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JUDICIAL ACTIVISM & INDIAN CONSTITUTION

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Introduction :- India has adopted parliamentary form of Government following West ministerial model. However, unlike Britain, we have written constitution and hence supremacy of the constitution and hence supremacy of the constitution and not the supremacy of parliament. As we all know ours is a single judiciary with pyramid structure at the apex of which here is Supreme Court. It is a final court of appeal, protector of fundamental rights. Our supreme court. It is a final court of appeal, protector of fundamental rights. Our Supreme Court is said to be the most powerful court in the world. The founding fathers of the Indian Constitution were keen on establishing free, strong and impartial judiciary.

Meaning of Judicial Activism: -In the height of this scenario the phenomenon of Judicial Activism has come into discussion in the last two decades and by this time to it has been well settled. When the judiciary is conscious, active and alert about its jurisdiction, enters into various fields of society by way of issuing orders, it leads to judicial activism. However, there is no unanimity on the term Judicial Activism. However, there is no unanimity on the term Judicial Activism neither there is agreement of its very existence or extent and scope. According to some judicial activism is a myth. The judges are discharging their duties. To other it is not enough to describe it as activism, but it is to be called as Super Activism of the courts. Ten years back A.M. Ahmadi the then Chief Justice of India opened that judicial activism in its current aggressive role was a temporary phase. But everyday newspaper covers news on the orders, judgement, interpretation, new meaning by the Supreme Court.

Characteristics of Judicial Activism :- There are certain set characteristics of judicial activism that can be drawn from the rulings of the court such as 1. While using their powers the judges show initiative on the complicated social, political issues leading to unusual situation in public life. 2. The activism pervades its scope and area. 3. Its frequency has been increasing through the P.I.L s i.e. Public Interest Litigations. 4. The methods adopted by the court are different from the traditional, rigid methods. The daily involving serious calamity, a post card also, took the form of a court case. 5. The courts have through their activism encouraged voluntary organization. 6. The courts have fixed responsibility on the executive officer on important matters and even penalised them. 7. The judiciary is instrumental to make CBI, CVO autonomous with statutory status. 8. The unique feature of the judicial activism is new, wide and extensive interpretation of the rights envisaged in the Article 21 of the constitution. 9. Lastly the judicial activism has also given attention to environment protection against air pollution.

Explanation or Justification of Judicial Activism :- According to Ahmadi the root of the problem was the failure of the executive and legislature to perform their constitutional assigned roles. The executive at various levels failed to take quick decisions, to remain firm on their decisions, also failed to effectively implement them. In some cases the tendency on the part of the executive was to shift the burden on the courts. Further, the parliament has loosened its grip. There has been decline in the standards of the discussion, debates of parliament. As a result

the legislative measures are delayed, remain incomplete and improper also there is high degree of cases involving breach of rules, laws codes by the high-ups in the Society. In order to reveal such cases and to control them the judiciary has stepped in. The number of cases involving corruption, bribe, smuggling scams and the amounts involving in them created a new records. As a result the courts have bound to take initiative to curb them. The judiciary also became alert and shirn about its power and jurisdiction. When it was observed that, the executive officers are unwilling, indifferent to carry out the order of the courts.

Dictionary definitions: -Merriam Websters Dictionary of Law define Judicial activism as “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 supposed constitutional or legislative intent.”

Black Law Dictionary defines: -Judicial activism as “A Philosophy of Judicial decision making where by Judges allow their personal views about public policy, among other factors to Judge their decision use with the suggestions that adherents of philosophy tend to fined constitutional violations and are willing to ignore procedure. Judicial activism is true term used to describe the actions of Judges who go beyond their constitution prescribed duties of applying law to the facts of individual case, and ‘Legislate’ from the bench. There judges create new constitutional rights, amend existing ones or create or amend existing legislation to fit their own nations of societal needs. Judicial review is used not only for the enforcement of rule of law but also for establishing the reign of law. Thus the judicial review is the inter position of Judicial restraint on the legislative and executive organs of the Government. The doctrine of judicial review became a part of living law when chief justice *Marshell affirmed in Marbury Vs Madison* – Not the constitution established judicial review but only it confirms and strengthens the principles.

