CHAPTER I
INTRODUCTION TO JUDICIAL ACTIVISM

The edifice of any democratic government rests on three pillars – the executive, the legislature and the judiciary. These three pillars constitute the three organs of the government machinery. The powers and functions of these organs are defined in the constitution which constitutes the supreme law of a democratic government. Under the constitution, the primary function of the legislature is to make law, that of the executive is to execute law and that of the judiciary is to enforce the law. In the enforcement of law, the constitution assigns three roles to the highest judiciary – (1) firstly, as an interpreter of the constitution to solve any ambiguity in the language of any provision of the constitution; (2) secondly, as the protector of fundamental rights which are guaranteed by the constitution to its people; and (3) thirdly, to resolve the disputes which have come by way of appeals from the lower judiciary. Under a federal constitution the judiciary also decides the disputes arising between the federal authorities and the state authorities. In playing its assigned roles, the judiciary reviews the actions of the other two organs – the legislature and the executive as to whether they have exceeded the limits set by the constitution or whether they have encroached the rights of the people through arbitrary laws and arbitrary actions. This is where judicial activism comes into play. Through judicial activism the judiciary plays an activist role in performing the tasks assigned to it by the constitution.

In recent times, there has been a criticism of judicial activism as judicial overreach thereby violating the separation of powers between the three organs.
Through this study an attempt is made to know as to whether an activist role on the part of the judiciary is judicial activism or judicial overreach. If it is judicial activism whether there is a need of judicial activism under the scheme of the constitution and whether judiciary has exercised such activism properly or it has committed mistakes. If there has been judicial transgression what are the reasons because of which the judiciary has exceeded its limits and what should be the remedy or future course of action for the judiciary in discharging its duties by remaining within the limits assigned by the constitution.

The current study has been discussed in seven chapters. The first chapter introduces us to the phenomenon of judicial activism by defining judicial activism, discussing the types of judicial activism, the distinction between an activist judge and a non–activist judge, the relation between judicial activism and living constitution philosophy, whether judicial activism has violated the separation of powers and the constitutional perspective of judicial activism in India.

The second chapter discusses the phenomenon of judicial activism under different constitutions through a brief comparative study. The discussion concentrates on the study of judicial activism under the constitutions with parliamentary supremacy and under the constitutions with constitutional supremacy. The discussion of judicial activism under the constitutions with constitutional supremacy covers the constitutions with Bill of Rights and without Bill of Rights.

The third chapter discusses judicial activism in India through historical perspective. The historical study is confined to the pre–emergency period of 1950
to 1974 and the emergency period of 1975 to 1977. The discussion of judicial activism during the pre–emergency period is further classified as judicial activism during the Nehruvian period of 1950 to 1964 and judicial activism during the post-Nehruvian period of 1965 to 1974.

The fourth chapter discusses the study of judicial activism in India during the post-emergency era. The discussion concentrates on judicial activism in India through human rights jurisprudence. The post-emergency era is dealt with from the year 1978 onwards.

The fifth chapter and the sixth chapters are a continuation of the discussion on judicial activism in India during the post–emergency era. The fifth chapter is a study of judicial activism in India though Public Interest Litigations. The sixth chapter is a study of judicial activism in India through rule of law.

The seventh chapter draws conclusion from the whole study. The whole study is a combination of descriptive, comparative, historical and analytical approach.

**Definition of Judicial Activism**

The term ‘judicial activism’ has not been defined anywhere in the Constitution of India nor it has been defined in any Indian statute. Some dictionary definitions of judicial activism are available.
Black’s Law Dictionary defines the term ‘judicial activism’ in the following words:

“A philosophy of judicial law-making whereby judges allow their personal views about public policy among other factors to guide their decisions; usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.”¹

According to Merriam -Webster’s Dictionary of Law:

“Judicial activism is the practice in the judiciary of protecting or expanding individual rights through decisions that depart from the established precedent or are independent of or in opposition to supposed constitutional or legislative intent”²

Agarwal’s legal dictionary defines judicial activism or judicial creativity as:

“Apparent power of the judges to modify the scope and pattern of existing offences and to create new offences resulting in judge–made law.”³

The phenomenon of judicial activism has been observed both under the Constitution of India and under different Indian statutes. In the absence of a constitutional definition and a statutory definition, different Indian jurists have made an attempt to define the term ‘judicial activism’.

In the words of Justice J.S. Verma:

“Judicial activism must necessarily mean the active process of implementation of the rule of law essential for the preservation of a functional democracy.”⁴

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² Merriam-Webster’s Dictionary of Law, (Springfield, Massachusetts: Merriam-Webster,1999)
Former Chief Justice of India A.M. Ahmadi defines:

“Judicial activism is a necessary adjunct of the judicial function since the protection of public interest as opposed to private interest happens to be its main concern.”

According to Prof. Upendra Baxi:

“Judicial activism is an ascriptive term. It means different things to different people. While some may exalt the term by describing it as judicial creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of public duties etc. Others have criticized the term by describing it as judicial extremism, judicial terrorism, judicial transgression into the domains of the other two organs of the state negating the constitutional spirit.”

In India, Public Interest Litigation (PIL) or Social Action Litigation (SAL) are the main strategies for developing ‘Judicial activism’. According to K.L. Bhatia:

“Judicial activism in India is a movement from personal injury to public concern by relaxing, expanding and broadening the concept of locus standi. Judicial activism in India, is a progressive movement from “personal injury standing” to “public concern standing” by allowing access to justice to pro bono public that is public spirited individuals and organizations on behalf of “lowly and lost” or “underprivileged” or “underdogs” or “little men” who on account of constraints of money, ignorance, illiteracy has been bearing the pains of excesses without access to justice.”

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According to Prof. Mehraj-ud-din Mir:

“Judicial activism is a sharp weapon with judicious teeth which has kept the authorities at the helm of affairs on toes to discharge their functions in the rightful and dutiful manner. The top ranking executives too have not been spared by this weapon.”

Some definitions of judicial activism from foreign jurists are also available.

David Strauss of the University of Chicago Law School has argued that judicial activism can be narrowly defined as one or more of three possible things: “(a) overturning law as unconstitutional; (b) overturning judicial precedent; (c) ruling against a preferred interpretation of the Constitution.”

Lord L. Scarman of U.K. defined judicial activism as:

“Law, it was strongly felt, can be developed into more and more refined notions, interconnections and codifications coupled with increasingly sophisticated ways of interpretation. ‘A rather harmless pastime,’ even legalistic might react. That attitude changes, however, when it is judges themselves who start ‘developing’ the law into something ‘better’. Judicial activism it is called, often pejoratively.”

