



### JUDICIAL RESTRAINT

- The doctrine of judicial restraint refers to 1) There is broad separation of powers within three organs of the executive, the legislature, the judiciary. 2) The judiciary must realise that the legislature is a democratically elected body, which expresses the will of the people.
- As pointed out by Prof. Thayer, judicial over-activism deprives the people of “the political experience & the moral education & stimulus that comes from fighting the problems in the ordinary way, & correcting their own errors”.
- In *Asif Hameed vs. The State of J&K*, 1989 S.C. observed: “Although doctrine of separation of powers has not been recognised under Constitution in its absolute rigidity, Constitution makers have defined the functions of various organs of the State.
- No organ can usurp the function of another - exercise of powers by the legislature & executive is subject to judicial restraint, there is need of self imposed discipline of judicial restraint.” (*Asif Hameed vs. The State of J&K*)
- The errors of the lower courts can be corrected by the higher courts, but there is none above the Supreme Court to correct its errors.
- If supreme court is parallelly making policy then it is not accountable to the popular sovereign
- Biggest litigant is govt in the SC
- Narrower benches causes inconsistency in judgments.

### WHAT IS JUDICIAL ACTIVISM

- It denotes the proactive role played by judiciary in the protection of rights of citizens & promotion of justice in the society .
- Recognition of judicial activism may lead to overstepping of the judiciary e.g. orders directing the construction of roads & bridges ; beautification of railways
- Judicial Activism – practice in the judiciary of protecting & expanding the individual rights through decisions that depart from established precedent.
- Gunnar Myrdal a Swedish economist called India a soft state – as it has no will & requisite discipline to implement laws made by it – when judiciary acts in such directions it is termed as Judicial activism.
- According to justice Kurian Joseph, Judicial activism is the duty of the courts against legislative adventurism & executive excesses
- Judicial activism is the obligatory response of the court against injustice

### HISTORICAL BACKGROUND

- In 1608 England – Stuart James I the ruler claimed absolute powers on the courts but Chief justice Coke replied that King could not do so but case ought to be determined & adjudged in court according to law & customs of Britain – King should be under the law .
- Chief justice Earl Warren of U.S. influenced Indian SC – by his decision he removed racial discrimination in academics – invalidated racial segregation in public schools.
- American historian Arthur Schlesinger Jr. introduced the term judicial activism in January 1947
- High water mark in India – *Kesavananda Bharati* case – invalidated the legislative actions considered as damaging the basic structure of the constitution
- 1970 – Justice Krishna Iyer, Justice P.N. Bhagwati, Chinnappa Reddy, D.A. Desai laid foundation.
- In the *Hawala* case many national level politicians were found linked with the terrorist funding – CBI played very suspicious role – SC ordered the then PM Narsingh Rao to stay apart from creating influence & to provide precedence to CVC over CBI
- In India – SC turned discernible after revoked emergency in 1977 – prisoners awaiting trial does not lose all his Fundamental & legal rights but loses right to free movement ; safeguards against arbitrary arrest ; prohibition of long incarceration of pending trial ; condemnation of routine handcuffing ; release of bonded labourers.

### WHY JUDICIARY OVERSTEPS ?

- According to Subhash Kashyap , judiciary oversteps when
  - legislature or govt is passive
  - Fails to discharge its responsibility
  - Hung legislature – weak govt busy in its survival – hampers interest or security of a specific community
  - Defensive decision making to protect their rule so may have referred such issues to court to pass on the time
  - Where the court of law is misused by a strong authoritarian govt for ulterior motives
  - Court turns victim of human weaknesses of craze of populism .
- According to Upendra Baxi followings forms the content, pulling pressure on courts for judicial activism.
  - Civil rights activists – civil & political rights

- Peoples rights activists – socio-economic rights within the context of state repression of people’s movement
- Consumer rights , Bonded labour activists , environmental activists, Rehabilitation activists , rights of children group ,custodial rights groups, poverty rights groups , Regional rights groups, women’s rights group, Media autonomy groups.
- Court acts as monitor of the conduct of the investigating & prosecuting agencies who have failed to investigate & prosecute executives .

