Judicial Activism

Essay No. 01

POINTS TO DEVELOP 1. Broad meaning of the term ‘judicial activism’.

concept of ‘basic structure’ of the Constitution born out of judicial activism.

PIL and judicial activism.

judiciary as part of the three wings of polity; the roles of the three wings and how judicial activism fits into the picture.

instances of judicial activism getting the desired results.

judicial intervention inevitable – even necessary – when executive and Legislative fail to perform their duties.

Judicial intervention not the best way to get things done in a democracy; negative aspects of judicial activism; what if the judicial orders are not enforced?

Need to ‘redemocratise’ India so that balance of power is maintained, and each wing performs its duty.

It is the current term in use- ‘judicial activism’. in a way it is an absurd term- if we have a judiciary it is to hoped that its members will be active; but the term ‘activism’, of course, implies ‘intervention’.

Judicial activism involves innovative interpretations of the nuances of law. According to justice J.S. Verma of the Supreme Court, “The role of the judiciary in interpreting existing laws according to the needs of the judiciary in interpreting existing laws according to the needs of the times and filling, in the gaps appears to be the true meaning of judicial activism”. In other words, it is judicial activism that helps to advance the cause of law, and it has been a continuous process in India. Judicial activism is, in fact, an essential part of judicial review.

It may be pointed out in this context that the doctrine of the basic structure of the Constitution limits the scope of amending power of Parliament in substantial ways. Some of the features of this basic structure, though not actually listed, include rule of law, equality, federalism, secular polity, and most important, judicial review. The judgement enunciating to concept of the basic structure of the Constitution may be described as ‘judicial activism ‘, and it came more then twenty- five years ago. A decade later came the public interest litigation (PIL) in favour of social action and the court’s accepting its validity and stepping in to met

things right. The PILs are a big weapon to the social spirited people, the seekers of truth and the votaries of justice. the amount of support rendered to the social issues through the public interest litigations has come as a big sherld against the government's excesses as well as apathy. Ideologically, such litigation and judicial intervention born of it has transformed the "classical liberal rights model enshrined in the constitution (Part III) into a paradigm of people's rights". Such litigation has indeed democratized the access to the apex court. These cases have broadened the scope of fundamentals rights to include right to dignity shelter, health, environment, privacy; they have given rise to fresh forms of judicial scrutiny of governmental institutions whether they be hospitals, prisons of juvenile homes.

How did public interest litigation (perhaps more aptly termed social action litigation) grow? Public spirited individuals began to seek redress in matters affecting not them individually, but the rights of people in general. Termed as public interest litigation, it was initially encouraged in the 1980' s by justice P.N. Bnagwati. Then justice M.N. Venkatachalliah came on the scene, and he set the tone for new activism. As the Chief justice, he adopted a posture independent of the government , and was sympathetic to the filing of PIL cases .He took the lead and judges began to get bolder.

A polity usually comprise three wings – Executive, Legislature and Judiciary . Each generally has its own role to perform. In this context , it may be worthwhile recalling the views Prof. Juffrey jowell from England. Outlining the guiding principles of judicial activism. He said that judges may intervene if the executive exceeds the terms of power conferred on them. So is judicial intervention to be invited if the state refuses to comply with the statutory provisions. It is also to be seen that policy is not sacrifice for principle. We live in an era where governments are weakened. Judges, in the circumstances, provide better guideposts to the State so that policy is not ignored. Elected representatives must fulfill the legitimate aspirations of the people. Judges., executive , and legislature cannot operate in mutually exclusive closeted compartments. True, utilitarian policies , socio- economic actions and rational implementation is best tackled and judges are not , the former do not like to cians are elected and judges are not , the former do not like to be pulled up by the latter . However, if the elected representatives betray the mandate reposed in them, they surely should be brought to book. And the process is only through recourse to courts . To bring back the rule of in a peaceful manner, and not through bloody revolution judicial activism is the first step.

Judicial activism becomes necessary to put a check on tyranny born out of a temporary political majority in legislature which might otherwise seek to rewrite the constitution in order to be entrenched in power. In the same way judicial

intervention becomes inevitable when the executive and the legislation abandon their duties and responsibilities.

There are fears in some quarters that the judiciary is overstepping its authority, that it is trespassing into spheres reserved for Parliament and the executive. Policy- making and administration or carrying on the business of government is the executive's job ; to legislate (or change the law) is the prerogative of the legislature, after due debate and discussion of public interest involved. Indeed, Article 212(1) provides immunity to legislative assemblies from any judicial action over conduct of business in the house. In a similar was, Article 122(1) gives immunity to the Members of Parliament for proceedings in Parliament.