Judicial Activism and Indian Constitution :

The Indian republic, in principle has broadly accepted the Montesquian anatomy of State as a trinity of instrumentalities consisting of the legislature, the executive and the judiciary. Following the theory of separation of powers, organs of a modern government leg-

islature, executive and judiciary are entrusted with three different functions viz. Policy making, policy implementation and policy adjudication respectively. But there is a harmony of purposes among the instrumentalities, as outlined in the preamble to the constitution.

Sheela Barse V Union of India (AIR 1986 3 SCC 596) :

The Court directed the central Government to pay to the petitioner, a social worker, Rs. 10000 for the expenses and to extend to all necessary assistance to offered to personally visit different parts of the country to verify whether the information submitted by the authority regarding children below the age of 18 years detained in jails in different states of the country was correct. The court directed that, th children’s Acts enacted by various state must be brought in to force and their provisions be implemented vigorously.

M.C. Mehta V. Union of India (AIR 1987 4 SCC 463) :

The Supreme Court ordered the closer of tanneries at Jajmau near Kanpur, polluting the Ganga. The matter was brought to the notice of the court by the petitioner, a social worker through a public interest litigation.

Visakha Vs. State of Rajasthan :- Supreme Court of India given important guidelines about the sexually harassment of working women’s at their working places. In noise pollution matter tee Supreme Court of India given strict directions to the Government to avoid noise pollution at late night.

In leading Supreme Court direction both central and State Govt. to fill up immediately the vacancies of the handicapped persons.

Sunil Batra V. Delhi Administration (AIR 1978 SC 1975) :

It has been held that, the writ of habeas corpus can be issued not only for releasing a person for illegal detentions but also for protecting prisoners form inhuman and barbarous treatment. The power of judicial review is recognized as part of the basic structure of the Indian constitution. It is necessary to protect the rule of law and there can not be any restraint upon judicial activism in matters of the legality of executive orders and administrative action is questioned. It is essential aspects of the dynamics of a constitutional court.

Impact of Judicial Activism :- The Supreme Court is interpreter of the constitution. According C.J. Bhagwati, the efforts of the court in this regard, should be to widen the scope of fundamental rights under article 19 and 21, and to see that the procedure should be just, fair, reasonable and in keeping with the principle of natural justice. It is not-adequate, that right to life should not be deprived of the executive or Legislature. Accordingly the Court tried to define the terms 'life', 'personal liberty' Personal liberty means freedom from physical restraint, coercion which is not authorised by law. Thus article 21 is a guarantee against total loss of personal liberty. Art 19 affords protection against unreasonable restrictions (which is particular). 'Life' means something more than mere animal existence. Right to life prohibits mutilation amputation domiciliary visits. It means to live with dignity alongwith necessities of life. Thus the impact of the judicial activism can be observed in the number of cases decided by the supreme court covering wide field of social life. They include in the orbit of article 21 (1) Providing livelihood, (2) providing necessities of life clothing, shelter, nutrition, facilities, for reading writing, freely moving mixing with fellow human beings. (3) minimum wages, drinking water, shelter, —, medical aid security to the honours. (4) Right to health, medical care to those who injured in accidents by public as well private doctors. (5) Pollution free air and water, (6) right to education as fundamental rights education without capitation fee (7) right of the prisoners against inhuman treatment delay in trial, illegal arrest, (8) Compensation for custodian deaths, (9) right to free legal aid, (10) freedom from bonded labour practice, (11) ban on smoking. Right to life is so important that it can't be taken away during emergency according article 359.

Criticisms against Judicial Activism : The phenomenon of judicial review has generated wide range of criticism even though it was accepted that it has been thrust upon the judiciary due to inefficient, unresponsive legislative and executive processes. It has been said that judiciary has overstepped its constitutional role. It has interfered in the matters in the field of policy making. The proliferation of PILs on different subjects is the out of activism. Some PILs are not in the real interests of the public, but protecting

vested interests. There is need to check the trend of rising PILs. If judiciary is really required to check excess on the part of Government and thereby safeguard the rights and welfare of the people, there should be, according Prof. Jeffrey Jowell, three principles governing reviews of courts i.e. principles of illegality, procedural — and unreasonableness.

