

## Acceptability of Judicial Activism in India Perspective

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### ABSTRACT

*Although the debate on the judicial activism has been around since the days of Blackstone and Bentham. The traditional role of the judge has always been considered as that of an impartial arbitrator who hears the argument of both parties and renders justice without interfering in the debate of the matter. The changing attitude of the Supreme Court of India in its journey from Supreme Court of India to Supreme Court for Indians which shed their character as upholders of the established system legitimised the expanding role of judiciary from mere arbitrator to a catalyst of social change and full fill the vacuum created due to passiveness of other organs of the government. The landscape of recent verdicts of Supreme Court clearly evident that it not only makes law in the sense of the realist jurisprudence but actually has started legislating exactly as the legislature legislates. In this background the paper intended to insights into the metamorphosis of judicial activism in India.*

### Introduction

The Supreme Court of India is entrusted to be the guardian of the constitution. It is the constitutional obligation of the judiciary to strike down the law made by the legislature and acts done by the executive found to be unconstitutional or infringes the rights of individual guaranteed by the constitution. According to Black Law Dictionary, judicial activism as "philosophy of judicial decision making whereby judges allows their personal views about public policy among other factors to guide their decision".<sup>1</sup> This power of the court to check the acts of other organs of the states provides the legitimacy to the concept of judicial activism. The power of judicial review given to higher judiciary under the constitution is the source of judicial activism. The notion of judicial activism has acquired legitimacy in the post emergency era due to various reasons including political changes when people felt that there must be an independent judiciary with the power of judicial review in order to protect Indian democratic values. Judicial activism would mean an activism by taking recourse to the judicial process leading to judicial pronouncement on different complex issues whereby new approaches emerged to tackle the contemporary problems of society. The important function of Judiciary under a written constitution is to maintain the power of authorities within the constitutional limitations this can be performed by way of judicial review. It has

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<sup>1</sup>Black Law Dictionary, 10th edition, 2014

more significance in public law in countries having written constitution like India.<sup>2</sup>

### **Evolution of Judicial Activism:**

Judicial Activism means different things to different persons. Judicial activism sometime termed as judicial anarchy, judicial despotism, judicial over activism. There are two types of approach in respect of the debate on judicial activism. Some scholars argued that the judiciary is doing its plan duty and considered the term of judicial activism merely a myth. Other argued that judiciary is transgressing in the domain of other organs of government which is against the rule of separation of power. They argued that the judges have no authority to legislate like legislature because they are lacking the necessary infrastructure as well as authority to make law according to the needs of the society. Despite the debate about the legitimacy of judicial activism for academic discussion there is no doubt that after the post emergency period through the device of public interest litigation the Supreme Court or the judiciary is the only hope for a common man. There are series of decision of Supreme Court and high courts which save the interest of the poor, indigent and disadvantaged sections of the Indian society.<sup>3</sup>

According to the analytical school of jurisprudence a court merely found the law or merely interpreted the law. The realist school of jurisprudence exploded the myth that the judges merely declared the pre-existing law or interpreted it and asserted that the judge made the law. The chief exponent this school were Jerome Frank, Justice Holmes, Cardozo and Llewellyn asserted that the judges made law, though interstitially. The examples of making law in the sense of realistic school of jurisprudence are the expanding the meaning of the word personal liberty, procedure established by law under Article 21<sup>4</sup>, freedom of speech under Article 19 of the Constitution and the basic structure doctrine etc. But whatever the Supreme Court is doing by issuing directions to the government on policy matters and creating positive rights is not judicial law making in the realistic sense of jurisprudence. Here the judiciary is doing the function that belongs to other organ of the government. The doctrine of separation of power exists nowhere or becomes meaningless. In such situation

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<sup>2</sup> A. R. Deshmukh, The Indian Constitution And Judicial Activism. *International Referred Research Journal*, Dec., 2011, ISSN- 0975-3486, RNI: RAJBIL 2009/30097, VOL- III \* ISSUE 27. Available at: <http://www.ssmr ae.org/admin/images/008de27349881481db0cc8e3ba992a20.pdf>

<sup>3</sup>Durga Das Basu, *Introduction to the Constitution of India*. 19th Edition Reprint Wadhwa and Company Law Publishers, 2004.

