Judicial Activism

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Mr. Bharat Doshi, members of the family of late Mr. Lalit Doshi and Lalit Doshi Memorial Foundation, distinguished ladies and gentlemen, a very good evening to you.

At the outset, I express my sincere thanks to Mr. Bharat Doshi and the Lalit Doshi Memorial Foundation for giving me the opportunity of participating in this memorial lecture series, which by all accounts, a series where a galaxy of eminent personalities have come and spoken.

Although, I did not have the pleasure of personally knowing Mr. Lalit Doshi, from all accounts I have learnt, he was a brilliant person who because of personal convictions, and the desire to render service to the country and society, chose Government service as an option. He had a distinguished career during which he served in various capacities as a member of Indian Administrative Service. He also worked as Joint Secretary in the Government of India. As a Secretary of Industries, in Maharashtra, he played a major role in giving shape to the new industrial policies for the State of Maharashtra. It is said of him, "that he always had a smile on his face irrespective of the magnitude and the tension of work." That can only come to a person who genuinely considers his work to be worship. It is possible to have smile on one's lips and be free of tension of work only when one enjoys the work. It is a pity that the cruel hands of fate snatched him away from us at a comparatively young age and deprived society from the benefit of service that it would have derived for a long time.

When I was asked to choose the subject, I was not sure what I was expected to talk about. Because I happened to be a Judge, I assumed a legal subject was required to be talked about. Somehow, the topic chosen happened to be Judicial Activism, about which I have my strong views and I have put them on record even while I was a sitting Judge of the Supreme Court of India.

Our civilization was nurtured by the waters of Ganga and Yamuna and their confluence was considered the holiest. This spirit of confluence we seem to have adopted while framing our constitution. Our constitution is a product of confluence of the ethos of rivers Thames and Potomac, as it is an admixture of

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the British Westminster Parliamentary system and the American Presidential form of governance. The founding fathers of our country sought inspiration from both and adapted the perceived merits of both into the new constitution that they set upon to draft. This synergy between the parliamentary and presidential systems has its decisive bearing on the relationship amongst the three important pillars of State trinity, namely, legislature, executive and judiciary.

The Indian constitution created an integrated judicial system in India where the judiciary is expected to act both as a constitutional watchdog and an institutional harbinger of social transformation. Judiciary got its constitutional strength because of its special power of judicial review to check and contain the excesses of other two wings of the government. It also managed to establish its constitutional ascendancy for possessing the sole discretionary right for progressive interpretations of law. As a result, one can clearly discern how the judiciary has changed its role in Indian polity since independence.

The theory of checks and balances, or *trias politica*, coined by the French political philosopher Montesquieu has been inbuilt into our constitution. Under this model the State is divided into three branches, and each branch of the State has separate and independent powers and areas of responsibility; however, each branch is also able to place limited restraints on the power exerted by the other branches. The normal division of branches is into the **executive**, the **legislature**, and the **judiciary**. This is also known as the theory of separation of powers. Proponents of this theory believe that it protects democracy and prevents concentration of power in one wing and consequential tyranny. No democratic system exists with an absolute separation of powers or an absolute lack of separation of powers. Nonetheless, some systems are clearly based on the principle of separation of powers while others are clearly based on entwining of powers.

Constitutions with a high degree of separation of powers are found worldwide, and are particularly common in the Americas, where the US system was the first such system. The UK system is distinguished by a particular entwining of powers. India's democratic system also offers a clear separation of powers with the constitution prescribing the roles to be played by the Legislature, Executive and the Judiciary.

Alexander Hamilton, a great lawyer from the United States, expressed in graphic language the power of the American judiciary and said:

> *"Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated.* ***The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm, even for the efficacy of its judgments"***[1].

The real power in the hands of the Judiciary is its constitutional power of adjudging the constitutional validity of the acts of the other branches. In an attempt to play effectively the self-appointed role of harbinger of social transformation, the Higher Judiciary has adopted an aggressively activist role, which seems to have generated the present controversy that the judiciary's activism is encroaching beyond legitimate constitutional limits. It is necessary to understand the true meaning and content of the expression Judicial Activism, bandied about so freely, to appreciate the contours of the current debate.

