

**JUDICIAL RESTRAIN AND JUDICIAL
ACTIVISM**

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INTRODUCTION

The judiciary has been assigned active role under the constitution. Judicial activism and judicial restraint are facets of that uncourageous creativity and pragmatic wisdom.¹

The concept of judicial activism is thus the polar opposite of judicial restraint. Judicial activism and judicial restraint are the two terms used to describe the philosophy and motivation behind some judicial decision. At most level, judicial activism refers to a theory of judgment that takes into account the spirit of the law and the changing times, while judicial restraint relies on a strict interpretation of the law and the importance of legal precedent.

¹ Dr. j.N Pandey- constitutional law of india 50th edition, page no-4-8

MEANING AND DEFINITION OF JUDICIAL RESTRAINT AND JUDICIAL ACTIVISM

JUDICIAL RESTRAINT:

Judicial restraint is a theory of judicial interpretation that encourages judges to limit the exercise of their own power.² It asserts that judges should hesitate to strike down laws unless they are obviously unconstitutional. Judicially-restrained judges respect stare-decisis, the principle of upholding established precedent handed down by past judges.

The term "judicial restraint" has a number of varying definitions. Some of those are listed below:

Auburn University - In the Glossary of Political Economy Terms, published by Auburn University, the glossary defines judicial restraint as the “view that the Supreme Court (and other lesser courts) should not read the judges' own philosophies or policy preferences into the constitution and laws and should whenever reasonably possible construe the law so as to avoid second guessing the policy decisions made by other governmental institutions such as Congress, the President and state governments within their constitutional spheres of authority. On such a view, judges have no popular mandate to act as policy makers and should defer to the decisions of the elected "political" branches of the Federal government and of the states in matters of policy making so long as these policymakers stay within the limits of their powers as defined by the US Constitution and the cons constitutions of the several states. ”

² <http://en.wikipedia.org/wiki/judicialrestraint>

Judicial restraint, a procedural or substantive approach to the exercise of judicial review. As a procedural doctrine, the principle of restraint urges judges to refrain from deciding legal issues, and especially constitutional ones, unless the decision is necessary to the resolution of a concrete dispute between adverse parties. As a substantive one, it urges judges considering constitutional questions to grant substantial deference to the views of the elected branches and invalidate their actions only when constitutional limits have clearly been violated. Compare judicial activism.

The courts should hesitate to use judicial review to promote new ideas or policy preferences. In short, the courts should interpret the law and not intervene in policy-making.

Judges should always try to decide cases on the basis of:

1. The original intent of those who wrote the constitution.
2. Precedent – past decisions in earlier cases.
3. The court should leave policy making to others.

They “restrain” themselves from setting new policies with their decisions.

They make decisions strictly based on what the Constitution says.

JUDICIAL ACTIVISM:

The expression 'judicial activism' is often used in contrast to another expression 'judicial restraint'. Judicial activism is a dynamic process of judicial outlook in a changing society. **Arthur Schlesinger Jr.** introduced the term "judicial activism" in a January 1947 Fortune magazine article titled "The Supreme Court: 1947".

According to Black's Law Dictionary judicial activism is a "judicial philosophy which motivates judges to depart from the traditional precedents in favour of progressive and new social policies".³

In recent years law making has assumed new dimensions through judicial activism of the courts. The judiciary has adopted a healthy trend of interpreting law in social context.

Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law.

Sometimes judges appear to exceed their power in deciding cases before the Court. They are supposed to exercise judgment in interpreting the law, according to the Constitution. Judicial activists, however, seem to exercise their will to make law in response to legal issues before the Court.

The question of judicial activism is closely related to constitutional interpretation, statutory construction and separation of powers. It is sometimes used as an antonym of judicial restraint.

Judges should act more boldly when making decisions on cases

³ Paranjapee "Jurisprudence And Legal Theory" .. Page No-438

1. Law should be interpreted and applied based on ongoing changes in conditions and values.
2. As society changes and their beliefs and values change, courts should then make decisions in cases that reflect those changes.⁴

According to the idea of judicial activism, judges should use their powers to correct injustices, especially when the other branches of government do not act to do so. In short, the courts should play an active role in shaping social policy on such issues as civil rights, protection of individual rights, political unfairness, and public morality.

Examples- of judicial activism are the decisions by the Indian Supreme Court in Maneka Gandhi's case⁵ as well as its decisions relating to Article 21 of the Indian Constitution, etc.