Lord Denning, the father of judicial activism has given suggestions in searching for the spirit of the British Constitution. His suggestions (which have undertones of judicial activism) rest upon three instincts:

“the instinct for justice, which he associates particularly with independence of the judges and certainty of the law; the instinct for liberty which involves freedom of discussion, (including freedom of the press) and also freedom of association (including the right to form political parties); finally, a practical instinct which leads to a

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balancing of rights with duties, and powers with safe guards, so that neither rights nor powers shall be exceeded or abused…” 11

Justice Obakayode Eso, former judge of the Supreme Court of Nigeria (referred to as Denning of Nigeria) said:

“The courts must rise to the challenge of the nation’s constitution, whereby the judicial arm as “guardian of the constitution must shed any form of inferiority complex and take its proper place as a co-ordinate arm of government with the mandate of checking the exercise of both the executive and legislative arms of government.”12

Thus, Justice Anand has rightly said that “Judicial activism was an expression incapable of precise definition and activism was a word of convenience.”13

Types of Judicial Activism

Though different definitions of ‘judicial activism’ are available, it has been categorized mainly into two types. In America, judicial activism is categorized either as conservative or as liberal. “The initial period of American constitutional history was characterized by conservative judicial activism where the Federal Supreme Court was unwilling to allow the States or the Congress to pass legislation that would regulate social or economic affairs.”14

The best known example of conservative judicial activism is *Lochner v. New York*\(^{15}\) where the Court invalidated a New York’s law regulating the hours bakers could work as a violation of ‘liberty of contract’ a part of the doctrine of substantive due process under the Fourteenth Amendment.”\(^{16}\)

But recently, the American Supreme Court has been engaging in liberal activism for which it has been subject to criticism.\(^{17}\) Such liberal activism has started since the advent of the Warren Court, continued through the Burger Court and into the Rehnquist Court.\(^{18}\) “Probably, the best known example of liberal activism is *Roe v. Wade*\(^{19}\) in which the Court struck down restrictive abortion laws as violating ‘the right to privacy’ it had previously found inherent in the ‘due process’ clause of the Fourteenth Amendment.”\(^{20}\)

In India also, judicial activism is classified into two types. According to Prof. Sathe, judicial activism can be positive as well as negative.\(^{21}\) He defines a court engaged in altering the power relations to make them more equitable is said to be positively activist and a court using its ingenuity to maintain the status quo in power relations is said to be negatively activist.\(^{22}\) Further, he cites the decisions of the US Supreme Court in *Dred Scott*\(^{23}\) or *Lochner*\(^{24}\) as examples of negative judicial

\(^{15}\) (1905) 198 U.S. 45
\(^{16}\) “Judicial Activism”, loc. cit
\(^{17}\) Ibid
\(^{18}\) Ibid
\(^{19}\) (1973) 410 U.S. 113
\(^{22}\) Ibid at p.5
\(^{23}\) *Dred Scott v. Stanford*, 60 U.S. 393 (1856)
\(^{24}\) *Lochner v. New York*, 198 U.S. 45 1904
activism whereas the decisions of that Court in *Brown v. Board of Education* 25 as examples of positive activism. In *Dred Scott* 26 the US Supreme Court upheld slavery as being protected by the right to property and in *Lochner* 27, it held a law against employment of children as violation of the ‘due process’ clause of the Constitution. In *Brown v. Board of Education* 28 the Court held that segregation on the ground of race was unconstitutional and void.

Prof. Upendra Baxi describes Indian judicial activism either as reactionary judicial activism or as progressive judicial activism. 29 He cites the Nehruvian era activism on issues of land reform and right to property and the pro-emergency activism typified in *Shiv Kant Shukla* 30 as manifestation of reactionary judicial activism. 31 On the other hand, he describes *Golak Nath* 32 and *Kesavananda* 33 as the beginning of progressive judicial activism. 34 According to Baxi, ‘Progressive judicial activism’ extends the frontiers of that which is judicially doable in time and place, both in terms of political and social transformation. 35 “But there can be no form of reactionary judicial activism. Reactionary judicial activism is an

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26 *Dred Scott v. Stanford*, 60 U.S. 393 (1856)
29 S.P. Sathe, op. cit., p.xiii (Preface)
30 *Shiv Kant Shukla v. A.D.M. Jabalpur*, AIR 1976 SC 120
31 S.P. Sathe, op. cit., p.xiv (Preface)
34 S.P. Sathe, op. cit., p. xiv (Preface)
oxymoron”. According to Justice David Ipp of South Africa, judicial activism consequently involves an increase in judicial power. “The corollary of increased judicial power is increased judicial responsibility.”

**Distinction between an Activist Judge and a non Activist Judge**

From an analysis of the juridical meanings of ‘judicial activism’, one may conclude that ‘judicial activism’ is the result of judicial decisions of an active judge. What then distinguishes an activist judge from a non-activist judge?

Prof. Upendra Baxi clarified the distinction at the Eleventh Triennial Conference of Association of Commonwealth Judges and Magistrates and the Commonwealth Judicial Education held at Cape Town in the year 1977. At the Conference, Prof. Upendra Baxi suggested that the distinction may lie in the self-image of a judge. Prof. Baxi cites three main distinctions between an active judge and an activist judge. Firstly, an active judge regards himself or herself as a trustee of state regime, power and authority. In other words, she subjects herself to the powers of the other two organs – the executive and the legislature. Secondly, she neither indulges in policy-making nor in policy-execution. Thirdly, she does not believe in revolution of the present social order. In brief, “an active (but non-activist) judge promotes ‘stability’ over change.” In stark contrast, firstly, “an activist judge regards herself as holding judicial power in fiduciary capacity for civil
and democratic rights of all people, especially the disadvantaged, the dispossessed and the deprived."\textsuperscript{43} Secondly, unlike a non-activist judge, an activist does not subject herself to the powers of the other two organs – the executive and the legislature. She does indulge in policy-making and policy-execution. According to Prof. Upendra Baxi, “an activist judge is aware that she wields enormous executive and legislative power in her role as a judge and that this power and discretion have to be used militantly for the promotion of constitutional values.”\textsuperscript{44} Thirdly, an activist judge through the exercise of her powers tries to cope with the present social and political problems of the society. In brief, she promotes ‘change’ over stability.

