



From procedure to substance: Judicial activism and the transformation of the due process clause

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Abstract

Contemporary courts are not passive; they have adopted a proactive stance focused on taking positive actions and issuing orders to address issues. Many ordinary Indian citizens believe that the legislature and executive have failed in their obligations to the public. The executive and legislators are held accountable for their actions, and their proximity to the people raises expectations, leading to criticism when they fall short. Citizens often feel that the administration is indifferent and ineffective, leaving them no choice but to seek redress from the judiciary. Consequently, the judiciary has become more activist in response. Judicial activism has gained significant legitimacy among the Indian public. However, this activist approach by the judiciary may lead to friction and tension with other branches of the state. While such tensions are natural and somewhat beneficial, they can also create challenges. Thanks to the power of judicial review explicitly granted by the Constitution, the judiciary has been able to safeguard Fundamental Rights from encroachments by the legislative and executive branches. By exercising its power of judicial review, the judiciary has successfully defended the Fundamental Rights outlined in the Constitution, earning it the characterization as an extension of these rights. The present paper is an attempt to showcase the role of judiciary in strengthening the Fundamental Rights with the help of Due Process Clause.

Keywords: Judiciary, fundamental rights, article 19, supreme court, activism

Introduction

Since its establishment, the Indian judiciary has experienced various phases of development. From the positivist period to the significant era of judicial activism, the evolution of case law and its interpretation reflects shifts in the court's perspectives on the government over time. It is crucial to grasp the concept of judicial activism to comprehend its growth and the expansion of the Judiciary's authority. Judicial activism denotes the judiciary's inherent authority to interpret laws and statutes freely, employing their extensive expertise and impartial principles to deliver impartial justice to disadvantaged individuals appearing in court^[1].

When the legislature neglects to pass appropriate laws to address changing needs, and when government agencies fail to fulfill their administrative duties with integrity, citizen's trust in constitutional values and democracy diminishes. In such instances, the court steps into domains typically reserved for the legislative and executive branches, resulting in judicial legislation or activism. It's noteworthy that the Indian system operates on a system of checks and balances, where only the Supreme Court has the authority to invalidate any law or legislation that violates the Indian constitution. This is aimed at mitigating the concentration of power and preventing institutional dominance.

Meaning of Judicial Activism

The phrase "judicial activism" was first coined by Arthur Schlesinger Jr. in his 1947 Fortune magazine article titled "The Supreme Court: 1947"^[2]. 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"^[3]. 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^[4].

The notion of judicial activism is complex and multifaceted, with its applicability varying depending on different constitutions and philosophical perspectives. There is no universal standard for measuring judicial activism, as interpretations differ among individuals. Critics argue that judicial activism undermines the authority of the elected branches of government and undermines the principles of the rule of law and democracy. Conversely, proponents of judicial activism view it as a legitimate form of judicial review, advocating for changes in legal interpretation to align with evolving societal needs. Judicial activism is considered beneficial when it serves the interests and advancement of marginalized segments of society, but it should not encroach upon the policymaking authority of the government.

Judicial activism occurs when courts possess the authority to examine State actions. Article 13, in conjunction with Articles 32 and 226 of the Indian Constitution, grants higher judiciary the power of judicial review to invalidate any legislative, executive, or administrative action that conflicts with the Constitution. The power of judicial review is an essential element of the Indian Constitution's framework^[5].

Growth and Development

Judicial activism can be described as the broad exercise of judicial authority or the bold utilization of judicial power to drive social change through policymaking. Initially, activism was commonly defined as judges overturning legislative laws due to inconsistency with the provisions of a written constitution, a practice that has faced criticism over time. Generally, the constitutional framework, including principles like separation of powers, checks and balances,

federalism, bicameralism, representation, an independent judiciary, and judicial review, serves as the foundation of judicial activism. At times, judicial activism is viewed as a progressive application of judicial power or the use of judicial authority to bring about socioeconomic and political changes through policymaking^[6].

The constitutional definition of the judicial role in India seems to fall somewhere between the approaches of the courts in England and the United States. While the idea of individual rights serving as a check on government power was not emphasized due to Parliament's authority to amend Part III of the Constitution, the Supreme Court, adopting a legalistic and conservative stance during its early years, faced criticism for striking down certain progressive laws aimed at achieving social justice. This led to accusations that the courts were impeding the socio-economic transformation of Indian society^[7].

During the early phase of judicial activism, the Supreme Court prioritized fundamental rights over directive principles, sparking criticism from the political establishment. This distinction was seen as potentially hindering government efforts to support the disadvantaged. However, the Keshavananda^[8] decision later recognized the significance of directive principles alongside fundamental rights. The tension between the judiciary's emphasis on rights and the government's welfare agenda resulted in constitutional amendments aimed at restricting judicial review.

