CHAPTER 2

LITERATURE REVIEW

The Origin and Current Meanings of "Judicial Activism"

Keenan D.Kmiec, J.D., School of Law, University of California explains the Origin and Current Meanings of Judicial Activism in the *California Law Review.*[10]

Early History of the Term "Judicial Activism."

- In Search of the Earliest Use. The idea of judicial activism has been around far longer than the term. Before the twentieth century, legal scholars squared off over the concept of judicial legislation, that is, judges making positive law. In the first half of twentieth century, a flood of scholarship discussed the merits of judicial legislation, and prominent scholars took positions on either side of the debate. Criticism of constitutional judicial legislation was particularly vehement during this era but contemporaneous literature does not mention "judicial activism" by name.
- First Recorded Use: Arthur Schlesinger in Fortune Magazine. The first use of the term occurred in a popular magazine, in an article meant for a general audience written by a non-lawyer. Arthur Schlesinger Jr. introduced the term "judicial activism" to the public in a *Fortune* magazine article in January 1947.Schlesinger's article profiled all nine Supreme Court justices on the Court at that time and explained the alliances and divisions among them. The article characterised four justices as "Judicial Activists", three as the "Champions of Self Restraint" and the reminder two justices comprised a middle group.
- Early Usage of "Judicial Activism". Scholars often label the overturning of democratically enacted statutes as "judicial activism". However, in its early days, the term "judicial activist" sometimes had a positive connotation, much more akin

[10] California Law Review. Vol 92, No 05, Oct, 2004. P 1441-1478.

to "civil rights activist" than "judge misusing authority." By the mid-1950s, the term had taken on a generally negative connotation, even if its specific meaning was hard to pin down.

Definitions of Judicial Activism

- Striking Down Arguably Constitutional Actions of Other Branches. At the broadest level, judicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation.
- Ignoring Precedent. Judges admonish their colleagues for judicial activism when they contravene precedent. When using "judicial activism" to describe the process of ignoring precedent, two important distinctions must be made. One distinction depends on whether the precedent is vertical or horizontal and the other depends on whether the precedent is a matter of constitutional, statutory, or common law.
    - Vertical versus Horizontal Precedent. The rule that lower courts should abide by controlling precedent, is called "vertical precedent". The act of disregarding vertical precedent qualifies as one kind of judicial activism. "Horizontal precedent", the doctrine requiring a court "to follow its own prior decisions in similar cases," is a more complicated and debatable matter. Many judges have deemed activist the failure to adhere to horizontal precedent. Yet, academics argue that it is sometimes proper to disregard horizontal precedent.
    - Constitutional versus Statutory versus Common Law Precedents. Charges of judicial activism as disregarding precedent must be considered in light of the fact that courts treat different kinds of law differently. The Supreme Court affords deference to common law precedents because it feels that lower courts are in a better position to change the law. Constitutional law precedents are entitled to less deference while statutory precedents, on the other hand, "often enjoy a

super-strong presumption of correctness" so that "overruling the earlier opinion is almost like repealing and rewriting the statute, which is something that only the legislature is supposed to do."

- Judicial Legislation Judges are labelled judicial activists when they "legislate from the bench." President George W. Bush has invoked this meaning. He said, 'We want people to interpret the law, not try to make law and write law."
- Result-Oriented Judging This kind of judicial activism differs from the previous three because it has a *scienter* element. It is defined as follows:-

"Judicial activism means not the mere failure to defer to political branches or to vindicate norms of predictability and uniformity; it means only the failure to do so in order to advance another, unofficial objective." Judicial activism is not always easily detected, because the critical elements of judicial activism either are subjective or defy clear and concrete definition. There is rarely smoking gun evidence of an ulterior motive, and it can be exceedingly difficult to "establish a non-controversial benchmark by which to evaluate how far from the 'correct' decision the supposedly activist judge has strayed."

Judicial Activism in American Courts

In one of the recent books on Judicial Activism, [11]Stephanie A Lindquist and Frank B. Cross provide a brief history of Judicial Activism, particularly as it has been associated with the Warren, Burger and Rehnquist Courts.