Chief Justice Hidayatullah described the true role of the judiciary sagaciously and said:

> "The first principle to observe is that the wisdom of the law must be accepted. A little incursion into law making interstitially, as Holmes put it, may be permissible. For other cases the attention of Parliament and/or government can be drawn to the flaw"[2].

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[1] Federalist Papers #78 , Alexander Hamilton

[2] Justice M. Hidayatullah, Highways and Bye-Lanes of Justice, (1984) 2 S.C.C. (Journal) 1 at p. 5.

The traditional role of the Judge is envisaged as that of an impartial arbiter who hears the forensic debate before him and renders judgment without ever stepping into the arena of debate. Lately, however, it has become fashionable for judges to jump into the fray and actively participate in the debate by supporting one side or the other and this process masquerades under the felicitous name "judicial activism". In the name of judicial activism, modern-day judges in India have abandoned the traditional role of a neutral referee and have increasingly resorted to tipping the scales of justice. The legitimacy of such actions needs critical appraisement at the hands of the legal fraternity, even at the risk of unpopularity by swimming against the tide.

The term "judicial activism" came into currency sometime in the twentieth century to describe the act of judicial legislation i.e. judges making positive law. Although, the underlying debate on judicial activism has been around since the days of Blackstone and Bentham, to a non-lawyer, Arthur Schlesinger Jr., belongs the credit for popularizing the term "judicial activism". His 1947 article in *Fortune*[3], a well-known magazine in the U.S., started the modern debate. It brought into focus the dichotomy observed in the judicial process: unelected judges *versus* democratically enacted legislatures; result-oriented judging versus principled decision making; observance versus side-stepping of precedents; law versus politics and so on. On the basis of their judicial philosophies, Schlesinger characterized some judges of the U.S. Supreme Court as "Judicial Activists", some as "Champions of Self Restraint" and others as comprising the middle group. Scholars of law, practitioners and the general public have debated, often fractiously, the correctness or otherwise of this kind of judicial activity, some advocating John Austin's deference to restraint and others Justice Benjamin Cardozo's views which tended towards activism.

In India, although the activism *versus* restraint debate existed even in the pre-Constitution period, it did not vigorously take off till the 1970s when the Supreme Court of India became very activist. However, the underlying philosophical issue of the relationship between means and ends has been long debated in Indian philosophy. In recent times, it was Mahatma Gandhi who advocated that the means used for achieving a particular result must also be as

[3] See Arthur M. Schlesinger, Jr., The Supreme Court: 1947, FORTUNE, Jan. 1947, at pp. 202, 208 cited from Keenan D. Kmiec, The Origin and Current Meanings of "Judicial Activism", 92 CALIF. L.R. 1441 (2004).

acceptable as the result itself.[4] As we shall see, the saga of judicial decision-making by the highest court in India indicates that judicial activism or the pursuit of ends without regard to the means has become the dominant approach in judicial thinking.

With this background, it becomes necessary for the judge to ask, Hamlet like, whether it is nobler in the mind to remain impervious to the dominant discourse around, or to trim the sails of his thinking to the winds blowing around. This is a question of great moment, which must haunt any conscientious judge. Tradition and good-sense demand that, irrespective of the political debate around, the judge should maintain a neutral stance in his decision-making, being guided only by accepted legal principles and the dictates of his conscience. The judge being human, the social ambience in which he operates is likely to affect his judgment, but the extent to which he disallows this to happen determines his true mettle.

