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## Judicial Activism: Origin and Growth

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**Abstract:** Courts are the cornerstone of an ordered society. Legislature legislates or enacts law and statutes are the edict of the legislature. Courts implement those edicts through interpretation. Legislature lays down the general principles. Judiciary applies those principles in concrete cases. From the earliest Vedic ages, India has had a recorded legal history. In fact, a civil legal system might well have been in existence in the Bronze Age and in the Indus Valley civilization. India was always governed by laws as laid down in the Arthashastra way back in 400 BC and then later in 100 AD in the Manusmriti. The Vedas, Upanishads and other religious books of the Hindus, Jains and Buddhists put laws in place in ancient India, so the Indians of these times were already exposed to the idea of living under the law. The first major case of judicial activism through social action litigation was the Bihar under trials case. In 1980 it came in the form of a writ petition under Article 21 by some professions of law revealing the barbaric conditions of detention in the Agra protective Home, followed by a case against Delhi women's Home filed by a Delhi law faculty student and a social worker. Judicial activism is not an aberration. It is an essential aspect of the dynamics of a constitutional court. It is a counter-majoritarian check on democracy. Judicial activism, however, does not mean governance by the judiciary. Judicial activism must also function within the limits of the judicial process. Within those limits, it performs the function of stigmatizing, as well as legitimizing, the actions of the other bodies of government – more often legitimizing than stigmatizing.

**Keywords:** Judicial Activism, Courts, Legislature, legislates, Hindus.

## INTRODUCTION

Courts are the cornerstone of an ordered society. Legislature legislates or enacts law and statutes are the edict of the legislature. Courts implement those edicts through interpretation. Legislature lays down the general principles. Judiciary applies those principles in concrete cases. The power of statutory interpretation makes the judiciary a partner in legislative envisaged to apply the existing laws and norms. It has to interpret law as enacted by the legislature according to its intention [1]. The institutionally assigned role of judiciary is to administer justice according to law. It is not required to create law. It is not because, people want to be governed by the edict of their representatives which is called legislature having a democratic virtue. On the other hand, judiciary is non-democratic. Keeping in view the democratic requirement judiciary adheres to the doctrine of judicial self-restraint. It does not interfere with the functioning of the other two branches

of the government i.e., legislature and executive which are democratic [2].

The judiciary enjoys a special position in the sense that even though it is one of the organs of the state, it is independent even of the state. It enjoys power of judicial review i.e., a power whereby the courts can declare the act done by the legislature or the executive as ultra vires and illegal. This power of judicial review makes the judiciary a powerful institution. Once judiciary was thought as weakest of the three branches of the government; legislature lashed with the power of purse, executive with sword and judiciary merely having will. But in the course of time the weakest has emerged as strongest branch of the government. The judicial creativity is on course limited to interstitial model and to gap cases, cases of open texture, unprovided cases and leeways model [3].

<sup>1</sup> A. S. Anand, *Judicial review: "Judicial Activism: Need for Caution"*: JILI, Vol. 42, April-December 2000.

<sup>2</sup> *Ibid.*

<sup>3</sup> Ran Hirshl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, P. 243 (Harvard University Press, Cambridge, 2004).

Once the power of judicial creativity is accepted, the courts, more than often cross the limit of self imposed limitation i.e. judicial self restraint and reach in an area which is called judicial activism [4]. Judicial activism is widening in view of judicial willingness to enter into the determination of policy issues once reserved for the political branches of the government. Reasons behind such a development are three fold: (1) the proponents of judicial creativity feel that there should be their hands in the change of governmental policy; (2) the personal political ideology of the judges compels them to create new policies where the other branches of the government are slow or ineffective; (3) judges have more liberty to implement their ideologies than the other branches of the government and it gives opportunity for judicial activism. Sometimes judiciary evolves principles while playing activist role which do not apply in the cases in hands, but provided room for future application and Dr. Upendra Baxi calls them, "Juridical and Juristic activism". He cites the concept of state action evolved in *Sukhdev Singh V. Bhagatram* [ 5 ] and 'Unconstitutional conditions' evolved in *St. Xavier College Society v State of Gujarat* [6].

