

# Judicial Activism

Dr. Bhagyashree M. Deshpande

Assistant Professor, Bharati Vidyapeeth Deemed University, New Law College, Pune, India

**Abstract---** Judicial activism is considered to be the fundamental pillar of the English legal system, in fact precedent is the most dominant source of law. The civil law legal system has no place for judicial activism but the judicial activism is a cardinal feature of the common law legal system. The Indian constitution impowers the judiciary make the law through the interpretation; and according to John Salmond the law made by judiciary is to be considered as subordinate legislation. This implies that the law-making authority of the judiciary is subject to the supreme legislation made by the legislature. The judicial activism has many advantages such as flexibility, no complex separate procedure is involved in the law making and granting of comparatively quick remedies because of the interpretation of law. However, one serious difficulty arises in the aspect of judicial law-making is that there is no limitation on it. The judiciary attempts to keep the state officials and the individuals within the sphere of limitation; now the question arises who will keep the judicial activism within the legal bounds ?

**Keywords---** The Realist Approach, The American legal realism, The Scandinavian legal realism, the theory of separation of powers, Judicial law-making technique, The doctrine of basic structure, Delegated legislation

## I. INTRODUCTION

Montesquieu has developed the theory of separation of powers which in deed is very meritorious and is followed partially by almost all the legal systems. According to Montesquieu the power of the state should be divided into three parts. Each type of the state power should be exercised by a separate organ. He firmly believes that if the powers are separated and are exercised by separate organs then there would be less scope of arbitrary exercise of powers. However, it is not administratively and practically feasible to have complete separation of powers. Due to administrative convenience diluted form of the theory of separation of powers is followed, in India we follow the theory of checks and balances. The state is divided into three separate organs, namely legislature, executive and judiciary. Each organ exercises their own exclusive powers however in addition to those exclusive powers the judiciary and the executive exercise additional powers. The executive organ exercises three types of powers which are as follows.

- a. The purely executive powers
- b. The delegated legislative powers
- c. The quasi-judicial powers

The judiciary also exercises two types of powers which are as follows.

- a. Judicial powers of adjudication
- b. Making of law through interpretation of law

The judiciary makes the law through interpretation which is called as judicial activism. To put it in other words when the judiciary creates a law while interpreting a provision of law it is said that the judiciary has indulged in

to judicial activism.

- The bases judicial activism.

The concept of judicial activism is based on the Realist Approach. The Realist Approach is divided into two branches.

- a. The American legal realism
- b. The Scandinavian legal realism

- A. The American legal realism: - According to this thought of approach the judgement given by a particular judge is influenced by the factors such as the judge's intelligence, culture, morality, historical and social background etc. These factors are inseparable from the judge's personality and are reflected in his judgement.
- B. The Scandinavian legal realism: - According to this thought of approach the judge takes into consideration the social factors which are prevalent in the society at that particular time when the judgement was delivered by the judge. So that the judgement reflects the social facts and makes the law more flexible and practical.

The concept of judicial activism was elaborated by Cardozo and according to him judicial activism means the judicial behavior while creating a law through interpretation. Further Cardozo states that many factors are responsible for making the judge think in a particular way and interpreting the law in a particular manner. These factors are explained by the American and the Scandinavian legal realism, in fact Cardozo was one of the founders of the realist approach.

Both the American and the Scandinavian legal realism

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are followed by the judiciary while making law through interpretation.

- The pre-requisites for the doctrine of judicial activism to prevail.
  - i. The nature of legal system: - The nature of legal system should allow the judges to make the law. For instance, in the civil law legal system the only source of law is statutory enactment or the codified law. The civil law legal system does not recognize any other source of law; hence precedent is not recognized as a valid source of law. Hence obviously the judges are prohibited from making the law through interpretation, and in the civil law legal system the judges have to only apply the existing law.

However, the common law legal system allows the doctrine of judicial activism to prevail. The most importance source of law in the common law system is the judge made law that is the precedent. In fact, majority of the law in the English legal system has been evolved and the developed by the judiciary through the doctrine of judicial activism. India also follows the common law legal system and hence the judiciary is allowed to make the law through the interpretation of law.

For the judicial activism to prevail the first and the foremost pre-requisite is that the nature of the legal system should be common law legal system.

- ii. A statutory provision to authorize the judicial law making: - A part from having the common law legal system nature, a legal system should also incorporate a statutory legal provision which authorizes the judges to make the law. To put it in other words the fundamental law that is the constitution should incorporate a provision which enable the judges to make the law through interpretation. In the English legal system, the constitution is unwritten and the constitutional convention permits the judiciary of England to make the law through interpretation. In India the constitution of India which is the basic law of the land permits the judiciary to make the law through interpretation. Hence in India the apex judiciary, that is the Supreme Court of India can declare a law through interpretation by virtue of Article 141 of the Indian constitution.
- The advantages of the doctrine of judicial activism.
  - i. The doctrine of judicial activism is a flexible method of law making: - The legislative technique of law making involves a cumbersome and a rigid process of amendment.

