CONCEPTUALIZATION OF TERMS AND EXPRESSION

2.1 INTRODUCTION

JUDICIAL ACTIVISM does not carry any statutory or judicial definition. In a rough manner, it is understood as connoting that function of the judiciary, which represents its active role in promoting justice. Judicial activism, to define broadly, is the assumption of an active role on the part of the Judiciary. What is “active” could itself be a matter of difference of opinion or, at least, lead to the expression of different shades of view, with varying emphasis. In one sense, one can say that the court displays “activism”, whenever it affords a Positive relief. In this sense, “activism” is not a new concept, because the award of specific performance of a contract represents the grant of a positive relief. Instead of granting a substituted remedy, such as damages, the court would be assisting the parties in realizing their legitimate expectations as per the contract. Similarly, in a decree for eviction the defendant is forced to act in favour of the plaintiff, by a positive order of the court. But the current understanding of activism is on different lines. The jurist, speaking of judicial activism in the modern context, thinks more of public law, than of private law. Justice between individuals is not the main concern of a judge. His business is to explore how justice to the individual (or group of individuals) or to society in general, is ensured through the active participation of the court, particularly as against public agencies. In this process, as sometimes pointed out the judiciary may have to tread upon what are supposed to be the spheres reserved for the legislature or the executive. This aspect has recently created a debate in high circles, as to what ought to be the proper demarcation of functions between the various organs of the State.

Apart from the vexing question of separation of powers, important question is what approach should be adopted by the courts? Should they interfere in every case of unjust action? Or should they go strictly according to legal principles?

65 Chaterji, Susanta. “‘For Public Administration’: Is Judicial Activism Really Deterrent to Legislative Anarchy and Executive Tyranny?” The Administrator, Vol.XLII, April-June 1997, p.9 at p.11.
66 Judicial Activism in India, from the website: http://www.ksl.edu.np/cpanel/pdf/jua.pdf (last accessed on 12th June, 2010).
2.2 MEANING OF JUDICIAL ACTIVISM

It is very difficult to define the concept of “Judicial Activism” precisely. “In a generic sense, Judicial Activism means the actions of an activated judiciary in protecting fundamental rights of the citizens. It is the direct outcome of the failure of the executive wing of the Government in fulfilling the Constitutional guarantees contemplated in Part III and Part IV of the Constitution, which assure, inter alia, socio-economic justice to the citizens for making their lives fruitful and meaningful”. Judicial Activism envisages the active role of the judiciary in ensuring that only justice is assured but also justice is done to the victims of the State in some form or the other. Judiciary is that branch of the Government with greatest institutional capacity to enforce the legal norms and constitutional objectives in the given spirit and letter.

In order to understand the true meaning of the expression - “judicial activism” - it would be appropriate to consider various terms usually spoken in the context of administration of justice. The term “judicial” is an adjective from the French word “judex” meaning a judge, pertaining to appropriate administration of justice or courts of justice or judge thereof or in the proceedings therein”. The right to pronounce a definitive judgment is considered the sine qua non of the court. The word “court of justice” denotes a judge who is a judge empowered by law to act judicially as a body when such judge or body of the judges is acting judicially. The word “judiciary” again is explained to mean the judges of the state collectively.

In the context of expectation aforesaid it is natural to ask as to what is ‘Judicial Activism’. Laws according to social activists have a social purpose i.e. betterment of society. Judiciary under our constitution is conceived as an arm of the social revolution. Legislature, while emanating a law, cannot visualise all situations arising in future and needing the support of law. New situation generally and usually develop and

the law has to be so interpreted and applied to solve problems arising out of such situations. In the process, the judicial creativity or craftsmanship is utilised to fill in the gaps between the laws as it is and the law as ought to be built in the process is the ability of proper perception and commitment to proper social values. Thus judicial creativity is called ‘judicial activism’. In other words it means “an active interpretation of existing legislation by a Judge made with a view to enhance the utility of legislation by a Judge made with a view to enhance the utility of legislation for social betterment.”

Judicial activism is inter-related to judicial review. In the process of judicial review, the higher judiciary has to assume certain powers, within the ambit of the Constitution, so as to provide appropriate justice. That justice, as is evident from the legal and Constitutional history, was initially aimed at assuring “natural justice”, which later on transformed into “legal Justice”, then to “social justice” and presently to “due justice”. Due justice, as in a modern concept provides postulates activation and reactivation of the judiciary. In this direction, and to achieve the above goal, Apex Court has alerted itself, acted swiftly, courageously and creatively, protected the rights of the victims and reminded the State of its duties and responsibilities towards the country and citizens in a manner congenial to internationally acceptable principles. Indian Judiciary has rejected all the inadequate and the outmoded doctrines that are vogue in developed countries like U.K, and introduced new strategies and goals to suit the national interests and due justice. It has widened the meaning and scope of Articles 19, 21, 32, 141, 142, 226, 227, 302, 368 etc. The activist role of the Judiciary has made people take recourse to the courts as the first resort.70

The idea of judicial activism has been around far longer than the term. Before the twentieth century, legal scholars squared off over the concept of judicial legislation, that is, judges making positive law. "Where Blackstone favoured judicial legislation as the strongest characteristic of the common law, Bentham regarded this as a usurpation of the legislative function and a charade or 'miserable sophistry.'" Bentham, in turn, taught John Austin, who rejected Bentham's view and defended a form of judicial legislation in his famous lectures on jurisprudence. In the first half of the twentieth

70 Ibid.
century, a flood of scholarship discussed the merits of judicial legislation, and prominent scholars took positions on either side of the debate.\(^71\)

The term judicial activism is explained in Black's law dictionary\(^{72}\) in 60 editions “judicial philosophy which motivate judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decision calling for social engineering and occasionally these decisions represent in true sense in the legislative and executives matters”. Though it is legislature which makes the law, the judgment rendered by the Supreme Court and High Court gives concrete shapes, which the people understand better as the law. There is need of importance of the decision making process. In the common law, development is permitted if not expected in statutory law, there must be at least a presumption that parliament has on the topic it is dealing with said all that it wanted to say. Justice V.R. Krishna Iyer, the greatest activist judge of India has so far seen feels of judicial activism as a device to accomplish the cherished goal of social justice\(^73\). He said:-

“After all, social justice is achieved not by lawlessness process, but legally tuned affirmative action's, activist just icing and began interpretation with the parameters of corpus jurist”\(^74\).

