Judicial Activism- Principles and Practice: (A Bird's Eye View of Theory, Practice & Current Trends in Global/Indian Scenario)

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Abstract

"Judicial activism is the process by which, new juristic principles are evolved to up-grade the existing law, to bring it in conformity with the current needs of the society and thereby to subserve the Constitutional purpose of advancing public interest under the rule of law............" Chief Justice Verma said in his speech delivered at SAARCLAW-India Chapter on 29th March 1996. Judicial activism is based on the theory of Jurisprudence called **Sociological Jurisprudence**. The evolution & growth of PIL has added a new dimension to judicial activism. Though the scope and periphery of judicial activism is immense and includes a vast number of subjects; the matters affecting Life & Liberty, Financial irregularities, Misuse of authority etc, needing immediate relief are some of the common instances. The practice of judicial activism is common in several other countries around the world more prominently US, UK and Canada. Judicial activism at times conveys a mistaken impression and despite its striking advantages is not free from criticism and the experts feel courts should exercise restraint and avoid Canutian directions that would lower its prestige while dealing with Suo Motu actions. This article attempts to examine (basis secondary data) the genesis, development, impact and the prevailing scenario in India/abroad relating to judicial activism, judicial review and judicial intervention.

KEYWORDS: Government, High Court/s, Judicial Activism, Judicial Review, Public Interest Litigations (PILs), Supreme Court of India and Suo Motu.

1. INTRODUCTION:

1.1 Meaning and Genesis: The phrase 'judicial activism' carries more than one connotation. According to Merriam-Webster's Dictionary of Law, judicial activism is "the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to the supposed constitutional or legislative intent". 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." The term "judicial activism" came into currency sometime in the twentieth century to describe the act of judicial legislation. Although, the underlying debate on judicial activism has been making waves since the days of ***Blackstone and Bentham***, the credit for popularizing the term "Judicial Activism" goes to a non lawyer ***Arthur Schlesinger Jr.,*** whose 1947 article in FORTUNE titled "Unelected Judges versus democratically elected legislatures: Result-oriented judging versus principled decision-making: Observance versus side-stepping of precedents: Law versus politics" and so on started the modern debate and brought into spotlight the dichotomy observed in the judicial process. On the basis of their judicial philosophies, Schlesinger characterized some Judges of the US Supreme Court as "judicial activists", some as "champions of self-restraint" and others as comprising the middle group.

1.2 "Judicial Review" and the Indian Constitution- Judicial Activism is said to be the offshoot of judicial review. Over the past sixty years, the Parliament and Legislatures in India have widened the horizon of their powers particularly affecting the life and liberty. The inclusion of explicit provisions for 'judicial review' in post-independent India, were necessary in order to give effect to the Fundamental Rights (FRs) guaranteed in the constitution. Dr. B.R. Ambedkar had described these provisions as the "heart of the constitution". Article 13(2) of the constitution of India, stipulates 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 contravention, be void. The Supreme Court of India and the High Courts were given the power to examine the constitutionality of legislative and administrative actions to protect/enforce the FRs guaranteed in PART III of the Constitution. While judicial review over administrative action has evolved on the lines of common law doctrines its reach has grown in three dimensions- i] to ensure fairness in administrative action, ii] to protect the constitutionally guaranteed fundamental rights of citizens and iii] to rule on questions of legislative capability of the centre and the states.

