

Judicial Activism: Rationality and Legitimacy

Dr. Nirmala Rana

Associate Professor, Department of Political Science, Bhagini Nivedita College, University of Delhi, Delhi (India)

ARTICLE DETAILS

Article History

Published Online: 10 December 2018

Keywords

Public Interest Litigation, Supreme Court of India, Judicial Activism, Rationality and Legitimacy.

*Corresponding Author

Email: nirmalrana.bnc[at]gmail.com

ABSTRACT

Judicial activism through a process known as public interest litigation (PIL) has emerged as a powerful mechanism of social change in India. The Public Interest Litigation (PIL) has become one of the most powerful instruments for judicial activism and the Supreme Court of India has emerged as the main organ of State and the foremost constitutional courts to exercise of writ jurisdiction and the expansive interpretation of fundamental rights guaranteed by the Constitution of India. Judicial action initiated through these written petitions have brought relief to a wide variety of cases by giving justice to the weaker sections and has even taken action against political corruption and unaccountability. The process of PIL has become an integral part of the judicial system of the country. Judicial activism is likely to continue and to force the State to act responsibly for the welfare of the people. This paper traces the rationality and legitimacy of judicial activism since Independence through pronouncements of the Supreme Court. The paper illustrates through judgements of the Supreme Court that the instrument of the PIL and the exercise of writ jurisdiction by the Supreme Court go beyond the traditional postulates of judicial processes and political theory on separation of powers between the organs of State. This paper evaluates the efforts made by the judiciary to address the problems through PIL and discuss the status of courts within the constitutional system by pointing out the drawbacks of administrative system responsible for human rights abuses. A rule of law in public administrations has not been developed in India over the years to address the social and economic conditions, whereas constitution only authorise the people to change the government. The exploitation of poor/weaker /neglected/ minorities section has been neglected and the government failed to address the problems and unable to provide basic education and economic power. Public Interest Litigation empowers the ordinary citizen to write a letter and draw the attention of the apex court about various problems.

1. Introduction

Judicial activism is a legal term that refers to court rulings that are partially or fully based on the judge's political or personal considerations, rather than existing laws. In basic terms, judicial activism occurs when a judge presiding over a case allows his personal or political views to guide his decision when rendering judgment on a case. Judicial activism can be described when the judiciary steps in to the shoes of the executive or the legislature and embarks on the works and privileges of the other two organs rather than interpretation of law. This topic has assumed immense significance because today everything from river pollution to the selection of the cricket team and even the disposal of waste has become the purview of Judicial Activism. The Supreme Court of India in a recent judgment on May 5, 2010 in *Selvi v. Karnataka* considered the constitutionality of the investigative Narco analysis technique holding it permissible only when the subject consents to its use. The decision taken by the Supreme Court of India about the 9th Schedule of the constitution deserves great attention. It was an example of excessive judicial Activism. In this case, one of the most controversial judgments of the Supreme Court was that the ninth schedule of the Constitution was open to judicial Review. The common citizens have discovered great relief in Judicial Activism because of the inefficient administration and nonperforming of the other organs of Government and the wide spread corruption and criminality in the political sphere. In many cases the courts acted in the right direction but in certain

instances it made upset the constitutional system of separation of powers. Today judicial activism has touched almost each and every aspect of life ranges from human rights issues to maintenance of public roads! Judicial activism is use of judicial power to articulate and enforce what is beneficial for the society in general and people at large. What has come to be called judicial activism was born as a corrective to inaction or failure of the executive and the legislature to provide clean, competent and citizen-friendly governance. The essence of judicial activism is an active justice delivery system. Judicial activism in India very largely had its source in the introduction of Public Interest Litigation (PIL).

In a country hit by rampant corruption and constant erosion of democratic norms, the Supreme Court orders and judgements since 1990s came like a breath of fresh air. By sensitising the Central Bureau of Investigation (CBI) and other central investigating agencies to the need to perform their constitutional obligations, the apex court exposed magnitude of corruption in high places.

In fact, judicial activism has touched almost every aspect of life in India to do positive justice. But it has been alleged that the judiciary, in the process, has gone beyond what is prescribed by law or written in black and overstepped the limitations prescribed by the sacrosanct, i.e., the Constitution.

2. Objective of the Study

Judicial Activism is an emerging concept and evolves in their later stages of development, the study emphasis on the study of rationality of judicial activism and its legitimacy and impact on Indian Judiciary. The study also throws some light on the critical analysis of Judicial Review and current debate of it in transnational scenario. The major objectives of the study are as"-

1. To study the historical background of Judicial Review
2. To examine the dimensions of legitimate use of —Doctrine of judicial review.
3. To examine the relevance and rationality of Judicial Activism.

The Scope of the judicial review to exercise its power over legislative and executive action and analyzing the consequences or after effects of judicial review, and to review the legal frame work regulating and governing the legitimate use of this doctrine

3. Research Methodologies

3.1. Scope of the Study:

The scope of the study is not only limited to the explaining the Doctrinal approach of Judicial activism but also the risk it carries, when used recklessly. It emphasis on the Legal framework the laws relating to —Judicial Review and Activism in India. As there is a little chance of field work, this study is based on —Doctrinal Approach.

3.2 Source of Information:

Research in this work mainly relied upon —Doctrinal Method. The present approach in the research is primarily Doctrinal, analytical and descriptive. The present research is mainly dependent on Statues and Committee reports and secondary sources like books and articles. Internet has provided with major contribution of the work. Internet has provided with major contribution to explore into the various dimensions of the topic by providing with most latest

3.3 Research Questions:-

This research paper focuses and tries to answer the following questions:-

1. What are definitions and the Historical background of Judicial Activism?
2. What's rationality of Judicial Activism?
3. What is the legal framework of the judicial activism in India?

The above research made a significant and considerable effort in answering the above spot questions.