The Warren Court

In both popular and academic discourse, the Warren Court (1953 -1969) has become the poster child for judicial activism in USA. Soon after Earl Warren was sworn in as Chief Justice, the Court began to render dramatic rulings protecting individual rights and eliminating segregation. Much of the animosity centred on the chief justice himself. Earl Warren was said to be the "paradigm of the result-oriented judge" who used his judicial

[11] 'Measuring Judicial Activism', Stephanie A Lindquist & Frank B. Cross, Oxford University Press, 2009.

authority to promote his own personal view of social justice. Warren reputedly asked attorneys making legal arguments, "Yes, Counsel, but is it fair?" Many commentators identify activism with the Warren Court. The continued relevance of the Warren Court's rulings and their relative immunity to change over time stems in part from the fact that most of that Court's decisions invalidated local or state laws or actions. Its activism was focused almost entirely on laws enacted by Southern states (such as segregation), those prompted by pre-Vatican II Catholicism, and a few local law enforcers.

The Burger Court

Although sworn into the presidency by Chief Justice Warren himself, Richard Nixon had pledged during his campaign to appoint justices who would not read their own preferences into the ambiguous clauses of the Constitution. Three years after his inauguration, Nixon appointed four new justices to the Supreme Court, including new Chief Justice Warren Burger. Nixon's objective in appointing these more conservative justices was to reorient the Court's policies away from the liberal outcomes championed by Earl Warren and his brethren. As a result, Court observers anticipated that the Burger Court would entrench the Warren Court precedents. Yet, in part because Nixon's appointees did not constitute a majority on the Court, the Burger Court did not reverse the Warren Court's most salient decisions. The major pillars of the Warren Court's jurisprudence, including those involving civil rights, defendants' rights and reapportionment remained largely unaffected by the Burger Court. Thus the Burger Court (1969-1986) continued to represent the worst of an activist judiciary as claimed by some commentators. For example, a conservative judge has referred to "the excessive activism of the Warren and Burger Courts"; while others have claimed that Warren Court activism "lived on" in the "super activism" of the Burger Court. As a result, conservatives continued to attack "government by the judiciary" through the Burger years.

The Rehnquist Court

Like Richard Nixon before him, Ronald Reagan entered office on a platform that included a strong opposition to judicial activism, proclaiming that he would appoint only judges "who understand the danger of short-circuiting the electoral process and disenfranchising the people through judicial activism." When Warren Burger retired in 1986, Ronald Reagan appointed William Rehnquist to the position of chief justice. Although the Rehnquist Court was conservative on many issues, it nevertheless rendered some liberal rulings that drew criticism from conservatives charging activism. For example, conservative critics have condemned the Court's decisions in two cases which provided some constitutional protections to enemy combatants in the Bush Administration's so-called "War on Terror." These two decisions challenged the authority of the executive branch in relation to its policy in that area. With the ascent of a conservative Supreme Court, accusations that conservatives are the "real judicial activists" have become frequent, with some observers even claiming that the Rehnquist Court is the most in history.

That the Rehnquist Court (1986 – 2005) is attacked from critics of all political persuasions illustrates well how charges of activism often depend on whose ideological ox is being gored. Although the Warren Court is often associated most closely with activism, the Burger and Rehnquist Courts have also been criticised for activist decision making, suggesting that activism is not solely the province of a liberal court. Recently appointed Chief Justice John Roberts has already been labelled a "raging judicial activist."

Judicial Activism and American Public Opinion

The authors, Stephanie A Lindquist and Frank B. Cross have tried to evaluate activism in American public discourse by asking the following questions:-

- How does the public view judicial activism, and what role has the press played in shaping the public debate over activism?
- How has the term been used as a rhetorical tool by political elites?

Public and Elite Opinion.

