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Activism Under Certain Circumstances be a Legitimate and Protect the Human Rights Effectively

Dr Anwar Baig[1]

Abstract

Judicial Activism (JA) is one of the contentious yet crucial tools in the preservation of human rights, constitutional order, and the rule of law. This paper delves into the intricate legal and political issues and the validity of JA around certain criteria, contending that it is absolutely necessary to handle gross violations of human rights, power deformations, and severe dysfunctions in state machinery. This study integrates literature review, case laws, and theoretical paradigms to develop a substantiative comprehension of JA and its ability to protect individual rights and fundamental freedoms, while adjusting to changing standards of institutions and societies, articulating democratic values. It is critical to note that JA is sometimes a matter of contention but a justified response in any system whereby usual checks and balances have failed. Based on these legal theories and historic precedents, the study proposes a more relaxed interpretation of the rule of law and constitutionalism that leases judges to be aggressive in postulating discriminatory or unethical legal enactments. Also, this research emphasizes the fact that JA should comply with international human rights standards, how, through the inadequacies of national legal systems and the change of societal values, judicial ingenuity may be relevant. In light of JA, it is Green's more recent understanding of the doctrine that provides the rationale for the broad interpretation of judicial functions. As opposed to refraining, judges are encouraged to participate in changing social and cultural practices. He definitively argues that JA is a bedrock of grounded constitutional democracy when there is moderation in its application: it is something that saves justice, fairness, and humanity within the context of changing society.

Keywords: Judicial Activism (JA), Human Rights, Rule of Law, Constitutionalism, Judiciary Independence

[1] Barrister / A. Professor of Law, Bahria University Islamabad, School of Law- Pakistan

Introduction

Judicial Activism (JA) is a topic that prompts ardent discussion in legal and political issues, often swinging from being praised as a tool for progressive socio-political change to being vilified as a violation of the limits of the judiciary. Very simply put, JA describes an active attitude towards fetching meanings from laws and constitutions in order to solve emerging problems of society rather than mere use of previous court judgments. This paper attempts to justify biased JA in particular to its possibility of being beneficial, in protecting basic human rights, advocating the law, and strengthening the constitution.

The ideal state in modern literature functions within the confines of a constitutional democracy with some form of constitutionalism, rule of law, and institutional accountability. Such a state ensures that institutions do not exercise power beyond what is prescribed by the law through mechanisms such as judicial review, parliamentary debates, and elections. However, these mechanisms can weaken, particularly in cases where a country suffers from systemic human rights violations, political disorder, or dysfunctional state institutions. It is in these contexts when the doctrine of judicial activism could play a crucial role as a remedy allowing the courts to function as a guardian of the sovereign, even if it means restraining the other branches of government.

This study adopts a broad and dynamic interpretation of the judiciary's role, emphasizing its moral and ethical dimensions in maintaining justice. Drawing on Green's reinterpretation of JA, which integrates historical and cultural standards, this paper underscores the judiciary's responsibility to respond to changing institutional and community values. Through a review of case law, theoretical perspectives, and international obligations, this research demonstrates how JA can be both a legitimate and necessary response to safeguard human rights and uphold the principles of constitutional democracy.

By addressing key questions about the scope, limitations, and implications of judicial activism, this paper seeks to provide a balanced perspective on its role in ensuring justice, equity, and societal progress in an increasingly complex global landscape.

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Review of the Literature

Judicial activism (JA) has been a subject of extensive academic scrutiny, particularly regarding its legitimacy and scope in various constitutional democracies. At its core, JA involves judicial decisions that either deviate from precedent or rely on broader interpretations of legal principles to achieve outcomes perceived as socially or morally significant (Green, 2016). Scholars have debated whether this practice undermines the separation of powers or serves as a necessary tool for protecting individual rights and ensuring the rule of law.

❖ The Concept and Scope of Judicial Activism

The definition of JA varies across jurisdictions and theoretical perspectives. While some view it as a means to foster creative constitutional development, others criticize it as a regressive overreach of judicial power (Kleinfield, 2002). JA is often linked to the doctrine of legal realism, which emphasizes that judicial decisions are influenced by broader societal principles, policies, and values rather than rigid adherence to legal formalism (Allan, 2013). This perspective aligns with the amplified and extended interpretations of the rule of law, which argue for the incorporation of moral and ethical considerations into judicial decision-making (Lord Bingham, 2010).

Green's (2016) reinterpretation of JA introduces a cultural dimension, suggesting that activism occurs when judicial decisions violate the prevailing cultural standards of the judicial role. This approach accounts for evolving institutional and community values, thereby providing a flexible framework to evaluate JA across different legal systems. Green argues that JA should be viewed through the lens of historical and institutional contexts rather than universal moral standards, which allows for a more nuanced understanding of the judiciary's role in contemporary governance.

