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# Judicial Activism

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TRISHLA DWIVEDI<sup>1</sup>

## ABSTRACT

*Judicial activism, particularly in light of recent developments in this respect, has often been a source of heated debate. With many contentious decisions in the last few years, the judges of the Supreme Court, as well as the various High Courts, have again sparked a debate that has always been very strong. However, it is still a mystery what the term "judicial activism" really connotes. The State is under the primary duty, under the Indian Constitution, to ensure justice, liberty, equality, and fraternity in the land. The Indian judiciary has been seen to be the protector and defender of the Indian Constitution in this context.*

*In view of its constitutional obligation, whenever necessary, the Indian judiciary has played an active role in protecting the fundamental rights of the citizen against the unfair, unreasonable, and unequal actions/inactions of the State. The complex phase of judicial outlook in a changing society is judicial activism. In a January 1947 Fortune magazine article titled "judicial activism" written by Arthur Schlesinger Jr. invented the phrase "The Supreme Court: 1947"*

*Law making has taken on new dimensions in recent years through the judicial activism of the courts. A healthy pattern of reading law in the social context has been embraced by the judiciary.*

*Judges often tend to exceed their authority to decide cases before the Court of Justice. According to the Constitution, they are expected to exercise judgment in reading the law. However, in reply to legal issues before the Court, judicial activists appear to be practicing their will to make law.*

## I. INTRODUCTION

Judicial activism, particularly in light of recent developments in this respect, has often been a source of heated debate. With many contentious decisions in the last few years, the judges of the Supreme Court, as well as the various High Courts, have again sparked a debate that has always been very strong. However, it is still a mystery what the term "judicial activism" really connotes. The State is under the primary duty, under the Indian Constitution, to ensure justice,

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In view of its constitutional obligation, whenever necessary, the Indian judiciary has played an active role in protecting the fundamental rights of the citizen against the unfair, unreasonable, and unequal actions/inactions of the State. The complex phase of judicial outlook in a changing society is judicial activism. In a January 1947 Fortune magazine article titled "judicial activism" written by Arthur Schlesinger Jr. invented the phrase "The Supreme Court: 1947"

Law making has taken on new dimensions in recent years through the judicial activism of the courts. A healthy pattern of reading law in the social context has been embraced by the judiciary. Black's Law Dictionary defines judicial activism as: "a philosophy of judicial decision-making whereby 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 constitutional violations and are willing to ignore precedent". Judicial activism defines judicial decisions accused of being based not on current law, but on personal or political interests.

Judges often tend to exceed their authority to decide cases before the Court of Justice. According to the Constitution, they are expected to exercise judgment in reading the law. However, in reply to legal issues before the Court, judicial activists appear to be practicing their will to make law.

Judges should act more boldly when making decisions on cases:

1. Law should be interpreted and applied based on ongoing changes in conditions and values.
2. As society changes and their beliefs and values change, courts should then make decisions in cases that reflect those changes.

Judges should use their powers to address injustices, according to the concept of judicial activism, especially when the other branches of government do not act to do so. In short, on topics such as civil rights, the defense of human rights, political unfairness and public morality, the courts should play an active role in influencing social policy.

Examples of judicial activism are the decisions by the Indian Supreme Court in Maneka Gandhi's case as well as its decisions relating to Article 21 of the Indian Constitution, etc.

The three wings of effective governance came into effect with the framing of the Constitution of India: the legislature, the executive and the judiciary, in particular. The Constitution allows for the division of powers and thus demarcates all these three machines' powers and areas. However, the division of authority, even with the failure of the legislature and the executive,

only in the text book remains a hypothesis and the third wing of government, the judiciary assumes, unprecedented powers under the name and guise of judicial review, which is a very simple feature of India's Constitution.

The Indian judiciary has taken on the mission of ensuring full liberty for the masses and In the meantime, the executive and the legislature are galvanized to work for the greater good. This, however, changing the status of the judiciary from a moderate to an aggressive role has led some parts to wrath: society, some others' criticism and encouragement and cheers from other sections.

Some political scholars feel that the judiciary is usurping powers in the name of public interest (Rajinder Sacher, 1999), while according to others, judicial activism and interference is actually preventing the executive from going astray (A. T. Thiruvengadam, 1999).