During the Emergency period from 1975 to 1977, the political leaders showed blatant disregard for the Constitution's sanctity. The State, purportedly dedicated to the people's welfare, instead perpetrated injustice. Countless individuals were imprisoned as undertrial prisoners, young individuals were forcibly castrated and sold as eunuchs, women and children were trafficked, and prisoners suffered from brutal treatment such as blinding. Despite purported welfare efforts, the poor did not receive benefits, while intermediaries grew wealthy. Bonded labor persisted, and laws regarding minimum wages were not enforced^[9].

In the aftermath of the emergency, there was a surge in judicial activism aimed at safeguarding the fundamental rights of the poor and marginalized individuals through Public Interest Litigations (PIL) and by broadening the interpretation of Article 21, which guarantees the right to life and personal liberty. This movement began with the Bihar Undertrial Case^[10], where the Supreme Court issued various orders related to bail for financially disadvantaged defendants, prison reform, and the recognition of the fundamental right to a speedy trial. Through progressive interpretation of fundamental rights, particularly Article 21, the Court acknowledged several unenumerated rights, such as the prohibition of handcuffing and solitary confinement without just cause, the right to decent living conditions for inmates of protective homes, the right to legal aid for indigent criminal defendants, the right to a speedy trial, protection against cruel and unusual punishment, including delays in the execution of death sentences, rights of bonded laborers to release and rehabilitation, the right to compensation for illegal and arbitrary detention, and finally, the democratic right to information.

The non-justiciable nature of the directive principles posed a challenge for the courts in ensuring general welfare and advancing remedies for the poor and oppressed. To address this, the courts interpreted and incorporated directive

principles into fundamental rights, particularly relying on Article 21, which guarantees the right to life and personal liberty. By doing so, the courts could enforce individual entitlements to public assistance, asserting that the right to life encompasses the right to live with dignity and without exploitation^[11].

In the case of *Olga Tellis v. Bombay Municipal Corporation*^[12], the Supreme Court emphasized the need for proactive measures to achieve equality under the law. It stated that equal protection of the laws requires not only less government interference, but also active government intervention to ensure equal treatment for marginalized groups. To enforce directive principles and newly recognized rights, the courts adopted the approach of public interest litigation (PIL).

Public Interest Litigation

Following independence, despite improvements in the lives of many Indians, a significant portion of the population remained below the poverty line. This disparity meant that access to the courts and the concept of justice was primarily available to the affluent. In response, Judicial Activism emerged in India, allowing High Courts to extend their reach to larger segments of the population, including the poorest. This shift, coupled with a liberalization of the doctrine of locus standi, facilitated the initiation of Public Interest Litigation, enabling disadvantaged individuals to seek justice through the courts^[13].

Public Interest Litigation (PIL) has expanded access to justice for a wide range of people. Through PIL, individuals can file petitions in the Supreme Court under Article 32 and in High Courts under Article 226 of the Indian Constitution on matters concerning public welfare. The origins of this concept can be traced back to Justice Krishna Iyer's landmark case *Mumbai Kamagar Sabha vs. Abdul Thai*^[14] in 1976, where the seeds of PIL were first planted in India.

The emergence of Public Interest Litigation (PIL) in India was catalyzed by the *Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India*^[15] where an unregistered workers union was permitted to collectively file a writ petition under Article 32 of the Constitution. However, it was in the landmark case of *S.P. Gupta and others v. Union of India*^[16] that the concept of PIL truly flourished, marking a significant milestone in the evolution of PIL in India.

Indian Judiciary and Instances of Judicial Activism

In *Lakshmi Kant Pandey v. Union of India*,^[17] Lakshmi Kant Pandey, an advocate, brought attention to the Supreme Court regarding concerns about negligence and misconduct by social organizations and private adoption agencies involved in the adoption of Indian children by foreign parents. His communication was based on an investigation conducted by a foreign magazine, *The Mail*. As there is no specific law in India governing such adoptions, the Court referred to Section 8 of the *Guardians and Wards Act, 1890*, which outlines norms and procedures for child adoption. The judgment emphasized the importance of policies aimed at protecting young children from exploitation and ensuring measures to prevent them from being pushed into inappropriate vocations considering their age and physical strength.

In *M.C. Mehta (2) v. Union of India*,^[18] writ petition was filed to stop leather tanneries from polluting the River Ganga with waste and effluents. The Supreme Court

supported the petition and ordered that environmental education be included as a compulsory subject in schools and colleges, gradually increasing awareness. Moreover, the Court issued specific guidelines to prevent pollution of the Ganga River water.