Judicial activism refers to court decisions that arguably go beyond applying and interpreting the law and extend into the realm of changing or creating laws, or going against legal precedents. Arguably these decisions are made, based on the judges' personal philosophies or political affiliations. When a judge makes a court ruling, that is not in accordance with constitutional or statutory law or legal precedent, that judge may be said to be "legislating from the bench." When a judge is thought to hold back

---

73 Ibid.
74 Ibid.
from being a "judicial activist," he or she may be said to have exercised judicial restraint\textsuperscript{75}.

Though the term "judicial activism" may be applied to any number of legal and governmental systems in the world, we can use the United States system as an example. In the US, a system of "checks and balances" is imposed to prevent any one of the three branches of the federal government (i.e., the executive branch, the legislative branch, and the judicial branch) from becoming too powerful. Under the separation of powers doctrine, Congress has the power to create laws whereas the judicial branch is charged with applying the law, and interpreting those parts of the law that might have been drafted in a vague way. Where that line between legal interpretation and creation of the law is, is often a matter of vigorous legal debate. Often those arguments lie upon political lines\textsuperscript{76}.

Often, one can categorize examples of judicial activism as liberal judicial activism or conservative judicial activism. Some might argue, for example, that the Supreme Court's decision in \textit{Heller} where the right to bear arms as granted by the Second Amendment was held to be an individual right as opposed to a right meant to be conveyed upon regulated militias. Alternatively, some may argue that the holding in \textit{Roe} which made abortion a woman's individual right went against a strict interpretation of the Constitution which didn't expressly convey that right. Some rulings that are arguably examples of judicial activism, however, are supported by both liberals and conservatives. The ruling in \textit{Brown v. Board of Education}\textsuperscript{77} which eliminated segregation in public schools may be one such example.

Judicial activism can exist at virtually any court level, including state courts, federal courts, and the Supreme Court. Often, when it arises at the Supreme Court level another legal debate is implicated — the theories of Constitutional interpretation. Originality, for example, is generally inclined to apply the Constitution strictly, according to the precise terms used by the authors of the document. Non-originality believes that some interpretation is permissible and that was in fact the intent of the authors in creating the Constitution as a living document. Depending on which form of

\textsuperscript{75} From the website: \url{http://www.wisegeek.com/what-is-judicial-activism.htm} (last accessed on 14th June, 2010).
\textsuperscript{76} Ibid
Constitutional interpretation one ascribes to, will affect how much interpretation is permissible by judges.\textsuperscript{78}

Judicial activism has to be so understood and with this meaning of the expression it can hardly be disputed that such action of the judiciary is within the role assigned to it under the constitution, and it cannot be termed as a trespass into field assigned to any other wing of the State. It is true that the occasion for the judiciary to so act, arises quite often because of the perception of failure of some other organ to discharge its obligation. That situation can be avoided only by preventing that situation by discharge of its functions properly by the other organs and the absence of the need for anyone to approach the courts for redressal of their grievances. It is therefore felt that it is duty of the judiciary “to keep the charter of the government current with the times and not allow it to become archaic or out of tune with the needs of the day.

2.3 DEFINITIONS

Like many catch words judicial activism has acquired so many different meanings as to obscure more than it reveals. However, there is no explicit statutory definition. Technically speaking judicial activism connotes that function of the judiciary which represents its active role in promoting justice. In simple words it can be said that it is an active role on the part of judiciary to implement the provision contains in Part III of our Constitution. Judicial activism may also be construed as the active process of implementation of the rule of law, essential for the preservation of a functional democracy.

Judicial Activism is not defined by any statute but it refers to the function of the judiciary which represents its active role in promoting justice. Judicial activism, to define broadly, is the assumption of an active role on the part of the Judiciary.\textsuperscript{79}

The Supreme Court in many of its path breaking judgements such as in \textit{S.P.Gupta v. Union of India}\textsuperscript{80}, \textit{Ratlam Municipality v. Virdichand}\textsuperscript{81} and \textit{Vineet Narain

\textsuperscript{78} Supra note. 68.
\textsuperscript{80} AIR 1982 SC 149.
\textsuperscript{81} AIR 1980 SC 162.
v. Union of India82 held that judicial activism in the modern day context explores how justice to the individual or group of individuals or to the society in general is ensured through the active role of judiciary, particularly against the agencies of the state. According to Justice P.N.Bhagwati judicial activism is:

“The judge infuses life & blood into the dry Skelton provided by legislature & creates a living organism appropriate & adequate to meet the needs of the society. The Indian judiciary has adopted an activist goal oriented approach in the matter of interpretation of fundamental rights. The judiciary has expanded the frontiers of fundamental rights and the process rewritten in some part of the Constitution through a variety of techniques of judicial activism. The Supreme Court of India has undergone a radical change in the last few years and it is now increasingly identified by the justice as well as people’s last resort for the purpose bewildered”83

According to Webster’s dictionary84 Judicial Activism means,

“the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent or in opposition to supposed constitutional or legislation intent”.

According to Black’s dictionary85 judicial activism is,

“A philosophy of judicial decisions where by judges allows their personal views about public policy among other factors, to guide their decisions with suggestions that adherent of this philosophy tend to find violations and they are willing to ignoble precedent.”86

In the words of Justice J.S. Verma, Judicial Activism must necessarily mean,

“The active process of implementation of the rule of law is essential for the preservation of a functional democracy”. According to former Chief Justice of India A.M.Ahamadi, “Judicial activism is a necessary adjunct of the judicial function since

82 AIR 1996 SC 3386.
84 From the website: http://www.h.cour.gov.au/speeches.kerbyj.indialt.htm, (last accessed on 02nd July 2010).
85 Ibid.
86 Ibid.
the protection of public interest as opposed to private interest happens to be main concern." 87

One of the meanings of judicial activism is that the function of the court is not merely to interpret the law but to make it by imaginatively sharing the passion of the Constitution for social justice. 88

According to Prof. Upendra Baxi, Judicial Activism is an accretive 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 criticised the term by describing it as judicial extremism, judicial terrorism, transgression into the domains of the other organs of the State negating the constitutional spirit etc. 89

As the famous saying of Lord Hewart, CJ goes “It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”. 90 It is from this concept that judicial activism emanated and found expression through judgments of various so-called “activist” judges. They have been responsible for taking justice to the doorsteps of the citizens, if necessary, through an unwarranted and uncalled for measure.