## **II. HISTORICAL BACKGROUND**

The idea of judicial activism found its roots in the English notions of 'equity' and 'natural rights'. The root of judicial activism in India is very hard to find. For a long time, the Indian judiciary had adopted a conventional approach to the thought of judicial activism. It is wrong, however, to say that there have been no incidents of judicial activism in India. Other scattered and lost incidents of judicial activism occur from time to time. Still, they did not come as publicity as the idea was unfamiliar in India. However, the history of judicial activism can be traced back to 1893, when Justice Mehmood of the Allahabad High Court delivered a controversial ruling that sowed the seeds of legal activism in India.

Judicial activism, as the modern expressions suggest, began in India later. This background can be traced to the Theory of Social Want propounded by David McClelland. It was because of the intense and extreme harassment that the judiciary had to interfere while legal action was proceeding. Let's look at the basics of such interventions. After the liberation from British Raj, the administration has long viewed the judiciary as a hostile branch of the State. This idea became stronger and more popular when the bureaucracy switched to a system of personal gain and not public policy.

Exploitation and Corruption have been part of the existing political system. The masses were exploited beyond imagination by the uncontrolled actions of Muscle Power, Money Power, Media Power, and Ministerial Power. The formulation of legal policy may be activities that support or challenge the choice of legal and administrative policies. But the latter is usually referred to as judicial activism. The nature of true judicial activism is the making of judgments

under the humor and time of the times. Judiciary policy activism encourages the cause of social change or expresses ideas such as freedom, equality, or justice. It should be the arm of the civil society. An activist judge creates the legal system and makes it an integral part of the social and economic cycle.

Since the judiciary is now regarded as an independent and separate organ of state under the Indian Government Act, 1935, and consequently under the Indian Constitution, it would be prudent to look back to 1935 to trace its origins. The new law applies not only to resolve the current problem, but also to generally extend to all potential problems that are not before the Court, but that may arise in the future. According to Black's Law Dictionary judicial activism, it is defined as “the belief in a decision-making process in which judges allow their views on public policy, among other things, to guide their decisions, often accompanied by those who follow this view.”

Judicial activism is when the Courts, after hearing both sides, move from their usual position of decision-making to the position of the legislature and formulate new legislation, new laws, and new policies. In the first decade of independence, activism on the part of the judiciary was non-existent, with the political elite taking the lead, and the parliament working with great vigor, and the judiciary working with the authorities. During the 1950s and 1970s, the Supreme Court had a comprehensive view of justice and constitutional institutions. The first major case of legal intervention by civil action cases was the case of the Bihar court which was **Hussainara Khatoon Vs State of Bihar**. In 1980, in the form of a written petition under Article 21, some jurists revealed the gruesome conditions for detention at the Agra Protective Home, followed by a case against Delhi Women's Home filed by a Delhi Law School student and a social worker. In 1967 In **Golak Nath v. the State of Punjab**, the Supreme Court held that the constitutional rights of Part III of the Constitution of India could not be changed, although there was no such limitation in Article 368, which included only a resolution of a two-thirds majority in both Houses of Parliament.

Later, in the famous case of *Kesavananda Bharati*, two years before the declaration of emergency, the Supreme Court ruled that the government had no right to obstruct the constitution and to change its basic provisions. In **Kesavananda Bharati v. The State of Kerala**, 13 Judge Bench of the Supreme Court overruled the *Golak Nath* judgment but held that the fundamental framework of the Constitution could not be distorted. As to what 'simple structure' means, it is still unclear, although some recent decisions have sought to clarify it. The point to keep in mind is that nothing in Article 368 states that the basic structure could not be altered. Accordingly, the decision has amended Article 368. Many decisions of the Supreme

Court of India, in which it holds the position of activist, refer to Article 21 of the Constitution of India and therefore deal with it separately.

