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Public Interest Litigation: Venturing along the Thin Line Between Judicial Activism and Judicial Overreach

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ABSTRACT

Public Interest Litigation is the birth child of the Supreme Court of India, which armed the Judiciary to fulfill the objectives manifested in the Indian Constitution[2]. The basic premise is rooted in the idea of making justice accessible to a common man. But the concept is not without its flaws. The debate about the nature of the doctrine of PIL has been debated for a very long time, the issues are complex and varied. The scope of PIL has broadened over time, through catena of judgments delivered by the Supreme Court in the last 50 years. The objective was to enhance and broaden the ambit of justice, so it can reach the poor and needy. While the idea in itself was succinct, and evidently led to a lot of progressive legislations and legal developments. Inadvertently, it also brought a myriad of issues. To allow for a full investigation of these problems, this article would not suffice. However, one aspect can be brought into focus which has been a pertinent issue when it comes to concept of PIL as a whole, whether it a legitimate exercise in form of Judicial Activism or Judicial Overreach? This article aims at viewing both the concepts through a critical lens to find out the distinction between the two, and whether the Apex Court is doing an optimal job of treading this thin line or not.

I. INTRODUCTION

Pritam Kumar Ghosh in his work[3] opined, that Public Interest Litigation is the embodiment of judicial activism as it captures the spirit of people, oriented in a litigative framework, for environmental preservation. The definition is rather reductive, as the scope of PIL has expanded far beyond just environmental issues. Key aspect for our discussion is the use of term 'judicial activism' in conjunction with PIL by Ghosh. What is 'Judicial Activism'?

'Judicial Activism' is defined[4] in its most literal parlance as a judicial philosophy which allows the judge to depart from the strict adherence of

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[2] PUDR v. Union of India; AIR 1982 SC 1473.

[3] Pritam Kumar Ghosh, *Judicial Activism and Public Interest Litigation in India*, Retrieved from, http://airwebworld.com/articles/index.php?article=1531, on October 17, 2021.

[4] Brayan A.Garner (ed.), *Black's Dictionary 850 (1999)*.

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judicial precedents in favor of new progressive social policies. It gives motive to judges to make their decisions for the purpose of social engineering, and therefore it gives rise to a possibility of intrusion/intervention in the executive and legislative matters. Professor Baxi, an eminent Indian jurist defines Judicial Activism "*…is that way of exercising judicial power which seeks fundamental re-codification of power relation among the dominant institutions of state, manned by members of the ruling classes."*[5] Baxi perceives judicial activism as a problem and says the judge can play a role of an 'activist' if they are paying attention to the governmental issues and coming to the aid, and protecting the rights of downtrodden and poor. And distinguishes it with role of an 'active' judge who toe the line of patriarchy and prefer stability over changes.

Professor Sathe has done extensive work on Judicial Activism on India. He has marked a distinction between what he perceives are two different types of activism i.e., Progressive Activism and Reactionary Activism.[6] He describes progressive judicial activism as social interest litigation, where the judiciary is responding and giving decisions on issues which they deem are in the interest of societal members at large. Whereas, Reactionary Activism according to him, is associated with instances where judiciary is *reacting* to a particular social and a political situation.

Professor Laxmikanth has defined judicial activism in realm of relationship of court with the other branches of the government. According to him, if the court is trying to give a widest decision possible in a case which could be decided on narrower grounds, and in doing ventures into unchartered territory, then it can be said it is indulging in judicial activism. He further asserts, if the court takes the role of the principal legislator and enunciates decision from where it can be inferred it is assuming this role, then it is judicial activism.

Even though multiple definitions have been discussed, it is difficult to pinpoint and ascribe a common meaning to the term 'judicial activism'. As a concept, in itself is polemic since the courts are only discharging functions assigned to it. Prof. Baxi in his later work in 90s asserted that it is an abstract phenomenon, whereby its meaning will differ from one person to another. This lack of clarity is the root of this problem, since every decision of the court can be justified under the guise of judicial activism.

II. Justification for Judicial Activism

While the concept has been debated, there are number of justifications which have been offered whereby court can be accepted to engage in judicial activism.

While addressing the societal concerns, PIL has led to number of innovations which are hugely beneficial. One of them is expansion of *'locus standi'* rule. While the traditional rule only permitted the aggrieved party to file a suit or bring a claim, this rule was expanded by Justice

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[5] Upendra Baxi, *Courage, Craft & Contention* 7 (1985).

