

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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JUDICIAL ACTIVISM: JUDGES AS THE CUSTODIAN OF CONSTITUTIONAL MORALITY

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ABSTRACT

The Indian Constitution is the grundnorm of all the legislations. The object of any statute is to give remedy to the already existing problems or those that are likely to arise in the future. Judicial activism arose on the very premise that where there is no solution and where the general public do not have access to justice, the judiciary must be in a position to do justice regardless of the existence or the absence of a law. As per the Constitution, all the three arms of the government i.e., the legislature, the executive and the judiciary have been vested with certain responsibilities which strive towards a democratic system. But when the legislature and the executive fail to discharge their duties, the judiciary pro – actively plays the role of custodian of constitutional morality. Hence, the judiciary does not remain a spectator but rather adopts a purposive construction i.e., the intention behind crafting of any legislation or provision with a view for social betterment, in accordance with the constitutional ideals.

The idea of judicial activism is largely influenced by people’s insight towards the working of courts. While some are of the opinion that it is necessary to uphold constitutional values and protect public interest, others believe that court’s duty is only to interpret the law and not to transgress its boundaries. This paper analyzes the notable precedents passed by the Supreme Court of India and also sheds light on how the judges have interpreted the Fundamental Rights and Directive Principles of State Policy giving it a wider connotation in order to fill the legal vacuum. The paper also explores whether judiciary has expanded its function resulting in judicial overreach.

Keywords: Judicial Activism, Fundamental rights, Directive Principles of State Policy, Judicial Overreach.

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INTRODUCTION:

The Constitution of India is a significant milestone enduring the robustness of democracy. The State is under the prime obligation to ensure to all its citizens justice, liberty, equality and fraternity.² In the contemporary times, the judiciary has ensured that democratic ideals are implemented, thus making the Constitution a living document. Over the past seven decades the role of the Supreme Court in interpreting the Constitution with changing times can be well grounded in Dr. B.R. Ambedkar's vision. This pro – active approach of the Indian judiciary can be witnessed through its significant landmark pronouncements which have successfully aimed at protecting and upholding the fundamental rights or freedoms and implement those in the light of Directive Principles of State Policy. The fundamental rights are the cluster of basic rights enshrined under the Indian Constitution which are vital for humans to live with dignity. It can be well stated that judiciary has transformed the soul of the nation by immensely contributing to the jurisprudence of rights.

The Constitution demarcates the responsibilities between three wings of the government by maintaining the institutional balance between the legislature, executive and the judiciary. The inherent authority has been conferred on the courts to review State's actions and to prevent them from avoiding its obligations. In this backdrop, the Indian judiciary is considered as the custodian of constitutional morality, while also confirming that the plight of vulnerable and marginalized class is heard and their well-being is upheld. The notable judges of the Supreme Court have thus played an active role in safeguarding the individual's fundamental rights against the State's unfair, unreasonable or unjust actions. This valuable contribution of the apex court is categorized as 'judicial activism'. It is also referred to as 'judicial creativity' or 'inventive power of the judiciary'. Nevertheless, the legitimacy of this activist role of the Supreme Court has been called into question based on the principles of democracy such as accountability and representation.

The paper highlights the transformative journey of the Indian Constitution over the past 75 years, especially the interplay between the Fundamental Rights and the Directive Principles of State Policy. It further encapsulates the expansion of the Fundamental Rights by the Indian judiciary through landmark judgments of eminent stalwarts like Justice P.N. Bhagwati, Justice V.R. Krishna Iyer, Justice Chinnappa Reddy and Justice D A Desai who laid the foundation of

² The Constitution of India, 1950, the Preamble.

judge made law. Justice P.N. Bhagwati is considered as the forerunner of judicial activism in India and is the pioneer of 'public interest litigation'.

