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ON

Rule of Law and Frontiers of Judicial Activism

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Philosophical Perspectives of Judicial Activism

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Introduction

Judicial activism is not a new concept. It is in existence in one form or the other since ancient periods. A peep into a number annals across the world though literary, socio, philosophical, political, economic, cultural and legal texts amply provided space for interpretation of law according to the situation than a judge to strictly confine to the statutory norms and regulations. Long ago Cicero in his *De Legibus*, had expressed clearly that a judge is clear voice of a statute, a speaking law (*magistratum esse legem loquentem*).¹ The Indian ancient texts in unison advocate that it is the duty of every individual to protect the *Dharma*, which is the essential quality of humans and the society. All the texts without exception advocated that the king needs to do justice and be a good role model to others as a judge. The Bhagavad Gita through chapters three and four advocates "consciously controlled and diligently regulatory action against evil in all its manifestations"² is nothing but an inference that a judge is expected to do justice by not only to interpret law but also ought to see that justice is done.

Judicial Activism or Judicial Review depends upon several factors. Amongst the many as Massimo La Torre has rightly observed,³ it depends upon three important factors. Firstly, how people conceive the constitution of a polity, secondly, it depends on the view of consideration of judicial reasoning, and finally, from a philosophical point of view what the law's nature is. If one examines from the above angles different results will emerge. In fact, judicial review is mainly based on the philosophical differences of

¹ Pierre Legrand, "Adjudication as Grammatication: The Case of French Judicial Politics," in Luis Pereira Coutinho, et.al., (eds), *Judicial Activism : An Interdisciplinary Approach to the American and European Experiences*, 51, 2015, (e-edition) Springer

² N.P. Rao, *Ancient and Modern Percepts in Administration A Probe into the Epics*, 61, 1998 M.D. Publications. New Delhi

³ Massimo La Torre: *Between Nightmare and Noble dream: Judicial Activism and Legal Theory*, Luis Pereira Coutinho, n1, 4.

the major schools of law i.e., naturalism and positivism. The angle in which one looks in, the reflection that comes in whether a judge is conventional, temporal or activist. Whatever may be the ideological leanings of scholars, as rightly opines by Justice A.S. Anand, judiciary needs to function as an *alarm clock* and not a *timekeeper*.⁴ In the light of the above, the paper attempts subtly to examine the perspectives of judicial activism from the theoretical perspective.

Justice to judicial Activism

From ancient to contemporary periods, justice has been a subject of philosophical and legal discourse. Though different philosophical approaches and the circumstances in which justice is grown and seen, it differs from the cultural and theoretical perceptions, the central idea and the function of justice remains as the same. Accordingly, justice may mean anything from (1) the accurate application of authoritative rules of positive law (called **formal justice**), through (2) treating the parties fairly according to some process model, (that is **procedural justice**), to (3) dealing with people according to their deserts, or their needs, or their moral rights or however we care to define (that is **substantive justice**). However, if it is seen from the prism of law, justice means according to the authoritative rules', or it might mean following procedural rules, or it might mean 'acting in accordance with the substantive fundamental moral principles embedded in the very idea of law.'⁵ If this being the accepted principle of law, judicial activism, a word which is not liked by many judges. Many judges opine that they do nothing in creating a new law, they only interpret the law according to situations of a case or changing social necessities, while disposing of a case according to circumstances in which they may give a broader interpretation of the law or procedures or rules. At most, they agree that they exercise the inherent power that is legally conferred on them either constitutionally or through canons of law. However, whenever a judge nullifies any legal provision or interpret a perception of law from the socio-economic point of view, such judges are mostly referred to as activist judges from where in the probably concept of judicial activism took birth.