In the present wave of judicial activism prompted by public interment suit ranging from cases of out-of – turn allotment of government houses without proper and LPG connection to those having influence with highly – placed husbandry scam in Bihar, and m of course, the(in) famous ' Hawala cases'. The Supreme Court has given firm decision. The Supreme court's directives on the Jharkhand political imbroglio may be a recent example, but there have been numerous other instances when either the apex court or the high courts have addressed issues of importance that impact the people and the country. Among such initiatives have been the orders given by the Supreme Court to the Delhi government to clean the polluted air in the city by phasing out diesel run public transport in favour of vehicles run on CNG (compressed natural gas) . judicial activism saw the judges wanting the politician Pappu Yadav with criminal antecedents to be lodged in New Delhi's Tihar jail as he was virtually making a mockery of his imprisonment in Bihar by ignoring every restriction. Judicial activism also saw the high courts go into the act in various parts of the country by banning day- long general strikes because of their disruptive effect on daily life or asking that political processions be rusticated to certain localities and certain specified periods. It was judicial intervention that helped the Election Commission to insist on the publication of the assets of candidates before contesting. And even more important declare if any criminal charges existed against them. These are citizen-friendly moves. True, in some cases, the court has assumed the role of issuing directions (telling the CBI to investigate thoroughly and not to close any case without the court's orders) – a job of the executive. It may also be pointed out that as the law stands. The CBI is a department under a particular minister. And there is no provision in law that the agency should report to a court and not to the minister concerned. And the CBI is also under law. Not empowered to investigate cases in a state without the state government's permission. The law, as it stands , may be productive of abuse but changing that law is the business of the legislature not the courts . So, here is the judiciary actually legislating!

But, what are the citizens to do if the executive authority would not do anything about the spreading canker of corruption in public life. And the legislature, including the highest one, is unable to do anything except to paralyse itself? Having lost all hope of any self-reform by the political system. Most Indians have started viewing politicians of all hues with cynicism, even contempt. They look up to the higher judiciary as the only possible redeemer of the despairing situation as the judiciary comes to the people's rescue and supports them to stand upright. Although all is not well with the judiciary too, it is still the best guard of national interests and the interests of the people. it tends to be so even at the risk of being dubbed as over active.

The former Chief justice of India. A.M Ahmadi as opined: "The present situation is not really a case of one democratic institution trying to exert itself over another; rather, it is a case of citizen finding new ways of expressing their concern for events occurring at the national level, and exerting their involvement in the democratic process."

In recent years, as the incumbents of Parliament have become less representative of the will of the people, there has been a growing sense of frustration with democratic process. The ordinary citizen have reacted in two ways. One group – whose members constitute a large majority- has chosen to look upon these developments as an unavoidable feature and has adapted itself to these uncertainties while continuing to bemoan sits destiny. The other froup-which construes a very small minority- has sought to achieve its positive. innovative approach and has sought to achieve its objectives through the judiciary. This it does by approaching public spirited organisations and bodies. Who, in turn, file public interest cases before the courts. This would have been wholly unnecessary if the issues were fully discussed in Parliament and people were kept informed of developments. When such citizen raise grave constitutional issues and exercise their fundamental rights in invoking the jurisdiction, the Supreme Court is lift with little choice but to act.

Judicial activism may seem disturbing when seen to encroach upon executive and executive and legislative spheres of action. But what else is possible, if the executive is lax or the legislators lack initiative to menu outdated laws or remain imperious to public interest clashers with the members' collective self-interest? As Nikhil Chakravarty once observed – "There are cases in which the intervention by the judiciary may seem unusual, but we are passing through abnormal times, and the judiciary is the organ of the Constitution which alone has the authority to interpret the Constitution.

The lack of concern by the legislature for some pressing problems of the people and the near-disappearance of responsible and responsive governance by the

executive have compelled the court to enforce the rights of citizens through novel and innovative strategies to meet the needs of the times whether it is government accommodation or the Hawala case, the court is upholding constitutional rights ; the right to life in the first example and the right to equality in the latter two. The decline in the role played by the other two institutions of the state has inexorably changed the role of the court from being a “sentinel on the qui vive” to a saviour on call. The Supreme Court, as the final court of appeal;,is known as “ the court of last resort”, but the wide writ jurisdiction enjoyed by it has often made it the court of first and only resort . Self – restraint, tolerance for institutional autonomy do not come easily to the rich and powerful in India. As the eminent jurist Nain Palkhivala once noted” let us not pretend that the rule of law is a concept which can be regarded as a part of the Indian psyche. “The judiciary is thus enjoined to attend to the difficult task of seeing to it that institutions, groups and individuals do not cross the limits.