4. Interpretations and Analysis of the Study

4.1 Constitutional provisions for Judicial Review in India

The Indian Constitution adopted the Judicial Review on lines of US Constitution. Parliament is not supreme under the Constitution of India. Its powers are limited in a manner that the power is divided between centre and states. Moreover the Supreme Court enjoys a position which entrusts it with the power of reviewing legislative enactments both of Parliament and the State legislatures. This grants the court a powerful

instrument of judicial review under the constitution. Both the political theory and text of the Constitution has granted the judiciary the power of judicial review of legislation. The following provisions speak on constitutional provisions:-

- a) The constitutional provisions which guarantee judicial review of legislations are articles 13, 32,131-136,143,145,226,246,251,254 and 372.
- b) Article 13 establishes that any law which contravenes any of the provisions of the part of Fundamental Rights shall be void.
- c) Article 372 establishes the judicial review of the pre-constitution legislation.
- d) Article 32 and 226 entrusts the roles of the protector and guarantor of fundamental rights to the Supreme and High Courts.
- e) Article 246 (3) ensures the state legislature's exclusive powers on matters pertaining to the State list.
- f) Article 245 states that the powers of both Parliament and State legislatures are subject to the provisions of the constitution. The legitimacy of any legislation can be challenged in the court of law on the ground that the legislature is not competent enough to pass a law on that particular subject matter the law is repugnant to the provisions of the constitution or the law infringes one of the fundamental rights
- g) Article 131-136 entrusts the court with the power to adjudicate disputes between individuals, between individuals and the state between the states and the union but the court may be required to interpret the provisions of the constitution and the interpretation given by the Supreme Court becomes the law honoured by all courts of the land.

4.2 Factors contributing to the Evolution of Judicial Review in India:

The concept of judicial activism can be seen to reflecting form the trends exemplified by some decisions and orders of the Supreme Court. They are as under: The Judiciary since 1973 claims the power to nullify on substantive grounds, even an Amendment to the Constitution by amending power if it changes —the basic structure of frame work of the constitution. The Concept of judicial control over the constitution has been evolved by and known to courts in India only.

1. The undoubted/doubtful privileges of the legislature even in respect of internal proceedings have been brought under the purview of judicial review.
2. Power of Judicial review as exercised by the Supreme Court and the High Court has been recognized by these courts to be unalterable —basic structure of Constitution
3. Twenty one High courts, with the Supreme Court at the Apex, correct the entire gamut of Country's administration.
4. The concept of —state for the purpose of the enforcement of fundamental rights has been widened by the Successive Judgments of the supreme court so as to include both public and Quasi- public authorities The courts have broadened the scope of —Locus Standi in the Public Interest Litigation

matters, in the early eighties; The Supreme court has often resorted to judicial legislation by virtue of its powers under Article 141 to fill the void created by the so-called legislative vacuum

4.3 Judicial Activism: Access to Justice

It is argued that the judiciary for some years has been over-willing to jump into the arena of executive or legislative functions. There appears to be a general agreement that in recent years the Indian Supreme Court has brought out more far reaching changes than the legislature and executive combined. Judicial activism, in fact, is not a distinctly separate concept from usual judicial activities. The expression 'activism', lexically as well as in ordinary parlance, means 'being active', 'doing things with decision' and the expression 'activist' should mean 'one who favours intensified activities'. In this sense every judge is, or at least, should be an activist, as Justice Krishna Iyer observed, "Every judge is an activist either on the forward gear or on the reverse."¹

Judicial policy making can be either an activity in support of the legislative and executive policy choices or in opposition to them. But, it is the latter pattern of activity that is usually styled as judicial activism and not policy making as such. Judicial activism is policy making in competition with policy making by legislature and executive. The essence of true judicial activism is the rendering of decisions which are in tune with the temper and tempo of the times.²

Activism is judicial policy making which furthers the cause of social change or articulates concepts such as liberty, equality or justice. Activism counters the traditional concept that judiciary is a mere umpire; it on the contrary, should work as an active catalyst in the constitutional scheme. It has to be an arm of social revolution. An activist judge activates the legal mechanism and makes it play a vital role in socio-economic process.

"Government by judiciary", Fehrenbacher writes, "is now, in a sense democracy's non-democratic alternative to representative government when the later bogs down in failure or inaction."³ According to Upendra Baxi, if the executive or legislature defaults on its legal and constitutional obligations, court cannot for long take a view that violations of rights involved in such defaults are of no concerns to them. What, therefore, emerges is that province of judicial function can be construed only in the context of the work being done by the other branches of the Constitution.⁴

Briefly, judicial activism means active role played by the judiciary in promoting justice. Judicial activism to define broadly is the assumption of an active role on the part of the judiciary.⁵ In the words of Justice J. S. Verma, judicial activism

¹ Iyer, Krishna V R. (2012), *Speaking for the Bench: Selected Judgments of Justice V.R. Krishna Iyer*, Oxford University Press, pp. 60-65

² Sathe, S. P. (2002), *Judicial Activism in India*, Oxford University Press, New Delhi, Preface

³ Fehrenbacher, Don E., *Slavery (1981), Law, and Politics: The Dred Scott Case in Historical Perspective*, Oxford University Press, pp. 102-120

⁴ Baxi, Upendra, *The Indian Supreme Court and Politics*, Eastern Book Company, New Delhi, 1980, pp. 10-21

⁵ Chaterji, Susanta, "For Public Administration, Is judicial Activism Really Deterrent to Legislative Anarchy and Executive Tyranny?" in *The Administrator*, Vol. XLII, April-June 1997, pp. 9-11

must necessarily mean "the active process of implementation of the rule of law, essential for the preservation of a functional democracy."⁶

4.4 Rationality of Judicial Activism

Ideally, legislature and the executive are the custodians of honest public life. They should, indeed, remove the mask which the corrupt wear and they are the ones who should initiate action against those who steal, cheat or deceive. But when the custodians themselves compromise with corruption or politicize it, the judiciary has to step in. This is what has happened. The Hawala Diaries would have accumulated dust in the archives of CBI if the Supreme Court had not forced the agency to take action against the recipients of illegal money. Again, it was the Supreme Court which goaded and prodded the CBI to push the proceedings.