In an address by the then Prime Minister Dr. Manmohan Singh at the conference of Chief Ministers and Chief Justices of the High Court in April 2007 at New Delhi, drew attention to the contemporary debate regarding judicial accountability and made the following statement: *"Courts have played a salutary and corrective role in innumerable instances. They are highly respected by our people for that. At the same time, the dividing line between judicial activism and judicial overreach is a thin one"*.³ During the period of emergency India witnessed a decline in public trust towards the legislature and the executive which prompted the individuals to approach the court for redress of their grievances. It is in this situation that judiciary has taken an activist stance and flourished enormously in the decades 1980s and 1990s.

EVOLUTION OF JUDICIAL ACTIVISM IN INDIA:

The evolution of the concept of 'judicial activism' can be perceived as a response to governance failure i.e., the dynamic conflict between the progressive Parliament with a conservative judiciary, or a progressive judiciary with a conservative administration or legislature. In India it can be traced back to early 1970s during the reign of Prime Minister Mrs. Indira Gandhi and the presence of eminent lawyer and legal expert Mohan Kumaramangalam as Union Minister. The term "judicial activism" was for the first time coined by Arthur Schlesinger in January 1947 in an article titled "The Supreme Court: 1947" published in Fortune Magazine. *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, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent".

The term "judicial activism" is used in contrast to "judicial restraint". Those who favor the activist approach of the judiciary calls it as the legitimate form of 'judicial review'. V.D. Kulshrestha said "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

³ R Shunmugasundaram, 'Judicial activism and overreach in India' (2007) <<https://core.ac.uk>> accessed 11 November 2025.

part of Judiciary is termed as Judicial Activism”.⁴

CONSTITUTIONAL FOUNDATION FOR JUDICIAL ACTIVISM:

‘Judicial activism’ occurs when the judiciary has the power to review the State action. This power of judicial review has been constitutionally vested on the courts under Article 13 read with Article 32 and 226 of the Constitution to ensure that the legislature and the executive perform their obligations and strive for public welfare. The court thus, by virtue of these Articles has the power to strike down any legislative or administrative action as void if it is ultravires the constitution. Though there is no specific Article which expressly deals with the concept of judicial activism, it derives its sanctity from the following provisions:

- **Article 32** that provides for “right to constitutional remedies” is the bedrock of our constitution as it empowers the individuals to directly approach the Supreme Court for the enforcement of fundamental rights.⁵
- **Article 226** gives power to the High Courts to not only enforce fundamental rights but also enforce other legal right. Hence, it is wider in scope when compared to Article 32.⁶
- **Article 136** deals with the discretionary power of the Supreme Court to grant special leave to appeal against the decisions of the lower courts.⁷ This power is exercised to determine a case based on justice, equity and good conscience.⁸
- **Article 142** gives splendid powers to the Supreme Court to pass suitable decree or order for doing ‘complete justice’ in any pending matter before it.⁹ This provision enables or gives authority for judge made laws.

TRADITIONAL PASSIVE POSITION:

Earlier the Indian judiciary followed the traditional passive approach i.e., interpreting the laws as it is. This can be well described as ‘judicial restraint’. The best instance of this is the “Habeas Corpus case”, when the emergency was invoked under Article 359 of the Constitution by the then Prime Minister, Indira Gandhi in the year 1975. During this period, the fundamental rights of the opposition leaders were violated as they were unlawfully detained and also were victims

⁴ V. D. Kulshrestha, *Landmarks in Indian Legal and Constitutional History* (9th edn, Eastern Book Company 2009) 491.

⁵ The Constitution of India, 1950, art 32.

⁶ The Constitution of India, 1950, art 226.

⁷ The Constitution of India, 1950, art 136.

⁸ *Union of India v. C. Damani and Co.*, [1980] SC 1149.

⁹ The Constitution of India, 1950, art 142.

of ill – treatment. Aggrieved by this, they filed a writ petition before the Supreme Court under Article 32 of the Constitution.