Judicial activism has been explained to mean 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 calling of social engineering and occasionally these decisions represent intrusions into legislative and executive matters [7].

Legal academics often describe judicial invalidation of legislative enactment as "judicial activism." Further, it is defined as "At the broadest level, judicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation." Judicial Invalidation alone, however, reveals little about the propriety of individual decisions. The mere fact that the Court has struck down more laws in recent years does not automatically render the individual decisions suspect. For example, that Congress somehow passed a bipartisan statute that established a national religion. If the Court invalidated this clearly unconstitutional law, no one would suggest that it had engaged in judicial activism. "Judicial activism" cannot be synonymous with merely exercising judicial review.

On the other hand, judicial activism is rooted in the concept that the end of any law is to arrive at justice, and if literal construction occasions injustice it defeats the very purpose for which the law was enacted. Thus, in the words of B. O. Okere, a leading jurist of Nigeria, judicial activism is 'Constitutive in theory, liberal in conception and teleological in essence [8].

According to the Black's Law Judiciary, judicial activism is a judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which is not always consistent with the restraint expected of appellate judges [9].

John W. Dean has argued that the term 'Judicial Activism' has not been defined properly through it 'has become an appellation of choice in the current debate about the role of judges and justices in American government. Most prominently, right now, it's used by Democrats to attack the President's judicial nominees, and by Republicans to attack judges who reach results of which they do not approve. He referred to this debate on the floor of the US House of Representatives and the Senate. Explaining his opposition to President's Bush's judicial nominees Priscilla Owen, Janice Rogers Brown, William Pryor and William Myers, Senator Jon Corzine said : "I believe strongly that we need to oppose these nominations.....not because of their personal character – but because, in my view, they have operated outside of the mainstream and endeavoured, through judicial activism, to inappropriately alter the law. On the other hand, senator Orrin Hatch denying the charge of judicial activism against them defended these nominees and said that this charge should be leveled against the type of judges that Democrats support: "The American people know judicial activism when they see it. Just last week a federal judge in Nebraska invalidated a state constitutional amendment preserving traditional marriage in that state. If that opinion is upheld, that will bind every state in the Union under the full faith and credit clause. Talk about activism.

John W. Dean comments that Corzine does not articulate what exactly he means by judicial activism nor does Hatch explain why he considers this particulars decision an example of judicial activism. However, in my opinion, these legislation are quite clear about their concept of judicial activism in which judges go beyond the textual meaning of the statute and thus defile and deface the law [10].

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<sup>4</sup> Upendra Baxi, *Judicial Activism in India*, P. 7 (Oxford University Press, New Delhi, 2003).

<sup>5</sup> AIR 1975 SC 1331.

<sup>6</sup> 1975 (1) SCR 173: AIR 1974 SC 1389.

<sup>7</sup> Supra Note 4.

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<sup>8</sup> Sudhanshu Ranjan, *Justice, Judocracy and Democracy in India*, P. 12 (Routledge Taylor & Francis Group, New Delhi, 2012).

<sup>9</sup> *Id.* at 13.

<sup>10</sup> *Ibid.*

Judicial activism may be of two kinds – conservative judicial activism and liberal/ progressive judicial activism. In U.S.A conservative judicial activism was prevalent during the New Deal period of 1930 witnessed the incidents of thwarting the progressive New Deal Liberal Labour enactments by the judiciary which caused tension between the Supreme Court and the President. A talk of the court packing had started but which in time saved the nine. In India conservative judicial activism prevailed during 1905 and 1960. In *State of West Bengal V. Bela Banerji* [11], the Supreme Court of India declared Bengal Land Development and Planning Act, 1948 as unconstitutional for not providing the just and equivalent compensation. The Parliament made the adequacy of compensation a non-justifiable issue by the Constitution 4<sup>th</sup> Amendment Act, 1955. Still the court continued the concept of just and equivalent compensation in *P. Vajra Velu V. Special Deputy Controller* [12].

