

## JUDICIAL ACTIVISM AND JUDICIALIZATION OF POLITICS

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### ABSTRACT

*As a tool for social change, Indian constitutional law provides a forum for resolving conflicts and conflicting claims. The Indian Constitution, in contrast to many others, is quite thorough and includes elements that are generally missing from other constitutional systems. The process of constitutionalising, which has expanded to include almost all public discussions, is a distinguishing characteristic of India's constitutional democracy. The court, especially via judicial activism, has greatly broadened the scope of constitutionalising. The Indian judiciary has worked to rectify the state's shortcomings in fostering social change and democracy ever since the post Emergency era. Three steps are generally used to classify judicial activism. The protection of individual rights under Article 21 is the main objective of the first phase. The defence of collective rights, including environmental rights, is emphasised in the second phase. The third phase explores effective governance, with courts increasingly using Public Interest Litigation (PIL) to address governance challenges. Although judicial activism has been praised for strengthening democracy, this paper contends that the current era has resulted in the judicialization of politics, whereby moral and political issues are increasingly referred to the judiciary rather than the proper institutional or public forums. In spite of the court's revolutionary role during its "golden era" of activism, it argues that institutional and non-institutional stakeholders are increasingly transferring political duties to the judiciary. As a result, the courts are overworked and given duties that go beyond the parameters specified in the Constitution.*

**Keywords:** *Judicial Activism, Public Interest Litigation, Right to Life, Environmental Rights, Judicialization and Politics.*

### INTRODUCTION

As a framework created to balance conflicting interests and negotiate the complexity of a varied society, Indian constitutional law occupies a special place.<sup>1</sup> Its importance stems from both its painstaking attention to detail and its extraordinary ability to influence and govern almost every facet of public life. The Constitution's intention to act as a stabilising influence

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Granville Austin, *Indian constitution: Cornerstone of a Nation* (Oxford University Press, New Delhi, 13th Impression, 2008) 45

at a very turbulent period in the country's history is reflected in this all-encompassing approach.

The Indian Constitution was written during the country's division, which was characterised by severe intercommunal violence and general social unrest. The streets of Delhi were life with violence and rioting as the Constituent Assembly discussed the Constitution's provisions in the relative safety of the capital. This unstable atmosphere highlighted how urgently a legal framework that can stop similar tragedies from happening again is needed. The desire to prevent the same turmoil and anarchy from tarnishing India's future motivated the drafters, both men and women, who were well aware of the dangers of fanaticism and governmental overreach.

They had a bold but realistic vision for the Constitution. In order to provide a peaceful means of resolving conflicts in a recently independent society, they aimed to draft a text that could take in and balance divergent opinions. The Constitution sought to replace other, sometimes violent, methods of resolving disputes by offering a formal legal process. It was essentially designed as a means of promoting communication, harmony, and social change.

India's constitutional history is steeped in the urge to constitutionalised almost every public discussion. This tendency is a result of the Constitution's broad application, which inevitably encourages a greater reliance on its tenets and provisions. Its length and level of detail further demonstrate how well it can adapt to the complexity of a heterogeneous society, making it a living document that is essential to India's democratic values.<sup>2</sup>

### **THE SEED: RISE OF THE ACTIVIST COURT**

The Indian Supreme Court greatly expanded the scope of constitutionalising in the years after the Emergency. As seen in the *A.K. Gopalan v. State of Madras* decision<sup>3</sup>, when it declined to put the due process provision into Article 21<sup>4</sup> the Court has previously upheld a more positivist and literal construction of the Constitution. But as time went on, the Court started to read the Constitution in a broader and more accommodating manner. The Gopalan ruling had

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Sujit Chowdhury & Madhav Khosla, (Locating Indian Constitutionalism in Oxford Handbook of Indian Constitution, New Delhi, 1<sup>st</sup> edition 2016) <DOI:10.1093/law/9780198704898.003.0001>

A K Gopalan v/s state of Madras -AIR 1950 SC 27

S.P. Sathe, Judicial Activism: (The Indian Experience, 6 WASH' U. J. L. an POL'Y 2001)40

previously limited the interdependence of some basic rights by drawing a clear division between them. This strict reading was ultimately rejected, and the Court made a major shift from its previous position in *Maneka Gandhi v. Union of India*<sup>5</sup> when it included the idea of "due process" into Article 21. A more expansive view of individual liberties and constitutional safeguards was made possible by the adoption of due process principles, which with major developments coming straight from inside the judiciary, the rise of an active judiciary signalled a turning point in the evolution of rights jurisprudence.