Few legal issues have agitated the American public as much as the controversy over so-called "judicial activism". According to a 2005 survey by the American Bar Association, 56% of Americans strongly or somewhat believed that judicial activism was a contemporary "crisis," while 46% strongly or somewhat agreed with the opinion that judges were "arrogant, out-of-control and unaccountable". Only 2% of Americans believe that federal judges do not allow their political views to influence their decisions.

Judicial activism on the American Supreme Court has often been prominently discussed on the editorial pages of leading American newspapers over time. On the conservative editorial pages of the *Wall Street Journal*, for example, the Warren Court era was characterised as involving "unapologetic judicial activism based more on good intensions than the law." The *Journal's* criticism has not been limited to the Warren Court. In 1984, the editorial page attacked the Burger Court for producing activist decisions rivalling those of the Warren Court. In 1997, the *Journal* further declared that the Court's "judicial activism has reached the outer limits of what this society is willing to tolerate." Yet as the Court became more conservative, a 2007 *Wall Street Journal* editorial gave a "cheer for judicial activism" arguing that such activism promoted liberty and the rule of law. *New York Times* has also commented occasionally on judicial activism. In 1982, it published an editorial defending activism as a necessary response to the other branches' "mean-spirited disregard" for the disadvantaged.

To gauge the level of media attention to judicial activism in recent years, the authors generated a simple measure of the frequency of references to "judicial activism" in the *New York Times, Wall Street Journal, Los Angeles Times, Washington Post* and *Chicago Tribune,* from 1985 to the present. Figure 1 displays the annual combined frequency with which activism was mentioned in these papers, whether those references were negative, positive or neutral.

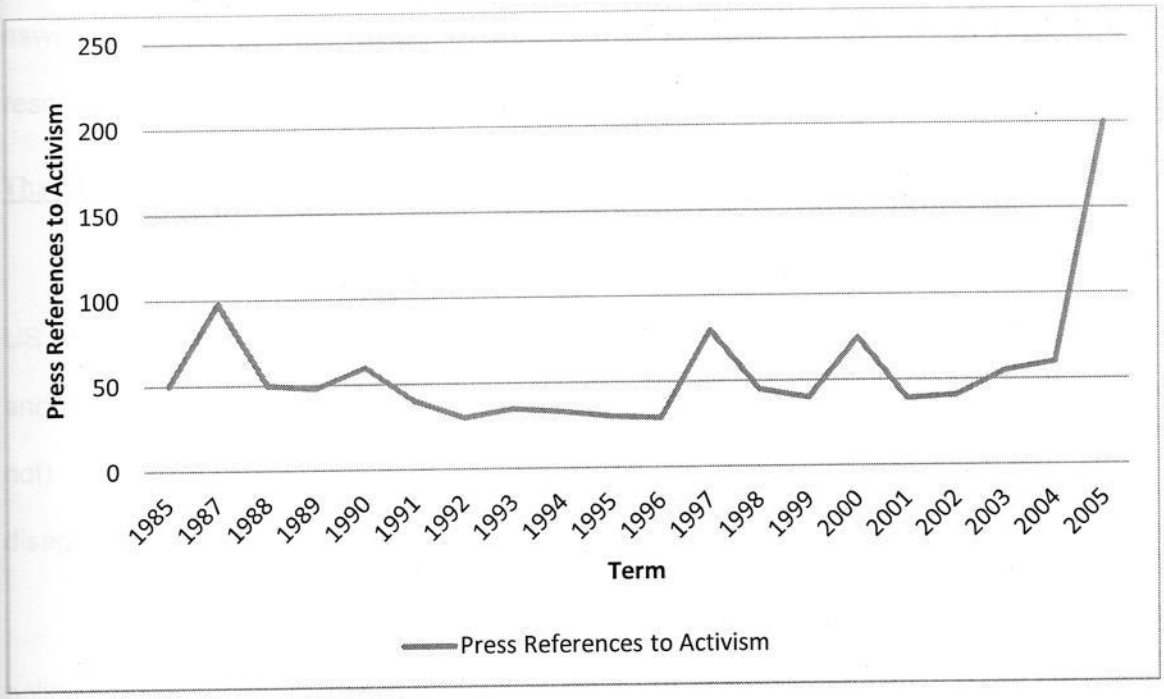

Figure 1 Reference to Judicial Activism in Major American Newspapers, 1985 – 2005