<sup>4</sup>Maneka Gandhi vs Union Of India, AIR 1978 SC 597

the function of judiciary becomes the subject of criticism and the question of legitimacy of such function would arise.

Since the early Sixties, a new generation of English Judges, likes of Lord Reid, Lord Denning and Lord Wilberforce, with their doctrine of "purposive interpretation" provided new meaning to English Administrative Law, reviving and extending ancient principles of natural justice and fairness, applying them to public authorities and to private bodies that exercise public power, and rejecting claims of unfettered administrative discretion.<sup>5</sup>In his famous lecture on the Judge as law-maker, Lord Reid, in 1972, observed:

"There was a time when it was thought almost indecent to suggest that judges make law - they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge muddles the password and the wrong door opens. But we do not believe in fairy tales anymore."<sup>6</sup>

The Supreme Court of United States in 1803, bestowed upon itself the power of judicial review through the epoch-making decision delivered in case of *Marbury v. Madison*.<sup>7</sup> The observation made by Chief Justice Marshall is now considered a classic exposition of law. He held:

"It is emphatically the province and duty of judicial department to say what the law is. Those who apply the rule in particular cases, must of necessity expound and interpret that rule..... A law repugnant to the Constitution is void....., courts as well as other departments are bound by that instrument."<sup>8</sup>

Judicial review has come to be defined as the power of a court to hold unconstitutional the act of other organs of government if found in conflict with the constitution. Former Chief

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<sup>5</sup> Justice A.M. Ahmadi. *Judicial Process: Social Legitimacy and Institutional Viability*, Cite as : (1996) 4 *SCC* (Jour) 1 Available at: <http://www.ebc-india.com/lawyer/articles/96v4a1.htm>

<sup>6</sup> Quoted in Anthony Mason, *The Judge as Law-maker*. *James Cook University Law Review*, Vol. 3,1996 Available at: <http://www.austlii.edu.au/au/journals/JCULawRw/1996/2.pdf>

<sup>7</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>8</sup> Nelson, William E. *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence* (1978). Faculty Scholarship Series. Paper 4501; David H. Coar, "It Is Emphatically the Province and Duty of the Judicial Department to Say" Who the President Is?, 34 *Loyola University Chicago Law Journal* 121 (2002). Available at: <http://lawcommons.luc.edu/lucj/vol34/iss1/6>

Justice (US) Warren Burger believe that without the power of judicial review and a Bill of Rights, the Constitution of U.S. could not have survived.<sup>9</sup>

Since the inception of US Supreme Court, charges have been levelled at Supreme Court that its judges continuously indulge in judicial legislation. Benjamin Cardozo, who later served on the Supreme Court, in his classic text - *The Nature of the Judicial Process*,<sup>10</sup> accepted the fact that judges do make law. However, he stated that:

"He (the judge) legislates only between gaps. He fills the open spaces in the law. How far he may go without travelling beyond the walls of the interstices cannot be staked out for him on a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the performance of an art."<sup>11</sup>

In regard to judicial activism in India, the former Chief Justice of India A.H Ahmadi viewed that, "Judicial Activism is necessary adjunct of the judicial function since the protection of public interest as opposed to private interest happens to be its main concern."<sup>12</sup> Presently, it is accepted universally that when a legal system entrusts the judiciary with such a crucial function as judicial review of legislation and administration action, it inevitably makes the judge a lawmaker.<sup>13</sup>

Our constitution maker purposely made the text of the constitution as detailed and specific so to avoid any discretion on the part of the judiciary. Pt. Nehru in constituent assembly debate said that the court could point out to us if we go wrong here and there but in matter of policy the parliament was supreme. Even in 1950 where the court decided against the land reform policy of the government, the constitution was amended to exclude judicial review for such policy matter. The court played a narrow and technocratic role and projected as a conservative, branch of the government. The SC in *A. K. Gopalan case*<sup>14</sup> itself defined its limited role and respected the doctrine of separation of power. It is only in 1965 in *Sajjan Singh case*<sup>15</sup> two judges raised doubt about the competence of parliament to

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<sup>9</sup> A.M. Ahmadi, *Judicial Process: Social Legitimacy and Institutional Viability* (1996) 4 SCC (Jour) pp.1-10

<sup>10</sup> Benjamin Cardozo, *The Nature of Judicial Process* (1977).

