

## Theoretical Foundations for Judicial Activism: Some Jurisprudential Perspectives

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### Abstract

Judicial activism has emerged as one of the most debated themes in contemporary jurisprudence, reflecting tensions between judicial restraint and the judiciary's evolving responsibility to protect rights, fill legislative gaps, and respond to social transformation. This paper explores the theoretical foundations of judicial activism through the lens of four major schools of legal thought: natural law, legal positivism, sociological jurisprudence, and realism. From a natural law perspective, judicial activism gains legitimacy by grounding legal interpretation in morality and the pursuit of justice, particularly where legislative inertia undermines rights protection. In contrast, strict positivism resists activism by prioritizing the sovereign command, yet even within Austin and Hart's formulations, space is found for judicial creativity through the recognition of open-textured rules and penumbral areas of law. Sociological jurisprudence situates activism within the broader project of social engineering, encouraging judges to adapt legal rules to shifting economic, political, and social realities. Realism, meanwhile, most directly acknowledges the judicial role in shaping law, emphasizing the judiciary's practical influence in transforming statutory texts into living norms. Methodologically, the paper employs a doctrinal approach, analyzing jurisprudential theories, judicial reasoning, and key cases to assess the scope and justification of judicial activism in the protection of human rights and the domestication of international legal obligations. The study concludes that judicial activism, when grounded in principle and institutional responsibility, is not an aberration but a vital judicial function, ensuring the law remains responsive to evolving societal demands and constitutional imperatives.

**Keywords:** Judicial Activism; Jurisprudence; Doctrinal Methodology; Human Rights.

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### 1. Introduction

Judicial activism has long remained a subject of vibrant jurisprudential debate, particularly in the context of courts asserting a more interventionist role in safeguarding rights and upholding constitutional values. As legal systems grapple with social transformation, legislative inertia, and executive overreach, the judiciary often finds itself at the forefront of addressing gaps in governance. This evolving role has provoked critical inquiry into whether judicial activism is a legitimate function of the judiciary or an overreach of its mandate. To understand and evaluate this phenomenon, it becomes essential to engage with legal theory not merely as an abstract exercise, but as a means of grounding judicial conduct within intellectual traditions that shape the contours of legal authority and discretion.

In both finding and establishing a theoretical foundation for judicial activism one cannot disregard the importance of theory as envisaged by justice Oliver Wendel Holmes where he stated that, '[t]heory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house'.<sup>1</sup> A theoretical analysis of judicial activism from a jurisprudential perspective will be helpful in both establishing the existence of judicial activism in such theories as well as the justification for utilization of judicial activism, in particular where human rights issues are involved. The following section is dedicated to looking at the issue of judicial activism from the lens of natural law, positivism, realism and sociological school of law. It will provide an insight into the nature and extent to which such theories are compatible with the idea of judicial activism.

This paper seeks to explore the theoretical foundations of judicial activism through the lens of four major schools of legal thought: natural law, legal positivism, sociological jurisprudence, and realism. By examining each perspective in turn, the analysis aims to assess the conceptual space each theory provides for an active judiciary, especially in the realm of human rights enforcement and the domestic application of international legal norms. Such a framework is particularly relevant in jurisdictions where courts are called upon to act in response to legislative gaps, institutional stagnation, or pressing social injustice.

## 2. Natural Law Perspective

According to the proponents of natural law school of legal thought, law and morality becomes incapable of separation and one is not able to speak about law without morality.<sup>2</sup> On a more objective ground, this theory is more concerned about what the law ought to be than what the law is. This ought proposition does give the opportunity for the judges to engage in judicial activism in trying to find out what is the law that is ought to be regarding a particular issue, including issues related to human rights and domestication of international human rights treaty norms at the domestic level. Natural law as a normative discourse emphasises on the need for an

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<sup>1</sup> W Holmes, 'The Path of the Law' [1897] Harvard Law Review 457, 487.