According to Prof. Baxi, the distinction between an activist judge and a non-activist judge, thus, lies in the exercise of its power. A non-activist judge prefers to exercise its power as an agent of the Government whereas an activist judge exercises its power as an agent of the people. As an agent of the people, an ‘activist’ judge has the ability not only to determine the legal relations of the Government with its people but also the ability to determine its own relation with the other two organs of the Government. Thus, a non-activist court stands for the ‘legal’ and ‘political sovereign’ whereas an activist court stands for the ‘popular sovereign’.

Prof. Sathe also agrees that ‘activism’ is related to change in power relations. “Since, through judicial activism, the court changes the existing power relations, judicial activism is bound to be political in nature.”\textsuperscript{45} Playing an important political

\textsuperscript{43} Ibid at p.165
\textsuperscript{44} Upendra Baxi, “On the Shame of Not Being an Activist: Thoughts on Judicial Activism”, \textit{Indian Bar Review} (IBR), Vol. 11(3) 1984, pp. 259-267, p.263
\textsuperscript{45} S.P. Sathe, \textit{Judicial Activism in India: Transgressing Borders and Enforcing Limits}, 2\textsuperscript{nd} ed., (New Delhi: Oxford University Press, 2002), p. 6
part through judicial activism, the constitutional court becomes an important power centre of democracy.\textsuperscript{46}

The Indian Supreme Court comprises a galaxy of such activist judges who display their power and preferences. Justices Krishna Iyer, P.N. Bhagwati, O. Chinappa Reddy and D.A. Desai were the pioneers to lay the foundation of judicial activism in India through their concept of Social Action Litigation (SAL).\textsuperscript{47} “With the foundation of judicial activism laid, judicial figures such as Desai and Chinnappa Reddy, JJ. were quick to extend the realm of judicial activism to the protection of the rights of organized labours.”\textsuperscript{48} “Subsequently, new judicial actors like Kuldeep Singh, K. Ramaswamy and J.S Verma entered the scene. Justice Kuldeep Singh displayed a rare concern for a clean and unpolluted environment, Justice K. Ramaswamy deployed judicial activism for the protection of the depressed under classes of contemporary Indian Society while Justice J.S. Verma through judicial activism strove to cleanse corruption in high places.”\textsuperscript{49}

The American Supreme Court also has its own galaxy of such activist or non-activist judges. The American Supreme Court judges are separated into three blocs: the Judicial Activist (which included Justices Black Douglas, Murphy and Rutledge); the Judicial Self-Restrained (which included Frankfurter, Jackson and Burton); and those falling in the middle (Justice Reed and the Chief Justice

\textsuperscript{46} Ibid at p. 6
\textsuperscript{48} Ibid at p. 176
\textsuperscript{49} Ibid at p. 176
Vinson). This classification was made by historian Arthur Achlesinger Jr. on an analysis of the nine Justices of the 1947 American Supreme Court.

In England, the list of such activist judges includes Justice Coke and Justice Denning, to name a few. Justice Coke was the pioneer to advocate the concept of judicial review in England whereas Justice Denning was the crusader of liberal interpretation in England. In so many areas of public law and private law, Lord Denning brought fresh insights and impatience with blind adherence to old formulation of the law where these appeared out of harmony with a sense of the just result of the particular case.

Similarly, other countries also do have their list of such activist judges. The galaxy is unlimited but the space for discussion limited.

**Judicial Activism and Living Constitution Philosophy**

Is there a need of judicial activism under the constitution? If there is, what is the need of such activism? The constitutional jurists answer the above questions by putting forward the ‘living constitution philosophy’. Though the constitutional jurists have defined the constitution as a legal document defining the framework of a government of a particular country, they refuse to accept that it is just a ‘document’. These jurists assert that the constitution is very much alive like a living

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50 Ibid at p.176
51 Ibid at p. 3. The Classification was published in an article written on ‘Judicial activism’ that appeared in ‘Fortune Magazine’ in 1947
organism. It grows and adapts itself to the changing needs of the time.\textsuperscript{53} To justify their claim, these jurists put forward the ‘living constitution philosophy’.

The ‘living constitution philosophy’ has its origin in America. The celebrated American Jurist Oliver Wendell Holmes propounded it in the following words: “The Constitution is not a document of fastidious dialectics but a means of ordering the life of a people. It is an organic growth.”\textsuperscript{54}

The reason for putting forward the living constitution philosophy was also cited by the American Supreme Court as: “The Constitution is framed for ages to come and is designed to approach immortality as near as human institutions can approach.”\textsuperscript{55}

M.V. Pylee puts the rationale behind such concept forward in the following words:

“When our mode of thinking, ways of life and culture change with the change of time, then why the words and phrases should not take colour from the surrounding aspects of the changing pattern of our life and thought.”\textsuperscript{56}

**Constitutional Provisions are not Mathematical Formulae** - The ‘living constitution philosophy’ has changed the attitude of the constitutional jurists of looking at the constitutional provisions. They contend that they are neither mathematical formulae nor have dictionary meaning.


\textsuperscript{54} In *Gompers v. United States*, (1914) 233 U.S. 604/610

\textsuperscript{55} In *Marbury v. Madison*, (1803) 1 Cr 157

\textsuperscript{56} M.V. Pylee, op. cit., p. xxxi (see Introduction)
In *Gompers v. United States* 57 the American Supreme Court was quick to point out that “the provisions of the Constitution are not to be taken as mathematical formulas having their essence in their form. Their significance is vital and not formal.”

Another view of the American Supreme Court through Justice Holmes was that “Constitutional law cannot be expounded with the aid of a dictionary. In ascertaining the meaning of words used in a Constitution, their origin and line of growth must be kept in view.” 58

Justice Hand of the US Federal Court also expressed that “Constitutional Statues should not be construed as theorems of Euclid but with imagination of purpose behind them.” 59

**Constitutional Provisions to be Interpreted Liberally** – The living constitution philosophy has influenced the Court’s method of interpreting the constitutional principles. The Court refuses to be bound by the restrictive canons of literal interpretation. Instead, the Court has started to interpret the constitution on the principles of “*Ut res magis valeat quam pereat.*” The ‘living constitution’ philosophers advocated ‘that the Court should not confine itself to the language but should look forward to the intent of the language’.

Justice Coke supported the rule of liberal interpretation. According to him, “the primary principle of interpretation is that a constitutional or statutory provision

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57 *(1914) 233 U.S. 604*(610)
58 Ibid
59 In *Leleigh Valley Coal Co. v. Ulensavage*, 281 Fed 517(522)
should be construed according to the intent of they that made it.”

