INTRODUCTION

“A Constitution states or ought to state not rules for the passing hour, but principles for an expanding future” –

Benjamin N Cardozo

“The candid citizen must confess that if the policy of the Government upon the vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made in ordinary legislation between the parties in their personal actions, people would be ceased to be their own rules, having to that extent, practically resigned their own government into the hands of the eminent Tribunal”

Abraham Lincoln

1.1 PRELUDE

Delivering justice to a population of over two billion does not sound like and never will be an easy task. It however, becomes increasingly difficult in a country like India. The varied cultures, the environment, the languages and the religions of the people of this country are as balanced as walking a tight rope; one foot wrong can send the entire country in disarray. Seemingly overlapping powers of the administrators of the nation can cause some serious trouble in this regard.

The Indian democracy follows the British model of the Parliamentary government which represents the will of the people. There are three distinct activities in every government through which the will of the people are expressed. These are the legislative, executive and judicial functions of the government. The legislative organ of the state makes laws, the executive enforces them and the judiciary applies them to the

3 Preamble to the Constitution of India clearly shows this.
specific cases arising out of the breach of law. The doctrine of Separation of powers stated in its rigid from means that each of the organs of the constitution should operate in its own sphere and there should be no overlapping between their functioning. Thus, even when acting in ambit of their own power, overlapping functions tend to appear amongst these organs. The framers of Indian Constitution never intended to adopt this doctrine in its absolute from rather they preferred the American doctrine of limited government to the British doctrine of absolute Parliamentary sovereignty.

It is widely accepted that for a political system to be stable, the holders of power need to be balanced off against each other. The principle of separation of powers deals with the mutual relations among the three organs of the government. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principle. This doctrine signifies the fact that one person or body of persons should not exercise all the three powers of the government. The same was expounded by the Montesquieu as-“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 justly be pronounced the very definition of tyranny”.

Even Dr. B.R. Ambedkar in his speech before the Constituent Assembly expressed his views regarding putting checks on the authority of the various organs of the Government. To quote:

“__ In fact, the purpose of a Constitution is not merely to create the organs of the State but to limit their authority, because, if no limitation was imposed upon the authority of the organs, there will be complete tyranny and complete oppression….. It would result in utter chaos.”

The study of various constitutional provisions shows that theoretically the functions of different wings have been clearly differentiated in such manner so as no

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4 This doctrine is traceable in the writings of Aristotle, Locke but actually, we owe these principles to French philosopher, Montesquieu, who explained it in his work L’ESPIRIT DES LOIS in 1748. For more details see C.K.Thakker, Administrative Law (1992) p.31.
6 See D.D.Basu, Introduction to the Constitution of India (1987) pp 36-37.Moreover, unlike America, in India the framers of the Constitution did not accord Constitutional status to this doctrine, as is evident from the constitutional scheme which does not embody any formal and dogmatic division of powers.
one organ assumes the functions of other organ. For instance, the legislature cannot
discuss the conduct of any judge of the Supreme Court or of a High Court in discharge
of his duties except in matters of removal of judge through impeachment.\(^9\) Similarly,
the Courts are prohibited to enquire into the validity of the proceeding of the
legislatures.\(^10\) Further clause (2) of Articles 122 and 212 respectively, places the
Speaker and any member of the House Beyond Court’s jurisdiction in exercise of his
powers regarding regulating procedure or the conduct of the business or for
maintaining order in the House.\(^11\) This suggests that in a dispute over the existence and
extent of his powers, the Speaker’s decision must be given the highest respect but it
cannot be final in all circumstances.\(^12\) Articles 121, 122, 211 and 212 plainly speaking,
express the doctrine of separation of power which requires non-interference by the
legislature and judiciary in each other’s domain.

But what powers and functions, practically belongs to who is a legal question,
which in our legal system is determined by the courts. Therefore, practically it is very
difficult to strictly adhere to doctrine of separation of powers minus checks and
balances.\(^13\) Though in India strict separation of powers just as in USA is not followed
but, the principle of ‘checks and balances’, a part of this doctrine is. Therefore, none of
the three organs can usurps the essential functions of the other organs, which constitute
a part of ‘basic structure’ doctrine so much so that, not even by amending the
constitution and if any such amendment is made, the court will strike it down as
unconstitutional.\(^14\)

Judicial institutions have a sacrosanct role to play in a constitutional democracy
like India. Under Article 32 a person can approach the Supreme Court for violation of
any of his fundamental rights as Article 13(2) also states that if a law passed by the
state affects a fundamental right, it may be declared null and void by the Supreme

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\(^9\) See Article 121 & 211 of the Constitution.
\(^10\) See Articles 122 (1) & 212 (1) of the Constitution.
\(^11\) See Articles 122 (2) & 212 (2) of the Constitution.
\(^12\) For instances In Re keshav Singh’s case the apex court said in relation to Article 122 (1) that “it
exempts from judicial scrutiny only irregularities in the legislative proceedings. But if the impugned
procedure is illegal and unconstitutional, it’ll be open to be scrutinized in a court of law” See AIR 1965
SC 745.
\(^13\) According to H.R. Wade the objection of Montesquieu – was against accumulation and monopoly
rather than interaction. Hence, mutual restraint in the exercise of powers by the three wings of the State
is soul of these doctrine of separation of powers. See I.P Massey, Administrative Law (2001) p.38.
The High Courts are empowered with wider jurisdiction to entertain any petition not only for the enforcement of fundamental rights alone but also for any other purpose. The Supreme Court can also decide whether Parliament or State Legislature has made any law beyond its allotted powers. Even Parliament can enlarge jurisdiction and powers of the Supreme Court with respect to any matters in the Union List by enacting law to this effect and also through law give it power to use it writ jurisdiction under clause (2) of Article 32 for any other purpose. Further, power is vested in the Supreme Court to pass such decree or order as is need for doing justice in any case or matter pending before it. This provision containing inherent powers of the court contains no limitation regarding the case or circumstances which necessitates the court to exercise its power nor does it lay down any conditions to be satisfied before such power is exercised. But the courts itself through various judgments have said that Article 142 could not be used to build a new edifice where none existed earlier so to achieve something indirectly, which could not be achieved directly.

