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"Judicial Activism Vis-À-Vis Judicial Restraint – The Indian Disarray"

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DECLARATION

I, Kurven K. Desai, a student of LL.M., ILNU, hereby declare that the dissertation titled **"Judicial Activism Vis-À-Vis Judicial Restraint – The Indian Disarray"** is my own efforts and no part of this report has been copied in any unauthorized manner and no part in it has been incorporated without due acknowledgment.

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This is to certify that this dissertation titled **"Judicial Activism Vis-À-Vis Judicial Restraint – The Indian Disarray"** has been prepared by **Kurven Desai** student LL.M. ILNU, Nirma University under the guidance of **Ms. Dr. Mukti Jaiswal** and is recommended for submission to the examiner herewith.

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INDEX

ABBREVIATIONS

1. Jud. Actis.	-	Judicial Activism
2. Jud. Res.	-	Judicial Restraint
3. Legis.	-	Legislative
4. Exec.	-	Executive
5. Jud.	-	Judiciary
6. Consti.	-	Constitution
7. Juris.	-	Jurisdiction
8. Jud. Rev.	-	Judicial Review
9. DB	-	Division Bench
10. P&H	-	Punjab and Haryana
11. V.	-	Versus
12. &	-	And
13. Anr.	-	Another
14. Ors.	-	Others
15. PIL	-	Public Interest Litigation
16. SC	-	Hon'ble Supreme Court of India
17. HC	-	Hon'ble High Court
18. Apex	-	Supreme Court
19. PNJ	-	Principles of Natural Justice
20. GOI	-	Government of India
21. FRs	-	Fundamental Rights
22. DPSPs	-	Directive Principles of State Policy
23. SOP	-	Separation of Powers

24. CG	-	Central Government
25. SG	-	State Government
26. TN	-	Tamil Nadu
27. DC	-	District Collector
28. AWB	-	Animal Welfare Board
29. MoEF	-	Ministry of Environment & Forest
30. POCTA Act	-	Prevention of Cruelty to Animals
31. WYO	-	World Youth Organization
32. u/a	-	Under article
33. u/s	-	Under Section
34. w.r.t.	-	With respect to
35. Art.	-	Article
36. ASG	-	Additional Solicitor General
37. AGI	-	Attorney General of India
38. OFCD Debentures	-	Optionally Fully Convertible
39. SEBI India	-	Securities Exchange Board of
40.		
41. SHICL Corporation Limited	-	Sahara Housing Investment
42. SIRECL Corporation Limited	-	Sahara India Real Estate

43. NJAC - National Judicial Appointments Commission

CASES

1. *State of Uttaranchal v. Balwant Singh, AIR 2010 S.C. 2550*
2. *Poe v. Ullman, 367 US 497 (1961).*
3. *State of Gujarat v Dilipbhai Nathjibhai Patel, AIR 1998 SC 1429*
4. *Baker v Carr, 369 US 186 (1962).*
5. *Ranjan Dwivedi v Union of India, AIR 1983 SC 624*
6. *.K. Gopalan v. State of Madras, AIR 1950 SC 27.*
7. *Maneka Gandhi v. Union of India, AIR 1978 SC 593.*
8. *Charles Sobraj v The Superintendent, Central Jail, Tihar, New Delhi, 1979 (1) SCR 512*
9. *Kesavananda Bharati v State of Kerala, AIR 1973 SC 1461*
10. *Vishaka & Ors. v. State of Rajasthan & Ors., AIR 1997 SC 3011.*
11. *Rajendra Prasad v State of U.P.,1979 AIR 916*
12. *L. C. Golak Nath & Ors. v. State of Punjab & Anr., AIR 1967 SC 1643*
13. *State of West Bengal & Ors. v. Committee for Protection of Democratic Rights, West Bengal & Ors., AIR 2010 SC 1476*
14. *Ram Jawaya Kapur & Ors. v. the State of Punjab, AIR 1955 SC 549*
15. *State of Bihar v. Bal Mukund Shah, (2000) 4 SCC 640*
16. *Narmada Bachao Andolan v Union of India, (2000) 10 SCC 664*
17. *State of U.P and ors. v. Jeet Bhisht , 2007 6 SCC 586*
18. *Parmanand Katara v. Union of India, AIR 1989 SC 2039.*
19. *M.C. Mehta v. Union of India, (1996) 4 SCC 750.*
20. *Francis Coralie v. Union Territory of Delhi, (1981) 1 SCC 688.*
21. *Unni Krishnan, J.P. v. State of Andhra Pradesh, (1993) 1 SCC 645.*