In this connection Lord Cairns also said “the primary duty of the judge, however, is to find out the intention of the legislature through the medium of written words. But if this fails to give effect to the intention of the legislative, it is entirely left to the judges to go beyond the written words.”

However, many British jurists are not prepared to accept that ‘sententia legis’ should be the first principle of interpretation. These jurists contend that since England has no written Constitution, there is no difference between the constitutional law and other laws in England. Hence ‘litera legis’ which is the first principle of statutory interpretation should also be the first principle for constitutional interpretation.

The above attitude of the English judges has been severely criticized by Mc. Whinney, an American critic in the following words:

“The story is one of a cramped, fettering approach on the part of the Judges who have devoted most of their professional lives to the final determination of private law cases and are suddenly confronted for the first time with broad policy problems inherent in the adjudication of constitutional law. Their approach has been to treat the Constitutions in question as ordinary statutes only, and to subject them to the same restrictive canons of construction normally applied by the common law judges to the interpretation of statute law.”

Unlike in England, the American judges liberally follow the canons of liberal interpretation in interpreting their Constitution. This is because of their obsession with the Marshallian dicta that:

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61 In *Hill v. East & West India Dock Co.*, (1884) 9 AC 488 (495) (HL)

“We must not forget that it is a Constitution we are expounding a Constitution which is to endure for ages and consequently to be adapted to the various crises of human affairs.”\(^6\)

American jurists assert that it is an undisputed fact that the US Supreme Court never confined itself to the liberal interpretation of the constitutional words and phrases.\(^6\) “If it were so, then the US Constitution which was framed in the ‘horse-and-buggy days’ would have become quite useless for the machine age and would have found a cold burial in the National Archives.”\(^6\) President Thomas Jefferson also views that if the US Supreme Court has not followed liberal interpretation then a revised constitution would have taken the place of the old one after about every twenty years.\(^6\) The constitution lays down great principles to be implemented in the progress of the society. Roscoe Pound, the famous Dean of the Harvard Law School emphasis that “interpretation of constitutional principles is a matter of reasoned application of rational precepts of conditions of time and place.”\(^6\)

This is particularly true for a written Constitution, “As Benjamin N. Cardozo rightly says that “A written Constitution is intended to state not rules for the passing hour but principles for an expanding future.”\(^6\)

\(^{63}\) Views expressed by Chief Justice Marshall in *Mc Calloh v. Maryland*, (1819) 4 Wheat 316


\(^{65}\) Saying of President Roosevelt quoted by W.B. Munro, Government of United States, p.67 seen in M.V. Pylee, op. cit, p. xix (Introduction)


The Australian courts also follow liberal interpretation of their Constitution. This is clear from the observations made by Lord Wright in *James v. Commonwealth of Australia:* “That a Constitution must not be construed in any narrow or pedantic sense.”

The living constitution philosophy has also been accepted by the Indian constitutional jurists who regard the constitution not just a document in a solemn form but a living framework for the government of the people. Hence, the liberal method of constitutional interpretation has been advocated. “Constitutional provisions are required to be understood and interpreted with an object oriented approach.” The true meaning of the constitutional provisions has to be imported from the purpose which they seek to achieve. Similar views were voiced by Alladi Krishnaswamy Aiyar:

“It is to be borne in mind that the Constitution is an instrument under which all laws are made and this consideration should rather impel the Court to interpret the constitutional provisions more liberally.”

**Judicial Activism violates Doctrine of Separation of Powers**

Critics of judicial activism argue that judicial activism violates the doctrine of separation of powers. According to the doctrine of separation of powers, all the three constitutional functionaries – executive, legislature and judiciary are allotted three different functions. The legislature makes policy; the executive executes the policy while the judiciary ensures the implementation of such policy. Each of these

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69  1936 AC 578 (614)
71  Constituent Assembly Debates, Vol. x, p. 417
three functionaries are not supposed to ‘jump into the other’s fence’. But there is an allegation that judiciary has jumped into the other two fences by indulging both in policy making and policy execution. Such an over-activist approach on the part of the judiciary is unconstitutional. The judiciary while exercising dynamism and creativity also has to exercise restraint and not go over-board.

The judiciary is equally bound by the principles of constitutionalism as the other two organs. Judicial activism and judicial restraint must go together.

What is the judiciary doing to violate the separation of powers? What should be the judiciary not doing to violate the separation of powers? The above questions are answered first by analyzing the doctrine of separation of powers and secondly to what extent it is applicable to the constitution?

According to Cheryl Saunders, “A society in which the observance of law is not assured, nor the separation of powers defined, has no constitution at all.”72 The doctrine of separation of powers is a model for the governance of democratic states. The model known as *trias politica* was first developed in ancient Greece and came into widespread use by the Roman Republic as part of the uncodified Constitution of the Roman Republic.73 But the term ‘Separation of powers’ was first ascribed by a French political philosopher, Baron de Montesquieu 74 to check corruption of democracy by extreme inequality and extreme equality. Montesquieu suggests that extreme inequality leads to aristocracy or monarchy and extreme equality leads to

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72 Cheryl Saunders, “Separation of powers and the Judicial Branch”, 20/07/11  
www.adminlaw.org.uk/.../Professor% 20 Cheryl % 20 Saunders% 20- % 20 July % 202006.doc  
73 Separation of powers: Its Scope and Changing Equations, 04/09/09  
According to Montesquieu, the concentration of power in one person or a group of persons results in tyranny. Therefore, decentralization of power is necessary to check arbitrariness. The decentralization of power is achieved by vesting the governmental power in three different organs – the legislature, the executive and the judiciary. The principle of separation of powers requires that each organ should be independent of the other and that no organ should perform functions that belong to the other. According to Montesquieu, the separation of powers is essential to protect liberty which was expressed in the following words:

“When the legislature and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty … there is no liberty if the powers of judging is not separated from the legislative and executive … there would be an end to everything, if the same man or the same body were to exercise those powers.”

The significance of the doctrine of separation of powers lies in the fact that it seeks to preserve the human liberty by avoiding concentration of powers in one person or body of persons.

The same was expounded by James Madison, one of the constitution-makers to the US Constitution that the accumulation of all powers, legislative, executive and judicial in the same hands, whether of one, a few or many and whether hereditary, self-appointed or elective, may just be pronounced the very definition of tyranny. The doctrine of separation of powers thus acts as a check against tyrannical rule. The very purpose of underlying the doctrine is to diffuse

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77 The Federalist Papers (No. 51) seen in “Separation of Powers under the United States Constitution” 20/07/10, [http://webcache.googleusercontent.com/search](http://webcache.googleusercontent.com/search)
governmental authority so as to prevent absolutism and guard against arbitrary and tyrannical powers of the State. The necessity of non-concentration of powers has also been emphasized by Lord Acton in the following words: “Power corrupts and absolute power corrupts absolutely.”