What motivated the Court to take on such an interventionist role is an interesting topic this presents. Why did it not uphold the neutral, passive posture that analytical jurists, who saw the court as an unbiased arbiter, had envisioned, or even the one that the founding members of the Supreme Court had adopted?

The inquiry explores the more profound mechanisms of institutional development and judicial behaviour. At first, the judiciary was supposed to function within a limited framework, concentrating on interpreting the law and settling conflicts without getting involved in social change or policymaking. But over time, the Court started to get increasingly involved in issues

that were previously seen to be the purview of the legislative or executive branch, especially when it came to social justice and fundamental rights. This transition from a passive arbiter to an active change agent calls into question preconceived notions about the judiciary's function in a democracy and requires us to think about the socio-political elements that could have shaped this development.

Professor Upendra Baxi made a compelling case that the Court's turn to activity was primarily a reaction to the political climate of the day. He noted that in the *Golaknath v. State of Punjab*<sup>6</sup> case, the well-known "argument of fear"<sup>7</sup> was very clear. The Supreme Court overturned its earlier ruling in this case, holding that basic rights were impervious to change.

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*Maneka Gandhi v/s Union of India* AIR 1978 SC 1978, 597, 1 SCC 248.

*Golaknath v/s State of Punjab* -AIR 1967 SC 1643

Upendra Baxi, *Indian Supreme Court and Politics* (Eastern Book Company, 1st ed. Lucknow, 1980)10-16

Political reaction to this ruling resulted in a number of constitutional changes intended to overturn the Court's position, especially with relation to the right to property.

The Court's historic ruling in *Keshava Nanda Bharathi v. State of Kerala*<sup>8</sup> marked a turning point. In this judgement, the Court made a substantial shift from previous interpretations by stating that no provision of the Constitution was unamendable. Nonetheless, the Court established the "basic structure" theory, which held that although the Constitution may be changed, its fundamental elements or "basic structure" could not. The Supreme Court's largest constitutional bench ever issued this ruling, which stressed that changing the fundamental principles of the Constitution would not be an amendment but rather a replacement of the original structure. Passed by a slim majority, the decision was a turning point in the history of the connection between constitutional modifications and judicial interpretation.

By adhering to the "basic structure" theory, the Court was able to keep its judicial review powers and make sure that any changes to the Constitution didn't change its core principles. But when Prime Minister Indira Gandhi and the ruling Congress Party proclaimed an emergency a few years later, this confrontational posture was severely contested. The judiciary experienced what legal historian S.P. Sathe calls "judicial surrender"<sup>9</sup> during the Emergency, especially in the well-known *Habeas Corpus* case<sup>10</sup>. The Court's previous claim of judicial independence was compromised when it effectively endorsed the government's actions, which severely restricted individual liberties and suspended several rights.

The Court faced the difficulty of regaining its power and reputation when the Emergency ended. The court felt compelled to reaffirm its commitment to upholding constitutional norms and reclaim its function as a check on executive authority after being perceived as

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*Keshava Nanda Bharati v/s State of Kerala*-AIR 1973 SC 1461

SP Sathe, *Judicial Activism (The Indian Experience)*, 6 WASH. U. J. L and POL'Y, 2001) 43-48  
*ADM Jabalpur v. Shiva Kant Shukla* - AIR 1976 SC 1207

complicit during this troubling period of Indian democracy. As the Court worked to restore its independence and reinterpret its relationship with the other arms of government, this was a pivotal time in its development.