#### PARADIGM SHIFT IN JUDICIAL INTERPRETATION

- In early years, the Supreme Court adopted a textualist approach, focusing on the plain meaning of the words used in the Constitution.
- In A.K. Gopalan v. State of Madras (1950) - Supreme Court held that the rights conferred by Article 19 were the rights of free men – both punitive & preventive detention were outside its range - textual approach
- In the second phase, the Supreme Court began exploring other methods of interpretation. Appeals to the text of the Constitution were gradually overtaken by appeals to the Constitution’s overall structure & coherence.
- In the leading case of Kesavananda Bharati v. State of Kerala (1973), the Court concluded that Parliament’s power to amend the Constitution did not extend to altering its “basic structure”
- When Parliament attempted to overturn this decision by amending the Constitution yet again, the Court, relying on structuralist justifications, decisively rejected that attempt.
- The Court categorically rejected the Gopalan approach in favour of a structuralist one in Maneka Gandhi v. Union of India (1978).
- Through this decision, the Court conceived of the fundamental rights as a cohesive bill of rights rather than a miscellaneous grouping of constitutional guarantees.
- The right to life was incrementally interpreted to include a wide range of rights such as clean air, speedy trial, and free legal aid.
- In first two phases - significant decisions involving the interpretation of the Constitution were entrusted to Constitution Benches.
- In the third phase, Court’s interpretive philosophy turned far more result-oriented than it had ever been.
- The Court often surrendered its responsibility of engaging in a thorough rights reasoning of the issues before it.
- This institutional failure is due to Changing structure of the Court, which at its inception began with eight judges, grew to a sanctioned strength of 31; it is currently 34.

#### IDEOLOGY BEHIND THE ACTIVISM

- Adoption of separation of power is partial & not total – legislature & judiciary are independent yet judiciary can interpret, review, & implement laws made by legislature
- The assertive role played by judiciary to force the other two organs of govt to discharge their constitutional duties.
- Art 21 remained the main part of judicial activism – RTE , privacy, pollution free water & air , medical aid to workers.
- Exercising judicial power to depart from normally practiced adherence to strict judicial precedence in favour of progressive & new social policies.
- Origin – doctrine of due process of law – more scope than that of procedure established by law
- Restrictive interpretation placed on personal liberty adopted through interpretation in 1950 were overruled in 1979.
- Judicial Dynamism – antithesis of judicial restraints –self control exercise by judiciary
- Scope is more at the field of interpretation of FRs – judges can read their individual interpretation based on philosophies
- In the west, the judicial activism is explained as ‘ legislating from the bench ’ – in India the case is much milder .
- The mere risk of over-activism cannot be an argument against judicial activism - it is necessary keeping in view the democratic ideals along with judicial activism

#### CRITICISM

- Activism originated from the judicial romanticism can create discomfort in the system .
- According to Prof. Waldron , empowering judges to decide on policy issues amounts to disrespecting the democratically elected representative.
- Arguments among intellectuals is that judicial activism results in upsetting the balance of power between executive , legislature & judiciary.
- In 1993 – court issued order on the conduct of the military operation in Kashmir where military had a matter of strategy restricted the food supplies to hostages – court ordered provision of food supplies- army general replied “ for the first time in the history , a court of law was asked to pronounce judgment on the conduct of an ongoing military operation. Its verdict materially affected the course of operation ”
- Justice Jackson of U.S, :- “ the doctrine of Judicial Activism justifies constant readiness of other branches of govt is wholly incompatible with a faith in democracy & in so far it encourages a belief that judges should be left to correct the result of public indifference it is a vicious teaching”
- It is possible for courts to monitor actions of the other limbs of democracy without actually stepping into their shoes .

- According to Prof. Roach the judiciary should not create policies to enforce rights but must require govt to draft its own policy & submit it along with a timetable of execution –finalisation of such policy should be done only after judiciary has heard objections from other interested parties.
- Judicial restraint contend that the role of judges should be limited – judicial conservatism - holds the view that the original intent of the constitution makers should be followed
- In the democracy the remedy for the malfunctioning legislature & executive must come from the people & not the judiciary – Justice Katju.

#### OUTCOME OF JUDICIAL ACTIVISM

- Judicial activism is independent of constitutional intent .
- Judicial activism has led to decision calling for social engineering & sometimes represents intrusion in legislative & executive matters.
- Judicial enthusiasm – Judges voluntarily acting in favour of social reforms with the changing times – encourages PIL & liberalises the locus standi .
- PIL is the outcome of judicial activism
- Expansion of rights of hearing in administrative processes – excessive delegation –expansion of judicial control over discretionary powers – indiscriminate exercise of contempt of the court – extra-jurisdictional activity – overextension of interpretation
- Judicial review - judge is willing to decide constitutional issues & to invalidate legislative & constitutional issues .
- Activist judges enforce their own views of constitutional requirements rather than to differ with the views of govt officials or earlier courts – both liberal & conservative judges can be activist in this sense – this activism is antonym of restrain and not the prerogative
- Art 143 – Presidential choice of court’s legal advice
- Through judicial activism court can assume the supervisory function over other branches of govt

#### WELFARIST COURT

- Court made severe interventions & made strong commands to the state wherever state was passive
- Jharkhand assembly case- court ordered assembly to conduct a motion of confidence & ordered speaker to conduct proceedings according to prescribed agenda & not to entertain any other business – proceedings were ordered to recorded for reporting the court
- Art 212 – courts are not to inquire into any proceedings of legislature
- Matters of policy of govt are subject to the court’s scrutiny – distribution of food grains to BPL section was monitored & made PM to remind the court that it was interfering with complex food distribution policies of the govt .