The Indian Constitution allows a persons to move the Supreme Court directly for redress of violation of basic rights (Article 32). In the circumstances, the doctrine of separation of power can only signify division of function. If the decisions of the coordinate branches of government are constitutionally correct, the judiciary has no right to interfere. In cases of judicial monitoring of institutions like jails and juvenile homes, it is wrong to say that the court us administering these institutions; it is the executive which continues to administer them but with the added duty of reporting to the court. The situation has arisen because of the indifference shown by the executive to the constitution rights of citizens within these institutions.

Judicial activism is feared even by conscientious and highly knowledgeable citizen of India on the ground that it may lead to a violation of basic principle of democracy- replacing an elected government by a nominated body. Nani Palkivala laments that we have a achieved a degree of degradation and corruption that the only way of preserving order is seen to be governance to the country through the apex court. “It portends the twilight of democracy … We have list all sense of propriety and are not only willing but eager to call upon the court to decide those questions which is the duty of the government to decide firmly and courageously. We forget the elementary proposition that courageously. We forget the elementary proposition that judicial pronouncement can never be a cover for inadequacy of government” In the circumstances there is a fear about the very survival of democracy. If today. The duty of governing the country can be shifted from the government to the Supreme Court, tomorrow it may be shifted from the elected representatives to nominated individuals. For example, the people may accept the decision of the army or any other dictator, as they are accepting the decisions of the Supreme Court today, without asking the question whether they are in the realm of the governance of the country. What has

happened before can happen again. If the government of the country can be carried on, not by the elected representatives of the people but by individuals the nominated by the government, is there- from the viewpoint of democracy – much difference between a government by lawyer appointed by the government to be Supreme Court judges and government by military officers nominated to be in charge of the army?

A disheartening situation, but in the present circumstances, there appears to be no choice- the judiciary seems to be the people for restoring lost, democratic rights. After all, how can democracy be better served if, along with the executive and legislature, the judiciary too abandons the citizen? That could lead to a situation in which the citizens may be compelled to take the law into their own hands; there would then be a revolution.

However, 'activism' should not become 'populism'; nor should it lead the judiciary to assume the mantle of arrogant righteousness, which can graduate to despotism. judges, too, are human and prone to errors and human aberrations. Furthermore, there can be no escape form an intense debate about the merits and defects of the Supreme Court 's judgements. Public debate could even degenerate into irresponsible partisanship, especially if the Supreme Court is to be called upon to decide such politically sensitive issues as what constitutes' Hindustan' or such economically vital matters like who gets which telecom contract. It is therefore absolutely necessary that the court is slowed to decide these matters without someone imputing motives or mala fide intentions to the judges. Nonetheless, the very essence of democracy and its product, the liberal order, would demand that the judges do not object to a discussion.

Just as the ministers, bureaucrats and legislators are not above criticism, similarly, the judges of the High Court and the Supreme Court cannot be presumed to be beyond the pale of scrutiny. Judicial activism should not become judicial fundamentalism.

In the words of justice J.S Verma, "Judicial activism and judicial restraint are two faces of the some coin. Self-discipline is to be practised strictly by the members of the judiciary and judges must refrain from commenting on policy matters."

One worry concerning judicial activism is , however, real: what if the orders passed are not enforced ? The Communists, for example, have time and again explicitly expressed their disobedience of the directives against strikes and processions, arguing that such directives ciolate dthe universally accrpted democratic rights to protest. In a somewhat similar manner, the Rashtriya Swayamsewak Sangh (RSSS), and its sister organisations such as the Bajrang Dal and the VHP had expressed the view, at the height of the temple –

mosque dispute in Ayodya, that view , that the courts have no jurisdiction in matters of religious faith. What if these PIL cases become unmanageable numerically and are put up by unscrupulous elements who intend to use it for promoting the vested interests? What is to done in case of delay- so common in judicial matters? The hope awakened in the public will die out . To obviate such a situation the courts must seek to enforce their orders – through the contempt power, for instance, or by requiring senior members of bureaucracy to be present during hearings .

It is also necessary that the effort to " redemocratise" India is not left to judge alone. It is the duty of every thinking citizen of this country to help the judiciary in this effort. The media , too, has a role in educating the public an crusading for a clean and efficient administration.