<sup>2</sup> Lon Fuller has pointed out that the relationship between law and morality is a necessary one. See, M Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet and Maxwell, 2014) 110.

analysis of what the law ought to be instead of what the law is. Sathe<sup>3</sup> points out that '[w]hen a court takes into account the philosophy of law and interprets a statute in terms of not only what it is but also what it ought to be, it is said to have moved towards judicial activism'. In *MLC Assurance Co Ltd v Evatt*<sup>4</sup> Barwick CJ asserted that:

The common law is what the court so informed, decides that it Should be, Subject Of Course to Correction by the Judicial Committee in a case in which Her Majesty's Privy Council retains jurisdiction. For, where no authority binds or current of accept able decision compels, it is not enough, nor indeed apposite, to say that the function of the court in general is to declare what the law is and not to decide what it ought to be.<sup>5</sup>

One main concern for natural law thinkers was to find out a set of objective criteria to measure the relationship between law and morality in an objective manner. In the latter parts of its development, thinkers such as Fuller and Finnis<sup>6</sup> came up with more objective criteria in measuring the normative validity of law. Fuller in particular made a distinction between morality of duty and morality of aspiration. He proposed eight principles of legality which is related to rule of law<sup>7</sup> and declared that a law which fails any of these principles will lose the quality of law. What these principles dictate is that, in order to be valid, a law should possess these qualities and in its absence the quality of law may come into question. While not directly speaking about judging, if one was to think about these principles from a judicial point of view, it becomes evident that a dormant judiciary will find it difficult to interpret the law which will adhere with these principles, especially when it is endeavouring to keep the law consistent. Hence, it can be argued that from Fullers point of view a court which is trying to bring a law within the eight principles postulated by him through means of judicial activism would be justified since these principles are for adhering with morality of duty instead of morality of aspiration where the bar is much higher.

This contention is supported by Fuller who does recognize the power of the courts to declare acts of the congress as being unconstitutional and often judges will be required to formulate appropriate rules to deal with such situations with their activism<sup>8</sup>. Hamilton thus points out that such rules are created not from the perspective of positive law 'but from the nature and reason of the things'.<sup>9</sup> Finnis in supplementing the eight postulates of rule of law as advanced by Fuller argues that,

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<sup>3</sup> S P Sathe, *Judicial Activism in India* (2nd edn Oxford, 2001) 42.

<sup>4</sup> [1968] 42 ALJR 316.

<sup>5</sup> *ibid*, 318.

<sup>6</sup> Finnis made his arguments based on 7 identified basic goods which is pursued by all individuals alike in his analysis of natural law. See generally, J Finnis, *Natural Law and Natural Rights* (Rev Eds Oxford, 2011)

<sup>7</sup> See generally, L Fuller, *Morality of Law* (Yale, 1969)

<sup>8</sup> *ibid*, 101.

<sup>9</sup> *The Federalist*, No. 68.

Coherence requires not merely an alert logic in statutory drafting, but also a judiciary authorized and willing to go beyond the formulae of intersecting or conflicting rules, to establish particular and if need be novel reconciliations, and to abide by those reconciliations when relevantly similar cases arise at different times before different tribunals.<sup>10</sup>

The above reasoning clearly articulates the fact that in discharging the judicial function, judges cannot be sitting still and allow the legislators to have their way in whatever manner they want, instead the judiciaries are required to act vigilantly and actively in protecting the rights. Hence ample support for judicial activism could be garnished from the natural law perspective.

### 3. Legal Positivism

Positivism is concerned about the law as it is instead of the law which ought to be thus denying a more central role for the judiciary. Forte points out that 'judges who embrace positivism as the touchstone of their legal authority claim that positivism is the best protection against judicial usurpation and judicial activism'.<sup>11</sup> Gustav Radbruch explains that 'positivism does not permit the validity of formal sources of law to be challenged on the grounds that they conflict with extraneous "supra-positive" standards of justice or morality'.<sup>12</sup> Positivism [in the Austinian sense] for most part will become incompatible with judicial activism for several reasons. First, since the law is seen as command of the sovereign which is to be complied with by all including the judges, they will have to abide by the dictated laws and give effect to it accordingly. There will be no possibility in this sense to evaluate the lawfulness of a given law with any other objective standard (though law in general lacks such objective criteria) apart from looking at whether the law so called has emancipated from the sovereign. Therefore, positivism would rather support judicial restraint than judicial activism, whereby a judge would be confined to follow the established legal rules in each situation and adhere to the established Law.