The fall of single-party rule in India during the years after the Emergency (1975–77) signalled the start of a new era in the political history of the nation. Indian politics moved towards coalition administrations as the one-party period came to an end, bringing with it a wide variety of perspectives and issues. Caste, regional identities, and, most significantly, human rights—particularly in the aftermath of the horrific abuses that took place during the Emergency—were all included in the political debate. The Supreme Court was under pressure to rebuild its reputation and win back the public's trust after the judiciary's inaction during the Emergency negatively affected the public's opinion of it. The Court had to react to the shifting political landscape after being mostly mute throughout that time over presidential overreach. In order to address the changing concerns of Indian society, the Court's approach had to change in tandem with the increased focus on human rights and the expansion of regional and caste-based political groups. The seeds of judicial activism started to germinate against this backdrop of political change. The activist judiciary emerged as a result of the Court's increased assertiveness in an attempt to reinterpret its function and restore its reputation as a defender of constitutional norms. The Court's need to confront the issues of a more varied and politically pluralistic India, as well as the evolving political debate, prompted this change.

### **THE TREE: ITINERARIES OF JUDICIAL ACTIVISM**

In India, there are two main aspects of judicial activism. In the first place, it entails rethinking the Court's interpretation techniques. The judiciary takes a more liberal and progressive stance when interpreting the basic rights provisions, which results in a more comprehensive and expansive reading of the Constitution's language. More rights are protected and advanced as a result of this broadening of the definitions of important phrases than may have been originally intended. Second, judicial activism has made access to the Court more inclusive by

reducing the procedural hurdles that traditionally limited citizens' ability to approach the judiciary.<sup>11</sup>

By easing these formalities, the Court has ensured that a wider spectrum of people can seek legal recourse, particularly in cases of public interest or social justice. This approach has made the judiciary more accessible and responsive to the needs of society, especially for marginalized or underrepresented groups. New areas of judicial authority and activity have been explored as a result of the Supreme Court justices' increasing desire to participate in judicial lawmaking and the relaxation of the conventional interpretative approach.

A wider spectrum of petitioners—people who were not directly impacted by the problems at hand—were able to approach the court as the customary method to standing in legal disputes was loosened. The nature of legal access was drastically changed by this change, especially when it came to issues of public interest. The Supreme Court of India created the idea of Public Interest Litigation (PIL) in this climate of judicial activism, enabling people or organisations to petition the court for remedies on behalf of a greater public interest, even if they were not directly affected by a violation or wrongdoing. Previously, only those who could demonstrate a direct, personal stake in a matter had the right to bring a case before the court. However, through PIL, the Court expanded this narrow focus and allowed cases to be brought forward on issues that affected society at large, such as environmental protection, human rights violations, and social justice concerns.

This shift was made possible by the judiciary's liberal approach to interpreting constitutional provisions, particularly in terms of the standing of the parties involved. By adopting a more inclusive and expansive understanding of the Constitution's language, the Court opened the doors for broader access to justice, making it possible to address societal issues that might have otherwise gone unaddressed in the formal legal system. In addition to making the courts more approachable, the judiciary used PIL to establish itself as a force for social change, intervening to protect the public interest and guarantee that everyone's fundamental rights were upheld, not just those who were directly impacted by a particular complaint.

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S.P. Sathe, Judicial Activism (The Indian Experience, 6 WASH. U. J. L. and POL'Y 2001)51



In contrast to its American counterpart, the public interest movement in India has been initiated and supported primarily by the judiciary itself,<sup>12</sup> making Public Interest Litigation (PIL) a novel and distinctive concept. In the United States, the PIL movement has been primarily driven by advocacy groups and activists.