The progressive activism may be seen in the decisions of the American Supreme Court rendered during 1950, 1960 and 1970. Thus the Supreme Court declared the doctrine of equal but separate ultra vires, the concept of equality by declaring 'separate can never be equal' in *Brown V. Board of Education* [13]. It applied doctrine of one man one vote in *Reynold V. Sims* [14] In India Judicial activism is seen from ancient.

### Historical Background

From the earliest Vedic ages, India has had a recorded legal history. In fact, a civil legal system might well have been in existence in the Bronze Age and in the Indus Valley civilization. India was always governed by laws as laid down in the Arthashastra way back in 400 BC and then later in 100 AD in the Manusmriti. The Vedas, Upanishads and other religious books of the Hindus, Jains and Buddhists put laws in place in ancient India, so the Indians of these times were already exposed to the idea of living under the law. A salient feature of ancient Indian law in these times was that it was secular, though it varied from kingdom to kingdom. Many leading dynasties belonging to ancient India had court systems to deal with civil and criminal cases. The Maurya dynasty and the Mughals are two excellent examples of this, with the latter paving the way for what we know today as common law. Centuries later, when the Muslims invaded India, Islamic law became applicable to the Muslims living here. But when India came under British rule, this practice was replaced by common law.

The concept of 'Judicial Legislation' emergence can be traced back to 1893, when Justice Mahmood of Allahabad High Court delivered a dissenting judgement. It was a case of an undertrial who could not afford to engage a lawyer. So the question was whether the court could decide his case by merely looking his papers. Justice Mahmood held that:

*"The pre-condition of the case being "heard" could be fulfilled only when somebody speaks. As to its meaning Judicial Activism is not a distinctly separate concept from usual judicial activities. The word 'activism' means 'being active', 'doing things with decision' and activist is the one who favours intensified activities."*

Justice Krishna Iyer also observed that every judge is an activist either on the forward gear or on the reverse. Judicial Policy making can be either an activity in support of legislative and executive policy choices or in opposition to them. But the latter one is usually returned to as judicial activism. The essence of true judicial activism is the underling of decision which is in tune with the temper and tempo of the times. Activism in judicial policy making furthers the cause of social change or articulates concepts such as liberty, equality or justice. It has to be an arm of the social revolution. An activist judge activates the legal mechanism and makes it play a vital role in socio-economic process.

In India, judicial activism has become a subject of controversy. Recent and past attempts to hinder the power of the courts, as well as access to the courts, included methods of disciplines the judiciary. 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 [15]. From this point onwards, the history of India's modern judicial system begins. The Indian judicial system was derived from the British legal system which they established in India in the middle of the 19<sup>th</sup> century. It was based on a hybrid judicial system which comprised precedents, customs and legislative law, all of which were valid before the law. Since Indian independence, the Constitution of India has come to be known as its most supreme legal document.

When India attained independence, its Parliament was the venue where the Constitution of India was written by none other than Dr. B. R. Ambedkar for a new and an independent and optimistic country. The Indian Constitution came into effect on January 26, 1950 and is regarded as the world's longest

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<sup>11</sup> AIR 1954 SC 170.

<sup>12</sup> AIR 1965 SC 1017.

<sup>13</sup> 347 U.S. 483 (1954).

<sup>14</sup> 377 U.S. 533 (1964).

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<sup>15</sup> A. M. Ahmadi, *Judicial Process: Social Legitimacy and Institutional Viability*, SCCJ, Vol. 1, PP. 1-10 (1996).

Constitution. The Indian Bar played its own role in India's independence movement, with Pandit Jawaharlal Nehru and Mahatma Gandhi, themselves being lawyers beyond compare. Their deep insight and knowledge into the law and its relationship with society gave them the focus to write the Constitution of a new nation in the widest scope. The Constitution of India is the foundation stone of all matters pertaining to judicial, executive and legislative. Though wide in its scope, it is sensitive to the needs of the people. It put an end to all colonial interests in India and turned its focus on to public welfare. The Constitution empowers the general public, including the weaker sections of society—through a system of rights and duties, through the channel of judicial interpretation.