Origin of concept :- There are two popular theories enunciating the factors which led to the origin and growth of judicial activism viz. 'Theory of Vacuum Filling' and 'Theory of Social Want'. The 'Theory of Vacuum Filling' implies that due to inaction or laxness of any organ, a power vacuum is created and the remaining organs of the government start filling that vacuum by expanding their horizon, because power vacuum may cause disaster to the fabric of democracy and rule of law. Thus judicial activism is the result of vacuum created by the two organs (i.e. legislature and executive) of the government. The judicial activism, which is also known as innovative interpretation was born in U.S.A. in 1804 when Chief Justice Marshall gave his landmark judgement in *Marbury v/s Madison* case. Another landmark in the history of judicial activism was the judgement given by the American judiciary in 1954 in case of *Brown v/s Board of Education* where the Supreme Court struck down the laws of segregation of Negroes especially in the field of education.

Between 1898 and 1937 the American Supreme Court declared 50 Congressional enactments and 400 State laws as unconstitutional. The function of the American judiciary was intended to be proscriptive to block the enforcement of an unjust law or action instead of being prescriptive giving directions as to how remedial actions should be taken by the executive. The foundation stone of judicial activism in India was laid down long back in 1893 when Justice Mehmood of the Allahabad High Court delivered a dissenting judgement in case of an under-trial, which could not afford to engage a lawyer. The question was whether the Court could decide his case by merely looking at his papers. Judicial activism as used in the modern parlance, originated in India later on. The 'Social Want' theory applied in India in its real sense. The growing hiatus between promise and performance, expectation and reality, enactment and implementation

has been causing disenchantment of the under dogs who seem to be developing a feeling of helplessness and alienation. At this juncture when India is at the threshold of the twenty-first century, Indian Government has enacted a large number of laws for the welfare and the upliftment, social as also economic, of weaker sections of the society. Anti-touchability laws with penal sanctions legislation for equality to women in matrimony, adoption, succession, workplaces, law for compulsory education of children and their protection from exploitation in factories, etc. Land reforms enactment's , legislation against bonded labour, nationalization of various industries, anti-corruption laws etc. But despite several pompous legislative declarations and pontific executive pronouncements, the Government has proved its inability to tackle the problems of the underprivileged strata of the society, as their condition went on worsening. Ultimately, the marginalized masses of the people opted for the judicial therapeutics to heal the ailing democracy. And, in response, the judiciary, leaving behind its traditional moderate role has adopted an active role.

Defining 'Judicial Activism' :- Judicial Activism which has been uniquely American development has been defined in many ways. Some definitions are worth of quotation. 1. According to Surya Deva "Judicial Activism refers the phenomenon of the courts dealing with those issues which they have traditionally not touched or which were not in the contemplation of the founding fathers... It is a state of mind, the origin of which lies in the 'inactivism' of other two wings of the government." 2. Ashok Kumar Johri writes : "Judicial activism in fact, is not distinctly separate concept from usual judicial activities. The expression 'activism', lexically as well as in ordinarily parlance, means 'being active', 'doing things with decision' and the expression 'activist' should mean 'one who favours intensified activities'. In this sense every judge is, or atleast, should be an activist as Justice Krishna Iyer observed, "every judge is an activist either on the forward gear or the reverse." 3. Justice V.G. Palshikar who has asserted that judicial activism means "an active interpretation of existing legislation by a judge, made with a view to enhance the utility of legislation for social betterment." 4. Justice J.S. Verma writes : "Judicial Activism is required only when there is in-

ertia in others. Proper judicial activism is that which ensures proper functioning of all other organs and the best kind of judicial activism is that which brings about results with the least judicial intervention. If everyone else is working, we don't have to step in."

Environment Protection :- Ensuring green belts and open spaces for maintaining ecological balance; forbidding stone-crushing activities near residential complexes; earmarking a part of the reserved forest for Advasis to ensure their habitat and means of livelihood; compelling the municipal authorities of the Delhi Municipal Corporation to perform their statutory obligations for protecting the health of the community : compelling the industrial units to set up effluent treatment plants ; directing installation of air-pollution-controlling devices for preventing air pollution : directing closure of recalcitrant factories in order to save the community from the hazards of environmental pollution and quashing of a warrant of appointment for the office of Judge. High Court of Assam and Guwahati are some of the later significant cases displaying judicial activism.

Gender Equality :- Gender jurisprudence has emerged due to judicial activism to protect the woman from exploitation and humiliation. In India, the Constitution and various legislative measures have abolished inequality and atrocities against women yet women continue to suffer injustice. To remove the loopholes the Supreme Court has laid down exhaustive guidelines for preventing sexual harassment of working women, for protection of women from prostitution and rehabilitation of their children.

