CHAPTER VII
CONCLUSION

From the first Chapter it is found that the judiciary forms an integral part of a democratic government along with the executive and the legislature. In a democratic set up the judiciary has to play a significant role in preserving a government which is for the people, of the people and by the people. An activist role on the part of the judiciary is inevitable. There is no room for a passive role of the judiciary.

It is also found that judicial activism increases judicial power. However, judicial activism not only involves power but it also involves responsibility. Where a power is coupled with a duty to exercise it there is no liberty not to exercise it.\(^1\) Under the constitution the judiciary has the power as also the duty to uphold the constitution which constitutes the supreme law of a democratic country. This is no liberty for a judge to abstain from its constitutional obligation.

Judicial activism has often been criticised as judicial excessivism that fly in the face of the doctrine of separation of powers.\(^2\) The doctrine of separation of powers is not rigid in any democratic country. In fact, the doctrine of separation of powers of any democratic country is blurred providing for fusion of powers and inter departmental checks and balances. But criticisms have poured in that the judiciary has crossed the *lakshman–rekha (limits of separation of powers)* and have

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entered the territories that belong to others. The judiciary should not cross the \textit{lakshman-rekha} and must act in accordance with law.

In India, during the post–emergency era there has been instances of the judiciary crossing the \textit{lakshman-rekha} through the monitoring of 2G scam, Swiss Bank accounts etc. The Indian Supreme Court has defended its activism on the ground that “\textit{lakshman–rekha} is not sacrosanct. \textit{Lakshman–rekha} is for a limited purpose. Had Sita not crossed \textit{lakshman–rekha}, Ravan would not have been killed.”\textsuperscript{3} The Indian Supreme Court has defended judicial activism as a necessity in view of emerging corruption in high places to check the widespread malaise of corruption. In this process, if the judiciary has stepped into the shoes of the executive it was meant for doing justice in a refashion tradition. The allegation of an activist Indian judiciary crossing the \textit{lakshman–rekha} is countered by an equally activist Indian judiciary promoting the principle of separation of powers as a basic feature of the Constitution of India. The Supreme Court of India was quick to remind that there should not be usurpation of power even by the judiciary. The judiciary must be cautious in treading the path of judicial activism.

In America also, it was found that there has been a criticism of the American Supreme Court violating the separation of powers. The American Supreme Court which was considered to be the least dangerous branch of American government had turned out to be the most extraordinary powerful court the world has ever known.\textsuperscript{4} This was possible due to judicial activism of the American Supreme Court.

\textsuperscript{3} The Hindu, September 24, 2011, p. 2
Through judicial activism the American Supreme Court advocated the concept of a limited government under the Constitution. The criticism of judicial excessivism on the part of the American Supreme Court is not fully accepted. There was judicial activism of the American Supreme Court because a need or occasion had arisen to reorganize or reconstitute the American Constitution of 1787 framed in the horse and buggy days of America.

From first chapter it is found that unlike the Constitution of India and USA, the Constitution of UK is flexible hence a literal interpretation is followed by the courts in England. It is suggested that this trend has set in UK since the British Parliament through legislations can bring a change in the constitutional law unlike in a written constitution which is to be adapted to the changing times through judicial interpretation.

It is submitted that the allegations regarding the judiciary violating the separation of powers very often are raised because of the misconception about the role of the judiciary in fixing the *lakshman–rekha* flexibly. The highest Court which is the final arbiter of the dispute and interpreter of the constitution ensures that the *lakshman–rekha* should be adjusted according to the needs of the society. This is essential to promote justice and preserve the supremacy of the constitution.

