

SCOPE OF JUDICIAL POWERS IN A DYNAMIC SOCIETY: JUDICIAL ACTIVISM

Dr. Rashmi Khorana Nagpal*

Abstract

Judicial Activism is a dynamic process of judicial outlook in a changing society. It is a judicial philosophy which motivates judges to depart from traditional precedents in the favor of progress and new social policies. It is an active interpretation of a present statute as to widening its scope for providing relief to the people at large. In case there is an inconsistency in the law enacted by the parliament and the provisions as laid down under the Constitution, the court has a duty to enforce the Constitution and ignore the legislative law, the present action is known as judicial review. Thus concepts of judicial review and judicial activism have similarities. However, there is a slight difference between judicial review and judicial activism. The Judicial Review symbolizes to decide if a statute or any administrative act is consistent with the constitution on the other hand judicial activism is more about the behavior of the judge concerned in the matter. Further, there are certain issues that are unanswered and need to be analyzed 1stly the issue of defining the limit of the power of Judicial Activism and 2ndly the issue of analyzing the point up to which the judiciary has the power under the constitution to actively interpret a defined statute.

Keywords: Judicial activism, Judicial review, Supreme Court, interpretation, interpret

* Principal @ Geeta Institute of Law, Panipat

INTRODUCTION

The term Judicial Activism has no universally accepted definition it has been understood and perceived differently by different authorities in different spheres. It depends upon the individual point of view. Professor Upendera Baxi has accurately pointed that there cannot be a precise definition regarding whether or not the decision is an example of Judicial Activism'. According to Prof Baxi,

*Judges are evaluated as activists by various social groups in terms of their interests, ideologies and value. Quite often, the label is attached to a judge who himself may not consider him as an activist.*¹

Judicial Activism is a dynamic process of judicial outlook in a changing society. According to Black's Law dictionary Judicial Activism is a judicial philosophy which motivates judges to depart from traditional precedents in the favour of progress and new social policies.

In case there is an inconsistency in the law enacted by the parliament and the provisions as laid down under the Constitution, the court has a duty to enforce the Constitution and ignore the legislative law, the present action is known as judicial review. Thus concepts of judicial review and judicial activism have similarities.²

However, there is a slight difference between judicial review and judicial activism. The Judicial Review symbolizes to decide if a statute or any administrative act is consistent with the constitution on the other hand judicial activism is more about the behaviour of the judge concerned in the matter. Judicial activism is usually based on the public interest and speedy disposal of pending litigation. Further, with judicial review the court acts as a protector and watcher of the fundamental rights. Therefore the power of judicial review is recognized as part of the constitution. In case of judicial activism, the court actively widens the scope of a present law by looking into the interpretation of the statute and the intent of the drafters.³

Judicial creativeness may present sound outcomes if they originate out of principled activism however, if it is derived by partisanship, it may provide in catastrophic outcomes and

¹ *Courage, craft, & Contention* 3 (1985)

² Justice M.N. Rao, 'Judicial Activism' (Eastern Book Company); Available at: <http://www.ebc-india.com/lawyer/articles/97v8a1.html>, (Accessed on 14/11/2017)

³ R Shunmugasundaram, 'Judicial activism and overreach in India' (Amicus Curiae Issue 72, Winter 2007); Available at: <https://core.ac.uk/download/pdf/112282.pdf>, (Accessed on 14/11/2017)

generate clashes which would result in negative social change. For instance in the year 1857 the American Supreme Court under the supervision of Chief Justice Taney adjudicated in *Dred Scott v. Sandford case*⁴ that coloured people (Negros) cannot be held as equal to the whites people and the fundamental guarantees as under the Constitution could not be provided to them, the decision accelerated the wave of civil war among Northern and Southern States and finally resulting in the abolishment of the concept of slavery and lead to the strengthening of the Union.⁵

