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JUDICIAL ACTIVISM: A NECESSARY EVIL OR A THREAT TO SEPARATION OF POWERS?

AUTHORED BY - SHREYA SHARMA

INTRODUCTION

"Courts have been proactive and remedial in numerous instances. This is why, the sentiments of our people are very much in favor to them. However, the very concept of judicial overreach and judicial activism should be clearly delineated."

This is in line with Lord Hewart, CJ¹: "It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." This phenomenon, which has been dubbed by some 'judicial activism' is the one which finds expression in decisions of certain class of the judgement – the "activist" judges. Democracy has deepened in recent years, with the judiciary stepping in to situations, where clear executive discretion is being abused or the corruption and other vices have been casually approached by law makers, where the letter of the law is somewhat bent but the spirit is followed.

The only thing which one can say in the outside sounds of judicial activism² is just the temporal necessity of overcoming the excessive progressive obstacles of retarded order. Courts are convinced that through judicial activism, democracy is undermined since it places non-elected judges in a position to exercise judgement in matters that should be left for the decision of elected officials.³

They opine that this approach holds the risk of court overreaching, where courts not only apply the law as it is supposed to be done, but also hand down judgment of their own. '**Hussainara Khatoon v. State of Bihar**⁴' emerged as the first case to extensively use social action litigation to target the courts. The phenomenon of judicial activism is often focally retargeted to have commenced with public interest litigations and followed up with amendment of the narrows

¹ "Simon James & Chantal Stebbings, **Tax: A Multidisciplinary Approach** (1997)."

² "K.D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 *Calif. L. Rev.* 1441, 1441–77 (2004), <https://doi.org/10.2307/3481421>"

³ "M.M. Semwal & S. Khosla, *Judicial Activism*, 69 *Indian J. Pol. Sci.* 113, 113–126 (2008), <http://www.jstor.org/stable/41856396>"

⁴ "Hussainara Khatoon v. State of Bihar A.I.R. 1979 S.C. 1369."

definition of standing or locus standi.

A Necessary Evil or a Threat to Separation of Powers?

Institutional delay or injustice is often what prevents people from administering justice and hence judicial activism is regarded as an evil for good. For example, Indian courts have played a pioneering role in the areas of social justice and public interest litigation by taking action when the state could not, especially on issues like human rights, corruption and environmental degradation. Case which highlights Judicial Activism is “*Maneka Gandhi v. Union of India*”⁵ where the Court regarded the right to personal liberty as contained in the Indian Constitution which was also citizenship should include the right to settle outside the country. Such Energy prevents any branch of the government from running unchecked and serves as a pressure release system for democracy. The intervention of the court in this case immediately helps to maintain the public faith in the constitutional governance whenever the political bodies fail to help the people’s cause. Judicial activism has its benefits which includes the protection of underrepresented minorities against possible excesses of people rule or populist legislation in young democracies. The “*Kesavananda Bharati case*”⁶ has been the foundation to check the excesses of the Parliament’s power of amendment. The decision retained the essential values of democracy, secularism and rule of law principles by preventing the parliament from having carte blanche over any amended provisions of the constitution.

To my mind, the decision can be categorized as a form of judicial activism that is crucial in the preservation of democracy through the rule of law. Here the rationales were to safeguard the principles of constitutionalism allowing no government to power as to change its fundamental constituent for any material convenience. It illustrated the self-activating judicial style, for instance rather than bettering coordinator of case specific solutions. Such kind of action ensures that the equilibrium of power within the democratic structure is maintained, and people feel confident that their basic freedoms are safe from excesses of short-term political sentiments.

A notable example of this is the “*NALSA case*”⁷ which accorded transgender status the right to self identification as a gender. In meeting the gap left by the legislature and executive branches, the court recognized legal gender for transgendered people and affirmed the need for the protection of what were once considered marginal groups. In this regard, the NALSA

⁵ “*Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597”

⁶ “*Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461”

⁷ “*Nat’l Legal Servs. Auth. v. Union of India*, (2014) 5 S.C.C. 438”

judgment, in my view, is an instance of the engaging of the legal authority in the process of change in society. In this instance, judicial activism centered on the historical evolution of the existing legal order and acquiring legislation in regard to equality and dignity rather than the introduction of new laws.