The Supreme Court of India began as a positivist court and strictly followed the traditions of the British Court. In *A. K. Gopalan V. State of Madras* [16], the court declined an invitation made on behalf of the petitioner, Mr. Gopalan, a communist leader who had been detained under a law of preventive detention, to read the provisions of the constitution liberally so as to give effect to the spirit of the constitution rather than remaining in the confines of its text. The court gave a narrow construction to works such as 'personal liberty' and 'procedure established by legitimated law' contained in Article 21 of the constitution. In matters of personal liberty as well as regulation of the economy, the court observed judicial restraint and legitimated the actions of the government. These were the days of the welfare state and the court was supposed to legitimize the expanded sphere of the state and its power. The court and parliament clashed only on the scope of the right to property. Parliament wanted to usher in a radical programme of changes in property relations and the court had adopted the policy of interpreting the right to property expansively so as to impede such program. Since the constitution allowed parliament to amend the constitution, a decision of the court could be circumvented. Since the constitution could be amended by a majority vote of two-third of the members present and voting and an absolute majority of the total membership in each house of parliament and the ruling party could easily muster such majority, the court decisions could not obstruct the property rights reforms. While on the topic of the right to property the court was humbled. It had started interpreting other provisions of the constitution more meaningfully so as to expand the rights of the people. In 1962 in *Sakal Newspapers (Private) Limited* [17] India, it held that a which prescribed the number of pages, price and space for advertisement of a newspaper violated the freedom of the press, which was included in the freedom of speech guaranteed by Article 19(1)(a) of the constitution. The

court held that the unlike any other business which could be regulated in the interest of the general public as provided by clause (6) of Article 19, the press could be restricted only on the specific grounds given in clause (2) of that Article, such as the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation, or incitement to an offence. The court thus inferred the doctrine of preferred freedoms from the subtle distinction between clauses (2) and (6) of the Article 19. Similarly, the court held that affirmative action programs in favour of discriminated classes of people enjoined by clause (4) of Article 15 had to complement, and not contradict, the general provision contained in Article 15(1), which forbade discrimination on grounds such as religion, race, caste, sex or place of birth. Reserved seats in educational institutions or jobs in government service could be reserved for discriminated classes without elimination the right to equality. Therefore, discriminated status should not be determined on the basis of caste alone, though it could be one of the factors for such a determination, and the total number of seats or jobs reserved should not exceed more than half of the total number of seats or jobs available. This was judicial activism during the sixties.

During the late sixties, the court seems to have become bolder, and it soon challenged parliament's power to amend the constitution. This brought about a major confrontation between the court and parliament. In 1967, the court, by a thin majority of 65, held in *Golaknath V. Punjab* [18] that parliament could not amend the constitution to take away or abridge fundamental rights. This decision was severely criticized. Parliament retaliated by passing the twenty-fourth amendment which explicitly stated that parliament was not limited in its power of constitutional amendment. When that amendment was challenged, the court, sitting in its largest strength of 13 judges held in *Kesavanand Bharati V. State of Kerala* [19] that although parliament could amend every provision of the constitution, it could not alter the basic structure of the constitution. This decision seemed most unsustainable and contrary to the theory of judicial review. It seemed to wrestle supremacy to a non-elected court and against the elected parliament. However, during the 1975 emergency, the ruling party passed such draconian amendments with the help of its brute majority and absence of any political opposition that the limitation upon parliament's power of constitution amendment acquired legitimacy. The Supreme Court struck down in *Indira Gandhi V. Raj Narain* [20] a constitutional amendment which sought to validate the election of the

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<sup>16</sup> AIR 1950 SC 27.

<sup>17</sup> AIR 1962 SC 305.

