
JUDICIAL ACTIVISM VS JUDICIAL RESTRAINT

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ABSTRACT

An essential position is being held in India is by Judiciary as it is empowered to enquire implementation, interpretation and legal validity of the legislation. To safeguard the liberties and rights of all the citizens and serving fair and equitable justice is anticipated to be the function of the judicial system. Indian citizens believe a change in the duties and performance by the judiciary in accordance with the changing perceptions, which poses a challenge in safeguarding justice in the speedily changing Indian socio-economic-political picture. Article 142 of the Indian Constitution provides that “the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it...”. Here, the conceptions of judicial activism and judicial restraint comes into the picture. The philosophy used by the judges to uphold a judicial decision is defined by these conceptions despite of the fact that both the concepts are exact opposite of each other. Essentially, they define how judges judge. Judicial Activism is considered to be a dynamic concept that considers the changing viewpoint of the society and Judicial Restrain depends upon the strict interpretation of laws.¹

¹“Judicial Activism and Judicial Restraint” <<http://www.legalserviceindia.com/legal/article-2971-judicial-activism-and-judicial-restraint.html>> accessed on 5 April 2021.

JUDICIAL ACTIVISM AND ITS TRENDS

Definition

Judicial Activism is the apprehension of courts by articulating a new rule to find suitable remedy to the wronged and to settle the inconsistent questions in the event of uncertain laws is implied as Judicial Activism. It is deemed to be judicial activism when the Judiciary steps into the shoes of the Executive or the Legislature and embarks on the work of making law rather than decoding the laws.²

Definition of Judicial Activism as per the Black's Law Dictionary, "it is a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent."

Trends

In the case of *Golak Nath v. State of Punjab*³, it was held by the Supreme Court that "the fundamental rights in Part III of the Indian Constitution could not be amended, even though there was no such restriction in Article 368 which only required a resolution of two third majorities in both Houses of Parliament." Afterwards, in *Keshavanand Bharti v. State of Kerala*⁴, the *Golak Nath* decision was overruled by the 13 Judge bench in the Supreme Court and held that "the basic structure of the Constitution could not be amended." The actual meaning of the term basic structure is still unclear even though some later verdicts have tried to explain it. As far as Article 368 of the Constitution is concerned it is nowhere mentioned that "the basic structure could not be amended". Therefore, it can be considered that the decision has somehow amended Article 368.

The need of judicial activism was clearly discussed in the case of *Vishaka vs State of Rajasthan*⁵ where the Supreme Court stated that "due to the absence of enactment with regards to enforcement of gender equality laws against sexual harassment, it has become imperative for the court to lay guidelines to be followed at all workplaces to observe proper treatment to

²"Importance of Judicial Activism"

<https://www.researchgate.net/publication/313837643_importance_of_judicial_activism > accessed on 5 April 2021.

³*Golak Nath v. State of Punjab* 1967 AIR 1643.

⁴*Keshavanand Bharti v. State of Kerala* 1973 AIR 1461.

⁵*Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

women.” It was also held that until there is no legislation enacted by the parliament the guidelines which was given in the case shall be treated as law under Article 141 of the Constitution.

Judicial Activism and Article 21

The Indian Supreme Court played an activist role in cases pertaining to Article 21 of the Indian Constitution. Article 21 states that “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

1. In the case of *A.K. Gopalan v. State of Madras*⁶, the arguments which was rejected by the Supreme Court was, (a) procedure established by law must be just, reasonable and fair before depriving a person from his life or liberty (b) Article 21 is also inclusive of due process clause which had been deliberately omitted by the framers of the Constitution. Later in the case of *Maneka Gandhi v. Union of India*⁷ via judicial interpretation it was held that the Article 21 also includes due process. It can be inferred that the due process clause, which was omitted by the framers of the Constitution, was introduced by judicial activism of Supreme Court.
2. The Supreme Court in the case of *Francis Coralie vs. Union Territory of Delhi*⁸ held that “the right to life is not restricted to mere animal existence or just physical survival. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and comingling with fellow human beings.”
3. In the case of *R. Rajagopal v. State of Tamil Nadu*⁹ the Court held that “the right to life under Article 21 also includes right to privacy and every citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education, among other matters.”
4. In the case of *Kapila Hingorani v. Union of India*¹⁰, the court clearly stated that “the right to food as a part of right to life it is the duty of the State to provide adequate means of livelihood in the situations where people are unable to afford food.”