Mawar in his discussion about judicial restraint opines that 'judicial restraint would be considered the formalist approach that is positivist in tradition'.<sup>13</sup> However, in contentious topics such as human rights, a rigid positivistic approach might come under scrutiny since unlike in the times of Austin, in the modern world human rights are protected through a constitution which may itself invite the judiciaries to play a more active role. The fictitious concept of there being a sovereign who is capable of obtaining the habitual obedience of the masses has now been distorted and the modern democratic process allows greater deference to courts in matters of human rights as evident from the Human Rights Act of 1998 which allows the judiciary to make

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<sup>10</sup> J Finnis, *Natural Law and Natural Rights* (Rev Eds Oxford, 2011) 271.

<sup>11</sup> F Forte, 'Natural Law and the Limits to Judicial Review' [1996] *Catholic Social Science Review* 42, 43.

<sup>12</sup> G Radbruch *Rechtsphilosophie* (8th Edn, Koehler 1973) 339, cited in M. Herdegen, 'The Activist Judge in a Positivist Environment – European Experiences' [1990] *Stellenbosch L Rev* 336, 337.

<sup>13</sup> D Mawar, 'The Perils of Judicial Restraint: How Judicial Activism Can Help Evolve the International court of Justice' [2019] *Goettingen Journal of International Law* 425, 427.

a declaration of incompatibility<sup>14</sup> in instances where the domestic law is incompatible with the ECHR.

Hart<sup>15</sup> who is conceived as a soft positivist came up with a theory of legal rules. He pointed that while primary societies may be capable of being managed with primary rules, when societies got more complex that such primary rules were not able to make such societies and there was a need of formulating secondary rules inclusive of inter alia, (i) rules of adjudication; (ii) rules of change; (iii) rules of recognition. (iv) Rules of adjudication give judges the power to apply the law and solve disputes. As these secondary rules are mostly communicated to officials who interpret and apply law, one must see that a certain degree of activism will be required in giving effect to these rules.

Hart formulated the rule of recognition which could validate a particular law or a custom if such has been accepted under the rule of recognition. As he pointed out 'a rule of recognition provides criteria of legal validity by determining which acts create law'.<sup>16</sup> In this vein, it would be possible for the legal system of a country to recognize under this rule the validity of judicial activism. India would be a good example for such a country where under the rule of recognition, the judicial practice related to judicial activism can be absorbed as a part of the legal system through this rule. He explains the need for having to interpret certain things in context with his example on prohibition of taking an automobile to School. What counts as an automobile is something to be determined. As Hart points out,

The toy automobile cannot speak up and say, "I am a vehicle for the purpose of this legal rule," nor can the roller skates chorus, "We are not a vehicle." Fact situations do not await us neatly labelled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision.<sup>17</sup>

The very nature of the law itself dictates that one would have to at least interpret the law in each situation where the law itself did not provide for a guide. While the positivist did not want to have morality as the ultimate consideration in such a situation, the need for some creativity could not be denied. As Hart points out, where a rule is situated in the penumbra away from the core without a precise definition, one will have to make provide a definition. He states that,

We may call the problems which arise outside the hard core of standard instances or settled meaning 'problems of the penumbra'; they are always with us whether

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<sup>14</sup> Section 4(2) of the Human Rights Act 1998 stipulates that '[i]f the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility'.

<sup>15</sup> S Ratnapala, *Jurisprudence* (Cambridge, 2009) 48.

<sup>16</sup> HLA Hart, *The Concept of Law* (3rd Edn Oxford, 2012) preface xxi.