2. JUDICIAL ACTIVISM –SCOPE & PERIPHERY:

2.1 Normally judicial activism arises in three different situations: first, when a new policy conflicts with existing precedent; second, when changing precedent conflicts with existing policy; and, third, when both policy and precedent evolve in different directions and at different paces. The scope of the "judicial review" and "judicial activism" is immense, most importantly Article 32 of the Constitution of India has bestowed the power on the Supreme Court to enforce the fundamental rights particularly in the form of writs- such as **Habeas Corpus** (direct the release of a person detained unlawfully), **Mandamus** (to direct a public authority to do its duty**), Quo Warranto** (to direct a person to vacate an office assumed wrongfully**), Prohibition** (to prohibit a lower court from proceeding on a case) and **Certiorari** (power of the higher court to remove a proceeding from a lower court and bring it before itself). Article 226 permits the citizens to file similar writs before the High Courts. Some of the other matters coming under the umbrella of judicial activism are- **Legislative Proceedings**: In the Jharkhand legislative assembly case, the Supreme Court ordered Speaker to take a motion of confidence and record it for reporting to the court in spite of article 212 which states that courts should not inquire into any proceedings of the legislature. **Centre-State Relations**: the higher courts can also be approached on questions of centre-state relations-(Article 246 read with the 7th schedule). **Military Operation:** In 1993, the Supreme Court issued orders on the conduct of military operations in Hazratbal Shrine, Kashmir where the military had as a matter of strategy restricted the food supplies to hostages. **Environmental Protection:** Many significant decisions have been taken in the realm of environmental protection and much credit goes to renowned environmentalist M.C. Mehta. In the nut shell the most common areas of judicial review/judicial activism are -i] Issuing writs of Certiorari, Mandamus, Prohibition or other direction to protect FRs. ii] Filing up the abeyance clause (in the words of CJI Verma) in the law of constitution with a view to advancing the object behind the provision. iii] Expanding the horizon of FRs for example reading the doctrine of natural justice into Art 14, iv] Bringing arbitrary action of the executive within the ambit of Art 14, v] Uplifting the Directive Principles of State Policy (DP) to the level of FRs in certain cases, vi] Issuing directions to the executive for failure to perform their duties, vii] Making administrative staff responsible for public wrongs and award severe punishment

[DDA v Skipper construction Co-1996 vol 1 SCC 273], viii] Expanding the scope of right to life by including therein the right to health and medical aid to workers.

2.2 Article 21 and Judicial Activism: Article 21 which states: "No person shall be deprived of his life or personal liberty except according to procedure established by law" is of paramount importance in the Constitution. *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27, is a landmark case on Art 21 wherein Supreme Court held that to deprive a person of his life or liberty the procedure prescribed by law must be followed and the procedure must be fair, reasonable and just. Subsequently in *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, the requirement of substantive due process was introduced into Article 21 by judicial interpretation. Thus, the due process clause, which was consciously and deliberately avoided by the Constitution makers earlier, got introduced by judicial activism. Another dimension was added to judicial activism when the Supreme Court interpreted the word `life' in Article 21 to mean not mere survival but a life of dignity as a human being. Judicial interpretation also expanded the scope of Art 21 and held that Right to education is a FR as it 'directly flows' from right to life. Thus the Court interpreted Article 21 in the light of Article 45 wherein the State is obligated to provide education to its citizen's up to the age of 14 years.

3. JUDICIAL ACTIVISM AND PUBLIC INTEREST LITIGATIONS (PILs):

3.1 Public Interest Litigation **(PIL):** As per Oxford English Dictionary 2nd Edn Vol.Xll "Public Interest" means the larger interests of the public, general welfare and interest of the masses and "Litigation" means "a legal action including all proceedings therein, initiated in a court of law with the purpose of enforcing a right or seeking a remedy." Thus *'Public Interest Litigation'* means "any litigation conducted for the benefit of public or for removal of some public grievance." PIL is common tool of Judicial Activism in many countries though known by different names. In the **USA** it is known as ***Class Action or Social Action Litigation or Social Interest Litigation.*** In India any public spirited citizen can approach the Supreme Court under Art.32, or the High Court under Art.226 of the Constitution or before the Court of Magistrate under Sec. 133 of the Code of Criminal Procedure, 1973, in the interest of public cause/ public welfare. *Other countries such as South Africa, Canada, Germany, France and Japan also have public interest litigation, though it is not described as such.*