The judicial branch is invested with the power of being the final arbiter of constitutional disputes under many democratic constitutions. India, which has modeled its constitution, to some extent, on the U.S. Constitution, falls in this category. One of the fundamental features of such a constitutional setup is the judicial power to invalidate legislation on the ground of infringement of constitutional parameters such as legislative incompetence, violation of guaranteed fundamental rights, inconsistency with an express provision or basic feature of the constitution. The power of judicial review is an exception to the principle of separation of powers, which demarcates distinct areas for the different constitutional organs for exercise of their powers. The power of judicial review postulates that, in the event of a dispute as to whether the legislature or the executive has over-stepped its constitutional bounds, the judiciary shall decide the dispute by application of well-established constitutional doctrines and principles of interpretation. Although, the doctrine of separation of powers is not watertight or immutable, judicial interpretation must not reduce it to a nullity. Indeed, in some areas, our Constitution's framers have created evident and unambiguous barriers against

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[4] Writing in YOUNG INDIA, July 17, 1924, he says:
"They say, 'means are after all means'. I would say, 'means are after all everything'. As the means so the end.... There is no wall of separation between the means and the end. Indeed, the Creator has given us control (and that, too, very limited) over means, none over the end. Realization of the goal is in exact proportion to that of the means. This is a proposition that admits of no exception."

judicial intervention in legislative or executive domains[5] but the courts, eager to assert their authority, have breached even these barriers.

Indeed, nothing can be headier than the power to invalidate another constitutional organ's action. Such great power must of necessity bring in its wake great responsibility. The problem with judicial activism is its proclivity for excessive and legally improper use of this very great power to invalidate arguably lawful and proper legislative or executive actions. In fact, history abounds with instances where overactive judges have jettisoned well-established principles to produce incongruous results, which they honestly thought were necessary, even if democratically elected legislatures or executive thought otherwise. Let us examine some of these instances in the U.S., India, and the U.K.

During the period of the Great Depression in the 1930s in the U.S., the U.S. Supreme Court invalidated a series of legislative measures taken by the government under the 'New Deal' program. These legislations were intended directly to address the problems arising from the Great Depression by generating employment, obligating minimum wages, safe-working conditions, and other social welfare measures. However, these legislations were struck down by a majority of the judges on the premise that they interfered with the doctrine of freedom of contract and were, therefore, contrary to the then current philosophy of *laissez faire*. The activism of the judges in striking down such obviously valid legislation contributed to the elongation of the Great Depression leading to avoidable loss of life and misery for millions of people. This judicial attitude led U.S. President Franklin Roosevelt to threaten to 'pack' the Supreme Court with judges who would show restraint and accept the legislative wisdom of the 'New Deal'. With this threat hanging over their heads and with the death or retirement of the activist judges, the U.S. Supreme Court eventually restrained its activism, leading to the famous quip about the *"switch in time that saved nine"*—the nine justices!

Judicial activism has still a darker history as seen in the infamous case of *Dred Scott v. Sandford*[6], where the U.S. Supreme Court virtually supported slavery by denying the power of the Federal Government to abolish this practice. The preposterous reasoning put forward by the judges, ignoring clear provisions of law, was that black people were not citizens and could not, therefore, claim

[5] For e.g., Articles 122 and 212, specifically prohibit the courts from inquiring into certain matters

[6] 60 U.S. 393 (1857).

constitutional protections. Moreover, since slaves were chattels of the slave-owners, freeing them from slavery meant forfeiture of the slave-owner's property without compensation—something, which in the thinking of those activist judges, was unfair and unreasonable. As we shall see later as well, this sort of result-oriented jurisprudence requires embarrassing legal gymnastics from judges.

Turning to India, there has developed a recent and disturbing trend of using the judiciary to second-guess unambiguously legislative or executive powers. Indeed, our judges have succumbed to the temptation to interfere even with well-recognized executive powers such as treaty making or foreign relations. A Delhi High Court judgment in 2002[7], made a treaty signed by India with another sovereign foreign state virtually inoperable, by striking down an administrative order connected with it, *inter alia* on the ground that the Court did not like the policy being effectuated by it. Judicial assays into the realm of executive policies seem to have become the norm of the day. One shudders to think where this trend could lead—whether, for example, the constitutionality of a declaration of war or peace treaty signed by India could also be questioned in a court of law? If the courts were to strike down the peace treaty as being 'unconstitutional', would the armed forces be compelled to prosecute the war under a judicial mandamus? Indeed, the mind boggles at such eventualities, though improbable they may appear, given the new found enthusiasm for judicial activism in areas that are inarguably *no pasaran*[8] for judges.