Apart from their traditional function of dispute resolution between the parties inter-se, such institutions are also required to act as a balancing mechanism between the conflicting pulls and pressures operating in the society. The only logic behind the doctrine of Separation of Powers is of polarity so to avoid absolutism of one organ of the government. Hence, this doctrine has been adopted along with its checks and balances without which no Constitution can survive today. An equally true is the fact that courts of law, on the other hand, are the creatures of the Constitution and also the instrumentalities for fulfilling the ideals of the state enshrined therein. While recognizing the same, the framers of the Indian Constitution took infinite care to provide for an independent and impartial judiciary as the interpreter of the Constitution and as a custodian of the citizen’s rights, by endowing it with the power of

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15 Articles 13(2) and 32(1) & (2) of the Constitution.
16 Article 226 of the Constitution.
17 Article 131 of the Constitution.
18 Articles 138 & 139 of the Constitution.
19 Article 142 of the Constitution.
21 See views of Chief Justice Ray (as he then was) & of Justice Chandrachud (as he then was) in case of Indira Gandhi v. Rajnarain AIR 1975 SC 2299; Also see on separation of powers State of Bihar v. Balmukund Shah AIR 2000 SC 1296; Also see Ram Jawaya v. State of Punjab AIR 1955 SC 549.
‘Judicial Review’ in order to keep all the other organs within the purview of the Constitution. Broadly speaking judicial Review comprises of three aspects namely: (a) judicial review of legislation action, (b) judicial review of administration and (c) judicial review of judicial decisions. But judiciary cannot exercise power of judicial review in relation to wisdom of legislative policy. This doctrine being highly complex and ever growing subjects, its scope and extent varies from case to case. In fact, ever since the commencement of our Constitution, the legitimacy of the power of courts vis-à-vis legislature has been questioned many times And analysis of the manner in which the framers of our Constitution incorporated provisions relating to the judiciary indicate that they were greatly concerned with securing the independence of judiciary and all their attempts were directed to ensure that the judiciary and all their attempts were directed to ensure that the judiciary would be capable of effectively discharging its wide power of judicial review, to protect rights of the Indian people. As rightly the term ‘judicial review’ acclaimed by Henry J. Abraham, is “the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon a law or any other action by a public official that it deems to be in conflict with the basic law, in the United States, its constitution.”

Many believe that the judiciary, under the guise of interpreting the law, goes a step beyond, and ends up giving the country new binding law, which is usually different from the existing one. This is called judicial activism. In a society undergoing fast social and economic change, Black letter law tradition interpretation of the constitution would stultify. Judicial activism is therefore inherent in judicial review. The Court interprets the provision of constitution liberally and in the light of the values underlying it thereby keeping the constitution abreast of the times. A Court through a dynamic interpretation gives a new meaning to a provision, so as to suit the changing social and economic condition or expanding horizons of the rights of the individuals, is

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22 Article 13 provides for judicial review of all laws both past & future.
23 From the website: http://www.lawyersclubindia.com/articles/JUDICIAL-ACTIVISM-IN-INDIA-604.asp(last accessed on 27th April, 2010).
24 M.P.Jain, Indian Constitution Law (Wadhwa and Company Nagpur, New Delhi, 5th edition, 2003, Vol 1) p. 120.
27 Ibid.
said to be an activist court. Judiciary’s primary duty is to protect the rule of law and uphold the Constitution.\textsuperscript{28}

In a democracy, the role of judiciary is crucial. Judiciary is a faithful keeper of the constitutional assurances. An independent and impartial judiciary can make the legal system vibrant. Our Indian judiciary can be regarded as a creative judiciary. Credibility of judicial process ultimately depends on the manner of doing administration of justice. Justice K. Subba Rao explains the function of the judiciary as thus\textsuperscript{29}

- It is a balancing wheel of the federation;
- It keeps equilibrium between fundamental rights and social justice;
- It keeps all forms of authorities within the bounds;
- It controls the Administrative Tribunals;
- The judicial branch is invested with the power of being the final arbiter of constitutional disputes under many democratic Constitutions. India, which has modelled its Constitution, to some extent, on the US Constitution, falls in this category.\textsuperscript{30}

Justice – Social, economic and political is clearly laid down in the preamble as the guiding principle of the constitution. Social justice is the main concept on which our constitution is built. Part III and IV of Indian constitution are significant in the direction of Social Justice and economic development of the citizens. Judiciary can promote social justice through its judgments. In other sense, they are under an obligation to do so. While applying judicial discretion in adjudication, judiciary should be so cautious. And prime importance should be to promote social justice.\textsuperscript{31} In these circumstances a judge is compelled to lay down a new rule of interpretation, leaving

\textsuperscript{28} In an interview said by Former Chief Justice, Justice K.G.Balkrishnan , See- “India Today”, January 22, 2007.
\textsuperscript{29} From the website: http://www.publishyourarticles.org/enp/articles/functions-of-judiciary.html (last accessed on 27th April, 2010).
\textsuperscript{30} From the website: http://www.preservearticles.com/.../6-essential-functions-of-the-judiciary-system in India (last accessed on 27\textsuperscript{th} April, 2010).
\textsuperscript{31} Ibid.
policy to the elected organs of democracy. According to Justice Cardozo, He (judge) legislates only between gaps. He fills the open spaces in the law.\textsuperscript{32}

According to former Chief Justice of India A.H Ahmadi, “Judicial Activism is necessary adjunct of the judicial function since the protection of public interest as opposed to private interest happens to be its main concern”\textsuperscript{33} Cardozo highlighted the role of subjective elements on the nature of judicial function, viz., whether judges merely declare the law or whether they in fact make law. Today it is accepted universally that when a legal system entrusts the judiciary with such important function as judicial review of legislation and administration action, it inevitably makes the judge a lawmaker.\textsuperscript{34}