It is suggested that judicial activism is never meant to terrorise either the people or the public authorities. In fact, judicial activism is meant for the people though through judicial activism it has made the public authorities aware of their obligations towards the people.
“Every legal order, federal or unitary, whether of civilian or common law ground faces the problem of the role of the courts in the evolution of law.”5 From a discussion in the second Chapter and the third Chapter it is found that through judicial activism the judiciary has openly acknowledged its law – making role. New doctrines have been evolved by the courts through such law – making role. It is suggested that the doctrines, however, were evolved for the benefit of the people and not for the harm of the people. Judicial activism, however, should be exercised in a very judicious manner and not to apply the existing doctrines blindly. In the third Chapter it is found that in India, the Supreme Court has evolved the doctrines of ‘prospective overruling’ and ‘basic structure’ through its law – making role. These doctrines were evolved to protect the rights of the people and to uphold the supremacy of the Constitution.

It is suggested that the Court is a non-partisan and a non-political body. It has no influence over either the sword or the purse. Judicial activism does not imply a superiority of judicial power over legislative power or executive power. It does not constitute control by an unelected minority over an elected majority. Judicial activism is not undemocratic.

From second chapter it is found that judicial activism is more of history and politics. The nature of judicial activism is based on the historical growth of a nation and the political developments taking place in the country. Under the unwritten constitution of U.K., judicial activism was based on historical and political

developments taking place in U.K. The Stuart period of 1603 to 1688 saw a conflict between the King and the Parliament, the courts siding with the King. It was during this period of conflict that Lord Edward Coke in *Dr. Bonham’s case* had developed the concept of judicial review of parliamentary legislations through ‘common law’ and ‘reason’. Lord Coke’s activism was, however, not followed by subsequent generation of British jurists since the Parliament established its sovereignty in U.K. Judicial activism in Britain, however, has revived with the gradual eroding of concept of parliamentary sovereignty, the ratification of the European Convention on Human Rights (ECHR) in 1951 and the passage of the Human Rights Act, 1988.

It is also found that judicial activism through judicial review remained dormant in U.K. during two centuries. But it was alive in British colonies and got an expression only under the US Constitution. Judicial activism in US was revolutionary during American civil war as legislations were struck down quickly for not being in conformity with the Constitution. Judicial activism with respect to legislations derives its legitimacy from the fact that the constitution is permanent but the legislature is elected only for a brief period of five years.

The importance of human rights has gained momentum after the Second World War. The universality of human rights has been recognised by the United Nations as well as by countries who were participants or non–participants to the Second World War. In post world war II constitutions of Japan and Germany which had experienced the horrors of war, it is found that the judiciary has played an activist role in protecting and promoting the human rights of its citizens.
From a discussion in the second chapter it is found that judicial activism under the different constitutions has not been a straitjacket formula. Judicial activism under the different constitutions varied from place to place and from time to time. Judicial activism under a particular constitution depended on several factors like historical, political, economic and social. The yardsticks for measuring security and liberty varied from country to country. It is suggested that to expect the same pattern of judicial activism under different constitutions is impossible as well as undesirable.

It is also suggested that the Indian Constitution has been adopted after a study of different constitutions. Therefore judicial activism of different constitutions had an impact on the judicial activism in India. Therefore to understand the phenomenon of judicial activism in India a study of judicial activism under different constitutions is a must. India cannot afford to remain aloof from the developments taking place elsewhere in the world.

It is suggested that judicial activism also varies according to the predilection of the bench. Judges have their own predilection based on their birth, education, religion, race and culture and hence cannot be divorced from these things. A judge is a human being even after taking oath. “But law is not a matter of personal or partisan politics, and a critique of law that does not understand this difference will provide poor understanding and even poorer guidance.”

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From a discussion in the first chapter it is found that judicial activism in India enjoys constitutional mandate under Article 32, 141 and 142. These constitutional provisions give plenary power and jurisdiction to provide remedies in order to meet the ends of justice. In the third chapter it is found that judicial activism was observed in India since the date of the inception of the Constitution. It is suggested that this was because of the higher judiciary, particularly the Supreme Court was expected to play not only an active role but also an activist role under the Constitution. It is also found that the pre–independence period also confirm judicial activism in India though incidents of judicial activism were rare and rudimentary in nature. The pre–emergency period of 1950 to 1974 and the emergency period from 1975 to 1977 also confirm the presence of judicial activism in India. But the temperament of judicial activism varied from time to time.