22. *Maneka Gandhi v. Union of India, AIR 1978 SC 597.*
23. *Judgment dated 24.01.2006 in the matter of Rameshwar Prasad & Ors v. Union of India & Anr., Writ Petition (C) 257 of 2005, before Hon'ble Supreme Court of India*
24. *Judgment dated 13.07.2016 in the matter of Nabam Rebia v. Deputy Speaker and ors. In Civil Appeal Nos. 6203-6204 of 2016 before Hon'ble Supreme Court of India.*
25. *Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603*
26. *Order dated 14th September, 2017 in M.A. No. 567 Of 2016 And M.A. No. 1220 of 2016 in Original Application No. 21 Of 2014, 95 Of 2015 and 303 Of 2015 before National Green Tribunal, Principal Bench New Delhi.*
27. *AIR 2015 SC 1523*
28. *Judgment dated 16th October, 2015 in the case of Supreme Court Advocates-on-Record Association and anr. v. Union of India, Writ Petition (Civil) No. 13 of 2015*
29. *Yakub Abdul Razak Menon v. State of Maharashtra Writ Petition Criminal No. 135 of 2015*
30. *Judgment dated 07.05.2014 in the matter of Animal Welfare Board of India v. A. Nagaraja & Ors. in Civil Appeal No. 5387 OF 2014 before the Hon'ble Supreme Court of India.*
31. *Judgment dated 2 January, 2017 in the matter of Board Of Control For Cricket v. Cricket Aasociation Of Bihar & Ors, Civil Appeal No. 4235 of 2014 before Supreme Court of India.*
32. *Manohar Lal Sharma v. The Principle Secretary and Ors. Writ Petition (Crl.) No. 120 of 2012*

33. *CRWP-4268 of 2021 (O&M), order dated 12.05.2021*

34. *Olga Tellis v. Bombay Municipal Corporation, 1986 AIR 180*

35. *Common Cause v. Union of India, (2008) 5 SCC 511*

36. *Mamata Banerjee V. Suvendu Adhikari, Election Petition no. 1 of 2021 before High Court of Calcutta.*

CHAPTER 1

INTRODUCTION

Utilization of power of jud. for the betterment of the society and individuals is judicial activism (Hereinafter referred as "Jud. Actis"). Despite the constitutional limitations, the Hon'ble Supreme Court of India (Hereinafter referred as "SC") has often arose as an advocate of the Justice in the truest sense. The word Justice has often been debated around the world a lot as the entire population is linked to this word. Jud. Actis has affected various aspects of life in India to do progressive justice but has also gone beyond the law in doing so. However, the Apex Court must always be conscious of the fact that while advocating positive justice, it must not go beyond the limitations prescribed in the Consti. of India.

The Judicial ruling has been suspected of being based on political considerations or political beliefs by the Jud. Actis. A recent example of the same can be seen when the DB of Hon'ble HC of P&H wherein in *Ujjawal v. State of Haryana*[1] denied protection to a live-in couple on rather moral grounds that such grant of protection would disturb the entire social fabric of the society. The issue w.r.t. Jud. Actis is compactly related to SOP, interpretation of Consti. and statutory construction.