The Supreme Court had itself suggested in one of the early and landmark case \textit{Bandhua Mukti Morcha v. Union of India}\textsuperscript{35} that there is a great merit in the court proceedings to decide an issue on the basis of strict legal principle and avoiding carefully the influence of purely emotional appeal. For that alone it gives the decision of the court a direction which is certain and unaltering, and that especial permanence in legal jurisprudence which makes it a base for the next step forward in the further progress of the law. Indeed both certainty of substance and certainty of direction are indispensable requirement in the development of the law and invest it with credibility which commands public confidence in its legitimacy.\textsuperscript{36}

The Court must take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the executive and the legislature by the constitution. Clear violation of constitutional or statutory provision must be interfered by the apex judiciary. If a considered policy decision has been taken which is not in conflict with any law or is not malafide, it will not be in Public Interest to require the court to go into and investigate those areas which are the function of the executive.\textsuperscript{37} When two or more options or views are possible and after considering them the government takes a policy decision it is then not the function of the court to

\textsuperscript{34} \textit{Supra.} note, 32.
\textsuperscript{35} \textit{Bandhua Mukti Morcha v. Union of India} 1984 1 SCC 161, 234
\textsuperscript{36} \textit{Ibid.}
go into the matter a fresh and in a way, sit in appeal over such a policy decision *Balco v. Union of India*\(^{38}\). Whatever method adopted by judiciary in adjudication, it must be the procedure known to the judicial tenets. A fearless, independent, incorruptible and non political judiciary, exercising the formidable power of judicial review with wisdom, is vital to any democratic country. An independent judiciary is the very heart of a republic. The foundation of democracy, the source of its perennial vitality is the condition for its growth and the hope for its welfare.\(^{39}\)

The concept that the judges have to interpret the constitution strictly what is provided by framers of the constitution, was no more acceptable to the Indian judiciary because law is not static but is changing due to change taking place in the society. It has to adjust as per the change taking place because of various factors. The Supreme Court of India had started exercising its power of judicial review so as to suit the need of changing society. In *S. P. Gupta, v. Union of India*\(^{40}\), Justice S. Ratnavel Pandian, & Justice Kuldip Singh observed – “The proposition that the provisions of the Constitution must be confined not only to the interpretation which the framers, with the conditions and outlook of their time would have placed upon them would not be tenable and is liable to be rejected for more than one reason - firstly, some of the current issues could not have been foreseen; secondly, others would not have been discussed and thirdly, still others may be left over as controversial issues, i.e. termed as deferred issues with conflicting intentions. Beyond these reasons, it is not easy or possible to decipher as to what were the factors that influenced the mind of the framers at the time of framing the Constitution when it is juxtaposed to the present time. The inevitable truth is that law is not static and immutable but ever increasingly dynamic and grows with the ongoing passage of time.” It is not enough merely to interpret the constitutional text. It must be interpreted so as to advance the policy and purpose underlying its provisions. A purposeful meaning, which may have become necessary by passage of time and process of experience, has to be given. The Courts must face the facts and meet the needs and aspirations of the times. The Constitution has not only to be read in the light of contemporary circumstances and values; it has to be read in

\(^{38}\) *Balco v. Union of India* (2002) 2 SCC 333.


such a way that the circumstances and values of the present generation are given expression in its provisions.”

Provision of “amendment of constitution” contends in part XX is the most distinguished feathers. It is this provision which became highly controversial topic and set conflict between parliament and judiciary as evidence by Shankari Prasad, Golaknath and Kesavanand Bharti case.

Judges in India were brought up in the British tradition of parliamentary supremacy and therefore rarely questioned the validity of the legislative actions except on the ground of being ultra-virus. However, they scrutinized the acts of the executive with vigilance and held them invalid where they overstepped the jurisdiction vested in them. The courts were supposed to interpret the Constitution not in terms of what it ‘ought to be’ but what the provisions are as ‘it is’.

Soon after the adoption of Bill of Rights in the Indian Constitution with the passing of Government of India Act, 1935, the nation gradually started witnessing a gradual shift from the traditional judicial role to a more participatory one. Consequently, the judiciary started playing an ‘active’ role in sharing the constitutional commitments adopted by way of interpreting the cold letters of the Constitution in a much profound and object oriented manner.

1.2 SOME IMPORTANT DEVELOPMENTS

The following illustrations reflect the trends of ‘Judicial Activism’ as exemplified by some decisions and orders of the Supreme Court.

a. Since 1973, the judiciary started using power to nullify, even an amendment made in the constitution by the amending body on substantive grounds, if it changes the basic structure or framework of the Constitution.

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41 Ibid.
42 Article 368 of the Constitution of India.
43 Shankari Prasad v. Union of India AIR1951 SC 458.
46 Ibid.
b. The undoubted privileges of the Legislature even in respect of their internal proceedings have been brought under the purview of judicial review\(^47\).

c. Power of ‘Judicial Review’ as exercised by the Supreme Court and the High Court has been recognized by these courts to be an unalterable basic structure of the Constitution\(^48\).

d. The concept of ‘state’ for the purpose of enforcement of fundamental rights has been widened by successive judgments of the Supreme Court so as to include all public, quasi-public authorities even involved in commercial activities as state had extended its role of promoting for public corporation\(^49\).

e. The courts have broadened the scope of ‘locus standi’ in the Public Interest Litigation matters in the early Eighties.

f. The Supreme Court has often resorted to extended interpretation of the constitution, which gave birth to new legislation, by virtue of its power under Art. 141 to fill the vacuum in changing need of the society which the legislature ought to have done\(^50\).