"Judicial activism" is frequently used in political debate without a clear definition, which has created some confusion over its precise meaning.

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: 91

- overturning laws as unconstitutional
- overturning judicial precedent
- ruling against a preferred interpretation of the constitution

88 Sheela Barse v. Union of India (1986) 3 SCC 596.
89 From the website: http://www.scribd.com (last accessed on 02nd July 2010).
91 Ibid.
Critics of Strauss' view have argued that these definitions include only legal interpretation. They argue that a judge may be termed "activist" based on the remedy chosen, even if the legal interpretation is not "activist". In practice, a speaker may use the term "activist judge" to mean that a judge has simply made an important decision that the accusing speaker disagrees with. When used in this way, the term "activist judge" is little more than a term of political criticism. While there are many who are willing to use this hot button term as a simple protest of disagreement, this is not the most common usage, nor the most common understanding, of the term. As a general usage, "activist judge" is used to describe a judge who actively and knowingly subverts misuses, grossly misinterprets, ignores, or otherwise flouts the law and or legal precedence due to personal opinion, be that opinion ideological, religious, philosophical, or other.

Bradley Canon laid six dimensions of Judicial Activism along with which judge's of courts may be perceived as activist:

- **Majoritarianism** - This dimension takes into account the degree to which policies adopted through the democratic process are judicially overturned.

- **Interpretive stability** - This dimension takes into account the degree to which court decisions alter earlier decisions, doctrines, or constitutional interpretations.

- **Interpretive fidelity** - This dimension takes into account the degree to which constitutional provisions are interpreted contrary to the clear intentions of their drafters, or the clear implications of the language used in the provision.

- **Substance/democratic process** - This dimension takes into account the degree to which judicial decisions make substantive policy, as opposed to acting to preserve the democratic political process.

- **Specificity of policy** - This dimension takes into account the degree to which a judicial decision establishes policy itself, as opposed to leaving discretion to other agencies.

---

• **Availability of an alternate policymaker** - This dimension takes into account the degree to which a judicial decision supersedes or inhibits serious consideration of the same problem by other government agencies.93

## 2.4 KINDS OF JUDICIAL ACTIVISM

Broadly speaking, judicial activism can be studied two dimensionally, namely,

(1) “Positive Judicial Activism” and (2) “Negative Judicial Activism”.

A review of the other literature provides for some more categories of this concept, namely, “Non interpretative review”, “Judicial restraint”, “Originalism”, “Result oriented judging”, “Imperial judiciary”, and “Adventurous judging”, “Bold Judges”, “Judicial Government”, “Judicial Policy making”, “Judicial usurpation”, “Judicial supremacy”, “Judicial conservativism”, “Judicial liberalism”, and “usurping the constitution and legislative powers”94. Judicial activism whenever it affords a positive relief or what may be called as the due justice, is known as Positive Judicial Activism, and other side of it is the negative judicial activism. Where, in a given case, the Courts interpret the Constitution in a manner by going beyond the Constitutionalised value judgements, it is called as affirmativist or “non-interpretative review”95. However, for an affirmative role of the judiciary, there must be written Constitution to record and reflect Constitutional value judgements. The legitimacy of the Court’s power to determine validity of an Act or action is always an implied provision under the Constitution, besides certain express provisions like Articles 141 & 142. A negative activist role of the judiciary is directly connected with the whims and vagaries of the individual Judges, which is depicted while they are exercising the original, inherent and discretionary powers, which more often than not, will demoralize the judiciary. Any act made to enter into or bypassing the functions of other organs of the Government by the judiciary, often leads to negative activism. In fact, it is now a well cherished principle that “the Courts will not substitute their own sense of fairness for that of the Parliament”96. As opined by justice Hidayatullah, the Legislature and

---

administrative machinery also interpret the Constitution, but they do so for themselves. Judges interpret it not only for themselves but for all.97

As observed by Justice Susanta Chatterjee, former Judge, High Court of Orissa, the style of activism as practised by the Indian Supreme Court until now has taken broadly three forms, namely,

(1) Conservatistic activism as prevailed during pre-Emergency Period of 1975,
(2) Calculative activism as emerging during post –emergency (1975-77),
(3) Populistic activism as prevailing during the post –emergency period.98

To this, a fourth category may be added, namely, the executive-advised/directed activism, which is being witnessed in the present times.

2.5 METHODS OF JUDICIAL ACTIVISM

The methods by which judges engage in judicial activism, according to those who make this accusation, include the following:

- Overturning legislation passed by an elected legislature, using an interpretation of the constitution that critics of the ruling believe is not clearly mandated or implied by the constitutional text;
- Ruling against the text or intent of a statute, using what critics of the ruling argue is an incorrect or overreaching interpretation;
- Ruling against judicial precedent in a way that critics of the ruling hold is a radical or unjustified departure from accepted interpretation;
- Holding legislation unconstitutional based on what critics of the ruling view as a clearly flawed precedent;
- Selectively using obscure case law or foreign law, in preference to what is seen by critics of the ruling as more pertinent case law or statutory law; and

Use by state courts of a single subject rule to nullify legislation or state constitutional amendments, in what critics of the ruling say is a questionable manner.

2.6 LAW

Holland put it, “the term ‘law’ is employed in jurisprudence not in the sense of the abstract idea or order but in that of the abstract idea of rules of conduct.” For him, Law is a general rule of external human action enforced by a Sovereign political authority. Roscoe Pound’s essential contribution to jurisprudence is that law should be used as an instrument of social control. He coined the phrase “social engineering” as a description of the problems of the legal order in balancing individual wants and social interests.

2.7 LAW & JUSTICE

It may be emphasized that Law and justice are, however, two distinct concepts. No doubt, they are interrelated but each has a distinct sphere of its own. The concept of Justice is even older than that of law. Justice is the legitimate end of law. It must, therefore, necessarily precede law because people thought of law as they wanted justice. Justice is a social value. Therefore, it is said that “it is not the words of law but the internal sense of it that makes the law. Letter of law is nobody, sense and reason of law is the sole.” These, in my view, are the established principles in judicial philosophy.

How far is a court bound by the law? Is there any option left to the court to disregard the law, where (in the opinion of the court) the needs of justice so require? The question posed in the last sentences raises a fundamental issue.