<sup>18</sup> AIR 1967 SC 1643.

<sup>19</sup> AIR 1973 SC 1461.

<sup>20</sup> AIR 1975 SC 2299.

Prime Minister, earlier set aside by the Allahabad High Court on some technical ground deemed destructive of the basic structure of the constitution. Could the power of constitutional amendment, which is legislative in nature, be used for settling a dispute between two private parties regarding an election? This was a manifest example of the possibility of abuse of such power if given without any limits. That decision conferred legitimacy on the basic structure doctrine. That doctrine is posited on the hypothesis that the power of constitutional amendment could not be equal to the power of making a constitution. The power of constitutional amendment could not be used for repealing the entire constitution. The identity of the original constitution must remain in tact. This doctrine imposes a restriction on the power of the majority and is in that sense a counter major check on democracy in the interest of democracy. That power made the Indian Supreme Court that most powerful apex court in the world. It also made it a political institution because the ultimate determination of a basic structure was bound to be a political judgment.

#### **Causes for the emergence of the Judicial Activism**

The following trends were the cause for the emergence of judicial activism expansion of rights of hearing on the administrative process, excessive delegation without limitation expansion of judicial review over administration, promotion of open government, indiscriminate exercise of contempt power, exercise of jurisdiction when non-exist; over extending the standard Kites of interpretation in its search to achieve economic, social and educational objectives; and passing of orders which are unmarkable [21].

The first major case of judicial activism through social action litigation was the Bihar under trials case. In 1980 it came in the form of a writ petition under Article 21 by some professions of law revealing the barbaric conditions of detention in the Agra protective Home, followed by a case against Delhi women's Home filed by a Delhi law faculty student and a social worker. Then three journalists filed a petition for the prohibition of the prostitution trade in which women were bought and sold as cattle. Taking cognizance of custody death Supreme Court ordered the police not too hard with a man arrested purely on suspicion not to take a woman to the police station after dusk. High Court judges visited the prisons to check the living conditions of prisoners [22].

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<sup>21</sup> Available at: <http://www.preservearticles.com/2011100314419/essay-s-on-the-meaning-causes-and-evaluation-of-judicial-activism-in-india.html> (Visited on November 17, 2013).

<sup>22</sup> Ibid.

In the year 1993 in just a month the apex court proclaimed judgement protecting the rights of innocents held in Hazratbal Mosque in Srinagar defining the constitutional powers of the chief election commissioner, threatening multi-crore rupees industries with closure if they continued to pollute the Ganga and Taj Mahal and brought all government and semi government bodies under the Purview of the consumer protection Act. In a 1994, judgement it asked the chief of Army staff to pay Rs. 6,00,000 to the widow and two children of an army officer who died due to the callousness of the authorities concerned some 16 years before. The controversial 27% reservation of jobs in Central Government and public sector undertakings was referred to the Supreme Court by the Rao government. The court decision favoured castes and class but the enemy lawyers' were exempted from this reservation. Similarly the court put a curb as the operation of capitation fee in colleges in Karnataka. The Supreme Court giving directions to the CBI and summoning the head of the CBI to report on the hawala case reveals the breakdown of other machineries of the government. The court interference with the CBI working became inevitable in the wake of the factices of delay and technical evasion that was undertaken by the investigative agencies. As justice A.M. Ahmadi had opined "Judicial activism has been more or less thrust upon Indian judiciary." The reluctance of the legislature and the executive to take hard unpleasant decisions has compelled the judiciary to become active. When a sensitive issue remains unattended to an unresolved people become restive and seeks the courts to come across a solution. But this era of judicial activism is a temporary one. In our democracy the legislative, the executive the judiciary and the media have their mutually reinforcing roles which cannot be urged by a single authority