HISTORICAL EVOLUTION

Judicial Activism also known as innovative interpretation is not a concept of a recent history. The concept came into being in 1804, in *Marbury v. Madison*⁶ in the present case Marbury who was appointed as Judge by the US Federal Government in accordance with the Judiciary Act of 1789. Although appointment warrant was signed it was not conveyed. Mr. Marbury files a writ of mandamus against the government. When the writ was filed Mr. Marshall was appointed by the outgoing President who lost the election, as the Chief Justice of the Supreme Court. Justice Marshall dealt with imminent prospect of elected Government not abiding the judicial decree if the Mr. Marbury's claim was to be upheld. In an exceptional showcasing of judicial statesmanship emphasizing the Court's power to review the Congress's and the Executive's action, Chief Justice Marshall rejected the issuance of relief based on the reasoning that the Judiciary Act of 1789 under Section 13, which lay the basis for the claim set forward by Mr. Marbury, was in violation of the constitution as it went in against the American Constitution, Chief Justice observed that in the US the Constitution is the fundamental and supreme authority of law of the nation and the court gets to say what the law actually is. He further asserted that the scrupulous phraseology present in the United State Constitution verifies and fortifies the rules which are essential for every written Constitution. That a law which goes against the Constitution is void and unacceptable and that all the courts and also the other departments are bound to follow the constitution. In case there is an inconsistency in the law enacted by the parliament and the provisions as lay down under the Constitution, the court has a duty to enforce the Constitution and ignore the legislative law.

⁴ 15 L Ed 691 (1857)

⁵ *Supra* note 2

⁶ 2 L Ed 60 (1803)

The similar concepts of judicial review and judicial activism were thus born.⁷

It is extremely complex to trace out the origin of judicial activism in India. As the independence of judiciary was recognized along with the concept of separation of power from the Government under the Government of India Act of 1935 and thereafter under the Constitution of India in 1949, it would only be fair of the tracing of origin is initiated after the year 1935. However, certain instances are there that occurred even before the said period, when certain judges of High Courts set up under the Indian High Courts Act, 1861 showed certain glimpses of judicial activism. During the year 1893, Justice Mahmood of the Allahabad High Court delivering a dissenting judgment, planted the seed of judicial activism in India. In the highlighted case, which was dealing with an under trial accused who being an indigent person was unable to afford and thereby engage a lawyer. Justice Mahmood in the present case held that the requirement of the right of being heard would only be fulfilled if the person is represented by a legal practitioner on his behalf.⁸

The Hon'ble Supreme Court is the ultimate interpreter of the Constitution and judicial activism being a product of judicial action, thus it will not be wrong in saying that judiciary by itself has the power to decide the limits of power to implement judicial activism. Interestingly since the drafting of the Constitution of India till today, the process of judicial separation keeps on ongoing. The paramount illustration of judicial activism which showed the ongoing process was recognition of the basic structure doctrine starting from the *Shankari Prasad judgment*⁹ to *Sajjan Singh's case*¹⁰ from there to *Golak Nath's case*¹¹ and from there to the *Keshavanand Bharti v. State of Kerala case*¹². Further, advancements in the area of Public Interest Litigations also indicate the valor of confidence and effective adjudication through which the Indian Supreme Court has transformed into the Indians Supreme Court.¹³ The Supreme court's order in *Maneka Gandhi's case*¹⁴ laid down the foundation of a very wide interpretation of Article 21 of the Indian Constitution where the apex court stated that the right to life and liberty includes not only right to live but also right to live with dignity.

⁷ Dr. Moreshwar Kothawade, *Need for Judicial Activism* (Laxmi Book Publication, 16/08/2015) p9

⁸ Balkrishna, *Ref. to the Article, When seed for Judicial Activism was sowed*, The Hindustan Times (New Delhi) dated 01-04-96, p.9.

⁹ *Sri Sankari Prasad Singh Deo v. Union of India & State of Bihar*, 1952 SCR 89

¹⁰ *Sajjan Singh v. State of Rajasthan* (1965) 1 SCR 933

¹¹ *L.C. Golak Nath & Ors. State of Punjab & Anr.* (1967) 2 SCR 762

¹² (1973) 4 SCC 225

¹³ M.J.C Vile, *Constitutionalism and Separation of Powers*, (1967)

¹⁴ *Maneka Gandhi v. Union of India* AIR 1978 SC 597

However, there are certain issues that are unanswered and need to be analyzed 1stly the issue of defining the limit of the power of Judicial Activism and 2ndly the issue of analyzing the point up to which the judiciary has the power under the constitution to actively interpret a defined statute.