Judicial intervention can be seen in three ways: First, by dismissing any declaration as unconstitutional, Second, by dismissing justice precedents and, Thirdly, by reading the Constitution. In simple words, judicial activism can be seen as a political task played by the judiciary, like the other two administrative and legal ones. Judicial activism is reasonable for a variety of reasons, such as the collapse of the government, which requires law enforcement to provide assistance and social welfare policies. The definition of activism varies from community to community, these categories are legal teachers, businessmen, police officers, judges, administrative officers, students, and many more. Any action which is supposed to be activism by one party, but at the same time can be justified by the inactivity of other parties. The concept of legal populism can be seen to be associated with absolute justice, the chaos of the judiciary, the sovereignty of the judiciary, and the imperialism of the judiciary. Judicial restraint is well known as judicial independence. It is like freedom of judgment. Legal intervention and the prevention of judgment in terms used to emphasize the 'appropriate position of the Courts.'

There is a thin line between **judicial activism** and **judicial overreach**. While the former means the use of judicial power to determine and enforce what is in the best interests of society as a whole, the latter is when judicial activism transcends its limit.

Judicial overreach is when the judiciary begins to interfere with the appropriate functioning of the legislative or executive organs of the government, i.e., the judiciary crosses its own function and enter the executive and legislative functions. Judicial overreach is considered disagreeable in a democracy. It also contradicts the process of power separation. To prevent violations of the law, the judiciary has always insisted that they intervene only in cases where the executive and legislative underreach.

### **III. LAWS APPLICABLE**

In post-independence India, to give effect to the person and community rights guaranteed in the text of the Constitution, the introduction of specific provisions for 'judicial review' was required. Dr. B.R. Ambedkar, who chaired our Constituent Assembly's drafting committee, described the same clause as the 'heart of the Constitution.' Article 13(2) of the Constitution of India prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void. Though judicial review of

administrative action has developed along the lines of doctrines of common law such as 'proportionality,' rational hope,' reasonableness,' and natural justice principles, the Supreme Court of India and the various High Courts have been given the power to rule on the constitutionality of both legislative and administrative acts. The power of judicial review is exercised in most cases to preserve and uphold the constitutional rights secured in Part III of the Constitution. The higher courts are also approached to rule on questions of legislative competence, mostly in the context of Centre-State relations since Article 246 of the Constitution read with the 7th schedule, contemplates a clear demarcation as well as a zone of intersection between the law-making powers of the Union Parliament and the various State Legislatures.

Judicial activism happens when the courts have power to review the State action. Article 13 read with Articles 32 and 226 of the Indian Constitution gives the power of judicial review to the higher judiciary to declare, any legislative, executive or administrative action, void if it is in contravention with the Constitution. The power of judicial review is a basic structure of the Indian Constitution.

Article 32 of the Indian Constitution gives right to every individual to move directly to the Supreme Court of India for the enforcement of his or her fundamental right. Article 32 confers power on the Supreme Court to issue any order or writ for the enforcement of any of the fundamental rights. The Supreme Court in *Fertilizer Corporation Kamgar Union v. Union Of India* pronounced that the power of the Supreme Court under Article 32 is an essential part of the basic structure of the Indian Constitution "because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated." even during emergency it remains in force. An appropriate writ/order against a private individual under Article 32 for the enforcement of Articles 17, 23 and 24 also. Increasingly, Article 32 has been interpreted by the Supreme Court in a very liberal manner in many cases so as to enforce fundamental rights even against the private entities performing public functions. The power for the enforcement of fundamental rights and other legal rights by way or writs or any other appropriate order is enshrined under Article 226 for the High Courts. The jurisdiction of Supreme court under Article 32 seems narrower than the jurisdiction conferred upon the High Court by way of Article 226 in this context. Both Articles 32 and 226 are basic structure of the Indian Constitution. power of supervisory control to the High Court over the subordinate courts, special courts and tribunals is given under Article 227.

In addition, the Supreme Court has the right, under Article 136 of the Indian Constitution, to grant special leave to appeal against any decision, declaration, determination, sentence or order

in any case or matter passed by any court or tribunal. In cases where gross injustice exists or significant matters of law are involved, the Supreme Court uses its special authority. Power is discretionary under Article 136 and may be exercised to rule on fairness, equity, and good conscience. In *Pritam Singh v. The State*, the Supreme Court said that wide discretionary power under Article 136 should be exercised sparingly and in exceptional cases only. In *Tirupati Balaji Developers Pvt. Ltd. v. State of Bihar*, the Supreme Court said that Article 136 does not confer a right of appeal on a party but vests a vast discretion in the Supreme Court meant to be exercised on the considerations of justice, call of duty and eradicating injustice. Again, curative petition has been invented by the higher judiciary in order to prevent abuse of process or to cure gross miscarriage of justice. It is also maintainable in case of violation of the principles of natural justice. The apex court in *Rupa Hura* judgment in 2002 said that the Bench considering curative petitions should have the three top judges of the Supreme Court. One of the most important constitutional provisions giving extraordinary power to the Supreme Court is Article 142 of the Indian Constitution. This provision empowers the Supreme Court to pass suitable decree or order for doing complete justice in any pending matter before it.

