NATIONAL AND INTERNATIONAL LAYOUT OF JUDICIAL ACTIVISM

*** VAIDEHI SONI**

I Introduction

Meaning and Genesis

The term '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".[1] 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."[2]

The phrase "judicial activism" came into currency in the twentieth century to elucidate the act of judicial legislation, the debate on the same has been making waves since the days of ***Blackstone and Bentham***, the condemnation for popularizing the term "Judicial Activism" goes to ***Arthur Schlesinger Jr.,*** whose 1947 article in FORTUNE titled "Unelected Judges versus democratically elected legislatures: Observance versus side-stepping of precedents: Result-oriented judging versus principled decision-making: Law versus politics" and so forth began the debate and illuminate the dichotomy observed in the judicial process. On the premise of their judicial philosophies, Schlesinger portrayed some Judges of the US Supreme Court as "judicial activists", some others as "champions of self-restraint". The term 'Judicial Activism' was introduced by Arthur Schlesinger Jr. in an article 'The Supreme Court: 1947' in a January 1947 Fortune Magazine[3]

Judicial activism can be perceived in three ways- firstly by overturning judicial precedents, secondly by overturning any law as unconstitutional, and thirdly by interpretation of the Constitution. In plain sailing words, judicial activism can be envisaged as the political role played by judiciary, just as the other two- legislative and executive. Judicial activism is rationalized on various grounds like collapse of Government, Thrust on judiciary to step in aid,

[1] Merriam –Webster's Dictionary of law ,pg 270
[2] As quoted in "Takings Clause Jurisprudence: Muddled, Perhaps; Judicial Activism, No" DF O'Scannlain, *Geo. JL & Pub. Pol'y*, 2002
[3] Kmiec, Keenan D, *The Origin and Current Meanings of Judicial Activism* (2004).

Judicial enthusiasm to assist in social reform which compels judiciary to facilitate, assist, aid and make policies for public well-being. The notion of activism differs from groups to groups, such groups are lawyers, executive, law teachers, police officials, students administrative authorities, etc. Any act which is considered as activism by one group but simultaneously that may become judicial inactiveness for other groups. For this reason, judicial activism is a substance to many debates. These groups regard judge as an 'activist' depending upon their values, ideologies, and perspectives. Concept of judicial activism can be regarded as synonym of judicial anarchy, judicial absolutism, judicial supremacy and judicial imperialism.

II Judicial Activism In Indian Scenario

Evolution And Growth Of Judicial Activism

Law primarily comes from two sources- legislative enactments and precedents or judicial decisions, the making of laws by judges. Many Constitutional provisions enable judiciary to play an active role by asserting itself. Article 13 of the Indian constitution empowers Court to declare any law unconstitutional if it violates any fundamental right of citizens which is guaranteed by Constitution. Article 19 enables Supreme Court to determine whether restrictions imposed on fundamental right are reasonable or not. Aggrieved person can approach Supreme Court under Article 32 or any High Court under Article 226. Article 131 upheld the federal principle. Supreme Court is the highest Court of appeal in all criminal, civil, and constitutional matters[4], it enjoys advisory jurisdiction[5] and has rule making power[6]. It has authority to make final declaration as to validity of law and all its judgments are binding on all other Courts in India except itself.[7]

From aforementioned constitutional provisions, it is clear that constitutional framework has given ample scope for judicial activism as judiciary, and specifically Supreme Court enjoys noteworthy position. The emergence was a result of trends like excessive delegation without limitation, expansion of power of judicial review over administration, extending the scope of its interpretation to achieve economic, social and educational objectives, etc.

[4] INDIA CONST.art.132 to art.137
[5] INDIA CONST.art.136
[6] INDIA CONST. art.142, art.145
[7] INDIA CONAT.art.141

History of judicial activism traces back to year 1983, it was a case of under-trial who could not afford a lawyer and a question was raised whether the court would decide merely by looking at papers. In that case Justice Mehmood of Allahabad High Court held that pre-condition of the case being 'heard' would be fulfilled only when somebody speaks.[8] Thus widest possible interpretation was of relevant laws were given and with that founding stone of judicial activism in India was laid down.

Implication Of Judicial Activism In India

The extensive view of Supreme Court ruling has some exciting perceptivity into the transmutation of judicial activism in India; in India judicial activism has taken a triggering face for the citizens. The Indian Supreme court's scan has gone beyond for the protection of the economically and socially downtrodden and into the domain of public administration. However, its viewpoints often resemble aspirations rather than adhering pronouncements. The Bihar under trial case was the first major judicial activism case which occurred through the social action litigation. In the year 1980, it came across under article 21 in the form of writ petition by few professor of law breaking out the black-hearted conditions of confinement in the Agra protective home, earlier there were many cases from where one can easily infer the acting of judicial activism in the country. Here, few illustrations will show the working of judicial activism in the territory.