1.3 AREA OF CONCERN

It would be very difficult to do justice to the ‘subject matter’ of this work in full, if all the areas of the Constitutional Law where judicial activism has been manifested and felt are to be studied in detail. Thus some of the areas in which the judicial activism is felt more and has made immense contribution for their development, shall be excluded either for the sake of limiting the scope of this study or in view of the inconsistency of the Judicial Output. These areas include the radical change in the judicial interpretation of Article 14 ushered in by the Supreme Court in the early 1980’s, the assumption of primacy by the judiciary; in the matter of appointment and transfer of the Supreme Court and the High Court Judges, the

\(^47\) In re Keshav Singh AIR 1965 SC 745.
\(^48\) Indira Nehru Gandhi v. Raj Narain (1975) SCC Sup.1
\(^49\) See Art.12 of the Constitution of India.
\(^50\) The famous exercise of this sort undertaken by the Supreme Court could be seen in Vishakha v. State of Rajasthan (1997) 6 SCC 241.
expansion of the scope of ‘other authorities’ under Article 12 regarding the definition of ‘State’ for the purpose of enforcement of the fundamental rights, and last but not the least the power of judicial review, arrogated to itself by the Supreme Court and High Courts, to decide upon the validity of imposition of State emergency under Article 356 of the Constitution. However, a passing reference may be made to many of these areas, whenever, the need arise, during the course of writing this Thesis.

1.4 OBJECT OF THE STUDY

The Main Objectives of this study are as under:

1. To evaluate and assess the role of Judiciary in modern constitutional states;
2. To discuss and analyze the concepts of Judicial Power, Judicial Review, Judicial Activism and Separation of powers in general with particular reference to India;
3. To evaluate the constitutional position of the Supreme Court of India, its powers and functions, the concept of Independence of Judiciary and it’s conflict with two organ as visualized by the framers of the constitution, as contained in the Constitution of India, 1950 and as seen after the 1980’s due to the activist behaviour;
4. To compare and contrast the Judicial Behaviour of the Supreme Court vis-à-vis specific areas in constitutional law before and after the 1980’s; Judicial Activism of the Supreme Court, its origin in India, evolution and reasons for its growth, justification and the problems and perils posed by it, & in the light of the decisions given by the Supreme Court in the post-1980 era;
5. To ascertain the problems and perils of judicial activism, and also to suggest ways and means to ensure and uphold the spirit of constitutionalism etc.
6. Role of the Supreme court in power of law making and it’s conflict with the law making power of the legislature

These objectives are proposed to be secured mainly by analyzing the judicial behaviour and trends based on the judgments delivered by the Supreme Court and the views of Higher Judiciary and Legislatures on all above the mentioned areas.
1.5 **RELEVANCE OF THE STUDY**

The present study has attempted to harmonize the concept of ‘Judicial Activism’ with the malady of ‘Judicial Overreach’. In the light of above discussion, the following issues can be listed which in turn are vital and retain higher relevance for a health democracy as well as a smooth functioning of the Constitutional machinery. Such issues are:

- Whether, under the constitutional scheme, judges make law? If yes, whether such lawmaking power at parity with the legislature’s power to enact law.
- Given the role ‘Judicial Activism’ has played in developing the constitutional jurisprudence of India, whether it is constitutionally justified for the judiciary to encroach in the domain of legislature?
- Whether it is justified to resort to ‘Judicial Activism’ as a solution for every anomaly that arises as a result of the mal-functioning or mis-functioning of other state organs?
- How far has the Indian Constitution adopted the Doctrine of Separation of Powers?

1.6 **SIGNIFICANCE OF THE STUDY**

The modern trends of increasing judicial interference purported to be done under ‘activist’ judicial process throw open certain vital questions upon constitutional jurisprudence of India. They offer a situation of tug-of-war between certain assumed notions of justice on one hand and the sanctity of the constitutional spirit and values on the other. With its sacrosanct role, the Indian Judiciary is often stigmatized of overstepping its constitutional limits, of overreaching in the domain of other coordinate organs, of behaving like emperors and of substituting its own will to that of the legislature, the correct interpretation of which is its paramount function.

This is further substantiated if an attempt is made to analyze catena of decisions of recent origin rendered by the Supreme Court where from time to time, either with zeal to do justice or in an urge to satisfy its hunger for power, the court has interfered in the domain of the executive and the legislature and has come up with filling up gaps left open by making laws wherever required in a manner similar to that of the
legislature or by securing compliance by the executive by passing giving directions. Cases like Vishakha\textsuperscript{51}, D.K.Basu\textsuperscript{52}, Laxmi Kant Pandey\textsuperscript{53} etc. may be cited to name a few which illustrate the point.

1.7 **UTILITY OF THE STUDY**

This research work has been carried out keeping in mind the various aspects of activist role of judiciary in the Indian context. Judicial activism characterized by moderation and self-restraint is bound to restore the faith of the people in the efficacy of the democratic institutions which alone, in turn, will activate the executive and the legislature to function effectively under the vigilant eye of the judiciary as ordained by the Constitution. The utility of the study is in arriving at an understanding of the effectiveness of the judicial activism as a magical wand in the hands of the judiciary in delivering justice to the masses and securing the public interest. It will help to strike a balance between two organs of the State and society development for acquiring the need of an hour. This study will also be useful to academicians and policy makers besides students and professionals.

1.8 **RATIONALE OF THE STUDY**

Judicial Activism plays important role as a law maker apart from adjudication. 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. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of the State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social economic justice.

\textsuperscript{51} Ibid.
\textsuperscript{52} D.K.Basu v. State of West Bengal AIR 1997 SC 3017.
\textsuperscript{53} Laxmi Kant Pandey v. Union of India AIR 1987 SC 232.
Laws enacted by the legislature must be implemented by the executive and their interpretation is within the province of the judiciary. That is the reason why judiciary has always been treated as the least dangerous branch and sometimes it is also described as the weakest of the three branches with no control either on the purse or on the sword. By reason of judicial activism, much good or harm could be brought about by the Judges by resorting to innovative interpretation. Decisions rendered by courts generally receive public acceptance in every democracy adhering to the concept of rule of law. Even so, the prescriptive role of the judiciary sometimes receives public approbation because the role played by it sustains what the Constitution mandates and averts the evils the basic document seeks to prohibit.