For most of this period, the number of references to activism fluctuated from the 20s to nearly 100, with intermittent spikes. The amount of press coverage peaked around the beginning of the Rehnquist Court in 1986. The dramatic spike in 2005 is associated with the nomination of John Roberts as chief justice. Thus, even though judicial activism is often associated with the Warren Court era, it continues to be a matter of major American public concern today. The authors quote Judge William Wayne's following observation:

"For the past 20 years, every United States Supreme Court nominee has come with a presidential warranty that he or she will be a jurist who interprets the law rather

than makes it. It has become commonplace for political office-seekers and office holders of all ideological stripes to make 'judicial activism' the target of much demagogic bluster."

Public interest in judicial activism has been fuelled in part by books published in the popular press that address the issue. That Mark Levin's recent book *Men in Black,* in particular, became a *New York Times* bestseller – "flying off the shelves" as one newspaper story put it – indicates the degree to which the issue of judicial activism resonates with the American public.

The Myth of Judicial Activism- An American Perspective

In *The Myth of Judicial Activism*[12], Kermit Roosevelt III shows how judges in US shape workable legal rules from constitutional meanings when reasonable minds can and do disagree. The author sets out with admirable clarity what constitutes (and what is not) 'judicial activism' and how we can accept as 'legitimate' decisions with which we disagree.

The critics in America say that activist judges are substituting their own political preferences for the mandates of the Constitution. Mark Levin in his famous book *Men in Black: How the Supreme Court Is Destroying America* writes how activist judges in America have abused their constitutional mandate by imposing their personal prejudices and beliefs on the rest of society. He goes on to say that these judges make, rather than interpret law. The author cites Abraham Lincoln who warned that if policy questions were placed in the hands of judges, "people will have ceased to be their own rulers" and quotes Franklin Roosevelt who accused the Supreme Court of America of "acting not as a judicial body, but as a policy-making body". Recent books on judicial activism argue that the Rehnquist Court displayed "activism on the right" and was in fact "the most activist Supreme Court in history."

In short, the Supreme Court has been castigated for activism almost continuously, from quite early on and by a wide variety of critics.

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[12]'The Myth of Judicial Activism', Kermit Roosevelt III, Universal Law Publishing Co.Pvt.Ltd, 2008.

The Plain Meaning of the Constitution: The Fallacy of Direct Enforcement.

The author says that words of the Constitution themselves convey very little information about how to decide particular cases. He is of the opinion that a judge cannot simply enforce the plain meaning of the Constitution. He refers to Justice Oliver Wendell Homes famous words to support his view:"General propositions do not decide concrete cases." The point made here is that the plain meaning does not get us all the way to a decision. Direct enforcement of the Constitution, as per Roosevelt is a fantasy. He further adds that if legitimate judicial behaviour is limited to enforcing the plain meaning of the Constitution, then no modern Supreme Court decision is legitimate.

The Model: What Doctrine is For.

He recommends a model based on certain doctrinal rules for constitutional decision making which is very different from the dichotomy between activism and direct enforcement. He comes up with three sets of doctrinal rules or a rational reconstruction of the doctrine for the Supreme Court to decide cases – 'rational basis review', a deferential posture which leaves the responsibility for compliance with the Constitution primarily with the legislature, 'intermediate scrutiny', a lesser deferential posture when legislatures are likely to make mistakes especially when certain sections of society are under-represented in legislatures (for instance women and children) and lastly 'strict scrutiny', which is the Court's most demanding form of review which does not defer to the legislature at all (for example fundamental rights).

From Activism to Legitimacy.