3.2 In India P.N. Bhagwati and Krishna lyer Judges of Supreme Court set the groundwork from mid 1970s to early 1980s, for the evolution of PIL. This was done by modifying the traditional requirements of locus standi, ***[locus standi, is sine qua non for instituting a case in the court],*** liberalizing the procedure to file writ petitions, expanding the horizons of Fundamental Rights (FRs) and evolving innovative remedies. The need was more pressing in a country like India where a large majority of people were either ignorant of their rights or were too poor to approach the court. Krishna lyer J., liberalized of the rule of Locus Standi in (*Fertilizer Corporation Kamgar Union v. Union of India (AIR 1981 SC 344).* The PIL bloomed in S.P. Gupta and others vs. Union of India*, (AIR 1982 SC 149)* popularly known as ***"judges transfer case",*** and since then, a good number of PILs have been filed. Supreme Court also played a vital role in laying down several principles in PIL cases e.g. the principle of *"absolute liability"* in *Oleum Gas Leak case,[* M.C. Mehta v Union of India AIR 1987 SC 965] "*public trust doctrine"* in Kamalnath Case [M.C. Mehta v Kamal Nath (1998) 1 SCC 388].

3.3 PIL Vs PCL (Public Cause Litigation):- Through PILs many scams and corruption cases were unearthed - Hawala scam, Urea scam, Fodder scam in Bihar,

St. kit's scam, Ayurvedic Medicines scam etc, to name a few. PIL cases there were no immediate or quick solutions, so the Court developed ‘‘creeping’’ jurisdiction thereby issuing appropriate interim orders and directions. However, over the years, the social action dimension of PIL has been diluted by another type namely ***“Public Cause Litigation***” (PCL). In PCL the court’s intervention is sought for correcting the actions/omissions of the executive/ public bodies. The recent instances of PCL are the Court’s order for compliance of policy in supplying mid-day meals in government-run primary schools to check the poor quality and widespread pilferage of food grains, *[People’s Union for Civil Liberties v. Union of India],* ordering wearing of helmets in cities, cleanliness in housing colonies, disposal of garbage, wearing of seat belts, control of monkey menace in cities and towns, prevent ragging of college freshers and recently 2G scam leading to prosecution of Telecom Minister and other officials, intervention in forcible eviction of Baba Ramdev from the Ramlila grounds by the Delhi Administration, etc.

3.4 Difficulties in exercising Judicial Activism through PIL: PIL is like a double edged sword, a weapon which must be used with greatest care and caution; it often encroaches upon the sphere of the executive and legislature. Some experts claim that there has been a rampant misuse of PLIs in India, which started in the 1990s. Though PILs is a good vehicle of exercising judicial activism there are certain teething problems in achieving this goal. Sometimes PILs are disguised and used with ulterior motive and tends to become either ***private interest litig*ation** or ***publicity interest litig*ation.** There is a widespread feeling that courts have failed to meticulously impose the prerequisites of PIL. Many times the PILs misuse of precious judicial resources which India cannot afford; given the fact that crores of cases are pending in the courts and decades are taken to settle the litigations. Several PILs are admitted by the courts thinking it might become a hot topic of debate and generate popularity for them. Once the PIL is decided the court is unsure whether its guidelines will be followed or not and the PIL decision remains mostly emblematic; e.g. sexual harassment at workplace (*Vishaka* case) or the procedure of arrest by police (*D.K. Basu* case). Further judiciary is acting selectively rather than showing uniformity. No doubt the judicial activism can be achieved through PIL but PILs cannot be equated with judicial activism and the overuse and abuse of PIL a useful remedy may eventually defeat the whole purpose.