Activist Judges have often ignored or sidestepped binding legal precedents to arrive at preconceived results, which conform to their conception of justice. However honest and *bona fide* this exercise may be, its legal legitimacy is open to question.

"Political questions", which were meant to be out-of-bounds for the courts have often been thrown into the laps of judges. Instead of throwing them back, the courts have, with great enthusiasm, forayed into adjudication of such questions, often with unsatisfactory results. We need to explore first the reasons for excluding the adjudication of "political questions" by courts.

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[7] Shiva Kant Jha; Azadi Bachao Andolan v. Union of India, (2002) 256 I.T.R. 563 (Del.): 2002 Tax L.R. 735 (Del.), *overruled* by the Supreme Court in, Union of India v. Azadi Bachao Andolan, (2004) 10 S.C.C. 1. These cases were concerned with the Indo-Mauritius Double Taxation Avoidance Treaty.

[8] *No Pasaran*, which is Spanish for 'they shall not pass', was the slogan of the anti-fascist movement in Europe in the 1930s.

The "Political Questions Exclusion" doctrine is best stated in *Baker v. Carr*,[9] where the U.S. Supreme Court held that certain questions were non-justiciable in a court of law when there was:

> *"a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a* ***lack of judicially discoverable and manageable standards*** *for resolving it..."*

The Jharkhand Assembly dispute would probably fall under the first category, because there is a constitutional provision, Article 212, entrusting the adjudication of such issues to a coordinate constitutional branch namely the legislature, which ideally should have been left free to deal with question, the courts keeping aloof.

The *Ayodhya* Reference case, where the President requested the Supreme Court to answer politically sensitive questions like: Whether there existed a temple at *Ayodhya* before the construction of the *Babri* Mosque, and the Ram Setu dispute as to its historical authenticity, fall in the second category, where the matter cannot be resolved by reference to "judicially manageable standards". It would have in fact required the judges to opine on a point of archaeology rather than law, and thereby step on to a political minefield. The Supreme Court was perfectly right in refusing to answer the *Ayodhya* reference. In fact, such questions have arisen merely on account of the failure of the executive or the legislature to resolve their own political problems and are attempts to pass the buck to the judiciary. The Supreme Court should stoutly refuse the temptation to crown itself with political thorns. The decision of the Supreme Court in the 2G spectrum case mandating public auction as the only mode of disposal of all natural resources and the inevitable fallout by way of Presidential reference is a very recent example. I am afraid I cannot comment more about it as the case is still *sub judice*.

Despite the dangers of entering the political *eddystone rocks*[10], the philosophy of judicial activism has propelled judges to sail into uncharted waters. Judges now seem to want to engage themselves with boundless enthusiasm in complex socio-economic issues raising myriads of factual details, and ideological issues, that cannot be adjudicated by "judicially manageable standards".

[9] 369 U.S. 186 (1962).

[10] A rocky islet of southwest England in the English Channel south of Plymouth. It has been the site of a strategic lighthouse since the 1690s to guide ships away from the treacherous rocks.

In the *Sarla Mudgal case*[11], the Supreme Court made wide-ranging observations on the need to bring in a Uniform Civil Code and directed the State to explain the steps it had taken towards the enactment of the same. The question of a Uniform Civil Code is undoubtedly an issue fraught with complex political fault lines involving minority rights, personal laws, and women's rights and so on, and the Supreme Court's observations not unexpectedly erupted into a major political issue. In a later case, the Supreme Court was forced to back down by explaining away its controversial observations in Sarla Mudgal, as having been "incidentally made"[12]. In other cases, Judges have sought to incorporate ideologically grounded concepts such as "Hindutva"[13] and "Socialism"[14] into their judgments with no credit whatsoever.