⁴ Lighthouse.mhs-la.org/.../19

⁵ (AIR 1978 SC 593)

TRENDS IN JUDICIAL RESTRAINT

There is broad (though not absolute) separation of powers in the Indian Constitution vide *Divisional Manager, Aravali Golf Course vs. Chander Haas*, 2008. The Constitution of India did not provide for the judiciary to be a super legislature or a substitute for the failure of the other two organs. Thus, the need arises for the judiciary to lay down its own limitations.

One of the examples of judicial restraint is the case of *State of Rajasthan Vs. Union of India*⁶, in which the court rejected the petition on the ground that it involved a political question and therefore the court would not go into the matter.

In *S.R. Bommai Vs. Union of India*⁷ The judges said that there are certain situations where the political element dominates and no judicial review is possible.

The exercise of power under Art.356 was a political question and therefore the judiciary should not interfere. Ahmadi J. said that it was difficult to evolve judicially manageable norms to scrutinize the political decisions and if the courts do it then it would be entering the political thicket and questioning the political wisdom, which the court must avoid.

In *Almitra H. Patel Vs. Union of India*, where the issue was whether directions should be issued to the Municipal Corporation regarding how to make Delhi clean, the Court held that it was not for the Supreme Court to direct them as to how to carry out their most basic functions and resolve their difficulties, and that the Court could only direct

⁶ AIR 1977 SC 1361

⁷ (1994) scc 1.

the authorities to carry out their duties in accordance with what has been assigned to them by law.

Justice A.S. Anand former Chief Justice of India, in a public lecture cautioned that with a view to see that judicial activism does not become “judicial adventurism”, judges need to be circumspect and self- disciplined in the discharge of their judicial functions. The worst result of judicial activism is unpredictability. Unless judges exercise self-restraint, each judge can become a law unto himself and issue directions according to his personal fancies, which will create chaos. Reservations have been expressed in many quarters about some very recent decisions of the Supreme Court.

The Indian Supreme Court, while conservative in the initial years, had later a burst of judicial activism through the social philosophies of Justice Gajendragadkar, Krishna Iyer, P.N. Bhagwati, etc. who in the garb of interpretation of Articles 14, 19 and 21 of the Indian Constitution created a host of legal norms by judicial verdicts.

Part III of the Indian Constitution enumerates certain Fundamental Rights which are enforceable e.g. freedom of speech, liberty, equality, freedom of religion, etc.

On the other hand Part IV called the Directive Principles of State Policy contain certain socio-economic ideals e.g. right to work, to education, to a living wage, to health etc. which though unenforceable are ideals which the State is directed to strive for. Though Article 37 states that these Directive Principles are unenforceable, the Indian Supreme Court has enforced many of them often by reading them into certain Fundamental Rights e.g. in Unnikrishan’s⁸ case the right to education was read into Article 21

⁸ (1993) SCC 645.

JUDICIAL ACTIVISM: THE INDIA SCENARIO

The Indian Constitution, promulgated in 1950, largely borrowed its principles from Western models – parliamentary democracy and an independent judiciary from England, the Fundamental Rights from the Bill of Rights, and federalism from the federal structure in the U.S. Constitution, and the Directive Principles from the Irish Constitution. These modern principles and institutions were borrowed from the West and then imposed from above on a semi-feudal, semi-backward society in India.

The Indian judiciary, being a wing of the State, has thus played a more activist role than its U.S. counterpart in seeking to transform Indian society into a modern one, by enforcing the modern principles and ideas in the Constitution through Court verdicts.

In the early period of its creation the Indian Supreme Court was largely conservative and not activist. In that period, which can broadly be said to be upto the time Justice Gajendragadkar became Chief Justice of India in 1964, the Indian Supreme Court followed the traditional British approach of Judges being passive and not activist. There were very few law creating judgments in that period.

Justice Gajendragadkar, who became Chief Justice in 1964, was known to be very pro-labour. Much of the Labour Law which he developed was judge made law e.g. that if a worker in an industry was sought to be dismissed for a misconduct there must be an enquiry held in which he must be given an opportunity to defend himself.

In 1967 the Supreme Court in *Golak Nath v. State of Punjab*⁹, held 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. Subsequently, in *Keshavanand Bharti v. State of Kerala*¹⁰, a 13 Judge Bench of the Supreme Court overruled the *Golak Nath* decision but held that the basic structure of the Constitution could not be amended. As to what precisely is meant by 'basic structure' is still not clear, though some later verdicts have tried to explain it. The point to note, however, is that Article 368 nowhere mentions that the basic structure could not be amended. The decision has therefore practically amended Article 368. A large number of decisions of the Indian Supreme Court where it has played an activist role relate to Article 21 of the Indian Constitution, and hence we are dealing with it separately.

