CHAPTER 4

SOCIAL DYNAMICS: LEGISLATIVE LAW VERSUS JUDGE MADE LAW

One of the desirable qualities of law is its dynamism coupled with stability and continuity. As rightly pointed out by Justice Benjamin N. Cardozo, law is never static.[1] That the human society by its very nature is progressive, is evident from the fact that more societies on the globe, are found progressing in their legal system and fewer are those which are yet to be found chained in their archaic and customary legal system, which operate through a complex phenomenon of psycho-mysticism and pragmatic compulsions of association with tribes and groups. Social necessities and social opinions are always in advance of law and degree of happiness of people is in direct proportion to the speed and promptitude with which the gulf between law and progressive society is bridged. Law as an instrument of social control is more static and its function is to reinforce the existing modes to design legal sanctions to minimise deviances and to maintain stability. Yet law is dynamic enough to keep pace with the changing demands of the society. This dual and apparently characteristic of law is harmonised by the checks and balances shared between the legislature and the judiciary in law making process. There is also an element of law making by the executive, but that is not within the purview of this thesis. As said by Karl Llewellyn, 'Law, as a going concern in society, may on his view best be viewed as a series of

[1] Benjamin N. Cardozo, *The Growth of Law*, p. 2

"cluster of attributes", varying constantly in proportion and degree, but all to be found in group life of all kinds'.[2]

There are usually two main sources of law. The first source is the legislation and the second source is the judge made law that is, the judicial interpretation of existing legislation.[3] The realistic school of jurisprudence exploded the myth that the judges merely declared the pre-existing law or interpreted it and asserted that the judges made the law. It stated that the law was what the courts said it was. This is known as legal skepticism and was really a reaction to Austin's definition of law as a command of the political sovereign. According to analytical jurisprudence a court merely found the law or merely interpreted the law. The American realistic school of jurisprudence asserted that the judges made law, though interstitially. Jerome Frank, Justice Holmes, Cardozo and Llewellyn were the chief exponents of this school. Judicial law-making in the realistic sense is what the court does when it expands the meanings of the words 'personal liberty'[4] or 'procedure established by law'[5] or 'freedom of speech and expression'.[6] As remarked by Julius

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[2] Quoted in Julius Stone, *Social Dimensions of Law and Justice*, p.647 (1966)

[3] There is also a third source of law making by the executive through rules and bye-laws which is also subject to judicial scrutiny.

[4] In *A.K. Gopalan* v. *State of Madras* AIR 1950 SC 27 the word 'personal liberty' was construed narrowly to mean only liberty of the physical body. This restrictive approach was not followed in *Kharak Singh* v. *State of U.P.* AIR 1963 SC 1295. In *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597 the Supreme Court overruled *Gopalan's case* and held that "the expression 'personal liberty' in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have raised to the status of distinct fundamental rights and given additional protection under Article 19."

[5] In *A.K. Gopalan* v. *State of Madras* AIR 1950 SC 27 the Supreme Court held that the 'procedure established by law' did not mean 'due process of law' as understood in America. However, the Supreme Court in *Maneka Gandhi* v. *Union of India* AIR

Stone, "Precedents present, for the instant case, a rapid review of social contexts comparable to the present and of results though to be apt in those contexts by other minds after careful inquiry".[7]

Most British judges and lawyers all the time, and all of them some time, do regard judicial decisions as either direct applications of existing law, or deductions from existing legal principle. It has been observed that the object of the common law was to solve difficulties and adjust relations in social and commercial life, grow with the development of the nation, and deal with changing and novel circumstances in an expanding society demanding an expanding common law. The dynamic nature of law is its quality to bring about social change by influencing behavior, beliefs and values. As an instrument of social change, judicial process involves interrelated processes. When new principles are enunciated, the institutionalisation of new pattern of behaviour starts manifesting in itself, new social values, though confined to relatively minorities.

In the nineteenth century, even when the separation of powers was not a constitutional imperative, it was deemed to be a moral and political imperative for the preservation of liberty. The precise boundaries between the powers were assumed to be fixed and discoverable, for without this the imperative would be brought to naught. So that what was not for the judicial power must be either for the legislature or the executive; and if the subject-matter was also not within preconceived legislative power, it must fall to the executive. The allocation of subject-matters thus tended to

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1978 SC 597 overruled *Gopalan's case* and held that the procedure prescribed by law has to be fair, just and reasonable not fanciful, oppressive or arbitrary. The concept of 'due process of law' has further found implementation in *Sunil Batra* v. *Delhi Administration* AIR 1978 SC 1675

[6] S.P.Sathe, *Judicial Activism in India*, p. 249 (2nd Edition 2003)

[7] Julius Stone, *Legal System and Lawyers' Reasonings*, p.282 (1964)

begin not from the subject-matter itself, as a basis for asking which kind of organ was functionally most apt for just and efficient handling of this. It began rather from the ambit of power of each kind of organ, as this was assumed to be pre-set.[8]

Separation of powers, in the American sense of the expression, hardly exists in countries with a parliamentary regime of government: although the judiciary is independent, the other two powers are intertwined. Montesquieu advocated very forcefully that Constitutions should be arranged in such a way that one power can always stop the other.[9] The proper balance between the three powers which the 'founding fathers' had in mind was inspired by the view that the liberty of the citizens would be better assured if none of the federal institutions was strong enough to impose arbitrary or authoritarian decisions.

4. 1. THE JUDICIAL ROLE

Filling gaps[10] is one of the most obvious forms of judicial interpretation. Law has to be interpreted according to the current societal standards. The law when enacted, in spite of the best effort and capacity of the legislators cannot visualize all situations in future to which that law requires application. New situations develop and the law has got to be interpreted for the purpose of finding a solution to the new problems. This is how the law advances. No statute, no code, no Constitution can be complete and detailed that it renders the interpretive work of the judge

[8] Julius Stone, *Social Dimensions of Law and Justice*, p. 696 (1966)

[9] Tim Koopmans, *Courts and Political Institutions-A Comparative View*, p. 175 (1st Edition 2003)

[10] The best examples of such filling gaps by the judiciary in India are *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241; *M.C. Mehta* cases, *Laxmi Kant Pandey* cases.

superfluous. Great legislators have been aware of this. When the draft for the original French Civil Code, the *Code Napoleon*, was presented, one of the drafters, Portalis, made an introductory speech which included the warning that legislation is necessarily incomplete:

> Un code, quelque complet qu'il puisse paraitre, n'est pas plus tot acheve que mille questions inattendues viennent s'offrir au magistrate. Car les lois, une fois redigees, demeurent telles qu'elles ont ete ecrites. Les homes, au contraire, ne se reposent jamais.
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> (A code may look very complete, but a thousand unexpected questions present themselves to the judges as soon as it is finished: for laws, once drafted, remain as they have been written down, but people never rest.)[11]

For this reason, the judicial task consists in grasping the true meaning of the laws, to apply them with understanding and to supplement them in cases they have not provided for. Every judge must play an active role in the discharge of his duties as "adjudicator of disputes". His role as an interpreter of law and dispenser of justice according to law should not be allowed to be diminished either because of the perceived notions of the other two wings of the State-the Legislature and the Executive or any section of the public.[12]The same has been reiterated by Justice Benjamin N. Cardozo:

> It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are

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[11]Tim Koópmans, *Courts and Political Institutions-A Comparative View*, p. 224 (1st Edition 2003)

[12] Justice M.N.Rao, *Reflections on Law and Society*, p.35 (1st Edition 2000)

gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided.[13]

It has also been observed by Dennis Lloyd[14] that-

> It has long been received opinion that judges filled in the gaps left by rules by using their discretion. Positivistic jurisprudence from Austin to Hart placed emphasis on the part played by judicial discretion.

Justice K.N. Goyal has enumerated the duty of a Judge while making law as under-

(a) Discovering the true intention of the legislature;

(b) Resolving ambiguities;

(c) Filling in the gaps;

(d) Avoiding absurdity or hardship; and

(e) Making the statute harmonious with the Constitution and other laws.[15]

In filling gaps, judges may not be founding their decisions on a specific constitutional provision, but they remain faithful to the constitutional system as they find it. For such purposes, it is not necessary to evoke the 'spirit' of the Constitution or the 'mind' of its framers. The Constitution, or the constitutional traditions it reflects, will suggest parallels, with the result that solutions to be devised by the courts will be as close as possible to those explicitly envisaged by the written texts. A Constitution cannot be regarded as a collection of isolated provisions; in order to be applied in practice, it must be considered as a coherent body of rules and principles. If courts have difficulty in finding any cohesion at

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[13] Benjamin N. Cardozo, *The Nature of the Judicial Process*, p. 14 (1961)

[14] M.D.A.Freeman, *Lloyd's Introduction to Jurisprudence*, p. 1389 (7th Edition 2001)

[15] Justice K.N. Goyal, *Limits of Judicial Law Making*, AIR 1994 Journal 21

all, they should make an additional effort: they will find it by examining the constitutional rules in their relations to each other and to the professed aims of the constitutional document in question. This cohesion will usually suggest solutions for cases that are not explicitly covered by any constitutional provision.[16]

The acceptance enjoyed by the judicial process in any society depends mostly upon the historic role played by that process in the shaping of lego-social institutions in that society. With the advent of common law and the judicial institutions employing common law techniques, courts in India have played undeniably an important role in moulding legal concepts and institutions according to changing social circumstances. With a written Constitution providing for entrenchment of basic human rights and for division of legislative and administrative power in a federal context, the place for judicial review has gained greatly in value and importance. The prestigious position of the judiciary in this respect has also focused attention on greater creative involvement of judiciary in law reform and upon social accountability of judicial process for the said reform. Greater the creative opportunity for judges to make adaptations and innovations in the law, greater is the scope for legal profession to participate in this judicial law-making process for, in the adversary system of adjudication judicial approach to law-reform is to a considerable extent determined by the extent of fruitful interaction judges have with counsel. Creative abilities of judges are to a large extent shaped by professional capacity of the lawyer to persuade the judiciary to adopt the change in the law argued for.