The basic question Roosevelt sets out to answer is how we can decide whether a particular judicial decision is legitimate. The distinction between legitimate and illegitimate decisions is meant to do what the concept of activism claims to do, but fails: to distinguish between decisions that should be accepted and those that should be condemned

or opposed. For the concept of judicial activism to make sense, two things must be true. First, determining the plain meaning of the Constitution must be relatively easy. Second, that plain meaning must tell judges how to decide individual cases. The first proposition is indeed true but the second is false. The author argues that in order to decide any but the most trivial cases, then, courts need something that takes them beyond the plain meaning of the Constitution. They need doctrine, and doctrine is what decides cases. In order to decide whether to uphold or strike down some governmental act, the Supreme Court applies one of the doctrinal tests – "tiers of scrutiny "mentioned in the preceding paragraph. They all take the same basic form, requiring a particular kind of governmental interest and a particular fit between that interest and the law chosen as a means to achieve it. They differ with respect to the significance of the interest demanded – a legitimate interest will satisfy the most lenient review; an important interest is required to meet intermediate scrutiny, and a compelling interest is required for strict scrutiny. They differ with respect to the tightness of the means – end fit the Court demands – a rational relationship between means and ends will satisfy "rational basis" review; intermediate scrutiny demands a substantial connection; and strict scrutiny requires that the act be necessary to serve the compelling interest.

The doctrine primarily reflects the Court's decision to defer, or not to defer, to another governmental actor. When the Court applies rational basis review, it is deferring. When it applies strict scrutiny, it is not deferring; it has adopted an anti-deferential stance. The author's basic claim is that decisions are legitimate if the level of deference the doctrine uses can be justified by reference to a relatively small number of factors which determine the appropriate level of deference. These factors are institutional competence, defects in democracy, the costs of error, the lessons of history and rules vs. Standards.

Separation of Powers.

The author talks of the importance of separation of powers in protecting liberty. He cites Alexander Hamilton who wrote that "there is no liberty, if the power of judging be not separated from the legislative and executive powers" and James Madison

who put the point still more strongly:"the accumulation of powers, legislative, executive and judiciary, in the same hands.....may justly be pronounced the very definition of tyranny."

Branches Behaving Badly: Whom do you trust?

Roosevelt observes that the Supreme Court of America is not an unfailing engine of progress and it cannot be evaluated in isolation. The ultimate question must be comparative: How does the Supreme Court stack up against the other branches of the government? Who should be trusted to observe and enforce the constitution? As per the author each Branch of government has done bad things in the past. Citing examples, the Supreme Court of America was an aggressive protector of slavery before the American Civil War. In the early years of the twentieth century, it was determined opponent of legitimate governmental regulation of the economy. More recently it has erred by supposing that the doctrine it creates is equivalent to the meaning of the Constitution itself, a conceptual mistake that could also be seen as an illegitimate power grab. Similar misdeeds on the part of the other branches of the federal government include Congress passing the Sedition Act in 1798 which criminalised criticism of the government, Fugitive Slave Act of 1850 that denied accused fugitives the right to testify in their own defence and scandals involving the Executive like Watergate, Iran Contra or impeachment of two presidents, Andrew Johnson and Bill Clinton for their misbehaviour. Each of them will do bad things in the future too. And no branch of government is the good guy all the time and none should be trusted to guard the meaning of the Constitution. Answering to the question as to which of the branches of the Government is the greatest threat to liberty and the ultimate authority of the people, Kermit quotes Alexander Hamilton who wrote that the judiciary, possessing neither force nor will, but only judgement, would always be the branch "least dangerous to the political rights of the Constitution."

In his concluding observations, Roosevelt remarks that people call the Court activist because they disagree with its decisions. But the kind of people who use the word "activist" are generally disagreeing on political grounds; the decisions they see as illegitimate

are the ones whose results they do not like. The author hopes that his work will serve as an antidote to the loose talk of judicial activism.