Judicial Activism has also extended to the use of authorities with political overtones for deciding cases—a wholly improper approach. For instance, in *Shah Bano*[15], while the final order granting maintenance to a divorced Muslim woman is probably correct, the Supreme Court's approach of relying on

[11] Sarla Mudgal v. Union of India, (1995) 3 S.C.C. 635.

[12] Ahmedabad Women's Action Group v. Union of India, (1997) 3 S.C.C. 573 at p.582 (para 14), per Venkataswami, J.

[13] Three Supreme Court judgments are often referred to as the 'Hindutva judgments' namely, Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte, (1996) 1 S.C.C. 130; Manohar Joshi v. Nitin Bhau Rao Patil, (1996) 1 S.C.C. 169; Ramchandra K. Kapse v. Haribansh R. Singh, (1996) 1 S.C.C. 206. The observations therein on 'Hindutva' must be compared and contrasted with the definition of 'Secularism' in the seminal judgment of S.R. Bommai v. Union of India, (1994) 3 S.C.C. 1. In fact, as is pointed out in Vikram Banerjee & Sumeet Malik, Changing Perceptions of Secularism, (1998) 7 S.C.C. (Journal) 3 at pp.6-8 not only has the Supreme Court taken conflicting opinions on the meaning of 'Secularism' and 'Hindutva' but even individual judges have vacillated in their own views from case to case. Indeed, such problems can only be avoided if judges avoid reference to ideological conceptions that defy definition by proper and accepted legal construction.

[14] References and discussions of political ideologies in judgments often lead to inconsistent and gratuitous philosophical debate by judges. For e.g., in D.S. Nakara v. Union of India, (1983) 1 S.C.C. 305 at pp.325-326 (para 33), Desai, J. observes: "Recall at this stage the Preamble, the flood light illuminating the path to be pursued by the State to set up a Sovereign Socialist Secular Democratic Republic....What does a Socialist Republic imply? Socialism is a much misunderstood word. Values determine contemporary socialism pure and simple. But it is not necessary at this stage to go into all its ramifications. The principal aim of a socialist State is to eliminate inequality in income and status and standards of life...This is a blend of Marxism and Gandhism leaning heavily towards Gandhian socialism..." (emphasis supplied). Compare this with the recent dictum of Sinha, J. (dissenting) in State of Punjab v. Devans Modern Breweries Ltd., (2004) 11 S.C.C. 26 at p.148 (para 307) who takes the diametrically opposite view: "Socialism might have been a catchword from our history. It may be present in the preamble of our Constitution. However, due to the liberalisation policy adopted by the Central Government from the early nineties, this view that the Indian society is essentially wedded to socialism is definitely withering away."

[15] Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 S.C.C. 556.

unfamiliar non-legal sources (such as the Holy Quran itself) and making sweeping generalizations, instead of narrow legal reasoning, made the Court the target of unseemly political controversies[16].

It appears that, at last, the Supreme Court has slowly begun to realize the futility of entering upon policy issues, especially economic policy, and this culminated in the following observations in the *BALCO Disinvestment case*:[17]

> *"Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority."*

This attitude, presently only extending to the economic sphere, should govern all policy-related disputes that are brought to the courts. Indeed, the answers to many socio-economic and political problems lie with Parliament and in the polling booth, and not in a courtroom.