In the third chapter it is also found that during the Nehruvian period we find judicial activism in India being influenced by a towering personality like Pandit Jawaharlal Nehru who also was the first Prime Minister of India. Nehru’s views influenced the judiciary in interpreting and working of the Constitution in initial years. In America also judicial activism had been influenced by towering personalities like George Washington, Jefferson etc. Their utterances had an impact on the judiciary and in reshaping the Constitution. Therefore we see a common phenomenon in India and in America. It is suggested that in a nascent democracy, the courts have looked to the views of the framers of the Constitution who made a great impact on the views of the judiciary. Therefore scope for judicial activism was less. But it does not mean that there was no judicial activism in a nascent
democracy. As found in the second chapter and third chapter, even in a nascent democracy there was judicial activism for freedom of press and liberty. The role of the judiciary is crucial in a democratic government. Hence judicial activism exists, has to exist and will exist even if a country is governed by the principle of parliamentary sovereignty. Such judicial activism may be in the area of constitutional law or even under ordinary law.

From a discussion in the various chapters it is found that judicial activism advances the concept of limited government and promotes constitutionalism in a democracy. As found in the third chapter and sixth chapter the doctrine of basic structure places substantive limits on the amending power of the Parliament. The doctrine is also extended to arbitrary executive actions. “The crucial element of the basic structure doctrine is that the judiciary arrogates to itself the right to interpret, determine and define forever what might consist the basic structure and therefore curtail the political sovereignty of the people.” It is suggested that the hullabaloo about the basic structure doctrine can be set at rest by a dynamic Bench of the Indian Supreme Court defining what is a basic structure. An attempt was made to review and reverse the basic structure theory. But the basic structure doctrine survived. The basic structure doctrine has now become a mantra of Indian constitutional law and is accepted without demure and applied in subsequent cases by the Supreme Court of India. The doctrine has been accepted and applied by the

7 Gul Bukhari, “Resounding silence”, Daily Times, November 15, 2010
Supreme Court of Bangladesh in Anwar Hussain Chowdhury’s case. The doctrine has been referred to but not applied by the Supreme Court of Pakistan. The recent decision there does not favour the doctrine. The Sri Lankan Supreme Court has rejected it. In India, however, the doctrine has been applied to all forms of state action to ensure that such action does not damage or destroy the basic features of the Constitution.

In the third chapter it is found that during the emergency period in India the judiciary particularly the Supreme Court appeared to be spineless. The Supreme Court’s judgements violated the human rights of the citizens during the emergency. Though such decisions were rare but it cannot be said that such a situation never happened. The fundamental right to life and liberty suffered a big eclipse in Habeas Corpus case. The judiciary had expressed that the majority decision in Habeas Corpus case be confined to the dustbin of history.

In the fourth chapter it is found that human rights jurisprudence as a part of the constitutional jurisprudence was the outcome of judicial activism in India during the post–emergency era. The Indian Supreme Court developed the human rights jurisprudence through a harmonious construction of Article 14, 21 and the directive principles often referred to as “a vertible dustbin of sentiments.” The Indian Supreme Court through judicial activism guaranteed not only the first generation rights and the second generation rights but also third generation rights like the right

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9 Anwar Hussain Chowdhury v. Bangladesh, 1989 BLD (AD) (spl) 1
10 Pakistan Lawyers Forum v. Federation of Pakistan, PLD 2005 SC 719
11 Thirteenth Amendment to the Constitution and Provincial Council Bill in re 1990 LRC (Consti)
to healthy environment, clean air, water etc. It is suggested that the reason for judicial activism is the increase in the problems faced by the society as a whole – the problems of a big and complicated society.

It is also found that the open textured expressions in Article 21 provided ample scope for judicial creativity. Article 21 was treated as a canvas for drawing different human rights and as the cornucopia from which all such newly created rights flew. The expression ‘procedure established by law’ in Article 21 of the Indian Constitution was equated with the words ‘due process clause’ of the Fifth and Fourteenth Amendment of the US Constitution. The due process clause also was the cornucopia for defining new rights by the US Supreme Court as found in the second chapter.