#### **Salient features of the Modern Indian judicial system**

The Indian judicial system is one the world's oldest legal systems. It was handed down to us by the British after over 200 years of rule over this country. Evidence of their bonds with India is seen in the provisions of our judicial system, which is common with the English legal system. The framework of our legal system was laid down by the fathers of the Indian Constitution from which the judicial system derives its powers [23]. Thanks to the common law system that prevailed in India in British India, this country now has an organic law. This has been further refined for Indian needs by means of legislative action and judicial verdicts. Since the Indian legal system moved in the direction of social justice, it soon began to mirror the social changes with the common law system. The

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<sup>23</sup> Available at: <http://www.ptinews.com/news/-dylsty> (Visited on December 17, 2013)



Indian judicial system has one integrated court system to deliver to administer state and union laws. At the top of the court structure in India is the Supreme Court, followed by the State High Courts that may serve one or more states. Below these High Courts are subordinate courts that comprise the District Courts that mete out justice at the district level and other courts. The Indian judicial system has been patterned on the adversarial system of conducting proceedings in court rather than the inquisitorial system. This adversarial system works in a way by which both sides in a case presents its arguments to an unbiased judge who then issues an order or verdict based on the merits of the case. Another important feature of our judicial system is that it gives the Supreme Court and the High Courts the power of judicial review, as also in the American judicial system. This means that the actions of the executive and legislature are subject to the examination of the judiciary who can nullify their actions if considered unconstitutional. So the laws framed by the legislature and the rules enacted by the executive have to comply with the Indian Constitution [24].

#### **Judicial Activism as a Philosophical Approach**

The expression 'Judicial activism' is often used in contrast to another expression 'judicial restraint'. As and ideology of the judicial process, 'judicial activism' implies the use of the court as an apparatus for intervention over the decision of policymakers through precedent in case law. In doing so, the court often creates law and seeks to play a greater part in the governance of a country through allowing their personal views about public policy to aid them in their decisions. The role of judges in such cases goes beyond the traditional interpretative role that has been assigned to them, and shifts to a model by which judges seek to make law, encroaching on the separation of powers doctrine, which forms the bedrock of the Indian and United States Constitutional system. When a court strikes down a law in an activist manner, it places primacy upon its interpretation of constitutional text, sidelining the opinion of the legislature or executive.

Not surprisingly, judicial activism has been extremely controversial from its very beginning. Opinions are divided as to whether an unelected body should exercise such power, and whether in doing so has the right to supersede an elected legislature. The extent to which the use of the term itself provokes such dislike from its detractors can be seen by the immediate branding of an opinion one dislikes as an example of judicial activism. In supporters, on the contrary, argue

that being an unelected body may give the court greater wherewithal in making decisions with regard to the enunciation of individual rights which the legislature for some reason may be unable or unwilling to do [25].

This may be explained by a case of the Irish Supreme Court, *McGee V. the Attorney General and Revenue Commissioner* [26] a case in which the validity of an archaic Irish law against the sale and import of contraceptives in a strongly catholic country was challenged.

The facts of the case were that an Irish lady Mrs. Mary McGee, had four children and her doctors advised her that it was dangerous to have another pregnancy. She imported contraceptive jelly from England, but when that landed on the Irish coast it was seized by the Irish Customs Authorities in view of the Irish law against the import and sale of contraceptives. The problem was that no Irish politician dared to bring a bill to repeal the outdated and archaic law against the import and sale of contraceptives out of fear that if he did so the Catholic Church would use its enormous influence to destroy the political career of the politician.

Before the modern era almost every woman had 15 to 20 children because there were no contraceptives then. Of course most of these children died at childbirth or at a tender age because medical science was not advanced at that time. In modern times most women prefer to have one or two children. That is because on each child a lot of time and money has to be invested. Hence the right of a woman to have sex without having pregnancy is a basic norm, without which modern society cannot function. If a norm is required by a society for its smooth functioning at a particular stage of its historical development, and society cannot function without that norm, then that norm is bound to emerge in some way or the other. Normally legal norms emerge out of the legislative process. But if the legislature is paralyzed, or if for some reason it is unable to create that legal norm, then that norm will emerge out of the judicial process or some other process, but emerge it will because society cannot function without it.