<sup>17</sup> HLA Hart, 'Positivism and the Separation of Law and Morals' [1958] *Harvard Law Review* 593, 607.

in relation to such trivial things as the regulation of the use of the public park or in relation to the multidimensional generalities of a constitution.<sup>18</sup>

From the above proposition what becomes clear is that even from a positivistic perspective, or at least for Hart, there is room to manoeuvre where cases appear in the penumbra. Hence, there is space for judicial activism in such circumstances especially where the judiciary has been recognized with such an authority according to the rule of recognition. The creativity and the law-making powers of a judge was even recognized even in the United Kingdom, and by Austin himself who states that,

I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature. Notwithstanding my great admiration for Mr. Bentham, I cannot but think that, instead of blaming judges for having legislated, he should blame them for the timid, narrow, and piecemeal manner in which they have legislated, and for legislating under cover of vague and indeterminate phrases, such as Lord Mansfield employed in the above example, and which would be censurable in any legislator.<sup>19</sup>

The above proposition of Austin advocates for judicial creativity in cases where the legislature has failed in its endeavour. Hart also accepts the fact that judges must exercise discretion in the interpretation and application of the law where the law falls outside the core and locates itself in the penumbra. Hart contends that the world we live in is not a one where it is 'fit for mechanical jurisprudence'.<sup>20</sup> He does recognize the reality that many laws are drafted as open textured, where it is not possible to know of everything in advance as one may wish. This open texture nature of the law is especially visible in the field of human rights as pointed out by Mahlmann<sup>21</sup> who states that '[o]pen-textured norms such as human rights require interpretation and concretization'. Hence Hart states that within the open texture of the penumbra judges have a discretion to develop the law creatively. He opines that

The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of

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<sup>18</sup> *ibid.*

<sup>19</sup> John Austin, *The Province of Jurisprudence Determined* (first published 1832, WE Rumble ed, CUP 1995) 167.

<sup>20</sup> HLA Hart, *Concept of Law* (3rd edn, Oxford 2012) 128.

<sup>21</sup> M Mahlmann, *Mind and Rights* (Cambridge 2023) 65.

circumstances, between competing interests which vary in weight from case to case.<sup>22</sup>

While positivism follows a very strict application of the law by engaging only with what the law is instead of what it ought to be in general does not entertain the idea of judicial creativity or activism. However, as it was observed from the ideas of both Austin and Hart, there is still room for this creativity or activism in certain situations. For Austin, it was possible for the judiciary to legislate on occasions of legislative lethargy by the parliament and for Hart the open texture in the penumbra outside the core gave the judges a discretion to work with the law and to apply it in a creative manner. What could be concluded from this analysis is that even within the realm of positivism, there is both possibility and space for judicial creativity and space.

#### **4. Sociological Jurisprudential Perspective**

In contrast to both natural law and positivism, the sociological school of law takes a more wholistic view of the law and treats it as a social phenomenon. This school of legal thought possesses many leading scholars such as Comte, Emile Durkheim, Max Weber who were all well versed in sociology who considered law as a sub discipline of sociology. However, when it comes to this field of study, Roscoe Pound can be identified as a leading figure of the subject for being a jurist who is capable in sociology.

One of the central themes of this school of legal thought is that law should not be considered in isolation and that one should consider about the social, economic, and political background that led to the enactment of a particular law in giving effect to it. For Roscoe Pound law was equal to engineering, social engineering to be exact. He defines a social engineer as 'one whose is to make a social process or activity achieve its purpose with a minimum of friction and waste'.<sup>23</sup> By social engineering what was expected to be achieved was a fair balance between the competing interests within a given society by optimization of relevant claims. Freeman points out that under social engineering '[t]he creative role of the judiciary, .... is in the forefront, as is the need for a new legal technique directed to social needs'.<sup>24</sup>

In general, the sociological school of law does not give greater prominence to the judiciary like realism. It sees the judiciary as a part of the bigger picture and not as the whole picture in its ultimate endeavour of optimizing the law. As a part of the bigger project on social engineering, a judiciary would be required to be more active in its decision making and facilitate the law in achieving its ultimate objective of balancing the competing interest within a given society.

This theory would encourage a court to think outside the strict limits of the law and to consider the economic, political, and social dimensions of a decision. The Indian judiciary with the devise of public interest litigation has come a long way in providing justice to those who are unable to

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<sup>22</sup> HLA Hart, *Concept of Law* (3rd edn, Oxford 2012) 135.