⁴ A.S. Anand: Indian Judiciary and Challenges of 21st Century in S.P. Verma (Ed) Indian Judicial System : Need and Directions of Reforms, 14, 2004, IIPA New Delhi

⁵ Tom Campbell : Judicial Activism-Justice or Treason? Available at <http://www.cappe.edu.au/docs/working-papers/Campbell3.pdf> visited on 10.8.2015

Judicial Activism Evolution and Concept

Judicial activism and judicial restraint are the terms evolved especially in the context of describing the assertive power of a Judge. Both the terms may have come into existence in the contemporary era, the idea behind activism has a long history. From the evolutionary perspective Arthur Schlesinger Jr. a non-lawyer, introduced the term "judicial activism" to the public through Fortune magazine article in January 1947 describing the alliances and differences that existed between the judges of the Supreme Court of US at that point of time on the interpretation of legislations in USA.⁶

Activism is considered as an ascriptive term.⁷ In general, whenever judges interpret a law in a liberal fashion, or to do justice striking down arbitrary provisions either in a legislation or in a government order, ideologists, social activists, media or NGO's term them as activist judges though it is difficult to define the word activist judge. According to Prof Baxi, to answer a question as to who is an —activist judge is rather difficult, since the labels —activist and its opposite the —restraintivist, are used by those who specialize in judging the judges. There appears to be at least five identifiable groups of people who judge the judges. First, the scientific judges of judge's viz., those including law teachers, social scientists and investigative journalists. Secondly, the —managerial judges of judges which group includes the top echelons of bureaucracy and the supreme executive (Prime Minister), for the management of acts like appointment and transfer of judges etc. Third, the lawyers some of whom feel that it is their professional duty to judge the judges, and some others who felt that it is their exclusive right to do so. Fourth, the so-called —victims of use of judicial power, who include police, prison officials, custodial officials, administrative authorities, corporations, universities and landlords etc. and Fifth, the —beneficiaries of use of judicial power eg. Civil services, students, trade unions, pensioners, prisoners, labour, and taxpayers, etc.⁸ A number of scholars defined judicial activism according to their own understanding.⁹

⁶ Keenan D. Kmiec: The Origin and Current Meanings of "Judicial Activism" California Law Review, 92, 1146, 2004 available at <http://scholarship.law.berkeley.edu/californialawreview/vol92/iss5/4> also see Michael J. Gerhardt: The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights, 10 Wm. & Mary Bill Rts. J. 585 (2002), <http://scholarship.law.wm.edu/wmbrj/vol10/iss3/3>

⁷ *Vishaka v. State of Rajasthan* (1997) 6 SCC 241

⁸ Tehmtan R. Andhyarujina: *Judicial Activism and Constitutional Democracy in India*, 62, 1992, N.M Tripathi, Bombay

⁹ *Judicial Activism in India*, 60-63,

http://shodhganga.inflibnet.ac.in/bitstream/10603/32340/8/09_chapter%203.pdf Visited on 5. 12.2015

Basing on the perception of observers the inherent power of judiciary, namely, judicial review described as judicial activism, it has been classified into a number of types. In US, it is defined as liberal and conservative. Whereas in India, different approaches have been adopted by prominent jurists on judicial activism. Prof Sathe calls it as positive and negative. He defines a court engaged in altering the power relations to make them more equitable is said to be positively activist and a court using its ingenuity to maintain the status quo in power relations is said to be negatively activist.¹⁰ Where as on the other hand, Prof Baxi is of the view that Indian judicial activism either as reactionary judicial activism or as progressive judicial activism. He cites the Nehruvian era activism on issues of land reform and right to property and the pro-emergency activism typified in *Shiv Kant Shukla* as manifestation of reactionary judicial activism. On the other hand, he describes *Golak Nath* and *Kesavananda* as the beginning of progressive judicial activism.¹¹

Theoretical Underpinnings of Judicial Activism

(a) Naturalist Vs. positivist Perceptions

Naturalism since its evolution known for invention and prevention of social maladies with the help of positive legislations, natural law theories too never advocate judges to be mechanical in discharging their duties, especially interpreting a law. The theories of natural law advocate the judge's needs to be deliberative and their deliberations to be guided with objectives values that are accessible through practical reason or value based moral intuition. Where as, on the other hand, Positivists argue that judges need to stick to the facts of case and do justice without any inkling to logical interpretations. In fact though the positivist differ on many counts in their theoretical percepts, they are in unison does not allow judges to be creative to the social needs and stipulates to be legislative bound in their reasoning's when it comes to the interpretation of rule of law.¹²