The concept of judicial activism can be seen to be reflecting from the following trends namely: expansion of rights of hearing in the administrative process; excessive delegation without limitation, expansion of judicial control over discretionary powers; expansion of judicial review over the administration; promotion of open government; indiscriminate exercise of contempt power; exercise of jurisdiction when none-exists; over-extending the standard rules of interpretation in its search to become economic, social and educational objectives; and passing of orders which are *per se* unworkable.

In India, two major aspects of judicial activism are being followed by the judiciary. The first comes in the form of various directions issued by the courts to the government authorities for protecting fundamental and other rights of citizens and for the fulfilment of a course of public interest. All the causes coming under PIL are covered under this aspect of judicial activism. The famous cases, where the court issued directions under PIL are: *Agra Protection Home case*, *Bihar (Bhagalpur) Under Trial Criminal case*, the case of Bombay pavement dwellers, *Sunil Batra v. Delhi Administration*, case of construction workers of Tilonia (Rajasthan), *Bandhua Mukti Morcha v. Union of India*, *Asiad Workers case*, *People's Union for Democratic Rights v. Union of India* etc.⁷

The second major aspect of judicial activism in India is in the field of interpretation of fundamental rights, particularly right to equality (Art. 14), right to freedom (Art. 19), and right to life and personal liberty (Art. 21). The courts have discretion to expand the scope of these rights. There is scope for a judge to read his personal philosophy into the provisions. The power of interpretation sometimes had the effect of undermining the powers of Parliament also. For example, in *Keshvanand Bharti case* (1973), the Supreme Court invented the principle of 'Basic Structure' which caps the power of Parliament to alter or amend certain features of the Constitution. Similar is the case with government decisions giving primacy to Fundamental Rights whereas Parliament resolved to give primacy to certain Directive Principles of State Policy over Fundamental Rights.⁸

⁶ Verma, J. S., "Judiciary and Judicial Reforms" in Kashyap, Subhash C. (ed.), *The Citizens and Judicial Reforms*, Universal, New Delhi, 2003, pp. 40-44

⁷ Kashyap, Subhash C. (2009), *Our Political System*, National Book Trust, New Delhi, pp. 182-187

⁸ Sathe, S. P., *op. cit.*, pp. 25-57

In a modern democratic set up, judicial activism should be looked upon as a mechanism to curb legislative adventurism and executive tyranny by enforcing constitutional limits. That is, it is only when the legislature and the executive fail in their responsibility or try to avoid it, that judicial activism has a role to play. In other words, judicial activism is to be viewed as a "damage control" exercise, in which sense, it is only a temporary phase. Recent times have seen judiciary play an intrusive role in the areas constitutionally reserved for the other branches of government. Issues in judicial activism arise, when governance is apparently done by *Mandamus*.

4.5 Judicial Activism: Historical Perspective

Arthur Schlesinger Jr. introduced the term "judicial activism" in a January 1947 *Fortune* magazine article titled "The Supreme Court: 1947."⁹ The phrase has been controversial since its beginning. An article by Craig Green, "An Intellectual History of Judicial Activism," is critical of Schlesinger's use of the term; "Schlesinger's original introduction of judicial activism was doubly blurred: not only did he fail to explain what counts as activism, he also declined to say whether activism is good or bad."¹⁰ Even before this phrase was first used, the general concept already existed. For example, Thomas Jefferson referred to the "despotic behaviour" of Federalist federal judges, in particular, John Marshall.

Judicial activism did not visit the high courts for the first three decades of independence. In the first decade, with political stalwarts running the executive, and Parliament functioning with shine, the judiciary was understandably inclined to go along with the executive to the farthest extent possible. In the 1950s through half of the 1970s, the Supreme Court on the whole adopted a judicial and structural view of the Constitution. The Emergency reduced the apex court and high courts virtually to an arm of the authoritarian executive. However, two years before the declaration of the Emergency, the Supreme Court had handed down the famous decision in the *Keshvananda Bharti Case*¹¹ that the executive had no right to tamper with the Constitution and alter its basic features. But it remained a passive spectator when Mrs. Gandhi did exactly that. After the end of the Emergency, the Supreme Court and also some high courts began to show signs of judicial activism. They began to intervene in executive as well as legislative areas albeit cautiously. A large number of decisions of the Supreme Court where it has played an activist role relate to Article 21 of the Indian Constitution.

The first major case of judicial activism through social action litigation was the *Bihar Under Trials* case. Then in 1980, two professors of law made a letter to the Editor of the Indian Express describing barbaric conditions of detention in the Agra Protective Home,¹² the basis for a writ petition under Article 21. This was followed by a similar petition for Delhi Women's Home by a third year Law student in Delhi Law Faculty and a

social worker.¹³ Then three journalists after an expose of a thriving market, in which women were bought and sold as cattle, filed a writ petition demanding prohibition of this practice and immediate relief for their victims through programmes of compensation and rehabilitation.¹⁴

The Supreme Court began to take cognizance of custody deaths, bride burning and rape in police stations.¹⁵ It ordered the police not to handcuff a man arrested purely on suspicion.¹⁶ It ordered that no woman can be taken to police station after dusk.¹⁷ Judges of high courts began to visit prisons to check the living conditions of prisoners.¹⁸ In about a single month of 1993, the Supreme Court delivered judgments protecting the rights of innocents held in Hazaratbal mosque in Srinagar, defining the constitutional powers of the Chief Election Commissioner, threatening multi-crore rupees industries with closure if they continued to pollute the river Ganges and endanger the Taj Mahal, and brought all government and semi-government bodies under the purview of the Consumer Protection Act.¹⁹ In 1994, it made a kind of history when it asked the Chief of Army Staff to pay Rs. 6,00,000 to the widow and two children of an army officer who died due to "gross negligence and callousness" by the authorities concerned some 16 years before.²⁰