The Constitutional Bench comprising of Justice P.N. Bhagwati, Justice Hans Raj Khanna, Chief Justice A.N. Ray, Justice Y.V. Chandrachud and Justice M.H. Beg was constituted and the issue before the Court was whether fundamental rights can be suspended during emergency? The court with a 4:1 ratio gave a verdict that “fundamental rights during the emergency are suspended and that no detention order can be questioned on the ground that it violates Part III of the Constitution till the emergency is lifted”. The dissenting opinion was given by Justice Hans Raj Khanna who is till date respected by public for his brave and fearless dissent.¹⁰

The perspective of the judiciary shifted from the traditional passive position to the custodian of constitutional morality.

BASIC STRUCTURE DOCTRINE – AN ACTIVIST STAND OF JUDICIARY:

The doctrine of basic structure is essentially developed from the German Constitution. They are the systematic principles which form the genesis of the working of our grundnorm i.e., the Constitution. They give coherence and durability to the constitution. The German jurist Professor Dietrich Conrad delivered a lecture at the Banaras Hindu University and who influenced this doctrine and is also referred to as ‘implied limitations’ on amending power of the parliament.

The journey of this doctrine started from the case of *Shankari Prasad v. Union of India*¹¹, *Sajjan Singh v. State of Rajasthan*¹² in which the Apex Court held that the power to amend the Constitution including Part III is contained in Article 368, and that the term ‘law’ in Article 13(2) includes only ordinary laws made in the exercise of legislative powers and does not include constitutional amendment which is made in the exercise of constituent powers. Subsequently, in *Golaknath v. State of Punjab*¹³, the Supreme Court overruled its earlier

¹⁰ *ADM Jabalpur v Shivkant Shukla*, [1976] 2 SCC 521.

¹¹ *Shankari Prasad v Union of India*, [1951] AIR 458.

¹² *Sajjan Singh v State of Rajasthan*, [1965] AIR 845.

¹³ *I. C. Golaknath & ors v State of Punjab & Anrs*, [1967] AIR 1643.

decisions by a majority of 6:5 ruled that Parliament had no power to amend Part III of the Constitution so as to take away or abridge fundamental rights. In this case the 'doctrine of prospective overruling' was propounded and also held that 'amendment' is a 'law' within Article 13.

The tussle between the parliament and Indian judiciary was finally settled in the landmark verdict of Indian history delivered in the case of *Kesavanand Bharati v. State of Kerala*¹⁴. The Court by 6:1:6 majority held that parliament has the power to amend any Part of the Constitution including Part III as long as it does not violate the core framework of the Constitution i.e., the basic features or structure. This stance of the Supreme Court shows activism. The legal scholar Upendra Baxi said "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".¹⁵

SHIFT FROM LOCUS STANDI TO PUBLIC INTEREST LITIGATION:

It is the prime duty of the judiciary to do justice and also ensure that no person is deprived of it by reason of non - availability of resources. The reason for non - access to justice can be multiple, to name a few like poverty, illiteracy etc. The Supreme Court has declared "access to justice as a fundamental right".¹⁶ It was Justice P.N. Bhagwati who for the first time relaxed the principle of 'locus standi' and held that 'Public Interest Litigation' is a phenomenon of participative justice.¹⁷

Justice P.N. Bhagwati propounded the creative concepts like Public Interest Litigation, Social Action Litigation, Free Legal Aid. He gave the pathway to transformative justice and is regarded as the father of Public Interest Litigation and Judicial Activism. Through his judgments he developed normative regime and admits this in his autobiography "*developed a new normative regime of rights, which require that the state cannot act arbitrarily and every action of the state must be informed with reason and be in the public interest and if it is not, it*

¹⁴ *Kesavanand Bharati v State of Kerala*, [1973] 4 SCC 225.

¹⁵ Upendra Baxi, *A Pilgrim's Progress: The Basic Structure Revisited* (Indian Bar Review- Vol. 24(1&2) 1997) 53.

¹⁶ *Imtiyaz Ahmad v State of Uttar Pradesh*, [2012] 2 SCC 688.