<sup>11</sup> Quoted in A.M. Ahmadi, *Supra* n. 9.

<sup>12</sup> *Ibid*

<sup>13</sup> M. K. Malviya, *Independent Judiciary: A Study in Indian Perspective. Bharati Law Review*, July – Sept., 2013 p. 113

<sup>14</sup> *A.K. Gopalan v. State of Madras A.I.R. 1950 S.C. 27.*

<sup>15</sup> *Sajjan Singh vs State Of Rajasthan, 1965 AIR 845; Justice Hidayattullah, and Justice J.R. Mudholkar, concurred with the opinion of Chief Justice Gajendragadkar upholding the amendment but, at the same time, expressed reservations about the effect of possible future amendments on Fundamental Rights and basic structure of the Constitution. Justice Mudholkar questioned that "It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be,*

amend the constitution so as to take away the fundamental rights. But the majority held that the power of parliament to amend the constitution was unlimited and since then it was the accepted model of judicial review.<sup>16</sup>

In 1967 in case of *Golak Nath*<sup>17</sup> SC overruled the previous decision of the court and held that the parliament had no power to amend the constitution as to infringe the fundamental rights. This decision shocked the entire community of the judges, advocates, politicians. Even legal academicians such as Seervai, Tripathi, Jain and Sathe took the position that how could a court say that a constitution could not be amended. Other cases of SC which made its image as pro-rich were bank nationalization case<sup>18</sup> and de-recognition of princes.<sup>19</sup> Even Indira Gandhi in its manifesto for 1971 election assured that she will make some basic changes in the constitution and she secured two third seats in the Lok Sabha that was really a mandate against the SC. Again in 1973 in *Kesavananda Bharti* case<sup>20</sup> the SC discovered the device of basic structure to avoid direct confrontation with the government. This battle between these two organs ended in *Minerva Mill* case.<sup>21</sup>

### **Legitimacy of Judicial Activism:**

The period of emergency marked as a water shad in the Indian politics. It was the period of atrocities, human rights violations and the misuse of the power. Some incidents such as the decision of Allahabad high court about Mis. Gandhi's election case<sup>22</sup> and the 39<sup>th</sup> constitutional amendment Act<sup>23</sup> realised the people that there must be some restrictions on the power of the government to save our democracy. The people of India looked in to the SC for such role to save the liberty of the people from excessive use of power. But the SC also disappointed the people of the country by giving its decision in *Shiv Kant Shukla* case<sup>24</sup> which is the black spot on the image of the Supreme Court of India. But the net outcome of

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in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of the Article 368?" (The Ninth Schedule Judgement, *Outlook*, January, 2007)

<sup>16</sup> P.P. Rao, Basic Features of the Constitution (2000) 2 *SCC (Jour)* 1.

<sup>17</sup> *Golaknath v. State of Punjab* A.I.R. 1967 S.C. 1643.

<sup>18</sup> *R.C Cooper v. Union of India*, 1970 AIR 564.

<sup>19</sup> *H. H. MaharajadhirajaMadhav Rao vs Union Of India* 1971 AIR 530.

<sup>20</sup> *KesavanandBharati v. State of Kerala* A.I.R. 1973 S.C. 1461.

<sup>21</sup> *Minerva Mills Ltd. and Ors. v. Union of India* AIR 1980 SC 1789.

<sup>22</sup> *Indira Nehru Gandhi v. Raj Narain*, A.I.R. 1975 SC 2299.

<sup>23</sup> The Constitution (39th Amendment) Act, 1975—The Act provides that disputes relating to the election of the President, Vice-President, Prime Minister and Speaker shall be determined by a forum to be determined by Parliamentary law which shall not be called in question in any court.