In *Union Carbide Corpn. (2) v. Union of India*,^[19] the Supreme Court directed Union Carbide to compensate \$470 million for the damages caused by the release of methyl isocyanate (MIC) gas from its industrial site. Justice Pathak emphasized the court's obligation to provide swift relief to the victims and applied the principle of polluters paying for the damage. As a result, the compensation amount was determined to be \$470 million.

In *Vishwa Jagriti Mission v. Central Govt.*,^[20] utilizing its authority under Articles 32 and 142 of the Indian Constitution, the Supreme Court has established comprehensive measures for colleges and educational institutions to curb ragging. These guidelines encompass various steps such as initiating anti-ragging campaigns, obtaining commitments from students and parents regarding the institution's response to ragging incidents, implementing mechanisms for redressal, ensuring heightened security for freshman hostel accommodations, withdrawing financial support from institutions where ragging occurs, and advocating for a reformatory approach by law enforcement when dealing with ragging perpetrators.

In *Murli S. Deora v. Union of India*,^[21] the Supreme Court in an attempt to protect the health of non-smokers, the Supreme Court prohibited smoking at public places and held that it is an indirect violation of the right to life of non-smokers as passive smokers who were helpless victims of air pollution caused by smoking.

In *Amardeep Singh v. Harveen Kaur*,^[22] it has been held by the Supreme Court that the period of 6 months, as mentioned in Section 13-B (2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

In *Aparna Batt v. State of M.P.*,^[23] observing unusual bail conditions, the Supreme Court established a set of guidelines to standardize bail terms in cases involving sexual offenses. This action followed the overturning of a bail condition set by the Madhya Pradesh High Court, which required the tying of a "rakhi" for bail in a sexual harassment case.

Benefits and Disadvantages of Judicial Activism

Arguments supporting judicial activism often assert that what may be perceived as instances of judicial activism are actually examples of judicial review, which is a fundamental function of the judiciary. This perspective aligns with the doctrine of checks and balances, wherein the judiciary is granted a specific role. Additionally, it emphasizes the judiciary's duty to interpret laws, a responsibility inherent to its function. Unlike England, where parliamentary supremacy is upheld, our constitution does not explicitly establish this doctrine. Furthermore, proponents of judicial activism argue that the nature of judicial activism inherently involves the judiciary in the process of rule-making to some degree. Essentially, these arguments suggest that judicial activism is not a departure from judicial review but rather a necessary aspect of it, serving to uphold the balance of power and ensure the proper functioning of democracy.

Opponents of judicial activism argue that it goes against the principle of separation of powers, as outlined by Montesquieu. They assert that by taking an active role in policymaking, the judiciary oversteps its bounds and encroaches upon the authority of the legislative and executive branches. Additionally, they contend that judicial activism undermines the doctrine of parliamentary supremacy, which is a fundamental aspect of many democratic systems. Critics also highlight instances where judicial activism has resulted in interpretations of the Constitution that contradict the original intentions of its drafters. In essence, these arguments suggest that judicial activism can lead to an imbalance of power and a departure from the intended framework of governance.

Need to Maintain the Balance

The concept of judicial activism should be redefined to encompass only those cases that serve the national interest within the boundaries of the Indian Constitution. It should not extend beyond the necessary scope required to uphold constitutional principles, rather than being driven solely by judicial preferences. Defining clear boundaries between judicial activism and the roles of other branches of government may be challenging, but it is crucial for maintaining a balanced system of governance. Each branch of government should respect the jurisdiction of the others to ensure effective functioning of the state^[24].

Former CJI N.V. Ramana opined on this issue, "The concept of separation of powers cannot be utilised to restrict the scope of judicial review. This concept only protects bona fide legitimate actions. It is required that the legislative and executive wings recognise their limits under the Constitution to ensure the smooth working of the democracy^[25]."

Judicial activism can pose challenges for the other branches of government due to its focus on addressing public interest. It may lead to the infringement of the separation of powers, as judgments deviating from traditional interpretations might encroach upon the domains of other branches to enforce their rulings. However, a collaborative approach is necessary to ensure that judicial activism remains constructive and does not transform into judicial adventurism, thereby preserving its noble intent and purpose.

