
JUDICIAL ACTIVISM AND JUDICIAL REVIEW IN INDIAN HISTORY

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ABSTRACT

The Supreme Court of India Plays a vital role to protect the Democracy of India. The history of the Higher Judiciary especially, the Supreme Court of India, during the last 70 Years, is the History of shifting the Judicial Pendulum from one extreme of judicial conservatism to the other Judicial Activism. In the beginning, the role of the Judiciary was so conservative that it interpreted the Fundamental Rights & the Constitution in a static & traditional colonial manner & ignored the Directive Principles. This landed it in Controversy. Pandit Jawaharlal Nehru was dismayed by such traditional & conservative role of Apex Court. Up to 1960, the position continued which prompted the then prime minister to accuse the Supreme Court as being Socially insensitive & irresponsible. Nehru, however, did not get further but with Indira Gandhi it was different story. She advocated the concept of “committed judiciary”. The logical end of this process of thinking was the suppression of the supreme court judges, declaration of emergency and transfer of inconvenient judges. Certain judgments¹ of Supreme court played a significant role in such development.

Since then, the supreme court has reaffirmed the role of judiciary as a guardian of the constitution and protector of the rule of the law. Exercising the judicial review, the supreme court has also expanded the concept of ‘state’ under Art.12 of the constitution of India bringing other state sponsored and supported institutions under the purview of judicial review². Power of judicial review with the judiciary to act as referee but not including the power of participate in the process of law making and its execution. This power has been recognized as one of the basic features of our constitution.³ In India’s legal and constructional history judicial review has proved to be a tool of great importance in upholding constitutional governance.

Keywords- Doctrine of separation of power, Doctrine of judicial review, Basic Structure Doctrine, Article 14.

¹ R.C. Cooper V. Union of India AIR 1970 SC 564

² Biman Krishna Bose V. United India insurance co. ltd, (2001) 6 SCC 477

³ S.R. Bommai v. Union of India, AIR 1994 SC 1918

INTRODUCTION

The concept of judicial activism originated and developed in the USA. This term was first coined by an American historian and educator Arthur Schlesinger Jr. in 1947.

In India, the doctrine of judicial activism was introduced in mid of the 1970s. Justice V.R. Krishna Ayyer, Justice P.N. Bhagwati, Justice O Chinnappa Reddy, and Justice D.A. Desai laid the foundations of judicial activism in the country. Judicial Activism denotes the pro-active role played by the judiciary in the protection of the rights of the citizens, and the promotion of justice in society. In other words, it implies the assertive role played by the judiciary to force the other two organs of the government to discharge their constitutional duties.

According to the doctrine of separation of power thereof specific roles define for each wing of the state i.e., legislature, executive and judiciary and that no branch must encroach on the sphere of activity of another. The judiciary here is understood as a referee and is to check the action of the legislature and the executive when they infringe the constitution.

DOCTRINE OF JUDICIAL REVIEW

The doctrine of judicial review was originated and developed in the USA and it was propounded for first time by John Marshall in the famous case of *Marbury V. Madison*⁴. In India the constitution itself confers the powers of judicial review on the higher judiciary. Since the judicial review is the basic feature of the constitution. Hence, that power cannot be curtail or excluded even by constitutional amendment⁵. Judicial review is the power of the judiciary to examine the constitutionality of legislative enactments and executive order of both central as well as state.

JUDICIAL ACTIVISM, JUDICIAL REVIEW vis-à-vis FUNDAMENTAL RIGHTS

The most contribution of judicial review has been the emergence of PIL which opened the doors of higher judiciary to the poor, neglected and deprived sections of the Indian society. In another hand the concept of judicial activism is closely related to the concept of PIL. In fact, PIL is the most popular form of judicial activism.

Supreme court played a vital role towards the protect of individual rights as well as to protect the society interests. It seems in various judgments which are listed below:

⁴ 5 US (1 Cranch) 137 (1803)

⁵ *Kihoto hollohon v. Zachilhu & Ors.* AIR 1993 SC 412

i. *Keshavanand Bharati case*⁶

In this case Supreme court under Art. 32 of the Indian constitution evolved Basic Structure Doctrine while enforcing the fundamental rights under Article 25, Art.26, Art.14 and Art.19(1)(f) as well as for declaring the Kerala law reforms (amendment) Act, 1969 as ultra-virus. The court further observed that the objectives specified in the preamble contain the basic structure of the constitution and that cannot be amended as a power under Art. 368 of the constitution.

ii. *Minerva Mills Case*⁷

It was laid down that, there is no disharmony between the fundamental rights and the DPSP. The court has the responsibility to interpret the constitution so as to ensure the achievement of the abovesaid body. The mandate address in Art. 37 is not only to the legislature but also to the judiciary too. Judicial review is the basic feature of the Indian constitution and it cannot taken away by the amendment of law.

iii. *Indira Nehru Gandhi V. Raj Narain*⁸

Supreme reiterated the rule of law, free and fair education and most important judicial review is a basic element of the Indian constitution. Thus, even a constitutional may be void if it excludes a matter from judicial review.

iv. *Habeas Corpus Case*⁹

Here in that case, the issue raised before the supreme court, whether the right to personal liberty suspended during emergency. That matter was heard by bend of 5 judges: Ray CJ, Khanna, Beg, Chandrachud, Bhagavti JJ. The supreme by majority of 4:1 held that the judicial protection against illegal arrest and detention would be zero and petitioners did not have any *locus standi* to approach the court. In the words of the court itself, which answered the question, “whether there was any rule of law in India apart from Art. 21”? In negative.

