

DE JURE NEXUS LAW JOURNAL

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NEED FOR JUDICIAL RESTRAINT THAN JUDICIAL ACTIVISM

*“The Citadel Never Falls: Except from within When a chief justice (of the Supreme Court of India) ‘digs-in-his-heels’ and fixes the roster or determines the composition of benches not to the liking of any particular judge or judges, there is no option but to ‘lump it’ and await his departure from office at the constitutionally prescribed age of retirement. What is set out above is not only a rough-and-ready rule of prudence, but a strict rule of law as well.”¹**

-Fali S. Nariman

ABSTRACT

The dynamic job of the Indian legal executive, especially that of the Supreme Court, has been valued both inside and outside India. The freedom guaranteed through the sacred arrangements,

¹Reflecting his strong disapprobation of judges expressing dissension in public, Nariman says, “I was greatly perturbed during the last few days (of August 2016) over an otherwise excellent and sober judge in the Supreme Court — then Judge No.5 in the hierarchy (Justice Chelameswar (sic)) — going public over the lack of transparency in the working of the collegium system.” Nariman delivers a strong message to sitting, former and future judges: “If a judge in the collegium doesn’t like the way the body functions (for lack of transparency or any other reason) he/she can quit and then complain why he/she quit.” *

through the constitutional provisions, for the legal executive and accordingly reinforced by the legal translation has unquestionably added to the current status of the Indian legal executive. However, in this circle of legal activism, there are additionally a couple of coinciding confusions that should be perceived to value the lobbyist part of the legal executive in India better.

Judicial activism has consistently been a wellspring of warmed discussion, particularly in the light of late improvements in such manner. Throughout the most recent couple of years with various controversial decisions, judges of the Supreme Court just as different High Courts have indeed set off the discussion that has consistently produced a ton of heat. Yet at the same time, what the expression "Judicial activism" really suggests is as yet a secret. From the beginning of legal history till date, various critics have given different meanings of legal activism, which are distinctive as well as conflicting. This is an endeavor to draw out the specific undertone of "Judicial activism" and to discover its impacts on the present evolving society.²

Legitimate scholastics regularly depict "legal activism"³ as negation of authoritative establishment by the legal executive. The first Chief Justice of India, Justice HarilafKania, at the introduction of the summit court, announced that the head capacity of the court was to protect the fundamental right and the freedoms of individuals. Before long after the beginning of the Constitution, the High Court perceived in RomeshThapar's case in 1950, its incredible obligation in the tangler of defending the key privileges of the residents. The pinnacle court held that this court is along these lines comprised the defender and underwriter of principal rights and with obligation so laid downward on reliably, it can't decline to entertain applications looking for security against encroachment of such rights*⁴.

Holding that there was no limit to judicial review, Supreme Court Chief Justice KG Balakrishnan has ruled out the question of having any compulsory annual declaration of wealth and assets by judges of the apex court and high courts. The statement of the then Chief Justice of the Supreme Court KG Balakrishnan that "no self-respecting judge would like his/her assets to be declared"

²Arpita Saha, 'Judicial Activism in India: A Necessary Evil' SSRN eJournal

³Justice Sikri, A.K., 'Human Rights and Indian Judiciary', NYAYA DEEP, The Official Journal of NALSA, Volume VII issue 4, October 2006, p. 57-58

⁴ *The term Judicial Activism is explained in Black's Law Dictionary, 16th Edition [Centennial Edition (1891-1991)] as "judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions of social engineering and occasionally these decisions represent intrusions in the legislative and executive matters."

has raised eyebrows of the citizens regarding their right to know what assets public servants have amassed. It is undistinguishable on what basis; the CJI makes a clear difference flanked by transparency in the case of law makers on the one hand, and similar non-openness for judges on the other. The disapproval of the highest judiciary to insertion of non-judicial members in the proposed National Judicial Council, as well as its wish to be exempted from the Right to Information Act 2006 was also not well received in different quarters⁵.

S. P. Sathe accept as true that, Judicial activism has become a subject of controversy in India. Recent and past attempts to hinder the power of the courts, as well as access to the courts, included indirect methods of disciplining the judiciary, such as supersession of the judges and transfers of inconvenient judges. Critics of judicial activism say that the courts usurp functions allotted to the other organs of government. On the other hand, defenders of judicial activism assert that the courts merely perform their legitimate function.⁶ According to Mr. Justice A. H. Ahmadi, the former Chief Justice of India, 'judicial activism is a necessary adjunct of the judicial function because the protection of public interest, as opposed to private interest, is the main concern'.

Of late than any other time, judicial activism has become a topic of debate in India. The grasp of legal activism is generally determined by individuals' impression of the job of the courts in a majority rule government. While some accept that legal activism is vital for the security of public interest, others are of the assessment that as a legal capacity, courts are needed to interpret law and not make them.⁷ In an air of disquiet brought about by jibes at *judicial* activism by the *executive and legislature*, a sitting Supreme Court judge avowed that it is a serious obligation performed by judges to check "*legislative adventurism and executive excesses.*" According to, Justice Josephin his interview, "*courts dare and ought to say what the law is and what the law should be. Such judicial response is not the special attribute of an activist judge but a solemn role or function or duty of a judge, who is seen popularly as the court. Judicial activism is the obligatory response of the institution, the court, against injustice.*"

⁵The Indian Journal of Political Science, April - June, 2011, Vol. 72, No. 2 (April - June, 2011), pp. 437-443

⁶S. P. Sathe, Judicial Activism: The Indian Experience, 6 Wash. U. J. L. & Pol'y 029 (2001),

⁷ Swati Sharma, Rahul Rishi & M. S. Ananth, 'Indian journal of constitutional & administrative law, issue I volume I 2017'.