¹⁷ *Fertilizer Corporation Kamgar v. Union of India*, [1981] AIR 344.

*would be liable to be invalidated by judicial intervention”.*¹⁸

The concept of ‘Public Interest Litigation’ has been borrowed from the American jurisprudence and in India it was sown by Justice Krishna Iyer in the case of *Mumbai Kamgar Sabha v. Abdulbhai Fazullabhai and others*¹⁹. For the first time this concept was addressed in the case of *Hussainara Khatoon v. State of Bihar*²⁰. By virtue of this case, the court’s attention was drawn to the inhumane conditions of the prison and undertrial prisoners who were detained for the period in excess of the maximum sentence for the offence with which they were charged. The court in this case released more than 40,000 undertrial prisoners and also proceeded to state ‘right to speedy trial’ as a fundamental right.

Another landmark judgment on public interest litigation is *S.P. Gupta v. Union of India*²¹, also known as judge’s transfer case. In this case the executive’s policy was challenged on the ground that it arbitrarily transferred the High Court Judges and this challenge was held to be in public interest. By this judgment PIL became a sword for the enforcement of “public duties” where the executive action resulted in public wrong or injury.

Furthermore, in *Parmanand Katara v. Union of India*²² the Supreme Court held that in medico – legal cases, the primary obligation of the doctor is to preserve human life and they must extend their services with full expertise to protect the life of a person injured in an accident. Hence, the innovative and activist approach is well reflected through the series of cases under the head ‘Public Interest Litigation’, but this weapon must not be misused or abused by the public.

POST CARD ACTIVISM:

The culture of post card petitions was introduced by the stalwart of Indian judiciary, Justice P.N. Bhagwati to redress the grievances of the vulnerable section of the society. This culture gave rise to ‘Epistolary Jurisdiction’ as the court took cognizance in a matter based on letters or post cards and treated them as writ petitions. It marked a significant step in the journey of judicial activism in India as it noted that ‘justice’ is not the privilege of affluent class of the society. Shri Kuldip Nayar, a renowned journalist wrote a letter to a Supreme Court Judge,

¹⁸ P.N. Bhagwati, *My Tryst with Justice* (Universal Lexis Nexis, Delhi 2013 reprint 2019) 66.

¹⁹ *Mumbai Kamgar Sabha v Abdulbhai Fazullabhai and others*, [1976] AIR 1455.

²⁰ *Hussainara Khatoon & ors v Home Secretary, State of Bihar*, [1979] AIR 1369.

²¹ *S. P. Gupta v Union of India*, [1982]2 SCR 365.

²² *Parmanand Katara v Union of India*, [1989] AIR 2039.

alleging basic human rights violations of persons arrested under Terrorist and Disruptive Activities (Prevention) (TADA) Act was treated as a Writ Petition under Article 32 of the Constitution of India.²³

In this framework of PIL and post card petition, the notion of free legal aid to the indigent persons gained significance. *Justice Bhagwati* states in his autobiography that: “any member of the public or social action group espouses the cause of the poor and downtrodden he/it should be able to move the court even by just writing a letter because it would not be right or fair to expect a person or social action group acting pro bono publico to incur expenses from his/its own pocket in order to brief a lawyer and prepare a regular written petition to be filed in court for enforcement of the fundamental rights. Therefore, in such case a letter addressed by him/it to the court can legitimately be regarded as an appropriate proceeding within the meaning of article 32 and 226 of the constitution.”²⁴

LEGAL AID TO THE INDIGENT:

Around the decade of 1970s is the era which witnessed the mechanism for ‘free legal aid’ to the poor. In the year 1973 under the Chairmanship of Justice Krishna Iyer, a committee was set up to prepare a scheme for ‘free legal aid’ to the indigent and those who deserved. The committee laid down the blueprint which is well reflected in ‘The Legal Services Authority Act, 1986’. This right also finds its place in Section 341 of ‘The Bharatiya Nagarik Suraksha Sanhita, 2023’.²⁵ The scope of free legal aid is well broadened by the idea of ‘Pro Bono Litigation’, in which the legal professionals extend their skills free of cost to the poor people and the Organizations that are in need of justice.