The doctrine of separation of powers has been adopted in almost all the constitutions of the world. An analysis of the doctrine under different constitutions gives an idea that the strict separation of powers was considered both undesirable and impracticable. The doctrine, therefore, has been adopted in almost all the countries in its diluted form. Gerard Carney suggests that the doctrine may be adopted to varying degrees by any system of government whether it be Westminster, Presidential etc.78 The doctrine also applies differently under a written and an unwritten constitution.79 But the theories of mixed and balanced government remain the essentials elements of the doctrine of separation of powers.80

The doctrine of separation of powers finds its place under the US Constitution. It forms the basis of the American constitutional structure. “Unlike the Massachusetts Constitution the federal Constitution of US does not speak of the separation of powers. Rather the Constitution of US provides separation of powers at the head of each of its first three Articles.”81 Article I vests the legislative power

79 Francis Bennion, “Separation of powers in Written and Unwritten Constitutions”, 06/09/2011
in the Congress which shall consist of a Senate and House of Representatives.\textsuperscript{82}

Article II vests the executive power in the President of the United States of America. Article III vests the judicial power in the Supreme Court of America and in such inferior courts the Congress may from time to time ordain and establish.\textsuperscript{83}

The Constitution makers of the American Constitution have included the principle of checks and balance along with the doctrine of separation of powers. For example, a bill passed by the Congress may be vetoed by the President in the exercise of his legislative power popularly known as ‘The Pocket Veto Power’.\textsuperscript{84}

Through the Pocket Veto Power the President reserves the bill for ten days for his assent. In such a case, the bill dies if the Congress adjourns before the expiry of ten days. Similarly, the treaty making power is with the President but it is not effective till approved by a two–third majority in the Senate. This is no doubt a limitation on his authority regarding the conduct of foreign relations.\textsuperscript{85} “It was the exercise of the executive power of the Senate due to which the US could not become a member of League of Nations”.\textsuperscript{86} Again the US Supreme Court has the power to declare the acts passed by the Congress as unconstitutional. Fried Charles observes that “In a modern state, the doctrine of separation powers shows up in two principle ways – control over administration and the independence of judiciary.”\textsuperscript{87}

Independence of judiciary means that the judges are able to act without fear or favour. Since there

\textsuperscript{83} Ibid at p. 2797
\textsuperscript{85} Ibid at p.178
are no provisions providing for direct checks on judicial acts, especially in the area of constitutional interpretation, the non-applicability of the principle of checks and balances on the Court has raised a debate. “In the American mind, the principle of checks and balances often stops at the door of the Court.”

As observed by American jurist, John Agresto by including the principle of checks and balances in the doctrine of separation of powers, the founders of the American Constitution tried to achieve two purposes simultaneously – (i) Firstly, they took great care to separate the exercise of political authority into three functionally distinct departments – legislative, executive and judicial; (ii) Secondly, they also took care to blur the edges of department, giving to each some partial oversight, some partial control over the activities of the coordinates.

Similar views were represented by another American jurist, Alexander M. Bickel. In the words of Alexander M Bickel:

“Our government consists of discrete institutions, but the effectiveness of the whole depends on their involvement with one another, on their intimacy, even if it is often the sweaty intimacy of creatures locked in combat.”

Alexander M. Bickel thus acknowledges the principle of checks and balances along with the principle of separation of powers though the presence of both may often result in conflict among the different organs. Such a conflict has arisen between the US Supreme Court and the other two organs. Judicial activism

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89 Ibid at p. 99
and non-applicability of the principle of checks and balances on the part of the judiciary has been cited as the main reasons for it. “The role of each branch so carefully defined in the Constitution has been greatly blurred by activist judges who, facing no consequences for their decisions, very often assume the role of social engineers.”91 The principle of separation of powers along with the principle of checks and balances should be applied on the judiciary. This is considered necessary to prevent judicial autocracy and judicial finality.

According to Barnett, “… separation of powers together with the rule of law and parliamentary sovereignty runs like a thread throughout the Constitution of the United Kingdom.”92 Although the doctrine of separation of powers is an integral part of U.K’s constitutional structure; the UK constitution is often described as having a weak separation of powers.”93 Separation of powers in the purest sense is not, and never has been, a feature of the Constitution of U.K.94 Instead there is a broad overlap or fusion of powers under the Constitution of UK. Under the UK Constitution, the executive forms a part of the legislature and also a part of the judiciary until the establishment of the Supreme Court of U.K. The Prime Minister, the Chief Executive sits as a member of the Parliament of UK either as a peer in the House of Lords or as an elected member of the House of Commons. The House of the Lords which is a part of the Parliament acts as the final arbiter of disputes until

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94 “Separation of powers”, p. 21, 26/09/11 http://bookshop.blackwell.co.uk/extracts/9780199232857_parpworth.pdf
recently it has been replaced by the Supreme Court of UK in 2009. The Supreme Court of UK was established by Part 3 of the Constitutional Reform Act, 2005 and started functioning on 1 October, 2009.

Like the US Constitution under the Constitution of India, the doctrine of separation of powers is not observed in the strict sense. Under the Constitution of India, there is an express provision that the executive powers of the Union and of a State is vested in the President and Governor by Articles 53 (1) and 154 (1) but there is no corresponding provision which vests the legislative and judicial powers in any particular organ. The blurring of powers are more manifest under the Constitution of India than under the Constitution of US. The President and the Governor exercises legislative functions like issuing an ordinance, framing rules and regulations relating to public service matters formulating law while proclamation of emergency is in force. The President and the Governor also exercise judicial functions through granting of pardons. Similarly the Parliament and the State legislatures exercise judicial powers for breach of its privileges through its power of contempt. The judiciary exercise administrative powers by making rules for the appointment of officers and servants of the Supreme Court. The High Court also exercise supervisory power on the subordinate courts.

96 Article 123 and 213 of the Constitution of India
97 Article 203 (3) of the Constitution of India
98 Article 353 (b) of the Constitution of India
99 Article 72 and 161 of the Constitution of India
100 Article 105 (3) and 194 (3) of the Constitution of India
101 Article 22 of the Constitution of India
Along with the principle of separation of powers the principle of interdepartmental checks and balances also works under the Constitution of India. The judiciary scrutinizes the actions of the executive and the legislature through its power of judicial review.\textsuperscript{102} The Parliament checks the actions of the President\textsuperscript{103} and the judiciary \textsuperscript{104} through the procedure of impeachment. The doctrine of separation of powers, thus, is not strictly followed in India. Rather, there is a fusion of power where all the three organs are required to perform almost all the three functions. The constitutional scheme of India requires all the three organs to work in a close–coordination. All the three organs are also interdependent on each other due to the principle of checks and balance.

