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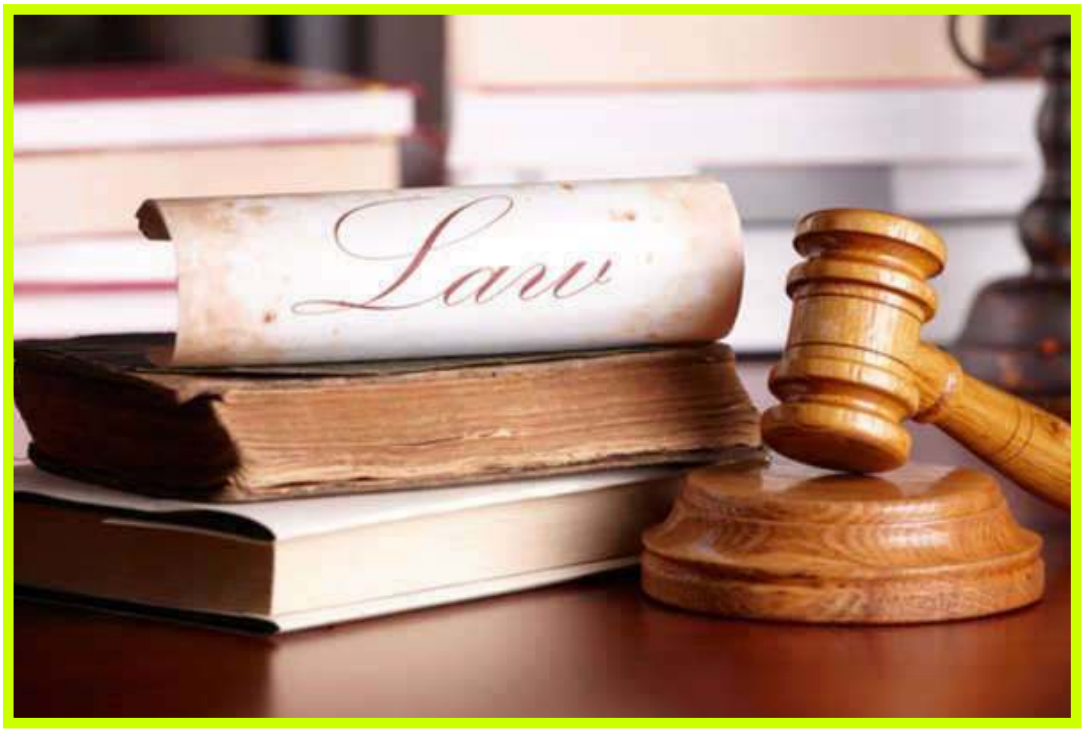
GOLDEN RESEARCH THOUGHTS

THE NOTION OF JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT IN INDIAN MILIEU



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Abstract :

Judicial activism has done a lot to ameliorate the conditions of the masses in the country. It has set right a number of wrongs committed by the states as well as by individuals. Judicial Activism provides a safety valve in a democracy. But when Judges start thinking they can solve all the problems in society and start performing legislative and executive functions, all kinds of problems are bound to arise. Such encroachment by the judiciary into the domain of the legislature or executive will almost invariably have a strong reaction from politicians and others. In this paper, I have taken an endeavor to discuss judicial activism vis-à-vis judicial restraint in the Indian context.

Keywords: Rights , Justice, Constitution , Judicial activism , Judicial restraint

INTRODUCTION

The Constitution provides for separation of powers and hence demarcates the powers and areas of all these three machineries. However sometimes with the failure of the legislature and the executive, the separation of power remains a theory only in the text book and the third wing of governance, the judiciary assumes powers unprecedented for under the name and guise of judicial review, which is a very basic feature of the Constitution of India.

After independence the executive has always looked upon the judiciary as a hostile branch of the State as executive started to rot itself into a system for personal and not public gains. Another reason can be traced into the Theory of Social Wants. Masses were oppressed beyond imagination by the unbridled actions by Money power, Muscle power, Media power and Ministerial power, which compelled judiciary to provide relief. Judiciary couldn't wait for the parliament to take some action as it takes far too long for social patience to suffer. This active process of implementation of the rule of law, essential for the preservation of functional democracy is termed as judicial activism.

Judicial activism is a dynamic process of judicial outlook in a changing society. Arthur Schlesinger Jr. introduced the term "judicial activism" in a January 1947 Fortune magazine article titled "The Supreme Court: 1947".

According to Black's Law Dictionary judicial activism is a " judicial philosophy which motivate judges to depart from the traditional precedents in favour of progressive and new social policies".