In India, public interest litigation (PIL) is a separate legal jurisdiction that gives courts the power to hear lawsuits on issues of public concern,<sup>13</sup> in contrast to the US, where PIL is mostly associated with pro bono legal work. PIL, or "social action litigation"<sup>14</sup> as Upendra Baxi calls it, was first a forum for cooperation between the judiciary and intellectuals. This collaboration sought to advance the constitutionally mandated social changes, which detractors said elected officials had disregarded or ignored. By filling up the void left by a lack of political action, PIL allowed the judiciary to actively address social challenges and advance constitutional ideals.<sup>15</sup>

The evolution of Public Interest Litigation (PIL) in India demonstrates how the court actively defends the rights of the people and advances social justice. PIL developed as a potent instrument for the judiciary to interact with public affairs throughout time, enabling it to broaden its purview by considering a greater variety of topics. Examining the development of PIL and judicial activism in India at this point is crucial.

### **THE FRUIT: FROM ACTIVISM TO JUDICIALIZATION**

vast and mostly joyous in character. These narratives<sup>16</sup> frequently emphasise the judiciary's transformational function without going into great detail about the difficulties or drawbacks of this strategy. The necessity for the court to react to the surge of populism that marked

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Camie Cassels, Judicial Activism and Public Interest Litigation in India: Attempting the impossible" (American Journal of Comparative Law) 497

Anuj Bhuwania, *Courting The People* (Public Interest Litigation In Post Independence India Cambridge University Press New York, 1st ed. 2016) 16

Upendra Baxi, *Taking Suffering Seriously* (Social Action Litigation in the Supreme Court of India, Third World Legal Studies, 1985) 108-111

See, supra. note 2.

Anuj Bhuwania, "Courting The People," (Public Interest Litigation In Post Emergency India CUP, New York, 1st edition, 2016) 3

Indian politics in the years immediately preceding and following the Emergency (1975–1977) is inextricably related to the rise of judicial activism. The court had to negotiate a tumultuous political landscape during this period, which was characterised by increased public consciousness and calls for social justice. The courts were forced by this political urgency to aggressively address urgent socio-political concerns and beyond their customary bounds. The conflict between the application of Directive Principles of State Policy and the basic right to property was the main focus of the constitutional discussion until the famous *Minerva Mills* case.<sup>17</sup>

The fight between the state's responsibility to establish social and economic fairness and individual rights was brought to light by this dispute. A larger conversation about striking a balance between rights and obligations within a democratic framework was made possible by the judiciary's actions throughout this time. In its early stages, the court was frequently criticised for its unwavering support of the right to property, which led to accusations that it was "anti-socialist" and opposed to advancement.<sup>18</sup> In the political sphere, progressivism versus conservatism were commonly used to assess the court's acts. According to this narrative, the court is out of sync with the changing goals of a society that is socialist in orientation.

The leadership frequently pushed for a "committed judiciary," one that would support the socialist ideals and objectives outlined in the Directive Principles of State Policy, especially during the contentious 1970s. This request emphasised a larger expectation that the court will actively assist the state's agenda of socio-economic development and give social justice first priority.

It was imperative that the Supreme Court repair its public image after its highly criticised position on civil freedoms during the Emergency era. By adopting the social justice tenets described in the Directive Principles of State Policy, it discovered a chance for redemption. The judiciary adopted a vocabulary similar to that of the political leaders of the day in an attempt to connect itself with the populist spirit of the moment. By the early 1980s, the Court

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*Minerva Mills* Case-AIR 1980 SC 1789

Granville Austin, *Working A Democratic Constitution* (Oxford University Press, New Delhi, 13<sup>th</sup> Impression) 264



had, as Bhuvania notes, embraced a sort of "commitment," but with one important distinction: it established itself as the driving force behind an elusive social change.<sup>19</sup> The judiciary restored its relevance and reinterpreted its mission by adopting an activist approach, assuming the position of a proactive agent of revolutionary change. The sole standard by which the results of PIL<sup>20</sup> were to be evaluated was social justice.

Justice Bhagwati declared, "Let me be clear that the goal for which we are trying to use juristic activism is the realisation of social justice."<sup>21</sup> Judicial decisions were increasingly evaluated based on the observable results they created rather than their conformity to legal principles or doctrinal coherence. The Supreme Court's interpretational approach has evolved across three separate phases, according to legal expert Chintan Chandrachud, who characterises the current phase as displaying "panchayati eclecticism"<sup>22</sup> This phrase highlights a move towards a result-oriented judicial philosophy, in which the Court frequently foregoes the necessity for thorough legal argumentation in favour of rendering rulings that immediately address societal or political issues.