<sup>24</sup> *A.D.M. Jabalpur v. Shiv Kant Shukla* A.I.R. 1976 SC at 1349.

the emergency was that two organs of government loosed faith of public and the court had struck roots among the people of India.<sup>25</sup>

Supreme Court started activism in 1978 when it focused its attention on the rights of under trial prisoners, prison inmates, accused criminals, bonded labour, child labour, and conditions of certain sections of society which were deprived of their basic rights through public interest litigation. PIL jurisdiction began haltingly with little idea of its potential when the Supreme Court, in 1979, entertained complaints by social activists drawing the attention of the Court to the conditions of certain sections of society or institutions which were deprived of their basic rights. In 1979, Supreme Court advocate Kapila Hingorani drew the Court's attention to a series of articles in a newspaper exposing the plight of Bihar undertrial prisoners, most of whom had served pretrial detention more than the period they could have been imprisoned if convicted. Sunil Batra, a prisoner, wrote a letter to Justice Krishna Iyer of the Supreme Court drawing his attention to torture by prison authorities and the miserable conditions of prisoners in jails. This was taken up as a petition and the Court passed orders for humane conditions in jails. In 1980, two professors of law wrote a letter to the editor of a newspaper describing the barbaric conditions of detention in the Agra Protective House for Women which was made the basis of a writ petition in the Supreme Court. The exploitation of workmen at construction sites in violation of labour laws was brought to the attention of the Supreme Court by a letter. The slave-like condition of bonded labourers in quarries was brought to the attention of the Court by a social activist organisation. A journalist moved the court against the evictions of pavement dwellers of Bombay.<sup>26</sup>

In dealing with such cases, the Court evolved a new regime of rights of citizens and obligations of the State and devised new methods for its accountability. In 1982, Justice P.N. Bhagwati, correctly stated the purpose of PIL as it originated. He emphasised that PIL “a strategic arm of the legal aid movement which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation.”<sup>27</sup> SC was no longer to be the protector of rich but played a role of cartelist of social change. Though the SC

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<sup>25</sup>UpendraBaxi. *The Indian Supreme Court and Politics*. Eastern Book Co. 1980.

<sup>26</sup> T. R. Andhyarujina, Disturbing Trends in Judicial Activism, *The Hindu*, August 6, 2012.

<sup>27</sup>People'S Union For Democratic vs Union Of India & Others 1982 AIR 1473.

attempted to reform the Muslim law relating to women's rights in Shah Bano case<sup>28</sup> through the judicial process. Further the SC focussed on the issue of criminalization of politics which was started in Rao government by upholding the anti-defection law as constitutional. The court also took initiative to resolve the issue of reservation when any political party failed to take any stand on such a sensitive issue of reservation.<sup>29</sup>

There are other areas in which the Supreme Court remarkably contributed for the welfare of the society particularly the deprived people. Right to information which is one of the effective tools in the hands of common man to ensure transparency, good governance or to fight against corruption was the contribution of our judiciary. The court's intervention in enforcing the rights of the disadvantaged or poor sections of the society is required because of the passive attitude of the officials and departments. The correction of various problems such as control over automobile emissions, air and noise and traffic pollution, cleanliness in housing colonies, disposal of garbage, control of traffic, made compulsory the wearing of seat belts, measures to prevent accidents at unmanned railway level crossings, prevent ragging in college and other institutions of higher education, regulation of collection and storage of blood in blood banks, and for control of loudspeakers and banning of fire crackers are the result of Supreme Court orders. The Court also undertook initiatives to monitor the conduct of investigating and prosecution agencies that are perceived to have failed or neglected to investigate and prosecute ministers and officials of government. Due to this approach of SC various scams were reviled such as Jain Hawala case, the fodder scam in Bihar, the Taj Corridor case, Commonwealth Game and the 2G Telecom scam, allocation of coal blocks etc. There are few areas in which the higher judiciary by its proactive role which is commonly understood as judicial activism contributed for the welfare of masses.

The efforts of the higher Judiciary in controlling environment pollution through Public Interest Litigation is indeed admirable, particularly when the legislature is lagging behind in meeting the current challenges. In Shriram food and fertilizer case the Supreme court at the instance of a PIL, directed the company manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in its neighbourhood, to take all necessary safety measures before reopening the plant.<sup>30</sup> In another case of M.C

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<sup>28</sup> Mohd. Ahmed Khan vs Shah Bano Begum and Ors. A.I.R. 1985 SC 945.