Despite the fact that the law-making power in India lies primarily with the Parliament only, the Supreme Court is able to legislate under Article 142 of the Indian Constitution. This provision is responsible for the judicial legislation in India. However, the judicial legislation is being done only when there is vacuum in law on the concerned subject matter. The directions or rules issued by the Supreme Court under Article 142 would remain into force until the Parliament makes proper legislation on the subject matter. It means that the court understands the fact that appropriate law-making body is the Parliament only. For Parliament has more resources the Supreme Court to pass suitable legislation on the subject-matter. In *Vishaka v. State of Rajasthan*, the Supreme Court held that in the “absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by this Court under Article 141 of the Constitution.”

Considering the importance of Article 32 read with Article 142, it becomes necessary for the judiciary that it should perform its constitutional obligation where there is no legislation on the certain field and implement the rule of law. Again, the Supreme Court in *Kalyan Chandra*

Sarkar v. Rajesh Ranjan, acknowledged the importance of Article 142 of the Indian Constitution and said that the court has power under Article 142 to issue directions and guidelines for implementing and protecting the fundamental rights in the absence of any enactment. The court reiterated that any such direction, filling up the vacuum of legislation, is the law of the land. However, the Parliament has power to replace such directions e.g. the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 replaced the Vishakha Guidelines for prevention of sexual harassment issued by the Hon'ble Supreme Court of India in the year of 1997.

#### **IV. SURVEY**

A survey on the topic of judicial activism in India has shown that generally, judicial activism is recognized with some judgments which are seen as out of practice or extraordinary. The Supreme Court and High Court Courts have delivered some judgments which are not in the line with those in the past.

It has been pointed out that the respondents had been requested to give their view of the subject of judicial activism with multiple choice questions and to supplement their views at the end by the unstructured response. The number of responses being very less and a still smaller number having made specific responses to this question, their views have been recorded verbatim. The ages of respondents vary from 18-30 years of age. Most of them have undergraduate degrees and few of them are pursuing LLM, therefore all of these people are educated enough to be a part of this survey.

#### **V. RESPONSES TO MULTIPLE CHOICE QUESTIONS**

**Question No. 1:** Judicial activism is an important concept for the judiciary:

The vast majority of (49.1%) of respondents strongly agreed that the concept is important. 41.5% agree that it was an important concept and a very small number of respondents that is 9.4% stayed neutral.

**Question No. 2:** This concept is relevant to current environment in social/ religious/ political/ economic/ other development:

Respondents have felt that it is very relevant(48.1%)and relevant (48.1%). Very few respondents (3.8%)have expressed the view that judicial activism is not so relevant for social, political, economic, and other development issues like those of the environment.

**Question No. 3:** Judges play a role in the promotion of judicial Activism:

(94.1%) of respondents confirmed that judges play a very important role while very few felt that they do not play an important role.

**Question No. 4:** Would you say from personal experience, judicial activism is more noticeable in the following Courts?

(76.5%) of respondents identified the Supreme Court is more noticeable in judicial activism and (23.5%) identified as High Courts.

**Question No. 5:** Is according to you, judicial activism mandated by:

Nearly (38.8%) of respondents have expressed the view that it is mandated in the Constitution, (6.1%) have stated that it is mandated in All Important Legislation, and (30.6%) have stated that it is mandated in “all the above.” Nearly (24.5%) have opted for “NONE OF THE ABOVE”.

**Question No. 6:** Would you say that for promoting judicial activism, existing laws ought to be changed to the following extent:

The respondents have confirmed that changes would be necessary “To Some Extent” (66%), “To a Large Extent,” (32%), and “Totally” only (2%). Thus, a large number of respondents have opined that judicial activism is mandatory by the Constitution of India and it is also mandated in all important pieces of the opinion that the existing laws require changes to promote judicial activism.