1) In *Sakal Newspaper Private Ltd v. Union of India*[9], "a company and a reader of the newspaper filed a writ petition challenging the daily newspaper (price and page) order, 1960, under Art 19(1)(a) laid down how much a newspaper could charge for a number of pages was being violation of freedom of press. The Court also conceptualized a doctrine of giving preferred position to freedom of speech and expression, which includes freedom of the press, over the freedom to do business. The supreme court held that the newspaper was not only a concept of business; it was a platform of to express ones thought and information in the form of writing therefore could not be regulate like a business."[10]

[8] Aman kumar Burnwal & Shilpa Rani, *Judicial Activism In India* : *Assertion Of Judicial Power To Fill The Legislative Vacuum*, IJLDAI, (2016)
[9] A.I.R.1962 S.C. 305.
[10] BURNWAL, *supra* note 8

2) In the well known *Keshavananda Bharti* case, "two years before the proclamation of emergency, the Apex Court declared that the executive has no right to fiddle with the constitution and alter its fundamental characteristics. But it could not deflect the emergency declared by Mrs. Indira Gandhi and it was only at the end of it that the Supreme Court and the Lower courts began to ceaselessly intervene in executive as well as legislative areas." [11]

3) In the post emergency activism, we would see the Apex court surpassing from legal positivism. With the help of liberal interpretation of the constitutional provisions, the Supreme Court expand the rights of the people as per the conditions, requirements and situations regarding right to personal liberty and right to equality, gave the expansive meaning to the word life, liberty and personality enshrined in Article 21of the Constitution of India.

4) In the case of *Balaji v. State of Maysore, "*the Supreme court held that Backward Classes are entitled to get reservations and such reservations should not contradict the concept of right to equality and equal protection of law. The judgment given by the judges that backwardness could not be determined by the caste itself it also include other criteria too that is poverty, socially and economically backward and many others and caste will be one of them."[12]

5) In 2006 Supreme Court issued guidelines to reform the police administration – which is a state subject upon which only state assemblies can legislate.

6) In recent orders, the Apex court has addressed the most complex engineering of completes rivers in India.[13] The court passed an order of complete ban on use of tinted plastic films disregarding of the degree of visibility on windscreens and another glass panels of vehicles throughout the territory.[14] Another notice given by Apex court to Baba Ramdev being coercively forced out from Ramlila grounds by Delhi Administration and reprimanded it[15]. The Supreme Court passed an order dissociated the ban on tourist activist in the key areas of tiger reserve forests. All these scuffles exercises by the court are adverted on the doubtable jurisdictional succeed in acquiring a position of enforcing fundamental rights under Article 32 of the

[11] Keshavananda Bharti v. State of Kerala ,A.I.R. 1973 S.C. 1461
[12] A.I.R. 1963 S.C. 649.
[13] T.R Andhyarujina, *Disturbing Trends In Judicial Activism*, THE HINDU, August 06, 2012
[14] Gyanant Singh, *SC Orders Complete Ban On Tinted Car Glasses , Sets May 4 As Deadline*, INDIA TODAY, April 29,2012
[15] BURNWAL, *supra* note 8

Constitution of India. In originality, no fundamental rights of any person or any legal issue are at all demanded in such cases. The court for that type of circumstances moved to better administration, governance and, which were not involving any definite or any proper judicial functions.

7) According to the doctrine of creative interpretation of the constitution of India, the Supreme Court took away the constitutionally bestowed the power to the president of India to appoint judges after consultation with the chief justice, and conquered this power in the chief justice of India and a collegiums of four judges.[16] This shows the working of judicial activism in the territory as nowhere in the world has the power to select and appoint judges conferred on the judges themselves

Instances Of Judicial Activism In India

There are many path breaking judgments which made various changes in Indian social and economic scenario. Before emergency in 1975, there was rare exhibition of any activism. It cannot be ignored that initially judiciary used by elite groups for their own interest and to serve their purpose, law favoured them. Judiciary was not progressive[17] and main reason behind this was the same class of persons constituting legal machinery- lawyers, judge etc. Many constitutional expert regarded Supreme Court of that time as 'rich man's court'.[18] We have cases in which land reforms were challenged. We have outstanding judgments in cases of *Shankari Prasad v. Union of India*[19], and *Sajjan Singh.*[20] These cases showed the slight changes in judicial system for the betterment of country.