❖ The Role of JA in Ensuring the Rule of Law is Upheld

First of all, prior to discussing the role JA can play towards upholding the rule of law, it is a pre-requisite that we define the meaning of the rule of law. This is no easy task as there are conflicting views about the meaning and scope to be attributed to the rule of law as a concept. The literature available on this subject describes the rule of law in various ways, such that there is no universally recognized definition of

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the concept (Tamanaha, 2012). For example, Kleinfield argues that the definition of the rule of law falls broadly into either of the following two categories:

(1) those that emphasize the ends that the rule of law is intended to serve within society (such as upholding law and order, or providing predictable and efficient judgments); and (2) those that highlight the institutional attributes believed necessary to actuate the rule of law (such as comprehensive laws, well-functioning courts, and trained law enforcement agencies). (Kleinfield, 2008)

More comprehensive versions of the rule of law have been provided by other commentators (J Alder, K Syrett, 2007). Nonetheless, irrespective of the viewpoints expressed, the definitions given shall fall broadly into one of the following groupings: formal; amplified; and extended (or substantive). The formal version lying at one end of the spectrum, and the amplified and extended versions lying at the opposite end of the spectrum. In ascending order on the scale, the formal view is the narrowest version of the meaning of the rule of law, suggesting that laws introduced through the formal constitutional process adopted by a state are valid, irrespective of their purpose or content, while the amplified and extended versions provide a broader interpretation of the rule of law, arguing that the rule of law has a substantive element (i.e. that the concept has a moral aspect, such as the protection of human rights).

The meaning given to the concept that is best suited to the hypothesis put forward in this thesis is the amplified and / or extended (substantive) version/s of the rule of law.

The 'amplified' view of the rule of law provides a broad interpretation of the concept, suggesting that the 'notion of law as rules necessarily implies certain moral principles' (J Alder, K Syrett, 2007). The underlying ethos behind this view is that 'rules must be clear, look at the future and be applied impartially and publicly'. Any rules failing to meet this condition shall fall foul of the concept and be deemed a breach of the rule of law. It follows therefore that a court could be empowered under the amplified version of the rule of law to engage in JA to uphold the rule of law, even where this means repealing existing laws to achieve this objective.

Lord Bingham gave an insight into the amplified version of the rule of law when he said:

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...all persons and authorities within the state, whether public or private, should be bound by, and entitled to the benefit of, laws publicly and prospectively promulgated and publicly administered in the courts.

The widest version of the rule of law is the extended (substantive) version. This version suggests not only that laws have a moral content but that it is permissible for the courts to 'restrain 'bad' law by interpreting legislation in the light of the shared values of the community.' In accordance with this version, a judge would be empowered to 'strike down legislation which offends such common values. (J Alder, K Syrett, 2007)

In accordance with the substantive version of the rule of law, a judiciary is empowered to take action to protect fundamental human rights even if those rights are not expressly set out in a state's legal framework. Such a course of action may, however, only be acceptable in circumstances where a broad interpretation of the rule of law is given, such as the meaning of the rule of law provided by the amplified or substantive versions of the concept, because these versions of the rule of law may support the protection of fundamental rights. Lord Bingham summed up his view of a broad interpretation of the rule of law when he said:

A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed. (Bingham, 2011)

Lord Bingham makes it categorically clear that he is of the opinion that laws must have a moral substance to be classified as valid and, moreover, consistent with the concept of the rule of law. It follows from Lord Bingham's comments that it is also permissible for a court of law to correct any such failure on the part of the other state institutions, regardless of whether that is the legislature or executive. A court may achieve this by deciding cases in a manner that supports the protection of rights that are covered by the rule of law, even if that means repealing legislation that has been passed by the legislature in a way that is compatible with the normal constitutional process adopted by the state. It follows that this type of action is not only possible but necessary in a state with poorly functioning state institutions that fail to provide individuals / citizens with adequate protection of their rights.

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The common law system is supportive of a liberal view of the rule of law as it provides judges with a degree of judicial discretion to make new laws, under the doctrine of stare decisis, which gives them the opportunity to make decisions that are consistent with the 'values of those subject to it' (Bingham, 2011). The independence of the courts in common law systems, guaranteed under the doctrine of the separation of powers, provides the courts with the opportunity to 'claim to represent the values of the community' (Bingham, 2011) by making decisions that are consistent with contemporaneous community values. As observed by Allan:

The principle that laws will be faithfully applied, according to the tenor in which they would reasonably be understood by those affected, is the most basic tenet of the rule of law: it constitutes that minimal sense of reciprocity between citizen and state that inheres in any form of decent government, where law is a genuine barrier to arbitrary power. (Allen, 2003)

While the adoption of the amplified or extended versions of the rule of law potentially has serious constitutional and legal implications for a state, this thesis shall argue that any tension between applying the law and protecting the rights of individuals / citizens ought to be resolved in favor of the protection of those rights. This is based on the premise that the rule of law demands that a certain level of morality must be ingrained within a state's legal framework, and more specifically the rule of law requires that individual / citizen's rights are protected, namely that they are protected against discriminatory practices.

How JA can Support the Constitution / Constitutionalism

The role JA can play to support a state's constitution and the issues relating to constitutionalism. In particular, this section shall consider the role played by the judiciary towards upholding a state's Constitution / Constitutionalism, uphold the Rule of Law, and uphold Individual / Citizen's Rights.