Mr. Arun Shourie's book *Courts and Their Judgments*, is a useful chronicle of the difficulties that arise when the courts attempt to do what the executive is constitutionally required to do. The concept of 'continuing mandamus' is an admission of the fact that controversial socio-economic issues need constant monitoring over intricate details to be sustained over a considerable period of

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16 As commented upon in Badar Durrez Ahmed, *Mohd. Ahmed Khan* v. *Shah Bano Begum: A Critique*, (1985) 4 S.C.C. (Journal) 9 at p.14 [hereinafter Ahmed]: "The honourable judges of the Supreme Court are men of great learning and acumen however they do not possess a complete knowledge of Arabic, of the Quran, the hadis and amal of the companions of the Prophet. It cannot however change it or interpret the Quran on its own…What the Supreme Court has done is to have expressed its "ra'y" or private opinion of the interpretation of the Aiyats. *This is highly arbitrary and extremely dangerous.* If this is permitted then the entire Shariat, nay, even the meaning of the Quran could be twisted. *It is this act of the Supreme Court that has caused such a stir amongst the Muslims of India."* (emphasis supplied). This unfortunate approach was again repeated in Dr. M. Ismail Faruqui v. Union of India, (1994) 6 S.C.C. 360, when the Court this time, referred to Hindu scriptures such as the *Vedas* to justify a particular notion of 'secularism'. Indeed, reference to non-legal sources, especially religious texts, to stylistically embellish a judgment is one thing, but using them as a mode of arriving at a legal result is another.. The Supreme Court in its role as a qazi can certainly apply the Shariat.

17 BALCO Employees Union (Regd.) v. Union of India, (2002) 2 S.C.C. 333

time. Frequent resort to such orders, which the courts have neither the time nor institutional mechanism to enforce to their ultimate conclusion, eventually erodes the credibility of the judicial institution. Despite the acclaim showered on the *Bandhua Mukti Morcha* orders, as pointed out in Courts and their Judgments, the results came to naught.

Judicial activists do not easily accept *stare decisis* as a fundamental principle and in the 1980's the Supreme Court gave the lead to the process of dismantling *stare decisis*. The judgment in *D. S. Nakara* is a classic example of this approach. In *D. S. Nakara*, the Court observed:

> *"Socio-economic justice stems from the concept of social morality coupled with abhorrence for economic exploitation. And the advancing society converts in course of time moral or ethical code into enforceable legal formulations. Overemphasis on precedent furnishes an insurmountable road-block to the onward march towards the promised millennium. An overdose of precedent is the bane of our system which is slowly getting stagnant, stratified and atrophied."*[18]

If the observations of the Court are right, then at any given time the judge may do what he thinks is in conformity with his conception of "social justice" by throwing to the winds established principles of law and binding judgments. Moreover, dramatic changes in law create immeasurable difficulties for High Courts and subordinate courts for they are left to flounder in a sea of conflicting precedents. They also create chaos and instability for citizens who have moulded their legal relationships based on the extant law but now find that the goal post has been moved in the middle of the game! Further, when the highest court in the land itself shows scant respect for precedents, it may well encourage High Courts and subordinate courts to follow suit, leading to judicial indiscipline and anarchy, which bodes ill for any legal system.

The judicial system, which is currently unable to handle ordinary litigation, as it faces a huge backlog of undecided cases, has to now contend with non-traditional types of litigation in the form of Public Interest Litigation (PILs) that are attempts to use judges as "social engineers". Abrogating the principle of *locus standi* in the name of ushering in social justice and the upliftment of the downtrodden sections of society, the courts opened their doors so wide that

[18] D. S. Nakara v. Union of India, (1983) 1 S.C.C. 305

they find it difficult to control the influx today. The U.S. Chief Justice John Roberts, writing about the U.S. Supreme Court, which only hears a small fraction of the cases the Indian Supreme Court hears, had this to say about the problem:

> *"So long as the Court views itself as being ultimately responsible for governing all aspects of our society, it will, understandably, be overworked"*[19]

Unmindful of the sobering *dicta* that judges have neither the power of sword nor of the purse, courts have taken upon themselves the duty of monitoring several actions, which fall exclusively within the purview of the executive domain. Often one may not find fault with the final results achieved, but one doubts whether the reasoning by which those results were arrived at is legally supportable.