In most States of India, there is in force a Civil Courts Act, which generally provides that where there is an enactment for the time being in force and applicable to the subject matter at hand, the court must decide the case according to that enactment. If the case is not covered by the enactment, then (in certain matters) the personal law of

101 Black Law Dictionary (Judicial Philosophy).
the parties shall apply. If the matter is not governed by statute or personal law, then the court shall decide according to justice, equity and good conscience.

Thus, according to the provisions of the Civil Courts Act, the scope for judicial activism may appear to be limited.

**ACTIVISM AS OLD AS LINCOLN** - Abraham Lincoln has pointed out,

- “Have we not lived enough to know that two men may honestly differ about a question, but both be right? In this paradox lies the secret of judicial process. There are areas where the judges must be activists and there are areas where they must be passivists. In which areas they should be activists and in which areas they should be passivists can be gathered from the knowledge we get by experience.”

No one will dispute that the judiciary has to perform an important role in the interpretation and enforcement of human rights inscribed in the fundamental law of the country. Therefore, it is necessary to consider what should be the approach of the judiciary in the matter of constitutional interpretation. An approach must be a creative and purposive approach in the interpretation of various rights embodied in the Constitution. With a view to advancing human rights jurisprudence and social justice, I stress the aspect because I believe social justice approach is the command of the Constitution of India.

It reminds me what Chief Justice Ahmedi [as he then was] has said in his interview of the week to The Sunday observer dated April 20-26, 1997. The query was “There is much talk about judicial activism. What does that mean? How far should it be carried in democracy?” to which he answered:

“I have always disapproved of this label of judicial activism because it gives the impression that the Court was earlier passive, which is incorrect. What is known as activism is where the judiciary takes decisions in sensitive cases, which are sensationalized by the media. When the media highlights the case of an influential person, it often referred to as activism. But the role of the court is limited. The concept of judicial activism and public interest litigation are connected. This started in the Seventies. The legal aspect of PILs is the waiver of the rule of locus standi. The normal rule is that only the aggrieved party can move the court. But the court found in certain

[40]
cases that the aggrieved party was so placed because of economic constraints or lack of awareness of rights that it could not move the court. So the court said that even if a third party moved it, the locus standi rule would be waived, if the petition had substance. In a situation where a mass of people would benefit, the court may not insist upon the locus standi rule. Then it becomes public interest litigation. This is sometimes described as activism or assertive action.”

2.8 INTERPRETATION OF STATUTE LAW

However, even after taking into account the narrowly drawn provisions in the Civil Courts Act (as noted above), one finds that interpreting the enacted law itself involves a good deal of judicial discretion.

Similarly, how much emphasis is to be placed on one particular statutory word (in contrast with other statutory words), will always remain a matter for judicial discretion. This is only an illustration of the vast scope for choice, when the judge is confronted with abstract questions of statutory interpretation.

A word is only an empty vessel, until a liquid is poured into it. The strength, the proportion and the colour of the liquid to be so poured – all these are matters that are left for further determination.

Of course, this is not a new development. Jurists have been aware of it for centuries. But the point that is being made is that different judges may possibly show different approaches. If Judge A shows greater boldness than Judge B, we are inclined to say that Judge A is an “activist” as contrasted with Judge B whom we would describe as having a “conservative” approach). 102

2.9 THE LEGISLATURE AND THE JUDGE

The situation just now described attempts one to say a few words about the relationship between the legislature and the judiciary, in the context of statutory interpretation. One can say that the legislature, while building a structure with walls in the shape of definitions, has kept a door open. Through that door, the judge is allowed to let in fresh air, “if the context so requires”. The dead hand of the draftsman then

102 From the website: http://en.wikipedia.org/wiki/Common_law.(last accessed on 18th July 2010).
becomes inoperative. The living law as conceived by the judge is then allowed to create a satisfactory product. Let us quote Aristotle:

“In the field of moral action, truth is judged by the actual facts of life, for it is in them, that the decisive element lies. So we must examine the conclusions we have so reached so far, by applying them to the actual facts of life, if they are in harmony with the facts, we must accept them, and if they clash, we must assume that they are mere words”.

2.10 THE ROLE OF CASE LAW

The judge’s function in deciding a point not covered by statute law in any respect is well known. Here, he enters virgin soil. He has to plant a new seed, which will bring forth a new tree and yield a new fruit.

There are areas of jurisprudence where there is in existence neither statute law nor definitive case law. Here, to begin with, the judge is free to roam in the open sky, as it were. But this is only to “begin with”. Even a bird in the sky comes home to roost, and the judge, notwithstanding the freedom available to him, has to examine which particular course he should select. A Judge, who, in such a situation happens to select a bold course of action, is generally understood as representing judicial activism. And there is nothing inherently wrong in the Judge preferring one course of action to another. Of course, once the same problem comes to be dealt with by the judiciary, whose judgments, then come to constitute the core of the law on the particular subject, then the erstwhile activism shown by the judge in the first case results in a “routing”.

From the category of a matter leaving scope for free and unbridled action, the matter travels into a region covered by “precedent”. The past now comes govern, until a new path is struck again.

This transformation of today’s activism into tomorrow’s familiar learning is, in itself, an interesting subject. The law of torts offers numerous examples of this process.

---

103 Ibid.
2.11 THE CONSTITUTIONAL ASPECT

One of the questions posed at the outset was the question how far under the title of “judicial activism” the creation of a doctrine which is inconsistent with the position so far understood is permissible. Here, the constitutional aspect requires some discussion. The Indian Constitution does not merely guarantee fundamental rights, but also gives to the High Court power to issue writs104 “for any other purpose” which is generally understood as meaning “for the purpose of enforcing any other right”. Besides this, it gives to the Supreme Court power to afford such relief as the justice of the case may require. The exact boundaries of this jurisdiction of the Supreme Court have not been defined and may never come to be defined. Courts are usually reluctant so to restrict their freedom of action for the future. However, what is relevant for the present purpose is the width of the jurisdiction of the High Courts in writ105 and the power of the Supreme Court to make such order as the justice of the case may require. Expressions like “such order as may be just in the circumstances of the case” or “justice of the case” are essentially intended to focus the attention of the court upon the peculiarities of the instant case. They may have the effect of the court experiencing a freedom from shackles flowing from rigid statutory provisions or from the equally rigid fetters of past precedents. The present is emphasized, in contrast with the past. The particular is highlighted, in contrast to the general and the abstract. The extent, to which a judge will utilize this freedom, must depend on his own approach.