The Adoption of JA to Uphold the Constitution / Constitutionalism

A country's constitution may be written or unwritten. The majority of countries around the world prefer the former, but a few countries, notably England, Israel and New Zealand, have unwritten constitutions (Mannin, 2009)). The source of the English constitution has a variety of different origins, namely constitutional

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conventions, royal prerogative, the Bill of Rights, and the country's laws (e.g. statute, court judgments, and the rule of law). So, a country can choose to adopt a written or unwritten constitution. More importantly for the purpose of this section of the research we need to deduce what a state's constitution must contain.

- **The Content of a State's Constitution**

Albert V Dicey famously stated that a country's constitution is not the "source but the consequence of the rights of individuals, as defined and enforced by the courts" (Dicey, 1885). It is implicit from the view expressed by Dicey that the courts are the primary custodian, creator and protector of individual rights. That may be through the exercise of their judicial role as interpreters of written legal instruments or the while exercising their judicial discretion as law-makers in accordance with the doctrine of stare decisis. Whichever power a court makes use of to produce the rights of individuals, we may surmise from Dicey's viewpoint that such rights are to be regarded as sacrosanct and part of a state's constitution. It is also implicit from Dicey's comments that in order to deduce the contents of a state's constitution and the rights of individuals, we should take a look at important case law handed down by the English courts pertaining to key individual rights to understand which rights form part of the country's constitution.

Approaching this topic from Dicey's perspective, by analyzing the case law to deduce which rights are to be viewed as constituting part of a state's constitution, is an ideal starting point because England, unlike the majority of countries around the world, does not have a written constitution. Furthermore, England is revered as the place where the common law system was established following the Norman Conquest in 1066 (Van Caenegem,1988) and is now 'one of the major legal systems of the world' (Van Caenegem,1988). The common law system in general is the most popular system of law in the world today with over one third of the world's populations (over 2 billion people) now living under common law jurisdictions, or in systems with mixed common law and civil law.

The court decisions of interest for the purpose of deducing how JA can support a state's constitution are those that fall into the following topics: Judicial Independence and Individual Rights.

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❖ Judicial Independence

Judicial independence is aimed at allowing the courts to perform its role free from any interference of the other branches of the state. We shall now take a look at some of the case law pertaining to the rights enshrined in the UK Constitution.

Judicial independence in a state may be outlined in a state's written constitution, enshrined in case law, or inferred from an interpretation of the rule of law. An example of the guarantee of judicial independence outlined in a state's constitution can be found in the US constitution. The US constitution secures the doctrine of the separation of powers. Under the US constitution, the US Supreme Court possesses the power to interpret the provisions of the Constitution. US Supreme Court justices are appointed by the president following the receipt of the Senate's advice and consent. The US Congress has the power to set the jurisdictions of the country's judiciary with the exception of the Supreme Court's jurisdiction. On the whole, therefore, the Supreme Court has the jurisdiction to hear cases of a constitutional nature, and possesses an appellate jurisdiction, except for cases that involve inter-state disputes or relate to foreign ambassadors, ministers or consuls. It is evident therefore that the US Supreme Court enjoys a sufficient amount of independence to engage in JA to protect certain rights by interpreting the country's constitution in a manner that is non-discriminatory, and applies to all individuals / citizens equally. (Brown v. Board of Education of Topeka,1954).

When considering the issue of judicial independence, such a discussion would be incomplete without taking a look at administrative law, and more particularly the court's power to conduct a judicial review of the legality of acts of public bodied. In R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Business Ltd [1982] AC 617, Lord Diplock described the development of administrative law as "the greatest achievement of the English courts" during his lifetime [[1982] AC 617, 641 C-D]. The power to observe and enforce laws aimed at ensuring public bodies remain within their rights (i.e. through judicial review proceedings), has also been described as having no equal (Roberts v Gwryfai District Council [1899]). What one can observe from administrative law in England is that the independence of the courts as a body with the power to review the legality of public bodies does not only illustrate how the doctrine of the separation of powers operates in practice, but also that judicial independence is an entrenched part of the UK Constitution. The case law in other prominent common law jurisdictions around

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the world would suggest that judicial review is also an integral part of their constitution. (Marbury v Madison, 1803).

- **Individual / Citizen Rights**

The rights of British citizens have been documented in various instruments and court judgments (Anisminic Ltd v Foreign Compensation Commission, 1969), and such rights date as far back as the 13th Century. In 1215, Magna Carta set out the Crown's recognition that subjects had rights under the law, and that laws also applied to the Crown. For instance, it is stated in Magna Carta that:

[n]o man shall be punished except by the judgment of his peers or the law of the land…….to no one should justice be denied." (Magna Carta, 1215)

Another notable right set out in the laws of England is that a person in detention should be given the right to go before a court to challenge the legality of his / her detention. (Habeas Corpus Act 1679)

The Bill of Rights of 1689 is an important instrument that imposed restrictions on the powers of the Crown, and provided Parliament with certain rights. Some of the rights outlined in the instrument were: the right to petition the King / Queen, the freedom from cruel and unusual punishments, similar to the prohibition of torture, and the freedom from being fined without first having an opportunity to present one's case before a court.