The Supreme Court in the decision of *Hussainara Khaton v. State of Bihar*²⁶, held that where an accused is not in a position to avail legal services due to poverty has a constitutional right to seek free legal aid. This right is a facet of Article 21 of the Constitution²⁷ as ‘right to representation’ is a necessary ingredient of just, fair and reasonable procedure.

²³ *Citizens for Democracy v State of Assam*, AIR 1996 SC 2193.

²⁴ P.N. Bhagwati, *My Tryst with Justice* (Universal Lexis Nexis, Delhi 2013 reprint 2019) 77.

²⁵ The Bharatiya Nagarik Suraksha Sanhita, 2023, s 341.

²⁶ *Hussainara Khaton & ors v Home Secretary, State of Bihar*, [1979] AIR 1369.

²⁷ The Constitution of India, 1950, art 21.

In *Madhav H. Hoscot v. State of Maharashtra*,²⁸ the Court affirmed with the ratio given in the above case and also stated further that in the interest of justice a competent counsel has to be provided for the accused's defence at the expense of the State.

JUDICIAL ACTIVISM IN THE REALM OF FUNDAMENTAL RIGHTS:

The fundamental rights as enshrined under Part III of the Constitution is the Magna Carta of Indian Constitution. The Supreme Court by giving liberal interpretation to many of its provisions has led to rejuvenation of confidence in the judiciary.

A new dimension to Article 14 was seen in *E.P.Royappa v. State of Tamil Nadu*,²⁹ in which Justice Bhagwati established the "doctrine of arbitrariness". It expanded the scope of Article 14 and held that whenever State acts arbitrarily, Article 14 would be attracted and that arbitrariness is antithesis to equality.

Article 21 of the Constitution that guarantees "right to life and personal liberty"³⁰ not only to citizens but also to non – citizens has emerged as one of the most important Articles because judiciary has interpreted it broadly so as to include within its ambit all those fundamental ideals of life and liberty that are not expressly stated in the Constitution. The restriction given under Article 21 is "procedure established by law", this was interpreted in a way so as to incorporate "due process of law" in the historic judgment of *Maneka Gandhi v. Union of India*.³¹ Due process of law means that the procedure should be just, fair and reasonable, thus allowing the court to safeguard both procedural and substantive rights.

The Hon'ble Apex Court declared that 'right to education' flows from Article 21 and observed that no person can live his life with dignity unless he/she has access to education. A cumulative interpretation of Articles 21, 38, Articles 39 (a) and (b), 41 and 45 underscored this right.³² By way of 86th constitutional amendment, 2002, this right was expressly incorporated under Article 21A, 45 and 51A – k.

Thus, Article 21 is interpreted liberally and includes variety of rights such as 'right to

²⁸ *M. H. Hoscot v State of Maharashtra*, [1978] 3 SCC 544.

²⁹ *E.P.Royappa v State of Tamil Nadu*, [1974] SCR (2) 348.

³⁰ The Constitution of India, 1950, art 21.

³¹ *Maneka Gandhi v Union of India*, [1978] SCR (2) 621.

³² *Mohini Jain v. State of Karnataka*, AIR 1992 SC 1858.

livelihood’, ‘right to speedy trial’, ‘right to education’, ‘right to free legal aid’ etc. This Article gave rise to many historic verdicts which reflects the activist approach of the judiciary.

JUDICIAL ACTIVISM AND ENVIRONMENT:

The Supreme Court has played active role and contributed immensely to Environmental jurisprudence through various judgments. The ‘principle of Absolute Liability’³³, ‘Sustainable Development’³⁴, ‘Polluter Pays principle’³⁵, ‘Public Trust doctrine’³⁶ are some of the instances which shows active role of the judiciary in protecting environment.