<sup>23</sup> Roscoe Pound, 'The Lawyer as a Social Engineer' [1954] 3 J Pub L 292, 292.

<sup>24</sup> M Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet and Maxwell 2014) 715.

afford it through normal channels and this may provide a perfect example for judicial creativity that is aligned with the ultimate objective of the sociological school of law.

Judicial activism from a sociological jurisprudential view will have to take a more pragmatic approach as the reasons for becoming active would differ in different contexts depending on social, economic, and political factors. This is epitomized by the judicial activism we find in India which is rooted on the notion of social justice<sup>25</sup> while in the United States it is more rooted in the notions of liberty and freedom.

As Sathe explains regarding the experience of the Indian judiciary in adapting its role to the changing needs of the society, he points out that,

Where courts interpret the law not strictly according to its letter but in the light of its spirit and taking into account the changing social conditions, they are supposed to entertain a broader conception of judicial function. Such courts conceive their own role in wider terms as upholders not only of the law but also of justice.<sup>26</sup>

Going on the same line of arguments Surana explains this transformative role of the judiciary in keeping with the societal changes in the following manner,

The transformative approach views the Indian Constitution as a transformative document, originally drafted with the broader purpose of engineering societal change. This allows the courts to broaden the scope of existing rights incrementally and to gradually transform Indian society into a more egalitarian one; and reliance on Indian obligations in the international sphere has been one way of achieving this.<sup>27</sup>

In the case of *Jaensch v Coffey*<sup>28</sup> Deane J on pronouncing about the issue of law relating to duty of care and how it evolved over time made the following remark on the need to keep the law in line with the developments of the society, albeit having due consideration to the judicial role in the following manner,

In any field of law, however, there may arise the rare 'landmark' case in which a court, usually a final appellate court, concludes that the circumstances are such as

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<sup>25</sup> Menski points out that India has taken a lead role in judicial activism in the Asian region and has uphold the public accountability of the government through such activism. See, W Menski, *Comparative Law in a Global Context* (2nd Edn, Cambridge, 2006) 269. The decision in *Ramakrishnan v State of Kerala*, [1999] (2) KLT 725 showcases this trend where the court, banned smoking in public places all over the state of Kerala, inter alia on the ground that, under Article 21 of the Constitution, a person is entitled to protection of law from being exposed to the hazards of passive smoking.

<sup>26</sup> S P Sathe, *Judicial Activism: The Indian Experience* (2nd end, Oxford 2001) 41-42.

<sup>27</sup> Praggya Surana, 'The Expansion of Constitutional Protections through International Law' in Helmut P Aust, Heike Krieger, and Felix Lange (eds), *Research Handbook on International Law and Domestic Legal Systems* (Edward Elgar 2024) 227

<sup>28</sup> [1984] 155 CLR 549.

to entitle and oblige it to reassess the content of some rule or set of rules in the context of current social conditions, standards and demands and to change or reverse the direction of the development of the law. In such a case, the judicial function may be seen to impinge, albeit in a subordinate role in that it remains subject to being overridden by legislative action, upon the function of the legislature and it is at least possible that judicial method and ability are liable to be exposed as wanting. The reassessment of the content of the particular rule or rules of law in such a case is, nonetheless, an unavoidable concomitant of the proper performance of the judicial function if the law is not to lose contact with the social needs which justify its existence and which it exists to serve.<sup>29</sup>

As McHugh points out, '[t]he proponents of sociological jurisprudence saw the body of the common law as made up of adjustments or compromises of conflicting individual interests.'<sup>30</sup> He further points out that, '[w]hen judges decided cases, they were resolving competing social interests and it was their duty to strive for a tolerable adjustment of interests and ultimate social reconciliation'.<sup>31</sup>

From the above analysis, it can be made clear that proponents of sociological jurisprudence of law also allows the judiciary to play a creative or an active role in keeping the law at par with the changing social realities, and to this extent allows the court to develop the law to meet the needs and demands of the society. Hence, there is room for judicial activism under sociological jurisprudence of law.