Conclusion

Under Article 37^[26] of the Indian Constitution, the State is mandated to apply the directive principles outlined in Part IV when formulating laws. Similarly, it is the responsibility of the judiciary to interpret and enforce these principles while adjudicating cases. Therefore, judicial legislation, far from being an act of judicial activism, is regarded as the solemn duty of a judge sworn to uphold the Constitution. In striving to uphold constitutional values, if a judge finds existing laws inadequate, it is incumbent upon them to interpret and apply the Constitution to address the situation, rather than dismissing a plea for justice on technical grounds. Judges have the authority to determine the law within the framework of the Constitution and are not required to defer to the legislature to enact new laws in such instances.

Judicial activism is a vital aspect of the Indian judiciary, having contributed significantly to its growth and public trust. It has enhanced the delivery of justice and played a

crucial role in shaping the judiciary's current status. While acknowledging its positive impact, it's essential to recognize the potential flaws and risks associated with judicial activism, including the possibility of misuse by judges. While not advocating for every judge to be an activist, it's important to appreciate the benefits it has brought and to utilize it judiciously when needed.

Fali Nariman stated that "Like it or not, the balance of constitutional power will remain in favour of the courts, but only so long as our Judges are perceived to be persons of exceptional competence and of high moral integrity. If that perception changes (God forbid), the constitutional system as it now operates will breakdown^[27]" Justice Bhagwati quoted that, "There is no need for Judges to feel shy or apologetic about the law creating roles^[28]."

It can be concluded by Justice Kurian Joseph word of caution: "the law made by the Judge should not be to project his personal philosophy on law or life; it should be what the Constitution says it to be and, if not, he will be upholding himself and not the Constitution^[29]."

References

1. Shashank Shekhar. "Expansion of Judiciary's role through Judicial Activism and its nexus with the principle of Separation of Powers" 2.2 JCLJ 737, 2022.
2. Nitu Mittal, Tarang Aggarwal. "Judicial Activism in India" IJLPP, 2014-15, 1(1). Can be accessed at: <http://docs.manupatra.in/newsline/articles/Upload/3D22F96F-B1FF-4D03-B90E-B0B2690BD83E.1-gconstitution.pdf>
3. Nishtha Jaswal and Lakhwinder Singh, "Judicial Activism in India" Bharati Law Review, Jan. – March, 2017
4. Supra note 2 at 1.
5. L. Chandra Kumar v. Union of India, 3 S.C.C. 261, 1997.
6. Upendra Baxi. "Judicial Activism: Usurpations or Re Democratization", in Jagga Kapur (ed.) Supreme Court on Public Interest Litigation, Vol. 3 (New Delhi: LIPS Publication, 1999, 131-144.
7. Ibid.
8. Kesavananda Bharati v State of Kerala. 4 SCC 225. It is one of the most famous landmark cases ever recorded in the judiciary comprised of the largest constitutional bench of 13 judges. In this case, the doctrine of "basic structure of the constitution" was evolved, which was not mentioned anywhere in the Constitution. The Supreme Court while expanding its role held that the Parliament cannot amend the "basic structure of the constitution". For the first time, the Supreme Court's rulings showed a growing agreement that constraints on Parliament's component power of amendment are necessary to maintain and defend constitutional rights, notably property rights and economic liberty from eroding. With regard to Article 14 and Article 21, the Judicial Activism of the post-emergency era demonstrated an open and progressive approach to interpretation, which expanded the power of the judiciary to an unprecedented degree in a positive way, 1973.
9. K.R. Aithal, "Judicial Activism - The Enforcement of Human Rights in India" 1.1 IJLS 60, 2015.
10. Hussainara Khatoon v. Home Secretary, Bihar, 1 SCC 81, 1980.
11. Bandhua Mukti Morcha v. Union of India, 4 SCC 177, 1991.
12. (1985) 3 SCC 545
13. Supra note 2 at 91.
14. AIR 1976 SC 1455
15. AIR 1981 SC 298
16. AIR 1982 SC 149
17. (1984) 2 SCC 244
18. (1988) 1 SCC 471
19. (1989) 2 SCC 540
20. (2001) 6 SCC 577
21. (2001) 8 SCC 765
22. (2017) 8 SCC 746
23. 2021 SCC OnLine SC 230
24. Shashank Shekha. "Expansion of Judiciary's role through Judicial Activism and its nexus with the principle of Separation of Powers" 2.2 JCLJ 737, 2022.
25. Live Law News Network, 'Judges Themselves Appointing Judges' A Widely Propagated Myth; Judiciary Merely One of The Players in Appointment Process: CJI Ramana' (Live Law, 26 December, 2021). Can be accessed at: <https://www.livelaw.in/top-stories/judges-themselves-appointing-judges-a-widely-propagated-myth-judiciary-merely-one-of-the-players-in-process-cji-ramana-188405>
26. The Constitution of India, Art. 37. Application of the principles contained in this Part. —The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.