Articles 32, 136 and 142 of the Constitution invest extraordinary powers in the Supreme Court. Correspondingly, Article 226 invests the High Courts with the all-powerful writ jurisdiction. By abandoning the principle of *locus standi*, judges have now become roaming knights-errant on white chargers tilting at windmills of injustice to defend the honour of Dame Justice. Extraordinary power must be reserved for use on extraordinary occasions. Its frequent use detracts from its efficacy and produces an incongruous effect. As is said in a well-known *subhashita:*

> **"अतिपरिचयावज्ञा सन्ततगमनादनादरो भवति |**
> **मलये भिल्लपुरन्ध्री चन्दनतरुकाष्ठमिन्धनं कुरुते ||"**
> *("Over familiarity breeds contempt and over-visitation results in inhospitality, just as the Bhil woman in the Malaya mountain burns sandalwood for fuel")*

The legislative and the executive wings of the body politic, which possess the core competence and specialization for dealing with complex socio-economic problems, are getting progressively marginalized. The judicial organ of the State, the least equipped to deal with socio-politico-economic issues, has

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[19] Judge John Roberts as quoted in Nancy Gibbs, *5 Things to Know About John Roberts,* TIME, Sept. 5, 2005, at p. 26, prior to his confirmation as Chief Justice of the U.S. Supreme Court. Judge John Roberts said in reply to the U.S. Senate's questionnaire, judges, "do not have a commission to solve society's problems".

occupied the center stage, and has got bogged down in more and more of such cases. Sheer expediency or the urge for immediate justice in an abstract sense is hardly a justification for taking on problems with myriad fine details that the court is ill equipped to handle.

Fine-tuning of administrative details is beyond the capacity of the courts, but unfortunately it is something that they have engaged in with enthusiasm. Judicial forays into policy issues through trial and error, without necessary technical inputs or competence, have resulted in unsatisfactory orders that have been passed beyond "judicially manageable standards". The reliance on affidavits tendered or even placing reliance on a report of a court-appointed commissioner can hardly supplant a judgment made by a competent executive officer with regard to the actual ground realities.

As we have seen, the tendency of the Supreme Court to pronounce on issues, which require purely political decisions, has led to situations where the Court has had to subsequently back down. The most embarrassing instance has been in the case of the directive for Uniform Civil Code legislation, as we have already seen, where the Court had to later downplay its initial activist observations.

While activist judgments may bring immediate and transitory succour, in the long run, if the judgments do not strike at the root of the problem, what follows is loss of credibility and respect for the institution among the other constitutional branches and the general public. As Justice Felix Frankfurter said in *Baker v. Carr*:

> *"...there is nothing judicially more unseemly nor more self-defeating than for this Court to make in terrorem pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope."*

Indeed, Justice Frankfurter could well have been talking about the bonded labourers and the Supreme Court of India after the *Bandhua Mukti Morcha* orders.

An important function of the judiciary in a democratic state is to act as a bulwark against illegal conduct by government. This is the quintessence of he Rule of Law doctrine. The Ruler must obey the law as construed by judges. This is the basic principle of parliamentary democracy. This principle, however, can only work if judges are consistent and steadfast in their application of the law. Once judicial decision-making becomes arbitrary,

inconsistent, and detached from fixed, objective and fair rules of law, and personality driven, it will fail to command the respect and obedience of the people and there is imminent danger that the system may collapse. That is why the doctrine of precedent is of importance. It *"is a safeguard against arbitrary, whimsical, capricious, unpredictable and autocratic decision making. It is of vital constitutional importance. It prevents the citizen from being at the mercy of an individual mind uncontrolled by due process of law"*[20].

Disloyalty to precedent in effect gives judges uncontrolled discretionary power, which is anathema to the Rule of Law. Judicial activism involving political and social reform is a dangerous phenomenon. If judges decide cases in accordance with their personal predilections, it not only detracts from the general reputation of the judiciary, but also leads to unpredictable and arbitrary results depending on the subjective proclivities of the judge concerned.