In order to produce conclusions that are viewed as practical and relevant, the Court has demonstrated a willingness to go beyond established precedents and the notion of stare decisis, which is the judicial practice of sticking to earlier decisions. Although this method allows the judiciary to react quickly to changing public opinion and issues, it also raises questions about the potential for inconsistent jurisprudence, the loss of doctrinal coherence, and the erosion of legal predictability. This tendency indicates the Court's expanding position as an agent of direct action rather than a passive interpreter of the law.

The Court has increasingly started judging cases based on its developing self-perception, whether as a catalyst for social development, a custodian of democratic ideals, or a defender

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Anuj Bhuvania, "Courting The People," (Public Interest Litigation In Post Emergency India CUP, New York, 1st edition ,2016 ) 25

Ibid at 115

P.N..Bhagawati, "Judicial Activism and Public Interest litigation" (23 COLUM. J. TRANSNAT'L L.1985) 566  
ChintanChandrachud,"Constitutionalinterpretation", (The Oxford Handbookof Indian Constitution, New York, 2016)<<https://www.oxfordhandbooks.com/view/10.1093/law/9780198704898.001.0001/oxfordhb-9780198704898e>>

of market economic interests. By doing this, it has changed its emphasis from giving thorough justifications for its decisions to giving priority to results that fit its intended function and identity. This unique method of producing decisions places a strong emphasis on matching rulings to the Court's own interpretation of its mission,<sup>23</sup> frequently ignoring more conventional methods of thorough reasoning.

This periodisation aligns with Professor Baxi's assessment of the "euphoria, chaos, and disenchantment" processes that are inherent in judicial activism.<sup>24</sup> During a time when other parts of government were experiencing a crisis of credibility, the Court strategically responded by taking an assertive posture to strengthen its legitimacy and moral authority. The court established itself as a major actor in tackling societal and political concerns by taking on responsibilities that were previously assigned to the legislative and government. But this change made the Court a political player by nature, vying with other government agencies for influence and authority. Like every political entity, the Court runs the risk of overstating its ability to bring about change, making it susceptible to popular disappointment when its interventions don't live up to expectations or produce noticeable outcomes.<sup>25</sup> The delicate balance the judge must strike between activity and excess is shown by this contradiction.

Despite the Court's fervour for "social justice," the phrase itself is expansive and subject to change in tandem with the times, which increases the likelihood that it will become a site of legislative and executive postponement of accountability.<sup>26</sup>

The Aadhaar case saw its initial hearing on September 23, 2013, during which the Supreme Court issued an interim order stating that Aadhaar could not be made mandatory until the final resolution of the case. Furthermore, the Court emphasized that the lack of an Aadhaar

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Ibid

Upendra Baxi, "The Avatars of Indian Judicial Activism: Exploring the Geographies of Justice" (FIFTY YEARS OF THE SUPREME COURT OF INDIA 2000) 156-165

Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in (Supreme Court of India Third World Legal Studies, 1985) 107

Anuj Bhawania, *Courting The People (Public Interest Litigation In Post-Emergency India)*, CUP, New York, 1st ed, 2016) 116

card should not lead to exclusion from essential services or benefits. However, by the time the Court convened for the final hearing in 2017, the situation had significantly evolved.<sup>27</sup> Over 90% of the population had already been enrolled in the Aadhaar scheme, effectively embedding it into the fabric of the nation's administrative and welfare systems. This raised critical questions about the practical implications of judicial intervention at such an advanced stage of implementation and the challenges of unwinding or modifying a program with such extensive reach and impact. In the Putta swamy ruling, the Supreme Court restricted several parts of the Aadhaar scheme's execution while maintaining the scheme's and the related laws' general legitimacy. The Court avoided the disruption that would have resulted from declaring the entire Aadhaar scheme invalid, according to legal scholar Gautam Bhatia, who claims that this decision reflects a type of "constitutionalism of convenience"<sup>27</sup>, especially since more than 90% of the population had already enrolled in the system.