We have Bank's Rationalization case, *R. C. Cooper v. Union of India*[21], in which Banking Companies (Acquisition and Transfer of Undertakings) Act of 1969 was challenged and Court declared those acts as invalid as it discriminate against 14 banks that were to be nationalized. Then we have *Keshavananda case*,[22] popularly known as Fundamental Rights case, in that case

[16] K.T Thomas, *In Defence Of The Collegium*, THE INDIAN EXPRESS, August 13, 2014
[17] Lyakar Ali, *Justice, Judiciary and Judicial Activism*, (Legal views and News, New Delhi, Feb 1998) p.26
[18] Mohd. Gouse, *The Two Faces of Judicial Activism*, (1990)
[19] A.I.R. 1951 S.C. 458
[20] A.I.R. 1965 S.C.845
[21] A.I.R. 1970 S.C. 564
[22] A.I.R. 1973 S.C. 1461

decision of *Golak Nath*[23] was overruled and Basic Structure Doctrine was given and Court retains the power to check the validity of constitutional amendments. Recent examples of judicial activism are 2G Spectrum[24] and commonwealth scam cases, Noida land acquisition case, case relating to 2002 Gujarat riot, and the order to convert the Auto rickshaw to CNG to reduce Delhi's smog problem.

During 1980's, two major developments- broadening of scope of constitutional laws and judicial activities through public Interest Litigation provided a strong drive for growth of Judicial activism in India. More scope was given to citizens and different groups. Importance of Directive Principles was shown in case of *Minerva Mills Ltd. v. Union of India*[25]. Equal importance should be given to both Part III (Fundamental Rights) and Part IV (Directive Principles) of Constitution otherwise harmony and balance will be disturbed. While giving its decision, Supreme Court envisaged judicial and quasi judicial bodies to change their earlier decision after impartial hearing. A new dimension was given to the legal requirement of audi alteram partem.

III Judicial Activism: 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."*[26]

In the United States, which is another gargantuan common law country, there is discernible separation of powers but the reach of the US Supreme Court which is the world's oldest court, is constitutionally finite and not all matters can be brought before it. The power of judicial review

[23] A.I.R. 1967 S.C. 1643
[24] ANDHYARUJINA, *supra* note 15
[25] A.I.R. 1980 S.C. 1789
[26] Fali S Nariman, *The Case Of Judicial Activism*, THE CARAVAN, (2011)

is not distinctly mentioned in the US Constitution, but in the celebrated case of *Marbury* v. *Madison*[27] the US Supreme Court struck down part of the Judiciary Act, 1789, holding that it violated the US Constitution, the Court assumed that it had this power since a Constitution is the prominent law of the land, and prevails over ordinary statutes. However, In recent years, 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*[28] where it struck down a Texas statute that envisaged same-sex sexual activity to be a crime.

Judicial activism has been more prominent and discernible under the written constitutions of America and Ireland. In America, the judges adopt an activist approach based on the principle that "judges not only interpret laws but also make laws".[29] Hence by applying the theory of emanation,the American judges liberally indulged in defining unenumerated rights from the existing enumerated rights. Likewise, under the Constitution of Free Irish State, 1937, the Irish courts have indulged in lenient interpretation by now and them appealing to the Preamble. Like the American courts, the Irish courts have inferred unenumerated 'natural rights' from the 'personal rights'.

Under the unwritten Constitution of U.K. (Britain) which is often described as 'a child of wisdom and chance'[30] judicial activism has been the ramification of a gradual evolution of the concept. Subtle in form, judicial activism in Britain has been directed mostly against the executive and not against the legislature since Britain recognizes the principle of parliamentary sovereignty but subject to rule of law and international treaties signed by Britain.[31]

In Germany, judicial activism mainly operates on the principle of 'basic law'. The Federal Constitutional Court (the highest Court of Germany) looks upon the Constitution as the 'basic law'. The Federal Constitutional Court applies the 'basic law' theory either to decide questions relating to the basic rights and the basic federal features of the German Constitution. Thus, in one

[27] 5 U.S. 137 (1803)
[28] 539 U.S. 558 (2003)
[29] John Austin, *The Province of Jurisprudence Determined* (1832), p. 655, (Trans.) by Wilfred E. Rumble, (Cambridge, UK: Cambridge University Press, 1995).
[30] W. B. Munro & M Ayearst, *The Governments of Europe*, 4th ed., (New York: The Macmillan Company, 1954), p.23
[31] Judicial Activism Under Different Constitutions- Brief Comparative Study, http://shodhganga.inflibnet.ac.in/bitstream/10603/20809/10/10_chapter%202.pdf

such decision, the Constitutional Court held a State law as 'null and void' if it was inconsistent with the provisions of the 'Basic Law' i.e. the Constitution.[32] 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".[33]

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.