⁶*A.K. Gopalan v. State of Madras* 1950 AIR 27.

⁷*Maneka Gandhi v. Union of India* 1978 AIR 597

⁸*Francis Coralie v. Union Territory of Delhi* (1980) 3 SCR 1338.

⁹*R. Rajagopal v. State of Tamil Nadu* 1995 AIR 264.

¹⁰*Kapila Hingorani v. Union of India* (2003) 6 SCC 1.

5. Right to freedom from noise pollution¹¹, right to livelihood¹², right to clean environment¹³, right to medical care¹⁴, speedy trial¹⁵, legal aid¹⁶, right to clean water¹⁷, right to clean air¹⁸ and recently right to privacy¹⁹ as a part of Article 21 i.e. right to life and personal liberty.

Thus, from the above-mentioned points it can be inferred that there are many rights which was held to be originating from Article 21 by Judicial Activism of the Supreme Court.

JUDICIAL RESTRAINT AND ITS TRENDS

Definition

The theory which encourages judges to limit the exercise of their own power and such judicial interpretation will be considered as Judicial Restraint. Until and unless the law is not absolutely unconstitutional, judges should hesitate to strike down the law. The judges who follow this theory they give emphasize to stare decisis (the principle of upholding precedents).

Judicial restraint, a substantive or procedural approach to the exercise of judicial review. Until and unless the decision is necessary to the resolution of a concrete dispute between adverse parties, as a procedural doctrine, judicial restraint urges judges to abstain from deciding legal issues and particularly constitution related issues. As a substantive one, it desires judges that the courts should interpret the law and not intervene in policy-making. There should be a hesitation before using judicial review for promoting new ideas or policy preferences.²⁰

Trends

In the landmark case of *State of Rajasthan vs Union of India*²¹, the Court restricted themselves by following the principle of judicial restraint and decided not to indulge into the matter as it involved political inquiry and also in the case of *S.R. Bommai vs Union of India*²², the Supreme

¹¹*In Re: Noise Pollution* (2005) 5 SCC 733.

¹²*Olga Tellis & others v. Bombay Municipal corporation* 1986 AIR 180.

¹³*Rural Litigation and Entitlement Kendra v. State of UP & others* 1985 AIR 652.

¹⁴*Pt. Parmanand Katra v. UOI* 1989 AIR 2039.

¹⁵*Hussainara Khatoon & others v. Home secretary, State of Bihar* 1979 AIR 1369.

¹⁶*Khatri and others v. State of Bihar and others* (1981) 1 SCC 627.

¹⁷*M.C. Mehta v. UOI and others* 1988 AIR 1115.

¹⁸*M.C. Mehta (Taj Trapezium Matter) v. UOI* (1997) 2 SCC 353.

¹⁹*K.S. Puttaswamy v. UOI* (2017) 10 SCC 1.

²⁰“Judicial activism vs. judicial restraint: The Indian disarray” <<https://blog.ipleaders.in/judicial-activism-vs-judicial-restraint-indian-disarray/>> accessed on 6 April 2021.

²¹*State of Rajasthan vs Union of India* 1977 AIR 1361.

²²*S.R. Bommai vs Union of India* 1994 AIR 1918.

Court held that the case is concerned to political inquiry and so, the Courts should not interfere. Justice Ahmadi stated that it was hard to advance judicially sensible standards to investigate the political choices and if the courts do it then it would be entering the political brush and scrutinizing the political knowledge, which the court must evade. In another case of *Almitra H. Patel vs Union of India*²³, the Supreme Court observed that until and unless there is no clear violation from the part of municipality it is not the duty of the court to give directions to the same and the manner in which their task has to be performed. The court can only give direction to authorities to conduct their activities only if it has been laid down by law.