**Question No.7:** Would you say that lack of judicial activism in India could be attributed to judges of:

Lack of judicial activism on the part of judges of Supreme Court and power court judges has been identified by as many as (35.3%) of respondents each, High Court (23.5%) and (33.3%) District Court. (7.9%) respondents pointed out “it all depends upon the tribunal and other courts”.

**Question No.8:** Promotion of judicial activism also depends upon persons other than judges:

The persons identified are Sr. Advocates (21.2%), Other Advocates (9.6%), Social Reformers (5.7%), “All above”, (63.5%) that promotion of judicial activism depends on another person as well.

**Question No.9:** Public Interest Litigation in India is to be linked with :

The respondents identified judicial activism (62%) is linked with Public Interest Litigation in India and other respondents believe that PIL is linked with the judicial review (26%) and judicial sanctity (12%).

**Question No.10:** Legal activism occurs when a court acts beyond its jurisdiction and interferes in areas which fall within the executive and/or the legislature's mandate." State whether true or false.

According to 74.5% of people, this statement is true and a very less number of respondents (25.5%)disagree with the above statement.

Judicial activism means activating the administration of justice that will be based on equity, good conscience – morality, high ethical significance. Judicial activism is actually based on some unknown motives in India and, it started from the Golaknath case when 311 the Supreme Court decided that right of property is not a fundamental right which was, in fact, a negative side of judicial activism in a negative sense except on one or two incidents.

In a welfare and democratic state like ours, judicial activism plays a significant role in various fields. Promotion of judicial activism makes sure for the benefit of the citizen. It depends on the co-operation of all concerned in the decision-making process in Courts, tribunals. Liberal outlook and conscious politicization by all concerned lead towards the promotion of judicial activism. Sincere efforts by all concerned to promote the welfare of every citizen are the need of the day. Speedy and inexpensive justice is an urgent need for society. Judicial activism is not such a new phenomenon. Earlier courts were passing orders in PIL petitions. An important issue raised in PIL can be the use of judicial activism. There is no lack of judicial activism and for promoting judicial activism, it is the duty of every citizen, individual, and also politicians, industrialists, and educationists to put their best to bring radical change.

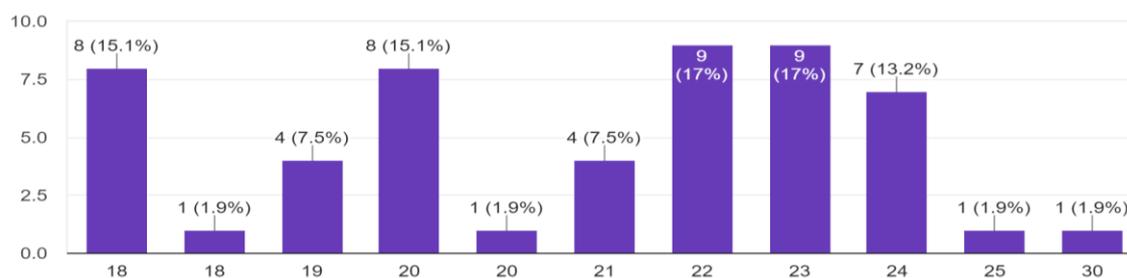
Judicial activism should be practiced by the Supreme Court and High Court. The lower judiciary must function as per codified law and the law laid down by the higher court. Judicial activism requires the sincerity and capacity of the judge otherwise the existing law of the land shall be sacrificed on the altar of judicial activism.

## VI. OUTCOME OF THE SURVEY

1)

What is your age?