In a welfare state like India, the judiciary especially the apex court plays an important role. Apart from performing its traditional functions like upholding the federal principle and interpreting the laws made, the court also exercises the power of judicial review to decide the validity of the executive or legislative actions of the state. The Supreme Court of India being the highest court of the land shapes the destiny of millions of Indians by exercising the various jurisdictions vested in it by the constitution. Sir Alladi Krishnaswami Ayyar had predicted with great vision, way back in 1949 that “the future evolution of the Indian Constitution will thus depend to a large extent upon the Supreme Court and the direction given to it by that court”.

104 Article 32 of the Constitution.
105 Article 226 of the Constitution.
An important issue that has assumed significance in recent times has been the activist role played by the Indian Judiciary especially the Supreme Court. The expression “judicial activism” has eluded a precise definition as it means different things to different people. It might mean dynamism to judges, judicial creativity to some, judicial legislation to some others and it may be an effort to bring “social revolution” through the judiciary. There is a great controversy as to the meaning and interpretation of the term ‘activism’ of the judiciary. For understanding the concept of judicial activism, the role of the judiciary has to be properly understood. Courts of law are the products of the constitution and instrumentalities for upholding the basic principles of constitutionalism and for fulfilling the ideals of the state enshrined in the constitution. Their traditional function is to administer justice according to law and in doing so they have to respond to the hopes and aspirations of the people. Generally and traditionally the courts must exercise their functions and powers while respecting the powers and functions of the other two political organs of the State viz. the legislature and the executive. This theory of separation of powers is more American than Indian in nature. So far as India is concerned, the role of the three wings has been quite clearly defined in the constitution and together these wings have an obligation to work to achieve the ideals of a welfare state. There is only functional separation of powers, at least to some extent between the three organs of the State.

In the absence of a precise definition of ‘judicial activism’, it is necessary to reevaluate the functions of the judiciary because of different meanings which have been given to this concept by different academicians and jurists. The constitutional mandate to the judiciary is that while exercising its functions and powers, it should keep in view the social and economic objectives which the constitution seeks to protect, promote and provide as embodied in the law. When each of the three organs of the state respects and appreciates the role of the other organs and functions within its own sphere and parameters, the harmony which would be the resultant product would go a long way in bringing about socio-economic changes in the country. However, when the political organs of the state fail to discharge their constitutional obligations effectively or if their indifference to certain constitutional objects especially the object of rendering social, economic and political justice to the people at large, the judiciary can legitimately assert its judicial power, to meet the constitutional ends. In the process, the judiciary may assume the role of a policy maker, legislator and even the role of a monitor to
oversee the implementation of its directions. Then its behaviour or attitude can be rightly summarized as “judicial activism”.

2.12 MEANING OF TERMS AND EXPRESSIONS

During the course of writing this thesis, so many new terms and expressions have been used to denote certain concepts which are unique to the judiciary and constitutional law. For the purpose of a greater clarity and easy understanding, their meanings as given by a majority of the scholars have been given hereunder. However, it may be made clear at the outset that, they are as understood by a ‘lay man’ and if there is any controversy as to their meaning or import, it has been discussed at appropriate places in the relevant chapters, whenever and wherever they occur.

2.12.1.1 Judicial Activism: It is a term used to describe the assertiveness of judicial power. The extreme model of judicial activism is of a court, so intrusive and ubiquitous that it virtually dominates the institutions of government. It has often been described as judicial supremacy, judicial absolutism, judicial legislation and judicial absolutism, judicial legislation and judicial policy making etc. Judges and Lawyers think that judicial activism is an extension of judicial review and not an extra-ordinary power conferred on the court. However, for outsiders and laymen it means encroachment of the court in the field of Legislative and executive powers like in the case of *Vishaka v State of Rajasthan.*

2.12.1.2 Judicial Power: It is an expression of the widest import which denotes the power exercised by the judiciary as an organ of the State. It varies according to the type of judicial system i.e. adversarial or inquisitorial system of justice. Judicial Power vested in the SC & HC which are empowered to judicial review both in regard to legislate & executive action that's judicial review.

2.12.1.3 Judicial policy making: Judicial policy making and related terms – judicial activism, judicial creativity, and Judicial Legislation – emphasize that judges are not mere legal automations who simply ‘discover’ or ‘find’ definite,

---


pre-existing principles and rules, as the declaratory or oracular conception of the judicial function insisted, but are often their makers. Simply stated, judicial policy making denotes that the judges do not merely declare law but are also creators of law.

2.12.1.4 **Judicial Review**: It denotes the power of the higher judiciary to test the validity of any passed by a Legislature or any executive action taken by a Government. The term is used quite often in the present work and is to be understood in the context in which it is used. The power of judicial review was first acquired by SC in *Marbury v. Madison*.108

2.12.1.5 **Judicial Restraint**: It is a legal term that describes a type of judicial interpretation that emphasizes the limited nature of the court's power. Judicial restraint asks judges to base their judicial decisions solely on the concept of stare decisis, which refers to an obligation of the court to honour previous decisions. It is the anti-thesis of the judicial activism; and denotes the self-control exercised by the judiciary. As Encyclopaedia of the American Constitution describes, the judicial restraint of a court is that it decides virtually nothing at all; it strains to find reasons why it lacks jurisdiction, it avows deference to the superiority of other departments or agencies in construing the law; it finds endless reasons why the constitutionality of laws cannot be examined. It is a model of government virtually without useful recourse to courts as enforcers of constitutional limits. Conservative judges often employ judicial restraint when deciding cases, unless the law is clearly unconstitutional. Judicial restraint is the opposite of judicial activism, in that it seeks to limit the power of judges to create new laws or policy. In most cases, the judicially restrained judge will decide cases in such a way as to uphold the law established by Congress. Jurists who practice judicial restraint show a solemn respect for the separation of governmental problems.109

2.12.1.6 **Constitutionalism**: It has both descriptive and prescriptive connotations. Used descriptively, it refers chiefly to the historical struggle for

---


109 From the website: [http://legalservice.com/.../judicial-activism-v-judicial-restraint-96-1.html](http://legalservice.com/.../judicial-activism-v-judicial-restraint-96-1.html) (last accessed on 24th July 2010).
constitutional recognition of the people’s rights, freedoms and privileges. Used, prescriptively, its meaning incorporates those features of government meaning incorporates those features of government seen as the essential elements of the Constitution. Simply stated, constitutionalism is the spirit of the constitution that commands respect from the rulers as well as the ruled.