The Supreme Court was now extending its activism to areas considered till then the preserve of the executive. The Rao Government referred to the Supreme Court the emotive and highly controversial issue of 27 per cent reservation of jobs in Central government and Public Sector Undertakings. The Court found decision of the National Front Government constitutionally valid, but exempted the "creamy layer" from the benefit of affirmative action. The Court decided that altogether 49 per cent of jobs could be reserved for deprived and poor castes and classes. In another decision, the Court completely changed the operation of the dreaded capitation fee colleges used to collect in Karnataka.²¹

For the Supreme Court to be virtually dictating terms to the CBI in the *Hawala* case—in other words, telling the executive how to do its job—is a reflection of a systemic breakdown of the other branches of the government. The 90s are replete with the interference of the Supreme Court in areas where judicial angles had feared to trade in the past, raising the retirement age for judges by what amounted to a virtual judicial fiat, fixing quotas and even fees for medical colleges. Justice Verma's role in the *Jain Hawala* case has given the judiciary its shining moment. When Justice Verma was asked that the *Hawala* case is perceived to have pushed the frontiers of judicial activism beyond anyone's expectations, his reply was, "As far as I'm concerned, we are only making the executive work. We

¹³ Whyte, Gerry (2002), *Social Inclusion and the Legal System: Public Interest Law in Ireland*, Institute of Public Administration, Dublin, p.40

¹⁴ Baxi, Upendra, "Taking Sufferings Seriously: Social Action Litigation in the Supreme Court of India" in *Third World Legal Studies*, 1985, Vol. 1, pp. 107-132

¹⁵ Singh Hoshier and Pankaj Singh (2011), *Indian Administration*, Pearson, p. 96

¹⁶ *Citizens for Democracy v. State of Assam*, AIR 1996 SC 2193

¹⁷ Singh Hoshier and Pankaj Singh, *op. cit.*, p. 96

¹⁸ *Prabha Dutt v. Union of India*, (1982) 1SCC1

¹⁹ *M. C. Mehta v. Union of India*, (1997), 3 SCC 715

²⁰ Gupta, Bhabani Sen, *op. cit.*, p. 227

²¹ *Mohini Jain v. State of Karnataka* (1992), SCC 666

⁹ Kmiec, Keenan D., "The Origin and Current Meanings of 'Judicial Activism'" in *Cal. L. Rev.*, 2004, 92: 1441, 1447

¹⁰ Green, Craig, *An Intellectual History of Judicial Activism*, Temple University - James E. Beasley School of Law, August 2008, p. 4

¹¹ *Keshvananda Bharti v. State of Kerala*, AIR 1973 SC 1461

¹² Gupta, Bhabani Sen (1996), *Problems of Governance*, Konark Publishers, Delhi, pp. 222-228

are not usurping its role. And while the courts are making the executive work, what is needed is deft handling. It is like a sharp edged tool which has to be used as a scalpel in the hands of a skilful surgeon to cure the malady. Not as a Rampuri knife which can kill."²²

On April 2, 1996 the Supreme Court made the Chiefs of central investigating agencies personally answerable regarding investigations into criminal, income tax and FERA offences alleged to have been committed by the controversial God man Chandra Swamy.²³ On February 14, 1996 Supreme Court ordered the CBI to probe into out of turn allotments of government houses between 1988 and 1994 on the basis of over 200 complaints it had received.²⁴ On March 20, 1996 the Supreme Court gave a green signal for a CBI probe into Rs 500 crore Animal Husbandry Scam in Bihar under supervision and control of Patna High Court.²⁵ In September 1996, the Delhi High Court appointed a fresh CBI team as court officers to investigate the JMM case.²⁶ The Court on July 28, 1998 ruled that all city buses in Delhi should be CNG run by March 31, 2001.²⁷ On December 16, 2010 the Supreme Court ordered a comprehensive and thorough investigation by the CBI and the enforcement directorate into what has become notorious as 'The 2G Scam'.²⁸ The investigation, into spectrum allocation from 2001 to 2008 is to be monitored by the judges. The allotment of 2G Spectrum in 2008, is estimated by the CAG to involve a loss of Rs. 1,76,000 crore.²⁹ In a rights-based judgment delivered on April 18, 2011 the Supreme Court banned the employment of children in circus companies. The Court directed the Central Government to take immediate steps to rescue the suffering Circus workers and arrange for their rehabilitation. The Court asked the government to raid all Circuses and liberate children and check violation of their fundamental rights.³⁰ Another Supreme Court judgment delivered on April 19, 2011 was highly critical of the caste system and declared *Khap Panchayats* illegal.³¹ A significant aspect of the judgment was that it directed the administrative and police officials to take strong steps to prevent such atrocious acts as honour killing. No less important is the serious concern expressed by justices Dalveer Bhandari and Deepak Verma over the increasing number of starvation deaths in the country.³² The Supreme Court has once again questioned the approach of the Central government to the eradication of malnutrition and its failure to arrest starvation deaths in some areas.³³ On July 4, 2011 the Supreme Court pulled up the Union government for not showing seriousness in bringing back black money stashed away abroad and constituted a Special Investigation Team (SIT) to take steps to bring back unaccounted monies. The Court rejected the Union government's absolute immunity and directed it to disclose the

names of those with bank accounts in Liechtenstein, as revealed by Germany with respect of investigations were concluded, either partially or wholly.³⁴ However, on July 15, 2011 the Central government moved the Supreme Court to recall its July 4 order describing it as "Judicial Overreach" The review petition said the order, which directed the SIT be headed by a retired Supreme Court judge, amounted to judicial overreach into executive domain and was against the principle of "Separation of Powers."³⁵

