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ACKNOWLEDGING THE TRENDS OF JUDICIAL ACTIVISM IN INDIAN FRAMEWORK

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Abstract

"Judicial Activism implies legal propensity or tendency be it conscious or unconscious to accomplish appropriate harmony between clashing social values through change in existing laws and regulation or through making new laws and regulation that did not previously exists"

Judicial activism is known as the political role played by the judiciary it is related to the problems and processes of political development of a country. It is a way of exercising judicial powers which seek fundamental re-codification of power relations among dominant institutions of the state manned by members of the ruling class. The justification of judicial activism is sought in the degenerating acts of the responsible government.

In the radiance of the given statement, the article attempts to make sense of the importance and meaning of Judicial Activism and its part in safeguarding the privileges of common man.

Keywords

Judiciary, Public Interest Litigation, checks and balances, overreach, arbitrary powers, constitutional amendments

Introduction

Arthur Schlesinger Jr. introduced the term "Judicial Activism" in a January 1947 Fortune magazine article titled "The Supreme Court: 1947"¹.

The Black law dictionary² described it as “the judicial philosophy which motivate charges to depart from traditional precedents in favour of progressive and new social policies”. Judicial activism are the court's decisions based on judges' personal wisdom which does not go well rigidly within the text of the state you passed by the legislative body and use the powers bestowed as the judicial power broadly to facilitate remedies to the white social injustices and for ensuring proper justice in the society.

India has a recent history of judicial activism, beginning after the Emergency in India which saw endeavors by the public authority to control the judiciary. "Suo moto" cognizance permits the courts to take up such cases all alone on its own. The pattern has been upheld as well as reprimanded. The introduction of public interest litigation by Equity V. R. Krishna Iyer and then its gradual development, further extended its scope. Ongoing examples cited can incorporate the order to Delhi Government to switch the Auto rikshaw over completely to CNG, a move accepted to have decreased Delhi's past intense exhaust smog cloud issue.

Origin and development

There are two theories associated with the origin of judicial activism: they are the theory of vacuum filling and the theory of social want.

The theory of vacuum filling

A vacuum suction is created due to in-activeness of one organ of the government. This may disturb the democratic setup of the democracy. Hence other organs should expand their horizons and cover up the vacuum. Therefore, hyper activism of the judiciary is a result of filling up the vacuum or void created by non-activism of executive and the legislature. In-activity may be in the form of incompetence, negligence, corruption, indiscipline, or lack of character.

¹ "The Origin and Current Meanings of 'Judicial Activism'". Cal. L. Rev. 92 (5): 1441–1477.

² as quoted in "Takings Clause Jurisprudence: Muddled, Perhaps; Judicial Activism, No", Geo. JL & Pub. Pol'y, 2002

The theory of social want

The legislation was incapable to cope up with the existing situations and problems in the country which give rise to a social want or need in the country. Legislation failed to pay a pathway; therefore, the judiciary had to step in forward and took on its own shoulders the problems of the oppressed and paved a way to solve them. The existing legislations were of little help in this. So, the only way left was to give progressive and non-conventional interpretations of the existing laws for the greater good.

The roots of origin and development of judicial activism can be traced back in the English as well as the American concept. As per the English concepts it arises its roots from equity and natural just natural rights principles. And as per the American concept it derives its origin from the concept of judicial review.

In America; initially only the doctrine of due processes was applied to the substantive laws but gradually procedural laws were also included in its purview. 1898 to 1937 American Supreme Court declared 400 state laws and 50 Congressional enactments as unconstitutional.

The first landmark judgment was of *Brown vs. Board Of Education of Topeka*³ through which all laws segregating the negroes from American were ruled out in America.

In India; judicial activism is considered to be a product devised by the judiciary. The judiciary begins to nullify the separation of power specified in the constitution when acting under the scope of judicial activism. Judicial activism is not backed by the constitution when it tries to step over the line of power given to it. Dissolved separation of power would result in uncertainty of the law and create chaos in the society. A clear balance has to be maintained by the judicial disciplines in order to maintain proper functioning of the society.

In The Constitution

Though the text clearly expressing the concept of judicial activism is not present in the constitution of India but the same derived its power from several articles of the constitution. Article 13 describes the power of judicial review under the power of judicial review it can examine the constitutionality of the legislative and the executive bodies of the country. Article 32 describes

³ 347 U.S. 483 (1954)

the remedies for ends enforcement of rights conferred under part 3 of the constitution.

Article 141 suggests that the power of the Supreme Court is to declare and not enact the law but however, in the course of interpretation they are allowed to modify the law.

Article 142 gives the liberty to the Supreme Court to pass any necessary judgments required to do complete justice in any case.

Judicial Developments

In 1893 justice Mahmood of Allahabad High court sowed the seeds of judicial activism in India. The main question that arose in this case was whether the court could decide the case of an under trial who cannot afford a lawyer to decide his case by merely looking at his papers?

Justice Mahmood in his dissenting judgment held that what is more important is being heard and not being read. The case will be heard only when someone speaks.⁴ This was the widest possible interpretation of the relevant applicable law and laid the foundation stone of activism in India.

The case of *Indira Gandhi vs. Raj Narain*⁵ is another example of defining moments of judicial activism in the country.