4. GLOBAL SCENARIO:

The span and reach of judicial power is almost limitless in countries having ***written Constitution.*** Judge Thijmen Koopmans from the **Netherlands** when asked about why the European Court of Justice had gone much further than the text of Treaty of Rome, which established that court; reacted “What the Luxembourg Court has done is a common phenomenon of all courts, national and international. There is a natural tendency for judges to write a larger role for themselves”. In the **common law countries**, too, this form of **"judicial activism**" is evident prompting one of **England's leading lawyers, Lord Anthony Lester**, to suggest that the hackneyed phrase, *"power corrupts and absolute power corrupts absolutely", should be adapted by today's judges as:* ***"Judicial power is wonderful, and absolute judicial power is absolutely wonderful."*** In the **United States**, another giant **common law country**, there is a more marked separation of powers but the reach of the US Supreme Court the world's oldest court, is constitutionally limited and not all matters can be brought before it. The power of judicial review is not specifically mentioned in the US Constitution, but in the celebrated case of ***Marbury* v. *Madison*** the US Supreme Court struck down part of the Judiciary Act, 1789, holding that it violated the US

Constitution. Thus the Court assumed that it had this power since a Constitution is the highest law of the land, and prevails over ordinary statutes. In recent years, however, the U.S. Supreme Court has become much ***less "activist"*** for instance the Courts' decisions was criticized on the grounds of 'activism' in *Lawrence* v. *State of Texas* where it struck down a Texas statute that considered same-sex sexual activity to be a crime. **In England**, since Parliament is supreme and there is no written Constitution, the traditional approach of the judiciary was only to apply the law made by Parliament, thus the British Judges were subservient to Parliament, and were not expected to be activist. ***In Mary McGee's case the Irish Supreme Court*** struck down s. 17 of the Act, which outlawed the sale and import of contraceptives, as being violative of Article 40.3 of the Irish Constitution which said that the State is bound to protect "the personal rights of the citizen", in particular his "life, person, good name and property". In **Germany** Judicial Activism was often juxtaposed against a policy of "judicial restraint," and it was conservatives who usually opposed such judicial activism. At the present time, judicial activism lacks defined content and is typically nothing more than an ideological harangue. However, there is a strong feeling that judges are acting improperly or even illegally and should observe "judicial restraint". In **France,** Montesquieu proclaimed that the judge is subordinate to the law and is bound by law indicating the absence or dilution of judicial activism. Though **Japan** is a bureaucratic state in which high-ranking administrators shape and reshapes many public policies, judicial activism has been firmly established since 1947. The **Meiji Constitution of 1889** did not provide for the power of judicial review and did not even recognize the judiciary as independent from the Diet and the Cabinet. In Japan instances of judicial activism are found even in the lower courts (like District courts), and some people argue that Lower court judges, who are relatively young, tend to be more activist than Supreme Court justices, who are considerably older; age, however, need not be a determining factor of judicial activism. In **Canada,** judicial activism was more suppressant and the leading case in point is ***Treasury Board v NAPE,*** Newfoundland and Labador Cout of Appeal in which Justice Marshall accused the Supreme Court of Canada of undue incursions into the policy domain of the elected branches of Government". Interestingly cases of judicial activism have increased over the period in Canada, catching up with the trend in other countries; and in fact there is now a demand for more restraint on the part of judges.

5. SUMMARY AND CONCLUSIONS:

The term judicial activism has many shades and is capable of conveying a mistaken impression. In these modern times everyone would agree with ***Professor Roscoe Pound's*** theory that "Law must be stable, yet it cannot stand still". Critics of judicial activism assert that it subverts the separation of powers principle founded by the framers of the U.S. Constitution and enshrined in many written constitutions across the world. In India where the population has reached the explosion limit and half of whom are illiterate, socially suppressed, unaware of their rights, are prone to all types of exploitation; the court is the only sentinel and guardian of their rights. It is interesting to note that while general public is happy about the court's intervention; it is the authorities/wrong doers who are the men with position; power and pelf, many of whom are affected by court's decision have drawn the ire and manage to raise hue and cry against the judicial activism. As that great democrat, **Edmund Burke**, used to say: "The fire-alarm at midnight may disturb your sleep, but it keeps you from being burned at night." Gerard Brennan before he became chief justice of **Australia in 1991** stressed the need not only for independent judges, but also the importance of an active judiciary. Thus via Judicial activism judges play the role of Social Engineers. #