<sup>29</sup> S.P. Sathe. *Judicial Activism in India: Transgressing Borders and Enforcing Limits*. Oxford University Press, 2005.

<sup>30</sup> M.C Mehta v Union of India, 1986, Vol. 2 SCC 176

Mehta regarding pollution of Taj Mahal, the petitioner through PIL tried to draw the attention of the court towards the degradation of the Taj Mahal due to the atmosphere pollution caused by a number of foundries and chemically hazardous industries functioning around the Taj Mahal. Mr. Justice Kuldeep Singh held that the 292 polluting industries locally operating in the area are the main source of pollution and directed them to change over within fixed time schedule to natural gas as industrial fuel and if they could not do so they must stop functioning beyond 31st Dec 1997 and be reallocated alternative plots in the industrial area outside Taj Trapezium.<sup>31</sup>

In case of Indian Council for Environmental Legal Action the SC has held that if a person's fundamental right is violated by the act of private corporate bodies, the court would not accept the argument that it is not 'state' within the meaning of Art. 12 of the Constitution and therefore, action cannot be taken against it. If the court finds that the Government or authorities concerned have not taken the action required of them by law and this has resulted in violation of the right to life of the citizens, it will be the duty of the court to intervene. In this case an environmentalist organization filed a writ petition under Art. 32 before the court complaining the plight of people living in the vicinity of chemical industrial plants in India and requesting for appropriate remedial measures.<sup>32</sup>

The court strictly dealt with the cases of illegal detention. In case of Sunil Batra it has been held that the writ of habeas corpus can be issued not only for releasing a person from illegal detention but also protecting prisoners from inhuman and barbarous treatment.<sup>33</sup> Taking the note of serious violation of human rights, the court directed the release of prisoners where the court was informed through a letter that some prisoners, who were insane at the time of trial but subsequently declared sane, were not released due to inaction of state authorities and had to remain in jails from 20 to 30 years.<sup>34</sup> By taking into account the growing cases of fake encounter by the police, the court has held that it is a gross violation of Art. 21. If it is proved that the person has been killed by the police in fake encounter, the state may be directed to pay compensation and in such cases the doctrine of sovereign immunity does not

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<sup>31</sup> M.C Mehta v Union of India AIR 1997 SC 735

<sup>32</sup> Indian Council for Environmental Legal Action v Union of India (1996) 3 SCC 212

<sup>33</sup> Sunil Batra v Delhi Administration AIR 1980 SC 1759

<sup>34</sup> Veena Sethi v State of Bihar AIR 1983 SC 339

apply.<sup>35</sup> In M.C Mehta case, the Supreme Court has held that the scope of Art 32 is wide enough to include the power to grant compensation for violation of fundamental rights.<sup>36</sup>

In case of Vishaka<sup>37</sup> the court has made it clear that the sexual harassment of working women amounts to violation of right of gender equality and right to life and personal liberty. As a logical consequence it also amounts to the violation of right to practice any profession, occupation or trade. The SC laid down certain guidelines to be observed at all work place or other institutions until legislation is enacted for the purpose. These guidelines would be treated as the law declared by SC under Art 141. These guidelines of the court provided relief to millions of working women who were compelled to remain silent at their working place even though they face sexual comment, harassment etc. In fact this case fills the lacuna in law to deal with this kind of problem facing by working women at their working place.<sup>38</sup> The Parliament took sixteen years to convert Vishaka guidelines into Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

The Supreme Court in a significant judgment held that it is a paramount obligation of every member of medical profession (private or government) to give medical aid to every injured citizen brought for treatment immediately without waiting for procedural formalities to be completed in order to avoid negligent death.<sup>39</sup> In case of bounded labour, the court held that the state is bound to ensure the observance of the labour legislation enacted for securing the workmen. Any inaction on part of state in implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Art 21.<sup>40</sup> In M.C Mehta case, it was held that the children can't be employed in match factories which are directly connected with the manufacturing process as it is a hazardous employment within the meaning of employment of children Act 1938. They can however be employed in place of manufacture to avoid exposure to accidents. Further, according to guidelines of the court, every child must be insured for a sum of five thousands and premium to be paid by employer as a condition of service.<sup>41</sup> In Lakshmi Kant Pandey case, a writ petition was filed on the basis of a letter complaining of malpractices indulged by social organization and agencies engaged

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<sup>35</sup> Union for Civil Liberties v Union of India AIR 1997 SC 1203.

