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JUDICIAL ACTIVISM VS JUDICIAL RESTRAINT

~Manvi

In the 19th century, Thomas Dunphy and Thomas J. Cummins published a compilation named 'Remarkable Trials of All Countries' featuring detailed narratives of famous, precedent-setting criminal and civil trials paired with historical background, courtroom proceedings, and arguments for both defense and prosecuting counsel. One of the cases was from a small island nation of Malta. One morning, Judge Cambro was looking out of the window when he happened to witness a murder. The victim was being chased by the assailant when he was brutally stabbed. The assailant soon fled the scene noticing a constable, leaving a knife stuck inside the victim. A passing baker saw the victim and tried to help him, but by this time constable too had arrived at the scene. The baker was arrested as he was found with a blood-stained knife in his hand. The baker was put on trial, and Judge Cambro, who happened to have witnessed the whole scene, was the Judge on the case due to the unavailability of other judges. He convicted the baker on the basis of circumstantial evidence, i.e., the knife and the constable's testimony. Regardless of knowing the truth about the murder, he found the baker guilty and sentenced him to death. Later, after his execution by rope, the truth surfaced and reached people who demanded Judge Cambro's resignation, as despite knowing the real truth, he convicted and sentenced an innocent man to death.¹

Fair enough, right? As the Universal Principle stated by Benjamin Franklin is that it's better for 100 guilty people to escape than for one innocent person to suffer.² So their demand is righteous as Judge Cambro was guilty of causing the death of an innocent person. But many Jurists came into his favour and even went to the extent of calling him an Ideal Judge. As according to these Jurists, a judge must follow the law as enacted by the legislature, without being influenced by his personal beliefs³.

¹ Thomas Dunphy & Thomas J. Cummins, *Remarkable Trials of All Countries: Particularly of the United States, Great Britain, Ireland, and France: With Notes and Speeches of Counsel* 453 (Diossy 1870).

² Benjamin Franklin, Letter to Benjamin Vaughan (Mar. 14, 1785), in *The Writings of Benjamin Franklin* 293 (Albert Henry Smyth ed., 1907).

³ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 3–15 (Amy Gutmann ed., Princeton Univ. Press 1997).

This has been the view until the recent times, i.e. Laws formulated by the legislature to be applied in *as it is* sense. Judges should not bring their personal understandings and interpretations when coming to a decision. But what about when a law fails in its application or is being correctly interpreted by the executive or when lawmakers bring a law that infringes on people's fundamental rights or when executive or legislature tries to misuse their authority?

In these scenarios, Judicial Intervention becomes necessary to protect people's rights and maintain balance among the branches of state and here Judicial review comes into picture.

JUDICIAL REVIEW

One of the key mechanisms through which the Judiciary can ensure balance of powers and ensure justice to all is Judicial Review. Though the term is not explicitly mentioned in the Constitution of India but Judiciary gains this power from various articles like 13, 32, 136, 226, 227, 37⁴. But the concept of Judicial Review originally came from the landmark case of *Marbury Vs Madison* in 1803, which asserted Judiciary with power to invalidate unconstitutional laws⁵. It established that Federal laws that are in conflict with the U.S. constitution are invalid.⁶ However, the scope of Judicial review is narrower in India than in U.S. as U.S. follows "Due process of law," which implies broader power to review laws both in substantive and procedural manner but India on the other hand follows "Procedure established by Law" where laws can be reviewed only on substantive grounds i.e. whether the law is Constitutional or not.⁷

Thus U.S. follows a more proactive role in reviewing the laws, it also helped in expanding the role of Judges in Judiciary. This expanding role was termed as Judicial Activism whereas countries who follow the law in *as it is* manner are following Judicial Restraint i.e. they limit the power of Judiciary and prioritize government elected by people.⁸

JUDICIAL ACTIVISM

The term was coined by American Historian Arthur M. Schlesinger Jr in 1947 in an article in *Fortune*.⁹ Judicial Activism can be exercised in two ways, either court is striking down an executive or legislative action or supporting it, thus abandoning its role as impartial and basically "legislating from the bench", or if it is resolving a legal issue arisen during a proceeding of the case.¹⁰

⁴ INDIA CONST. arts. 13, 32, 136, 226, 227, 372.

⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁷ *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248.

⁸ See generally Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 3–7 (Harvard Univ. Press 1999).

⁹ Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, *Fortune*, Jan. 1947, at 73, 74–75. Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, *Fortune*, Jan. 1947, at 73, 74–75.

