JUDICIAL ACTIVISM: IS IT ACTIVISM?*

I feel happy to have been associated by Gandhi Peace Foundation, organising this seminar on 'Manifold Dimensions of Judicial Activism' in whatever capacity for me the organizers have chosen for the purpose of facilitating my association. Let me share with you the reason why I am here. I am here to learn what is 'judicial activism' and what are its 'manifold dimensions'. I wish to learn because, though by this time I have been a Judge – and I believe an active Judge – for over fourteen years but I have never indulged into judicial activism in the sense of the expression in which it is understood in the fashion gallery of legal world, media and vocal activists.

As a lay and humble Judge, when I hear anybody talking about judicial activism, I feel like interviewing him and asking a few questions to anyone who, for the first time, coined this expression or gave it the meaning in which it has come to stay. The word 'judicial' is something related to or by the Judges and the judiciary. The word 'activism' originates from the word 'active'. So far so good. I would have ended my present inaugural address by asking a simple question – 'Should a Judge be not active? Should the judiciary be not active?' The answer, if left to myself, would be - a Judge who is not active is not worth holding his office. A judiciary which is not active and is dormant or submissive, accommodates the power that be, blinks the eyes at arbitrary, capricious or unreasonable actions or omissions of other wings of governance – be it executive or legislature, ceases to be an independent judiciary. However, I came across an amusing definition of 'judicial activism'. It says – "a philosophy of judicial decision making whereby, judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedents".[1] Here 'judicial activism' seems to have been defined in contradistinction with 'judicial restraint' which is nothing but the principle that, when a court can resolve a case based on a particular issue, it should do so, without reaching unnecessary issues. "Judicial restraint is a philosophy of judicial decision-making whereby, Judges avoid indulging their personal beliefs about public good and instead try merely to interpret the law as legislated and according to precedent."[2]

Judicial activism is called – rather misnamed – by some as 'judicial excessivism' and the critics of judicial activism do not hesitate in paying a backhand compliment to such trend by calling it 'judicial terrorism'. Justice J.S. Verma, former Chief Justice of India gave the reason and justification for judicial activism and also gave a warning. He said—

> "It is unnecessary to indicate the extent of expansion of judicial review in the non-traditional areas which, ordinarily, are treated to be the functions of other branches in the scheme of separation of powers. The fact is that the extension, even into those areas, is because of the people's perception that judicial intervention is the only feasible correctional remedy available. It is primarily this perception of the people which brings the acceptance of judicial activism in India as the pragmatic means of realising the full promise given by the guarantee of Fundamental Rights and the mandate of the Directive Principles in the Constitution of India. This acceptance exists in spite of some inherent dangers from uncontrolled judicial activism, voiced at times, seeking judicial restraint as an internal check. This warning is timely."[3]

Dr. A.S. Anand, former Chief Justice of India, in one of his addresses, beautifully explained what judicial activism is. He said that a judicial activist acts like an alarm clock. At the needed hour of time the judicial activist sounds the alarm to awaken those who are sleeping and snoring at a time when they ought to have awakened – doing their duty as the Constitution has entrusted them to do - and the alarm clock is only too willing to discontinue its ringing of the bell, the minute the person who is awakened, activates his hand to press the lever of the alarm clock to put off the alarm. Justice Aharon Barak, the President of the Supreme Court of Israel, has called the expression 'judicial activism' a misnomer and instead chosen to call the same by the name of 'judicial creativity'.[4] To me this expression is more welcome and sounds more befitting.

True it is that the Constitution of India accepts and incorporates the doctrine of separation of powers according to which it is the legislature which makes the law; it is the executive which implements the law (into action); and it is the judiciary which settles in accordance with the law the dispute and conflicts. Normally one organ of the State or governance is not supposed to enter into the arena of the other one. It is not uncommon to hear such like observations as that the Indian Supreme Court has clearly crossed the limits of its power and functions and encroached upon the arena, belonging to the legislature and the executive. But then, is it not that abnormal situations call for abnormal solutions?