On July 5, 2011 in a blow to both the Chhattisgarh government and the Centre, the Supreme Court declared illegal and unconstitutional the deployment of tribal youth as Special Police Officers- either as 'Koya Commandos' Salva Judum or any other force - in the fight against the Maoist Insurgency, and ordered their immediate disarming. The Court strongly indicted the State for violating constitutional principles in arming youth who had passed only fifth standard and conferring on them the powers of police.³⁶ On July 6, 2011 the Supreme Court upheld an Allahabad High Court order quashing the Uttar Pradesh notification to acquire 156 hectares of land for construction of residential apartment by private builders in the Greater Noida Extension Area of Gautam Budh Nagar District. It ordered the return of the land to the villagers. The Court said it impose costs on the GNIDA for undertaking an exercise of allotment of land to the builders, in complete violation of the purpose for which the land was shot to be acquired, even before the approval by the government for change of land use.³⁷

With Justice Kapadia at the helm since May 2010 to September 2012, the Supreme Court took the government to task for the excesses of the bureaucracy and the corruption in high places.³⁸ In March 2011, a three member bench headed by Justice Kapadia dealt a severe blow to the government by quashing the appointment of Chief Vigilance Commissioner P. V. Thomas.³⁹ In the Right to Education case the Supreme Court upheld the constitutional validity of the Right of Children to Free and Compulsory Education Act, 2009 which provides for free and compulsory education to children between the age of 6 and 14 years and mandates government/aided/ and non-minority un-aided schools to reserve 25% of the seats for these children.⁴⁰ Under him, the Court ordered the inter-linking of rivers and directed the Centre to take up the project on a war-footing.⁴¹ Holding that the Right to Life includes a pollution free environment, the Court ordered the suspension of all mining operations and transport of minerals in Bellary and other districts.⁴² The Court also ordered a CBI probe into illegal mining in the areas of Andhra Pradesh and Karnataka, covering the alleged illegal mining activities of the former Karnataka minister G. Janardhana Reddy. In August 2012 the Supreme Court directed the Union government and Madhya Pradesh government to take immediate step for disposal of

²² *India Today*, March 15, 1996. p 121

²³ *The Hindustan Times*, New Delhi, April 23, 1996

²⁴ *India Today*, October 31, 1996. p 121

²⁵ *India Today*, September 30, 2013 "Fodder scam: Key facts and timeline"

²⁶ *India Today*, October 31, 1996. p 121 [(1998) 4 SCC 626]

²⁷ *India Today*, April 16, 2001, pp 52-55

²⁸ *The Hindu*, January 6, 2011

²⁹ *The Hindu*, January 12, 2011

³⁰ *The Hindu*, April 25, 2011

³¹ *Ibid*

³² "A Bench comprising Justice Dalveer Bhandari and Justice Deepak Verma, hearing petitions relating to the streamlining of the public distribution system (PDS), expressed serious concern over the increasing number of starvation deaths." *The Hindu*, April 21, 2011

³³ *Ibid*

³⁴ The Black Money Case - *The Hindu*, July 5, 2011

³⁵ *The Hindu*, July 16, 2011

³⁶ The Salva Judum Case - *The Hindu*, July 6, 2011

³⁷ The Noida Land Allotment Case - *The Hindu*, July 7, 2011

³⁸ *The Hindu*, September 28, 2012

³⁹ *The Hindu*, September 28, 2012

⁴⁰ The Economic Times, April 14, 2012

⁴¹ "SC approves Government's project of interlinking rivers", CNN-IBN@ibnlive, February 27, 2012

⁴² *Judiciary/ Law- 2012*, January to December 2012, Compiled By Human Rights Documentation, Indian Social Institute, New Delhi

toxic waste lying in and around the Union Carbide factory in Bhopal in six months.⁴³ In the 2G Licenses Case, the Court held that all public resources and assets are a matter of a public trust and they can only be disposed off in a transparent manner by a public auction to the highest bidder.⁴⁴

The Supreme Court on November 19, 2012 issued notice to the Centre and the CBI on a public interest litigation (PIL) petition by a group of prominent citizens and Common Cause, a non-government organisation, seeking cancellation of the allocation of captive coal blocks from 1993 and for a direction to order a probe by a special investigation team. The petitioners said: "According to the conservative estimates made by the CAG, the allocation between 2004 and 2010 caused a windfall gain of Rs. 1.86-lakh crore to private companies, making it bigger than the 2G scam. There was also a related loss to public exchequer. Various political and commercial vested interests joined forces to block competitive bidding [auction] of coal blocks. The blocks were allocated almost for free to the private players in the name of 'catering to the need of growing demand of coal in power, cement and steel industries."⁴⁵ The Supreme Court on October 31, 2013 (PIL by 83 former civil servants) ruled that civil servants should be assured of a minimum tenure in a posting and civil services boards (CSB) should be formed to make recommendations to governments on service issues, especially on transfers, postings and disciplinary actions.⁴⁶

The Supreme Court also ruled that the right to life guaranteed under Article 21 includes the right to livelihood as well. The right to food as a part of right to life was also recognised in *Kapila Hingorani Vs. Union of India* whereby it was clearly stated that it is the duty of the State to provide adequate means of livelihood in the situations where people are unable to afford food. The Court has also held that the right to safe drinking water is one of the Fundamental Rights that flow from the right to life. Right to a fair trial, right to health and medical care, protection of tanks, ponds, forests etc which give a quality life, right to Family Pension, right to legal aid and counsel, right against sexual harassment, right to medical assistance in case of accidents, right against solitary confinement, right against handcuffing and bar fetters, right to speedy trial, right against police atrocities, torture and custodial violence, right to legal aid and be defended by an efficient lawyer of his choice, right to interview and visitors according to the Prison Rules, right to minimum wages etc. have been ruled to be included in the expression of 'right to life' in Article 21. Recently the Supreme Court has directed providing a second home for Asiatic Lions vide *Centre for Environmental Law V. Union of India* (writ petition 337/1995 decided on 15.4.2013) on the ground that protecting the environment is part of Article 21. The right to sleep was held to be part of Article 21 vide *In re Ramlila Maidan* (2012) S.C.I.1. In *Ajay Bansal vs Union of India*, Writ Petition 18351/2013 vide order dated 20.6.2013 the Supreme Court directed that helicopters be provided for stranded persons in Uttarakhand.