2.12.1.7 **Separation of powers:** As propounded and popularized by the French Political Analyst, Montesquieu. It denotes the vesting of the legislative, executive and judicial powers and functions in three separate organs of the legislative, executive and judicial powers and functions in three separate organs of Government namely the Legislature, the Executive and the Judiciary. It contemplates an absence of overlapping of these separate powers and distinct functions, structurally and functionally. In modern times, it has been substituted by a more flexible theory i.e. the theory of checks and Balances, at least in the United States of America. It also means that one organ of the Government should not exercise the powers and functions of other organs. However, the effective implementation of this doctrine is not possible in modern days in view of growth of delegated legislation and administrative tribunals.\(^{110}\)

2.12.1.8 **Public Interest Litigations:** In Indian law, **public interest litigation** means litigation for the protection of the public interest. It is litigation introduced in a court of law, not by the aggrieved party but by the court itself or by any other private party. It is not necessary, for the exercise of the court's jurisdiction, that the person who is the victim of the violation of his or her right should personally approach the court. Public interest litigation is the power given to the public by courts through judicial activism. However, the person filing the petition must prove to the satisfaction of the court that the petition is being filed for a public interest and not just as a frivolous litigation by a busy body. Such cases may occur when the victim does not have the necessary resources to commence litigation or his freedom to move court has been suppressed or encroached upon. The court can itself take cognizance of the matter and precede suo motu or cases can commence on the petition of any

public-spirited individual. It denotes a new use of judicial power by the judiciary, to provide easy access to the justice, to the socially and economically disadvantaged sections of the people. It also represents a kind of representative litigation which is also called “Social Action Litigation”. In India, it has been induced and led by the Supreme Court in the early 1980’s. Prior to the 1980s, only the aggrieved party could approach the courts for justice. However, post 1980s and after the emergency era, the apex court decided to reach out to the people and hence it devised an innovative way wherein a person or a civil society group could approach the supreme court seeking legal remedies in cases where public interest is at stake. Justice P. N. Bhagwati and Justice V. R. Krishna Iyer were among the first judges to admit PIL’s in the court. Filing a PIL is not as cumbersome as any other legal case and there have been instances when even letters and telegrams addressed to the court have been taken up as PIL’s and heard by the court.\textsuperscript{111}

2.12.1.9 \textbf{Writ} - Writs are extra ordinary remedies in cases where there is either no remedy available under the ordinary law or the remedy available is inadequate. Articles 32 and 226 of our Constitution empower anyone, whose rights are violated, to seek writs, Under Article 32; the Supreme Court can be moved for enforcement of fundamental right only. However, under Article 226, High Court can be moved for enforcement of any right including fundamental right. Depending upon circumstance, the various types of writs can be issued.\textsuperscript{112} Which are discussed below:-

\textbf{Writ of Habeas Corpus}

The words ‘habeas corpus’ literally means ‘to have body. It is a remedy available to a person who is confined without legal justification. Through this writ, the court let it know the reasons for detention of the person and if there is no justification, order the authority concerned to see the person free. The writ of habeas corpus, thus, entails the authority to produce the person before the court. The applicant of this writ may be the prisoner or any person on his

\textsuperscript{111} From the website: \url{http://en.wikipedia.org/wiki/Public_Interest_Litigation} (last accessed on 25\textsuperscript{th} July 2010).

\textsuperscript{112} From the website: \url{http://www.xomba.com/writs_constitution_india} (last accessed on 28th July 2010).
behalf to safeguard his liberty. It seeks immediate relief from unlawful detention whether in prison or private custody.

**Writ of Mandamus**

Mandamus literally means a command. This writ of command is issued by the Supreme Court of High court when any government, court, corporation or any public authority has to do a public duty but fail to do so. To invoke the performance of such duty this writ of mandamus is issued, it should be noted that it should not be discretionary duty of the authority which is challenged. It should be a compulsory one; the applicant too should have a legal right to enforce such performance. It may further be noted that this writ cannot be issued against President or the Governor.

**Writ of Prohibition**

Writ of Prohibition is issued by a superior court to subordinate court preventing latter from usurping the jurisdiction which is legally not vested in it. The writ lies in both for access of jurisdiction or absence of jurisdiction. It is generally issued before the trial of the case or during the pendency of the proceeding but before the order is made. It may be noted that this writ is available against judicial and quasi-judicial body.

**Writ of Certiorari**

If any lower court or a tribunal gives its decision but based on wrong jurisdiction, the effected party can move this writ for a direction against such lower court or tribunal to ignore such decisions based on wrong jurisdiction. The writ of certiorari issued to subordinate judicial or quasi-judicial body when they act:

a) Without or in excess of jurisdiction;

b) In violation of the prescribed procedure;

c) In contravention of principles of natural justice;

d) Resulting in an error of law apparent on the face of record.
The writs of prohibition and certiorari are of the same nature, the only difference being that the writ of prohibition is issued at an earlier stage, before the order is made and the writ of certiorari is available on a later stage i.e. after the order has been passed.

**Writ of Quo Warranto**

The term ‘Quo Warranto’ means “What is your authority”. Whenever any public office is held by any one not qualified to hold it, it can be challenged by this writ by any person. An order issued by the court to such an authority to explain under what valid grounds he is holding such a post. It is found on investigation that he is not entitled to be office; the court may restrain him from acting in the office and declare the office to be Vacant. The writ of quo-warranto to issue when:

a) The office is public and of substantive nature;
b) The office is created by the State or by the Constitution itself; and
c) The respondent must have asserted his claim to the office.\(^{113}\)

**2.12.1.10 Independence of Judiciary - Independence of the judiciary**

(also judicial independence) is the idea that the judiciary needs to be kept away from the other branches of government. That is, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. Different nations deal with the idea of judicial independence through different means of judicial selection, or choosing judges. One way to promote judicial independence is by granting life tenure or long tenure for judges, which ideally frees them to decide cases and make rulings according to the rule of law and judicial discretion, even if those decisions are politically unpopular or opposed by powerful interests. In some countries, the ability of the judiciary to check the legislature is enhanced by the power of judicial review. This power can be used, for example, when the judiciary perceives that legislators are jeopardizing constitutional rights such as the accused. In our country also the constitution has established a separate and