The study aims at critically examining the depth and extent of power of judiciary & transgressing the borders into the domain of other organs for the welfare of the society.

1.9 SCOPE OF THE STUDY

The study aims at arriving at an understanding the role of judiciary in modern scenario and finding solutions to some important questions: In this ongoing complex of adjudicatory process, *the role of the Judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and reality.* Therefore, the judge is required to take judicial notice of the social and economic ramification, consistent with the theory of law. Whether the creativity and judicial activism of the judiciary does not some time cross the thin invisible line of separation of powers and usurps the powers of the other two organs governance i.e. legislatures and executives. Does judiciary evaluate the practicability of implementation of its decisions by the other two organs of governance while adjudicating e.g. Delhi CNG case? Whether judiciary requires self restraint when dealing with PILs and last but not the least, to what extent Judiciary has been able to live up to the expectations and deliver justice to the masses and actually served as the need of an hour.

1.10 HYPOTHESES OF THE STUDY

Keeping in view the broad objectives of this research work, certain hypotheses have been formulated:
1. Judicial Activism is the result of the failure or indifference on the part of the two political organs of the state namely the legislature and the executive, to discharge their constitutional responsibilities assigned under the constitution.

2. Judicial Activism of the Supreme Court is nothing but the conscious exercise by the judges of the power of judicial review to meet the changing needs of the Society.

3. Along with the legislatures and the executors, the judicial branch of the state, by its judicial activism has contributed more for the development for the specific areas in the constitutional law after 1980.

4. The judicial Activism has been primarily instrumental in making the Supreme Court of India as the Supreme Court of the Indians.

5. The Indian nation is obsessed with Judicial Salvation. Judicial Activism has been particularly beneficial in the protection and enforcement of civil liberties and personal freedom of the people.

6. The Supreme Court, by resorting to judicial legislation and judicial execution in the guise of judicial activism is trying to achieve supremacy of the judiciary rather than establishing the supremacy of the constitution.

7. The judiciary in modern times not only interprets the existing law but also makes a law. Thus the role of the court has changed from merely interpreter of law to maker of law.

8. An unfettered and unrestrained judicial activism is detrimental to the constitutionalism in a democratic country like India.

9. The Judicial Activism of the Supreme Court is indispensable to the Indian system of government and constitutionalism.

10. There can be ‘Judicial Activation’ without ‘Judicial Overreach’. However, instances where the two concepts overlap each other, must be dealt with judiciously by blowing the judicial whistle with care and caution instead of usurping the limits of powers and disturbing the delicate balance between the organs of the state which are required to function in harmony with each other.

1.11 RESEARCH METHODOLOGY

The research is primarily doctrinal, concerned with the study of legislative measures and judicial trends with special reference to the “Judicial Activism vis-à-vis
Judicial Overreach with respect to legislative function of the Indian Parliament”. As the topic has a vast information base with regard to the Constitution of India. The methodology accordingly involved review of relevant literature, critical & analytical study of the theoretical, practical, legislative and judicial aspects. In pursuing this study, I have followed the Doctrinal approach. However, as the legal research may not exactly be done in any specific and recognized scientific method as in the case of research in social sciences, a multi-pronged approach is intended to be adopted, depending on the necessity. As the topic is from Constitutional Law, historical Approach to study the position, role of judiciary and judicial review is felt necessary. A reference to the Constituent Assembly Debates shall be made to find out the intention of the framers of the Constitution in certain crucial areas of the study. As regards the evaluation of the position of the Judiciary in India, the method adopted shall be purely Historical whereas with regard to the Analysis of the Judicial Behaviour of the Supreme Court of India in specific areas of the Constitutional Law of India, the methodology adopted shall be Analytical and Critical.

Judicial Behaviours have always been regarded as a national autobiography of any nation’s civilization and culture. Therefore, the need of a scientific study of the various determinants which go into the shaping of judicial behaviour cannot be over emphasized. Unfortunately very little endeavour appears to have been made to undertake such a study.

The study involves reference to a plethora of cases to ascertain the dicta lay down therein; hence doctrinal or empirical method shall be followed. On the whole, the work shall be mainly based upon views of Jurist, library based and doctrinal in nature with traits of historical and analytical methodology. The relevant material has thus been collected from various primary and secondary sources. Material and information has been collected from both legal sources and socio-economic sources like original judgments of various National and International Courts, National and International Journals, Research Papers presented at National and International Seminars and other published works, websites, etc.
1.12 LIMITATIONS OF THE STUDY

All studies have inbuilt restrictions and limitation being affected by the paucity of time and other resources. Any attempt to present a comprehensive study shall be inhibited by the fast moving world of law and ongoing judicial decisions. This topic is of such a nature that an individual like the researcher has to face the various limitations. The study involves research into an ever changing role of judiciary for the socio – economic welfare of the society. For researcher it was difficult to collect primary data for this study and as such she has to depend very much on the secondary data. Much dependence has been made on the records of the parliament and of other legislative bodies and on the journals, periodicals, Articles and books. In the aforesaid circumstances and under the aforesaid limitations the researcher has focused her studies on the basis of case laws and books and periodicals. A sincere attempt has been made to overcome these limitations and present a study that is relevant in the areas of time and content.

1.13 LITERATURE REVIEW

The source of research includes, inter alia, published books on Constitutional Law of India, newspaper, national and international periodicals, magazines, journals published by the Indian Law Institute, official gazettes with respect to the latest amendments in the Constitutional of India, AIR, latest judgments which have been decided by the SC of India, HC of States, cases relating to the matter Judicial Activism.