“There is no doubt that the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State – legislature, executive and judiciary.”\textsuperscript{105} The Indian judiciary has played an activist role in promoting the doctrine of separation of powers which has been recognized as a basic feature of the Constitution of India. The Supreme Court in \textit{Kesavananda Bharati v. State of Kerala} \textsuperscript{106} held that the separation of powers between the executive, legislature and the judiciary is a part of the basic structure of the Constitution. K.P. Chakravarti observes that “Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of

\begin{itemize}
  \item \textsuperscript{102} Article 13 of the Constitution of India
  \item \textsuperscript{103} Article 61 of the Constitution of India
  \item \textsuperscript{104} Article 124 (4) (5) of the Constitution of India
  \item \textsuperscript{105} K. P. Chakravarthi, \textit{Words and Phrases under the Constitution}, 2\textsuperscript{nd} ed., (Kolkata: Eastern Law House, 2003), p. 56
  \item \textsuperscript{106} AIR 1973 SC 1461, para 302
\end{itemize}
the State function within the constitutional limits. It is the sentinel of democracy.”

The Supreme Court of India has maintained that there should not be usurpation of power under the constitutional scheme of separation of powers. This was expressed by a three judge bench of the Supreme Court in *Arif Hameed v. State of Jammu and Kashmir* where the Court held:

“Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another.”

The Supreme Court has held that under the Constitution of India the principle of separation of powers includes the principle of checks and balances. This was expressed in *I.R. Coelho v. State of Tamil Nadu* where the Supreme Court held that the principle of constitutionalism advocates a check and balance model of the separation of powers. The Supreme Court has advocated the doctrine of separation of powers to prevent the judiciary from usurping the functions of the executive and to exercise judicial restraint. “While the exercise of powers by the legislature and executive is subordinate to judicial review, the only check on judicial exercise of power is self imposed discipline of judicial restraint.”

In this regard a division bench of the Supreme Court (comprising A.K. Mathur and Markandey Katju, JJ.,) in *S.C. Chandra and others v. State of Jharkhand and others* held:

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107 K. P. Chakravarthi, op. cit., p. 57
108 AIR 1989 SC 1899 at para 17
109 AIR 2007 SC 861 at para 44
“There is a broad separation of powers under the Constitution and the judiciary should not ordinarily encroach into the executive and legislative domain. The theory of separation of power first propounded by the French philosopher, Montesquieu in his book ‘The Spirit of Laws’ still broadly holds the field in India today.”

Similar views were reiterated by the same division bench (comprising A.K. Mathur and Markandey Katju, JJ.) in *Union of India v. M.S. Mohammed Rawther* as:

“The Court has only judicial power to review that executive order on Wednesbury principles but it cannot arrogate to itself the power of the executive. If the order passed by the Union of India is not justifiable on Wednesbury principles then the court can only set it aside and remit the matter back to the executive for a fresh decision but the court cannot assume the power of the Union of India. The court must exercise judicial restraint in such matters. There is broad separation of powers under the Constitution and one organ of the State should not ordinarily encroach into the domain of another. Montesquieu’s theory broadly applies in India too.”

The above judicial pronouncements indicate that the Indian judiciary has supported the observance of the doctrine of separation of powers under the Constitution. It has asked the Bench to exercise restraint whenever there was a usurpation of power by the judiciary thus violating the doctrine of separation of powers.

**Judicial Activism in India – Constitutional Perspective**

The Supreme Court is the Apex Court of India. The Constitution of India confers wide jurisdiction on the Supreme Court. It also confers on the Supreme Court.

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AIR 2007 SC 3021 at para 11
AIR 2007 SC 3014 at para 6
Article 131 to 136 of the Constitution of India confers wide jurisdiction to the Supreme Court of India
Court the power of judicial review,\textsuperscript{114} the power to enforce its decrees and orders\textsuperscript{115} and to some extent the power of law-making.\textsuperscript{116} The High Courts of India are also conferred the power of judicial review.\textsuperscript{117} The conferment of such wide jurisdiction and wide powers provides enough scope for judicial activism in India.

Under the Constitution of India, the Supreme Court enjoys a wide jurisdiction by way of original,\textsuperscript{118} appellate\textsuperscript{119} and advisory jurisdiction.\textsuperscript{120} It also has a jurisdiction to entertain appeals by way of special leave.\textsuperscript{121} Under the original jurisdiction the Supreme Court has to decide any dispute – (a) between the Government of India and one or more States; (b) between the Government of India and any State or States on one side and one or more other States on the other; or (c) between two or more States. The Supreme Court through its original jurisdiction has played an activist role in promoting the principles of federalism by deciding issues relating to the distribution of legislative powers between the Union and the States or relating to the matters of both intra–State and inter–State freedom of trade and commerce.\textsuperscript{122}

\textsuperscript{114} Article 13 of the Constitution of India confers the power of judicial review to the Supreme Court of India
\textsuperscript{115} Article 142 and 144 of the Constitution of India confers such power to the Supreme Court
\textsuperscript{116} Article 141 of the Constitution of India confers such power to the Supreme Court
\textsuperscript{117} Article 13 also confers the power of judicial review to the High Courts of India
\textsuperscript{118} Article 131 of the Constitution of India
\textsuperscript{119} Article 132 of the Constitution of India
\textsuperscript{120} Article 143 of the Constitution of India
\textsuperscript{121} Article 136 of the Constitution of India
\textsuperscript{122} In Atiabari Tea Co. v. State of Assam, AIR 1951 SC 232, Automobile Transport Ltd. v. State of Rajasthan, AIR 1962 SC 1906 and many others
Under its appellate jurisdiction the Supreme Court has wide jurisdiction over constitutional matters if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

Under its advisory jurisdiction the Supreme Court may decide a question of law or fact referred to it for its opinion by the President. Some examples of such references made by the President to the Supreme Court can be cited. In *re Delhi Laws Act Case*, the opinion of the Supreme Court was sought regarding the validity of the Act with regard to delegated legislation. In *re Kerala education Bill*, the Bill was reserved for the consideration of the President who referred to the Supreme Court to give its opinion on its validity. In *re Berubari Case*, the opinion of the Supreme Court was sought to find out the manner in which the territory of India could be transferred to Pakistan. In *Special Court reference Case*, the Supreme Court was asked to consider the extent of the privileges of the legislature and the powers of judicial review in relation to it. In *re Presidential Reference*, the Supreme Court was asked to consider as to whether the recommendation made by the Chief Justice of India on the appointment of Judges of the Supreme Court and the High Courts without following the consultation process are binding on the Government.