Thus, Judicial activism has been observed under the post World War II constitutions of Japan and Germany. Though based on the American model, the Japanese Supreme Court was a little cautious in declaring an unenumerated fundamental right and safeguarding human rights of its citizens. In this regard, the German courts were more open either in protecting the human rights of its citizens or promoting the principles of federalism or through the theory of basic structure.

In France**,** Under the Constitution of the Fifth French Republic, 1958 which operates on the principle of 'popular sovereignty'[34] , judicial activism has been through a political non-judicial body known as the 'Constitutional Council'. The French Constitutional Council has played an activist role in reaffirming the freedoms and rights guaranteed in the Declaration of Rights, 1789**.**[35]

[32] In Southwest case, (1951) 1 B VerfGe 14
[33] Krishnarao L. Ukey, *Judicial Activism – Principles and Practise* : (A bird's eye view of theory , Practice & Current Trends in Global /Indian Scenario)
[34] Article 2 of the Fifth French Republic, 1985 declares 'its principle shall be Government of the people, by the people, and for the people seen in Durga Das Basu, Select Constitutions of the World (Including International Charters), 4th ed., (Nagpur : LexisNexis Butterworth Wadhwa , 2009), p. 368
[35] Judicial Activism Under Different Constitutions – A Brief Comparative Study, http://shodhganga.inflibnet.ac.in/bitstream/10603/20809/10/10_chapter%202.pdf

In Israel, The Israeli approach to judicial activism has transformed significantly in the last 3 decades, and currently presents an especially broad version of robust judicial review and intervention.[36] Additionally, taking into consideration the intensity of public life in Israel and the challenges that the country faces (including security threats), the case law of the Israeli Supreme Court[37] touches on diverse and controversial public matters. The alleged judicial activism of the Israeli Supreme Court is not limited to constitutional law. Among other things, the court determined that in the field of administrative justice, a lack of plausibility was an independent reason for judicial control over individualistic administrative regulations and decisions; that the State in general is obliged to keep its promises, and that an administrative authority that causes damage to an individual through some illegal action would have to pay monetary reparations (not just according to the law of damages but by force of administrative law itself).[38] In Israel, judicial activism, that has contributed to a society living under difficult security, economic and social pressures, has more than once based itself specifically on formalistic legal logic.

In Canada**,** judicial activism was more suppressant and the leading case in point is *Treasury Board v Nape,*[39] 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.[40]

Thus from the above discussion, it can be concluded that judicial activism has taken place under most constitutions of the world, if not all, definitely under those constitutions aforementioned.

IV Concluding Remarks

The term judicial activism has many shades and is capable of conveying an erroneous impression. Critics of judicial activism contend that it subverts the principle of separation of power founded by the framers of the U.S. Constitution and embodied in many written

[36] Ariel L. Bendor, *The Israeli Constitutionalism : Between Legal Formalism and Judicial Activism*
[37] Israeli Supreme Court Decisions database, http://www.lawofisrael.com/israeli-supreme-court-decisions
[38] Ariel L. Bender, *The Israeli Constitutionalism: Between Legal Formalism and Judicial Activism*
[39] [2004] 3 S.C.R. 38
[40] Sujit Choudhry and Claire **E.** Hunter, *Measuring Judicial Activism on the Supreme Court of Canada: **A** Comment on* Newfoundland (Treasury Board) v. NAPE, MCGILL Law journal, vol 48 pp527-532

constitutions across the world. In India where the population has reached the explosion limit and half of whom are uneducated, unaware of their rights, socially suppressed, are vulnerable to all kind of exploitation; the court is the only guardian and sentinel of their rights. It is intriguing to note that while general public is happy about the court's intervention; it is the authorities/wrong doers who are the one with power and position; many of whom are affected by court's decision have drawn the ire and manage to raise hue and cry against the judicial activism. Henceforth via Judicial activism, judges play the role of Social Engineers.

Judicial activism has to be there if the citizen's fundamental rights and freedoms are to be safeguarded from its arbitrary invasion by the State. Judicial activism had varied from constitution to constitution in respect of period, form, and also the source from where it derived its existence. Whatever the variation may be, judicial activism was and shall be present, if the supreme law of the land has to be safeguarded from the arbitrary violation Despite the great advantages of "judicial activism." some steps need to be taken so as to prevent an ***"over-activist"*** *j*udiciary from transgressing its limits and intercepting 'judicial activism' from becoming ***'judicial adventurism'***. It is apropos to note that any divergence from the well-trodden path oftentimes leads to disputation and sometime even to entirely unjust outcomes. Judicial activism may be a good thing on certain remarkable occasions, sometimes a blessing to the society when it is experienced and the legislative/executive, are reluctant and inefficient to do their duties, sincerely and correctly and even unenlightened about their duties; yet we have to draw the line somewhere sometimes.