Thus we see that a plethora of rights have been held to be emanating from Article 21 because of the judicial activism shown by the Supreme Court of India. However there can be grave reservations about some of these orders. One wonders whether there will be any limit to the number of such rights created by court orders.

In a subsequent decision, *Bhagwan Dass Vs. State (NCT) of Delhi*, 2011(5) Scale 498, again authored by the writer, the Supreme Court mandated death sentence for 'honour killing' i.e. killing of young men and women who married outside their caste or religion, or in their same village, thereby 'dishonouring' the parents or their caste.

The most recent case on judicial activism was the case of *Aruna Ramchandra Shanbaug Vs. Union of India and Others*, Aruna Shanbaug, a nurse in 1973, while working at a Hospital at Mumbai, was sexually assaulted and has been in a permanent vegetative state since the assault. In 2011, after she had been in this status for 37 years, the Supreme Court of India heard the petition to the plea for euthanasia filed by a social activist claiming to be Aruna's friend. The Court turned down the petition, but in its landmark judgment (authored by the writer) it allowed passive euthanasia i.e. withdrawal of life support to a person in permanently vegetative state, subject to approval by the High Court.

Judicial activism describes the judicial rulings alleged of being based on personal or political considerations rather than on existing law. The following are most prominent cases of judicial activism: - **1).** In *Maneka Gandhi v /s Union of India* case, the court recited the term 'procedure established by law' under Article 21 of the Constitution by repositioning it as 'due process of law' which means the procedure which is established by the law must be just, fair and reasonable. **2).** In the case of *Vishakha v/s State of Rajasthan*, the court laid down guidelines for protection of women from sexual harassment at workplace. **3).** Reforms in Cricket: The Supreme Court is trying its best to restructuring the Board for the Control of Cricket in India (BCCI). This is surprising since the BCCI is a private body. The Supreme Court had set up Mudgal committee and the Lodha Panel to investigate the betting charges and suggest reforms. Later the Supreme court has dismissed BCCI officials for not adhering to the suggested reforms. **4).** In *Olga Telis v/s Union of India*, the court said that the outlines of Article 21 which provides right to life also include itself the Right to livelihood as well as shelter. **5).** The Supreme Court had issued a notice to Arunachal Pradesh governor Jyoti Prasad Rajkhowa, which was recalled later. This decision was taken under Article 361, according to which the governor and the President are not answerable to any court in the exercise of powers and duties of the office. Their conduct can still be reviewed by the court. **6).** The Supreme Court Advocate on Record Association v/s Union of India which is known as the Second Judges Case is an example of Judicial Creativity. The term 'consultation' as 'concurrence' under Article 124 of the Constitution of India in the cases of appointment of Judges. **7).** SIT on Black money: The Supreme Court ordered the UPA government to set up SIT to investigate black money. Though the UPA government

⁴³ *The Hindu*, August 10, 2012

⁴⁴ *The Hindu*, September 29, 2012

⁴⁵ *The Hindu*, November 19, 2012

⁴⁶ Parakh, P. C., *Crusader or Conspirator – Coalgate and Other Truths*, Manas Publications, New Delhi, 2014, pp. 161-189

did not take action on this judgment the NDA government has now fulfilled the task.

4.6 Legitimacy of Judicial Activism

Judicial activism fills the vacuum that non-activism of other institutions creates. The then Chief Justice of India, Mr. A. M. Ahmadi, is reported to have said that judicial activism has been more or less thrust upon the Indian judiciary. The current phase of judicial activism draws its justification from "the reluctance of the legislature and the executive to take hard and unpleasant decisions. The question is: Is it the job of the Supreme Court to take hard and unpleasant decisions not taken by the Government and Parliament?"⁴⁷

The then Chief Justice observes: "In recent times, we have noticed instances of one wing of the government avoiding to take a decision on a politically sensitive issue by passing it to another wing, the latter not being expected to make this decision ... In cases where the sensitive issue is 'not' pushed into the lap of another institution, we have noticed that it remains unattended and unresolved, making the people restive and forcing them to take it to the Courts." While the judiciary does not seek an "expanding role", clarified Justice Ahmadi, it has often been forced to pronounce judgment on politico-legal and socio-economic issues. However, the Chief Justice said that "the phenomenon of judicial activism in its aggressive role will have to be a temporary one." This is just as well. It cannot become a permanent feature of jurisprudence or governance in a democracy. The legislature, the executive and the judiciary as well as the "fourth estate", the media, have their mutually reinforcing roles in our democracy. None can usurp the role of the other. Equally, the judiciary must remain alert to the danger of "Judicial Activism" becoming "Judicial Populism". "Judicial activism should never verge on judicial adventurism."⁴⁸

The judicial activism has led to the prosecution of a number of politicians and other public servants on various charges under the Indian Penal Code, the Prevention of Corruption Act and TADA. Some were even sent to jail and this happened for the first time in the post-independence era.

4.7. Consequences of Judicial Activism

1. Corruption exposed in high places. 2. Penal action initiated against top politicians and public servants. 3. Strict enforcement of Environmental Laws leading to closure or relocation of a large number of industries.