The liberal interpretation of due process clause had also invited criticisms. When B.N. Rau, the constitutional adviser to the Constituent Assembly of India had a discussion with Justice Frankfurter of the US Supreme Court, Justice Frankfurter expressed the view that the power of judicial review implied in ‘due process’ clause was not only undemocratic because it gave to a few judges the power of vetoing legislation enacted by the representatives of the nation but also threw an unfair burden on the judiciary.\textsuperscript{12} It is submitted that Justice Frankfurter’s views had become outdated in the recent times.

From a discussion in the fourth, fifth and sixth chapters it is found that judicial activism with respect to socio–economic rights is welcomed. But

proliferation of socio-economic rights and remedies require resources. To enforce these rights funds are required otherwise judicial activism with respect to socio-economic rights will not be helpful. It is known that the judiciary neither has the power nor the expertise to create funds. Hence it is submitted that judicial activism with respect to socio-economic rights shall not be fruitful until and unless it gets the co-operation of the other two organs.

Judicial activism sometimes was bold and adventurous. In the fourth chapter it is found that the Indian Supreme Court while expanding the horizon of human rights considered the validity of those rights in the Constitution which were still now unheard and unknown. One such right is the right to die. The Court was not in favour of granting the right to die a status of fundamental right. But the Court seemed to be in favour of decriminalizing those provisions of the IPC which sought to criminalize and punish those persons who made an attempt to die. The Court viewed that it was harsh and unjustifiable to doubly punish a person who had already found life so unbearable. Similar views are shared by H. Romilly Fedden, an English writer. H. Romilly Fedden finds that it is a monstrous procedure to inflict further suffering on even a single individual who has already found life so unbearable, his chances of happiness so slender that he has been willing to face pain and death in order to cease living.\textsuperscript{13} The views of the Indian Supreme Court and H. Romilly Fedden are further supported in the recommendation made by the Indian Law Commission in its 42\textsuperscript{nd} Report. It is submitted that the Indian Penal Code (IPC) is a colonial legislation framed by the colonial rulers dating back to the year 1860.

The IPC needs to be reviewed and certain portions need to be repealed. In this regard the British Parliament has enacted the Suicide Act in 1961 whereby attempt to commit suicide ceased to be an offence.

The concept of suicide or ‘Icchamrityu’ was considered to be permissible in some circumstances in India.\textsuperscript{14} The great sages of India had practiced getting rid of one’s body by one of the modes like drowning, precipitating, burning or starving to be free from sorrow and fear. Hindu commentators, Govardhana and Kulluka also view that a man may undertake the mahaprasthana (great departure) on a journey which ends in death when he is incurably deceased or meets with a great misfortune.

In the fourth chapter it is found that through judicial activism, the Indian Supreme Court has played the role of a saviour in the protection as well as the promotion of human rights in India. The Court’s jurisprudence has ensured that the nation’s promises to respect the human rights on an international level do not remain on the papers. With regard to human rights, the Indian Supreme Court’s judgements and guidelines were humane, progressive and persuasive.

As found in the fourth chapter, judicial activism with regard to women’s rights is welcomed. The right to human dignity is a preambular promise. The Parliament has not made sufficient legislations for improving the status of and equality of women. The judiciary cannot remain in slumber. Therefore judicial

guidelines and directions are welcomed which enhances the status of a woman as a human being and confers her the right to live with dignity.

From a discussion in the fifth chapter it is found that in regard to judicial activism for socio-economic justice, PIL proved a boon. Through PIL the Indian Supreme Court ensured that the Constitution is meant not only for the elite but also for the butcher, the baker and the candlestick maker. Through PIL, the Indian Supreme Court met procedural innovations for making justice available to the poorest of the poor.