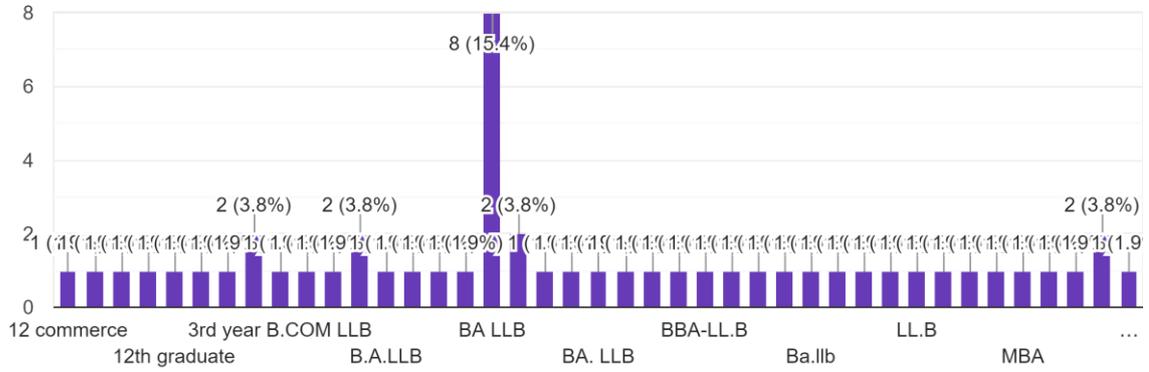
53 responses



2)

Educational Qualifications

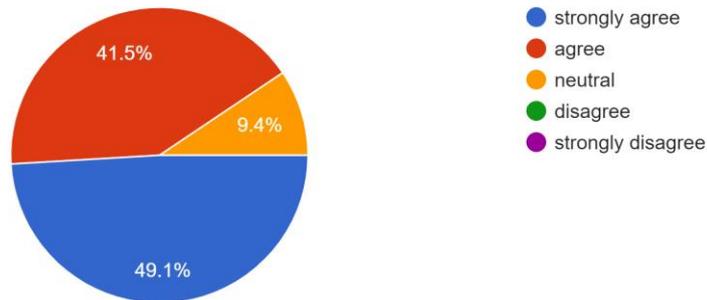
52 responses



3)

Judicial activism is an important concept for judiciary :

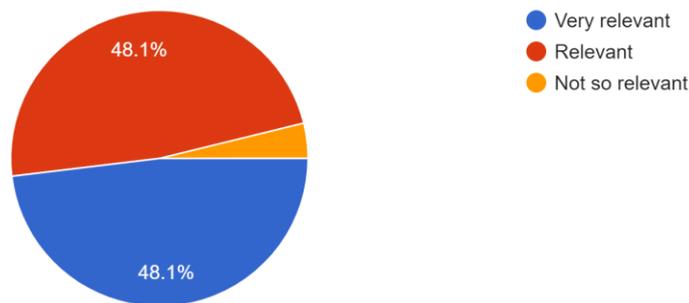
53 responses



4)

Is this concept relevant to current environment in social/ religious/ political economic/ other development :

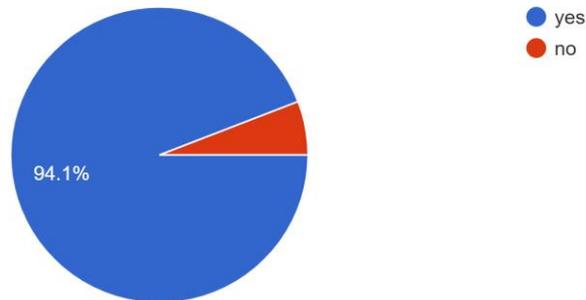
52 responses



5)

Judges play a role in promotion of Judicial Activism

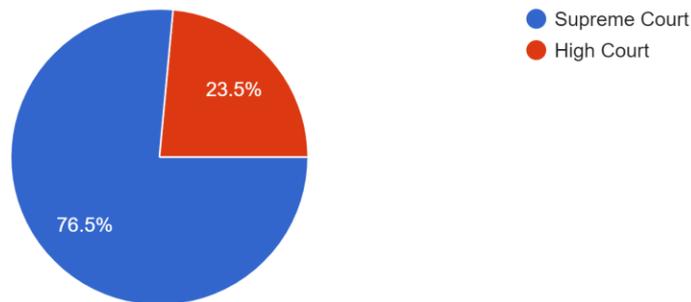
51 responses



6)

Would you say from personal experience, judicial activism is more noticeable in the following Courts?