Further important legislation aimed at protecting individual / citizen's rights were introduced by Parliament, namely the race and sex discrimination legislation (in the 1970s), the Disability Discrimination Act 1995, Human Rights Act 1998, and the Equality Act 2010. Many of the rights enshrined in these pieces of legislation have been consolidated into one Act (i.e. Equality Act 2010). Given that the rights enshrined in the above legislation are in the form of Acts of Parliament, the courts are obliged to give effect to these rights.

The development of individual rights in the UK can not only be credited to domestic court decisions and instruments. For example, other countries have also influenced the development of human rights in the' UK. Notably, the French National Assembly approved the Declaration of the Rights of Man in 1789 (Declaration des Droits de L'homme et du Citoyen,1789)., which has had a significant impact on the

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development of human rights in the United Kingdom. The inalienable rights enshrined in the instrument include the protection of "...liberty, property, security, and resistance to tyranny." (Declaration des Droits de L'homme et du Citoyen,1789)

- **Upholding the Rule of Law**

We have already observed how there are a range of views about the meaning of the concept: the rule of law. Adopting the broader interpretations that falls into either the amplified and / or extended (substantive) versions of the concept are more amenable to the adoption of JA. This is especially the case where JA is adopted to protect individual / citizen's rights. We shall therefore consider some important case law and instruments to understand the extent to which a judiciary would go to uphold the rule of law. This shall highlight the restrictions imposed on the judiciary, such as any tension that may arise from the applicable rules of constitutionalism.
A useful case to examine when considering the extent to which a judiciary is willing to go to uphold the rule of law is the case of Jackson and others v. Her Majesty's Attorney General [2005] UKHL 56. In this case senior members of the judiciary made controversial remarks in obiter dicta regarding the role of the judiciary in relation to their power to scrutinize the legality of an Act of Parliament. The significance of this from a constitutional perspective is that a 'pure' view of the doctrine of Parliamentary Sovereignty suggests that Parliament's authority as chief legislator is beyond reproach. In other words, under the English constitution Parliament is sovereign and absolute.

Nonetheless, in Jackson senior judges suggested that this is no longer the case from constitutional perspective. Lord Steyn, for example, argued in obiter dicta that it is possible that a time would come when senior English judges will be required to scrutinize an Act of Parliament, and thereby inadvertently question the authority of the legislature, in order to deduce if the legislation is consistent with the rule of law. ([2005] UKHL 56, para 102)

The most controversial aspect of Lord Steyn's remarks is his suggestion that the judiciary may be required to challenge the legitimacy of an Act of Parliament given that this view conflicts with the doctrine of Parliamentary Supremacy. The 'pure' version of this doctrine suggests that the judiciary would not be entitled to adopt such a course of action without statutory backing. It is clear that Lord Steyn was aware of the constitutional conundrum that such a move would present as he pointed out that: "the courts may have to qualify a principle established on a

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different hypothesis of constitutionalism". The existing hypothesis of constitutionalism being that under the UK Constitution Parliament is sovereign and absolute. Changing the UK Constitution so that Parliament is no longer absolute and sovereign could occur by introducing qualifications.

Lord Steyn was not the only senior judge in Jackson to give an opinion about how a conflict between Parliament and the judiciary ought to be resolved. Lord Hope explicitly stated the doctrine of Parliamentary Sovereignty is "no longer" (Jackson and others v. Her Majesty's Attorney General, 2005) absolute, if it ever was. The qualification Lord Hope attached to Parliament's authority was that Parliament must introduce legislation that is acceptable to the public for it to be valid. Lord Hope also said categorically that "the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based." This underscores that, in Lord Hope's view, the legitimacy of any law introduced by the legislator is only valid where it is fully compatible with the rule of law. It is implicit from the above remarks by senior judges in England that engaging in JA is not only permissible but to be expected to overturn laws that are inconsistent with the rule of law.

Lord Steyn gave a scenario that would permit the Courts to carry out an investigation of the lawfulness of an Act of Parliament when he said:

In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.

Therefore, in Lord Steyn's view, if Parliament attempted to introduce legislation that sought to curtail the higher court's supervisory judicial review jurisdiction, this would be an example of a situation that would justify the scrutiny of the validity of an Act of Parliament. From considering the remarks expressed by different senior judges in Jackson, it is clear that the above scenario is not the only one that would empower the Courts to question the validity of legislation. The judges were collectively of the opinion that the underlying qualification that must be met by the legislature when enacting legislation is to ensure that the wording of the legislation is consistent with the rule of law.