<sup>36</sup> M.C Mehta v Union of India AIR 1987 SC 1086.

<sup>37</sup> Vishaka v State of Rajasthan AIR 1997 SC 3011.

<sup>38</sup> Judicial Activism under the Indian Constitution, Address by Hon'ble Mr. K.G. Balakrishnan, Chief Justice of India (Trinity College Dublin, Ireland – October 14, 2009), Available at [http://supremecourtindia.nic.in/speeches/speeches\\_2009/judicial\\_activism\\_tcd\\_dublin\\_14-10-09.pdf](http://supremecourtindia.nic.in/speeches/speeches_2009/judicial_activism_tcd_dublin_14-10-09.pdf).

<sup>39</sup> Parmanand Katara v Union of India AIR 1989 SC 2039.

<sup>40</sup> People' Union for Democratic Rights v Union of India AIR 1982 SC 1473.

<sup>41</sup> M.C Mehta v State of Tamilnadu AIR 1991 SC 417.

in offering Indian children in adoption to foreign parents. Bhagwati J (as he then was) laid down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents with object of ensuring the welfare of the child. The court directed the government and various agencies dealing with the matter to follow these principles in such cases as it is their constitutional obligation under Art 15(3) and 39(c) and (f) to ensure the welfare of child.<sup>42</sup> The SC interpreted the protection of Article 21 to provide protection to non-citizens. The Court held that every citizen or non-citizen is entitled to the right of life and personal liberty guaranteed by Art 21.<sup>43</sup>

Further Judicial Activism also helpful in curbing the menace of corruption. The scam like commonwealth and 2G Spectrum, Coal block allocation, Chopper scam are glaring examples to show how judiciary is serious in checking the problem of corruption. These cases were revealed through public interest litigation initiated at the instance of public spirited person. The Supreme Court of India in 2012 has taken an unparalleled step and cancelled 122 2G licenses distributed by Indian government to different telecom companies in 2008. Though such judicial overreach was criticised by politicians but the judiciary is the only organ which can prevent the government in case it working against the interest of public. The Supreme Court justified its order of cancelling 122 licenses for 2G-spectrum, saying it was duty-bound to strike down policies that violate constitutional principles or were contrary to public interest.<sup>44</sup> Further, while justifying the Court's decision to take up the issue of Spectrum Allocation, Justice Singhvi notes: "However, when it is clearly demonstrated before the Court that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters."<sup>45</sup>

Further, the court said that the recommendations made by TRAI cannot be overlooked the basic constitutional principles resulting in denying majority of people from participating in the distribution of state property admitting that TRAI was an expert body assigned with important functions under the 1997 TRAI Act. The court said that spectrum was natural

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<sup>42</sup> Lakshmi Kant Pandey v Union of India (1984) 2 SCC 244

<sup>43</sup> National Human Rights Commission v State of Arunachal Pradesh AIR 1996 SC 1234

<sup>44</sup> Use Natural Resources For Larger Public Good Supreme Court, *The Times of India*, Feb, 2012.