(b) Theory of social want:

The Theory of Social want makes a clarion call to judiciary to exercise its inherent power of judicial review to promote the social interests to confine to the theoretical

¹⁰ S.P. Sathe, *Judicial Activism In India: Transgressing Borders And Enforcing Limits*, 2nd ed., 5, 2002, Oxford University Press, New Delhi

¹¹ *Ibid.* xiii

¹² Massimo La Torre: *Between nightmare and Noble Dream: Judicial Activism and Legal theory*, Luis Pereira Countinho et.al. (Eds), *Judicial Activism: An Interdisciplinary to the American and European Experiences*, 6-12, 2015, Springer, (e-edition)

proclivity of law and justice. Actually, this theory emerged in all parts of the world through the writings of various jurists. This theory mostly has its underpinnings in the philosophical, ethical, moral, and naturalist's ideologies interwoven with the changing dimensions of justice. Basing on this premise a number of jurists like Roscoe Pound, Julius Stone, Ronald Dworkin, Myers McDougal, John Rawls, Prof Upendra Baxi, et.al., across the world, interlinked the conceptual tenets of justice to address the legal problems through the social knowledge domain. The undercurrents of contemporary theoretical prepositions led the judiciary to interpret the legal problems, which have been less attended, by state to expand the jurisprudential vistas of second generation of human rights, viz., Economical, Social, and Cultural rights. In order to fill the gaps of the international and national order and to give a shape to justice, the interpretative skills of judges led to the evolution of judicial activism from a sociological perspective.

(C) Theory of Marginalization:

The theory of Marginalization is an offshoot of exploitation of 'have-nots' by 'haves' basing on economic, socio, cultural, religious, and customary practices, especially in the developing world. The equality perception of justice had to be circumvented to meet the needs of marginalized groups, destitutes, vulnerable and disadvantaged sections of societies across in fulfilling the objective expectations of law and order. Accordingly, to fill the gaps in law and to meet the expectations of legalist premises of fraternity, equality, liberty and to rise the standards of Life and Liberty, many a times the judges need to interpret the legal provisions in order to provide justice to them. Whenever, the judges look at the gaps in legislative or administrative orders to protect the above groups, it is labeled as judicial activism. In the realm of international legal jurisprudence, with sound philosophical base it is developing as 'global justice.'

(d) Theory of Nepotism:

Judiciary and judges being the most important arm of a state, as an offshoot of mismanagement of administration nepotism, secrecy, poor quality of legislative framework, and a host of aspects also led the judiciary to focus on its long arm of judicial review to set the things right. Whenever, the judges exercise their rights to set aside the games of other organs and criticise the malfunctioning of any organ, it again refers to as judicial activism.

(e) Theoretical Percepts of Human Rights

Apart from the above philosophical origins of judicial activism, one more important branch of law and justice both internationally and nationally became prominent in the contemporary era is human rights. Violence, repression of social stability, the tyrannical attitude of certain governmental organs and states, judicial measures implemented by judges bending the principles of law to rebuild the social trust to repair the fractured justice system with a direction to build democratic governance, it is often criticised that the judges stepping into the shoes of executive and legislative organs. The emphasis of judiciary is on how to augment the guaranteed human rights is termed as new kind of judicial activism by various observers. However, in the realm of international law it is termed as 'transitional justice', which requires the attention of both judicial and non-judicial measures to arrest all kinds of abuses to human rights and to wipe tears from every eye.

Indian scenario

Judicial review or in other words judicial activism what is popularly referred to in the contemporary Indian society, especially in the corridors of Law, is not a new concept. As discussed earlier, it is in existence in one form or the other from ancient periods. The Calcutta High Court in 1858 itself started exercising the power of judicial review. In *Empress v. Burah and Book Book Singh*,¹³ the Calcutta High Court enunciated the principle of judicial review:

The theory of every government with a written Constitution forming the fundamental and paramount law of the nation must be that an Act of legislature repugnant to the Constitution is void; if void, it cannot bind the courts, and oblige them to give effect; for this would be to overthrow in fact what was established in theory and make that operative in law which was not law.