It is submitted that the legitimacy of such Public Interest Litigations in India is both legal and moral. Public Interest Litigation derives its legal legitimacy through a harmonious construction of Articles 14, 32, and 142 of the Constitution of India. Article 14 provides the right to access to justice. Article 32 provides free and unrestricted access to justice. Article 142 provides for passing decrees or orders as may be necessary for doing complete justice. Public Interest Litigations derive its moral legitimacy from the emergency period of 1975 to 1977. Through Public Interest Litigations, the judiciary tried to clean its negative image created during the emergency period. Right to life and liberty reached the nadir after the Supreme Court’s judgement in the *Habeas Corpus case*.

It is submitted that change is inevitable. Change is a necessity. The world is not static but dynamic. Therefore the Constitution and the law are changing. Consequently, procedural innovations are inevitable but within permissible limits.

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15 Justice Vivian Bose in *Bidi Supply Co., v. Union of India*, AIR 1956 SC 479, p. 48
“Justice is the key concern of law or in other words, law is centrally implicated in the project of justice.”

It is suggested that judges should be given the power to shape law to meet justice and hence procedural innovations are welcomed. Written law has to be expounded and given shape to meet justice. Such procedural innovations are required for the larger interest of the people. This is also in consonance with the principles of equity. Therefore judicial activism through PIL has become a necessity. Judicial activism has a tendency to become more because of the changes brought by science, technology and medicine aspects. A judge has to create process to meet different situations hence creativity involves. Judges cannot be inactive, shy or sorry about their creativity. At the same time judges should not violate the other procedural norms laid down in the Constitution.

It is submitted that judicial activism is a necessity in shaping the law according to the changing circumstances. It is not an outcome of power play. But when judicial activism comes into conflict with the doctrine of separation of powers there is an impression that there is a power play. When it appears such it should either be discouraged or limited. It has to be encouraged within the permissible limits. In this regard, the Indian Supreme Court is the best to know as to what are the permissible limits since the Court is the sole interpreter of the Constitution.

It is suggested that the Constitution of India contemplates an activist judiciary. The judiciary cannot sleep if the other two organs are sleeping. It has to initiate action if the other two organs are inactive through judicial interference in the

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working of the other two organs. Consequently, there is a pressure on the other two organs from the judiciary to legitimize judicial activism.

From a discussion in the fifth chapter it is found that PIL is not a pill for all ills. It is suggested that though pills may be wrongly used but PIL cannot be discarded. Therefore PIL has to be used with safeguards in order to prevent its abuse or misuse. The Court also should not disregard its epistolary jurisdiction. The epistolary jurisdiction was created for providing access to justice to those who neither had the money nor the power to reach the portals of the Court. The epistolary jurisdiction has to be exercised by the Indian Supreme Court with care and caution to prevent its misuse or abuse. Public Interest Litigations were never created to become ‘Private interest litigations’, ‘Paisa income litigation’ or for that matter ‘Publicity interest litigation’.

As found in the fifth chapter, in India Public Interest Litigations are popularly known as PIL. Sometimes they are also referred to as ‘SAL’ or Social Action Litigation. Prof. S.P. Sathe prefers to use ‘PIL’ instead of ‘SAL’. Prof. Sathe’s opinion is welcomed. But Professor Upendra Baxi’s opinion is also welcomed and appreciated. It is suggested that difference of opinion is welcomed in a democracy. It is a future nourishment to introduce a new concept in the coming years. It is a necessity for development of law. In the coming years we may soon use ‘SAL’ instead of ‘PIL’.
It is submitted that the concept of PIL is popular among the masses and the media. Such is the popularity of ‘PIL’ that a Bill for regulating PIL did not get support from the whole of the Parliament and the Bill got lapsed.

A democratic government operates on the principle of rule of law. “Indian democracy has long been the subject of admiration around the world.”17 In India, however, the rule of law appears not to have taken roots in the country. Inefficiency and corruption continue to plague the country’s democratic structure as the administration has turned anti–people. As found in the sixth chapter there was judicial activism based on rule of law. Through judicial activism the judiciary assumed the role of the saviour of the principle of rule of law which ran like a thread binding the different provisions of the constitution. The Dicean concept of rule of law is not applicable in India in the strict sense. The concept is applicable in India with modifications. Similarly, the Dicean concept of rule of law is not applicable in International law. It is applicable in a particular country according to the circumstances of the country.