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[16] Tim Koopmans, *Courts and Political Institutions-A Comparative View*, p. 225 (1st Edition 2003)

The advent of sociological jurisprudence and legal realism has shifted the emphasis in the twentieth century from the nature and ultimate source of law to an examination of the structure, objectives and functions of legal institutions. Students of Judicial process and behavior can benefit from comparisons of the Judge as rule-maker and rule interpreter with administrators who make and interpret rules in other types of organizational settings, including administrative law agencies. The Judge is a man whose profession has been rule oriented and control-oriented for centuries, in different types of social systems and through bewildering social changes.[17]

4. 2. THE LEGISLATIVE ROLE

The constitutional philosophy, the underlying political-social ethos, the relative dominance and leadership resources provided by democratised legislators in key areas of social change and the opportunities available for pressure groups, elastic or otherwise, to articulate their positions and to make those available in a viable form to be taken cognizance of by the judicial process, are all important elements. In any democratic society under conditions of modernisation and social change in an era of transition from a colonial legal culture to a dynamic social order, society tends to legitimise adoption of vast social control measures in terms of representation which more by fiction than as an operationally viable model, affords opportunity for association of popular will with the law making process tending thereby to eliminate the superficial separation of the people from participating in the legislative decision making process. The legislature in such a situation is universally

[17] A. Lakshminath, *Precedent in Indian Law*, p. 117 (2nd Edition 2005)

respected as an agent of social change and as an authentic expression of populist mandate. In comparison the judicial process is institutionally weak and in the absence of the representative element it cannot claim legitimacy for its activist assertion as an agent of social change.[18] The judiciary may through the political question rationale respect the exclusive authority of the political branches for decision making in key areas of public life where it is institutionally ill-adapted for goal formulation, clarification and implementation. Outside of these areas which are covered under the rubric of political question, the judicial branch claims to share political power, albeit in an interpretative sense with the rest of the branches of Government.[19] It is argued that the political process involves an element of accountability which has no equivalent in judicial decision making. If the decision ultimately turns out to have been incorrect, or even bad or dangerous, the political decision-makers, or their political party, will have to face the distress or rage of the electorate. In judicial decision making, the judgment of the final appellate court closes the argument.

The political institutions are also in a strong position as far as accessibility of information is concerned. Courts are bound by the law of evidence. In civil litigation, which habitually respects the autonomy of the parties, the evidence available to the courts concerns the facts the

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[18] According to the positivist approach and especially according to Kelsen, law is recognised by the society to be such because it has a particular form and is enacted through a particular process which has a representative element. Due to these characteristics people are able to recognise it as law and respect it as an agent of control and social change. Judicial activism/social dynamics on the other hand neither has form nor a particular process or a representative element. To this extent the latter is considered to be weak and less assertive. Interestingly however, much social transformation has been achieved through the latter process of law making than the former.

[19] A. Lakshminath, *Precedent in Indian Law*, p. 116 (2nd Edition 2005)

parties have thought fit to produce. The administrative courts, such as exist in France and Germany, are in a somewhat stronger position: they can ask for documents and other information on their own initiative, and the public authority which is party to the proceedings will usually comply. Governments and parliamentary committees have, however, an entirely free hand in collecting every kind of information they consider as relevant.[20]

4. 3. THE LEGISLATURE VERSUS THE JUDICIARY

There are, however, also important arguments in favour of decision-making by judges. Governments may rush legislation through the representative bodies, in particular in those parliamentary regimes where the government can rely on a stable majority in Parliament. Courts will rarely, if ever, indulge in behaviour of this kind: they are restrained by their professional attitudes. Judges are professionally trained to consider every argument, however curious, and to balance different arguments against each other. Normally they will give reasons for their decisions, thereby enabling others to reconstruct the court's line of thought. A further advantage of judicial decision-making is that those who decide have no personal interest in the result. They are more unprejudiced than politicians, who are more frequently linked to the business community or to interest groups, or to single-issue movements such as anti-hunting lobbies or environmental groups.[21]

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[20] Tim Koopmans, *Courts and Political Institutions-A Comparative View*, p. 92 (1st Edition 2003)

[21] *Ibid* at 94

The legislature, when it enacts the law is naturally unable to visualize all the situations to which it would apply in future. In the myriad situations which arise thereafter there are some occasions when the existing law appears to be deficient to provide for the felt needs of the time. In such a situation the role of the judiciary is not only to interpret but also to expound the law to provide for those situations as well, though within the bounds of law, since rule of law which does not permit any vacuum, must prevail to respond to the needs of the society.[22]

The observations of the Supreme Court in this regard has been highlighted in *Vishaka* v. *State of Rajasthan*[23] as thus-

> The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.[24]

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[22] Dr. Justice A.S. Anand, *Protection of Human Rights-Judicial Obligation or Judicial Activism*, (1997) 7 SCC (Journal) 11

[23] (1997) 6 SCC 241. The Supreme Court of India laid down certain guidelines to ensure the prevention of sexual harassment of women in workplaces which were made binding and enforceable in law until suitable legislation is enacted to occupy the field. However, even after eleven years of the passing of the judgment (the judgment was delivered on 13th August 1997); no suitable legislation has been passed to deal with the prevention of sexual harassment of women in workplaces.

[24] *Ibid* at 247

It is also seen that the legislators are not always best suited for the role of adopting the law to the necessities of time for, the legislative process is too slow and the legislatures are often divided by politics, slowed down by politics, slowed by periodic elections and overburdened with myriad and other legislative activities. Sometimes, the drafting of the laws is also poor and ambiguous. Even the executive can sometimes fail to implement the law. Thus, the task must, therefore, of necessity fall upon the courts because the courts can by the process of interpretation or judicial activism adopt the law to suit adopt the law to suit the needs of the society.[25]

Merely because the judiciary is unelected, it cannot be said that it has no competence to mould the law by interpretation. Framing or amending law and putting it in actual action poses problems and issues of different kinds. They arise from time to time, event to event and case to case. In judicial process and the adversarial system, all sections of people involved in an issue are heard. Everyone's point of view, including those volunteering to assist the court, is given due consideration and weight. The judiciary adopts a participatory process, which is sometimes more effective than the process of law-making adopted by the legislature.[26] As remarked by Roscoe Pound-

> Judicial finding of law has a real advantage in competition with legislation in that it works with concrete cases and generalizes only after a long course of trial and error in the effort to work out a practicable principle.[27]

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[25] Dr. Paramjit S. Jaswal and Dr. Nishtha Jaswal, *Judicial Activism: The Genesis and Progress*, Vol. 28 (2 & 3) 2001, Page 221

[26] Justice D.M.Dharmadhikari, *The Principle of Constitutional Interpretation: Some Reflections*, (2004) 4 SCC (Journal) 1

[27] *Ibid*

The essence of a parliamentary government is that it has a head of State who is also the constitutional head although; the real executive powers are vested in the Council of Ministers with the Prime Minister at its head. The Prime Minister and the Council of Ministers take executive action on behalf of the head of the State (the President in the case of India). The legislature consisting of the President, the central Parliament (the Lok Sabha and Rajya Sabha) and the state legislatures, form the second organ of India. The third organ is the judiciary which draws its powers from the Constitution.

All the three organs have a definite role to play under the constitutional framework. The legislature frames the laws, the executive enforces the law and the judiciary interprets the law. In theory all the three organs act exclusively within the sphere allotted to them by the Constitution. However, in actual practice, there is a certain amount of overlapping in the fields of all the three organs of the State. The legislature while framing a law has to strictly abide by the provisions of the Constitution and it cannot frame a law which is contrary to any provisions of the Constitution. The validity or otherwise of a law framed by the legislature can be considered by the judiciary and if the law is found to be *ultra vires*, the judiciary can strike down such a law and thus the law is obliterated from the statute books. On the other hand, if the judiciary finds the law to be valid, it upholds such a law and it is then enforced in terms of the interpretation placed on the law by the courts. The executive, when it enforces the law framed by the legislature, its action are subject to scrutiny by the judiciary. The judiciary then checks the actions of the executive not only on the touchstone of the law sought to be enforced, but also on the touchstone of the Constitution. The decisions of the courts are binding on both the legislature as well as the executive. There is no power vested either with the legislature or the

executive to ignore the decisions of the courts or to act contrary to such decisions. Any action of either the executive or the legislature contrary to any decision of the courts would be liable to be struck down without any doubt.