- Foreign policy is considered as non-justiciable – courts cannot interfere – issued notice to union govt seeking explanation of steps taken by it to ameliorate the plight of Indian students in Australia who were victims of racial attacks.
- Budgetary allocations are also considered as non-justiciable but it issued notices to U.P. state govt regarding budgetary allocation

#### ARTICLE 142

- Article 142 empowers the SC to pass any decree or order necessary for doing “complete justice” in any matter pending before it.
- Court could even override the laws made by Parliament by holding that, “prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142.”
- In Supreme Court Bar Association v. Union of India , Court said that, article could not be used to supplant the existing law, but only to supplement the law.
- Supreme Court has been foraying into areas, forbidden to the judiciary to uphold the doctrine of ‘separation of powers’, which is part of the basic structure of the Constitution.
- All cases invoking Art 142 should be referred to a Constitution Bench of at least five judges so that this exercise of discretion may be the outcome of five independent judicial minds
- Sc stripped a Manipur Minister of his office & banned entry in state assembly on the basis of defecation in the election - presiding officer was inert on this decision. Used power under art 142
- Bench headed by Justice Rohinton F. Nariman had ruled that courts have the power to fix a time-frame for Speakers to dispose of petitions under the anti-defection law.
- ‘failure to exercise jurisdiction’ is a stage at which the court can intervene.
- The court invoked its powers under Art 142 to step away from the convention of open court hearings. The open court system ensures transparency in administration of justice.
- The Supreme Court’s use of its vast powers under the Art 142 has done tremendous good to many deprived sections. However, it is time to institute checks & balances.
- Art 142 – can deal with policy issue – union Carbide case – SC awarded \$470 millions to victims saying that it can exceed the laws made by Parliament - statement was turned down later in SC Bar Association v. Union of India – art 142 could not be used to supplant the existing law, but only to supplement the law.

#### PANCHAYATI ECLECTICISM

- It began to sit in panels of two or three judges, effectively transforming it into a “polyvocal” group of about a dozen sub-Supreme Courts.

- The Court began deciding cases based on a certain conception of its own role — whether as sentinel of democracy or protector of the market economy.
- This unique decision-making process sidelined reason-giving in preference to arriving at outcomes that match the Court's perception.
- The failure to give reasons contributed not only to methodological incoherence but also to serious doctrinal incoherence & inconsistency across the law
- This can be best described as panchayati eclecticism, with different Benches adopting inconsistent interpretive approaches based on their conception
- It means , a group of wise men & women (applying the analogy, sub-Supreme Courts), taking decisions based on notions of fairness that are detached from precedent, doctrine and established interpretive methods.
- In enacting the Constitution, the founders of our Republic expressed a sense of unease with the status quo and raised expectations of root-and-branch social revolution
- The Court is now beginning to interpret the Constitution in accordance with its revolutionary & transformative potential.
- The constitutional law of all nations consists of some combination of the written & unwritten.

- Judges interpret the abstract language of written constitutions & speak where the text remains silent.(Doctrine of due process of law)

#### DECEPTION

- Codified constitution undergoes change with the , judicial decisions & political practice over time.
- Some constitutional provisions are inconsistent with the existing constitutional position
- e.g. Articles 368(4) & (5), provides that there is 'no limitation whatever' on the power of Parliament to amend the Constitution.
- Similarly, Art 31B — a clause intended to protect legislation inserted into the Ninth Schedule to protect from judicial review — inconsistent with the succession of Supreme Court judgments, fully insulate legislation from judicial scrutiny.
- Instead, courts can test legislation inserted into the Ninth Schedule on the basis that it abrogates fundamental rights that form part of the basic structure of the Constitution.
- Indian Constitution has proven relatively easy to change, and has been amended more than once a year on average.
- Indian Supreme Court has the power to strike down or set aside constitutional amendments
- Aside from its symbolic significance, one of the benefits of a codified constitution is that it generates awareness about the processes of governance.



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