It all depends on the angle from which the subject is looked at. A glass containing water half of its capacity is half-empty for some and half-filled for others. It is the negative and positive way of looking at the same glass of water. Patrick Devlin in his book 'The Judge'[5], published a quarter of a century before, contemplates the role of a Judge as an interpreter of the law, a social reformer and also as a law maker. 'The disinterested application of the law calls for many virtues in a Judge such as balance, patience, courtesy and detachment which leave little room for the ardour of the creative reformer'.[6] 'The law maker takes an idea or a policy and turns it into law. For this he needs the ability to formulate, and a judge, in common with any other trained lawyer, should have that. Is the judge any different in this respect from a professor or a parliamentary draftsman? Yes, because he has experience of the administration of the law. So has the barrister and the solicitor, but it has an advantage to see it working from the Bench. So there is no reason why, given the policy, a judge should not be a good activist lawmaker'.[5] A Judge may or may not be an innovator but he has to be a rationaliser. He translates into law, the steady morality of his times and the expectations, aspirations and demands of the society. There are Judges who are traditionalists, prepared to abrogate their powers and say "I could if I would, but I think I better not".[7] Even if they have not abrogated their powers, negativism in attitude of such judges is writ large. Then there are judges who think that they must be true to their oath under the Constitution and they must do where they can; else they would be failing in coming up to the expectations of the society which, through a constitutional system, has commanded them to adorn the seat of justice seated whereon they are ordained to remain active.

The expression 'judicial activism' looses all its odour and acquires a fragrance if we look at only two pages of the Constitution - its Preamble and the oath of a Judge. The Preamble to the Constitution is a charter of assurance to the people of India that it shall secure to all its citizens JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY, assuring the dignity of every individual and the unity and integrity of the

Nation. The form of the oath of a Judge of the Supreme Court provides for swearing in the name of God, or solemnly affirming, that he shall bear true faith and allegiance to the Constitution of India as by law established, that he will uphold the sovereignty and integrity of India, that he will duly and faithfully and to the best of his ability, knowledge and judgment perform the duties of his office without fear or favour, affection or ill-will and that he will uphold the Constitution and the laws. Similarly worded is the oath administered to a Judge of the High Court when he enters upon the office. A Judge is duty-bound to fulfill, just as the legislature and the executive are, the expectations of the teeming people of India as enshrined in the Preamble for securing them justice, liberty, equality and fraternity. To secure these to the people of India, if a Judge feels that he should be active and even an activist, he has to be; else he would be failing in being true to his oath. What is the dividing line?

Prof. Upendra Baxi, tracing the origin and development of 'judicial activism', refers to two paths wherefrom, the judicial activism has walked in. He calls them the 'normal path' and the 'problematic path'. He says – "One may wish to normalise the story of origins, or probelmatise it as willed strivings, at constructing the time, manner, and circumstance of accomplishing the tasks of justice. The 'normalising' narratives accustom us all to certain habits of thought, which lead us to think that judicial activism has always been with us, and only the forms of articulation differ in various historic moments and movements. The 'probelmatising' path insists, in contrast, that judicial activism marks breaks, discontinuities, and ruptures – in short, profoundly new emergences in the social histories of power and resistance. On one reading of his narrative, we are treated to, in the main, the story of continuity. On this view, judicial activism has always been with us, though differences in *styles* of performance necessarily vary."[8]

The Legislature, the Executive and the Judiciary are three pillars of democracy. Wisdom and prudence dictate that four legs are better than three. As three pillars may not be able to provide the requisite balance enough to act against the pull of gravity, Press, armed with powerful strength of freedom of speech and expression, has been invited by Constitutional convention to join as the fourth pillar to share the weight on other pillars. They are all four partners engaged in the common business of protecting the democracy and serving the society. It is a friendship with a common concern. The very fact that the four partners have regards for each other and wish well of each other, the obligation is cast on one pillar to be ready to additionally bear the weight and burden if the other pillar becomes weak or for some reason or the other, may be because of fortuitous circumstances, is unable to bear its weight or is in danger of crumbling. That is what the judiciary is doing. It is its eagerness, preparedness and creativity which is erroneously being termed as 'activism'.