Debate over 'judicial review' has assumed great significance in recent years in the form of conflicting philosophies. The question "Which is supreme under our constitution Parliament or the Supreme Court?" is a mischievous one; the answer is "neither". ***'Judicial Activism by Judicial Interpretation'*- In the garb of interpretation Judges often make law (though they never admit it openly), e.g. the creation of a right to privacy in Griswold. Some experts feel "Judicial activism" does not amount to **"judicial legislation"** the phrase used by Justice William Rehnquist in his ***Roe v. Wade*** dissent, it is merely when judges cross the line that separates judging from legislating and do not take away legislative power from legislators. ***'Judicial Activism by Judicial Interpretation'*-** In the garb of interpretation Judges often make law (though they never admit it openly), e.g. the creation of a right to privacy in Griswold. Chief Justice of the ***Canadian Supreme Court*** Mrs Beverley McLaughlin had described "judicial legislation" as an 'Oxymoron'. The Indian Supreme Court in *Sarojini Ramaswami v. Union of India, AIR 1992 SC 2219, (Paragraph 2),* observed: "*It used to be disputed that judges make law. Today, it is no longer a matter of doubt that a substantial volume of the law governing the lives of citizens and regulating the functions of the State flows from the decisions of the superior courts".* There was a time' observed ***Lord Reid****, 'when it was thought almost indecent to suggest that judges make law – they only declare it……….But we do not believe in fairy tales any more' In* ***Germany*** the free law movement pioneered by Fuchs and Kantorowicz required the judges to create law in accordance with justice and equity whenever the positive law was unclear or ambiguous. **# 'Judicial Activism' and 'Judicial Self Restraint'-**in the sagacious words of Chief Justice Hidayatullah (1984),"The first principle to observe is that the wisdom of the law must be accepted. A little incursion into law-making interstitially, as ***Holmes*** put it, may be permissible. For other cases the attention of Parliament and/or Government can be drawn to the flaw". Adding further he said, "Fortunately, the fervour for judicial activism which engulfed the courts during the third and fourth decades, seems to be ebbing with the progressive realisation that it is preferable to tread the "highways" of justice instead of resorting to the "bye-lanes" of activism in the hope of expeditiously reaching the goal of justice". Though the times have changed there is still a strong feeling not only in India but almost all the countries across the world; that the judges must observe Judicial Self Restraint. While addressing a conference of High Court Chief Justices presided by CJI in January 2001 the chief guest PM Manmohan Singh voiced his concerns about "judicial activism." what he described as **"Judicial overreach",** obviously, meaning a lack of restraint on the part of some justices in not respecting the "territory" or domain of other organs of governance. Not everyone favours judicial restraint, some critics of judicial restraint say it is "pro-government", "pro-rich" and "anti-social justice" and hence a "rightist" ideology. It is a common perception that Judges are meant to act as humble interpreters of law, not pose as emperors who adjudicate on a whim. But in modern times we do not need faceless, impassive Judges, sadly; enough technical Judges are not easy to come by in India. The proponents of judicial restraint often add "JUDICIAL RESTRAINT WOULD HAVE MEANT NO KESAVANANDA BHARATI" *(AIR 1973 SC 1461).* # Despite the great advantages of "judicial activism." some steps need to be taken in order to prevent an ***"over-activist"*** *j*udiciary from transgressing its limits and preventing 'judicial activism' from becoming ***'judicial adventurism'***. It is pertinent to note that any deviation from the well-trodden path frequently leads to controversies and sometime even to entirely unjust outcomes. Judicial activism may be a good thing on certain special occasions, sometimes a blessing to the society when it is

experienced and the executive/ legislative, are inefficient and reluctant to do their duties, correctly and sincerely and even ignorant about their duties; yet we have to draw the line somewhere sometimes.

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