MS Gandhi changed the laws relating to election and amended the constitution in favour of protecting her seat of the prime minister. Clause 4 was added in article 329A by 39th amendment preventing judicial review of election to the post of prime minister. This was later struck down by the Supreme Court. Looking at the access of emergency of 1975 and its aftermath constituted to be the defining moments in the sphere of judicial activism in India.

Before 1980 only aggrieved could personally approach the courts and seek remedy for their grievances.

*S.P. Gupta vs. Union of India*⁶ (also known as the judges' transfer case). According to justice Bhagwati the traditional rule was of ancient vintage and arose during an era when private law dominated. He observed that there is an urgent need to innovate new methods and devise new

⁴ Ref. to the Article, When seed for Judicial Activism was sowed, —The Hindustan Times (New Delhi) dated 01-04-96, p.9

⁵ 1975 AIR 2299; 1976 (2) SCR 347

⁶ AIR 1982 SC 149

strategies for the purpose of providing access to the judiciary for large masses of people, who are deprived of their human rights and to whom freedom and liberty have no meaning.

There are several other instances where the judiciary took on its role to safeguard the essence of the constitution and acted actively.

Pro environmental

*Union Carbide Corporation vs Union Of India*⁷ (Bhopal gas tragedy)

It was decided by the Supreme Court that the right to a healthy environment is a fundamental right under article 21. It helped in the inclusion of pro-environmental steps in the constitution.

Gender jurisprudence

*Delhi democratic working women's forum vs. union of India*⁸ (1995).

The guidelines to prevent sexual harassment of women at workplace were given in this case.

*Gaurav Jain vs. union of India*⁹

The guidelines for protection of women prostitutes and rehabilitation of their children were awarded in this case.

Upliftment of lower classes

*State of Kerala vs. N.M. Thomas*¹⁰

The Supreme Court conceded a liberal implementation of article 46 in relation to article 15 and 16, particularly in respect of the special provisions for Scheduled Caste and Scheduled Tribes.

Recent judgments where the judges have encroached the legislation are:

Rajesh Sharma vs. State of Uttar Pradesh (2017)¹¹

In this case section 498 of IPC was amended. It was made necessary that the complaints under this provision will need to be sent to a family welfare committee constituted by district legal service authority.

⁷ 1990 AIR 273, 1989 SCC (2) 540

⁸ 1995 SCC (1) 14, JT 1994 (7) 183

⁹ AIR 1997 SC 3021

¹⁰ AIR1976SC 490

¹¹ 2017 SCC 821

*Arjun Gopal vs union of India (2017)*¹²

The Supreme Court ordered that the use of non green crackers were prohibited and the timings were fixed for bursting of Diwali fireworks.

*MC Mehta vs. union of India (2018)*¹³

The rule under article 115 (21) of Central motor vehicle rules 1989 was annulled by the courts. It declared that only B6 vehicles can be sold after 30th March 2020 and complete ban on the B4 vehicles order to curb the pollution rates.

*Subhash Kashinath Mahajan vs. state of Maharashtra (2018)*¹⁴

Section 18 of the Scheduled caste and Scheduled tribe prevention of atrocities act 1989 was annulled. Hence the law declared that section 438 of the code can be applied to a person committing offence under the act.

Merits and Demerits of judicial activism

Talking about the merits and demerits of the judicial activism following could be termed as the positive points of the same. Judicial activism shows a system of check and balance to the other branches of the government. Judges can use their personal wisdom to provide a balance and stability to the society. Legislature may get struck for majority reasons and order being passed in respected houses hence they take time to make the loss but judiciary can provide a speedy process in making laws. Public power can many a times cause harm to society so judiciary helps in checking the misuse of public power.

However, this system of judicial activism clearly has its own draw-backs. Such as, it violates the line drawn by the constitution as judges can override any existing law. Judgment may be influenced by personal or selfish motives which can further harm the public at large. The trust of the common man upon the quality, integrity and efficiency of other two government institutions which are the legislature and executive will erode due to repeated influence of the courts. The courts limit the functioning of other organs of the government.

¹² 2018 SCC OnLine SC 2118

¹³ Writ Petition (Civil) No. 13381/1984 | 28-08-2018

¹⁴ AIR 2018 SC 1498

Conclusion

Arun Jaitley and eminent lawyer of the country and the former finance minister of India made his remark in wake of some recent judgments such as the court's verdict on section 66A of the IT act and the national anthem issue.

In his opinion the Supreme Court first struck down section 66A of the IT act. But later when people wrote comments or roadblocks against the judges the court started discussing measures to restrain the social media.

Initially courts allowed the Jehovah community not to sing the national anthem in 1986. Later a letter by the former chief justice of India was treated as a petition and singing the National anthem was considered a part of fundamental duties of the citizens of India.

To such issues, he remarked that “I think there is something which is needed. Parliament needs a vision for a long-term, governance needs that vision, politicians need an element of statesmanship; and the judiciary needs an unusual level of statesmanship, which is not influenced by the events of the day”¹⁵

¹⁵ Ref. to the Article, National Law Day: Judicial activism based on flawed premise, says Arun Jaitley , —The Indian Express dated 26-11-17