

Judicial Activism

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Abstract

Judicial activism is a ruling issued by a judge that overlooks legal precedents or past constitutional interpretations in order to support a political view. Coined by Arthur Schlesinger, Jr. in 1947, the term “judicial activism” carries multiple definitions. Some argue that a judge is a judicial activist, simply by overturning a prior decision. Others argue that the primary function of the court is to re-interpret elements of the Constitution and assess the constitutionality of laws, and therefore such actions could not be called judicial activism. As a result, the term “judicial activism” relies heavily on how someone interprets the Constitution, as well as someone’s opinion on the role of the Supreme Court in the separation of powers. Judicial activism becomes necessary to put a check on tyranny, born out of a temporary political majority in legislature, which might otherwise seek to rewrite

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INTRODUCTION

Judicial activism [1] means the act replacing an impartial interpretation of existing law with the judge’s personal feeling about what the law should be. Judicial activism involves interpretation of the nuances of law. According to Justice J.S. Verma of the Supreme Court, “The role of Judiciary in interpreting existing laws according to the needs of the times and filling in the gaps appears to be the true meaning of judicial activism.” In other words, it is judicial activism that helps to advance the cause of law and it has been a continuous process. In India, judicial activism is, infact, an essential part of judicial review.

A polity usually comprises of three wings: executive, legislature, and judiciary. Each generally has its own role to perform. In this context, it may be worthwhile recalling the views of Prof. Jeffrey Jowell from England. Outlining the guideline principles of judicial activism, he said that judges may intervene in the executive if it exceeds the terms of power conferred on them. So, judicial intervention is to be invited if the state refuses to comply with the statutory provisions. It is also seen that policy is not sacrificed for principles.

Judge Frank Easter Brook, at a recent

symposium, opened with an apparently safe sentence, “Everyone scorns judicial activism that is a notoriously slippery term.” Yet even this observation cannot go unqualified. Most would agree that judicial activism is indeed slippery. But some scholars like Sterling Harwood including at least one sitting Supreme Court justice [Justice John Paul Stevens] have suggested that in some contexts, it’s not always a bad thing. This is a problem one can scarcely make an observation about judicial activism today with out appending definitions and qualifications.

The term has assumed a prominent role in public debates, appearing regularly in editorial pages, web blogs, political discussions, and confirmation battles. Ironically, its meaning has become increasingly unclear. This is so because judicial activism is defined in a number of disparate, even contradictory, ways; scholars and judges recognize this problem, yet persist in speaking about the concept without defining it. Thus, the problem continues unabated. People talk past one another, using the same language to convey very different concepts.

This comment does not seek to attack or defend any particular nation nor does it proffer

an entirely new theory of the term. Its purpose is to clarify the meaning of “judicial activism” when it is used in different contexts, so that those who use the term can communicate their ideas more effectively.

Some scholars have suggested that in its present state, “judicial activism” is a virtually an empty term.” They rightly point out that by itself the label carries little more than a pejorative connotation.

We live in an era where governments are weakened. Judges in the circumstances provide better guide posts to the state so that policy is not ignored. Elected representatives must fulfil the legitimate aspirations of the people. Judges, executive and legislature can not operate in mutually exclusive closeted compartments; true utilitarian policies, socio-economic actions, and rational implementation is best tackled by the state, but abuse of power, unfair procedure, unconstitutional action or even lack of required action may surely be checked by the judiciary. As politicians are elected and judges are not, the former do not like to be pulled up by the latter. However, if the elected representatives betray the mandate reposed in them, they surely should be brought to book, and the process is only through recourse to courts to bring back the rule of law in a peaceful manner and not through bloody revolution. judicial activism is the first step.

Judicial activism becomes necessary to put a check on tyranny born out of a temporary political majority in legislature which might otherwise seek to rewrite the constitution in order to be entrenched in power. Judicial activism is use of judicial power to articulate and enforce what is beneficial for the society in general and people at large. Judicial activism has arisen mainly due to the failure of the executive and legislature to act effectively and to deliver the goods in a just manner.

EARLY HISTORY OF THE TERM JUDICIAL ACTIVISM

The idea of judicial activism has been around far longer than the term. Before the twentieth century, legal scholars squared off over the concept of judicial legislation, i.e., judges making positive law “where Blackstone favored judicial legislation as the strongest

characteristic of common law, Bentham recorded this as usurpation of the legislative function and a charade or miserable sophistry.” Bentham, in turn taught John Austin, who rejected Bentham’s view and defended a form of judicial legislation in his famous lectures on jurisprudence.