This lack of representation explains why this type of judicial intervention is sometimes necessary as reforms or legislative measures progress slowly or the minority stands to be sidelined. The directive also proved instrumental in facilitating cultural inclusion and the fight for rights by transgender individuals in Indian society.

There are reasons that may warrant the use of judicial activism but it is clear that when in excess, the concept of the checks and balances on the three branches of government is at risk. Judicial activism has its share of opinions towards waging war on the democratic controlled principles of accountability. Courts, in contrast to legislatures, are not representational bodies. Where a court makes new laws or pursues policy solutions without a parliamentary endorsement it is likely to go beyond the Judiciary's territory. An example of this is the "*National Judicial nominations Commission*⁸" case of judicial overreaching when the judiciary overruled constitutional amendment passed by the Indian Parliament aiming to bring about reform in Judicial appointments. It is argued that these rulings not only break the system of checks and balances but also tend to support judicial dictatorship.

Judicial overreach has been documented in a few notable cases, apart from other instances of judicial overreach – which cases include "*Liquor Ban*⁹," "*Arun Gopal v. Union of India*¹⁰" and "*M.C. Mehta v. Union of India*¹¹." With this line of thought, it is suggested that there have been instances where the emias has seeped into what can be regarded as political decision making which is the prerogative of other arms of government. Although the aim of the "*liquor ban*" was aimed at reducing the number of vehicle accidents related with drunk driving, such an order advanced unreasonable restrictions on the business of state owned enterprises which many thought should rather be left to the control of the state level where issues regarding alcohol are usually dealt with. People were also concerned with the movement in the "*Arun Gopal*" case that restrained fireworks on Diwali as doing so would violate customs and would

⁸ "Supreme Court Advocates-on-Record Ass'n v. Union of India, (2016) 5 S.C.C. 1"

⁹ "State of Tamil Nadu v. K. Balu, (2017) 2 S.C.C. 281"

¹⁰ "Arun Gopal v. Union of India, W.P. (C) No. 728/2015, Supreme Court of India (Oct. 9, 2017)."

¹¹ "M.C. Mehta v. Union of India, (2018) 3 S.C.C. 199"

not be backed by legal requirements. In the same vein, the “*M.C. Mehta*” case showcased how the court was directly involved in economic regulation and industrial policy practices, which are by far the domain of the administrators.

In relation to my own experiences, even if the stated opinions of the court were noble in those instances, I sometimes wondered about the role of the courts and what the control mechanisms are. When performing such acts, such undertakings are likely to compromise the independence of the executive and the encroaching of democratic governance.

Because judicial activism has often been needed in bridging the shortcomings of either the legislature or the executive, excess and overreach in reach may cause the courts to issue decisions which are detached from the practical, contextual and social reasonable man. This court has to be scrupulous enough not to overstep its constitutional mandate while preserving the human rights envisioned by that Constitution.

CONCLUSION

Judicial activism, as I have stated, has been without a doubt important when it comes to justice; especially in cases when other branches of government have failed to perform their duties. Numerous rulings demonstrate how the court has moved outside the box of legal interpretation to fulfil even political goals and the ideals of democracy and fundamental rights. Judicial activism in these cases preserves the rights embodied in the Constitution even under political apathy and remains a positive force in the pursuit of social equality.

I do appreciate the risks taken by the judges but in relation to judicial tyranny, that is assuming too much control over the legislative and governance processes. Although in many instances the judicial system was aimed at addressing major social and ecological concerns, some of its decisions raised relevant issues concerning the division of powers. It is these decisions that remind the other branches of government that although they can and will defend the Constitution.

To me, this very thin margin between political tolerance and judicial activism, is of utmost importance. It is particularly so in order not to make the courts another politically neutral and non-elected body which makes decisions that are the province of popular elected politicians. Striking this balance contributes to sustenance of the public confidence and belief in the judicial independence while still honoring the ideals of separation of powers.