\(^{113}\) *Ibid.*
independent judiciary. It has remained impartial and independent all these years. There is no doubt that the Indian Supreme Court has always shown its independence and impartiality since its inception. On many occasions it pronounced several historical judgements fearlessly, which sometimes even went against the government. Our Supreme Court has very zealously been protecting the fundamental rights of the citizens. Thus it has been acting as a protector and guardian of the Indian Constitution as well as the rights of the citizens. But in the modern age the independence of the judiciary doesn't mean that it should not keep in mind the social and economic deals and aspirations of the people, while delivering its judgements. Rather the judiciary should actively participate in the sacred task of building a welfare society in the country and the regeneration of the nation. Similarly the executive or the Parliament should not do anything to undermine the independence of judiciary.\textsuperscript{114}

2.12.1.11 Checks and Balances of Judicial Activism – While discussing the aspect of Constitutional Law, it would be subtle to make a reference to the doctrine of separation of powers. Constitution of India is so framed that each wing of the Government has its own parameters and limitation, with assured liberty and freedom within which it can exercise its powers and functions in an atmosphere of Parliamentary supremacy. While Parliament can make a law and also amend the very Constitution, higher judiciary is empowered to check these measures and verify whether the same are within the framework of the basic structure of the Constitution. This arrangement establishes is the supremacy of the Indian higher judiciary as an instrument of State, guided and directed by the Executive Wing.\textsuperscript{115}

Constitution framework is such that there must be compatibility in the working of the three wings of Government. But what is happening is entirely different. Competitive spirit and power race of supremacy between these three Wings have become a common practice. Experience goes to show that quite a number of decisions, guidelines and directives issued by the Supreme Court and other High Courts are not adhered to by the State authorities in the given letter and

\textsuperscript{114} From the website: http://en.wikipedia.org/wiki/Independence_of_the_judiciary (last accessed on 30th July 2010).
\textsuperscript{115} Ibid.
spirit. There are also instances where the higher judiciary has not paid attention to the Law, but has laid down its own policies and programmes on the name of justice, and not adhering to its own earlier decisions even though it is under a self-imposed duty of valuing its own earlier decisions/precedents. Today, some of the laws or amendment to the existing ones is made without taking into consideration the practical problems involved in their day to day implementation and enforcement patterns. Because of the weaknesses and selfish goal among the enforcement authorities even the existing laws in force are ignored, abused or misused, in a manner falling out of the boundaries of the power of judicial review. Ignorance of law and frequent changes in it made the people give least attention thereto. A stage has now come where everybody wants to disobey the law and the judicial decision.\footnote{Ibid.}

An institution flourishes only when it is manned by wide-ranged, wide-vision and committed person corrupt brains will corrupt the system. In such a state of affairs coupled with the Constitutional arrangement, the best way of putting controls over the excessive judicial activism is only “Self-Restrained”. Ultimately that in turned depends upon the quality of man power injected into the judiciary. It is a chain reaction. During the past several years, Indian Judiciary has assumed enormous power beyond the contemplation of the Constitution-makers. It could also succeed in justifying such a change.

2.12.1.12 Rule of Law –The constitution of India declares that Democratic, Secular and a Socialist Republic in Preamble. The Rule of law governs our country. 'Equality before law' and 'Equal protection of law' is the most fundamental right conferred on its citizens. We have a lengthy constitution and some other wonderful laws. Independence of judiciary and highly qualified bureaucrats are the need of the hour. In the present situation, many just exist on paper. The question is about our compliance with the ‘Rule of Law’. Rules of law contain three principles or it has three meanings as stated below:\footnote{Arpita Batra, Rule of Law in India from the website: \url{http://www.scribd.com/doc/26791089/Rule-of-law-in-India}. (last accessed on accessed on 05\textsuperscript{th} August 2010).}

- Supremacy of law,
- Equality before Law,
The doctrine of Rule of Law has been adopted in Indian Constitution. The ideals of the Constitution, justice, liberty and equality are enshrined (embodied) in the preamble. The Constitution of India has been made the supreme law of the country and other laws are required to be in conformity with the Constitution. Any law which is found in violation of any provision of the Constitution is declared invalid. In India, the meaning of rule of law has been much expanded. It is regarded as a part of the basic structure of the Constitution and, therefore, it cannot be abrogated or destroyed even by Parliament. It is also regarded as a part of natural justice. In *Keshavanand Bharti v. State of Kerala*¹¹⁸ and *Maneka Gandhi v. Union of India*¹¹⁹, the Supreme Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure.¹²⁰

ON AUGUST 15, 2007, India celebrated its 60th year of Independence — a momentous journey in realising its constitutional goals and democratic aspirations. The main challenge for the Indian democracy and its governance has been social, economic and political developments. And, with this the rule of law is still not sufficiently protected in the Indian society. Though we have achieved social and economic progress, not much effort has been put to successfully protect the rule of law. Therefore, it’s a challenge for the Indian democracy and poses grave threat to governance.¹²¹

The first reason why the rule of law¹²² in the Indian society has not achieved the intended results is that the deeply embedded values of constitutionalism or abiding by the Constitution of India have not taken roots in the society. There has been a lot of abuse of power by various institutions protecting the rule of law and they have also failed to fulfil their promise.

---

¹¹⁹ *AIR 1978 SC 597*.
¹²⁰ Supra note.¹¹⁶.
¹²² Ibid.
The Indian judiciary has always moved hand-in-hand with our Constitution with a view to promote social justice. If we go to interpret the deeper meaning of fundamental rights creating new avenues for seeking remedies for human rights violations through Public Interest Litigation (PIL) pleas and promoting genuine judicial interventions in the areas of child labour, bonded labour, clean and healthy environment, the women’s rights are a few examples how our judicial system has upheld the rule of law and ensured justice.123

Dicey’s rule of law has been adopted and incorporated in the Constitution of India. The preamble itself enunciates the ideals of justice, liberty, and equality. In chapter III of the Constitution these concepts are enshrined as fundamental rights and are made enforceable.124 Fundamental rights enshrined in part III of the constitution is a restriction on the law making power of the Indian Parliament. It includes freedom of speech, expression, association, movement, residence, property, profession and personal liberty. In its broader sense the Constitution itself prescribes the basic legal system of the country. To guarantee and promote fundamental rights and freedoms of the citizens and the respect for the principles of the democratic State based on rule of law. The popular habeas corpus case, ADM Jabalpur v. Shivakant Shukla125 is one of the most important cases when it comes to rule of law. In this case, the question before the court was ‘whether there was any rule of law in India apart from Article 21’. This was in context of suspension of enforcement of Articles 14, 21 and 22 during the proclamation of an emergency. The answer of the majority of the bench was in negative for the question of law. However Justice H.R. Khanna dissented from the majority opinion and observed that “Even in absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life and liberty without the authority of law. Without such

123 Ibid.
126 Fundamental right – Right to life and personal liberty (Art.21 of the Constitution).
sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning…”

Applied to the powers of the government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man’s land), or which infringes a man’s liberty (as by refusing him planning permission), must be able to justify its action as authorized by law - and in nearly every case this will mean authorized directly or indirectly by Act of Parliament. Thus it appears that doctrine of law is embodied in the Constitution of India, and treated as the basic structure of the Constitution.