The use of the computer is an essential instrument while doing research. Data and material has also been collected through the Internet connection. There is some information with respect to “Judicial Activism vis-à-vis Judicial Overreach with respect to legislative function”, which are available on Internet. While doing research, the Computer has an important role in feeding in all collected data.

By way of library research, the methods are analysis of historical records, and analysis of documents. All types of old and latest information with respect to judicial law making are available in the library records. Further, with respect to the field research it involved views of Judges, case studies, particularly from legal fraternity make them into a jury, visits to institutions with respect to law making authorities,
attending seminars, international conferences and taking critical instructions from time to time from the guiding teacher.

Descriptive, analytical and critical research applied to sources for the uses of facts or information already available and analysis to make a critical evaluation of the material.

**The Sources of Research**

**Primary Sources**: The primary sources for this study have been:

(i) The various development in the field of the Constitution of India, after 1980 in particular;

(ii) The views expressed by various members of the Constituent Assembly in the form of Constituent Assembly Debates (CAD)’

(iii) The decisions rendered by the Supreme Court of India and other High Courts, reported in different Law Journals like the Supreme Court Cases, All India Reporter, SCALE and Judgment Today and

(iv) Reports of Inquiry Commissions, Law Commission of India and Parliamentary Committees etc.

The **Secondary sources** that have been referred to and relied upon are-

(i) Various Treatises on the Constitutional Law of India;

(ii) Leading works on Judiciary in general and judicial activism in particular;


Apart from these secondary sources, an effort has been made to refer to various memorial lectures, extension lectures, inaugural and valedictory addresses given by eminent personalities related to the administration of justice and judiciary.
1.14 REVIEW OF THE CHAPTERS

The research work is concerned with an analytical & critical study of Judicial Activism vis-à-vis Judicial Overreach with respect to legislative function in Indian Parliament, the evolution of Judicial Activism in India, relation between the legislature and adjudication since the inception of the Constitution to date is the principal issue in Research. The various developments that took place during the various decades of the republic and the various developments effect on the nation. The power, scope and restrictions imposed by the Constitution on their agencies to achieve objective of socio-economic justice, and the limitations placed on them have been studied. The progress and success achieved by judicial pronouncements and critical thought process caused by judicial jurisprudence. There must be desirability of harmonious relations amongst the legislature, the executive and the judiciary. The need of the society will be fulfill by activist judiciary for filling vacuum gap. Will their efforts wipe out the tears of every eye and will their harmonious functioning bring prosperity to the nation and ultimately to the people of this country? Whether the judiciary is encroaching into the jurisdiction of legislature and gives contrary judgments? Does judiciary make laws while interpreting Constitution in real sense?

To study the various aspect of the entire study is divided into eight different chapters. Even though every chapter is capable of being a separate topic, all the chapters form a part of this entire study. A brief description of the contents of each chapter is given below.

CHAPTER I - INTRODUCTION

With the framing of the Constitution of India, the three wings of effective governance came into being, namely the legislature, the executive and the judiciary. The Constitution provides for separation of powers and hence demarcates the powers and areas of all these three machineries. However sometimes with the failure of the legislature and the executive, the separation of power remains a theory only in the text book and the third wing of governance, the judiciary assumes powers unprecedented for under the name and guise of judicial review, which is a very basic feature of the Constitution of India. The Indian judiciary has taken upon itself the task of ensuring maximum freedom to the masses and in the process, to galvanize the executive and the
legislature to work for public good. However, this changing stance of the judiciary from moderate to active role has invited wrath from some sections of the society, criticism from some others and support and cheers from still other sections. Some political scholars feel that the judiciary is usurping powers in the name of public interest, while according to others, judicial activism and interference is actually preventing the executive from going astray.

The first chapter also deals with work which is initiated by providing an introduction about the subject matter and making others aware on various segments of the study viz- scope, utility, limitation. It also explains the importance of the study and specifies the postulations which form the basis of the study. Moreover it gives the information about the objects which it seeks to achieve, last but not the least it provides for the methodology adopted in completion of the whole research work. Thus, this chapter outlines the need for judicial activism for democratic country like India where there is a vacuum in the legal field.

CHAPTER II - CONCEPTUALIZATION OF CERTAIN TERMS & EXPRESSION

The Second chapter deals with the explanation of certain terms like Judicial Activism, Judicial Review, Judicial Restraint, Judicial Power, Judicial Passivism, Separation of Powers, and Public Interest Litigation & Judicial Overreach without which study will not be complete.

CHAPTER III - EVOLUTION AND GROWTH OF JUDICIAL ACTIVISM IN INDIA

For a very long time, the Indian judiciary had taken an orthodox approach to the very concept of judicial activism. However, it would be wrong to say that there have been no incidents of judicial activism in India. Some scattered and stray incidents of judicial activism took place from time to time.

Judicial activism as the modern terminology denotes, originated in India much later. This origin can be traced to the Theory of Social Want. It was due to executive abuses and excesses that the judiciary had to intervene during the course of legal proceedings. Let us look into the rationale behind such intervention. After independence from the Raj, the executive has always looked upon the judiciary as a hostile branch of the State. This view gained more momentum and popularity when the
bureaucracy degenerated into a system for personal and not public gains. Exploitation and corruption became inbuilt in the present political system. The masses were oppressed beyond imagination by the unbridled actions by Money power, Muscle power, Media power and Ministerial power (B. Venkatachalapathi, 1998). In this scenario, some emergency situations arose which could not wait for the Parliament for its looking into. Hence, it became a responsibility of the judiciary to do something to provide relief to the oppressed masses of the society. In *Sunil Batra v. Delhi Administration*, Justice V. R. Krishna Iyer described the situation in the following words: “Though legislation was the best solution, but when lawmakers take for far too long for social patience to suffer. Courts have to make do with interpretation and curve on wood and sculpt on stone without waiting for the distant marble.” Therefore, in the historic case of *Mumbai Kamghar Sabha v. Abdul Bhai*, the Apex Court introduced the doctrine of judicial activism, though without the nomenclature. The theory of judicial activism received impetus in the case of *Maneka Gandhi v. Union of India*, where the Apex Court substituted the due process clause in Article 21 instead of ‘procedure established by law’ in order to bypass the absolutism of the Executive and its interference with individual freedom. In course of time, the PILs carried on with the task of unearthing many scams, providing justice to the citizens and also to enhance their rights. In this chapter, an effort shall be made to trace the history of the Supreme Court of India, when judicial activism has removed the iron curtain of rigid procedure that stood between public justice and the court. The most remarkable case of Judicial Activism by the Indian Supreme Court was *Keshavanand Bharti v. State of Kerala*, wherein the Supreme Court restricted the power of Parliament to amend the Constitution by asserting that basic structure of the Constitution cannot be touched.