4. 4. THE JUDICIARY IN INDIA

The members of the Indian Constituent Assembly brought to the framing of the judicial provisions of the Constitutions an idealism equaled only by that shown towards the Fundamental Rights. Indeed, the Judiciary was seen as an extension of the Rights, for it was the courts that would give the Rights force. The Judiciary was to be an arm of the social revolution, upholding the equality that Indians had longed for during colonial days, but had not gained-not simply because the regime was colonial, and perforce repressive, but largely because the British had feared that social change would endanger their rule. The courts were idealized because, as guardians of the Constitution, they would be the expression of the new law created by Indians for Indians. The courts were, therefore, widely considered one of the most tangible evidences of independence.[28] As remarked by Chief Justice Marshall in *Marbury* v. *Maddison*[29], "it is for the Court to say what the law is".

It was realized that democracy cannot survive without an independent judiciary assisted by an independent legal profession. There are inevitable conflicts of view between an executive taking action which ministers deem to be in the public interest and an independent judiciary

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[28] Granville Williams, *The Indian Constitution-Cornerstone of a Nation*, p.164 (5th Edition 2002)

[29] (1803) 2 L Ed 60 quoted by Justice R.C.Lahoti, *Judicial Activism-Constitutional Obligation of the Courts*, AIR 2005 Journal 177

charged with ensuring that executive action does not exceed the powers conferred by the Constitution or infringes the rule of law. The Supreme Court has also to be vigilant to protect the integrity of the Constitution from an impatient Parliament asserting total supremacy through the operation of the express power contained in the Constitution for the amendment of the Constitution. It was aptly remarked by M. Ananthasayanam Ayyangar during the Constituent Assembly Debates that the Supreme Court is the supreme guardian of the citizen's rights in any democracy[30].

Mr. Alladi Krishnaswami Ayyer, during the Constituent Assembly Debates, had remarked on the importance of the Supreme Court while interpretation of the Constitution of India-

> The future evolution of Indian Constitution will thus depend to a large extent upon the work of the Supreme Court and the direction given to it by the Court. While its function may be one of interpreting the Constitution, it cannot in the discharge of its duties afford to ignore the social, economic and work tendencies of the time, which furnish the necessary background.[31]

However, the framers of the Indian Constitution did not incorporate a strict doctrine of separation of powers but envisaged a system of checks and balances. Policy-making and implementation of policy are conventionally regarded as the exclusive domain of the executive and the legislature, with judiciary enforcing the law.

As early as in 1951, the Supreme Court noted that though there are no specific provisions in the Constitution vesting legislative powers

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[30] Constituent Assembly Debates, Vol. VII, pg. 940

[31] Justice R.C.Lahoti, *Judicial Activism-Constitutional Obligation of the Courts*, AIR 2005 Journal 177

exclusively in the legislature and the judicial power in the judiciary, the essence of the doctrine of separation of powers was implicit in the constitutional scheme.[32] The Supreme Court has itself recognized that the 'Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another'.[33]

Chief Justice S.M. Sikri observed in *Keshavananda Bharati* v. *State of Kerala*[34] that-

> Separation of powers between the legislature, the executive and the judiciary is a part of the basic structure of the Constitution.

Chief Justice A.N. Ray[35] is of the opinion that in the Indian Constitution, there is separation of powers in a broad sense only. A rigid separation as under the American Constitution or under the Australian Constitution does not apply to India.

The observations of the Supreme Court in *Asif Hameed* v. *State of J & K*[36] are-

> Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the

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[32] *In re Delhi Laws Act* AIR 1951 SC 332

[33] *Ram Jawaya Kapur* v. *State of Punjab* AIR 1955 SC 549 at 556

[34] AIR 1973 SC 1461

[35] *Indira Nehru Gandhi* v. *Raj Narain* AIR 1975 SC 2299

[36] AIR 1989 SC 1899 at 1905. This line of demarcation between the three organs of the State was later followed in *Supreme Court Employees' Welfare Association* v. *Union of India* AIR 1990 SC 334 and *Mallikarjuna Rao* v. *State of A.P.* AIR 1990 SC 1251

> Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs.

Justice Markandey Katju has observed in *Indian Drugs & Pharmaceutical Ltd.* v. *Workmen* [37] that "there is broad separation of powers under the Constitution". Justice Markandey Katju has also remarked that, "it is true that there is no rigid separation of powers under our Constitution but there is broad separation of powers, and it is not proper for one organ of the State to encroach into the domain of others".[38]

Pandit Thakur Das Bhargava during the Constituent Assembly Debates had opined, "Every constitution provides for three basic requirements, *viz.*, firstly, an independent judiciary: secondly, a legislature, and thirdly an executive. It would be a mistake for one to ask as to which of the three is of greater or lesser importance, because all the three, though independent in their respective spheres are component parts of the body politic of the State".[39]

The working of the three organs has been explained by Justice A.S.Anand[40] as follows-

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[37] (2007) 1 SCC 408 at 426

[38] *State of U.P.* v. *Jeet S. Bisht* (2007) 6 SCC 586. He followed the same view in *Divisional Manager, Aravali Golf Club* v. *Chander Hass* (2008) 1 SCC 683 at 689

[39] Constituent Assembly Debates, Vol. VIII, pg. 393

[40] Dr. Justice A.S.Anand, *Judicial Review-Judicial Activism-Need for a Caution*, 42 JILI (2000) Page 149

> The necessity of empowering the courts to declare a statute unconstitutional arises not because the judiciary is to be made supreme but only because a system of checks and balances between the legislature and the executive on the one hand and the judiciary on the other hand provides the means by which mistakes committed by on are corrected by the other and vice versa. The function of the judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is simply to give effect to the legislative policy of a statute in the light of the policy of the Constitution. The duty of the judiciary is to consider and decide whether a particular statute accords of conflicts with the Constitution and make a declaration accordingly....When it is said, therefore, that the judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive are not equally to guard the Constitution. For the progress of the nation, however, it is imperative that all the three wings of the state function in complete harmony.

At the time of inauguration of the Supreme Court, our first Chief Justice H.C. Kania said-

> The people make the laws through their Legislature. It is not for the Court to supervise or correct the laws as superior authority. Only function is to point out, while examining the lacuna or loop-holes solely with the view to rectify them by the legislative authority, if necessary.[41]

The Constitution of India has recognized the two modes of law making. Article 141 of the Constitution of India lays down that the law as declared by the Supreme Court of India shall be binding on all courts

[41] Justice Ashok A. Desai, *Justice Versus Justice*, p. 100 (2000)

within the territory of India. Article 142 further gives the Supreme Court in exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India.

The verdict of Supreme Court has a command of a law having binding force on all the Courts within the territory. One may *prima facie* understand the term, which has been known in a common parlance as well as referring to that the Supreme Court has laid down the law. However, it is felt that the Supreme Court merely declares the position of law on a statute, which is in vogue and does not legislate. The view is founded on the basis that the words of the Supreme Court are not the solemn will of the people and is not akin to a legislative enactment. The law of the Legislature, which is in conformity with the Constitution, always has an upper edge.[42]

The judiciary has always remained active. It cannot afford to be passive. While the other two wings of the government, i.e. executive and legislature sometimes remain passive and sometimes become overactive, but judiciary functions within its framework and is bound to work within its parameters because of constitutional device of division of powers. The main and prior function of the judiciary is to deliver justice to all without fear or favour. The judiciary endeavours to protect the oppressed, powerless, poor and helpless people against the injustice committed by omnipotent persons, authority or body. Judiciary protects the weakest persons from the oppressive acts of either executive or legislatures. When judiciary protects and provides justice to the poorest people against oppressive acts of a private persons, authority or body, there is no hue

[42] *Ibid* at 63

and cry but when it protects against tyranny of the Government, everyone thinks about judicial activism.

In the previous chapter it has been shown that in several *pro bono public* litigations the Supreme Court is attracting judicial attention in almost every aspect of human life including simplification of judicial procedure. This initiative of the Supreme Court followed by the High Courts was backed by the Parliament to some extent. In this regard, the incorporation of Article 39A in the Constitution which enjoined upon the State to secure that the operation of legal system promotes justice on the basis of equal opportunity, and to provide free legal aid to ensure that the opportunities for securing justice are not denied to any citizen by reason of economic and other disability has strengthened the hands of the judiciary in its quest to impart justice to every common man. The initiative of the judiciary and the use of its judicial mind in various public interest litigation's and other regular cases relating to environment, education, electoral reforms, women atrocities, child exploitation, etc. has resulted in adding new legislations to our statute books. It is the endeavor of the judiciary which has made the Indian society more aware about their legal rights and remedies and has resulted in the judiciary 'legislating' exactly in the way in which a legislature legislates.