2.12.1.13 Judicial Accountability – The Constitution of India says the executive, legislature and judiciary are the three arms of our constitution. The Executive is accountable to the Legislature, which in turn is democratically accountable to the Legislature, which in turn is democratically accountable to the people. Of the three pillars of democracy, Judiciary is the most powerful, primarily because it has the power of judicial review over every action of the executive and the Legislature. It is not only the arbiter of disputes between the citizens, between citizens and the State, between States and the Union, it is also in purported exercise of powers to enforce fundamental rights, directs the governments to close down industries, commercial establishments, demolish unauthorized constructions, remove hawkers and rickshaw pullers from the streets, prohibits strikes and bandhs etc. In short, it has come to be most powerful institution of the State.

Accountability and transparency are the very essence of democracy. Not one public institutions, or for that matter even private institution dealing with the public is exempt from accountability. However, judicial accountability is not the same as the accountability of the executive or the legislature, or any other

128 Ibid.
130 Justice Mohite S. Shah, Gujarat High Court, Study of the American Legal System for Procedural Reforms in Civil Courts in India, from the website: http://www.lawcommission_of_india.nic.in (last accessed on15th August 2010).
institution. This is because the independence and impartiality expected of the judicial organ is different from other agencies. Judges are accountable to the extent of deciding cases before them expeditiously in public (unless for special reasons), fairly, promptly, and with reasons for their decisions. Their judgements are also subject to scrutiny by the appellate courts. No doubt legal scholars and the public, including the media, frame an opinion on the judgements. If judges misconduct themselves, they are subject to discipline by the mechanisms provided under the law. Hence, the judicial arm of the government is also accountable. The accountability must be comprehensive so as to include not only the politicians, but also the bureaucrats, judges and everyone invested with public power.

In Sheela Barse v. Union of India, Justice Venkatachaliah said:

“…..the references to judicial-accountability, having regard to the specific-context in which they are made really mean no more than that the proceedings are to be conducted in conformity with the standards of promptitude and dispatch of which the applicant chooses to constitute herself the judge to sit in judgment over the alleged short comings in that behalf. The concept of public accountability of the judicial system is, indeed, a matter of vital public-concern for debate and evaluation at a different plane. All social and political institutions are under massive challenges and pressures of reassessment of their relevance and utility. Judicial institutions are no exception. The justification for all public institutions are related to and limited by their social relevance, professional competence and ability to promote the common-well. There is no denying that a debate is necessary and perhaps, is overdue”.

In A.M. Mathur v. Pramod Kumar, K. Jagannatha Shetty J speaking for the court has said:

“Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this

---


134 (1990) 2 SCC 533.
humility of function should be constant theme of our judges. This quality in
decision making is as much necessary for judges to command respect as to
protect the independence of the judiciary. Judicial restraint in this regard might
better be called judicial respect, that is, respect by the judiciary. Respect to
those who come before the court as well to other co-ordinate branches of the
State, the executive and the legislature. There must be mutual respect.”

Judicial Accountability-Meaning

Accountable, as per the *Oxford Advanced Learner’s Dictionary* (Sixth
Edition, 2000) means being “responsible for your decisions or actions and
expected to explain them when you are asked”.

In *Webster’s Dictionary*, accountability is defined as “the quality or state of
being accountable, liable, or responsible.” Generally speaking, accountability
implies the necessity to justify or explain one’s past conduct, behaviour or
action.

A powerful judiciary without accountability is not only an anathema to our
constitution but also a recipe for disaster for our democracy. The situation
needs to be urgently rectified. It is hard to say that the judicial system in this
country is in a state of collapse. Many of the solutions necessary to remedy this
problem have been suggested by the successive Law commissions and have
been known to successive governments. However those in power have little
incentive to reform the judiciary, since they do not need the judiciary to get
justice. They have the power of authority. It is the poor and weak and the
helpless that usually need the courts to get justice, often against those who are
in power. It suits a corrupt executive to have a corrupt judiciary.

2.12.1.14 Judicial Passivism - The approach that says courts should uphold
all laws unless they are unconstitutional beyond a reasonable doubt -- has the

---

135 Suman Meen, “Judicial Accountability” from the website:
http://www.legalindia.in/%E2%80%9Cjudicial.accountability%E2%80%9D (last accessed on 18th August 2010).

136 Ibid.

137 Dhurjati Mukherjee (2008) “Corruption in Judiciary” from the website:
virtue of insulating courts from difficult constitutional issues and giving great
deferece to the decisions of the democratically-elected branches of
government. Unfortunately, these are also its vices. Most fundamentally, this
approach misapprehends the essential nature of our constitutional system and
abdicates a central responsibility of the judiciary. The problem with "judicial
passivism," in other words, is that it abdicates judicial responsibility and
subverts a fundamental part of the genius of the American constitutional
system. By evading their duty to enforce the Constitution in a meaningful
manner, judicial passivists betray a central feature of our constitutional
system. 138

2.13 FINDINGS

It is submitted that these concepts are not the only concepts occurring or being referred
to in the thesis. However, because of their greater significance, these concepts are
understood in this chapter and only in real sense it relied upon it like Judicial Activism
can be understood differently by various person and jurist. Neither statute defines any
of these terms. So likewise it connotes the concept by various legal dictionary and
judgment.

138 From the website: http://www.huffingtonpost.com/geoffrey-r-stone/supreme-imbatance-why-jud_b_70823.html (last accessed on 03rd September, 2010).