The Different Aspects of Justice under the Constitution of India

Fali S.Nariman in his book, *India's Legal System: Can it be saved?*[13] observes that the social, economic and political aspects of justice encapsulated in Articles 38 to 51, in Part IV of our Constitution: the Directive Principles of State Policy have been declared as 'fundamental in the governance of the country', but with the constitutional injunction that they will not be enforceable in any court (Article 37). However, the author further observes that over the years, despite Article 37 of the Constitution, courts in India (especially after 1980) have been considerably influenced in decision making by the Directive Principles of State Policy set out in the Constitution; in fact, the directive principle in Article 48 (that the state shall regard the improvement of public health as among its primary duties) has inspired the higher judiciary, for instance, to specifically direct the Government of Delhi to prescribe the nature of fuel to be used for engines of buses, motor cars and scooters plying the city roads, so as to cause minimum pollution. The rationalisation for direct judicial interaction in a sphere exclusively within the legislature and executive domain of the Union of India and of the then Union territory of Delhi is set out in the opening paragraph of the decision of the Supreme Court of India in a PIL case:

"Articles 39 (e), 47 and 48-A by themselves and collectively cast a duty on the state to secure the health of the people, improve public health and protect and improve the environment. It was by reason of the lack of effort on the part of the enforcing agencies, notwithstanding adequate laws being in place that this Court has been concerned with the state of air pollution in the capital of this country. Lack of concern or effort on the part of various governmental agencies had resulted in spiralling pollution levels. The quality of air was steadily decreasing and no effective steps were being taken by the administration in this behalf."

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[13] "India's Legal System: Can it be saved?" by Fali S.Nariman, Penguin Books, India, 2006.

Fali S. Nariman opines that if the framers of the Constitution had contemplated an era when judicial power (not prompted by any legal provision) would be exercised in the vacuum created by governmental or state inaction, they may have been a little surprised; but then the author likes to believe that they may have felt the compulsion to remove the fetter of Article 37, making the Directive Principles of State Policy directly enforceable by the courts!

Under our Constitution, judges of the Supreme Court have been conferred a special and unique power, not conferred on judges of high courts or judges of any other courts in the country. Article 142 (1) provides that the Supreme Court, in the exercise of its jurisdiction, may pass such decree or make such order as is necessary 'for doing complete justice in any cause or matter pending before it', and any decree so passed, or so made, is enforceable throughout the territory of India. Judges of the highest court, conferred with this extraordinary power, are apparently empowered to disregard statutory prohibitions – 'apparently' because there has been a flip-flop in the approach of the court – judges speaking in different voices at different times.

The author asks whether courts can strike down a law that violates a constitutional provision- not for the case at hand- but only for the future. He goes on to explain that until recently, the common law rule adopted by courts in India was that judges do not make law, they only discover or find the law. In India, if a decision of a court holding a law to be unconstitutional has overruled an earlier decision which had previously held it to be valid and constitutional, the theory was that the subsequent decision did not make new law; it discovered only the correct principle of law! The result of this common law view was that all decisions were necessarily retrospective in operation. This, the author observes, was too artificial for American courts – they invented a new doctrine – that of 'prospective overruling' which has been consistently adopted by the Supreme Court of India since the historic Kesavananda Bharti case.[14] The doctrine of prospective overruling is 'justice not in its logical

[14] Keshavanand Bharti v. State of Kerala AIR 1973 SC 1463.

but in its equitable sense.' Fali S Nariman quotes the example of Justice Krishna Iyer who in many of his judicial pronouncements has shown how our legal system does work: *if you only know how to make it work.* The author sums up:"Decide as you must – according to law – but never forget that law without justice is like an egg without its yolk, and much of its salt."

Judicial Activism versus Doctrine of Separation of Powers

In an article in All India Reporter[15] by Abhaykumar Dilip Ostwal, Advocate, Supreme Court of India, the author emphasises that for efficient functioning of democracy the legislative, executive and the judiciary must respect each other's supremacy in their respective field and should not step in one another's shoes. He quotes Former Chief Justice A.S.Anand who while defending judicial activism, emphasised the need for caution to ensure that activism does not become 'judicial adventurism', otherwise, he warned, it might lead to chaos and people would not know which organ of the State to look for to stop abuse or misuse of power. He reiterated the observations by Lord Justice Lawton, 'the role of the Judge is that of a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play'. Justice Anand added that judicial whistle needs to be blown for a purpose and with caution. It needs to be remembered that Court cannot run the Government. The Court has the duty of implementing the constitutional safeguards that protect individual rights but they cannot push back the limits of the Constitution to accommodate the challenged violation.