## 5. Realism

Realism<sup>32</sup> is both in sharp contrast the theories that have been discussed so far. Realism developed through the ideas of formalism which in turn was focused on logic and mathematics to a certain extent. The jurisprudential tradition associated with formalism was developed by Holmes through his ideas on logic of law. For him law has always been about experience and logic, and what was expected of it was to predict as to how the courts will decide a given case<sup>33</sup>. This school of legal thought took away the theoretical debates articulated in other theories of law such as natural law and positivism and focused on what happens to law once such laws have been passed by the legislatures. The analysis therefore was on the reality of law as applied and interpreted by the courts.<sup>34</sup>

Realism rejects the morality of law and is focused on what the law is instead of what it ought to be. In this sense, it does share some similarities with legal positivism. However, realism also does

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<sup>29</sup> [1984] 155 CLR 549 at 599-600.

<sup>30</sup> Micheal McHugh, 'The Law-making Function of the Judicial Process Part I' [1988] Australian Law Journal 15, 28.

<sup>31</sup> *ibid*

<sup>32</sup> Realism is used in the sense of American Realism. Scandinavian Realism is not considered here.

<sup>33</sup> M Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn Sweet and Maxwell, 2014) 824.

<sup>34</sup> Ridwanul Hoque, *Judicial Activism in Bangladesh* (Cambridge Scholars Publishing 2011) 29.

not show fidelity to the view that law is a sovereign command and that the courts of law are simply there to carry out the will of the sovereign. From an American perspective, Freeman states that,

Not only was the Austinian analysis based on sovereignty singularly ill-adapted to the complexities of the federal constitution, but the function of the Supreme Court acting as a censor of legislation and deciding what were effectively political issues....'.<sup>35</sup>

In the comparison between realism and the school on sociological jurisprudence, while both schools of legal thought do recognize the importance of the judicial role, under sociological jurisprudence, the judiciary is but one institution of social engineering and is not significantly superior to any other institution involved with law. However, under legal realism the centre stage is taken by the judiciary who determines the contents of the law, and it is they who have the power to give life to the dead letter law as promulgated by the legislature that is implemented through the executive arm of the government.

Realist do not go into an argument of whether law making by the judges is correct or wrong. Instead, it is proposed that such is the reality. This reality was succinctly expressed by Lord Reid who was bold enough to state that, 'for better or for worse judges do make law and tackle the question how do they approach their task and how should they approach it'.<sup>36</sup> Capurso<sup>37</sup> explains that according to realist, the judges first come up with the decision and then only look for legal principles and precedents to justify their decisions instead of going the other way around.

In connecting legal realism with judicial activism there can be a basis for the justification of such activism since the judiciary is the ultimate forum from which the law is distributed among the citizens of a country. As Hoque points out,

The emergent South Asian judicial activism comfortably fits into [realists] broader premise. More generally, legal realism or instrumentalism makes a convincing case that judicial alertness or assertiveness is a necessity'.<sup>38</sup>

Realism in comparison to all the other theories that were discussed puts the highest emphasis on the role of the courts in shaping the law and therefore it would be prudent to argue that judicial activism would be something that would come natural under the realist theory since it would be the courts who would make the ultimate decision as to the meaning and context of the law. As realist gives much prominence to judges and how they judge, an activist judge would not be an anomaly but a part and parcel of the judicial process according to the realist school of legal thought.

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<sup>35</sup> M Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn Sweet and Maxwell, 2014) 825.

<sup>36</sup> Lord Reid, 'The Judge as Law Maker' [1972] *Society of Public Teachers of Law* 22, 22.

<sup>37</sup> Timothy J Capurso, 'How Judges Judge: Theories on Judicial Decision Making' [1998] *U Balt L Forum* 5

<sup>38</sup> Ridwanul Hoque, *Judicial Activism in Bangladesh* (Cambridge Scholars Publishing 2011) 30.