I am particularly allergic to the association of suffix 'ism' with judicial activity. A few judgments which can be counted on finger tips out of the thousands delivered by Indian judiciary cannot simply on account of difference in perception be termed as an 'ism' which is suggestive of "any distinctive doctrine, theory or practice – usually in disparagement."

Democracy is a delicate balance between majority rule and the fundamental values of society that rule the majority. When the majority deprives the minority of human rights, this harms democracy. When judges interpret provisions of the Constitution and declare void the harmful laws, they give expression to the fundamental values of society as they have

evolved throughout the history of that society. Thus, they protect constitutional democracy and uphold the delicate balance on which it is based.[9]

In a constitutional democracy neither the legislature nor the judiciary is supreme; only the Constitution is supreme. When a Constitution is adopted, the legislature is obliged to uphold its provisions. The task of the Court is to protect the Constitution and ensure that the legislature fulfils its obligation[10]. So also if the executive fails to act or violates the constitutional protection, conferred on the citizens of the country, it is the Constitution which obliges the judiciary to crack a whip on inaction and lend its shield against torture, terror and injustice.

The judges do not have a monopoly on the mistakes. The judges come and go. The history and precedents bear testimony to the fact that most mistakes are corrected by the judges themselves[11]. What is called 'judicial activism', if appreciated in right perception, is only a partnership between the Constitution and the judges wherein the sleeping partner is assured by the working partner that he would take care of the business of the both. Under the Indian Constitution, the judiciary is 'sentinel on qui vive'. The founding fathers of the Constitution have entrusted the judiciary, as a trustee, the task of maintaining and upholding the Constitution and with the privilege of telling what the Constitution means and to discharge the delicate task of keeping the other wings of the governance moving when they fail to move, and of bringing back on the path where they depart and go astray or run amuck. If the judiciary fails to act in spite of arbitrariness, unreasonability, capriciousness or inaction having been brought to its notice it would be committing the breach of trust reposed in it by Article 14 of the Constitution and the judiciary does not notice if it is applauded as having risen to the occasion or branded of unmindfully falling into the trap of an 'ism'.

Shri M.R. Andhyarujina, Senior Advocate and former Advocate General for the State of Maharashtra in his beautiful monograph 'Judicial Activism', catalogues more than 30 instances where in his objective assessment the judiciary has played a role – rather assumed a role to itself – which the Constitution did not contemplate for the judiciary. This is one learned way of looking at the events.

However I ask a few questions to all concerned. I would not like to travel down the memory lane but confine myself to referring to just a few instances, fresh in the memory of everybody.

Recently Hon'ble the Chief Justice of India has invited attention of the Legislature to what the framers of the Constitution had ordained 55 years before that the State shall endeavour for a common civil code in the country as it is necessary for the unity and integrity of the nation and for long life of democracy. The Chief Justice had said nothing of his own except for reading and reiterating a forgotten Article 44 of the Constitution. A few eyebrows came to be raised. Another recent judgment of Supreme Court, upholding the validity of a legislation, enacted by the State of Haryana adopting the two-child norm for the grass-root level society has laid down no philosophy of its own except for saying that the legislative enactment is constitutionally *intra vires*. If there has been any activism, it has been on the part of the State Legislature and not on the part of the judiciary. Both the judgments were highlighted in the media as uncalled for judicial activism on the part of the Supreme Court.