Black's Law Dictionary defines Judicial Activism as: “ a philosophy of decision making where by judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find the constitutional violations and are willing to ignore precedent.”¹¹

DEVELOPMENT IN INDIA OF JUDICIAL ACTIVISM

The history of Judicial Activism in India reflects the evolving relationship between the three organs of the Government. The Highest Court of India , Supreme court has taken a more active and aggressive role in the interpretation of laws in the favour of citizen's rights. In the pre-independence era this became a crucial mechanism in safeguarding the rights and helped in laying basis for constitutional governance layed through various cases. Like the Ilbert Bill Controversy where ,the British introduced the Ilbert bill in 1883, which allowed Indian judges to preside over cases which involved European defendants. However, the bill was heavily criticized by the Europeans settled in India as this step could seen as a loss of their superior position in society. To their criticism , even Indian Judges like Justice Romesh Chunder Mitter , expressed their dissent ,they advocated for equality before law hereby challenged the discriminatory practice of colonial administration.¹²

In post Independent India, Judicial Activism has gained much more importance. This spirit of active role of Judiciary is enshrined in the Constitution of India. Article 13 when read with Article 32 and 226 of the Indian constitution¹³ gives authority to the higher court to declare any action void if it's not in accordance with the Constitution. Article 32 further gives right to an individual to directly move to Supreme court if state encroached upon their fundamental right. This particular Article has been expanded with time that it can be moved even against private entities. Article 226 gives similar power to move to High court. In various cases Supreme court itself has came forward and took an active role in the implementation and interpretation of the laws and constitution of India. Further Article 142 empowers the Supreme court to pass orders for necessary for “complete justice”. This was acknowledged by *Kalyan Chandra Sarkar Vs Rajesh Ranjan* (2005)¹⁴. The The most notable and one of the initial judgement which expanded the scope of Judicial Activism is *Kesavananda Bharti vs State of Kerala* (1973)¹⁵. Through this judgement court held that power given in constitution to amend itself does not mean to take change the inherent spirit of the constitution i.e amendment should not mean to replace the fundamental features of constitution like rule of law, equality, democracy, federalism and secularism. The supreme court further added “It does not include the power to alter the basic structure, or framework of the constitution so as

¹⁰ See generally Keenan D. Kmiec, The Origin and Current Meanings of “Judicial Activism,” 92 Calif. L. Rev. 1441, 1446–52 (2004).

¹¹ *Black's Law Dictionary* (12th ed. 2024).

¹² See generally Elizabeth Kolsky, Codification and the Rule of Colonial Difference: Criminal Procedure in British India, 23 Law & Hist. Rev. 631, 632–37 (2005).

¹³ INDIA CONST. arts. 13, 14, 19, 21, 32, 142, 22

¹⁴ *Kalyan Chandra Sarkar v. Rajesh Ranjan*, (2005) 3 S.C.C. 284

¹⁵ *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C. 225

to change its identity". This judgement basically gave the "Doctrine of Basic Structure" which became the most important precedent looked into whenever the question of an amendment infringing on the rights of the citizens comes to light. Moreover during the period of Emergency (1975-77), the Judiciary took over a passive role which can be seen through cases like *ADM Jabalpur Vs Shivkant Shukla (1976)*,¹⁶ which raised the question of credibility in people's minds. In the post emergency period, Supreme Court under the leadership of Justice P.N. Bhagwati and Justice V.R. Krishna Iyer, started taking a more active role while interpreting the Constitution like in the case *Hussainara Khatoon Vs State of Bihar (1979)*¹⁷, where SC addressed the condition of undertrial prisoners, especially the ones who have been living there with no trial for years. This case marked the beginning of Public Interest Litigation (PIL) in India which became a direct instrument of activism as because of it the third parties or who have no relation to the case can approach the court on other's behalf especially the one's who are underprivileged and find it difficult to represent themselves. One of the notable example of this is *Vishaka & Ors. Vs State of Rajasthan & Ors. (1997)*¹⁸, where provided for formal guidelines for the employer on how to handle complaints revolving around Sexual harassment. This was a PIL filed by Naina Kapur and her NGO Sakshi to enforce fundamental rights of working women under Article 14, 19 and 21, after a Social Worker was gang raped for stopping child marriage in Rajasthan.

Though a step ahead to make Justice accessible to all, at times Courts have been accused of overstepping their role, called as Judicial Overreach. This can be seen in the 2G Spectrum case (2012) where court cancelled 122 telecom licences and gave policy decisions.¹⁹ This explains that why many historic Jurists were in favour of passive role judiciary that could be termed as Judicial Restraint.