It is submitted that rule of law is neither an ‘unruly horse nor a mere legalistic slogan’. Rather, it is a commitment to uphold the constitutional principle of ‘equality before law’ irrespective of one’s status or power. From a discussion in the sixth chapter it is found that in India equality based on rule of law was a changing concept through judicial activism. It is suggested that such judicial activism was in accordance with the changing times to meet the problems faced by

17 N.R. Madhava Menon (ed.), Rule of Law in a Free Society, (New Delhi: Oxford University Press, 2008), see page next to cover
the changing society. Judicial activism based on the rule of law invited criticisms since the judiciary assumed the role of sole interpreter of a ‘nebulous concept’ or an ‘amorphous concept’. The purpose of such judicial activism is ‘rule of law not men’ and ‘rule of law not states’.

From sixth chapter it is found that apart from developing the concept of Public Interest Litigation and human rights jurisprudence, judicial activism based on rule of law has contributed to the growth of administrative law. Preventive detention laws were reviewed by the judiciary through rule of law. It is suggested that judicial activism based on rule of law was aimed to achieve socio-economic justice.

Through judicial activism rule of law became a cardinal principle of the basic structure of constitutional governance in the country. Chanting the mantra of rule of law the judiciary reviewed not only the constitutional amendments but also the presidential actions which had put the liberties in peril. The theme behind such judicial activism was the republican philosophy which says “Whoever high you may be, the law is still above you”. The legitimacy of such judicial activism is based upon the constitutional goals it seeks to achieve and advance.

It is also found that judicial activism based on rule of law has been the major factor for checking political corruption and promoting good governance in the country. In the recent times the judiciary has been accused of judicial overreach for ordering the appointment of a Special Investigation Team (SIT), for delivering a verdict against the appointment of P.J. Thomas as the new Central Vigilance
Commissioner (CVC). The judiciary has also been accused of giving anti people judgements in the Binayak Sen case, the Bhopal gas tragedy case and in Graham Staines murder case.

It is submitted that the allegations of judicial overreach become louder when the malaise of corruption has spread its tentacles on the judiciary. Judges like Caesar’s wife should be above suspicion. Like the others, the judiciary should be held accountable for corruption. But questions are raised regarding judicial accountability. To whom it is accountable? Why it should be made accountable? It is suggested that the judiciary cannot act like a big brother. Since there is a limited government, the judiciary like the other two organs are accountable to the Constitution.

From sixth chapter it is found that through judicial activism, the judiciary has established its independence as a condition precedent to the establishment of rule of law. It is suggested that this is because judges are required to act without fear or favour to decide disputes between a man and a man, a man and the State, a State and a State and the Centre. In discharging its function “judges are not required to bend their knee to governments, to particular religions, to the military, to money, to tabloid media or to the screaming mob. Judges serve no majority nor any minority either”.18

It is submitted that judicial activism is never intended to create what is sometimes called ‘Judicial Oligarchy’ or the ‘Aristocracy of the Robe’. It is not intended to become a super-legislature. In cases where there has been a vacuum of legislations the Indian Supreme Court has come with guidelines to supplement the law to meet the required needs of the society.

It is submitted that judicial activism has become a necessity when criminals are getting into the legislature and law breakers are becoming law-makers under the present system. But judicial activism should not be the Brahmastra of the judiciary to solve every problem faced by the society. Judicial activism derives its legitimacy from its loyalty towards justice.

But judicial activism can never be abandoned. It should not be viewed with suspicion. In this regard, Justice Krishna Iyer rightly said, “To distrust the judiciary marks the beginning of the end of the society”.

The judiciary is a reflection of a society, government and nation. The judges, therefore, have a huge responsibility to make the justice delivery system smooth and fair. Hence judicial activism is an inevitable necessity.