This strategy calls into question the judiciary's ability to strike a balance between constitutional ideals and pragmatic considerations. The practical difficulties of reversing a program that is so ingrained in the lives of millions of people seem to have played a role in the Court's decision to simply address some aspects of the plan rather than declare it completely unconstitutional. Some have referred to the practice of judicial delay in this situation as "passive activism,"<sup>28</sup> when the Court postpones rulings in order to handle politically delicate matters. The Court's final decision appeared to be a reaction to the current political and administrative reality rather than only concentrating on theoretical constitutional concerns since it waited until the Aadhaar program had almost completely been implemented. This demonstrates how the political climate may be significantly impacted by the legal system's inactivity or delayed action.

## CONCLUSION

Despite coming from a variety of circumstances, the Supreme Court's activity in the modern age through Public Interest Litigation (PIL) demonstrates a number of recurrent

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See, Gautam Bhatia, "The Aadhar Judgment and the Constitution: Doctrinal inconsistencies and a Constitutionalism of Convenience" (Indian Constitutional Law And Philosophy, June 28, 2018) < <https://indconlawphil.wordpress.com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience> >  
Werner Menski, "Judicial Passivism in Public Interest" (Bangladesh Journal of Law, 2006) 11-20

characteristics. These trends demonstrate how courts are becoming more and more important as the main setting for settling disputes that have an impact on daily politics. One important finding is that judicial interventions are increasingly being used to ignite or influence public conversation, with political or social movements playing a less role in bringing about change. As seen in the triple talaq case, when the Supreme Court's decision ultimately led to the enactment of a legislative act addressing the matter, the court has occasionally been the catalyst for legislative action. In this case, the judiciary filled the apparent void in political will by acting as a stimulant for legislative and political procedures. In other instances, as those concerning Aadhaar and demonetisation, the judicialization of problems has resulted in what may be called judicial avoidance or postponement tactics.

The court has occasionally seemed to put pragmatic concerns ahead of prompt constitutional adjudication by postponing cases or interpreting its conclusions to fit current political circumstances. The Court's strategy in the triple talaq case in particular reveals an intriguing dynamic. In the face of fierce political backlash, the court mostly relied on religious texts to support its ruling.

The Court's attempt to negotiate the delicate sociopolitical environment and publicly validate its decision is evident in this line of reasoning, which draws on religious texts rather than just constitutional precepts. At the same time, it demonstrated how reluctant the legislature is to act unless the court orders it to.

All things considered, these incidents show a larger pattern in which the court fills a gap created by other institutions by mediating important political and social discussions as well as frequently starting them. The proper extent of judicial intervention and the distribution of authority among the government's organs are also called into question by this change.

Opposition to government choices has mostly taken place in the judiciary rather than through conventional political or social avenues, as demonstrated by the demonetisation and Aadhaar lawsuits. This change is indicative of a larger trend of institutional and non-institutional actors postponing political accountability. By relying on the judiciary to provide remedies, the courts were overburdened with duties that were not part of their mandate and were

essentially pulled into the world of everyday, practical politics, which is not their original function. The judiciary frequently used decision-delaying tactics in these situations, possibly to ease the conflict between political concerns and legal judgement. The goal of judicial activism was to speed up access to justice, especially by easing the standing requirements and processes in Public Interest Litigations (PILs). But this transparency had an unforeseen consequence as well: courts were used to address governance and policy issues that were previously beyond their jurisdiction. The "judicialization of politics," in which judges arbitrate more and more political and policy disagreements, is highlighted by this occurrence. This presents serious obstacles to judicial legitimacy and democracy, even though it has broad ramifications for scholarly debates. Courts run the danger of losing their impartiality as arbiters and obfuscating the distinction between the judicial and political spheres when they are used as forums for political discussions. This tendency calls for a critical assessment of the ways in which judicial involvement in political affairs influences democratic institutions and procedures.