In 1893, Justice Syed Mahmood of the Allahabad High Court delivered a dissenting judgment *Queen Empress v. Phopi*¹⁴ remains unexcelled unto this day. According to section 420 of then Cr.p.c., the case could not be disposed of in the absence of accused, and appellant must be heard in person. The precise issue before the court was whether the court could decide the case of an under-trial person when he was neither present nor

¹³ *Empress v. Burah and Book Singh*, I.L.R. 3 (Cal.) 63, 87-88.

¹⁴ I. L. R. XIII All. 171

represented by any lawyer, by merely looking into the case record. Justice Mahmood held the pre-condition of the case being "heard" could be fulfilled only when somebody speaks. His dissenting judgment in the Full Bench is more truly the reflex of his impartial perception of the objective, the essential, the universal, and he alone had asserted that no man-made law can be permitted to violate the divine injunctions for humanity. In the realm of personal laws of Hindus and Mahomedans the mainsprings of his expositions are the texts. To arrive at correct interpretation of the texts one must seek out its makers in the still sanctuary of their own works and very rightly his first counsel were the creators themselves than the expositors. Not only this, he travelled into the regions left unexplored by the commentators on the texts and his judgments like the sunlight pouring through the clouds revealed many a hidden truth.

His judgments in *Jafri Begum v. Amir Mohammad*¹⁵ and *Allahdad Khan v. Ismail*¹⁶ are indeed startling innovations in Mahomedan Law. On the law of preemption, his exposition in *Gobind Dayal v. Inayatullah* is classic and his conclusions on the origin of the right of preemption have enjoyed acceptance with unbroken consistency.¹⁷

Apart from these cases laws, after the constitution of India came into existence as rightly pointed out by Prof Sathe, Article 13 (1) and (2) coupled with writ jurisdictions and other provisions of the constitution, the judiciary is empowered to employ the extraordinary power of judicial review. Dr Ambedkar himself favoured for such a power to be vested with judiciary in order to safeguard the provisions of the constitution especially, any attempt to abridgement of fundamental rights of citizens.¹⁸

Conclusion

Judicial review and judicial process is an important power of judiciary. As Justice khanna aptly remarked, "when the light of law fails, Judges are supposed to have some

¹⁵ I. L.R. VII All. 1289

¹⁶ I. L. R. X All. 1289

¹⁷ For detailed discussion on the contribution of Justice Syed Mahmood, see Justice M. Hidayatullah: Jusitce Syed Mahmood , available at

http://www.allahabadhighcourt.in/event/Justice_Syed_Mahmood_M_Hidayatullah.pdf visited on January 2, 2016 see the contributions of justice Mohamood to Muslim law reform in India available at http://digitool.library.mcgill.ca/webclient/StreamGate?folder_id=0&dvs=1455901424017-148 visited on January 2, 2016.

¹⁸ For a detailed discussion see S.P. Sathe: Judicial Activism: The Indian Experience, 6, Washington University Journal of Law and Policy, 30-108, 2001.

special vision like the third eye of Shiva"¹⁹ At the same time, he cautioned that it is the duty of judges that they need to exercise alertness and restraint when exercising their authority without encouraging the powers of the other organs. It is a tough task for a judge where to draw the *lakshman rekha*. It is a common syndrome, when they to stick to legal principles, it is immediately criticised that they are not dynamic, if they exercise their power they are overstepping their powers. Justice and Judicial review are most delicate issues interwoven with complicities, which needs to be borne in mind and needs to be exercised with due care and caution.²⁰ In fact the kind of path that the Indian judiciary has adopted from its inception to post modernism, (with few exceptions here and there), it needs to be credited by and large for maintaining the balance between legal problems on one side, exercising its judicial review power to address the concerns of various sections of the people on another side, are well with in the philosophical percepts discussed above.

¹⁹ Quoted in Kalraj Mishra : Judicial Accountability , 37 Ocean Books, New Delhi 2013

²⁰ For a critical analysis see the author's paper TSN Sastry , Judicial Process and Human Rights in India , Indian Law Review, 56-69, vol.5, 2013