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It is argued that the principle expressed by senior English judges in the case of Jackson would apply to states with either a written or unwritten constitution. These views suggest that it is permissible for the judiciary to examine the lawfulness of other branches of the state where there has been a potential breach of the rule of law, even if such scrutiny is contrary to the prevailing rules of constitutionalism applying in that state. This conclusion is based on the notion that two of the most important features of judiciaries operating in constitutional democracies around the world are: independence; and the duty to uphold the rule of law. These facets are a consistent theme throughout every judiciary operating in a constitutional democracy and underpin the role of a judge. Where a countries constitution has these features enshrined in a written instrument, it is more likely that seeking to uphold them would be viewed as permissible, even where a court might be subjected to accusations of engaging in JA to achieve this objective. (Marbury v Madison, 1803) However, as senior judges observe in Jackson, even where these features are not expressly outlined in a written constitution, it is necessary in a constitutional democracy to infer that these features are entrenched. Accordingly, engaging in JA to give effect to judicial independence and adherence to the rule of law is permissible and to be expected.

- **Upholding Individual / Citizen's Rights**

Having reached the conclusion that a judiciary operating in a constitutional democracy is obliged to discharge its duty in an independent manner, and must always seek to uphold the rule of law, we shall now turn to take a look at the type of rights that a judiciary would be expected to uphold, regardless of the conduct of the other branches of the state.

An ideal example of where most commentators would argue that judges ought to protect the rights of individuals / citizens, even if that meant engaging in JA, is in relation to how Jews were treated in Nazi Germany. This is an ideal example to illustrate how JA can and ought to be used to uphold the rule of law by protecting the rights of individuals / citizens. The Nazi regime introduced laws that were explicitly discriminatory against Jews and other minority groups, and German judges were expected to uphold these laws as they were introduced through the proper constitutional process adopted by the state.

The film 'Judgment at Nuremburg in 1961' was a story about a fictional character named Ernst Janning, who was a prosecutor and judge in Nuremberg under the Nazi

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regime. However, the film was based on the true story about the role Oswald Rothaug played in the Katzenberger trial, where he sentenced Leo Katzenberger, an elderly Jewish man, to death in 1943 for allegedly defiling a young German woman. The act Leo Katzenberger was accused of was a crime in Germany under the racial purity law (referred to as Rassenschande laws). The majority of people would not dispute that it was right to charge the top officials in the Nazi regime for the crimes they were accused of committing during World War II. Likewise, many would agree that those found guilty of any crimes had to be punished under the law. Oswald Rothaug, like his fictional counterpart Ernst Janning, was sentenced to life imprisonment in December 1947 following his trial. Notwithstanding this, those accused of such crimes were doing nothing more than what they were asked to do by their superiors. In other words, they were simply following orders. The fact that the Nuremberg Trial panel disagreed with this defense alludes to the notion that in order for laws to be valid they must contain a certain degree of morality. Therefore, what we can take from the Nuremberg Trials is that individuals / citizens are entitled to expect a degree of protection from the state, and any laws which are aimed at removing such protection (i.e. the Rassenschande laws) are deemed invalid and unlawful. This is essentially what the proponents of the theory of natural law argue - that the law must contain a moral aspect to be valid.

By considering the rulings handed down by the International Tribunals in Nuremberg, especially in relation to the role played by judges such as Oswald Rothaug during World War II, we can see that under international law albeit judges are expected to enjoy judicial independence, that independence should not be exercised in a manner that satisfies their personal whims or beliefs. Rothaug was a staunch supporter of the racial purity laws introduced by Nazi Germany, and was simply discharging his duty to the Nazi state when applying those laws, but he was nevertheless found guilty with 15 other German judges and officials of the Reich Ministry of being criminally responsible of enforcing 'immoral laws'. It follows therefore that the judicial independence that judges possess is not unfettered, but rather aimed at ensuring judges are empowered to uphold the rule of law. That is to say that the two features of independence and upholding the rule of law are inextricably linked. The independence enjoyed by a judge is intended to facilitate the state's adherence to the rule of law. An ideal example of this proposition can be seen by taking a look at the senior court's supervisory jurisdiction to review the lawfulness of acts carried out by other branches of the state. (Marbury v. Madison,1803).

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The Adoption of JA to Protect and Uphold Fundamental Human Rights

Most constitutional democracies around the world provide their judiciary with independence in accordance with the doctrine of the separation of powers. The doctrine demands that clear distinctions are drawn between the powers held by the judicial, legislative, and executive branches of the state. As noted by Axford et al (1997), under this doctrine:

…three powers/elements of government (executive, legislature, and judiciary) should be separated in role and responsibility'.

In relation to the role and responsibility of the judiciary under this doctrine, it has been outlined above how it is a primary role of the judiciary to uphold the rule of law. Furthermore, it has been noted how a liberal interpretation of the concept denotes that this entails a duty to protect the individual / citizen's rights. These rights include a myriad of rights that may or may not be in written form. Nonetheless, the rulings handed down in the Nuremberg Trials suggest that one of the most important rights that ought to be upheld is the duty to protect individuals / citizens against discrimination, particularly minority groups. It is clear from the Nuremberg Trials that this right is an integral part of the rule of law.

The importance of a state adopting judicial independence as a principal feature of its judiciary is clear from Article 16 of the Declaration of the Rights of Man and of the Citizen (1789). Article 16 of the instrument says that any state failing to adopt the separation of powers, and where respect for the law is not assumed, that is a state that 'has no constitution at all.' (Declaration of the Rights of Man and of the Citizen,1789, Art 16).