Judicial activism can be regarded as an unconventional role played by judiciary by delivering valuable judgments and granting reliefs to the aggrieved according to the moral and social justice where statutory law is silent or even contrary. Active interpretation of an existing provision with a view to enhance the utility of a legislation for social betterment, can be regarded as a judicial activism. In brief, it can be also assumed that judicial activism comes in to play when there is a legislative shortsightedness or executive arbitrariness or both.

The Supreme Court of India has itself urged judges to actively strive to achieve the constitutional aspirations of socio-economic justice. In S. P. Gupta v. Union of India, AIR 1982 SC 149, referring to the orthodox British view of judging—judge as a neutral
and passive umpire—the Court observed:

"Now this approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities' justice, dalit justice and equal justice between chronic un-equals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach. The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service of social justice through a pro-active goal oriented approach. . . .What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and Obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half hungry millions of India who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives."

The Supreme Court also ruled that the right to life guaranteed under Article 21 includes the right to livelihood as well. The right to food as a part of right to life was also recognized in Kapila Hingorani Vs. Union of India whereby it was clearly stated that it is the duty of the State to provide adequate means of livelihood in the situations where people are unable to afford food. The Court has also held that the right to safe drinking water is one of the Fundamental Rights that flow from the right to life. Right to a fair trial, right to health and medical care, protection of tanks, ponds, forests etc which give a quality life, right to Family Pension, right to legal aid and counsel, right against sexual harassment, right to medical assistance in case of accidents, right against solitary confinement, right against handcuffing and bar fetters, right to speedy trial, right against police atrocities, torture and custodial violence, right to legal aid and be defended by an efficient lawyer of his choice, right to interview and visitors according to the Prison Rules, right to minimum wages etc. have been ruled to be included in the expression of 'right to life' in Article 21. Recently the Supreme Court has directed providing a second home for Asiatic Lions vide Centre for Environmental Law V. Union of India (writ petition 337/1995 decided on 15.4.2013) on the ground that protecting the environment is part of Article 21. The right to sleep was held to be part of Article 21 vide In re Ramlila Maidan (2012) S.C.I.1. In Ajay Bansal vs Union of India , Writ Petition 18351/2013 vide order dated 20.6.2013 the Supreme Court directed that helicopters be provided for stranded persons in Uttarakhand.

The most recent case on judicial activism was the case of Aruna Ramchandra Shanbaug Vs. Union of India and Others AIR 2011 SC 1290. Aruna Shanbaug, a nurse in 1973, while working at a Hospital at Mumbai, was sexually assaulted and has been in a permanent vegetative state since the assault. In 2011, after she had been in this status for 37 years, the Supreme Court of India heard the petition to the plea for euthanasia filed by a social activist claiming to be Aruna's friend. The Court turned down the petition, but in its landmark judgment it allowed passive euthanasia i.e. withdrawal of life support to a person in permanently vegetative state, subject to approval by the High Court.

Thus we see that a plethora of rights have been held to be emanating from Article 21 because of the judicial activism shown by the Supreme Court of India.

Judicial activism not only activated the judiciary but the executive and the legislature too. Several new legislations have appeared on the scene after judiciary's efforts and directions (The Consumer Protection Act, 1986, The Environmental (Protection) Act, 1986, Protection of Human Rights Act, 1993 etc.). Judicial activism has unearthed several scams and scandals (e.g. Hawala Scam, Fodder Scam, St. Kits Scam, Illegal Allotment of Government Houses and Petrol Pumps, Fertilizer Scam etc.).

Sometimes judges appear to exceed their power in deciding cases before the Court. True sometimes the court have gone beyond the scope of their powers. They have entertained matters they ought not to have entertained, and they have been guilty of populism as well as adventurism in violation of the doctrine of separation of powers. They are supposed to exercise judgment in interpreting the law, according to the Constitution.

Arguments against judicial activism

Antagonist of judicial activism argues that activist judges make laws, not just interpret them, which is an abuse of their constitutional power. The issue, they claim, is not whether social problems need to be solved but whether the courts should involve themselves in such problem solving. By making decisions about how to run prisons or schools, argue the critics of judicial activism, the courts assume responsibilities that belong exclusively to the legislative and executive branches of government.

They further argue that judges lack special expertise in handling such complex tasks as running prisons, administering schools, or determining hiring policies for businesses. Judges are experts in the law, not in managing social institutions.

One of the views of that society, which postulates judicial activism as a wrong practice is that it has a detrimental effect on our democratic order. The judiciary has also flaws and loophole in its administration system, so in case of an autocratic decision by the judiciary, there is no recourse. The misuse of PIL to achieve political ends is another curse that looms around Indian judiciary. Red-tapism, corruption, changing governments, lack of legal-awareness, weight of arrears of cases, has contributed to weakening of the implementing mechanism of the executive which has lead to some orders to remain on paper only. This is due to the lack of effective feedback system. Judiciary despite having the best intention is not able to deliver the goods well in time.

