to provide justice to the people and if they fail to do so, there existence is questioned.

Moreover, if we see the way powers are divided in India, there is always a clash between the judiciary and legislature and whenever there is a conflict, the one who has public support genuinely supersedes the other. We had seen how the powers of the Indian judiciary were ruined by Prime Minister, Indira Gandhi at the time of her rule and the saddest aspect was that there was nobody who could stand in support of the judiciary. Justice Khanna who tried to prevent judiciary by his minority judgment in *A.K. Gopalan* was brutally curbed. He in spite being the eldest person, he was not made the CJI of India and resigned in protest.

But, if such a similar situation happens today, the act of legislature will not sustain because the people will stand up for the judiciary, as they have faith in it. And this has been possible because of the exercise of the power of Activism by the judges. In, India where still a considerable part of population lives below poverty line and there is a need to make people aware of the rights they have and the remedies available and this can happen only and only through Judicial Activism, be it in any form. Thus, Judiciary Activism is a necessary evil. At the end, each country has to develop its own system to address its own problems and like in India where the other two wings have consistently failed the people the judiciary is but compelled to act.[40]

11. CONCLUSION

Judicial Activism is and will continue to be one of the most important functions of the Indian judiciary. It is the one who has made the judiciary grow and gain the support of people and stand

[40]Kulshrestha,V.D., "*Landmarks in Indian Legal and Constitutional History*", Lucknow, Eastern Book Company, Ninth Edition, 2009, pp492

at the position where it is today. It has improved the quality of justice being provided to the people and the judiciary cannot function well without the use of Activism. This however does not mean that we will ignore the flaws Judicial Activism has and the risk regarding the misuse of such power by the judges. We cannot say that Judicial Activism is the only option and that every judge should be an activist judge. But we cannot also ignore the good that Judicial Activism has brought and that a judge should not step back from applying this principle wherever necessary.

We cannot rely completely on the laws made by the legislature. Perhaps, Baxi has rightly said that an activist assertion cannot lie on state laws and its processes. An activist judge has to use his own reasoning and opinion rather than completely relying on laws stated in the constitution or made by the legislature. Thus, he has to be creative and apply Judicial Activism. It is the justice of the people which is the first and the most important thing.