The antidote to this judicial disease is, as far as possible, the rigorous application of impartiality and responsibility in the use of established precedent. Of course, this should not preclude the principled development of the law so that it keeps pace with changing social and community values, and it cannot preclude the development of new principles applicable to new situations not covered by existing rules. But, as one of the founders of the United States Constitution, Alexander Hamilton, said:

> *"Considerate men of every description ought to prize whatever will tend to begat or fortify [integrity and moderation] in the court; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today"*.

Appropriate judicial conduct must tread a fine line between judicial activism of the kind that results in judges making new laws to satisfy their own political, social beliefs, and judicial alertness to protect human rights by construing legislation in a humanitarian way and in being acute to examine claims of police and other authoritarian misconduct against individuals. This is a difficult task indeed, but essential for the proper maintenance of the rule of law. Above all, it is consistent with the judicial duty of neutrality and impartiality.

Judicial activism creates labels for judges such as 'pro-labour', 'anti-labour',

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[20] Justice J. D. Heydon, "Judicial Activism and the Death of the Rule of Law" [2003] Aust Bar Rev 110 at 132.

'pro-tenant', 'anti-tenant', 'progressive', 'conservative' and so on. This is so because the scope and the extent of judicial activism ultimately depends on the personal predilections of the individual judge and his/her own conception of what "social justice" ought to be. In effect, the result becomes personality-oriented rather than oriented towards 'justice according to law', which is the duty of a judge. Personality-driven adjudication provides avenues for 'forum shopping' by lawyers and litigants. Instead of 'justice according to law', courts would administer justice according to the propensities of the judge, harking back to the days of justice according to the Chancellor's foot in England.

A key factor in the speedy and just resolution of disputes is the disinterested application by the judge of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge. Judicial activism is using judicial power for a different purpose. Judicial activism in this sense harms the rule of law, which is the bedrock of any democratic polity. Often, judicial activism involves furthering some political, moral or social programme.

Fortunately, the fervour for judicial activism, which engulfed the courts during the third and fourth decades, seems to be ebbing with the progressive realization that it is preferable to tread the 'highways' of justice instead of resorting to the 'bye lanes' of activism in the hope of expeditiously reaching the goal of justice. Deviation from the well-trodden path frequently leads to wholly unjust outcomes. The wholesome admonition of the *Garuda Purana* in this respect is worth bearing in mind:

> **"यो ध्रुवाणि परित्यज्याध्रुवं परिषेवते |**
> **ध्रुवाणि तस्य नश्यन्त्यध्रुवं नष्टमेव च ||"**
>
> *("He who forsakes that which is stable in favour of something unstable, suffers doubly; he loses that which is stable, and, of course, loses that which is unstable")*[21]

Justice A.S.Anand, a former Chief Justice of India, speaking on the occasion of conferment of IPI–India Award for excellence in Journalism, trenchantly said:

> *"The function of the judiciary of course is not to set itself in opposition to the policy and politics of the majority rule, but to test the validity and constitutionality of the actions of the states. Having said this I wish also*

[21] Garuda Purana.110.

> *to emphasise that courts have to function within established parameters and constitutional bounds. Decisions should have a jurisprudential base with clearly discernible principles. Limits of jurisprudence cannot be pushed back so as to make them irrelevant. Courts have to be careful to see that they do not overstep their limits because to them is assigned the sacred duty of guarding the Constitution so as to protect individual's rights. They cannot shy away from this duty and while acting within the bounds of law must respond to the knock of the oppressed and downtrodden. However, the Courts must while exercising the power of judicial review, exercise proper restraint and base their decisions on recognized doctrines or principles of law.*
>
> *Keeping in view some of the recent developments we need to maintain a delicate balance not only between the three wings of the state, but also between them and the freedom of press. This brings to focus the need for tolerance."*

I began with Chief Justice Hidayatullah and would like to reiterate his by now famous quip on judicial activism and restraint:

> *"There are many ways of skinning a cat. You can do it quietly or you can do it ostentatiously."*[22]

In my view, it is preferable to do the judicial skinning quietly, unostentatiously and in accordance with law.

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[22] Hidayatullah, *supra* note 2