These are features that are guaranteed by most constitutional democracies in contemporary times. For example, the US Constitution guarantees judicial independence in the following two ways: (1) empowering federal judges to stay in office 'during good behaviour' (Constitution of the United States of America, 1787, Art III); and (2) by preventing the other arms of the state (the executive and legislative arms) from reducing the salary of a judge as a form of punishment for performing their duty. When considering these two issues in conjunction with each other, it has the effect of ensuring that the US judiciary is independent. In England, however, there is no written constitution to provide the judiciary with

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independence. However, the independence of the judiciary in England is enshrined in statute. For instance, the Act of Settlement (1701) established the independence of the judiciary in England by, not unlike the position in the US, providing that judges shall be recognized in their positions for life during their good behaviour. The guarantees afforded judges in both the US and UK provides the judiciary with the freedom to perform their judicial functions in a manner without fear of interference from the other state institutions, such as being removed from judicial office for a decision that is viewed as unfavorable.

It is clear from Alexander Hamilton, one of the framers of the US Constitution, that the 'complete independence of the courts of justice is peculiarly essential in a limited Constitution' (Hamilton, 1788). The rationale behind this reasoning is based on the idea that it is only a truly independent judiciary that can provide the impartiality required to allow judges to perform a proper checks and balances role to prevent the excessive use of power by the other institutions, and more peculiarly uphold the rule of law in a constitutional democracy. It follows from this reasoning that a Court has the power to invalidate legislation if it conflicts with the Constitution, and especially the rule of law (The principle of judicial review, 1803). More specifically, a judge that is faced with laws that seek to curtail the rule of law, and more specifically individual / citizen's rights, can and should rule them invalid and unlawful.

This is a viewpoint that is consistent with the opinions expressed by senior justices in cases in England (Jackson and others v. Her Majesty's Attorney General [2005] UKHL 56) and the US (Marbury v Madison, 1803). However, it is worth noting that judges are yet to adopt JA to uphold the rule of law. The closest the Supreme Court in England came to challenging the existing constitutional order was for a number of senior judges to express their opinion/s that there may come a time when the judiciary would be required to consider the validity of an Act of Parliament. It follows that the judiciary would be willing to strike down an Act of Parliament when necessary. According to the opinions given, the type of situations that would warrant such a course of action include any attempt by the legislature to impose restrictions on the rule of law (Jackson and others v. Her Majesty's Attorney General [2005] UKHL 56). A potential breach of the rule of law in this context may come in the form of legislation to impose restrictions on the judicial review powers of the Court, or impose restrictions on the rights of individuals / citizens.

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It is worth noting however that these opinions were expressed in obiter dicta and did not amount to the ratio decidendi (reason for the decision) in the case. That said, the legal framework in England aimed at protecting the rights of individuals / citizens is already comprehensive, so it is highly unlikely that there would ever be any need for the judiciary in England to engage in JA to protect such rights.

Nonetheless, some of the opinions expressed in Jackson do provide support for the assertion that JA can and ought to be used to protect the rule of law, and the rights of individuals / citizens in certain circumstances. It follows that courts operating in other common law jurisdictions should also engage in JA to protect the rule of law and the rights of individuals / citizens where laws have been introduced to remove them. The courts are therefore required under certain circumstances to adopt a more proactive stance in order to discharge their first and foremost duty to uphold the law. This is especially the case in jurisdictions where the other state institutions are performing poorly, and without a more proactive stance by the judiciary the rule of law and rights of citizens would be infringed.

JA as feature of a functioning constitutional state

It is clear from the Nuremberg Trials that a state must guarantee its judiciary with the independence to decide cases not only in a fair and impartial manner, but also in line with the rule of law. Most countries around the world have written constitutions where they expressly clarify the extent of the powers each of the state institutions possess. Other countries, such as the UK, while not having a written constitution may take other measures to bring the country under 'a distinctive separation of powers umbrella' (Saunders, 2006).

It is evident that this is an essential and mandatory facet for a modern-day judiciary. According to Montesquieu, the doctrine helps safeguard against tyranny and uphold liberty (Montesquieu, Charles de Secondat, baron de, 1989). Other commentators have also noted that in contemporary times the doctrine also acts as a 'system of checks and balances necessary for good government' (Benwell and O Gay, 2011). Nonetheless, there shall always be overlaps between the powers held by the three institutions under the constitutions of different countries around the world, in terms of the functioning of the separation of powers in practice (Calabresi, Berghausen and Albertson, 2012). The extent to which a state has to engage in JA to

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uphold individual / citizen's rights therefore shall depend on other factors, such as the state's other obligations under international law.

