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Evolution & Growth of Judicial Activism in India

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Abstract--- *Judicial activism does not have a limited scope. It is used to look into the issues and to enforce what benefits the community as a whole. There is no end to the word "JUSTICE," which critically says justice is for all,' rich or poor, strong or weak,' even karma has entrusted the king and queen with justice. The present research paper focuses on method of expansion of judicial activism in Indian democracy. India's judicial activism had reached almost every aspect of life to ensure social justice. Majority of time the judicial review and judicial activism act as a boon for the weaker section of society in protecting their rights by simply filling out a litigation of social interest or a litigation of public interest. Several times judicial interference in executive and legislative matters has given society the upper hand in seeking justice. Judicial system is a means of providing ' JUSTICE ' to all, and of taking all necessary and practicable steps to protect JUSTICE's interests. Legal framework for judicial activism in the integration of Indian constitution towards fundamental rights.*

Index Terms--- *Judicial Activism, Justice, Democracy, PIL.*

I. INTRODUCTION

The history of judicial activism in India is extremely difficult to trace. Since, under the Government of India Act, 1935 and subsequently under the Constitution of India, the judiciary has become recognized as an autonomous and separate government agency, it would be wise to search the time after 1935 for tracing the roots. However, even before that period, there are a few instances where some selected high court judges established under the Indian High Court Act, 1861, exhibited some flashes of judicial activism. In that case, which originated with an under-trial that could not afford to hire an attorney, Justice Mahmood held that the pre-condition of the case being−heard would only be met when someone was speaking.

Term "Judicial activism" do not have any precise definition accepted by one and all. However, there is a widely accepted notion that it is related to problems and processes of political development of a country.1 In other words, judicial activism deals with the political role played by the judiciary, like the other two branches of the State viz, the legislature

[1] Balkrishna,Ref. to the Article, When seed for Judicial Activism was sowed, ―The Hindustan Times‖ (New Delhi) dated 01-04-96, p.9.

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and the executive.

Judicial Activism has been defined by an eminent Indian jurist in the following words:

"(Judicial) Activism is that way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes."

The same authority goes on to add that judicial activism is the use of judicial power to express and enact counter-ideologies that facilitate significant recodifications of power relations within governance structures when successful. 2An analysis of Upendra Baxi's above attempt to define judicial activism reveals that judicial activism pertains to the political role it plays, as do the other two branches of politics. The reason for the judicial activism derives from the near collapse of the responsible government and pressure on the judiciary to step in the help that compelled the judiciary to react and make political or policy-making decisions.

The words used to characterize the assertiveness of judicial power are judicial activism and judicial restraint. The user of these words presumes to locate between two abstract extremes the relatives' assertiveness of particular courts or individual judges. The extreme model of judicial activism is so intrusive and omnipresent of a tribunal that it virtually dominates government institutions. The American Constitution Encyclopedia notes that the purposes of judicial restraint are not entirely universal. The terms are often used non- committal, i.e. merely as a descriptive shorthand to identify some courts or judges as being more activist or more restrained than others.3

Terminologies, 'Judicial Activism" and "Judicial Restraint" are used from the point of view of the Court's right role from the personal or professional point of view. The courts can, therefore, be condemned or commended for straying from or conforming to that right role. In the U.S.A., over two decades of judicial review, supervised by more than a hundred judges who served at the Supreme Court and interpreted a highly ambiguous constitution, continuity was not institutional but personal in much of its language. Individual judges maintained strongly diverse notions of the proper judicial role or the right one.

In the United States, the idea of judicial activism has often been used as a synonym for judicial absolutism, judicial dominance, judicial anarchy, and judicial imperialism as well. Judicial activism has always been used as an antonym of judicial independence, popularly referred to as judicial conservatism.

According to Americans activism means the tendency of federal judges to interfere in the judicial process, primarily but not always at the Supreme Court, as to replace their decision with that of federal and state political officials.