**CHAPTER IV – SEPERATION OF POWERS AND THE INDIAN CONSTITUTION**

This chapter deals with the very first objection that ousts the constitutionality of ‘Judicial Activism’ is the concept of ‘*Separation of Powers*’ which suggests separation of governmental functions between the various organs in order to evade tyranny and achieve political liberty. The principle of separation of powers deals with the mutual

54 AIR 1978 SC 1548.
55 AIR 1976 SC 1465.
56 AIR1978 SC 853.
57 *Supra note.no.24.*
relations among the three organs of the government, namely legislature, executive and judiciary. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principle. This doctrine signifies the fact that one person or body of persons should not exercise all the three powers of the government. Though the very doctrine finds no strict adherence in the scheme of Indian Constitution, how far does the Constitution adopt it in essence is the real question which the present study undertakes under chapter IV. Further it shall also touch upon various other vital aspects of ‘separation of powers’ with a detailed analysis of its origin, genesis, its true precept etc.

CHAPTER V - SCOPE FOR ‘JUDICIAL ACTIVISM’ UNDER THE SCHEME OF INDIAN CONSTITUTION

Judges all over the world function as impartial and independent bringing meaningful judicial order and justice in a democratic manner. They are vested with great powers as envisaged through democratic convention as practiced in Great Britain or by constitutional provisions as in the U.S. and India. Judges enjoy wide jurisdiction in India conferred on them by the constitution. Within the broad Scheme of the Supremacy there are powers and autonomy in the executive and the legislature that are inviolable authority. Social justice is the main concept on which our Constitution is built which is clearly laid down in the preamble as the guiding principle of the Constitution. Part III and IV of Indian constitution are significant in the direction of Social Justice and economic development of the citizens. Judiciary can promote social justice through its judgments. In other sense, they are under an obligation to do so. While applying judicial discretion in adjudication, judiciary should be so cautious. And prime importance should be to promote social justice. It attempts to focus on the analysis of the powers which are constitutionally vested with the constitutional courts in India which, in turn, provide scope for the judiciary to behave in an ‘activist’ manner. It also focuses upon the manner in which such powers are crystallized and expanded by the judiciary by taking recourse to innovative interpretation.

CHAPTER VI - JUDICIAL ACTIVISM VIS-À-VIS JUDICIAL OVERREACH

The role of judiciary in the changing times has marked a significant shift from its traditional role to a more participatory one to cater to the changing needs of the society. Apart from its traditional role of dispute resolution, it discharges certain other vital functions within the constitutional scheme such as sole arbiter of the Constitution, the authoritative interpretation of the will of the people, the protector of fundamental rights of the citizens, and as a guardian to keep necessary checks upon constitutional transgressions by other organs of the state.

Under the constitutional scheme, judiciary has been amply endowed with powers to carry out these functions ranging, inter-alia, from issuing writs of certain nature to the entertainment of petitions by special leave etc. Further, new innovations resulting in a broad expansion of such powers also serve as a tool in the hands of judiciary to carry out its objectives manifested in the Constitution. The concept of PIL and its journey from rhetoric to a trusted court procedure also clarifies the point in this regard\(^6\).

In recent times, such an enormous expansion of unaccountable judicial power has attracted the attention of many since the change in its role; there has been a remarkable shift in the working pattern of the courts by virtue of which the judiciary is said to have occupied an ascendant position within the nation’s politics. What it could not do under the traditional pattern now seems evidently possible with growing judicial intervention in other spheres of state businesses.

An attempt is being made to examine and ascertain various differences, definitions given to the term ‘Judicial Activism’ by various legal scholars and jurists like Professor Baxi and Professor Sathe and further undertakes a detailed analysis of the factors which are responsible for the judiciary to behave in an ‘activist’ or ‘over-activist’ manner as the case may be. It further undertakes an exhaustive dimensional analysis of situations which cater a platform to ‘Judicial Activism’ for its development and lastly demarcates between ‘activism’ and ‘overreach’.

CHAPTER VII - JUDICIAL LAWMAKING IN INDIA: TRANSITION FROM “ACTIVISM” TO “OVERREACH”

This chapter deals with ‘Judicial Law Making’. A responsibility is cast upon the judiciary to evolve law in consonance with the changing needs and aspirations of society and to serve the cause of social justice. It is aimed at drawing a distinction between ‘adjudication’ and ‘legislation’ in the backdrop of the realist philosophy of law.

It highlights certain peculiar instances of judicial law making resulting in clear-cut ‘overreach’ in the legislative domain. ‘Judicial law making’ a responsibility is based upon judiciary to evolve law in consonance with the changing needs and aspirations of the society and to serve the cause of social justice. In India, Article 141 of the Constitution gives a constitutional status to the theory of precedents in respect of law declared by the Supreme Court.