Contrary to Jud. Actis, Judicial restraint (Hereinafter referred as "Jud. Res") is theory which inspires jud. to check the use of their powers. It emphasizes that jud. ought to be hesitant in striking down laws which are constitutional,[2] however what is considered as constitutional and unconstitutional is itself a moot point.[3] The jurist advocating this theory often goes to great extents to concede to the legislature while deciding any issue on constitutional law. Judicially-restrained jurists respect the precedents established by the past judges.[4]

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[1] Ujjawal & Anr. v. State of Haryana, CRWP-4268 of 2021 (O&M), order dated 12.05.2021.
[2] Judicial Restitution, (Jul. 21, 2021, 10.00 A.M.) *http://www.bartleby.com/59/14/judicialrest.html*.
[3] Zachary Baron Shemtob, *Following Thayer: The Conflicting Models of Judicial Restraint*, BOSTON UNI. PUB. INT. L. J., 21 (2011) SSRN: https://ssrn.com/abstract=2029687.
[4] (Jul. 21, 2021, 10.00 A.M.) *http://www.time.com/time/magazine/article/0,9171,961645-6,00.html* .

According to Hamilton, the jud. is a fragile pillar of government because it has almost no control over the force or money.[5] The Jud. ought to appear to the society and individuals as their protector. It must not only be rational, fair and capable of resolving issues but also must appear to be so. There would have been no necessity of interpretation of other FRs if Art. 21 of the Consti. of India had been interpreted in its realest and novel logic.[6]

STATEMENT OF PROBLEM:

The scope of the present research is very wide in the nature. The researcher has limited the scope of present research to the legal perspective especially with regard to the judgments of Courts post 2011 evolving the concepts of Jud. Actis and Jud. Res and its pros as well as cons in the different spheres.

The researcher will mainly focus on the various ruling of the SC as well as the HC w.r.t. various issues such as Government Policies (which would include 2G Spectrum Case, Coal Allocation Case, Delhi Car Ban Case, etc.) the Sahara-Birla Diary Case, the SEBI-SAHARA case, NJAC case, The Ban of Jallikattu in TN case, etc.

The researcher will also critically analyse the role of SC while giving such pronouncement as to whether SC is overstepping is juris. or is well within its ambit while giving such rulings. The SC may be Supreme but it cannot be infallible.

OBJECTIVES:

The research work has been carried out with the following aims and objectives:

- To know the meaning and origin of the concept of Jud. Actis and Jud. Res;
- To discover the role of Court in expounding Jud. Actis and restraint;
- To reveal the points of distinction between Jud. Actis and Jud. Res;

HYPOTHESIS:

1. The concept of judicial activism has been evolved from the English Law.

[5] S. P. SATHE, JUDICIAL ACTIVISM IN INDIA – TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002).
[6] P. P. RAO, THE CONSTITUTION, PARLIAMENT AND THE JUD.' IN PRAN CHOPRA'S THE SUPREME COURT VERSUS THE CONSTI. – A CHALLENGE TO FEDERALISM (2006).

(while looking at the introduction aspect and historical aspect this hypothesis was framed)

2. There is no written law on judicial activism or judicial restraint, but it is expounded in different judgments of Courts with the passage of time.

   (after going through various cases this hypothesis was framed)

3. The dignity of Court and rule of law can be maintained only if the balance is maintained between activism and restraint.
   (while reading about SOP and current scenario of our judicial system this hypothesis was framed)

4. The Jud. has always been stringent in maintaining the principle of SOP and exercise its judicial restraint.
   (while going through the concept of SOP this hypothesis was framed)

SCOPE OF STUDY:

The scope of the present research is very wide in the nature. The researcher has limited the scope of present research to the legal perspective especially with regard to the judgments of Courts post 2011 evolving the concepts of Jud. Actis and Jud. Res and its pros as well as cons in the different spheres.

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The researcher will also critically analyse the role of SC while giving such pronouncement as to whether SC is overstepping is juris. or is well within its ambit while giving such rulings. The SC may be Supreme but it cannot be infallible.