Human Rights :- In the field of basic human rights too, the judiciary has been consistently building new linkages of a new egalitarian democratic and free society in consonance with new universal socio-political and economic order by raising some rights as Fundamental Rights under Part III of the Constitution. Some of them are worth mentioning e.g. right to information, right to work (provided under Article 23 of the Universal Declaration on Human Rights, 1948), right to get minimum wages, right to speedy trial (Article 8 of the above mentioned Declaration), right to secrecy (Article 12 of the Declaration) etc. Above all the judicial activism itself is the saviour of one basic human right. As Justice Krishna Iyer states that 'the access to jus-

tice is the first among human rights.' Judicial activism has removed the iron curtain of rigid procedure that stood between public justice and the court.

Some other areas :- a. 1985 – Shah Bano case : Related to the issue of Muslim personal law, it caused a furore as the court awarded a maintenance allowance after divorce. b. 1994 – Babri Masjid case : The case questioned the Constitutional validity of the acquisition of a certain area adjoining the disputed site in Ayodhya. The Supreme Court upheld status quo. c. 1998 – Rupan Deop Bajaj vs K.P.S. Gill : Top cop convicted for misbehaving with senior IAS Officer. d. 2002 – Representation of the People (Amendment) Act : The judgement ordered candidates contesting elections to declare their assets and all criminal cases pending against them at the time of filing of nominations. e. 2004 – Tamil Nadu vs Suhas Katti :- The first case involving conviction under the Information and Technology Act, 2000. f. 2006 – Om Prakash vs Dil Bahar : The court held that a rape accused could be convicted on the evidence of the victim, even if medical evidence did not prove rape. When Chief Justice P.N. Bhagwati and three other judges, on the basis of letter received by the Supreme Court, gave about 20 directions to the state in 1983 to ensure that the human rights of the workers are protected, that was a turning point in the evolution of Indian jurisprudence. The order made it clear that the doors of the highest temple of justice would be open not only to black-robed legal luminaries and their clients, but also to the enslaved millions who sought justice. There was no petition before the court, but only a letter listing their grievances.

Right or wrong ? The basic question now arises is whether Judicial Activism is right or wrong? All jurists and political commentator have given various distinctive arguments in favour or against it. Here are some points, which postulates judicial activism as wrong practice. 1. The judicial intervention in legislative or executive domain has endangered the system of checks and balances and has proved to be the main threat to the system of separation of powers in India. 2. Secondly, the judicial activism is the outcome of the judiciary's zeal to be in the limelight. Moreover, there are similar flaws and shortcomings in judicial administration as in other administrative systems. There is

not merely a tremendous amount of filtration but also distortions galore at the chambers of advocates and in the court premises. 3. Thirdly, the critics point out the abuse of PIL. Even the Chief Justice of the Supreme Court cautioned the legal community against misuse of P.I.L and emphasized the need for its proper regulation. The cases of Janta Dal v. H.S. Chowdhari, Krishna Swami v. Union of India and Simranjit Singh v. Union of India are fine examples where the petitioners tried to abuse the PIL to achieve political ends. 4. A common criticism we hear about judicial activism is that in the name of interpreting the provisions of the Constitution and legislative enactment's, the judiciary often rewrites them without explicitly standing so and in this process some of the personal opinions of the judges metamorphose into legal principles and constitutional values. The line of demarcation between the three organs of the State as laid down by the Apex Court finds clearer expression in its subsequent rulings in Supreme Court Employees' Welfare Assn. v. Union of India and Millikarjuna Rao v. State of Andhra Pradesh. "In this ongoing complex of adjudicatory process, the role of the Judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideas enshrined in the Constitution meaningful and reality. Therefore, the judge is required to take judicial notice of the social and economic ramifications, consistent with the theory of law." It is the duty of the executive to implement faithfully the laws made by the legislature. When the executive fails to discharge its obligation, it become the primordial duty of the judiciary to compel the executive to perform its lawful functions.

In the recent times, much of the criticism aired against the judiciary concerns this area. When crimes are committed by men in power and attempts are made to conceal them by rendering the official machinery ineffective, recourse to judiciary becomes inevitable. It becomes the duty of the judiciary to take cognizance of the executive's lapses and the issue appropriate directions as to the method and manner in which the executive should act as ordained by the Constitution and the laws. If the judiciary fails to respond, it would be guilty of violating the Constitution, a treason indeed.