It has been said that Justices, bound by solemn oaths to uphold the Constitution, without fear or favour, the Indian Constitution must remain the sacrosanct text.[43]

[43] Upendra Baxi, *Judicial Activism, Legal Education & Research in a Globalising India*, p. 8 (1996)

The activist[44] role of the judiciary has been explained by Justice P.N.Bhagwati as under-

> 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 in the process rewritten some parts of the Constitution through a variety of techniques of judicial activism. The Supreme Court judiciary in India has undergone a radical change in the last few years and it is now increasingly being identical by justices as well as by people as "the last resort for the purpose of the bewildered".[45]

Holland has beautifully blended his view with that of Aristotle while explaining about the duty of a judge. He writes[46]-

> When the balance of justice is distributed by wrong-doing, or even by a threat of it, the law intervenes to restore, as far as possible, the *status quo ante*. 'The judge', says Aristotle, 'equalises'.

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[44] There is a difference between an active and an activist judge. An active judge regards himself a trustee of State regime, power and authority. Accordingly, he usually defers to the executive and legislature; shuns any appearance of policy-making; supports patriarchy and other forms of violent social exclusion; and overall promotes 'stability' over 'change'. In contrast, an activist judge regards himself as holding judicial power in fiduciary capacity for civil and democratic rights of all peoples, especially the disadvantaged, disposed, and the deprived and does not regard adjudicatory power as repository of the reason of the State-See Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice* in S.K. Verma and Kusum(ed.), *Fifty Years of the Supreme Court of India-Its Grasp and Reach,* p.165 (2nd Edition 2006)

[45] Justice P.N.Bhagwati, *Enforcement of Fundamental Rights: Role of the Courts,* Indian Bar Review, Vol. 24 (1& 2) 1997 Page 197

[46] Thomas Erskine Holland, *The Elements of Jurisprudence*, p. 325 (13th Edition 1924)

In *The Authorised Officer, Thanjavur* v. *S. Naganatha Iyer*[47] it has been observed-

> The judiciary is not a mere umpire, as some assume, but is an active catalyst in the constitutional scheme.

While explaining about the role of an activist judge, Justice V.R.Krishna Iyer has stated that "Judicial activism is no more a serendipity. It is the conscious fulfillment of the obligation implied in the oath of office of a judge. That is his discipline, his ethic, his tryst with the people of India"[48]. He further observed-

> The Indian Constitution is not a neutral document but has a definite slant towards social justice and the weaker sections and, therefore, judges have to share the values of the Supreme Lex. Then alone class actions, test cases, representative litigation and social action proceedings will meet with expected results. Our courts are on trial and judicial performance is under scrutiny. A people-oriented perspective, a dynamic vision and instrumental obligation with a passion to see that the State secures, through the operation of the legal system, social justice on a basis of equal opportunity is the desideratum. It follows that the Constitution fulfills itself in its Preambular pledges only when the right type of judge with activism and imagination capacity for affirmative action and courage to resist proprietariat pressure sits on the bench and commits himself to a constituency which embraces the entire Indian people. [49]

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[47] AIR 1979 SC 1487

[48] Justice V.R.Krishna Iyer, *Legally Speaking*, p. 215 (2003)

[49] V.R.Krishna Iyer, *Judicial Activism-A Democratic Demand*, Indian Bar Review Vol. XXXI (1 & 2) 2004 Page 1

The observations of Justice K. Ramaswamy on the importance of judicial law-making is-

> The judge cannot retain his earlier passive judicial role when he administers the law under the Constitution to give effect to the constitutional ideals. The extraordinary complexity of modern litigation required him not merely to declare the rights to citizens but also to mould the relief warranted under facts and circumstances and often command the executive and other agencies to enforce and give effect to the order, writ or direction or prohibit them to do unconstitutional acts. In this ongoing complex of adjudicator 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 a reality. Therefore, the judge is required to take judicial notice of the social and economic ramification, consistent with the theory of law. Thereby, the society demands active judicial role, which formerly were considered exceptional but not a routine.[50]

Justice A.S.Anand has called the duty of the courts as a judicial sentinel. His opinion in regard to judicial institution is worth mentioning. He observed[51]-

> Judicial institutions have a sacrosanct role to play not only for resolving *inter-se* disputes but also to act as a balancing mechanism between the conflicting pulls and pressures operating in a society. Courts of law are the products of the Constitution and the

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[50] *C. Ravichandran Iyer* v. *Justice A.M. Bhattacharjee* (1995) 5 SCC 457 at 471

[51] Dr. Justice A.S.Anand, *Judicial Review-Judicial Activism-Need for a caution*, 42 JILI (2000) Page 149

instrumentalities for fulfilling the ideals enshrined therein. Their function is to administer justice according to the law and in doing so, they have to respond to the hopes and aspirations of the people because the people of this country, in no uncertain terms, have committed themselves to secure justice-social, economic and political-besides equality and dignity to all.

Dr. G.B.Reddy[52] has set a *raison de etre* for the functioning of an active judge as-

> 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 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.

Where a judge interprets the law or the Constitution not merely by giving effect to the literal meaning of the words of the statute, or the

[52] Quoted in Justice V.R.Krishna Iyer, *Legally Speaking*, p. 218 (2003)

Constitution but, by giving such meaning as he thinks is in consonance with its spirit, he is said to be an activist judge.[53]

In modern democratic society, judge must steer his way between the Scylla of subservience to government and the Charybdis of remoteness from constantly changing social pressures and economic needs.[54] There is little to point out the dangers of complete political subservience which the judiciary has experienced where the administration of law becomes a predominantly political function and an instrument of government policy. The concept of stitching the cloth is the business of the legislature whereas straightening the creases is the province of the judiciary, has long been abandoned as a broken tool.[55]

The judiciary has evolved three contours in its effort to adopt an activist role. The concept of public interest litigation (PIL) being the first contour. Secondly, giving of a wide interpretation to various fundamental rights of Part III of the Constitution and the third is related to the accountability of the officials, who are the trustee of public power, for their misuse of the power. The mission of the judiciary is not merely to decide the case but to secure justice to every citizen of the country and of creating a just democratic order amidst us. As stated by Upendra Baxi, Justices are, explicitly and implicitly, asked to make the Indian Constitution compatible with the sacred texts of globalization[56].

However, the judiciary has not adopted a uniform and consistent approach in dealing with its emerging role as a policy-maker. While in

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[53] S.P.Sathe, *Judicial Activism in India*, p. 30 (1st Edition 2002)

[54] W. Friedmann, *Law in a Changing Society*, p.88 (2nd Edition 1972)

[55] Justice Pana Chand Jain, *Judges do Make Law*, AIR 2003 Journal 218

[56] Upendra Baxi, *Judicial Activism, Legal Education & Research in a Globalising India*, p. 8 (1996)

some cases, the Court has expressed its reluctance to step into the legislative field, in others it has laid down detailed guidelines and explicitly formulated policy. The former approach was taken by the Supreme Court when dealing with the question of ragging of students in Medical Colleges. The Supreme Court overturned the High Court's direction to the State Government to introduce anti-ragging legislation and observed-

> The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging....It is entirely a matter for the executive branch of the Government to decide whether or not to introduce any particular legislation. The court certainly cannot mandate the executive or any member of th legislature to initiate legislation, howsoever necessary or desirable the court may consider it to be. If the executive is not carrying out any duty laid upon it by the Constitution or the law, the Court can certainly require the executive to carry out such duty and this is precisely what the Court does when it entertains public interest litigation.....But at the same time the Court cannot usurp the functions assigned to the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature.[57]

Speaking on the same lines, the Supreme Court has observed in *M.P. Oil Extraction* v. *State of M.P.*[58] as-

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[57] *State of H.P.* v. *A Parent of a Student of Medical College, Shimla* (1985) 3 SCC 169

[58] (1997) 7 SCC 592 at 611

> The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State....The supremacy of each of the three organs of the State i.e. legislature, executive and judiciary in the respective fields of operation needs to be emphasized.

This attitude was also followed in the Disinvestment case[59] by Justice Kirpal on behalf of a unanimous Court-

> Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority.

These observations might have been prompted by the reasoning given by W. Friedmann[60] wherein he had observed-

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[59] *BALCO Employees' Union (Regd.)* v. *Union of India* (2002) 2 SCC 333

[60] W. Friedmann, *Legal Theory*, p. 503 (5th Edition 1967)

Courts can and indeed are called upon to adjust rights and liabilities in accordance with changing canons of public policy. But because they develop the law on a case-by-case basis they cannot as can the legislature, undertake the establishment of a new legal institution, "an elaborate procedure of investigation and consideration eventuating in the approval of a particular form of words as law".

Lord Devlin had said:

Judicial law-making power must not be interpreted as implying that judges have the power, let alone the right to make any type of law they wish, some types of legal regulations are inherently and completely outside their powers.[61]

The idea of leaving legislation as the sole authority of the Legislature was also supported by the majority in *P. Ramachandra Rao* v. *State of Karnataka*[62] wherein it was observed-

The primary function of the judiciary is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by legislation.[63]

This view notwithstanding, the more recent trend, however, is for the judiciary to assert its new role as policy-maker, as the decision in *Visakha*[64] demonstrates wherein the Supreme Court observed-

Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation,

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[61] Quoted by Justice M.N. Venkatachaliah, *Indian Judges as Law Makers: Some Glimpses of the Past*, (1995) 1 SCC (Journal) 1

[62] (2002) 4 SCC 578

[63] *Ibid* at 600

[64] *Visakha* v. *State of Rajasthan* (1997) 6 SCC 241

and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.[65]

The same view has been reiterated by the Supreme Court in *Vineet Narain* v. *Union of India*[66] wherein the Court observed-

It is the duty of the executive to fill the vacuum by executive orders because its field is conterminus with that of the legislature and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.