JUDICIAL ACTIVISM AND WOMEN EMPOWERMENT:

Judiciary has played crucial role in women empowerment and has made an attempt to eliminate discrimination and prevent exploitation against women. In *Air India v. Nargesh Meerza*,³⁷ the Supreme Court struck down the provision of Air India Regulation which provided for termination of Air Hostess on her first pregnancy on that ground that it is unconstitutional and violative of Article 14 of the Constitution.

The legislative power of the Court is well demonstrated in the case of *Vishaka v. State of Rajasthan*,³⁸ wherein the court issued guidelines to prevent sexual harassment of women at workplace.

THE HARMONIOUS CONSTRUCTION:

The doctrine of ‘harmonious construction’ serves as the guiding principle to the courts. Initially the debate regarding enforceability of Directive Principles of State Policy was going on. In the case of *Champakam Dorairajan v. State of Madras*,³⁹ the court held that since fundamental rights are sacrosanct rights they hold priority over Directive Principles of State Policy (DPSP) and hence are enforceable while DPSPs are not and they are subsidiary to the fundamental rights.

³³ *M.C. Mehta v Union of India*, AIR 1987 SC 1965.

³⁴ *Rural Litigation and Entitlement Kendra & Ors v State of UP & Ors*, [1989] AIR 594.

³⁵ *M.C. Mehta v Union of India & ors*, [1997] 2 SCC 353.

³⁶ *M.C. Mehta v Kamalnath & ors*, AIR 1996 SC 711.

³⁷ *Air India v. Nargesh Meerza*, [1981] AIR 1829.

³⁸ *Vishaka v. State of Rajasthan*, [1997] 6 SCC 241.

³⁹ *Champakam Dorairajan Vs. State of Madras*, AIR 1951 SC 226.

However, in the case of *Minerva Mills v. Union of India*,⁴⁰ Justice Bhagwati stated that the “doctrine of harmonious construction” should be applied and both the Fundamental Rights and the DPSPs should be balanced as far as possible. He was of the opinion that Fundamental Rights and the DPSPs are the two wheels of a chariot and must work hand in hand for the betterment of the nation.

JUDICIAL ACTIVISM OR JUDICIAL OVERREACH:

Recognizing the distinction between judicial overreach and judicial activism is critical to the maintenance of democracy where division of powers between the three wings of the government is primary element with the Constitution acting as its basis. In the above mentioned precedents, the judiciary has played pro – active role for the enforcement of Fundamental Rights of the citizens and ensuring that the government meet its constitutional responsibilities.

While the phenomenon of judicial activism is taken positively in matters of environmental issues, labor related matters, prisoner’s rights, women empowerment, excessive court involvement in fiscal policy, political matters is regarded as ‘judicial overreach’.

CONCLUSION:

Judicial Activism is a powerful instrument to uphold justice and address the concern of governance failures as can be observed from the precedents cited in this paper. But at the same time the judiciary must not overstep into the exclusive domains of the legislature or executive as it results in unhealthy situation between the institutions. The way forward for this is as stated by Mr. Dipankar P Gupta, former Solicitor General of India, “*the task of the court should be to compel the authorities to act and to pass appropriate executive orders rather than substitute judicial orders for administrative ones. They must be told how their duties are to be properly discharged and then commanded to do so. For this, they must be held accountable to the court*”.⁴¹

Thus, the author concludes by the following observation: “Judicial review is the exclusive domain of the judiciary and I(judiciary) can be accused of ‘judicial activism’ if there is law, and I’m doing something that is contrary to that particular legislation. But when there is no law and I am trying to address a certain situation, I cannot be accused of going against something.”

⁴⁰ *Minerva Mills Vs. Union of India*, AIR [1980] SC 1789.

⁴¹ Dipankar P Gupta, (Hindustan Times, June 15, 2007).

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