The use of JA to protect individual rights by relating on international commitments Important factors that may influence a judiciary's decision-making apart from domestic issues are international obligations that the state has entered into. Pursuant to Article 38 of the Statute of the International Court of Justice, the sources of international law include international treaties, customary international law, general principles of law, the decisions of national and lower courts, and scholarly writings (Statute of the International Court of Justice, Art. 38). In terms of international treaties, under international law there is an elaborate and comprehensive international human rights framework in place. Some of the protections afforded under the international instruments are regarded as non-derogable rights. Non-deorgable rights cover certain fundamental rights that states are required to uphold under all circumstances. An example of a non-derogable right can be found at Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT). Article 2 of CAT states that:

Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984)

These include, for example, the rights set out at article 4, paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR). These include Articles '6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18'. Article 6 provides the right to life. While article 7 states that nobody should be subjected to 'torture or to cruel, inhuman or degrading treatment or punishment.' (International Covenant on Civil and Political Rights, 1966). Article 8 prohibits "all forms" of slavery. Article 11 states that "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." Under Article 15, no person shall be found "guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence"

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(International Covenant on Civil and Political Rights (ICCPR), Article 15(1)). Article 16 provides everyone with a right to be recognized "everywhere as a person before the law", (International Covenant on Civil and Political Rights (ICCPR), Article 15(1)) and Article 18 provides everyone with a "right to freedom of thought, conscience and religion". In addition to the ICCPR, some of the other key international human rights treaties include:

The International Convention on the Elimination of All Forms of Racial Discrimination (1969) (ICERD).

The International Covenant on Economic Social and Cultural Rights (1966) (ICESCR).

Signatory states must also be mindful of the fact that in order to ensure that the rights outlined in international treaties / conventions have been upheld, the United Nations created Treaty Bodies to supervise compliance with the treaties / conventions. Under the mechanisms, each UN Treaty has a treaty body called a 'Committee' to monitor the compliance of States with the relevant Treaty provisions. However, these Committees are referred to as quasi-judicial bodies and therefore do not give binding judgments to States. Instead, they issue 'views', 'opinions', or 'decisions', and make recommendations, but their rulings shall nonetheless be persuasive on signatory states. Such Committees have been established under key international instruments, such as the CAT, ICCPR, ICERD, and the ICESCR.

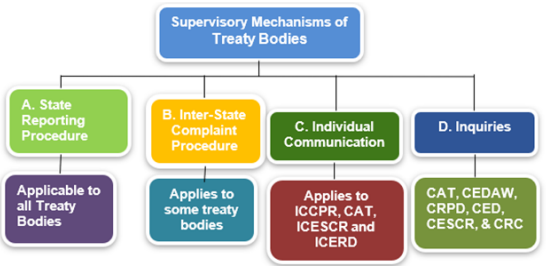

Figure 1 - UN Treaty Supervisory Mechanisms

International law is founded upon the principle of state sovereignty, so states must ratify a treaty / instrument before it is viewed as having entered into an obligation to implement the provisions protecting the rights enshrined in those international instruments. Furthermore, in accordance with the rule relating to dualist nations,

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such states must also introduce domestic measures through their own constitutional process to give effect to any international obligations before those international treaties / instruments have effect in the country in question. The UK is an example of a dualist nation, so any international (e.g. ICCPR) or regional (e.g. ECHR) treaties / instruments the UK Government has signed shall only take effect before English Courts when the legislator (Parliament) has passed domestic laws giving effect to those obligations. An example of this is the enactment of the Human Rights Act 1998 to give effect to the UK's obligations under the European Convention on Human Rights (1950).

Therefore, once a state has ratified key international human rights instruments, some of the protections afforded in those instruments shall be binding on national courts, without the need of domestic legislation being introduced in the case of non-dualist nations, or where domestic incorporating legislation has been introduced in the case of a dualist nation, such as the UK.

Article 14 of the ICCPR clearly states that:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (International Covenant on Civil and Political Rights, Art.14(1)).

Therefore, the literature review highlights that while judges can legitimately engage in judicial activism to protect the rights of individuals, the effectiveness of activism to protect such rights depends on the constitutional system adopted by the state where the judge is operating.

The adoption of JA to ensure the judiciary responds to institutional and community values established over time

In the article titled 'An Intellectual History of Judicial Activism', Green seeks to reinterpret JA from the notion that activism amounts to either legal error, a political mistake, or the invalidation of statutes or prior decisions (Scalia and Gutman, 1997). Green's view is that JA is a term that is broader than the original meaning given to it by Schlesinger and instead is founded on the premise that the previous views expressed by academics are 'incomplete' and otherwise vague (Green, 2008). Green

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classifies the modern definitions of the term JA into the following groups: (1) any serious legal error; (2) any controversial or undesirable result; (3) any decision that nullifies a statute; or (4) a smorgasbord of these and other factors. It is Green's view that this traditional view of JA is flawed and inadequate and demands a 'new approach' to be adopted to defining the term JA. Green proposes to reinterpret the traditional meaning of JA to constitute a violation of cultural standards pertaining to the judicial role. The introduction of the cultural dimension to determining the judicial role allows scope for a judiciary to adopt JA to ensure that they respond to institutional and community values occurring due to the passage of time.

It is essential, in Green's opinion, that the judicial role is properly understood to evaluate if a judgment can be classed as activist. In order to do this, one must examine the role of a judiciary in the country in which it performs its functions. In general, Green defines the judicial role as having the following two components: (i) a significant law-making authority; and (ii) this body is not supervised by other governmental entities.