Going a step further, the Supreme Court laid down the objectives and the functions of the judiciary as under-

(a) to ensure that all persons are able to live securely under the Rule of Law:

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State.[67]

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[65] *Ibid* at 247

[66] (1998) 1 SCC 226

[67] *Ibid*

The power and function of the judiciary was explained by the Supreme Court in *Minerva Mills* v. *Union of India*[68] as under-

> Our Constitution is founded on a nice balance of power amongst the three organs of the State namely the Executive, the Legislature and the Judiciary. It is the function of the Judges nay their duty to pronounce upon the validity of laws. If the Courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies is a writ in water. A controlled Constitution will become uncontrolled.[69]

In *Bandhua Mukti Morcha* v. *Union of India*[70] the Supreme Court explained the role of courts while entertaining public interest litigation as under-

> When the court entertains public interest litigation, it does not do so in a cavaling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive framed for the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive.

A look at the Constituent Assembly Debates[71] shows that the members of the Assembly were apprehensive in the matter of clothing the Supreme Court with a wide jurisdiction in dealing with issues regarding

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[68] AIR 1981 SC 1787

[69] *Ibid* at 1799

[70] (1984) 3 SCC 161

[71] Constituent Assembly Debates, Vol. VIII, p. 930-950

fundamental rights as it may usurp of the powers of the Parliament. The heat of the Constituent Assembly Debates was felt by the judiciary for which it tried to adopt a balance view in matters coming before.

Initially, the judiciary followed a policy of adhering to a narrow doctrine and tended to shy away from the development of law. In *A.K.Gopalan* v. *State of Madras*,[72] the Supreme Court placed a rather narrow and restrictive interpretation upon Article 21 of the Constitution.[73] The Court gave a very restrictive interpretation of 'procedure established by law' and refused to include the principles of natural justice akin to the 'due process of law' under the American Constitution. It remarked-

> In India the position of the judiciary is somewhere in between the Courts in England and the United States....But our Constitution, unlike the American Constitution, does not recognise the absolute supremacy of the Court over the legislative authority in all respects, for outside the restricted field of constitutional limitations our Parliament and the State Legislatures are supreme in their respective legislative fields and in that wider field there is no scope for the Court in India to play the role of the Supreme Court of the United States.[74]

A similar restrictive view was taken in *Romesh Thappar* v. *State of Madras* [75]where the Supreme Court permitted the restriction on freedom of speech in the interest of 'security of State' while invalidating the pre-censorship even if there was danger to public order.

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[72] AIR 1950 SC 27

[73] Dr. Justice A.S.Anand, *Justice for Women*, p.44 (2nd Edition 2003)

[74] *A.K. Gopalan* v. *State of Madras* AIR 1950 SC 27

[75] AIR 1950 SC 124

The judiciary was, however violent in smashing the *zamindari* system without paying adequate compensation to the *zamindars*.[76] It struck down the land reforms law which the Parliament felt that the Judges of the Supreme Court were trying to impose their personal philosophy on the nation rather than accepting the national philosophy. Such judgment resulted in a strong criticism of the legal system by the then Prime Minister, Pandit Jawaharlal Nehru. The judgment of the Supreme Court was neutralised by the Parliament by way of amendment under Article 368 of the Constitution. This was done by the Legislature and the Executive on the belief that the Supreme Court was trying to defeat the socio-economic base of the Constitution.

In *Golak Nath* v. *State of Punjab*[77] the Supreme Court laid down that the amendments to the Constitution could not encroach upon the fundamental rights and if they did so, the amendments had to be declared void by reason of Article 13(2) of the Constitution. The Supreme Court applied the doctrine of prospective overruling and did not upset the amendments and the judgments before the *Golak Nath* case. The legislatures were quick to react and passed the Constitution (Twenty-fourth Amendment) Act in 1971 by which Article 13 and Article 368 was amended, clothing the Parliament with unlimited powers to amend all the provisions of the Constitution. The Supreme Court was quick to apply the brakes on such unfettered powers of the Parliament and in *Keshavananda Bharati* v. *State of Kerala*[78] held by a majority of 7 to 6 that the Parliament has wide powers of amending the Constitution and it extends to all the Articles, but the amending power is not unlimited and does not

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[76] *Kameshwar Prasad* v. *State of Bihar* AIR 1962 SC 1166

[77] AIR 1967 SC 1643

[78] AIR 1973 SC 1461

include the power to destroy or abrogate the 'basic structure' or 'framework' of the Constitution. The 'basic structure' theory propounded by the Supreme Court was revolutionary and perhaps without a parallel anywhere in the world.

The executive came to enact laws nationalising banks[79], abolishing Privy Purse[80] and imposing restrictions on import of newsprints.[81] The Supreme Court while adopting a balanced approach held that the legislation nationalising banks was unconstitutional due to inadequacy of compensation[82] but upheld the legislation abolishing Privy Purse.[83] The Supreme Court did not permit the government to put pressure on newspapers in the supply of newsprint but permitted the government to have some restraints on the newspapers.[84]

The conflict between the executive and the judiciary resulted in the declaration of the national emergency on 26th June, 1975 and suspension of Articles 14, 19 and 21 of the Constitution of India. The Supreme supported the stand of the Parliament by declaring that the right to life and liberty was automatically suspended during the emergency.[85] The majority (A.N.Ray, M.H.Beg, Chandrachud and Bhagwati,JJ.) held that

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[79] Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969

[80] The Constitution (Twenty Sixth Amendment) Act, 1971 where Article 363A was inserted

[81] The Newsprint Policy for 1972-73, The Import Control Order,1955 and the Newsprint Control Order 1962 passed by the Central Government under sec 3 and 4A of the Imports and Exports Control Act, 1947

[82] *R.C.Cooper* v. *Union of India* AIR 1970 SC 564

[83] *H.H.Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur* v. *Union of India* AIR 1971 SC 530

[84] *Bennet Coleman and Co. Ltd.* v. *Union of India* AIR 1973 SC 106

[85] *A.D.M.Jabalpur* v. *Shivakant Shukla* AIR 1976 SC 1207

in view of the Presidential Order dated 27th June, 1975 no person had any *locus standi* to move any writ petition under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order was not under or in compliance with the Act or was illegal, or was vitiated by *mala fides* factual or legal or was based on extraneous consideration. The dissenting opinion was given by Justice H.R.Khanna as he observed-

> More is at stake in these cases than the liberty of a few individuals or the correct construction of the wording of an order. What is at stake is the rule of law...A dissent in a Court of last resort....is an appeal to the brooding spirit of law, to the intelligence of a future day, when a later decision may possibly correct into which the dissenting judge believes the Court to have been betrayed.[86]

The lifting of emergency ushered in an era where the judiciary developed its innovativeness to bring in a social revolution and upholding the rule of law. The passing of the Constitution (Forty fourth Amendment) Act, 1978 tried to restore the lost independence of the judiciary. The epistolary jurisdiction, public interest litigation (PIL), and development of the law in tune with the international developments embracing all aspects of human life has ameliorated the conditions of the people of the Indian society.

Twenty-eight years after the coming into existence of the Constitution of India, the Supreme Court in *Maneka Gandhi* v. *Union of India* [87] pronounced that the 'procedure' as intended by Article 21 must conform to the principles of natural justice. The judgment in *Maneka*

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[86] *Ibid*

[87] AIR 1978 SC 597

Gandhi is a watershed in the history of Indian judiciary. By giving a wide interpretation to Article 21 and interrelating it with Article 14 and 19, the ambit of its application was enhanced to a high pedestal.

The development of the judiciary as a force after the emergency as remarked by S.P.Sathe[88] is-

> Judicial activism of the post-emergency period might have been inspired by the emergency experience. The Court might have realized that its independence and neutrality towards various political formations depended upon the support of the people. Post-emergency activism clearly marked the Court's distance from legal positivism. The Court took an opportunity to expand the rights of the people through liberal interpretation of the constitutional provisions regarding the right to equality and right to personal liberty.....
>
> Post-emergency judicial activism was inspired by a philosophy of constitutional interpretation that looked at the Constitution not as a mere catalogue of rules but as statements of principles of constitutional governance. The provisions of the Constitution had to read in the light of the principles that were supposed to underline and transcend the formally enacted legal rules.

During the post-emergency period the judiciary came forward with a plethora of judgments to protect a wider range of interests covering almost every field of human rights. The decision in *M.H.Hoskot* v. *State of Maharashtra*[89] for providing free legal service to the poor and needy was an essential element of the 'reasonable, fair and just procedure'.