Opponents of judicial activism point to the constitutional principle of separation of powers (the division of power among the executive, legislative, and judicial branches of the federal government) and federalism (the division of power between the states and the federal government) to justify judicial restraint.

In L. C. Golak Nath & Ors. v. State of Punjab & Anr., AIR 1967 SC 1643, the Supreme Court enforced its view with respect to separation of powers thus:

"The constitution creates Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them"

In the words of **Sir Alladi Krishnaswamy Iyer:-**

"The doctrine of independence is not to be raised to the level of a dogma so as to enable the judiciary to function as a kind of super-legislature or super-executive."

Separation of Powers and Judicial Restraint

Argued **Montesquieu**, the great political philosopher of the Enlightenment, in favour of a system of governance in which different branches of government exercise different powers to avoid concentration of powers and preserve human liberty—the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the law. This is the doctrine of separation of powers.

The philosophy behind the doctrine of judicial restraint is that there is broad separation of powers under the Constitution, and the three organs of the State, the legislature, the executive, and the judiciary, must respect each other, and must not ordinarily encroach into each other's domain, otherwise the system cannot function properly. Also, the judiciary must realize that the legislature is a democratically elected body, which expresses the will of the people (however imperfectly) and in a democracy this will is not to be lightly frustrated or thwarted.

Apart from the above, as pointed out by Prof. Thayer, judicial over-activism deprives the people of "the political experience and the moral education and stimulus that comes from fighting the problems in the ordinary way, and correcting their own errors".

In Asif Hameed vs. The State of J&K, AIR 1989 S.C. 1899 (paragraphs 17 to 19), the Indian Supreme Court observed: "Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity, the Constitution makers have meticulously defined the functions of various organs of the State. The legislature, executive, and judiciary have to function within their own spheres demarcated in the Constitution. No organ can usurp

the function of another. -- While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self imposed discipline of judicial restraint."

In **Divisional Manager, Aravali Golf Course vs. Chander Haas (2006)** the Indian Supreme Court observed: "Judges must know their limits and not try to run the government. They must have modesty and humility and not behave like Emperors. There is broad separation of powers under the Constitution, and each of the organs of the state must have respect for the others and must not encroach into each other's domain." A similar view was taken in Government of Andhra Pradesh vs. P. Laxmi Devi.

One of the examples of judicial restraint is the case of **State of Rajasthan Vs. Union of India AIR 1977 SC 1361**, in which the court rejected the petition on the ground that it involved a political question and therefore the court would not go into the matter.

In **S.R. Bommai Vs. Union of India (1994) SCC 1.** The judges said that there are certain situations where the political element dominates and no judicial review is possible.

In the case **State of U.P and Anothers v. Jeet .S .Bhisht AIR 2007 6 SCC 586 ,** Justice Markandeya Katju observed, by exercising Judicial restraint judiciary will enhance its own respect and prestige. If a law clearly violates a provision of the constitution, it can be struck down, but otherwise, it is not for the judiciary to sit in appeal over the wisdom of the legislature, nor it can amend the law. The court may feel that law may be amended or the forum created by the Act need to be made more effective, but on this ground it cannot itself amend the law or take over the functions of the legislature or the executive.

CONCLUSION

Admitting all the matters mentioned above, without disputing the idea behind judicial restraint, it is submitted here that too much restraint imposed by judiciary upon itself on the basis of strict separation of powers cannot be a path to identify justice in the eyes of poor. Just as too much of interference by judiciary impairs smooth governance, the stand of restraint also affects the system adversely. As too much judicial activism would produce an adverse impact on the position of the Judiciary itself , too much restraint would have a self annihilating effect. If one is to put the doctrine of separation of power in to absolute rigidity, it would not have any superior court in this country, whether developed or developing, to create new rights through interpretative process. If the courts are not able to check abuse of legislative and executive power by the very raison d'tre of judicial institution would be defeated. Such a failure on the part of the judiciary would destroy the confidence of the people not only in judicial institutions, but also in democratic process.

A wise judicial policy has to be a judicious blend of Activism and Restraint, the exact properties of each varying with the exigencies of the situation is to be welcomed. If the judiciary does not maintain restraint and crosses its limits there will be a reaction which may do great damage to the judiciary, its independence, and its respect in society.

It is not my opinion that a judge should never be activist, but such activism should be done only in exceptional and rare cases, and ordinarily judges should exercise self restraint.

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