ARTICLE 21 AND JUDICIAL ACTIVISM

Article 21 states: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

In *A.K. Gopalan v. State of Madras*¹¹, the Indian Supreme Court rejected the argument that to deprive a person of his life or liberty not only the procedure prescribed by law for doing so must be followed but also that such procedure must be fair, reasonable and just. To hold otherwise would be to introduce the due process clause in Article 21 which had been deliberately omitted when the Indian Constitution was being framed.

⁹ AIR 1967 SC 1643

¹⁰ AIR 1973 SC 1461

¹¹ AIR 1950 SC 27

However, subsequently in *Maneka Gandhi v. Union of India*¹², this requirement of substantive due process was introduced into Article 21 by judicial interpretation. Thus, the due process clause, which was consciously and deliberately avoided by the Constitution makers, was introduced by judicial activism of the Indian Supreme Court.

Another great arena of judicial activism was begun by the Indian Supreme Court when it interpreted the word 'life' in Article 21 to mean not mere survival but a life of dignity as a human being.

Thus the Supreme Court in *Francis Coralie vs. Union Territory of Delhi*¹³ held that the right to live is not restricted to mere animal existence. It means something more than just physical survival. The Court held that: "... 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."

The 'right to privacy' which is a new right was read into Article 21 in *R. Rajagopal Vs. State of Tamil Nadu*.¹⁴ The Court held that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education, among other matters.

The Supreme Court also ruled that the right to life guaranteed under Article 21 includes the right to livelihood as well. The right to food as a part of right to life was also recognised in *Kapila Hingorani Vs. Union of India* whereby it was clearly stated

¹² AIR 1978 SC 597

¹³ AIR 1978 SC 597.

¹⁴ (1994) 6 SCC 632

that it is the duty of the State to provide adequate means of livelihood in the situations where people are unable to afford food. The Court has also held that the right to safe drinking water is one of the Fundamental Rights that flow from the right to life. Right to a fair trial, right to health and medical care, protection of tanks, ponds, forests etc which give a quality life, right to Family Pension, right to legal aid and counsel, right against sexual harassment, right to medical assistance in case of accidents, right against solitary confinement, right against handcuffing and bar fetters, right to speedy trial, right against police atrocities, torture and custodial violence, right to legal aid and be defended by an efficient lawyer of his choice, right to interview and visitors according to the Prison Rules, right to minimum wages etc. have been ruled to be included in the expression of 'right to life' in Article 21. Recently the Supreme Court has directed providing a second home for Asiatic Lions vide Centre for Environmental Law V. Union of India (writ petition 337/1995 decided on 15.4.2013) on the ground that protecting the environment is part of Article 21. The right to sleep was held to be part of Article 21 vide In re Ramlila Maidan (2012) S.C.I.1. In Ajay Bansal vs Union of India , Writ Petition 18351/2013 vide order dated 20.6.2013 the Supreme Court directed that helicopters be provided for stranded persons in Uttarakhand.

Thus we see that a plethora of rights have been held to be emanating from Article 21 because of the judicial activism shown by the Supreme Court of India. However there can be grave reservations about some of these orders. One wonders whether there will be any limit to the number of such rights created by court orders.

In a subsequent decision, Bhagwan Dass Vs. State (NCT) of Delhi, 2011(5) Scale 498, again authored by the writer, the Supreme Court mandated death sentence for 'honour killing' i.e. killing of young men and women who married outside their

caste or religion, or in their same village, thereby `dishonouring' the parents or their caste.

The most recent case on judicial activism was the case of Aruna Ramchandra Shanbaug Vs. Union of India and Others.¹⁵ Aruna Shanbaug, a nurse in 1973, while working at a Hospital at Mumbai, was sexually assaulted and has been in a permanent vegetative state since the assault. In 2011, after she had been in this status for 37 years, the Supreme Court of India heard the petition to the plea for euthanasia filed by a social activist claiming to be Aruna's friend. The Court turned down the petition, but in its landmark judgment (authored by the writer) it allowed passive euthanasia i.e. withdrawal of life support to a person in permanently vegetative state, subject to approval by the High Court.