In the concluding remarks the author observes that the characteristics of developing countries make separation of powers more desirable but at the same time more difficult to implement. The Supreme Court's specific political role lies in its functioning as a

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[15] Judicial Activism versus Doctrine of Separation of Powers, All India reporter, Vol 96,No 9,Sept 2009,p142-144.

parallel legislature and quite often as a parallel constituent body. Today there is no area where the judgements of Supreme Court have not played a significant contribution in the governance-good governance-whether it be- environment, human rights, gender justice, education, minorities, and police reforms, elections and limits on constituent powers of Parliament to amend the Constitution. The Supreme Court of India as equal, not hierarchically superior, to other branches – is preferable in principle and practice. In the face of the sad reality of the masses being taken for a ride by their elected representatives and their considerable control over the bureaucracy, the citizen's only hope lies with the judiciary. The people of India look upon the Supreme Court as an instrument of social justice and guarantor of the great ideals enshrined in the Constitution. The author argues that while separation of powers is necessary to preserve liberty and democracy, a complete and absolute separation of powers is unworkable and leads to tyranny. What is being attempted in modern democracies is 'mixed Government,' a system of overlapping, intermingling powers, and a system of checks and balances.

SWOT Analysis for Judicial Activism in India

The article by Mrs Asmita Vaidya[16] reveals the importance of 'SWOT' analysis for Judicial Activism in changing Indian scenario. The judiciary in India has used armoury of law through the process of judicial activism to protect and promote the values of democracy and by ensuring socio-economic justice to the people. While doing so, judiciary requires being very conscious about its role to play in the society. This article persuades the judicial institutions to become more and more conscious in the matters related to the 'social justice' and on academic excellence by carrying out 'SWOT' analysis of judicial activism.

[15] All India Reporter, No 04, April 2004, p 116-117.

Salient Features of SWOT Analysis

- Strengths
  - Committed manpower to handle variety of complicated situations and self contained facilities.
  - Capacity to handle the challenges posed by social complexity because of changed socio- economic-politico scenario to some extent.
  - Judicious role of judiciary providing remedy seeking machinery for early relief.
  - Judiciary activating itself for achievement of 'social justice' through broad interpretative techniques and response to PILs.
  - Continuing efforts for achievement of the ultimate goal i.e. 'justice'.
  - Independent Judiciary.
  - Application of 'Stare Decisis' through our constitution under Article 141.
- Weaknesses
  - It is too cumbersome to interpret the unwritten text. Judicial activism is generally observed to fill in the gaps between the laws as it is and the law as it ought to be.
  - Short of Judges having in built ability of 'proper perception'.
  - Judiciary weak in commitment to proper social values.
  - Lacking in having Judges with extraordinary vision and innovative ideas to provide access to justice.
  - No settled norms or parameters for effective judicial activism.
  - Encroachment upon the exclusive domain of the executive.
- Opportunities
  - Judiciary can activate itself where no written law exists, thus becoming 'creator of law'.
  - Judiciary can play very important role in every such situation where judicious, rational as well as reasonable action is expected from it.

- Encompassing newly emerging rights such as right to live with human dignity, right to take birth, right to live in healthy environment, right to education etc.in its domain through the process of judicial activism.
- Opportunity to enter into and touch new problems/aspects of society by moulding the law to meet the challenges of time for achieving ultimate aim.
- Issues of directions to public officers for social betterment.

- Threats
  - Concentration of power may lead to undemocratic judicial approach.
  - Judiciary sometimes trespasses its jurisdictional limits and encroaches legislative as well as executive domain.
  - Over enthusiasm, mode of getting fame through activism may result in mala fide activism.
  - Interference in policy making.