When a change has to be brought in a statute then the legislative technique of conducting three readings in the upper house and three readings in the lower house has to be followed. Due to this a lot of time and efforts are involved. The doctrine of judicial activism is a process of making law which involves flexibility. The judges can make the law as and when required by the society's developments. This is a very important aspect because the society being of a dynamic nature is constantly changing and also requires a law which incorporates the changes. The judges can visualize the change and can create a law through interpretation in order to fulfil the gap.

- ii. The judge made law requires no separate law-making procedure: - Another very important advantage of the judicial activism is that it required no separate law-making procedure. The judges make the law while adjudicating and when a provision of law requires interpretation.
- iii. Remedies can be afforded quickly: - When a statutory law either violates the rights or causes injustice then a cumbersome legislative process has to be followed. This legislative process involves a lot of time period and hence the remedy is available after a long duration. However, in the case of a judge made law, the judge can grant a remedy immediately while adjudicating the matter and interpreting the law.
- iv. The doctrine of judicial activism helps the law to keep in pace with the national and the international scenario: - According to the Scandinavian legal realism the judges make the law by considering the social facts which are prevalent at that time. The judge while making the law can consider national and the international facts in order to give a suitable interpretation of law.
- v. The doctrine of judicial activism involves the law making by legal experts: - The judicial law making through interpretation is made by expert and imminent and knowledgeable legal scholars so naturally the best creation of law is forwarded. The legislative law-making technique includes the representativeness of the people but may lack the expert legal knowledge.
- Disadvantages of the doctrine of judicial activism.
  - i. The basic disadvantage of the judicial law-making is that it lacks the consent of the people for law making. In a democracy the legislature

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is entrusted with the function of law making because it consists the will of the people to make the law for them. The judiciary consists of the judicial officers which are appointed and hence do not enjoy the aspect of representativeness for law making.

- ii. The doctrine of judicial activism involves a lot of variation in the law making. Another disadvantage of judicial law-making is that there may be a lot of variation in the law making because the interpretation of the provision of law may vary from judge to judge. This may lead to dichotomy and confusion in the ascertainment of the real interpretation of the provisions of the law.
- iii. The doctrine of judicial activism results in the law being scattered in the various case laws. The judge made law is scattered in the various case laws as enunciated by judiciary. As a result of which it becomes very difficult for a common man to know the exact interpretation of the provision of law as he is unable to find and understand the ratio-decidenti and the obiter-dictum. This leads to another fact of engaging of legal experts or lawyers by the common man in order to know the law.
- iv. The doctrine of judicial activism lacks limitation. The legislature has to follow the constitutional limitation while performing the function of law-making. While in the case of judge made law, there is no limitation on the judicial creativity except that the judiciary can not make the law in contravention to the legislative provision. The judges can make law through interpretation and be creative and even make inroads in the constitutional provision. For instance, the judicial creativity for granting compensation for administrative wrongs for the violation of the right to liberty granted under Article 21 of the Indian constitution. There is no parameter to assess the quantum of the compensation and hence the awarding of the compensation is left to the discretion and the creativity of the judiciary.

- Judicial activism in India.

In India one can see the tremendous growth of judicial activism in the various branches of law. In spite of the fact that the Indian constitution is a written statutory document, still a considerable law is made by the judges while interpreting the constitution and the Indian judiciary is responsible for the developing of the constitutional

provisions.

Article 21 of the Indian constitution is a glaring example of the judicial activism. It is the most widely interpreted article involving a lot of judicial creativity. Almost the entire chapter four of the Indian constitution that is the chapter of directive principles is interpreted as the various rights incorporated in the aspect of 'life and liberty' included in the Article 21 of the Indian constitution. The same aspect of judicial activism is involved in the terms of; 'equality, secularism, locus-standi, freedom of speech and expression, rights of minorities, the aspect of law and amendability of the constitution, the constitutional remedies in the form of writs, the concept of citizenship and the pardoning powers of the executive, the doctrine of delegated legislation, the doctrine of prospective over ruling, the doctrine of conditional legislation, the doctrine of colourable legislation and the doctrine of basic structure. A part from this, an exhaustive list still remains where in the judiciary has made the law through interpretation indulging in the judicial activism. A part from the constitution the entire administrative law and the law of torts is evolved and developed by the judges and is a classic work of judicial activism.

## II. CONCLUSION

Judicial activism is a fundamental aspect of the English legal system. Most of the ancient English law has been evolved and developed by the House of Lords of England. Only the common law legal system enables the judiciary to make the law through interpretation. India also follows the common law legal system and hence the judiciary can make the law through interpretation. Judiciary activism ensures flexibility in the law-making process and hence is considered to be very advantageous. So also, the judicial law making involves the law making by legal experts. However, the dangers lie in the over judicial activism because the judicial activism knows no limitation.

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