RESEARCH METHODOLOGY:

The author has adopted doctrinal research methodology for the present dissertation. The author has collected material for w.r.t. the topic of the dissertation from primary sources

such as case laws, books, reports, etc. as well as secondary sources such as articles, journals, websites, etc. The author has used such material and interpreted them for testing of hypothesis.

MEANING/ DEFINITION:

Jud. Actis has been defined by Black's law dictionary –

> "a judicial philosophy which drives judge to proceed from strict adherence to precedents in favour of progressive approach which may not be consistent with the restraint expected by the judges."

Jud. has on many occasions exercised juris. with a courageous creativity only with intention to answer to expectations and ambitions of the litigants. According to Chaterji Susanta, Jud. Actis means –

> "active role played by the jud. in promoting justice and it is also the assumption of an active role on the part of the jud.."[7]

Jud. Actis cannot be seen as a conventional role of the jud. in delivering valuable judgments and redressing victims in accordance with social justice when the law is uneven or even unjust. The usefulness of social improvement laws can be viewed as Jud. Actis. In summary, it can also be expected that Jud. Actis comes into play in the case of legis. shortsightedness or exec. arbitrariness or both.

Jud. Actis necessitates going past the usual restrictions put on jud.. Jud. Actis provides jurists the authority to overturn any law or rule even if against precedent if it appears to the jurists that such law or rule violates the Consti. of India. According to Judge J.S. Verma, Jud. Actis means –

> "the active process of implementing the rule of law, which is essential for maintaining a functioning democracy".

In the present democratic framework, Jud. Actis should be seen as a tool to limit legis. experiments and the dictatorship of the exec. through the imposition of constitutional limits of jud. wherein jud. rev. of actions of exec. and legislation are restricted. Jud. Actis comes into play when the Legislature and the Exec. fail or are not able to fulfill

[7] Susanta Chaterji, *For Public Administration' Is Judicial Activism Really Deterrent Tolegis. Anarchy and Exec. Tyranny?*, THE ADMINISTRATOR, XLII, 9,11 (1997).

its responsibilities on purpose. Resultantly, Jud. Actis should be viewed as a "damage control" step insofar as it is an impermanent segment.

It has recently become apparent that the jud. plays a crucial part in areas that are reserved for branches of government. When governance appears to be done by Mandamus, issues of Jud. Actis arise. The Indian Consti. operates in congruence with the powers of the exec. & legis.

As rightly said in an Art. published by the Hindu newspaper that –

> "To be actually noble, the jud. that wields democratic power must enjoy a high level of independence, but independence could become dangerous and undemocratic if there is no constitutional discipline with rules of conduct and accountability: without these, the robes may appear arrogant."[8]

Jud. Actis is more of an assurance that judges of SC and various HC would adopt method of golden interpretation of the constitutional and legis. laws to serve the needs of the society. Jud. Actis believes that judges should play an active role in reforming the society and it needs as per the growth of the culture and its people. A best example can be seen of this when the SC indirectly legalized gay relationships and marriage. The concept of Jud. Actis is the opposite of Jud. Res. The failure of the government's legis. and exec. branches to provide "good governance" necessitates Jud. Actis. However, providing justice to over 1.3 billion people doesn't appear to be a simple job.

HISTORY:

Issue of Jud. Actis versus Jud. Res has been discoursed - *State of U.P and ors. v. Jeet Bhisht*[9]. Wherein the bench opined that by exercising Jud. Res. courts will enrich credibility. Similar argument was also taken by Advocate Abhishek Manu Singhvi in the recent Election petition filed by Chief Minister Mamta Banerji before the Calcutta HC[10].