[6] S.P. Sathe, *Judicial Activism in India* 1 (2002).

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P.N Bhagwati in 1982[7], whereby any public-spirited person can bring a suit before the court which involves an issues which concerns the society at large. The scope of PIL was further widened in 1987[8] with advent of epistolary jurisdiction, whereby a poor person could approach to the court directly by writing a letter (without any affidavit) to any of the judges (instead of the entire court). The court in the same case, also provided it can grant remedy in the form of compensation to those person whose fundamental rights have been grossly or patently violated, or affect persons at large.

PIL has also lead to some of the most important and landmark judgments in Indian history. In *Vishakha v State of Rajasthan*,[9] the Apex Court recognized sexual harassment as a 'clear violation' of fundamental right and issued exhaustive guidelines including a definition of sexual harassment, list of steps for prevention of harassment, complain procedure in workplace etc. These Vishakha guidelines were followed and turned into a legislative Act[10]. The jurisprudence of Art. 21 has been greatly broadened with the advent of PIL, rights of prisoners have been recognized by the Court as it held right to a speedy trial and right to free legal aid is a fundamental right under Art. 21.[11] Other rights such as right to clean environment[12], right against bondage[13], right to food[14], etc. have also been recognized as a fundamental right. The Courts have also given many progressive judgments, including one in *Javed v. State of Haryana*,[15] whereby court upheld provisions of Haryana Panchyati Raj Act, 1994 to be constitutionally valid. The provision disqualified a person from holding office of a Gram Panchayat, or a Sarpanch if he had more than two living children. Courts reasoning was such a provision was based on intelligible differentia having nexus with the object of popularization of family planning programme.

The main argument of the proponents of judicial activism is, when the other political branches of the government fail to discharge their respective functions, it gives rise to a near collapse of responsible government. Since a responsible government is the hallmark of a successful democracy and constitutionalism, its collapse warrants many a drastic and unconventional steps. It is difficult to argue with that logic because when the legislature fails to make the necessary legislation to suit the changing times, and governmental agencies fail to perform their administrative functions sincerely, the rights of the citizens are at risk. It becomes natural for them to look up to judiciary to come to their aid and protect their fundamental rights and freedoms. This mounts tremendous pressure on the judiciary to do something for the suffering masses, which in turn leads to this extra-ordinary scenario, where judiciary steps into the areas

[7] *Supra.* note 1.
[8] M.C. Mehta v. Union of India, 1987 AIR 1086.
[9] (1997) 6 SCC 241.
[10] Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.
[11] 1979 AIR 1369. M.H Hoskot v. State Of Maharashtra, 1978 AIR 1548.
[12] *Supra* note 7.
[13] PUDR v. Union of India, 1982 2 SCC 235.
[14] PUCL v. Union of India, 2005 (5) SCALE.
[15] AIR 2003 SC 3057.

usually earmarked for the legislature and executive and this results in judicial activism.

III. Perils of Judicial Activism

As mentioned above, one of the main argument for judicial activism is that it acts as a check on democracy. It can step in to discharge the functions of other bodies of the government who are slacking. However, while this action may be seen as a 'positive' (since judiciary is doing to safeguard the rights of citizens), it has a negative implication for democracy as well. Since, we are accepting it is fine for one organ to venture beyond their powers to preserve democratic institutions and values. If, another organ were to do the same in the future then it would be difficult to offer a rebuttal, since Supreme Court themselves would serve as a precedent for this kind of behavior.

Mehta has also asserted in his work[16], that there has been a remarkable shift in the working pattern of the courts by virtue of which the judiciary is said to have occupied an ascendant position within the nation's politics. So, what it could not do under the traditional pattern now seems evidently possible with growing judicial intervention in other spheres of state businesses.

Furthermore, there is a lack of consistency in decisions of judiciary, which is not necessarily restricted to cases of PIL. It is difficult to trace a common thread in judicial behavior in India over the last five decades. If we cast a look at this period, we shall find that Supreme Court has oscillated in its approach and conduct, depending on factors like strengths and weaknesses of the political organs of the state. Furthermore, judges have also expanded the definition or rights which are constitutionally justiciable, and in turn expanded the scope of judicial intervention. Such a shift, as epitomized by catena of judicial pronouncements, is however perceived differently with different connotations. As Prof. Baxi has suggested, judges are evaluated as activists by various social groups in terms of their interest, ideologies and values. In this process, on one hand the judiciary has tasked itself of ensuring maximum freedom to the masses and to galvanize the executive and the legislature to work for public good and on the other hand, there have been instances where it has acted whimsically without having regard to the spirit of the Constitution and has thereby manifestly encroached in the domain of other state organs. Along with Mehta and Baxi, this problem has been recognized by *Sathe* as well who asserts that the judiciary has been reacting to a particular political and social situation.[17] So, their quest in achieving justice is being guided by existing political climate which is creating a bottleneck. Prime examples of existence of such a bottleneck would be Judiciary shirking away from taking a firm stance on religious matters and their reluctance to take a stance on delicate political matters such as corruption of ministry and judiciary.