In the first half of 20th century, a flood of scholarship discussed the merits of judicial legislation, and prominent scholars took positions on either side of the debate.

Judicial activism was criticised vehemently during the louncher's era.

Judicial activism is the practice going beyond the normal law for the jury. There are some very important cases where judicial activism plays an important role like Bhopal gas tragedy, and the Jessica Lal murder cases are among the top two. Money and muscle power tried to win over the good. But at last, it was with the help of judicial activism that the case came to at least one decision.

Other Case Laws:

- . *Maneka Gandhi v/s Union of India* [2]
- . *Vishaka v/s State of Rajasthan* [3]³
- . *Olga Telis v/s Union of India* [4]⁴
- . *P Ramachandran Rao v/s State of Karnataka* [5]
- . *Kerala v/s A Lakshmi Kutty* [6]
- . *Keshvananda Bharti v/s Kerala* [7]

Eminent jurist Nani Palkhivala once noted “let us not pretend that the rule of law is a concept, which can be regarded as a part of the Indian psyche. Thus judiciary is enjoined to attend to the difficult task of same to it that institutions, groups and individuals do not cross the limits.

However activism should not become “populism” nor should it lead the judiciary to assume the mantle of arrogant righteousness which can graduate to despotism of judges too, or human and prone to errors and human aberrations.

In the words of justice J.S. Verma, “Judicial activism and judicial restraint are two faces of the same coin, self discipline is to be practised strictly by the members of the judiciary, and judges must refrain from committing on policy matters.”

Schlesinger's judicial activists believe that law and politics are inseparable. They see judicial decision as "result oriented"; because no result is foreordained they adopt the famous learned hand dictum that, "the words a judge must construe are empty vessels in to which he can pour nearly anything he will". From this perspective, the Frankfurter Jackson ideal of judicial restraint begins to look like abdication of responsibility.

According to judicial activists, Schlesinger explains that, "The court cannot escape politics; therefore, let it use its political power for wholesome social purposes; judicial self-restraint is at best a mirage."

The Frankfurter Jackson view is predicted on the belief that all law is not politics. These justices might have conceded that there are many close cases, but they believed that common law, statutes and the constitution are not empty vessels." There is meaning, they would assert, and there are right answers. Just as importantly, they thought that because reasonable people can hold vastly different notions of justice, it is unfair and unjustifiable to force one's view upon others. Any attempt to do so would lead towards a state of judicial despotism that would threaten the democratic process.

EARLY USAGE OF JUDICIAL ACTIVISM

In its early days, the term "judicial activist" sometimes had a positive connotation much more akin to "civil rights activist" than "judge misusing authority". Take, for example, reference to the late Justice Frank Murphy. Albou P. Man observed that "Murphy's votes in civil rights cases reflect not only his objectivity and independence as a judge but also his position as perhaps the outstanding judicial activist on the court" Alfred I. Scanlon offered similar praise for Justice Murphy's judicial activism in civil rights issues, answering the criticism that such activism is undemocratic by replying.

RIGHTS RECOGNISED THROUGH JUDICIAL ACTIVISM

Right to live with human dignity

- . Right to livelihood
- . Right to shelter
- . Right to privacy
- . Right of health and medical aid
- . Right to live in a pollution-free environment
- . Ban on smoking in public places
- . Compensation for violation of article 21
- . Right of prisoners

These are some of the fundamental rights recognized through judicial activism and judicial activism has played a commendable role in protecting and expanding the scope of these rights.

CONCLUSION

Ideally, of course, the Court should be like Baby Bear: It should get everything just right, engaging in activism when, and only when, We the People act in ways that we will later be considered shameful or regrettable. But that perfection is impossible, and so we must choose between a Court that views its role narrowly and a Court that views its role broadly, between a more deferential Court and a more activist Court. Both kinds of Courts will sometimes be controversial, and both will make mistakes. But history teaches us that the cases in which a deferential Court fails to invalidate governmental acts are worse. Only a Court inclined toward activism will vigilantly avoid such cases, and hence we need more judicial activism.

REFERENCES

1. Jan 1947. Fortune Magazine article titled "the Supreme Court 1947."
2. 1978 AIR S97, 1978 SCR(2) 621.
3. AIR 1997 SUPREME COURT 3011.
4. 1985 SCC (3) 545.
5. (2002)4 SCC 578.
6. (1980) 4 SCC 632.
7. Supra, note 13.

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