The word activism is known as descriptive. In general, judges are judged by various social classes as advocates in terms of their preferences, views and values.4 As Baxi explained in his erudite style, it is rather difficult to answer a question as to who is an activist judge, since those who specialize in judging the judges use the labels activist and his opposite the restraint.

The above discussion makes it clear that a definition as an abstract concept has been eluded by the expression- Judicial

[2] Since Keshavanad Bharti v. State of Kerala AIR 1973 SC 1463
[3] In Indira Nehru Gandhi v. Raj Narain, (1975) SCC Supp. 1, Kihota Hollohon v. Zachillu L. (AIR 1993 SC 412) Chandra Kumar v. Union of India (1997, SC) AIR 1997 SC 1125.
[4] Vishaka v. State of Rajashan (1997) 6 SCC 241

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Activism. It is by definition incapable of formulating only. Different people mean different things. Many agree that it implies the dynamism of the judges, some others find it an innovation of the judiciary and some others may consider it a revolution of the judiciary social or cultural. However, the use of revolution to describe a judicial function appears to be improper.

II. VARIOUS THORIES OF CONCEPT OF JUDICIAL ACTIVISM

As far as the origin and evolution of judicial activism is concerned, there are two basic theories behind the whole concept. These are:

- Theory of vacuum filling
- Theory of social want

THEORY OF VACUUM FILLING

Vacuum filling theory states that a vacuum of power is created in the governance system because of any organ's indifference and laziness. When such a vacuum is established, it is against the nation's well-being and may bring disaster to the country's democratic system. Nature, therefore, does not allow this void to continue and other governance institutions expand their horizons and take up this vacuum. In this situation, the void is created between the two governance bodies by inactivity, ignorance, disregard for law, negligence, corruption, absolute indiscipline and lack of character viz.5 Legislative and executive bodies. Hence the remaining governance system organ, i.e., the judiciary, is left with no alternative but to expand and fill its horizons; the vacuums created by the executive and the legislature. Therefore, according to this theory, the so-called judicial hyper-activism is the product of filling up the vacuum or void created by the legislative and executive non-activism.

THEORY OF SOCIAL WANT

The theory of social want states that judicial activism arose as a result of the inability of existing laws to deal with current country conditions and issues. When the existing laws failed to provide any direction, it became the duty of the judiciary to take on the oppressed problems and find a way to solve them. In order to achieve this aim, the only way left to them within the governance system was to provide non-conventional definitions of existing laws in order to adapt them for greater good. Supporters of this theory believe that judicial activism plays a vital role in bringing about the transformation of society. It is the state's judicial branch that injects life into life law and provides the statute with the missing links. Having been armed with power of review, the judiciary comes to acquire the status of a catalyst on change.

III. ORIGIN OF THE CONCEPT OF JUDICIAL ACTIVISM

The concept of judicial activism was rooted in English equity and natural rights concepts. These Concepts found expression on American soil in the concept of judicial review. The first landmark case in this way was the Marbury v. Madison case. For the first time in this case the judiciary took an active step and took a step beyond the legislative actions.

[5] This view is advocated by T.R.Adhyarujina in his book titled ―Judicial Activism and Constitutional Democracy in India (Bombay, 1992) at p.9.

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Marbury was appointed by the U.S. Federal Government as Judge under the Judiciary Act of 1789. Thought the appointment warrant had been signed, it could not be delivered. Marbury filed an action to issue a mandamus writ. By then, Marshall had been appointed by the outgoing President, who lost the election, to become the Supreme Court's Chief Justice. In a rare display of judicial statesmanship asserting the power of the court to review the actions of the congress and the Executive, Chief Justice Marshall denied the relief on the ground that Section 13 of the Judiciary Act of 1789, which was the foundation for the claim made by Marbury, was unconstitutional since it conferred in violation of the American Constitution, original jurisdiction on the Supreme Court to issue writs of mandamus. He observed that the United States Constitution confirms and reinforces the principle which is supposed to be essential to all written constitutions. That a law that is repugnant to the Constitution is void, and that instrument is bound by the courts and other departments. If a law made by congress and the clauses in the Constitution disagreed, it was the court's responsibility to uphold the constitution and ignore the law. This decision earned lots of criticism from different sources but there was judicial review and it was here to stay.6