Who is responsible for all of us breathing more fresh air and comparatively pollution free environment in the National Capital of Delhi? Who has highlighted the issue of bonded labour, leading to emancipation of thousands of forgotten human-beings who were forced to live the animal life of slaves? Who has come to the rescue of numberless women and girls, facing like dumb creatures, sexual harassment in work places? Who has taken the lead for introducing purity and probity in public life and succeeded in creating some obstacle in free flow of criminalisation into politics? The questions can be multiplied endlessly. I do not propose to give an answer; the answer is known to everyone. Is it not a conscious discharge of constitutional obligation cast on one of the constituents of democracy? If it is to be called judicial activism, let it be. It only gives dignity, popularity and acceptability to the phrase – judicial activism. The judges under the Indian Constitution are not the representatives of the people elected by popular vote and it would be a tragedy if they become so. The principle of representation applies to the Legislature and directly or indirectly to the Executive; certainly it does not apply to the Judiciary. The judiciary reflects the different values that are accepted in the society and it should have an accountability that reflects its independence and its special role in a democracy.[12]

The role of judiciary in any constitutional democracy is to bridge the gap between the law and the society to uphold the Constitution and to protect the democracy. Despite criticism the judiciary has silently continued to tread its path upto this time and hopefully it shall continue to do so in the times to come. The judiciary is conscious of the responsibility which rests on its shoulders. The judges know that when they sit at the trial they also stand on trial. 'Acceptability' is the philosophy of judiciary which works in both the directions. The judges have no agenda of their own and have no demands of their own; they accept what is given to them. They neither protest nor demand nor demonstrate. At the other end, the acceptance of their verdict by the society is the source and strength of their power. So long as, in the people's estimation, they are doing their duty, they are on the right path and they do not mind being called activists.

The great philosopher Aristotle had said (in 4th Century B.C.) – 'Man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all'. The judiciary is entrusted by the Constitution with the task of watching that none succeeds in separating the man from law and justice.[13] Lord Atkin tendered a sane stimulating advice – "When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judges is to pass through them undeterred"[14] and let me add – do not be deterred even if a few law activists call it 'judicial activism".

I once again welcome the Gandhi Peace Foundation for having organised this seminar. 'PIL and human rights', 'judiciary and its impact on social development', 'ensuring an upright judiciary and an upright Bar' – are the subjects on which the three sessions of this seminar are chartered to deliberate. I find a galaxy of learned speakers, contributing their rich thoughts and leading the deliberations. I would be eagerly waiting for the conclusions of this seminar and request the convener of this seminar, Dr. Ravi Bhatia and Shri Krishan Mahajan – the moving force behind the curtain of this seminar, to bring out a publication of the papers presented at the seminar and prepare summary of the conclusions to guide the judiciary of today and tomorrow so as to take care of judicial activism if at all it is an 'ism', and if at all the activism has run into too much of activity, in the assessment of the learned participants of this seminar.

I would end with a request to this seminar, made through an anecdote.

A couple was holidaying and went to stay in a hotel at a hill station. The hotel manager told the couple – "If you want anything you have not got, just ask for it and we will advise you how to do without it". I hope the seminar would not end with this concluding advice to the judiciary.

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1. Black's *Law Dictionary*, 7th Edn., p. 850.
2. Black's *Law Dictionary*, 7th Edn., p. 852.
3. Independence of Judiciary – some latent dangers – (1995) 6 SCC Journal 1 (3).
4. Ahron Barak, A Judge on Judging, HLR Vol. 116, No. 1, Nov. 2002.
5. Oxford University Press, 1979.
6. The Judge, p. 5.
7. The Judge, p. 6.
8. Judicial Activism in India, S.P. Sathe, page xi.
9. Ahron Barak, A Judge on Judging, p. 49-50.
10. A Judge on Judging, p. 50.
11. A Judge on Judging, p. 53.
12. A Judge on Judging, p. 161-162.
13. Dictionary of Legal Quotations – Simon James, p. 77.
14. *Ambard* v. *A.G. for Trinidad and Tobago*, (1936) AC 322 (335).