<sup>45</sup> Can Review Policy Decision in Public Interest: SC on 2G, *Outlook*, May, 2016.

resources and natural resources are vested with the government as a matter of trust in the name of the people of India. Thus it is the solemn duty of the state to protect the national interest, and natural resources must always be used in interest of the country and not private interest.<sup>46</sup>

In Noida land acquisition case the Supreme Court cancelled the acquisition of land by U.P government as it was acquired for industrial purpose but it was given to builders for making apartments. The court ordered that land should be reverted back to farmers from it was acquired. Supreme Court and different high courts often pass order for CBI investigation in several cases involving public interest. The Supreme Court has also played a substantial role in case relating to Gujarat riot in 2002 in order to provide justice for victims.<sup>47</sup>

In Coal block allocation scam, the Supreme Court declared coal block allocations, made from 1993 to 2011 illegal and arbitrary. The scam was revealed in the report of the Comptroller and Auditor General of India, accused the government of allocating coal blocks in an arbitrary manner causing a loss of Rs. 1.86 Lakh crore.<sup>48</sup> The Chopper Scam revealed in 2013 involves several politicians and defence officers, who have been accused of having accepted bribes from Augusta Westland to clear a contract to supply 12 Agusta Westland AW101 helicopters to India. In this regard Supreme Court sought Centre and CBI's response on a Public Interest Litigation (PIL) seeking FIR against the people whose names have figured in the Italian court's judgment in connection with the VVIP chopper scam.<sup>49</sup>

The critics of judicial activism must remember the fact that justice was only a remote and even theoretical proposition for the mass of illiterate, underprivileged and exploited people in the country until PIL was developed by the Supreme Court. At a time of crucial, social and economic transformation, the judicial process has a part to play as important role of change. The issue of PIL investigates into the matter of highest importance, affecting the quality of life of millions of Indian. It helps in spreading judicial popular support and moral authority, especially at a time when other institution of governance are facing legitimate crisis.

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<sup>46</sup>Dr. Subramanian Swamy v. Union of India and others, Writ Petition (Civil) No. 10 of 2011

<sup>47</sup> Judicial Activism in India, 23 February 2012, Available at: <http://lawthing.blogspot.in/2012/02/judicial-activism-in-india.html>

<sup>48</sup> J. Venkatesan, Coal block allocations since 1993 illegal: Supreme Court, *The Hindu*, August 26, 2014

<sup>49</sup> Cost of Agusta Westland Chopper Deal was Unreasonably High: CAG, Available at: <http://newsinklive.com/readAllArticles.php>

PIL must not be allowed to degenerate into mere private publicity or political Interest litigation. Thus finding the delicate balance between ensuring justice and maintaining institutional legitimacy is a challenge before the higher judiciary in India. The instrument of PIL must be used by the courts carefully, prudently because any discriminate use of it would bring it contempt, both from the government and public. Thus, the correct approach of the court in PIL cases should be a judicious mix of restraint and activism determined by the dictates of existing realities. Any misuse of the same must be strongly discouraged by the courts. In this regard the Supreme Court in case of BALCO expressed its concern about the abuse to PIL and said that administrative powers cannot be challenged in PIL unless there is a violation of Art 21 of the constitution and persons adversely affected are incapable to approach the court. This limits the power of the court and the initiative of a busybody.<sup>50</sup> The apex court further in order to check the misuse of PIL has laid down several guidelines including that courts must encourage genuine and bonafide PIL and effectively discourage and curb PIL filed for extraneous considerations; the courts should be fully satisfied that substantial public interest is involved before entertaining the petition.<sup>51</sup>

Addressing the valedictory function of the 150th anniversary celebrations of the Madras High Court, President Pranab Mukherjee urged judiciary to keep reinventing itself through a process of introspection and self-correction at the same time. Delivering a note of caution on judicial activism, President Mukherjee said that judicial pronouncements must respect the boundaries that separate the legislature, executive and judiciary. He further believed that the judges through innovation and activism have contributed enormously to expanding the frontiers of justice and providing access to the poorest of the poor. Referring to backlog of cases, the President said the courts must be strengthened with additional resources to provide speedy justice.<sup>52</sup>

History is full of evidences about the conflict between the parliament and judiciary where both wings of government want to control each other. Where the Supreme Court is the guardian of the constitution and work as watchdog to check the power of the legislature and executive. The parliament has also been trying to control the judiciary in regard to the appointment of judges of higher judiciary. In this regard the parliament passed 99<sup>th</sup>

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<sup>50</sup> BALCO Employees' Union v Union of India (2002) 2 SCC 333

<sup>51</sup> State of Uttaranchal v Balwant Singh Chufal and others (2010) 3 SCC 402