If any provision of the legislation violates any Art. of the Consti. of India, it can be held unconstitutional and be struck down. In no other circumstances, the jud. can amend or struck down provisions of any legislation. The court may believe that the provisions of

[8] V.R.Krishna Iyer, Judicial Appointments & Disappointments , THE HINDU, (Jun. 12, 2021, 10.30 P.M.) http://www.thehindu.com/opinion/lead/article3785898.ece.
[9] State of U.P and Ors. v. Jeet Bhisht, 2007 6 SCC 586.
[10] Mamata Banerjee v. Suvendu Adhikari, Election Petition no. 1 of 2021 before High Court of Calcutta.

any legislation should be amended or that the institution established by any legislation should be strengthened, but for this reason it cannot change the law or assume the working of legislation or the exec. However, Judge Sinhaaa had contrary view, citing the fact that law made by judges is recognized in many countries. If the doctrine of SOP is applied rigidly, there will be no superior court in this country to establish new rights or provide justice through an interpretative process. In view of the above, without challenging the concept of Jud. Res, it is asserted that excessive restraint, if the jud. imposes on itself due to strict SOP then it may not appear to be righteous in the eyes of the poor.

Excessive Jud. Actis may also be detrimental to the Jud. itself, while excessive restraint would be self-defeating. If the jud. is unable to impede abuses of legis. and exec. power, the judicial institution's very purpose will be defeated. Such a failure of the jud. would destroy the population's trust not only in the jud. and legal profession, but also in the society at large. Sound judicial policies must be a judicious blend of Jud. Actis and Jud. Res. Courts shall always refrain itself transgressing into the role of legislature.11 Excess meddling by courts harms governance whereas excess restraint upsets system.[12]

The role of the higher jud. under the Consti. imposes a great responsibility it as guardian to uphold the stature of the Indian Consti. and the citizens being governed by the Consti. As rightly observed by the bench in Narmada bachao andolan case that –

> "to uphold the rule of law and harness their power in the public interest, the Court must act within their judicially permissible limitations."[13]

HISTORY & ORIGIN OF JUDICIAL ACTIVISM:

The British jud. is the common ancestor of both the American and Indian judiciaries. As a result, both countries owe many of their principles and institutions to the British legal system.

Because Parliament was sovereign in England with no written Consti. alike India, judges in England were applying law enacted by Parliament to the facts of a particular matter and then arrive at a decision or opinion based on such law as enacted. *"Law is*

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[11] *Judicial Activism v. Judicial Restraint*, LEGALSERVICE INDIA, (Jan, 21, 2021, 11.00 A.M.) http://www.legalservicesindia.com/article/article/judicial-activism-v-judicial-restraint-96-1..

[12] N.K. JAYAKUMAR, JUDICIAL PROCESS LIMITATIONS AND LEEWAYS (1997).

[13] Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664.

the command of the sovereign," Austin said, and because the Parliament in England was supreme, law was made by Parliament, not by Jud.. As a result, courts there were subordinate to Parliament and weren't expected to be activists. The French writer Montesquieu's SOP theory stated that the legislature's job was to make laws, while the exec.'s job was to make administrative and policy decisions. The literal rule of interpretation was followed with particular vigor in England as any other method of interpretation would be seen as unsettling the enactment of the Parliament which was utmost important in England's unwritten constitution.[14] On the contrary, sociological jurisprudence in the USA sought to shift the legal system's center of gravity from legis. made law to judge made law.[15]

The traditional interpretation of role of jud. is that the legislature enacts laws, the exec. implements or enforces such laws and the jud. is to interpret and apply such laws to the facts and circumstances of a particular case. This applies to both India and the USA as legal systems of both the countries share few fundamental similarities. India being a former British colony, it inherited common law system and an abysmal disbelief of government agency that lacks the necessary controls and countermeasures. Both Constitutions are federal; except that India's Consti. has been described as "quasi-federal," with a "strong unitary bias." Furthermore, through their respective chapters on inalienable rights, both Constitutions guarantee equality, freedom of speech, life and liberty, and religion.[16]

In diverse country like India, the Jud. is often called upon to play prominent role in dispute or interpretation of rights of individual while the Consti. creates enormous binding force through their guarantees of equality, secularism, and federalism. Such can be very appealing as the solitary interpreter of rights of the individual may play larger role in country's development.[17]

The SC had to broaden its juris. by issuing directives to the exec.. as stated, -

> "In recent years, as incumbents of Parliament have become less representative of the will of the people, there has been a growing sense of public frustration with the democratic process."