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[88] S.P.Sathe, *Judicial Activism in India*, p.12 (1st Edition 2002)

[89] AIR 1978 SC 1548

Again in the series of *Hussainara Khatoon (I to VI)*[90] cases from 1979 to 1980 the Supreme Court stressed on the right to speedy trial for the under trials languishing in various jails. The judiciary has been making its presence felt by its intervention in cases concerning violation of human rights as an ongoing judicial process. Decisions on such matters as the right to protection against solitary confinement[91], the right not to be held in fetters[92], the right against handcuffing[93], the right against custodial violence[94] rights of an arrestee[95], rights of female employees not to be sexually harassed at the place of work[96] are a few examples in this regard.

Over the years an enforceable right to compensation in cases of torture or other injuries inflicted by the State or its agencies has also been crystallized.[97] Starting with decisions like *Rudal Sah*,[98] *Bhim Singh*,[99] etc. it was authoritatively laid down in *Nilabati Behara's*[100] case; wherein the Supreme Court had expanded the enforceable right to compensation in cases of custodial death as under-

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[90] AIR 1979 SC 1360, (1980) 1 SCC 91, (1980) 1 SCC 93, (1980) 1 SCC 98, (1980) 1 SCC 108, (1980) 1 SCC 115

[91] *Sunil Batra* v. *Delhi Administration* AIR 1978 SC 1575

[92] *Charles Sobraj* v. *Superintendent, Central Jail* (1978) 4 SCC 494

[93] *T.V.Vatheeswaran* v. *State of Tamil Nadu* (1983) 2 SCC 68

[94] *Nilabati Behara* v. *State of Orissa* (1993) 2 SCC 476

[95] *D.K.Basu* v. *State of West Bengal* (1997) 1 SCC 426

[96] *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241 and *Apparel Export Promotion Council* v. *A.K.Chopra* AIR 1999 SC 625

[97] This is often termed as "Compensatory Jurisprudence"

[98] *Rudul Sah* v. *State of Bihar* (1983) 4 SCC 141

[99] *Bhim Singh* v. *State of J & K* (1985) 4 SCC 677

[100] *Nilabati Behara* v. *State of Orissa* (1993) 2 SCC 476

The Court, where the infringement of fundamental right is established, therefore cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of citizen. To repair the wrong done and give judicial redress for legal injury is a judicial conscience.

The decisions of the Supreme Court in *Sunil Batra* v. *Delhi Administration*,[101] *Municipal Corporation, Ratlam* v. *Vardichand*,[102] *Akhil Bharitya Soshit Karamchari Sangh* v. *Union of India*,[103] and umpteen number of decisions thereafter by the Supreme Court and more particularly the decision of the Supreme Court in S.P.Gupta's case[104] represent watersheds in the development of public interest litigation and liberalisation of the concept of *locus standi* to make access to the courts easy. The principle underlying Order 1 Rule 8 of the Code of Civil Procedure has been applied in public interest litigation to entertain class action and at the same time to check misuse of public interest litigation. The appointment of *animus curiae* in these matters ensures objectivity in the proceedings. Judicial creativity of this kin has enabled realisation of the promise of socio-economic justice made in the preamble to the Constitution of India.

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[101] (1978) 4 SCC 494

[102] AIR 1980 SC1622

[103] AIR 1981 SC 293

[104] *S.P.Gupta* v. *President of India* AIR 1982 SC 149. See also *Supreme Court Advocates' on Record Association* v. *Union of India* (1993) 4 SCC 441

During the first phase of public interest litigation, the emphasis was on human rights of the weaker sections of the society which included prisoners, undertrial prisoners, bonded labourers, unorganised labourers, or women in protective homes. During the second phase, the emphasis shifted on governance. Professor Wadhwa petitioned the Court against promulgation of ordinances in Bihar,[105] lawyers petitioned the Court against arbitrary termination of judicial appointments and transfer of judges[106], and M.C.Mehta filed petitions against private corporations' or government's disregard of anti-pollution safeguards,[107] against the erosion of the Taj Mahal,[108] and against pollution of the river Ganges.[109] Common Cause asked the Court to lay down guidelines for the storing and transfusion of blood[110] and appointment of consumer forums in each district to provide quick, cheap and informal delivery of justice to consumers.[111] In the 1990s, the emphasis shifted from governance to environment, education, right to gender justice, election and other related subjects which were the need of the hour.

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[105] *D.C.Wadhwa* v. *State of Bihar* AIR 1987 SC 579

[106] S.*P.Gupta* v. *President of India* AIR 1982 SC 149. *Supreme Court Advocates' on Record Association* v. *Union of India* (1993) 4 SCC 441

[107] *M.C.Mehta* v. *Union of India* AIR 1986 SC 965; *M.C.Mehta* v. *Union of India* AIR 1987 SC 1086

[108] *M.C.Mehta* v. *Union of India* AIR 1997 SC 734

[109] *M.C.Mehta* v. *Union of India* (1997) 2 SCC 411

[110] *Common Cause* v. *Union of India* (1996) 1 SCC 753

[111] *Common Cause* v. *Union of India* (1992) 1 SCC 707

It was the judgment of the Supreme Court in *Unni Krishnan* v. *State of A.P.*[112] and in *T.M.A. Pai Foundation* v. *State of Karnataka*[113] for which the Parliament had to insert Article 21A[114] providing for free and compulsory education to children below the age of 14 years. The existing Article 45 has also been suitably modified to provide for early childhood care and education for all children until they complete the age of six years. The judgment of the Supreme Court in *Priti Srivastava*[115] of laying down the standard of education in an institution is an example of judicial craftsmanship. Although the decisions in *T.M.A. Pai Foundation*[116] to *P.A.Inamdar*[117] signifies that the Supreme Court in its enthusiasm to set things right in the vital area of higher education created conflicts calling for legislative interference; but usually developmental jurisprudence leading to social change emerges from debates and conflicts.

The decision of the Supreme Court in the field of control of noise pollution,[118] ban on smoking in public places,[119] conversion of diesel vehicles plying in Delhi to convert to CNG (Compressed Natural Gas) to reduce automobile pollution[120] are a few examples of providing reprieve and relief for the public from the menace of the noise, air and sound

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[112] AIR 1993 SC 2178

[113] (2002) 8 SCC 481

[114] Constitutional (86th Amendment) Act, 2002

[115] *Priti Srivastava* v. *State of Madhya Pradesh* AIR 1999 SC 2894

[116] *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481

[117] *P.A.Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537

[118] *Noise Pollution (V), In re* (2005) 5 SCC 733 where *Noise Pollution (II), In re* (2005) 5 SCC 728 was affirmed

[119] *Murli S Deora* v. *Union of India* AIR 2002 SC 40

[120] *M.C.Mehta* v. *Union of India* AIR 2002 SC 1696

pollution. The modernisation of the judiciary was felt when the principle of absolute liability[121] was developed by discarding the principle of strict liability.[122]

The decision of the Supreme Court of the declaration of assets of a candidate contesting election as MP or MLA and the right of a voter to know the qualifications and involvement of the candidate in any offence received applause from the common people.[123] However, the Parliament was quick to react and tried to invalidate the judgment by making amendments in the Representation of the People Act, 1951.[124] When the said amendment was challenged before the Supreme Court,[125] the Court showed its boldness to declare the said amendment[126] as unconstitutional.

The judiciary was active enough to give due recognition to the theme that man and woman are two pillars of the social structure. Their roles, duties and rights are complementary and supplementary towards each other. The judgment in CEHAT[127] wherein directions were given for the implementation of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 is noteworthy. The various laboratories and scan centres all throughout the country have been forced to display notices regarding the Act and resulting in a check of female foeticide.

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[121] *M.C.Mehta* v. *Union of India* AIR 1987 SC 1086

[122] *Rylands* v. *Fletcher* (1886) LR 3 HL 330

[123] *Union of India* v. *Association for Democratic Reforms* (2002) 5 SCC 294

[124] Representation of the People (Third Amendment) Act, 2002

[125] *People's Union for Civil Liberties* v. *Union of India* (2003) 4 SCC 399

[126] Section 33-B of Representation of the People (Third Amendment) Act, 2002

[127] *Centre for Enquiry into Health and Allied Themes (CEHAT)* v. *Union of India* (2001) 5 SCC 577

In *Lakshmi Kant Pandey* cases[128] the Supreme Court gave directions as to what procedures should be followed and what precautions should be taken while allowing Indian children to be adopted by foreign adoptive parents. There was no law to regulate inter-country adoptions and such lack of regulation could cause incalculable harm to Indian children, considering the possibility of child trade for prostitution as well as slave labour. When the Court was approached, it did not throw up its hands in despair and say that since there was no legislation it could do nothing. Justice Bhagwati laid down an entire scheme for regulating inter-country adoptions and intra-country adoptions which has been taken recourse to by the social activists for protecting children and promoting desirable adoptions for the last two decades.

Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The Court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as an essential component of its role as a constitutional court. In *M.C.Mehta* v. *State of Tamil Nadu*,[129] although the actual petition was in respect of child labour in Sivakasi in Tamil Nadu, where a large number of children were engaged in the hazardous work of matchbox manufacture, the Court thought it fit to 'travel beyond the confines of Sivakasi' and to 'deal with the issue in wider spectrum and broader perspective taking it as a national problem'. The Supreme Court laid down detailed guidelines for the abolition and rehabilitation of child labourers. Justice Hansaria, while referring to the Directive Principles of State Policy, observed-

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[128] *Lakshmi Kant Pandey* v. *Union of India* (1984) 2 SCC 244; *Lakshmi Kant Pandey* v. *Union of India* (1987) 1 SCC 66; *Lakshmi Kant Pandey* v. *Union of India* (1991) 4 SCC 33

[129] (1996) 6 SCC 756

It is the duty of all the organs of the State according to Article 37 to apply these principles. Judiciary being also one of the three principles organs of the State, has to keep the same in mind when called upon to decide matters of great public importance. Abolition of child labour is definitely a matter of great public concern and significance.[130]

4. 4. 1. JUDICIARY AND THE UNIFORM CIVIL CODE

The process of unification of India by breaking all types of differences in the personal laws and introduction of a uniform civil code has been a long cherished dream of the judiciary. In *Mohd. Ahmed Khan* v. *Shah Bano Begum*,[131] a five-Judge Bench of the Supreme Court observed-

> It is also a matter of regret that Article 44 of our Constitution has remained a dead letter....A Common Civil Code will help the cause of national integration by removing disparaging loyalties to laws which have conflict of ideologies. No community is likely to bell the cat by making gratuitous concessions on the issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably has the legislative competence to do so.....We understand the difficulties involved in bringing persons of different faith and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have nay meaning. Inevitably the role of the reformer has to be assumed by the courts because; it is beyond the

[130] *Ibid* at 766

[131] (1985) 2 SCC 556

endurance of sensitive minds to the injustice to be suffered when it is so palpalable.

The Parliament was quick to react and passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 taking the maintenance of a Muslim woman outside the purview of section 125 of the Code of Criminal Procedure, 1973.

While dealing with a suit for declaration of nullity of marriage by a Presbyterian Christian wife against her husband in *Jordan Diengdeh* v. *S.S.Chopra*[132] the Supreme Court observed-

> It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform code applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has been completely and signally broken down. We suggest that the time has come for intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take.

[132] (1985) 3 SCC 62

In *Sarla Mudgal* v. *Union of India*[133] a case of three Hindu men who embraced Islam to marry again, while there Hindu wives, who were not legally divorced, remained Hindus. Justice Kuldip Singh, while delivering the leading judgment observed-

> Those who preferred to remain in India after partition fully know that the Indian leaders did not believe in two-nation or three - nation theory and that in the Indian Republic there was to be only one nation - the Indian Nation-and no community could claim to remain a separate entity on the basis of religion. "

Mr. Justice R.M.Sahay, delivering a separate but concurring judgment observed-

> The desirability of uniform code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesman amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change..... Therefore, a unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity. But the first step should be to rationalise the personal law of the minorities to develop religious and cultural amity. The Government would be well advised to entrust the responsibility to the Law Commission which may in consultation with Minorities Commission examine the matter and bring about a comprehensive legislation in keeping with modern day concept of human rights for women. The Government may also consider feasibility of appointing a Committee to enact a Conversion of Religion Act, immediately, to check the abuse of religion by any person.[134]

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[133] (1995) 3 SCC 635

[134] *Ibid*

In *Lily Thomas* v. *Union of India*[135] the desirability of a uniform civil code was admitted in a diluted manner when the court observed-

> The desirability of uniform civil code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change

In *John Vallamattom* v. *Union of India,*[136] while talking about the Doctrine of Suspect Legislation, the Supreme Court stressed the need for a uniform civil code and observed-

> It is matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.

Going a step further for the introduction of a uniform Civil Code, a two-Judge Bench of the Supreme Court comprising of Arijit Pasawat and S.H.Kapadia, JJ., in *Seema* v. *Ashwani Kumar*[137] has directed the State Governments and the Central Government to take steps for compulsory registration of marriages of all persons who are citizens of India belonging to various religions. Earlier the National Commission for Women had indicated in its proposal for the importance of compulsory registration of marriage on the following issues:

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[135] AIR 2000 SC 1650

[136] (2003) 6 SCC 611

[137] (2006) 2 SCC 578. See also *Seema* v. *Ashwani Kumar* (2008) 1 SCC 180 where three months time was given to comply with the directions of the judgment of *Seema* v. *Aswani Kumar* (2006) 2 SCC 578

(a) Prevention of child marriages and to ensure minimum age of marriage,

(b) Prevention of marriages without the consent of the parties,

(c) Check illegal bigamy/polygamy,

(d) Enabling widows to claim their right to live in the matrimonial house, maintenance, etc,

(e) Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband,

(f) Deterring men from deserting women after marriage, and

(g) Deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the grab of marriage.

The Supreme Court, while agreeing with the contention of the National Commission for Women, observed-

> If the record of marriage is kept, to a large extent, the dispute concerning solemnization of marriages between two persons is avoided. As rightly contended by the National Commission, in most cases non-registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place. Though, the registration itself cannot be a proof of valid marriage per se, and it would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage.[138]

[138] *Ibid* at 582

4. 4. 2. NECESSITY OF JUDICIAL ACTIVISM

The dynamism of the judiciary has been often called as 'Judicial Activism" by many critics. The main thrust of the criticism is that the judiciary by its directives to the administration is usurping the functions of the legislatures and of the executive and is running the country and, according to some, ruining it. What these critics of the judiciary overlook is that it is the tardiness of legislatures and the indifference of the executive to address it to the complaints of the citizens about violations of their human rights which provides the necessity for judicial intervention. In cases where the executive refuses to carry out the legislative will or ignores or thwarts it, it is surely legitimate for courts to step in and ensure compliance with the legislative mandate. When the court is apprised of and is satisfied about gross violations of basic human rights it cannot fold its hands in despair and look the other way. The judiciary can neither prevaricate nor procrastinate. It must respond to the knock of the oppressed and the downtrodden for justice by adopting certain operational principles within the parameters of the Constitution and pass appropriate directions in order to render full and effective relief. If the judiciary were to shut its door to the citizen who finds the legislature as not responding and executive indifferent, the citizen would take to the streets and that would be bad both for the rule of law and democratic functioning of the State.[139] Courts have come to realise and accept that judicial response to human rights cannot be blunted by legal bigotry.

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[139] Dr. Justice A.S.Anand, *Public Interest Litigation as Aid to Protection of Human Rights*, (2001) 7 SCC (Journal) 1

Judiciary in this country has been the most vigilant defender of democracy, democratic values and constitutionalism.[140]

If it is admitted that the judiciary has entered the areas that traditionally did not belong to it and ought to be the concern of the legislature and the executive, then why have such transgressions of the separation of power not evoked protest from the executive? Although sometimes it is whispered that the judiciary is overreaching itself, not only are the political players as well as the people obeying the decisions of the Courts, but there is a general feeling that such obedience is necessary and obligatory. As appositely remarked by Soli Sorabjee-

> That it is the executive's failure to perform its duty and the notorious tardiness of legislatures that impels judicial activism and provides its motivation and legitimacy. Even gross violations of human rights are brought to its notice, the judiciary cannot procrastinate.[141]

While discussing about the permissibility of the Parliament under Article 31B of the Constitution to immunize legislations from the purview of fundamental rights by inserting them into the Ninth Schedule, it has been remarked by a nine Judge Bench of the Supreme Court that "the jurisdiction conferred on this Court by Article 32 is an important and integral part of the basic structure of the Constitution of India and no act of Parliament can abrogate it or take it away except by way of impermissible erosion of fundamental principles of the constitutional

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[140] Dr. Justice A.S.Anand, *Judicial Review-Judicial Activism-Need for a caution*, 42 JILI (2000) Page 149

[141] H.S. Mattewal, *Judiciary and the Government in the Making of Modern India*, (2002) 1 SCC (Journal) 17

scheme are settled propositions of Indian jurisprudence".[142] The Supreme Court further observed-

> The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision-making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.[143]

4. 4. 3. JUDICIAL RESTRAINT

Judicial Activism is not an aberration. It is an essential aspect of the dynamics of a constitutional Court. It is a counter-majoritarian check on democracy. Judicial activism does not however mean governance by the judiciary. It also must function within the limits of the judicial process.[144] Judicial activism reinforces the strength of democracy and reaffirms the faith of the common man in the 'rule of law'. The judiciary,

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[142] *I.R. Coelho* v. *State of Tamil Nadu* AIR 2007 SC 861

[143] *Ibid* at 871

[144] Justice R.C.Lahoti, *Judicial Activism-Constitutional Obligation of the Courts*, AIR 2005 Journal 177

however, can act only as an alarm clock but not as a timekeeper. After giving the alarm call it must ensure to see that the executive performs its duties in the manner envisaged by the Constitution.[145] Judicial Activism is a response to a lawlessness of the State, which is the most intransigent problem of the people of India.