<sup>52</sup> Prez. Sounds Note of Caution on Judicial Activism, *FIRSTPOST*, Tuesday, August 25, 2015, Available at: <http://www.firstpost.com/india/prez-sounds-note-of-caution-on-judicial-activism-448902.html>

Constitutional Amendment, Act and The National Judicial Appointment Commission, 2014. The Supreme Court by majority of 4:1 had struck down the NJAC Act and constitutional amendment as unconstitutional which sought to give politicians and civil society a final say in the appointment of judges to the higher judiciary. The court declaring that the judiciary cannot risk being caught in a web of indebtedness towards the government. The five judge constitutional bench explained that “It is difficult to hold that the wisdom of appointment of judges can be shared with the political-executive. In India, the organic development of civil society, has not as yet sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it absolutely insulated and independent, from the other organs of governance.”<sup>53</sup>

In this regard, recently addressing the conference of chief justices and chief ministers, Chief Justice of India, T.S. Thakur become emotional as he spoke about the shortage of judges in the country that the judiciary should not alone have to bear the cross for the huge pendency of cases in the country. He mentioned that there were six vacancies in the Supreme Court, 432 in various high courts and 4,432 in the subordinate judiciary.<sup>54</sup> In 1987 the Law Commission of India pointed out that the judge-population ratio in India was only 10.5 per judges per million population (now 12 judges per million) while the ratio was 41.6 in Australia, 50.9 in England, 75.2 in Canada and 107 in United States. The commission recommended that 107 judges per million required in India. Government is not sensitive about the issue and not taking any initiative to do the needful in order to provide speedy justice to poor masses. With such huge vacancies and lake of court rooms and infrastructure, the judiciary working effectively for the interest of the people.<sup>55</sup>

### **Conclusion:**

The legitimacy of judicial activism is based on the theory of vacuum filling. It is the duty of the legislature to make law according to the needs of society. Whenever any case comes before the court for adjudication on the issue on which there is no law on the point, the court

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<sup>53</sup>KrishnadasRajagopal, SC Bench strikes down NJAC Act as ‘Unconstitutional and Void, *The Hindu*, October 20, 2015. Available at: <http://www.thehindu.com/news/national/supreme-court-verdict-on-njac-and-collegium-system/article7769266.ece>

<sup>54</sup> CJI Thakur’s Emotional Appeal To Modi To Protect Judiciary, *The Hindu* April 24, 2016 New Delhi, Available at: <http://www.thehindu.com/news/national/cji-thakurs-emotional-appeal-to-modi-to-protect-judiciary/article8516096.ece>

<sup>55</sup>ManeeshChhibber, Do We Need More Judges? CJI Thakur’s Plea To The Govt. Raises Key Questions, *Indian Express* May 1, 2016, Available at: <http://indianexpress.com /article/india/india-news-india/india-judiciary-cji-t-s-thakur-supreme-court-judges-pen ding-cases-2778419/#sthash.7nLD561E.dpuf>

cannot deny merely on the ground that there is no law on the point. It is the constitution duty of the court to render justice. The directions of the court can be replaced by the legislature by making a law on the point. By analysing various decisions of SC in which it laid down guidelines or decision on policy matter it is evident that the court clearly transcended the limit and usurp the power of legislature of executive. It has created various positive rights and directed the government on policy matters such as environmental issues, corruption, child labour, proceeding of legislative assembly etc. Despite all these allegations judicial activism is welcomed by every section of the society. Supreme Court has acquired lot of respect and faith of the common people even people in general feels that courts are the better forum to resolve their problems. It can be said that the Supreme Court of India is perhaps one of the most dynamic courts when it comes into the matter of protection of Rights. Due to its proactive role in the protection of rights of masses it acquires great reputation and credibility. People are more concern about the investigation of corruption cases rather to bother about the expending role of the judiciary outside of its constitutional limitations. The common man see a ray of hope in judicial intervention having become absolutely helpless against growing corruption and misuse of power by politicians and those holding powerful position. People generally believe that judicial process is better than political process. Such faith of the people constitutes the legitimacy of the court and of judicial activism. The court has to strive continuously to sustain and maintain such legitimacy.