Citizens at anyplace in the World need all the organs of the public authority to be dynamic, dynamic and lively and the activism of legal executive is an invite marvel. What torments us, isn't the activism yet the over activism of our legal executive, which is Extremism and that's it. The Supreme Court should restrict its utilization of the sociological school of law to just the most exceptional state of affairs, and utilize the positivist school beyond what many would consider possible.

- In some cases, honorable Judges have invoked various philosophers and sources to underwrite the rhyme in their judgment, however in this way they lost the very explanation which ought to have been the bedrock of the judgment.
- During some hearings when the courts start championing ideology, not constitution then it affronts the balance. There is no germane peril to the legal freedom than a legal executive focused on a specific socio-political philosophy and not the constitution.
- The inventive act of utilizing discretions to fill the gap or a longing to make a supposed extension among society and law, will rather make some extemporary declarations regularly obscure to individuals and prepare for legal oppression. The legal executive should be retold in any event three things to follow, when the lines in-between expected to be regarded, were disregarded and the outcomes demonstrated terrible.

The component of populism is likewise affecting some of the choices. Noted writer Sri Pratap Bhanu Mehta describes a well-known joke among the legal counselors 'what is bail? It is what is denied when the courts need to show they can act tough'. Presently the characteristic inquiry emerges what is alluring 'showing of strength or organization of equity' and administration of justice'? Mr. Mehta effectively says that, 'there are no quick fixes for executive failures.' Our legal executive ought to be helped to remember what John Milton once stated, "fame is the last infirmity of a noble soul"

In succinct, as was observed by Justice Mukul Mudgal "the Parliament is the ultimate judge of what the law should be and the Supreme Court is the ultimate judge of what the law means. And that has to be maintained." Justice J.S. Varma is even more emphatically clear when he says that 'judicial activism should be used like a surgeon's scalpel, not as Rampuri knives'. The same kind of opinions have been articulated by the chief Justice of India Honorable Justice H.S. Kapadia who maintains that 'judges should not govern this country...we are not accountable to

the people. We are not giving respect to the constitution of our country if we decide matters based on our own philosophy. Weightage has to be given to the text of the constitution.”

judicial activism versus Legal limitation:

The contrast between judicial activism and legal restriction are methods of deciphering the Constitution. An appointed authority who is an exacting constructionist may manage in cases such that peruses the Constitution in a real sense or depends on the first expectation of the designers. An adjudicator that is a legal lobbyist may run in an exceptionally wide way.

The purposes of distinction between the two are as per the following: Judicial activism is the translation of the constitution to advocate contemporary qualities and conditions. Then again, legal limitation is restricting the forces of the adjudicators to strike down a law.

In the legal limitation, the court ought to maintain all demonstrations of the parliament and the state councils except if they are disregarding the constitution of the country. In judicial activism, the courts by and large concede to understandings of the constitution by the parliament or some other protected body.

Judicial activism and legal restriction have various objectives. Legal restriction helps in protecting an equilibrium among the three organs of government, judiciary, executive, and legislative. In such situation, the adjudicators and the court energize assessing a current law as opposed to altering the current law. Judicial activism enables to overrule certain demonstrations or decisions.

The dynamic job of the Indian legal executive, especially that of the Supreme Court, has been valued both inside and outside India. The freedom guaranteed through the sacred arrangements, through the constitutional provisions, for the legal executive and accordingly reinforced by the legal translation has unquestionably added to the current status of the Indian legal executive. However, in this circle of legal activism, there are additionally a couple of coinciding confusions that should be perceived to value the lobbyist part of the legal executive in India better.⁸

"judicial activism" of the Supreme Court of India is unparalleled in the judicial history of any modern democracy due to the introduction of "Public Interest Litigation".

⁸<https://www.hindustantimes.com/india/what-is-judicial-activism/story-S4tUDIJp7E04dGWwBHJAcl.html>

- *Attorney General KK Venugopal*

Of course, Public Interest Litigation (PIL) made legal activism conceivable in India. But, under the steady gaze of the court acknowledges a matter for settling, it should be fulfilled that the individual who approaches it has adequate interest in the matter. The test is whether the candidate has locus standi to keep up the activity? This is expected to stay away from superfluous suit. The legitimate principle that nobody with the exception of the influenced individual can move toward a court for a lawful cure was holding the field both in regard of private and public law arbitrations until it was ousted by the PIL wave.

Legal limitation Judges should look to the first expectation of the scholars of the Constitution. Judicial activism judges should look past the first purpose of the framers of the constitution. The basic requirement for a healthy functioning of the judicial process is the right consciousness amongst the people whereby all possible interests in the society are pressed upon the judicial system and the courts are able to strike a balance between these interests in the framework of the social objectives. goals. The judicial process ceases to be democratic in the absence of the people-court relation.⁹

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⁹Mishra, Shashi P.: Fundamental rights and the Supreme Court. New Delhi, Deep & Deep Publications (1985)