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[14] "*Recent Judicial Trends on Separation of Powers*" at: http://shodhganga.inflibnet.ac.in/bitstream/10603/71955/13/13_chapter%205.pdf.
[15] W. Friedman *"Legal Theory"* & James Herget *"American Jurisprudence".*
[16] *Id.*
[17] *Id.*

Many criticize Jud. Actis as it creates more legal uncertainty than required, regardless of whether the decision is based on constitutional, historical or other grounds or not. Jud. Actis is sometimes referred to as "legislating from the bench." Some call it judicial autocracy. Implying that a judge is making a decision based on personal political beliefs or emotions. Former AGI Soli J Sorabjee stated that the jud. plays an important role in protecting minority rights in a pluralistic society, adding that *"Jud. Actis has contributed to the protection of fundamental human rights."*[18]

HISTORY & ORIGIN OF JUDICIAL RESTRAINT:

Jud. Res is a procedural slant to jud. rev.. The doctrine of Res. itches Courts from adjudicating certain issues, particularly which are matter of Const. as a procedural doctrine, unless the adjudication is needed to resolve a material dispute concerning adversarial parties. As a noun, it calls on courts dealing with constitutional issues to pay considerable heed of any opinions of the ones who are on the post and to only declare what they have done invalid if it is in direct violation to the articles of the Const. of India.

Courts of federal nature cannot adjudicate suits having general grievances or pursuing general remedy. The ‘doctrine of ripeness’ prohibits plaintiff from seeking relief in case of a threat merely being speculative and the ‘doctrine of mootness’ prohibits judges from settling cases after a dispute is resolved.[19] Even if cases can be heard properly in federal court in the USA, Jud. Res provides limiting procedural devices. The constitutional avoidance canon requires courts to rule on constitutional issues only as a last option. Therefore, when a case can be decided via multiple ways, judges should select one that allows them to avoid a constitutional problem. If two possible readings of a statute exist then the one that does not cast doubt on the statute's constitutionality is to be preferred.

EVOLUTION:

[18] < http://news.oneindia.in/2008/11/15/sorabjee-defends-judicial-activism-1226761401. html>.
[19] Kermit Roosevelt, *Judicial Restraint*, BRITANNICA (Jun. 13, 2021, 09.00 P.M.) https://www.britannica.com/topic/judicial-restraint.

Provisions for "judicial review" were required for giving effect to the rights of everyone. Art. 13 (2) of the Consti. provide that no government shall enact law that suppresses / restricts any FRs, and any law that violates the above mandate shall, as far as possible, be void.[20]

While jud. rev. of actions of the exec. has developed via doctrines such as *'proportionality,' 'legitimate expectation,' 'reasonableness,' and 'PNJ'*, the SC and the various HCs were given the authority to rule on the constitutional issues of exec. and legis. actions. The SC and HCs also decides issues w.r.t. Art. 246 of the Consti. of India, r/w the 7th appendix, provides delimitation and an intersection between the legis. branches of the Union parliament and the various state parliaments.[21]

As a result, the concept of jud. rev. before our courts has evolved in 3 components:

1. to ensure equality in exec.'s action,
2. to preserve citizens' FRs, and
3. to decide on issues of legis. competence between the CG and SG.

Art. 32 of the Indian Consti. grants the SC the authority to enforce these FRs. It gives citizens the right to go appeal to the SC to seek redress for violations of these FRs. FR in and of itself form part of consti. remedies, and it can be implemented through writs derived from common law, such as habeas corpus, mandamus, quo warranto, prohibition, and certiorari. In addition to the SC, the HCs are assigned as Consti. Forum if any citizen wishes to file any writ for violation of the FR.