The survey of the decisional law of the High Courts and the Supreme Court shows that the judiciary has clearly transcended the limits of the judicial function and has undertaken functions that really belonged to either the legislature or the executive. Its decision clearly violated the limits that the doctrine of separation of powers had imposed on it. A court is not equipped with the skills and competence to discharge functions that essentially belong to the other co-ordinate organs of government. Its institutional equipment is not adequate for undertaking legislation or administrative functions. It cannot create positive rights such as the right to work, the right to education, or the right to shelter. It does not have the equipment for monitoring various steps that are required for the abolition of child labour. It cannot entirely stop environmental degradation or government lawlessness. Its actions in these areas are bound to be symbolic.[146]

No doubt the judiciary has a duty to shape the progress of law and react to the changing conceptions of social values having regard to public policy of law as determined by new conditions and in case of deprivation of the weaker sections, the judiciary must rise to occasion and grant relief to the seeker of justice. The judiciary while resorting to judicial activism has to keep in mind that it has certain inherent limitations and should

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[145] Dr. Justice A.S.Anand, *Judicial Review-Judicial Activism-Need for a caution,* 42 JILI (2000) Page 149

[146] S.P.Sathe, *Judicial Activism in India*, p. 251 (1st Edition 2002)

normally avoid judge-made amendments to the provisions over and above the available legislation. Where the legislative intention is clear, the court should not interpret the provisions contrary to it or add something to it.[147]Judges are not superstars and should not be expected to behave as such.[148]

Justice M.M. Punchhi[149] has remarked-

> Thus, the judiciary can evolve new methods, tools and procedure to promote the rule of law and enforce fundamental rights. But there is no fundamental right to compel the Union of India to bring forth a particular legislation or to exercise its discretion in legislation or to exercise its discretion in Parliament in a particular manner. The courts in exercise of their power of judicial review should not interfere in policy matters of the State, unless the policy so formulated either violates the mandate of the Constitution or any statutory provision or is otherwise activated by *malafides*.

In order to confine their activities to judicial determination or a controversy and not to involve themselves with determination of policy-oriented issues or matters with political overtones the courts have developed many doctrines which operate as self-imposed restrictions. Justice Pathak[150] had opined-

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[147] *Raghunath Rai Bareja* v. *Punjab National Bank* (2007) 2 SCC 230; *Indian Drugs & Pharmaceuticals Ltd.* v. *Workmen* (2007) 1 SCC 408; *Oriental Insurance Co. Ltd.* v. *Hansrajbhai V. Kodala* (2001) 5 SCC 175; *Basawaraj R. Patil* v. *State of Karnataka* (2000) 8 SCC 740; *Rishabh Agro Industries Ltd.* v. *PNB Capital Service Ltd.* (2000) 5 SCC 515.

[148] Justice Binod Kumar Roy, *Role of Judiciary in the Present Day Context*, AIR 1998 Journal 17

[149] *Madhu Kishwar* v. *State of Bihar* (1996) 5 SCC 125

[150] *Bandhua Mukti Morcha* v. *Union of India* (1984) 3 SCC 161

The courts must never forget that the jurisdiction extends no further than the legitimate limits of its constitutional powers and avoid trespassing into political territory which under the Constitution has been appropriated to the other organs of the State.

A note of caution has been sounded by Justice Venkataramiah in *National Textile Workers' Union* v. *P.R. Ramakrishnan*[151] when he observed-

It is true that law should not be static and it should grow but it should have its legitimate birth in the precincts of the legislature. It should be the result of the exercise of legislative judgment, particularly when a departure from express provisions of a statute or an established practice is to be made. Participation by the public at large in the legislative process cannot be ignored.

Even though there is no express statement in our constitutional law incorporating in it the doctrine of separation of powers, in the interpretation of the Constitution the Supreme Court has broadly adopted the said doctrine. Even though by virtue of its powers of interpretation of law the court in an indirect way is making law, there are well recognised limitations on the power of the court making inroads into the legislative domain of the legislature. If the legislature exceeds its power, Supreme Court steps in, if the Executive exceeds its power, then also Supreme Court steps in, but if the Supreme Court exceeds its power, what can people do? Should they be driven to seek an amendment of the law on every occasion? Judges are not expected to know all aspects of every such matter. As discussion involving a comprehensive view of all interests which are likely to be affected by any decision which

[151] AIR 1983 SC 75

makes a serious departure from a well-settled principle of law would not take place before a court where only the parties to a case or their lawyers are heard. Therefore, it is always better and safe to leave such matters to the decision of the legislature, instead of the court, sometimes by a majority of one assuming power to make a new law. The court should observe restraint in its pronouncements so that they do not go beyond its own legitimate sphere.[152]

A seven judge Bench in *P. Ramachandra Rao* v. *State of Karnataka*[153] has observed-

> The primary function of the judiciary is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by legislation. Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature.

Justice Markandey Katju has remarked that the Supreme Court cannot direct legislation and the judiciary must exercise self-restraint. [154] He felt that judicial restraint tends to protect the independence of the judiciary and separation of powers for which he observed-

> Judicial restraint is consistent with and complimentary to the balance of power among the three independent branches of the State.[155]

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[152] *Ibid* at 101

[153] (2002) 4 SCC 578

[154] *State of U.P.* v. *Jeet S. Bisht* (2007) 6 SCC 586. The same line of approach was followed in *Tata Cellular* v. *Union of India* AIR 1996 SC 11 at 26

[155] *Ibid* at 612

Justice Markandey Katju has also observed that judicial legislation is an oxymoron and the temptation to do judicial legislation should be eschewed by the courts.[156]

In *Divisional Manager, Aravali Golf Club* v. *Chander Hass*[157] it has been observed by Justice Markandey Katju that the judiciary should exercise self-restraint. The Supreme Court observed-

> Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the State. It accomplishes this in two ways. First, judicial restraint not only recognizes the equality of the other two branches with the judiciary, it also fosters that equality by minimizing inter-branch interference by the judiciary. In this analysis, judicial restraint may also be called judicial respect, that is, respect by the judiciary for the other coequal branches. In contrast, judicial activism's unpredictable results make the judiciary a moving target and thus decrease the ability to maintain equality with the co-branches. Restraint stabilizes the judiciary so that it may better function in a system of inter-branch equality.
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> Second, judicial restraint tends to protect the independence of the judiciary. When courts encroach into the legislative or administrative fields almost inevitably voters, legislators, and other elected officials will conclude that the activities of judges should be closely monitored. If judges act like legislators or administrators it follows that judges should be elected like legislators or selected and trained like administrators. This would be counterproductive.

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[156] *Raghunath Rai Bareja* v. *Punjab National Bank* (2007) 2 SCC 230 at 245

[157] (2008) 1 SCC 683.

> The touchstone of an independent judiciary has been its removal from the political or administrative process. Even if this removal has sometimes been less than complete, it is an ideal worthy of support and one that has had valuable effects.[158]

However, 'judicial activism' and 'judicial restraint' are two expressions generally misunderstood describing one class of judges as progressive and the other as conservative. In judicial process both concepts have their own role to play depending upon the constitutional issues involved. If an issue of policy of legislation is under question, sometimes 'judicial restraint' is exercised by the court as the policy is found to be one among various reasonable policies and the choice must be left to the legislation. Where the issue raises encroachment on fundamental rights of citizens the judge may become active and give greater importance to the fundamental freedoms by subjecting the legislation to strict scrutiny and if necessary, declare the same as unconstitutional.

4. 5. SUMMING UP

Judicial Activism, however, is not an unguided missile. It has to be controlled and properly channelized. Courts have to function within established parameters and constitutional bounds. People of this country have reposed faith and trust in the courts and therefore, the judges have to act as their trustees. Betrayal of that trust would lead to judicial despotism

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[158] *Ibid* at 693-694. Reiterated in Judgment dated 11th April 2008 in *Common Cause* v. *Union of India* reported in http://www.judis.nic.in visited on 7th June 2008

which posterity would not forgive.[159] The dividing line between judicial activism and judicial overreach is a thin one.[160] Judicial Activism should not become 'judicial adventurism' and lead a Judge going in pursuit of his own notions of justice and beauty, ignoring the limits of law, the bounds of his jurisdiction and the binding precedents.[161] The Judges must act like Statesman in the exercise of the vast powers entrusted to them in the name of justice. The duty of activating the other two organs of the Government for the Constitutional purpose falls on the shoulders of the judiciary.[162]

The judiciary while following the activist role in view of their constitutional obligation must remember the following warning of Benjamin N. Cardozo:[163]

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiments, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to "the primordial necessity of order in social life". Wide enough in all conscience is the field of discretion that remains.

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[159] Dr. Justice A.S.Anand, *Judicial Review-Judicial Activism-Need for a caution*, 42 JILI (2000) Page 149

[160] Dr. A.B.Kafaltiya, *Interpretation of Statutes*, p. 361 (2008)

[161] Dr. Justice A.S.Anand, *Protection of Human Rights-Judicial Obligation or Judicial Activism*, (1997) 7 SCC (Journal) 11

[162] Dr. Malkit S. Rahi, *Judicial Activism and Judicial Restraint*, AIR 1999 Journal 44

[163] Benjamin N. Cardozo, *Nature of the Judicial Process*, p. 141 (1961)

It has been aptly said that to be active without a check is tyranny; but a self-generated check on activity may well undermine the possibility of great contributions.[164] The dynamic role of the judiciary which is characterised 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. In the modern age, it has been established beyond doubt that co-operation rather than separation, in a constant interchange of give and take between the legislature, executive and judiciary, reflects the reality of the legal process.

[164] John Agresto, *The Supreme Court and Constitutional Democracy*, p. 37 (1984)