In Green's opinion, not all judicial errors by a judge can be characterized as JA. It is noted by Green that some errors are instead the result of incompetence by judges, albeit he says that some incompetent judges may have been activist on occasion. The crux of this view is that judicial error and JA are not synonymous within each other. Green argues that the judicial role is similar to a 'rope tied to an anchor' where the anchor, albeit holding the judges in place, can be moved if the conditions compel it to do so. The role is therefore more 'elastic' than other commentators would suggest. This naturally has implications on what 'judicial errors' can be classified as JA. Notwithstanding this, Green suggests that an evaluation of what decisions amount to JA can be determined by considering those decisions in accordance with a combination of historical cases and dogmatic principles. Green's model aims to accommodate changes at the institutional level and 'identifies limits to channel judicial decision-making'. Key to Green's notion of JA is the claim that the 'judicial role turns on the history and principles applicable to a particular jurisdiction'. Relying on this proposition, problems shall inevitably arise in terms of using a fixed theory of what constitutes the role of the judiciary. In other words, the evaluation about the judicial role is relative to the jurisdiction under consideration. For instance, what is classified as JA in the US may not be classified as JA elsewhere. Accordingly, it follows that the evaluation of JA is also relative to the jurisdiction where it is claimed the judge has been activist.

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Nonetheless, Green's approach to evaluating the role of the judiciary can overcome the divergence in views about the meaning of the term JA. Green's approach suggests that a judiciary is permitted to depart from the role judges may have played in the past to take into account changes in society. Those evaluating the judicial role based on conventional methods shall deem the role played by judges in the past as being indicative of the role that the judiciary should play in contemporary times. This approach can fail to take into account inevitable institutional changes occurring in the relevant institutions of state and especially its judiciary.

Green's analysis of the judicial role 'applies only principles with historical and institutional roots, as opposed to universal morality or logic'. This ensures the avoidance of labeling a decision activist or not activist, without thoroughly considering the decision in the context of the applicable principles which have historical and institutional roots to the court making the decision. This prevents the haphazard use and politicization of the term JA to describe a decision handed down by a court. Moreover, it permits a judiciary to respond to institutional and community values that occur over time. For example, during the passage of time the values in society change, which the judiciary may be required to respond to on occasion to avoid discriminatory practices example of this is the change in western societies views about homosexuality. This was a topic that was regarded as taboo and unlawful in the not too distant past, but in modern times it is an issue that is no longer unlawful and the law provides protection to people in same-sex relationships. The implications of adopting Green's approach is that it shall give rise to a consistent notion of what constitutes JA when applied to a particular jurisdiction. The techniques adopted by Green to evaluate JA is amenable to common law systems where senior judges determine cases in an 'unsupervised' manner (Scalia and Gutman, 1997). The approach adopted by Green ensures that institutional changes and the culture prevailing in the judiciary at any given time are taken into account when evaluating if a court judgment can be described as activist. In order to illustrate how this approach can work in practice, an example is given about how a court decision might be viewed when applying Green's approach. For example, if a judge actively adopted a personal campaign to hand down decisions that further the cause of capitalism, this could, pursuant to other definitions of JA, be described as activism notwithstanding the fact that he is exercising judicial autonomy as a common law judge. If capitalism fell into a broader principle that arguably meant that all judges should encourage and promote, Green's approach would thereafter demand that there is consideration about whether or not there are historical

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examples and examples against capitalism to either provide confirmation of or refute any notion that judges are required to further the cause of capitalism. In accordance with Green's approach, if there was no evidence of historical examples supporting the advancement of a capitalist agenda, the judge's chosen capitalist agenda could rightly be labelled judicial activism by critics of his decisions. (Green, 2008).

Conclusion

Primarily, this study confirms that JA is not only lawful, but also necessary, when it comes to the protection of individual rights, the rule of law, and the constitutional order. JA gives judges the authority to take action in instances that include, but are not limited to, the unlawful taking over of power, massive violations of human rights, and disproportionate exercises of power among state organs. The enhanced and widened definitions of the rule of law demonstrate that breaches of fundamental rights ought to be recognized, and if those are not recognized, then it is a violation of the rule of law.

Judicial activism serves a purpose beyond adhering to the letter of the Constitution, it should engage with vestiges of discrimination and fight for fundamental rights, as was done in the Nuremberg Trials. In addition, JA is crucial in interpreting the constitution and domestic laws for compliance with treaty obligations like ICCPR and CAT, even when there is no enabling legislation in the country.

Green's model distinguishes between JA as a concept and JA as an activity. The former marks a progression that allows courts to respond to societal and institutional values over time, enabling courts to reflect the contemporary realities. This leads to judges serving contemporary needs while achieving long term legitimacy and supply. In this regard, JA is critical in responding to ailing state institutions and justice in an ever changing and complex society.

The rationale behind accepting JA rests on its ability to sustain the rule of law, respect public sentiment, abide by international commitments, and defend widespread principles of law. Stated differently, a particular form of activism builds democracy constitutionalism as the centerpiece of justice, fairness, and global development through active participation in a rapidly shifting environment.

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