LIMIT OF THE POWER OF JUDICIAL REVIEW

As rightly pointed out by Justice J.S. Verma that Judicial activism is *“like a sharp-edged tool which has to be used as a scalpel by a skilful surgeon to cure the malady; not as a Rampuri knife which can kill”*¹⁵

It will be opposed to the idea, purpose and values of the Indian constitution if in a given the judiciary oversteps its boundaries and covers the executive and legislature under a veil by overreaching its limits. Recurrent interventions by the judiciary in the legislative or administrative action will most definitely lead to weakening of the two out of three wings of the constitution. The acceptance of much required this distinction between “judicial activism” and “judicial overreach” is essential for smooth and effective functioning of judicial power without hindering the legislative and administrative body and respecting the constitutional democracy with due regard to the doctrine of separation of powers. The evident cases showing the reality of judicial overreach was seen in the Supreme Court orders for shutting the commercial operations in Delhi which were unauthorized also the order of Hon’ble Supreme Court for demolition of constructions within the city of Chennai which were unauthorized and also the formation of Monitoring Committee for checking the application of the present order. These are the matters concerning the executive and administrative action and the interference of judiciary in the same could lead to public suffering. Further in the *S.R Bommai v. Union of India*¹⁶ the Supreme Court laid down that the Proclamation of the dissolving a State Legislative Assembly by the President can be a subject to judicial action and that in case the proclamation orders are struck down by the Supreme Court, it further has the authority to reinstate the sacked State Government back to its office¹⁷.

Further the order of Supreme Court in the *Arjun Gopal & Others. v. Union of India & Others* case¹⁸ the latest example of judicial overreaching the apex court on November 2016, ordered

¹⁵ Kishan Khanna, *Judicial Systems of the Third World: The Case of India*, (Author House, 2002)