Another major issue, when it comes to judiciary engaging in judicial activism through PIL, is that it does not account for, from where they are

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[16] Pratap Bhanu Mehta, India's Unlikely Democracy: The Rise of Judicial Sovereignty, Journal of Democracy, Volume 18, Number 2, April 2007.

[17] *Supra* note 5.

deriving the power to do so. In many instances, judiciary while working towards the objective of a democratic goal, have usurped legislative and executive functions but not explained from where its own authority is supposed to come from. Their actions have been justified by taking recourse to Constitution providing for courts to intervene for social reforms. This is dangerous, if we map and paint everything on the same canvas in lieu of social reforms, then there would be very little matters on which courts cannot adjudicate. This form of practice would render Separation of Powers meaningless, which is one of the key pillars of constitutionalism.

IV. CONCLUSION

Enormous expansion of unaccountable judicial power in conjunction with lack of clarity regarding scope/boundaries of such power have resulted in a situation whereby judiciary has transcended from the role of judicial activism to judicial overreach. *"The line between judicial activism and judicial overreach is a thin one…A takeover of the functions of another organ may become a case of over-reach"*[18]

Like its predecessor, 'judicial overreach' is also an abstract concept. It can be defined as the point at which judicial activism starts to lose its legitimacy in entirety, any further exercise of judicial power beyond that point would amount to judicial overreach. Verma created the distinction between two and provides a more simplistic view[19], he says whenever courts are taking over the functions of other bodies it amounts to overreach. It is legitimate judicial activism and is only justified if what they are adjudicating upon, is a legal issue, and the decision has a juristic basis. He further adds, judicial activism is appropriate when it is with the purview of a legitimate judicial review.

From above we can infer, that main issue is that of legitimacy. The entire premise of overreach is to restrict unjustifiable intervention by judiciary into other organs. It is concerned with the functional separation of powers, albeit in a broad and not a strict manner within the constitutional scheme. The instances where judiciary has overreached are far too many to label them, SC in *Aravali Golf Club*[20] named few such instances in cases of: nature of buses for public transport with regards to air pollution, free hospital beds on a public land, enhanced fines due to rising number of road accidents, identifying buildings to be demolished in Delhi, world class burn-wards and ambulance services amongst many. The most common error which can be traced in these catena of decisions is that judiciary is not exercising restraint and therefore, overstretching its limits. They are making laws, when their role is only that of interpretation and they are issuing directions to other organs on matters which do not come within their purview. Judicial intervention cannot be used for filling up the lacunae in legislation or for providing rights or creating liabilities which are not provided by the legislation. Ronald Dworkin remarked in one of

[18] Former Prime Minister of India, Dr. Manmohan Singh, speaking at the *Conference of Chief Ministers and Chief Justices* held in New Delhi on April 8, 2007.
[19] J.S.Verma, *The Indian Polity: Seperation of Powers*, 2007.
[20] Div. Manager Aravali Golf v. Chander Hass (2008) 1 SCC 283.

his celebrated works (*Laws' Empire)* that *"the courts are the capitals of the law's empire, and judges are its princes, not its seers and prophets."*[21]

Therefore, it can be summarized that judicial activism is only a legitimate intervention if it falls within the scope of judicial review. Beyond that, it is over-reaching. To solve this problem, basic functions of different branches of the government have to be mapped out and a line has to be drawn between appropriate and inappropriate judicial intervention within which those functions could be placed. In marginal cases, focus must be on the main legal question at the center of dispute in order to determine the legitimacy of judiciary to intervene. In matters of policy, or purely political matters which lack a core legal issue, they would fall outside the domain of judiciary. This demarcation would allow judiciary to exercise restraint and prevent them from over-reaching.

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[21] Ronald Dworkin, *Law's Empire*, 1986.

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