Initially the Indian Supreme Court acted in a conservative and restrictive manner but at later point of time they had a burst of judicial activism through the social philosophies of Justice P.N. Bhagwati, Justice Krishna Iyer, etc. who created a host of legal norms by judicial verdicts while interpreting Articles 14, 19 and 21 of the Indian Constitution.

Separation of Powers and Judicial restraint

According to Montesquieu, “the life and liberty of the citizens would be endangered if the judicial powers and legislative powers are merged, as then the judge would act as a legislator. Even if the judicial and executive powers are merged, the judge would act as an oppressor, which might result in arbitrary actions.” As far as modern system of democratic governance is concerned, he believes that the principle of separation of power is eternal.

This principle is followed for good governance although it has been nowhere mentioned in the Constitution. There are certain Articles that suggest this doctrine in the Constitution, but still, it has not been mentioned expressly. In the case of *State of Bihar v. Bal Mukund Shah*²⁴, it was held that doctrine of separation power is one of the basic features of the Constitution.

In India this doctrine doesn't have a strict interpretation but there has been an attempt to follow it by entrusting each organ in a specific sense. For example, as per Article 121 there is a restriction to the Parliament that they cannot discuss the conduct of any judge of the Supreme Court or any High Court. Similarly, under Article 212 the Courts cannot inquire into the legislative proceedings. Henceforth, it is inferred that the Constitution does not see the judiciary

²³*Almitra H. Patel vs Union of India* (1998) 2 SCC 416.

²⁴*State of Bihar v. Bal Mukund Shah* (2000) 4 SCC 640.

as the substitute for the executive or the legislature in any sense. The judiciary has a discretion to set its own limitation by judicial restraint.

As far as the misuse of powers by the judiciary is considered, in the case of *J.P. Unnikrishnan vs State of Andhra Pradesh*²⁵, the court read Article 37 while interpreting Article 21 of the Constitution but the point to be noted here is that Article 37 is a Directive principle of State Policy which is also considered as socio-economic rights and it is unenforceable. On the other side, Article 21 is a fundamental right. Hence, sometimes court follow a different path as compared to the intention of framers of the constitution due to Judicial Activism.

JUDICIAL ACTIVISM VS JUDICIAL RESTRAINT

There is a difference between judicial restraint (strict constructionist) and judicial activism (loose constructionist) as these are the ways of interpreting the Constitution. A strict constructionist judge might decide a case by relying upon the original intent of the framer or by reading the constitution very literally. An activist judge might rule the same in a very comprehensive or broad manner.

The major differences between the two are as follows:

Judicial Restraint	Judicial Activism
1. limits the powers of the judges to strike down a law.	1. interpretation of the constitution to advocate contemporary values and conditions
2. uphold all the acts of the legislature unless they are clearly violating the Constitution as they believe that law making power is with legislature only.	2. generally defer to interpretations of the legislature
3. its goal is to help in maintaining a balance between the three pillars i.e. executive, legislative and judiciary.	3. it gives power to judges to overrule certain judgements or acts.

²⁵*J.P. Unnikrishnan v. State of Andhra Pradesh* (1993) 1 SCC 645.

4. considers the original intent of the framers of the constitution	4. should look beyond the original intent of the framers of the constitution
5. reviewing the existing law rather than modifying the same	5. modifying the existing law rather than reviewing the same

CONCLUSION

The judge should not see the fairness of the law towards public policy but is only required to administer the same as believed by the supporters of the concept of Judicial Restraint. Nonetheless, the pure object of any legislation can have adverse effect from strict implementation of the same. We cannot say that a law will cover all the prospects of a situation and there can be a set of facts which are unimaginable by a pre-existing generality of law. In such cases, for the purpose of its interpretation and deliberation of appropriate decision, a judge should try to analyze the minds of the framers of the Constitution.

It might be correct that some issue may arise if judges take up the tasks of legislature and executive in their own hands due to lack of expertise and might violate the doctrine of separation of power. But as far as Indian scenario is concerned it also requires application of personal minds and creativity while giving decision because of the complex nature of the cases in present time. Judges can intervene in the domain of executive or legislative whenever there is a requirement to promote natural justice and public order.²⁶

²⁶“Judicial Activism and Judicial Restraint”.