The premise of the doctrine of separation of powers is that the Courts do not create new law, but merely declare newly reasoned applications of the ancient rule. Judges do not function mechanically. Sometimes a rule itself authorizes a judge to do what is fair, just or reasonable. As it has been rightly said by Prof. Baxi that, “In this last quarter of the twentieth century, very few people would (venture to contest or deny the elementary proposition that appellate judges not merely declare the law, or apply it, but that they also make or create law. Judges of the Indian Supreme Court have demonstrated this truth not merely by creating law but also by creating constitution; they have not just amply exercised their legislative power but they have also exercised constituent power”. 61

The major part of the Constitutional law of the US is judge-made law. Post-1977, the Indian Supreme Court has accentuated this trend by enlightened judicial creativity. This, however, does not mean that a judge is free to create new rules without inherent limitations of judicial process. By interpretive technique the judges not only make the law, but they also assert what it ought to be. 62 Lord Bentham held that judicial process could only give directions to the spirit law of law. Basic reforms whether social

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or political do not fall within the jurisdiction of the court. In India, the Supreme Court has invoked the doctrine of basic structure as a counter-majoritarian device to sustain the liberal and democratic character of the Constitution. The need not be seen as device for judicial supremacy as against Parliamentary supremacy. It has to be seen as the supremacy of the people against the ruling elite. The basic structure doctrine is the high water mark of judicial activism. The Indian Supreme Court alone enjoys such power. The Court has to allow legitimate changes in the Constitution, but prevent the erosion of those enduring values that constitute the essence Constitutionalism.

CHAPTER VIII - MAJOR FINDINGS, CONCLUSION AND SUGGESTIONS

Our Constitution embodies certain permanent ideals in the Preamble and they need interpretation in the context of changing social and economic conditions which are transitory in nature. The Constitutional court undertakes the delicate task of reconciling the permanent with the transitory. The reason of judicial activism is mere collapse of responsible Government elected by the people and lack of action on the part legislature in a democratic set up. Judicial activism also includes over-ruling power of settled precedent or striking down the statutory provision, thereby encroaching upon the domains of the legislature. In the case of Maneka Gandhi v. Union of India, the Supreme Court became quite active and the judgment became historical on the issue of protection of personal liberty of the citizens of India. Therefore judicial activism is the result of the failure or indifference on the part of the two political organs of the State namely the legislature and the executive, to discharge their constitutional responsibilities assigned under the Constitution.

In a country where large number of people are economically poor and subjected to discrimination; where the Legislature and Executive remain apathetic and fail to discharge their constitutional duties; where the bureaucracy shows a callous indifference and insensitivity to its mandatory duties; where law enforcing agencies exhibit their brutality in the process of implementation of laws, how can the judiciary remain a passive observer of the scenario? No doubt, the judiciary is said to be the weakest organ of the State. But it becomes strong only when people repose trust in it. Such trust of the people constitutes the legitimacy of Judicial Activism.

64 Supra note.56.
‘Judicial Activism’ is a delicate exercise involving creativity. However, such sort of an unaccountable creativity can, in no manner be respected if it thwarts the sanctity of the very fundamental law of the land. For judges cannot and are not expected to run the government within the scheme of governance. They can neither govern nor administrative in the manner akin to other organs only by resorting to their contempt powers.

Judicial activism is appropriate when it is in the domain of legitimate Judicial Review. However, judicial intervention in the matters relating to purely political questions or legislature policy would be characterized as “Judicial Overreach”.

Political democracy was established after Independence and free elections to Parliament and Legislative Assemblies were held. But political democracy cannot last long unless there lies at the base of it socio-economic democracy. Our judiciary is made independent of the Legislature and Executive by the provisions of the Constitution, but it is not independent of the nation and the Constitution. It is also accountable to the people through the Constitution. Out of three organs of the State, the most respected organ is the judiciary. It has become increasingly effective and powerful in its role as the arbiter of justice because of the confidence of the common man has placed in it.

Political instability in our country is the major concern as a result of which coalition governments have to be established at the centre with the support of some regional political parties in the states. Most of the regional political parties lack rational outlook and are able to get undue advantage of Government machinery and resources by threatening to quit. In coalition politics, for any government, irrespective of the party in power survival has become more important than probity in public life. In such circumstances, Legislature and Executive are unable to perform their obligations towards the people and therefore the people look towards the judiciary to redress their grievances against the government.

‘Judicial Activism’ is a delicate exercise involving creativity. However, such sort of an unaccountable creativity can, in no manner be respected if it thwarts the sanctity of the very fundamental law of the land. For judges cannot and are not expected to run the government within the scheme of governance. They can neither govern nor
administrative in the manner akin to other organs only by resorting to their contempt powers.

It is to be admitted that judges are in fact human beings and are fallible just like other humans. They are bound to have their predilections which influence their judgments. It is only by way of exercising ‘judicial restraint’ admixed with the feeling of respect which the judiciary ought to have for other organs and by not being swayed by public adulations, and inter-se harmony between the organs of governance can be achieved. If the Indian judicial system is to be saved from a sheer collapse, the need of the day is to propound a policy of judicial non-intervention in defined areas. Such a policy-making would not be a signification of weakness or abdication by the judiciary but would only be recognition of the fact that the Constitution did not make the judiciary a substitute for the failure of other branches of government and that judicial power has its limitations.

Judicial activism is appropriate when it is in the domain of legitimate Judicial Review. However, judicial intervention in the matters relating to purely political questions or legislature policy would be characterized as “Judicial Overreach”.

One of the important functions of the courts in administering justice is the interpretation of statute that’s to know the intention of the legislature for making the law however the role of the Supreme Court of merely interpreting the law has undergone a radically change. The new role of Hon’ble Supreme Court is of law making is an undisputed reality. The degree of judicial intervention in the Governmental process is at increasing trend. The judiciary performs following functions in modern era: Interpretation of the constitution; Protection of the federal character of the state; guarding and protecting the fundamental rights of the citizens; testing the validity of legislative and executive action of the State; Interpretation of the laws made by legislature; Determination of the validity of amendments made to the Constitution, the supreme law of the land & to provide guidelines where the legislature’s are silent on the emerging issues which are arising in the society.