¹⁵ AIR 2011 SC 1290

ARGUMENTS AGAINST JUDICIAL ACTIVISM

1. Opponents of judicial activism argue that activist judges make laws, not just interpret them, which is an abuse of their constitutional power. The issue, they claim, is not whether social problems need to be solved but whether the courts should involve themselves in such problem solving. By making decisions about how to run prisons or schools, argue the critics of judicial activism, the courts assume responsibilities that belong exclusively to the legislative and executive branches of government.
2. Opponents of judicial activism argue that judges lack special expertise in handling such complex tasks as running prisons, administering schools, or determining hiring policies for businesses. Judges are experts in the law, not in managing social institutions.
3. Opponents of judicial activism point to the constitutional principle of separation of powers (the division of power among the executive, legislative, and judicial branches of the federal government) and federalism (the division of power between the states and the federal government) to justify judicial restraint. *Arguments for judicial activism* Supporters of judicial activism argue that it is necessary to correct injustices and promote needed social changes.
4. Supporters of judicial activism point out that the courts often step in only after governors and state legislatures have refused to do anything about a problem.
5. Judicial activists argue that the courts do not create policy as legislatures do. Judges inevitably shape policy, however, as they interpret the law. And, they argue, interpreting the law is the job of the courts.

6. Finally, judicial activists argue that the framers of the Constitution expected the courts to interpret the Constitution actively in order to react to new conditions .¹⁶

¹⁶<http://www.answers.com/topic/judicial-activism-and-judicial-restraint#iXZZ1jjWnDZXU>

JUDICIAL ACTIVISM V/S JUDICIAL RESTRAINT

The difference between judicial activism (“loose constructionist”) and “judicial restraint (“strict constructionist”). These are ways of interpreting the Constitution. A judge who is a strict constructionist might rule in cases in a way that reads the Constitution very literally or relies on the original intent of the framers. A judge that is a judicial activist might rule in a very broad manner that takes into account how times have changed since 1787.

Judicial activism and judicial restraint are two opposite approaches. Judicial activism and judicial restraint, which are very relevant in the United States, are related to the judicial system of a country, and they are a check against the fraudulent use of powers of the government or any constitutional body.

1. Judicial activism is the interpretation of the constitution to advocate contemporary values and conditions.

On the other hand, judicial restraint is limiting the powers of the judges to strike down a law.

2. In the judicial restraint, the court should uphold all acts of the congress and the state legislatures unless they are violating the constitution of the country.

In judicial restraint, the courts generally defer to interpretations of the constitution by the congress or any other constitutional body.

3. In the matter of judicial restraint and judicial activism, the judges are required to use their power to correct any injustice especially when the other constitutional bodies are not acting. This means that Judicial activism has a

great role in formulating social policies on issues like protection of rights of an individual, civil rights, public morality, and political unfairness.

4. Judicial activism and judicial restraint have different goals.

Judicial restraint helps in preserving a balance among the three branches of government, judiciary, executive, and legislative. In this case, the judges and the court encourage reviewing an existing law rather than modifying the existing law.

5. When talking about the goals of judicial activism, it gives the power to overrule certain acts or judgments.

For example, the Supreme Court or an appellate court can reverse some previous decisions if they were faulty. This judicial system also acts as checks and balances and prevents the three branches of government, judiciary, executive and legislative from becoming powerful.

6. Judicial activism is the interpretation of the constitution to advocate contemporary values and conditions.

Judicial restraint is limiting the powers of the judges to strike down a law.

In judicial restraint, the court should uphold all acts of the congress and the state legislature unless they are violating the constitution of the country.

7. In Judicial activism, the judges are required to use their power to correct any injustice especially when the other constitutional bodies are not acting. Judicial activism has a great role in formulating social policies on issues like protection of rights of an individual, civil rights, public morality, and the political unfairness.¹⁷

¹⁷ WWW.differencebetween.net/.../diffrence...

8. Judicial restraint Judges should look to the original intent of the writers of the Constitution.

Judicial activism judges should look beyond the original intent of the framers (after all they were mere humans too and not infallible to making mistakes).

9. Judicial restraint Judges should look at the intent of the legislatures that wrote the law and the text of the law in making decisions any changes to the original Constitution language can only be made by constitutional amendments.

CONCLUSION

When Judges start thinking they can solve all the problems in society and start performing legislative and executive functions (because the legislature and executive have in their perception failed in their duties), all kinds of problems are bound to arise. Judges can no doubt intervene in some extreme cases, but otherwise they neither have the expertise nor resources to solve major problems in society. Also, such encroachment by the judiciary into the domain of the legislature or executive will almost invariably have a strong reaction from politicians and others.

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