In the initial stages, the doctrine of due process was applied only with respect to substantive laws but later the procedural laws were also brought into its purview. The US Supreme Court declared congressional enactments and 400 state laws unconstitutional between 1898 and 1937. With the power of judicial review up in its sleeves, the American judiciary started the modern concept of judicial activism in 1954 with the landmark judgment in Brown v. Board of Education. Starting with this judgment and series of decisions following, the Supreme Court of America threw out all the laws that excluded the Negroes from all fields of daily life. The earlier position taken in Plessy v. Ferguson that blacks could be treated as a separate class but must provide with equal-founded on racial discrimination was rejected by the Supreme Court at the risk of disturbing the institutional committee and delicate balance between the three organs of the state. Not only did the court abolish the laws which did not ascribe to the prescribed Constitutional norms, but also encompassed more rights which were not clearly provided for in the Constitution.

IV. REASONS FOR THE RISE AND GROWTH OF JUDICIAL ACTIVISM

Precise explanations for the rise of judicial activism under any constitution are extremely difficult to say. Furthermore, in view of the conflicting interests and ideologies of different groups of society concerned with judicial activism in particular, and judicial power in general, there can be no universal acceptance of these reasons to be correct. The following are some of the well-accepted reasons that require a court or a judge to be active while performing the judicial functions assigned to them by either a constitution or any organic legislation.

IV.I. Near collapse of responsible government

When the government's two branches of politics viz. The legislative and Executive will struggle to perform their respective duties, and the responsible government will almost collapse. Since a responsible government is the cornerstone

[6] Arthur Selwyn Miller, Toward Increased Judicial Activism: The Political role of the Supreme Court (West Court: Comn 1982), p 6.

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of a successful democracy and constitutionalism, certain drastic and unorthodox measures cause its collapse. If the legislature fails to make the requisite laws to match the changing times and government agencies fail to carry out their administrative functions faithfully and with honesty miserably, it would lead to an erosion of trust among the people in the constitution and democracy. In such an extraordinary scenario, the judiciary can legally enter the areas normally allocated to the legislature and executive. The result is judicial legislation and judicial government.

IV.II. Pressure on judiciary to step in aid

Now it has become fully established that the judiciary cannot remain a silent spectators when the government or third parties trample on the fundamental or other rights of the citizens. Now it has become fully established that the judiciary cannot remain a silent spectators when the government or third parties trample on the fundamental or other rights of the citizens. It has become common for people to seek help from the judiciary to defend their basic rights and freedoms. It may lead to an activist role being taken up by the judiciary.

IV.III. Legislative vacuum left open

In Administrative Law, there is a saying that even if the parliament and all the state legislatures in India made laws for 24 hours a day and 365 days in a year, the quantum of law cannot be sufficient to the changing needs of the modern society. The same thing holds well in respect of many a legislation passed by the competent legislature. In spite of the existence of a large quantum of pre and post- constitutional laws, there may still be certain areas, which have not been legislated upon. This may be due to inadvertence, lack of exposure to the issues, the absence of legislation or indifference of the legislature. Thus, when a competent legislature fails to act legislatively and enact a necessary law to meet the societal needs, the courts often indulge in judicial legislation. In this context, judicial legislation has to be understood as an incident to statutory interpretation. The courts often have acted to fill the void created by the legislature's abdication of legislative responsibility.

IV.IV. The Constitutional scheme

The Indian Constitution contains a number of provisions which provide ample scope for the judiciary to assert itself and play an active role. According to Article 13, the judiciary is expressly empowered to check the validity of any Fundamental Rights touchstone statute, and to find the same as invalid if it contravenes any of the Fundamental Rights. Under Article 19 the court has the power to decide whether or not the Fundamental Rights limits are fair. Under Article 32, for the enforcement of those fundamental rights, any person who is violated can petition the Supreme Court immediately. Further the right to approach the Supreme Court under Article 32 itself has been made a fundamental right under the caption 'right to constitutional remedies'. 7Thus the Supreme Court has been designated as the guardian of the fundamental rights of the citizens and while playing that role, the Supreme Court has been designated as the guardian of the fundamental rights of the citizens and while playing that role, the Supreme Court often indulges in legitimate judicial

[7] S.C.Kashyap, Judiciary-Legislature Interface (Universal Pubblishing House, New Delhi, 1997), p.71

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legislation and judicial government.