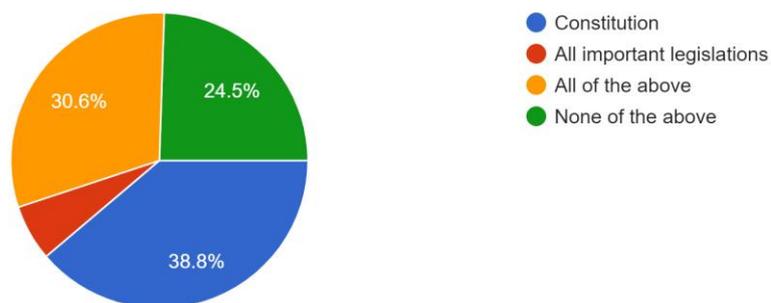
51 responses



7)

According to you, judicial activism is mandated by:

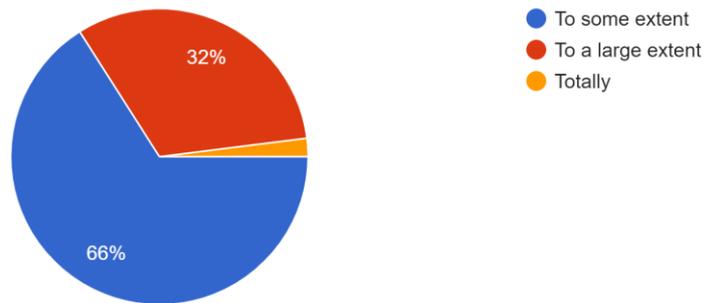
49 responses



8)

Would you say that for promoting judicial activism, existing laws ought to be changed to the following extent :

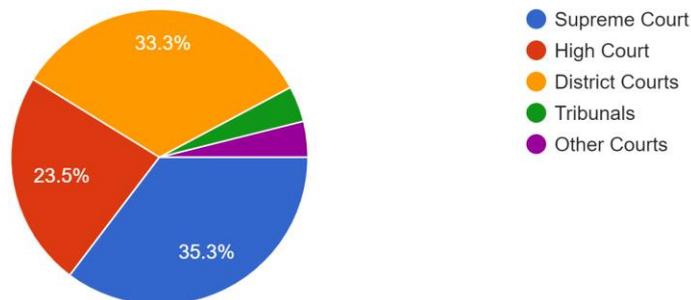
50 responses



9)

Would you say that lack of judicial activism in India could be attributed to judges of:

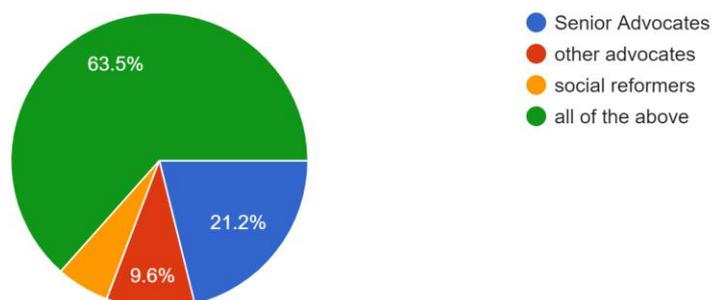
51 responses



10)

Promotion of judicial activism also depends upon persons other than judges:

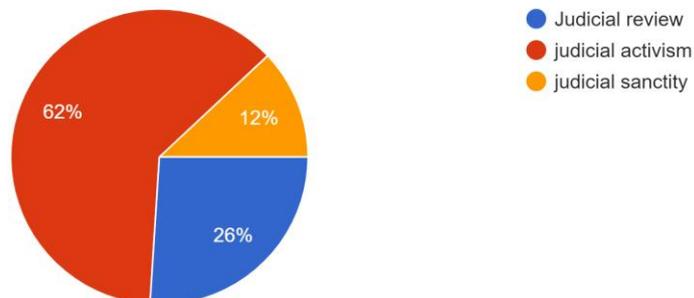
52 responses



11)

Public Interest Litigation in India is to be linked with

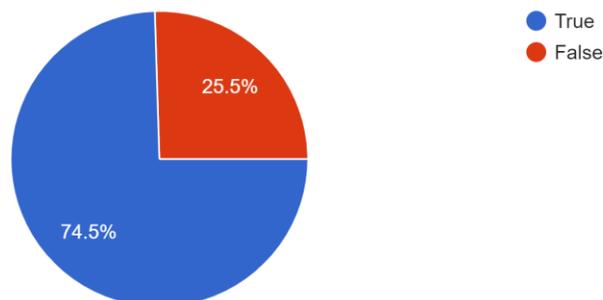
50 responses



12)

Legal activism occurs when occurs when a court acts beyond its jurisdiction and interferes in areas which fall within the executive and/or the legislature's mandate." State whether true or false.