Art. 32 and Art. 226 has been construed to form novel solutions like "continuing mandamus". Judges have also introduced legal remedies under private law such as "interim injunctions" and "residence orders".[22]

Effective challenge to provisions of any legislation may result in relief if such provisions are struck down or legislations being read down. Reading down a legislation

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[20] *Doctrine of Judicial Review in India: Relevancy of Defining Contours* http://www.legalservicesindia.com/article/article/doctrine-of-judicial-review-in-india-relevancy-of-defining-contours-1679-1.html.

[21] *Ib.*

[22] B.N. KIRPAL ET. AL. (EDS.), SUPREME BUT NOT INFALLIBLE – ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (2000):;Also see K.G. Balakrishnan, '*Growth of Public Interest Litigation in India'*, Fifteenth Annual Lecture, SINGAPORE ACADEMY OF LAW (2008) <www.sal.org>.

means that a court dismisses particular approach to interpret a provision rather than striking down the provision entirely.[23]

Most significant change since inception of PIL in the late 1970s was that the requirement of ‘locus standi' for filing PIL was relaxed. The Courts allowed social activists and lawyers to bring actions on behalf of the needy.[24] The Court own its own decided cases which were presented to them via couriers i.e., ‘epistolary juris.'

In the case of PIL that seeks to secure the direction of state responsibility or protection of environment, the process is like a joint issue resolving exercise than dispute. There is no meaningful opportunity for the parties to produce evidence on file prior to legal proceedings. In order to solve this issue, jud. set up "investigative commissions" for investigating the facts and reporting to the court. These commissions are typically made up of experts in the relevant fields or practising lawyers. On a case to case basis, the Courts require the services of senior counsels in matters involving complex legal considerations by appointing them as amicus curiae.[25]

[23] In the United Kingdom, Courts have developed another tool for ruling on legis. action – i.e. issuing a ‘declaration of incompatibility’ for statutory provisions that contravene the ECHR.
[24] Susan D. Susman, *Distant voices in the Courts of India: Transformation of standing in Public Interest Litigation*, 13 WISCONSIN INT’L. L. J. 57 (1994).
[25] KIRPAL, *supra* note 22.

CHAPTER- 2

JUDICIAL TREND AND KEY HISTORICAL MOVEMENT AND CRITICISM

QUA INDIA

a. COAL ALLOCATION CASE[1]

The coal gate scam refers to the allocation of coal blocks to corporates of public sector entities (PSEs) and companies in the private sector during Prime Minister Manmohan Singh's tenure as Prime Minister. This procedure was not followed and there were many discrepancies during reporting and the allocations were believed to be arbitrary with approximately 194 blocks given to private institutions.

This political swindle came to light in 2012, when the Comptroller and Auditor General (CAG) of India reported that the inability to auction 194 coal blocks resulted in substantial losses for the Indian government. The CAG initially estimated the government's losses at Rs 10 lakh crore. The losses were revealed to be Rs 1.76 lakh crore after the CAG final report was tabled in parliament.

On the orders of the Central Vigilance Commission (CVC), the CBI launched its investigation; simultaneously, the Income Tax Department launched its investigation. The Parliamentary Standing Committee played an important role, as it criticised the allocation process between 1993 and 2008 as arbitrary in April 2013. It also ordered a probe to be launched on all those engaged in the swindle.

The CBI charged top industrialists Naveen Jindal, Dasari Narayana Rao, Kumar Mangalam, and former coal secretary PC Parakh in 2013. In July 2014, the SC established a separate CBI court to hear all allocation matters. The SC decided on August 25, 2014, declaring all coal allocations between 1993 and 2010 unlawful. It was established that, according to the Screening Committee's recommendations from July 14, 1993, the allocation through the government

[1] Manohar Lal Sharma v. The Principal Secretary and Ors. Writ Petition (Crl.) No. 120 of 2012.

dispensation route suffered from arbitrariness and legal deficiencies in 36 meetings. The apex court stated that the swindle resulted in significant harm to the common good and public interest.

b. BCCI CASE[2]

For years, the BCCI had positioned itself as a greedy kid, with the full support of rootless and reckless politicians backed up by cunning lawyers, and they had long believed that they were above the law of the country. Certain lawyer-politicians encouraged them to take on the highest court in the land, but luckily, their hubris has been cut cryptically and terribly for them.

