SPEECH OF HON'BLE MR. JUSTICE VIJENDER JAIN, CHIEF JUSTICE, PUNJAB AND HARYANA HIGH COURT, CHANDIGARH ON JUDICIAL ACTIVISM ON 17.05.2008

==========

The great contribution of judicial activism in India has been to provide a safety valve and a hope that justice is not beyond reach.

India is known for high ethics and values. The idea of justice on this land of ethics form the body of cultural ethos with myriad expressions in governance systems that were practiced in ancient India and are still in place.

Judicial activism was made possible in India, thanks to PIL (Public Interest Litigation). Generally speaking before the court takes up a matter for adjudication, it must be satisfied that the person who approaches it has sufficient interest in the matter. Stated differently, the test is whether the petitioner has locus standi to maintain the action? This is intended to avoid unnecessary litigation. The legal doctrine 'Jus tertii' implying that no one except the affected person can

approach a court for a legal remedy was holding the field both in respect of private and public law adjudications until it was overthrown by the PIL wave.

PIL, a manifestation of judicial activism, has introduced a new dimension regarding judiciary's involvement in public administration. The sanctity of locus standi and the procedural complexities are totally side-tracked in the causes brought before the courts through PIL. In the beginning, the application of PIL was confined only to improving the lot of the disadvantaged sections of the society who by reason of their poverty and ignorance were not in a position to seek justice from the courts and, therefore, any member of the public was permitted to maintain an application for appropriate directions.

It may also be noticed that there are certain important constitutional provisions which give the citizens the right to approach the High Courts as well as the Supreme Court of India to protect their fundamental rights. Article 226 of the Constitution gives the right to citizens to approach the High Court to enforce their fundamental rights and the High

Courts are given the power to issue various writs. Article 32 of the Indian Constitution could be invoked by the citizens for enforcement of rights conferred by Part III of the Constitution, namely, the Fundamental Rights. It is also to be noted that Article 21 of the Constitution guarantees one of the important fundamental right to the citizens and says that no person shall be deprived of his life and personal liberty, except according to procedure established by law. This “right to life” contained in Article 21 has been given a very wide interpretation by the Supreme Court of India. Article 48-A, which is one of the Directive Principles of State Policy states that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. Part IV-A was added to the Constitution by the Constitution (42nd Amendment) Act, 1976 and Article 51-A(g) thereof specifically says that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

Till 1980, not much contribution was made by the courts in preserving the environment. One of the earliest cases which came to the Supreme Court of India was Municipal Council, Ratlam vs. Vardhichand AIR 1980 SC 1622. Ratlam is a city in the State of Madhya Pradesh in India. Some of the residents of the municipality filed a complaint before the Sub-Divisional Magistrate alleging that the municipality is not constructing proper drains and there is stench and stink caused by the excretion by nereby slum-dwellers and that there was nuisance to the petitioners. The Sub-Divisional Magistrate directed the municipality to prepare a plan with six months to remove the nuisance. The order passed by the SDM was approved by the High Court. The Municipality came in appeal before the Supreme Court of India and contended that it did not have sufficient funds to carry out the work directed by the SDM. The Supreme Court of India gave directions to the Municipality to comply with the directions and said that paucity of funds shall not be a defence to carry out the basic duties by the local authorities.

Thereafter, series of cases were filed before the Supreme Court and there was a dynamic change in the whole approach of the courts in matters concerning environment.

The Supreme Court of India interpreted Article 21 which guarantees the fundamental right to life and personal liberty, to include the right to a wholesome environment and held that a litigant may assert his or her right to a healthy environment against the State by a writ petition to the Supreme Court or a High Court. The powers of a High Court under Article 226 or those of the Supreme Court under Article 32 are not confined to the prerogative writs derived from English law, but extended to directions or orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. The term “writs in the nature of” widened the court’s discretionary powers in granting relief by releasing Indian courts from the procedural technicalities that govern procedures and rules in English law. The courts are empowered to

give declaratory relief, issue an injunction or quash an action without recourse to specific writs.

By the second half of 1970s, the public interest litigation became a model litigation relaxing the standard of standing. The public interest litigation altered the landscape and the role of the higher judiciary in India. The Supreme Court and the High Courts dealt with series of public grievances or flagrant human right violations by the State. In a public interest case, the subject matter of litigation is typically a grievance against the violation of basic human rights of the poor and helpless and the petitioner seeks to champion a public cause for the benefit of all society.

Traditionally, only a person whose rights were injured was entitled to seek remedy. But that traditional view of standing prevented the grievances of poor from being heard by court. They were denied access to justice because of their poverty and the poor and under-privileged suffered economic reprisals from the dominant sections of the community. In 1981, a seven Judge bench of the Supreme Court gave a definite opinion

regarding the standing and enlarged the scope of what has been termed as “representative standing”. The court held that it may therefore now be taken as a well established that where a legal wrong or legal injury is caused to a person, or to determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or legal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability of socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of any fundamental right of such person or determinate class of persons, in the Supreme Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.

The judicial power under our Constitution is vested in the Supreme Court and the High Courts which are empowered to exercise the power of judicial review

both in regard to legislative and executive actions. Judges cannot shirk their responsibilities as adjudicators of legal and constitutional matters.

A common criticism we hear about judicial activism is that in the name of interpreting the provisions of the Constitution and legislative enactments, the judiciary often rewrites them without explicitly stating so and in this process, some of the personal opinions of the judges metamorphose into legal principles and constitutional values. One other facet of this line of criticism is that in the name of judicial activism, the theory of separation of powers is overthrown and the judiciary is undermining the authority of the legislature and the executive by encroaching upon the spheres reserved for them. Critics openly assert that the Constitution provides for checks and balances in order to pre-empt concentration of power by any branch not confided in it by the Constitution.

Every Judge must play an active role in the discharge of his duties as "adjudicator of disputes". His role as an interpreter of law and dispenser of justice

according to law should not be allowed to be diminished either because of the perceived notions of the other two wings of the State - the legislature and the executive or any section of the public. But this cannot be termed judicial activism.

Laws enacted by the legislature must be implemented by the executive and their interpretation is within the province of the judiciary. That is the reason why judiciary has always been treated as the least dangerous branch and sometimes it is also described as the weakest of the three branches with no control either on the purse or on the sword. By reason of judicial activism, much good or harm could be brought about by the Judges by resorting to innovative interpretation. Decisions rendered by courts generally receive public acceptance in every democracy adhering to the concept of rule of law. The criticism occasionally voiced that the judiciary does not have a popular mandate and, therefore, it cannot play a prescriptive role which is the domain of the elected law-making body sounds at first blush sensible. Even so, the prescriptive role of the judiciary sometimes receives public approbation because the role played by it sustains what the

Constitution mandates and averts the evils the basic document seeks to prohibit.

The permanent values embodied in the Constitution need interpretation in the context of the changing social and economic conditions which are transitory in nature. The constitutional court undertakes the delicate task of reconciling the permanent with the transitory. It is the duty of the executive to implement faithfully the laws made by the legislature. When the executive fails to discharge its obligations, it becomes the primordial duty of the judiciary to compel the executive to perform its lawful functions. In the recent times, much of the criticism aired against the judiciary concerns this area. When crimes are committed by men in power and attempts are made to conceal them by rendering the official machinery ineffective, recourse to judiciary becomes inevitable. It becomes the duty of the judiciary to take cognizance of the executive's lapses and issue appropriate directions as to the method and manner in which the executive should act as ordained by the Constitution and the laws. If the judiciary fails to respond, it would be guilty of violating the Constitution, a treason indeed.

****