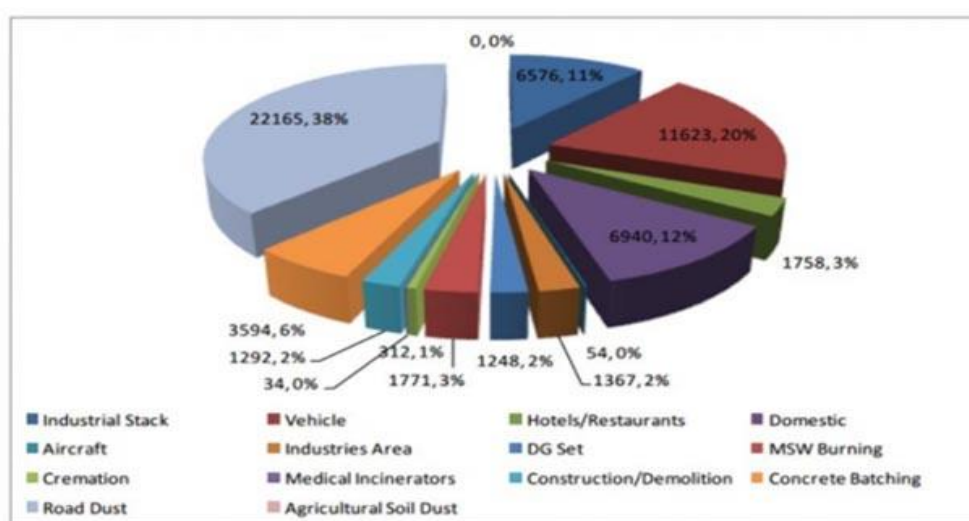
¹⁶ AIR 1994 SC 1918

¹⁷ *Supra* note 3

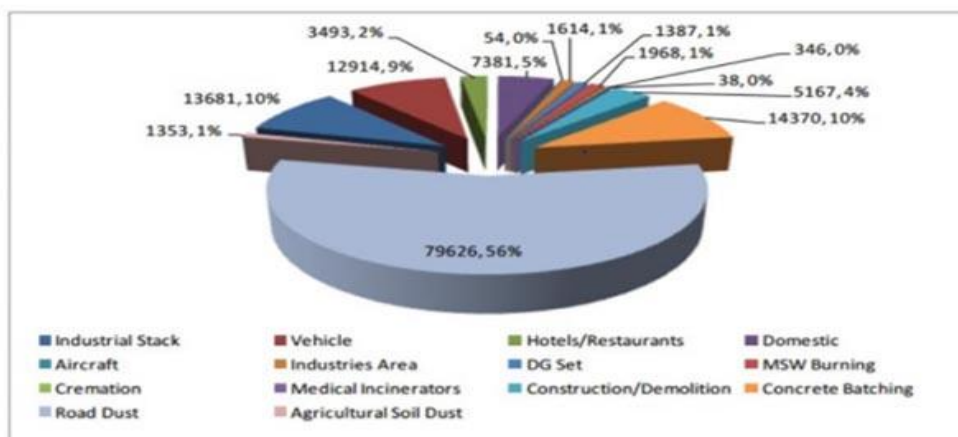
¹⁸ Civil Writ Petition No.728 of 2015

suspensions of license permits to sale firecrackers in form of wholesale and retail, in Delhi National Capital Region. However, in the month of September 2017, the SC in the interim took back its earlier order thereby permitting the sale of crackers for the forthcoming festive season. Another order was given by the Supreme Court on 9th October 2017 again banning the sale of firecrackers in Delhi NCR. The order is deemed to be unjust and resulted into a heavy loss to the shopkeepers, merchants and businessmen, who were investing in the sale and purchase of firecrackers. The orders for ban were declared only three days prior to the diwali festival resulting into an approximate loss of Rs 500 Crore to the festival industry. The orders were opposed by shopkeepers within the NCR and requests were made to government for filing a review petition. The orders resulted to be hurtful to the small traders. The orders where to suppress the environmental harm however by not banning the bursting of firecrackers and only banning the sale of the same raised a legitimate apprehension of black marketing of firecrackers and also resulted into black marketing of firecrackers.

As per the detailed study conducted by IIT-Kanpur in 2016 which examined the most influential causes of air pollution the institute concluded that the air pollution in Delhi is mainly the result of multiple anthropogenic and natural causes. The study further provided for the recommendations that are to be followed to tackle the problems in hand. Road dust, emissions from vehicles, burning of crops and waste burning contributes the most in disturbing the environment within the region. The below provided charts shows the details of causes resulting in composition of Particulate Matter from 2.5 to 10 in Delhi's air:



PM_{2.5} Emission Load of Different Sources in the City Of Delhi



PM₁₀ Emission Load of Different Sources in the City Of Delhi

There is no doubt that Firecrackers results into worsening of the air quality during and massively rises the levels of spiking potassium and sulphur especially during the diwali time. However, the banning firecrackers will only be a very temporary solution to a problem which can only be eradicating by regular check.¹⁹ The aforementioned cases shows clear over judicial overreach such matters are to be best solving through legislative action as judiciary cannot act as an expert on every problem²⁰.

CONCLUSION

Judicial activism has been recognized as a most effective and influential tool to improve and repair any discrepancy in a legislative statute or in any administrative action and also it magnifies the scope of a prevailing law. However it is of the utmost importance that the doctrine of Judicial Activism is used carefully as to provide justice to the people. It should be utilized in a way as to cause justice to the whole of society at minimum cost. Legislative check on the court's power of judicial activism will not be an effective solution as the same will result into hindrance in the doctrine of separation of power. Also the frequent interference by the court in the legislative and administrative action will also lead to the hindrance in application of the said doctrine. The accurate action will be the careful and cautious application of the doctrine. It should not be utilized in a way as to cause harm,

¹⁹ Maitridevi Sisodia, *Supreme Court order to ban firecrackers is a case of Judicial Overreaching*, (Daily O,10 October 2017); Available at: <https://www.dailyo.in/variety/firecracker-ban-supreme-court-delhi-ncr-air-pollution/story/1/19993.html>, (Accessed on 14/11/2017)

²⁰ Geoffrey Robertson QC, *Judicial Independence: Some Recent Problems* (International Bar Association's Human Rights Institute (IBAHRI) Thematic Papers No 4, June 2014); Available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUId=9f2297b2-5bdf-4c7c-b950-025604a2c363>, (Accessed on 14/11/2017)

however it should work in accordance with the doctrine of utilitarianism.

As rightly pointed out by Justice J.S Verma that “*Judicial activism is like a sharp-edged tool which has to be used as a scalpel by a skilful surgeon to cure the malady; not as a Rampuri knife which can kill*”²¹

Thus the judicial activism if used casually will lead to more harm than good for the society at large however by effective and well researched adjudication it can lead to great and speedy improvement of the legal structure as the wait for legislative or administrative action could be avoided. The act of judiciary in such a way will strengthen the constitutive values and will heighten the faith in judiciary of the general public.

²¹ *Supra* note 15