It was only Justice Khanna who sounded very powerful note of the dessent with the majority view. He observed: even in absence of Art. 21 of the constitution,

⁶ AIR 1973 SC 1461

⁷ AIR 1980 SC 1789

⁸ AIR 1975 SC2299

⁹ ADM Jabalpur v. Shivkant Shukla (1976) 2 SCC 521

the state has bought no power to deprive the person of his life liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law. Without such sanctity of life and liberty, the distinction between lawless society and one governed by laws would cease to have any meaning.

v. ***Maneka Gandhi Case***¹⁰

This case is a landmark case that initiated the process of exertion of article 21 of the constitution wherein supreme court observed that, the attempt of the court should be to expand the reach and ambit of the fundamental rights. Rather than to attenuate their meaning and content by process judicial construction.

vi. ***S. P. Gupta v. Union of India***¹¹

Here in that case the supreme court ruled that “the right to know” has become an integral part of the citizens right in our democracy. “Right of information is a facet” of the right of “Speech and Expression” as contained in Art. 19(1) (a) of the constitution.

vii. ***Air India Case***¹²

In this case the court ruled that, Compulsory retirement of an Air hostess on her first pregnancy was violative of art. 14. The court held that, the discretionary power may not necessarily be discriminatory power. The provision of regulations 46 and 47 of the Air India Employees Service Regulations and Regulation 12 of the Indian Airlines service Regulations were struck down as invalid, as they suffered from vice of excessive delegation of powers.

viii. ***Oleum gas Case***¹³

This is a historic case wherein the court awarded compensation for enforcement of Art.21. It was said that the law should keep pace with changing socioeconomic norms. Where a law of the past does not fit in the present context, the court should evolve new law.

¹⁰ Makena Gandhi v. Union of India AIR 1978 SC 597

¹¹ AIR 1982 SC 149

¹² Air India v. Nargesh Mirza (1981) 4 SCC 35

¹³ M.C. Mehta v. Union of India 1987 AIR 1086, 1987 SCR (1) 819.

Rumored to have been decided with an eye on the Bhopal Disaster¹⁴ which was to come up for adjudication at any moment, this case accorded judicial recognition to the principle of absolute liability holding that an enterprise which engaged itself in hazardous or inherently dangerous industry, which pose a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas, owed an absolute and non-delegable duty to the community. It propounded the principle of “Polluter pays” and ruled that the amount of compensation in such cases must be co related to the magnitude and capacity of the enterprise.

The court also said that, the power of the court was not merely injunctive, that is preventing the infringement but was also remedial in scope, and could provide relief against the breach of fundamental right already committed including the grant of compensation.

The judgment of the case is certainly an indicator of the trend of liberalization of *locus standi* rules. Moreover, the process has set in for making the fundamental rights under Art.21 applicable to private sector, with the assistance of public policy doctrine under the law of contract and by including right to livelihood in the right to life.

ix. ASIAD Case¹⁵

The judgment makes a juridical leap to recognize the notion of “economic cohesion”. Where an economic compelled person to provide labour to another for remuneration that was less than the statutory minimum wage, the labour or service provided by him fall within the meaning of forced labour under Art. 23.

The Bandhua Case¹⁶ retreated that whenever there was a violation fundamental rights, even a person other than the one whose fundamental rights were violated could move the court under Art.32 of the constitution of India. Art.21 derives its breath from art. 39 (e), (f), Art. 41 and Art. 42.

¹⁴ Union Carbide Corporation vs Union Of India 1990 AIR 273 1989 SCC (2) 540

¹⁵ People’s union for democratic v. Union of India AIR 1985 SC 1473

¹⁶ Bandhua Mukti Morcha v. Union of India (1997) 10 SCC 549

x. *Suchitra Shrivastava v. Chandigarh Administration*¹⁷

It was held that, forceable sterilization or abortion of mentally retarded person is anti-democratic and violative of art. 14. Equality is a positive concept; it does not apply to illegality.

CONCLUSION

Judicial Activism is the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent, or are independent of, or in opposition to supposed constitutional or legislative intent. Judicial Activism is the creation of law by judiciary; however, it has to be within the limits of judicial process.

Judicial review is a weapon in the hand of judiciary to scrutinize every action which has been taken by other wings of the states. There is a need for judicial review, to uphold the supremacy of the constitution to maintain federal equilibrium and to protect the fundamental rights of the citizens.

¹⁷ AIR 2009 SC 1858