JUDICIAL RESTRAINT

The key principle behind Judicial Restraint is Judges should not intervene in policy or politically contentious issues unless absolutely necessary. This can be seen as following the substantial and procedural way to the exercise of Judicial Review. It urges judges to refrain from deciding the constitutional cases unless it's necessary to resolve an ongoing dispute and let the legislature handle the matter. It basically advises Judges to refrain from interfering in the democratic process. It encourages Judges to merely interpret the law and not intervene in the policy making. This restraint becomes an important mechanism in ensuring a clear separation of powers among the three organs of the Government. One of the notable cases under this could be *S.R. Bommai Vs Union Of India (1994)*²⁰, where the Supreme court held that exercise of power under Article 356 of the Constitution was a political question, which should be left on legislature to make a decision on it. Another thing which it prioritizes is a

¹⁶ *A.D.M. Jabalpur v. Shivkant Shukla*, (1976) 2 S.C.C. 521

¹⁷ *Hussainara Khatoon (I) v. Home Secretary, State of Bihar*, (1980) 1 S.C.C. 81

¹⁸ *Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 241.

¹⁹ *Centre for Pub. Interest Litig. v. Union of India*, (2012) 3 S.C.C. 1.

²⁰ *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1.

conservative approach to the law i.e. Judges to interpret the law in *as it is* manner without creating any new policies.

Judicial Restraint insists on the principle of Stare-decisis, where Judges uphold the past judgements called Precedents. This help Judges to refrain their personal bias or interpretations and follow the previously established rule or interpretation while giving a decision.

Another way it can be manifested in Judiciary is by preserving the original intent of the Constitution makers while interpreting any case. Intent of the legislature while constructing a law should be kept in priority over their own belief whole providing a decision.

Scholarly Jurist often confer with the idea of restraint, as they believe Judges should act in their limits to resolving dispute and not let those decisions be interfered by personal opinions. As it can be seen in the above example of Malta, where Judge Cambro was applauded for not letting his personal experience hinder the ongoing trial. However many contemporary Judges disagree as they view the restraint as direct affect to rights of the individuals. As this restraint could be a source of injustice towards the individuals whose rights are being affected by t6he laws passed by the legislature.

JUDICIAL ACTIVISM VS JUDICIAL RESTRAINT

These are basically two contrasting mindsets judges bring to the constitution. Judges who lean towards activism keep up with how society changes over time , whereas judges who lean towards restraint stick closer to what text says, past judgements, and not intereven in the political process.

But how do we decide on how much a judge should intervene. In some scenarios it's important tonlean in while in others it's important to let the system sort itself.

1. Two ways reading the same document- An activist Judge looks at old constitutional ideas and asks how they apply to problems happening right now, problems that nobody could have predicted decades ago. A restraint judge takes a safer road and leave the tough policy decisions to the people voters actually picked.
2. Giving the Legislature the Benefit of Doubt- Restraint basically means starting out by trusting that kaw is fine unless there's a pretty obvious problem with it. The thinking here is simple- lawmakers were elected to make these calls, so judges shouldn't swoop in and replace their choice with personal opinions.
3. Knowing when to step in - Activist judges are quick in getting involved once it looks like someone's rights are being ignored, or when other parts of government drop the ball on something serious. This tends to come up around things like personal freedoms, discrimination, and other hot-button social issues.
4. Staying in your lane - Restraint is all about balance in courts, lawmakers, and all the executive branch each doing their own job without interfering with other's. A restrained judge tries not to wander into territory that isn't theirs. Activism is the opposite, if rights are truly at risk getting involved becomes important.

5. Sticking to the Original Idea vs Moving with times- Restraint usually means caring a lot about what the people who wrote the constitution originally meant and being careful not to stretch that meaning too far. Activism on the other hand, as the new problems keep popping up that nobody saw coming, so the thinking needs room to grow instead of staying still.
6. Changing your mind on old rulings- Judges with activist mindset are usually more open to going back and fixing decisions that they think got wrong in the first time. That's not new, as courts revisit old rulings all the time and in a way that's how the system remains in check.

CONCLUSION

The question that which is better role for Judiciary to play could be simply none i.e there is no inherent nature that one is good and other is bad. The concept of Judicial Activism and Restraint merely are mechanisms that help define the role of Judge while giving a decision. At times it might be necessary for the Judges to go beyond the legislative explanation of the law and interpret it in broader sense but also there might be scenarios where it may be required for the Judges to go with the narrower perspective and limit itself in the interpretation to not go beyond its authority and interfere with the legislative decision. Both Activism as well Restraint has their shortcomings but that does not mean that the concepts are flawed. As we have seen that Judicial Activism since the pre independence times has played an important role in establishing constitutional governance and ensuring that state does not infringe the rights of citizens. Whereas , Judicial Restraint helps maintain a balance of power as encouraging judges to merely interpret the law and to not intervene in the policy making which is the domain of the legislature.