In *Mary McGee's Case* the Irish SC struck down Section 17 of the Act, which outlawed the sale and import of contraceptives, as being violative of Article 40.3 of the Irish Constitution which said that the state is bound to protect the personal rights of the citizen, in particular his life, person, good name and

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<sup>24</sup> MEST Education, *A Brief History and Origin of the Indian Judicial System*, Available At: <http://mesteducation.com/a-brief-history-and-origin-of-the-indian-judicial-system/> (Visited on November 23, 2013).

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<sup>25</sup> Available at: <http://justicekatju.blogspot.in/2013/10/separation-of-powers-judicial-review.html> (Visited on December 01, 2013)

<sup>26</sup> 1974, IR 284 at 298.

property. There was no mention of any rights to privacy in Article 40.3, but by judicial interpretation it was accepted as an unremunerated right included in personal rights.

Other examples of judicial activism are the decisions by the U. S. Supreme Court in *Brown V. Board of Education* [27] *Miranda V. Arizona* [28] and *Roe V. Wade* [29] and of the Indian Supreme Court in *Maneka Gandhi Case* [30] as well as its decisions relating to Article 21 of the Indian Constitution, etc.

## CONCLUSION

Judicial activism is not an aberration. It is an essential aspect of the dynamics of a constitutional court. It is a counter-majoritarian check on democracy. Judicial activism, however, does not mean governance by the judiciary. Judicial activism must also function within the limits of the judicial process. Within those limits, it performs the function of stigmatizing, as well as legitimizing, the actions of the other bodies of government – more often legitimizing than stigmatizing. The word remain the same, but they acquire new meaning as the experience of a nation unfolds and the Supreme Court gives continuity of life and expression to the open-textured expression in the constitution, to keep the constitution abreast of the times. The judiciary is the weakest body of the state. It becomes strong only when people repose faith in it. Such faith constitutes the legitimacy strive to sustain their legitimacy. Courts do not have to bow to public pressure, but rather they should stand firm against public pressure. What sustains legitimacy of judicial activism is not its submission to populism, but its capacity to withstand such pressure without sacrificing impartiality and objectivity. Courts must not only be fair, they must appear to be fair. Such inarticulate and diffused consensus about the impartiality and integrity of the judiciary is the source of the court's legitimacy. In such way, judicial activism is most welcome in modern creative judicial world scenario, but we have always to remember caution of Dr. A. S. Anand, the former Chief Justice of India; "Activism is justified but not adventurism." The legitimacy and acceptability to judicial activism is most likely where the other branches of the government are inactive in responding to the current needs of the hour. Pointing out the pressing need of central and state legislature laying down appropriate law regulating educational institutions of different kinds R. C. Lahoti C.J. Speaking for the seven judge unanimous court in *P.A.Inamdar v. State of Maharashtra*, (2005) warned that earlier the union of India and the State Government act, the better it would

be. The learned chief Justice made clear that the judicial wing of the state is called upon to act when the other two wings, the legislature and the executive do not act. Indian judiciary presents a unique concept to the world through activism. It is the concept of Curative Petition which was evolved by the constitution Bench of the Supreme Court in *Rupa Ashok Hurra V. Ashok Hurra* (2002). The Court ruled that consideration under inherent powers of Supreme Court is possible through a curative petition even after the dismissal of review petition, to prevent abuse of court's process and to cure a grave miscarriage of justice. It would provide relief *ex debito justitiae*, if the petitioner establishes (i) violation of principles of natural justice and (ii) non-disclosure on the part of the judge of his connection with the subject matter or parties giving scope for apprehension of bias and that the judgment adversely affected the petitioner. Thus, judicial activism is the need of the hour, providing justice to the ordinary citizens in the face of draconian and outdated laws.

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<sup>27</sup> Supra Note 13.

<sup>28</sup> 384 US 436 (1966).

<sup>29</sup> 410 US 113 (1973).

<sup>30</sup> AIR 1978 SC 597.