The above discussion in general points to the fact that the existing legal theories are more in favour of an active judiciary than one which is more restrained. However, this is not to say that whatever the judiciary decides to do can or will be considered as judicial activism proper. To be within the limits of what is accepted under the premise of judicial activism is something which needs to be seriously considered and greater involvement by the courts will require greater justification for being active in matters of social interest and in matters of human rights as showcased in some of the more famous decisions of the Supreme Court of India.<sup>39</sup>

It is therefore evident that judicial activism is not necessarily an evil and on most occasions is activated by inactiveness of the legislative and the executive branches, which is heightened in matters of human rights since many courts all over the world are provided with the jurisdiction to protect human rights and provide relief to those whose rights have been violated by the governmental agencies. In this background, it can be shown that in the implementation of international human rights obligations of a country, judicial activism can play a pivotal role, especially so in countries which are still in the developing stage where people often turn to courts for both protection and vindication of their rights guaranteed under their respective constitutions.

## 6. Conclusion

Judicial activism, when examined through the prisms of classical and contemporary legal theory, emerges not as an aberration but as a legitimate, and at times necessary, function of the judiciary. Natural law theory readily accommodates judicial engagement in the pursuit of moral justice, while sociological jurisprudence encourages a pragmatic and responsive judiciary attuned to the needs of a dynamic society. Even legal positivism often viewed as restrictive offers interpretive leeway through Hart's open-textured rules and Austin's recognition of judicial creativity in the absence of legislative clarity. Realism, perhaps most emphatically, places the judge at the center of legal development, acknowledging that law in action is often shaped more by judicial choices than by statutory text.

These varied perspectives demonstrate that judicial activism is not without theoretical foundation. Rather, it is deeply embedded in the understanding that law must be responsive to context, guided by reason, and anchored in justice. While restraint remains an essential judicial virtue, a rigid adherence to passivity may render the judiciary ineffective in the face of evolving societal needs and constitutional mandates. Thus, when grounded in principle and guided by institutional responsibility, judicial activism can serve as a vital tool for upholding rights, bridging normative gaps, and reinforcing the rule of law especially in societies where legal institutions are called upon to navigate complex intersections of law, morality, and justice.

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<sup>39</sup> In the case of *Antony v Commissioner, Corporation of Cochin*, 1994(1) KLT 169, it was held that life 'no longer means animal existence . . . but includes the finer grades of human civilisation'. This epitomizes the willingness of the judiciary to actively take part in the protection of the rights of the citizens of India.

## References

### Secondary Sources

1. Austin J, *The Province of Jurisprudence Determined* (first published 1832, WE Rumble ed, CUP 1995)
2. Capurso TJ, 'How Judges Judge: Theories on Judicial Decision Making' [1998] U Balt L Forum 5
3. Finnis J, *Natural Law and Natural Rights* (Rev edn, OUP 2011)
4. Forte F, 'Natural Law and the Limits to Judicial Review' [1996] Catholic Social Science Review 42
5. Freeman M, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet and Maxwell 2014)
6. Fuller L, *The Morality of Law* (Yale 1969)
7. Hamilton A, *The Federalist* No. 68
8. Hart HLA, 'Positivism and the Separation of Law and Morals' [1958] Harvard Law Review 593
9. Hart HLA, *The Concept of Law* (3rd edn, OUP 2012)
10. Herdegen M, 'The Activist Judge in a Positivistic Environment – European Experiences' [1990] Stellenbosch L Rev 336
11. Hoque R, *Judicial Activism in Bangladesh* (Cambridge Scholars Publishing 2011)
12. Lord Reid, 'The Judge as Law Maker' [1972] Society of Public Teachers of Law 22
13. Mahlmann M, *Mind and Rights* (CUP 2023)
14. Mawar D, 'The Perils of Judicial Restraint: How Judicial Activism Can Help Evolve the International Court of Justice' [2019] Goettingen Journal of International Law 425
15. McHugh M, 'The Law-making Function of the Judicial Process Part I' [1988] Australian Law Journal 15
16. Menski W, *Comparative Law in a Global Context* (2nd edn, CUP 2006)
17. Pound R, 'The Lawyer as a Social Engineer' [1954] 3 J Pub L 292