Apart from the original, appellate and advisory jurisdiction, the Supreme Court has a jurisdiction to entertain appeals by way of special leave. Under Article

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123 AIR 1951 SC 332
124 AIR 1958 SC 956
125 AIR 1960 SC 845
126 AIR 1965 SC I
127 AIR 1999 SC I
the Supreme Court is authorized to grant in its discretion special leave to appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal (except a military tribunal) in the territory of India. Article 136 is worded in the widest possible terms. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals by way of special leave.\(^\text{128}\) The exercise of this power is left entirely to the discretion of the Court unfettered by any restrictions and this power cannot be curtailed by any legislation short of amending the Article itself.\(^\text{129}\) “Although the power under Article 136 (1) is unfettered certain principles have been adopted by the Supreme Court in entertaining appeals by way of special leave.”\(^\text{130}\) The exercise of such wide discretionary powers was explained by the Supreme Court on *Pritam Singh v. The State* in the following words:

“On a careful examination of Article 136 along with the preceding article it seems clear that the wide discretionary powers with which the Supreme Court is invested under it is to be exercised sparingly and in exceptional cases only and as far as possible a more or less uniform stand should be adopted in granting special leave in the wide range of matters which can come up before it under this Article.”\(^\text{131}\)

According to H.M. Seervai, through Article 136, the Supreme Court frequently converts itself into a third court.\(^\text{132}\) But the Court was quick to advocate


\(^{131}\) AIR 1950 SC 169 at para 9

\(^{132}\) H.M. Seervai, loc. cit.
judicial restrain in entertaining appeals by way of special leave: In this regard, Krishna Iyer and O. Chinappa Reddy JJ. asserted in *Rafiq v. U.P* that:

“Concurrent findings of fact ordinarily acquire a deterrent sanctity and tentative finality when challenged in court and we rarely invoke the special jurisdiction under Article 136 which is meant to correct manifest injustice or errors of law of great moment.” \(^{133}\)

But the Court held that Article 136 being an exceptional and overriding power has to be exercised sparingly and with caution and only in special extraordinary situations. It refused to fetter the exercise of this power by any set formula or rule.\(^ {134}\)

Under the Constitution of India, the Supreme Court discharges a double-faceted role in relation to the fundamental rights. In the first role, it acts as the protector of fundamental rights. In the second role, it acts as the interpreter of the Constitution. Both the roles often overlap and are dependent upon each other. The Supreme Court’s role as the protector of fundamental rights enjoys a constitutional mandate under Article 13. Article 13 confers power on the Supreme Court as well as the High Courts to declare a law in contravention to Part III of the Constitution as unconstitutional. Part III describes the fundamental rights and the restrictions that can be imposed on them by the State. “This is unlike the US Constitution which contains no express provision that a law contravening the Constitution is *pro tanto* void”. \(^ {135}\) As observed by Prof. S. P. Sathe, while vesting such power of judicial review in the High Court and the Supreme Court, maximum care was taken to

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\(^{133}\) AIR 1981 SC 559 at para 5

\(^{134}\) In *D.C. Mills v. Commissioner of Income Tax, West Bengal*, AIR 1955 SC 55

prevent the courts in India from being more than auditors of legality. The rights were defined and restrictions upon them were also defined with precision so as to leave the least discretion with the courts. This was unlike the Constitution of the United States which mentioned rights in unqualified terms and left it to the court to define their limits and legitimize the restrictions on them.

The makers of the Indian Constitution preferred limited judicial review. But the courts refused to restrict its role as the protector of fundamental rights. From the very beginning the Indian Supreme Court has adopted an activist stance in promoting its role as the sentinel on the ‘qui vive’ vis à vis fundamental rights. In the very first year of the Constitution coming into force the Supreme Court emphasized its role as the protector of fundamental rights. In the year 1950 itself, the Supreme Court in Romesh Thappar v. State of Madras held:

“The court is thus constituted the protector and guarantor of the fundamental rights and it cannot consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights.”

As observed by S. P. Sathe in A. K. Gopalan v. State of Madras, although the Court conceived its role in a narrow manner, it asserted that its power of judicial

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137 Ibid at p. 3
139 Ibid at p. 4
140 AIR 1950 SC 124, para 5
141 AIR 1950 SC 27
review was inherent in the very nature of the written Constitution.\textsuperscript{142} Referring to Article 13 in \textit{A. K. Gopalan v. State of Madras}, the Supreme Court said:

“The inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislature enactment, the court has always the power to declare the enactment to the extent it transgresses the limits invalid.” \textsuperscript{143}

When the Supreme Court has assumed an activist attitude as protector of fundamental rights then whether such fundamental rights can be waived by the citizens. Answering in negative in \textit{Basheshwar Nath v. Income-tax Commissioner} \textsuperscript{144} the Supreme Court said that the doctrine of waiver is not applicable in India. In this regard N. H. Bhagwati and K. Subba Rao, JJ. said:

“It is not open to a citizen to waive his fundamental rights conferred by Part III of the Constitution. The Supreme Court is the bulwark of the fundamental rights.” \textsuperscript{145}

The Court justified the non-inclusion of the American doctrine of waiver by making a distinction between the fundamental rights under the US Constitution and the fundamental rights under the Indian Constitution. Under the US Constitution fundamental rights are classified as those enacted for the benefit of the individual and those enacted in public interest or on grounds of public policy. The doctrine of waiver is made applicable to those fundamental rights enacted for the benefit of individual. But under the Indian Constitution there is no such distinction between the fundamental rights. The Court therefore held that there is no justification

\textsuperscript{142} S. P. Sathe, \textit{Judicial Activism in India: Transgressing Borders and Enforcing Limits}, 2\textsuperscript{nd} ed., (New Delhi: Oxford University Press, 2002), p. 4
\textsuperscript{143} AIR 1950 SC 27
\textsuperscript{144} AIR 1959 SC 149
\textsuperscript{145} Ibid at para 32
whatever for importing any notions from the United States or the authority of cases
decided by the Supreme Court there in order to whittle down the plenitude of the
fundamental rights enshrined in Part III of the Constitution. 146 Emphasizing its role
as the protector of fundamental rights N.H. Bhagwati J., said:

“Ours is a nascent democracy and situated as we are socially,
economically, educationally it is the sacred duty of the Supreme
Court to safeguard the fundamental rights which have been for the
first time enacted in part III of our Constitution.” 147

Through judicial activism the Supreme Court has asserted its role as the
ultimate interpreter of the Constitution. Such observation was made by P.N.
Bhagwati J., in State of Rajasthan v. Union of India in the following words:

“This Court is the ultimate interpreter of the Constitution and
to this Court is assigned the delicate task of determining what is the
power conferred on each branch of Government, whether it is
limited, and if so, what are the limits and whether any action of that
branch transgressed such limits. It is for this Court to uphold the
constitutional values and to enforce the constitutional limitations.
That is the essence of the rule of law.” 148

The Supreme Court emphasized its role as a liberal interpreter in Pathumma
v. State of Kerala 149 and in Maneka Gandhi v. Union of India. 150 In Pathumma`s
case 151 the Supreme Court held that in interpreting the Constitution the judicial
approach should be dynamic rather than static, pragmatic and not pedantic and

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146 Ibid at para 2
147 Ibid at para 21
148 AIR 1977 SC 1361, para 143, p. 1413
149 AIR 1978 SC 771
150 AIR 1978 SC 597
151 AIR 1978 SC 771, para 5
elastic rather than rigid. In *Maneka Gandhi’s* cases \(^{152}\) the Supreme Court observed that the attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content by a process of judicial construction.

In interpreting the fundamental rights, the Supreme Court has displayed a judicial creativity of a high order.\(^ {153}\) “An instance of judicial creativity is in the expanding connotation being given to the term ‘other authority’ in article 12.”\(^ {154}\)

The Supreme Court expanded its role as the protector of fundamental rights with the expansive interpretation given to the term ‘State’. The wider the concept of ‘other authority’ the wider the coverage of fundamental rights. The judicial trend of expanding the horizon of ‘other authority’ began with *Ramana Dayaram Shetty* case.\(^ {155}\) In *Ramana Dayaram Shetty v. International Airport Authority of India* the Supreme Court laid down a broader test to determine as to whether a particular body is an agency or instrumentality of government. If a body whether it is a statutory corporation, a government company or even a registered society acts as an agency or instrumentality of government then it may be ‘an authority’ within the meaning of Article 12 of the Constitution. Consequently, the action of an agency or instrumentality of the government could be subject to judicial review for violation of fundamental rights. In course of time, through judicial creativity more and more

\(^{152}\) AIR 1978 SC 597, p. 622


\(^{154}\) Ibid at p. 37

\(^{155}\) *Ramana Dayaram Shetty v. International Airport Authority of India*, AIR 1979 SC 1628
bodies have been held to be authorities within the meaning of Article 12 of the Constitution.

Through judicial creativity the Court has involved in law making. The Court does not seek to conceal its law-creative role in the area of constitutional jurisprudence. It avowedly advocates that it seeks to play such a role.156 Such law-making role was openly acknowledged by Subba Rao CJ., in *Golak Nath*'s case in the following words:

“Our Constitution does not expressly or by necessary implications speak against the doctrine of prospective overruling. Indeed, Article 32, 141 and 142 are couched in such wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice….. To deny this power to the Supreme Court on the basis of some outmoded theory that the Court only finds the law but does not make it is to make ineffective the powerful instrument of justice placed in the hands of the highest judiciary of this country”.

The Constitution of India confers power on the Supreme Court under Article 32 to issue writs and orders in the nature of habeas corpus, mandamus, certiorari, prohibition and quo warranto. Similar powers are conferred on the High Court under Article 226 of the Indian Constitution. The Supreme Court can issue these writs for the enforcement of the fundamental rights and the High Courts can issue them for the enforcement of the fundamental rights and for ‘any other purpose’. The term ‘in the nature of’ and for ‘any other purpose’ are not specifically defined in the

Constitution. “This liberates the Supreme Court from a technical interpretation of these terms.” Judicial activism is, therefore, inherent under Article 32 and Article 226 of the Constitution.

In one of its earliest judgment in *T.C. Basappa v. T. Nagappa* the Supreme Court made it clear that the scope of the writs under the Indian Constitution is wider than that of the prerogative writs in England. That in view of the express provisions of the Constitution the Court need not now look back to the early history or the procedural technicalities of these writs in England nor be effected by any difference or change of opinion expressed in particular cases by English Judges. The Supreme Court through a liberal interpretation of Article 32 and Article 226 has expanded the scope of its writs under its jurisdiction. The writ of ‘continuing mandamus’ is an innovation of the Supreme Court’s law-making power under Article 32. The Supreme Court in *Vineet Narain v. Union of India* had issued the writ of continuing mandamus to ensure that the government agencies like the CBI and the revenue authorities perform their duties. The CBI had failed to perform their duties and legal obligations as they had failed to investigate the matter arising out seizure of the Jain diaries and to prosecute all persons involved in the Hawala transactions.

Article 142 and 144 are another provision of the Constitution which provide scope for judicial activism of the Supreme Court. The Constitution gives power on the Supreme Court under Article 142 to pass such decrees or orders as may be

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159 AIR 1954 SC 440
160 Ibid at para 6, p. 443
161 AIR 1996 SC 3386 at para 7, p. 3387
necessary for doing complete justice in the matter pending before it. Such orders includes orders for the purpose of securing the attendance of any person, the discovery or production of any document or the investigation or punishment of any contempt of itself.\textsuperscript{162}

The Constitution through Article 144 provides the mandate to the Supreme Court to enforce its decisions. Article 144 provides that all authorities, civil and judicial in the territory of India shall act in the aid of the Supreme Court. As observed by Durga Das Basu the mandate of Article 144 is not confined to Court alone. But it is also extended to the executive and the legislature which are bound by the Supreme Court’s interpretation of the Constitution. This makes the Supreme Court the final interpreter of the Constitution. It also gives legitimacy to judicial activism of the Supreme Court.

Again, according to Article 37 of the Constitution of India it shall be the duty of the State to apply the directive principles in making law though they are expressly made non-justiciable in a court of law. The judiciary has been held to be State\textsuperscript{163} hence there is an equal obligation on the judiciary along with the legislature and the executive to apply these principles in making law. Hence there arises scope for judicial activism under Article 37.

\textsuperscript{163} A.R. Antulay v. R.S. Nayak, \textit{AIR} 1988 SC 1531