Subhash Kashyap, a leading constitutional expert observes, "In recent years, under what has come to be called judicial activism, the Supreme Court has issued directions to control pollution, to check the evil of child prostitution, to receive a sick company to protect the livelihood of 10,000 employees, to look into the danger to safety in building a dam, to segregate the children of prostitutes from their mothers, to provide insurance to workers in match factories, to protect the Taj Mahal from environmental pollution."⁴⁹

Some of the critics argue that judiciary encroaches upon the jurisdiction of the executive, the legislature and other independent and autonomous institutions in its activist role. However, the majority of the cases, where the courts have directed the authorities to perform certain things or to refrain from others, the acts have been such as the authorities were duty bound under the law to perform or to refrain from performing. In compelling the authorities to do their mandatory duties under the law or to refrain from doing them against law or in setting aside the accomplished illegal acts, the judiciary only performs its duty. The second objection to judicial activism is that the judiciary enters an area where it has no expertise and competence to undertake the regulation and management to the affairs. The history of the cases so far shows that the courts have entered such area only when compelled to do so for reasons of law and have taken precautions to be guided by experts in the field. It is also contended that courts are indulging in activism at the expense of their normal adjudicatory works, and this is one of the reasons responsible for huge arrears of cases. This criticism, indeed, is not based on facts. The statistics show that the public interest litigation or the cases where the Court assumes the allegedly 'activist role', constitutes a negligible proportion of the total number of cases. There is no evidence to show that the cases where the judiciary had assumed 'activist role' affected disposal of other cases in any significant way.⁵⁰ Critics also argue that the judiciary most of the time gives direction to perform the mandatory duties under the law. It leaves the implementation of direction to the authorities themselves and only monitors compliance by calling for reports. Further, the judiciary has the power to punish for the non-compliance of its directions by invoking its contempt power. Experience shows that the authorities do heed the Court direction.

The critics apprehended that by making inroads into the executive and legislative domain without restraint, judicial activism had upset the constitutional systems of checks and balances. The most serious objection to judicial policy making is, of course, that the judiciary is an unelected and non-representative body that is not accountable to the people and its growing power represented in the words of Thomas Jefferson, "the despotism of an oligarchy". Whether in the case of pollution around the Taj Mahal or air pollution in Delhi, it has been virtually setting policies on critical issues of environment. Yet, in no democratic country are such issues of policy decided by the judiciary as they cast for debate, the setting of priorities and the balancing of interests through the political system. B. P. Maurya, one of the former General Secretaries of the AICC, in a statement accused the Supreme Court of trying to become country's "third legislature". Earlier still, a former judge of the Supreme Court, Justice H.R. Khanna, had also written in the press, criticizing the Supreme Court for trespassing into spheres constitutionally assigned to the legislative and the executive organs of the polity.⁵¹ However, former Supreme Court Justice O. Chinappa Reddy refutes the allegation made by critics that judicial monitoring of the investigations undermines the principle separation of powers. "The Courts

⁴⁷ Fadia, B. L., Indian Government and Politics, Sahitya Bhawan Publications, Agra, 2014, p. 457

⁴⁸ *The Times of India*, February 19, 1996

⁴⁹ Kashyap, Subhash C., Our Constitution, National Book Trust, New Delhi, 2001 p. 234

⁵⁰ Gauri, Varun, "Fundamental Rights and Public Interest Litigation in India : Overreaching or Underachieving?", Indian Journal of Law & Economics, 2010, Vol.1 : No.1, pp. 71-93

⁵¹ Lal, Hardwari, "Supreme Court's Dilemma", *The Hindustan Times*, January 20, 1996

had to resort to monitoring in the light of the executive's poor track record of complying with their orders."⁵²

In a country where the executive and legislature failed to discharge their constitutional duties, the Supreme Court has no other choice but to step in and direct them to fulfil their obligations. Criticizing the role of the executive, former Supreme Court judge Ratnavel Pandian asked if the executive abdicated its responsibilities, which forum could the public approach, barring the judiciary, to seek solutions. Describing judicial creativity and judicial activism as two sides of the same coin, he said that the recent trend of public interest litigation led to increased judicial creativity.

4.8 Judicial Activism v. Judicial Restraint

The important question today was not whether the Supreme Court could activate its judicial role, but to what extent could the concepts of judicial activism and creativity be exercised, Justice Pandian said.⁵³ The voice of judicial restraint has been raised from within the judiciary itself. Calling for judicial restraint, a Supreme Court Bench consisting of Justices Markanday Katju and A. K. Mathur, in a judgement dated December 10, 2007⁵⁴ advised the courts not to take over the functions of legislature or executive. The Bench said that the Jagdambika Pal Case of 1998⁵⁵ involving the UP Legislative Assembly, the Jharkhand Assembly Case 2005⁵⁶ and ban on the interview of children in nursing schools of Delhi, 2007 are glaring examples of deviation from the clearly provided constitutional scheme of separation of powers. If there is a law, judges can certainly enforce it but judges cannot create a law and seek to enforce it. The bench also rejected the justification of judicial activism on the ground that two organs are not performing their functions well, as this allegation can be made against the judiciary also because there are cases pending in courts for half a century. Judicial restraint, which requires the judiciary not to take over the functions of the executive and the legislature, is also required for the efficient functioning of the government as the judiciary has neither the expertise nor the resources to perform these functions. Efforts have been made in India to curtail the scope of judicial review in some constitutional areas. The Law Minister in the Central Government once stated in Parliament that the courts had, through their exercise of power of judicial review, retarded the process of socio-economic development of the country, and, therefore, he justified certain restrictions on the powers of the courts to declare laws unconstitutional. But, in spite of all the hurdles, the doctrine of Judicial Review has a vibrancy of its own and has even been declared as the basic features of the Constitution

Matters of policy of government are subject to the Court's scrutiny. Distribution of food grains to persons below poverty line was monitored, which even made the Prime Minister reminded the Court that it was interfering with the complex of

food distribution policy of government. The Court has for all practical purposes disregarded separation of powers under the Constitution and assumes a general supervisory function over other branches of government.⁵⁷ These are ways of interpreting the Constitution. A judge who is a strict constructionist might rule in cases in a way that reads the Constitution very literally or relies on the original intent of the framers. A judge that is a judicial activist might rule in a very broad manner that takes into account how times have changed since 1787. Judicial Activism and Judicial Restraint are two opposite approaches. Judicial activism and judicial restraint, which are very relevant in the United States, are related to the judicial system of a country, and they are a check against the fraudulent use of powers of the government or any constitutional body. 1. *Judicial activism is the interpretation of the constitution to advocate contemporary values and conditions.*

On the other hand, judicial restraint is limiting the powers of the judges to strike down a law. 2. In the judicial restraint, the court should uphold all acts of the congress and the state legislatures unless they are violating the constitution of the country.