51 responses



## VII. CONCLUSION

Lately, the nation has witnessed a series of favorable judicial activism on a large scale. Shibu Soren, a respected politician, was convicted of murder in 1994. World-famous Sanjay Dutt of Gandhigiri's fame has been convicted under the Arms Act of 1993. Navjyot Sidhu, a former explorer who was carrying a gift from gab, was convicted of murdering a street rage 18 years ago. Whatever the criticism of the judiciary, there is no denying that the judiciary has done much to improve the conditions of most people in the country.

The higher judiciary in India has had a tendency to deviate from their constitutional basis and end up exercising judicial creativity that cannot always be said to be valid in law. While the practice of following a strong separation of powers has been moderately successful in India, judges often do not show legal restraint in making decisions that are politically or socially

significant. Most of the time, judges select technical issues outside their legal limits, on key policy issues under the jurisdiction of the legal and administrative authority. While the judiciary in India has been the mediator of the values of democracy and constitutional dignity, it must also be mindful of self-inflicted dangers such as judicial intolerance, aggressive political strife, and bigotry. Extreme courtesy or intervention only leads to inefficiency. It is clear that the executive council may choose not to act if the SC adopts an interventionist approach in all cases. The SC establishment of the code of conduct and values only undermines its role and political process and in so doing, undermines the Constitution.

It corrects various mistakes made by both states and people. Ordinary people are the ones who are most deprived of legal protection because of the indolent practice of justice, also called legal inertia or legal delays. Judicial activism has also begun the process of eradicating this occasional disruption. This can only be promoted by an honest and judgmental lawyer, not by dragging the legal profession down in the eyes of the public. The greatest asset and the strongest weapon in the mantle of justice is the reliance on discipline and the faith that inspires the minds of the people in its power to administer justice by hand and keep the scales balanced in any dispute.

There is a thin line between activism and overreach. In some cases, the process of judicial activism, the judiciary intervened extensively and demonstrated their personal beliefs while providing justice. Interpreting the law is a major function of the judiciary but rather than the courts interpreting the law in order to start making law, they issue guidelines and guidelines to be made by the legislature.

Due to judicial overreach, clashes occur between the legislative and judiciary, and the law appears to be ineffective or of little human competence. Apart from this, the division of power in which democracy stands is killed by the judicial overreach. The functioning of the justice system that operates as part of government FOR THE PEOPLE is enshrined in the provisions of the constitution. It is also necessary for other non-governmental institutions to work for the people.

A wide scope of the recent Supreme Court decision has an exciting view on the transformation of judicial activism in India; Indian law enforcement has now given citizens an offensive face. The eyes of the Supreme Court of India have now gone far beyond the protection of the socially and economically disadvantaged and government officials. Its ideas, however, tend to be more ambitious than adherence to declarations. If we look at the post-emergency advocacy, we can see the Supreme Court surpassing the legal positivism.

The judicial activism as witnessed in India has been portrayed to be episodal and anecdotal in character. In India, a simple definition of judicial activism has been described by various scholars as ‘any judgment that is not related to the past, and that sets new guidelines or ideas is an activist’. In fact, the departure from the past and the separation from the past was required in the country in all the higher justice judgments. It is therefore clear that the judiciary should act in accordance with the requirements of the case. Judicial Activism is a critical activity that involves ingenuity. Great skill and creativity are required.

The role of Judicial Activism is inescapable as it has played a key role in providing justice to the poorest sections of society, the poor, socially and academically, victims of trafficking, and under trial prisoners. Proper implementation of fundamental rights is possible only because of the development of Judicial Activism.

So, in a nutshell, I would like to say that the concept of legal activism has both advantages and disadvantages. If the judiciary interferes with the functioning of other spheres of government and attempts to override the power of the constitution, then this concept of judicial activism loses its significance and context. Sometimes, lawmakers often rewrite their ideas in the name of activism, the belief in the separation of powers is dispelled.

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