V. CONCLUSION

The extension of' judicial review' (which is often described as' judicial activism') has increased the public profile of India's higher judiciary. Furthermore, in the area of judicial regulation, cases are routinely made against following the values of the' aspirational' guideline. There are two philosophical challenges to these constructive expectations about the justiciability. The first is that it leads to an interference into the legislative and executive sphere if judges formulate tactics to implement the values of the Directive. It is argued that articulating new fundamental rights is the duty of the legislature, and that the judiciary should refrain from doing so. However, it is argued that executive agencies are unfairly burdened by the costs associated with these positive obligations, particularly bearing in mind that, due to practical considerations, the framers have classified these obligations as directive principles. The criticism mirrors the familiar philosophy of 'judicial restraint' when it comes to constitutional adjudication. The second opposition to reading constructive obligations in, however, opens some room for introspection among judges. It can be claimed that in the long run, the extension of justiciability to include freedoms that are difficult to enforce undermines the integrity of the justice system. The judicial inclusion of socio-economic objectives as fundamental rights can be criticized as an unviable textual exercise, which may have no bearing on ground-level conditions. In turn the unenforceability and inability of state agencies to protect such aspirational rights could have an adverse effect on public perceptions about the efficacy and legitimacy of the judiciary.

REFERENCES

[1] C. F. Moffat, "Aquaculture," Issues Environ. Sci. Technol., 2017.
[2] "The State of world fisheries and aquaculture, 2012," Choice Rev. Online, 2013.
[3] P. Pandiyan et al., "Probiotics in aquaculture," Drug Invention Today. 2013.
[4] Y. Ye et al., "FAO's statistic data and sustainability of fisheries and aquaculture: Comments on Pauly and Zeller (2017)," Mar. Policy, 2017.
[5] FAO, Building a Common Vision for Sustainable Food and Agriculture. 2014.
[6] V. Díaz, R. Ibáñez, P. Gómez, A. M. Urtiaga, and I. Ortiz, "Kinetics of nitrogen compounds in a commercial marine Recirculating Aquaculture System," Aquac. Eng., 2012.
[7] J. M. Ebeling and M. B. Timmons, "Recirculating Aquaculture Systems," in Aquaculture Production Systems, 2012.
[8] Anonymus, "Prospects for Fisheries and Aquaculture," Agric. Environ. Serv. Discuss. Pap., 2013.
[9] H. M. J. Udo et al., "Impact of intensification of different types of livestock production in smallholder crop-livestock systems," Livest. Sci., 2011.
[10] F. G. Barroso, C. de Haro, M. J. Sánchez-Muros, E. Venegas, A. Martínez-Sánchez, and C. Pérez-Bañón, "The potential of various insect species for use as food for fish," Aquaculture, 2014.
[11] J. Bostock et al., "Aquaculture: Global status and trends," Philosophical Transactions of the Royal Society B: Biological Sciences. 2010.
[12] J. M. Munguti, J. D. Kim, and E. O. Ogello, "An overview of Kenyan aquaculture: Current status, challenges, and opportunities for future development," Fisheries and Aquatic Sciences. 2014.
[13] L. Váradi, A. Lane, Y. Harache, G. Gyalog, E. Békefi, and P. Lengyel., Regional Review on Status and Trends in Aquaculture Development in Europe. 2011.
[14] B. Samuel-Fitwi, S. Wuertz, J. P. Schroeder, and C. Schulz, "Sustainability assessment tools to support aquaculture development," Journal of Cleaner Production. 2012.

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