In judicial restraint, the courts generally defer to interpretations of the constitution by the congress or any other constitutional body. 3. In the matter of judicial restraint and judicial activism, the judges are required to use their power to correct any injustice especially when the other constitutional bodies are not acting. This means that Judicial activism has a great role in formulating social policies on issues like protection of rights of an individual, civil rights, public morality, and political unfairness 4. Judicial activism and judicial restraint have different goals. Judicial restraint helps in preserving a balance among the three branches of government, judiciary, executive, and legislative. In this case, the judges and the court encourage reviewing an existing law rather than modifying the existing law. 5. When talking about the goals of judicial activism, it gives the power to overrule certain acts or judgments. 6. Judicial activism is the interpretation of the constitution to advocate contemporary values and conditions. Judicial restraint is limiting the powers of the judges to strike down a law. In judicial restraint, the court should uphold all acts of the congress and the state legislature unless they are violating the constitution of the country. 7. In Judicial activism, the judges are required to use their power to correct any injustice especially when the other constitutional bodies are not acting. Judicial activism has a great role in formulating social policies on issues like protection of rights of an individual, civil rights, public morality, and the political unfairness. 8. Judicial restraint Judges should look to the original intent of the writers of the Constitution. Judicial activism judges should look beyond the original intent of the framers (after all they were mere humans too and not infallible to making mistakes). 9. Judicial restraint Judges should look at the intent of the legislatures that wrote the law and the text of the law in making decisions any changes to the original Constitution language can only be made by constitutional amendments.

⁵² Joshi, Charu Lata and Mitta, Manoj, "Steely resolve - Arrest of political bigwigs shows courts' determination to uphold accountability at all costs", *India Today*, October 31, 1996

⁵³ *Indian Express*, January 28, 1996

⁵⁴ "It is not for judges to set the agendas for social change, or to impose their personal views on society. The role of judges is to support the rule of law, not the rule of judicial whim." *The Hindu*, December 19, 2007

⁵⁵ *Jagdambika Pal v. Union of India and Others*, 27 February, 1998

⁵⁶ *The Hindu*, March 10, 2005

⁵⁷ *The Hindu*, August 6, 2012

4.9 Criticism in the Indian Context

The Opposition to Judicial Activism also comes from the difficulties created in implementation of the directives given by the court, in the form of some affirmative action. This So-called affirmative activism may require the court to supervise the continuous action which affects large number of individuals. Consequently, it often produces extensive administrative responsibilities for the court. In the process, the court formulate controversial programs of affirmative action requiring detailed administration for protracted periods of time under constant judicial supervision. In India, the continuing monitoring of —Jain -Hawala-Dairies Scamll, investigation by the supreme Court in Vineet Narain Vs. UOI by forming a new writ called — Continuing Mandamus and the series of positive directions pertaining to shifting of polluting industries causing damages to Taj Mahal and their closure and banning of the plying of 15 years old and more than 15 years of old commercial vehicles in the National Capital Region of Delhi demonstrate this kind of Judicial Administration which is continuous. This judicial attitude raises both pragmatic and jurisprudential questions about the limits of the Judicial Power

5. Conclusions

In the era of unstable, short-lived coalition governments in the 1990s Supreme Court's judicial activism helped to repair and correct the Indian State. The Court played a critical role in approximating a framework of lawfulness and predictability that has had some success in protecting citizens' rights, limiting malfeasance and safeguarding environmental and other public goods. The Court's decisions and actions in the pre-economic reform phase of judicial activism sought to enforce citizens' fundamental rights and more broadly, to protect the human rights of the poor and powerless. In the late 1980s and early 1990s, the Court extended its judicial activism to protecting the viability of public goods, e.g., clean air and water and uncontaminated blood supplies. In the mid-1990s the Court's judicial activism turned in yet another direction. Coincident with

the rise of precariously balanced coalition governments and of a marked increase in ministerial-level corruption, the Supreme Court moved to restore the independence of CBI, the Union Government's principal investigative agency.⁵⁸ The exercise of the power of judicial review has at times generated controversies and tensions between the courts, the executive and the legislature. For example the pronouncements in the aria of the property relations, legislative privileges, and constitutional amendments have been controversial and have even led to several constitutional amendments which were undertaken to undo or dilute judicial rulings which the central Government did not like. For example the decision given in Shah Bano case the Supreme Court of India held that Muslim women can claim for maintenance after divorce but central Government passed Muslim Women's (Protection of Rights on Divorce) Act, 1986 to dilute the decision given in Mohd. Ahmad Khan. V. Shah Bano Begum 1985 Cr.L.J. 875 (SC) To conclude, judicial activism is all right as it protects the public from the despotism of the executive but it must not lead to government by the judiciary. Judicial activism is not an aberration; it is an essential aspect of the dynamics of a constitutional court. It is a counter-majoritarian check on democracy. It must also function within the limits of the judicial process. Within those limits, it performs the function of legitimizing or, more rarely, stigmatizing the actions of other organs of government. When Judges start thinking they can solve all the problems in society and start performing legislative and executive functions (because the legislature and executive have in their perception failed in their duties), all kinds of problems are bound to arise. Judges can no doubt intervene in some extreme cases, but otherwise they neither have the expertise nor resources to solve major problems in society. Also, such encroachment by the judiciary into the domain of the legislature or executive will almost invariably have a strong reaction from politicians and others.

⁵⁸ Kohli, Atul (ed.), *The Success of India's Democracy*, Cambridge University Press, 2001, pp 132-140.