From January to July 18, 2016, when the verdict was issued, the SC provided the arrogant BCCI and their state entities with enough chance to submit its case against any perceived concern coming from Lodha Committee recommendations. Advocate after advocate, paid lakhs per hearing, kept singing one melody - "We are an autonomous association and enjoy the right u/a 19 (1) (c) of the Constitution. As a result, even you cannot compel us to reform." The average man was astounded by the BCCI henchmen' audacity, led by an arrogant president who disobeyed the SC's decision. Thankfully, the SC has put an end to the BCCI's disobedience, and they have decided the future of cricket administration in the country after months of uncertainty and controversy during the fight between the BCCI and the Lodha panel. In one fell swoop, they removed the BCCI's biggest stumbling block, Anurag Thakur, as president.

The SC ruled that Anurag Thakur and Ajay Shirke chose not to comply with the 18 July order and were thus ousted. Unsurprisingly, Thakur was thus served with a Contempt of Court notice for allegedly "committing perjury" by lying about whether he requested a letter from the ICC CEO regarding the appointment of CAG as a BCCI member.

The obstinate office bearers of state units and the BCCI must now follow the recommendations of the Lodha panel or be removed from office immediately. Seeta and Geeta's dual roles – one in state units and another in BCCI – were perceived as impeding the judgment's execution. BCCI was desperately stating

[2] Board Of Control For Cricket v. Cricket Association Of Bihar & Ors, Civil Appeal No. 4235 of 2014.

that state units were unwilling to listen to them when it came to implementing their judgement. Each BCCI mandarin was a boss in one of the state units, but they were attempting to deceive the SC by claiming that they were completely powerless to persuade their units to comply.

To avoid such cunning, all BCCI and state association office bearers are now required to sign a pledge to follow the Lodha Committee's recommendations. The SC had nominated Fali Nariman and senior lawyer Gopal Subramanium as amicus curiae to choose the observers who will oversee the judgment's implementation.

Sports fans and athletes in India have grown tired of corruption in sports. 27 former Olympians, professional athletes, and Arjuna Awardees have petitioned the SC to enforce the Lodha Committee recommendations across several sporting disciplines, led by Ashok Kumar, hockey captain, and son of the renowned Maj Dhyan Chand.

In the matter of *Board of Cricket Control in India v. Cricket Association of Bihar*[3], the SC identified various anomalies and illegalities in the way the principal administrator of cricket, i.e. BCCI, operated. The board operated in an ambiguous manner that did not adhere to the principles of transparency, better governance, and fairness, all of which were required to maintain the institutional integrity of the cricket administrator, especially since it was the board that would send the team to represent India at international tournaments. The court then established the SC Committee on Cricket Reforms, chaired by Chief Justice (Retd) RM Lodha, whose suggestions are not only beneficial, but also critical in accomplishing the goal of transparency and good governance.

In 2011, the Government of India presented the National Sports Development Bill, largely to streamline the operations of National Sports Federations and to promote sports. Following that, the Government of India amended and introduced the proposal of the National Sports Development Bill in 2013, after

[3] *Supra* note 27.

soliciting opinion and ideas from various stakeholders. Despite this enormous effort, the Bill did not see the light of day, and the situation of sports administration in India remains as terrible as it was previously. I am confident that the SC's decision will end the mess in sports once and for all. I thank the SC for stepping in to define justice, transparency, and integrity in the operation of the BCCI

c. YAKUB MEMON[4]

Yakub was related to Tiger and Dawood Ibrahim. He was the financer in the 1993 Mumbai serial blasts. He was convicted in 2007 for the same. The Court has been steadfast in taking up matters of critical importance, even at 2 a.m., to ensure that the ends of justice are met. The Apex court was hearing Yakub Memon's final plea against his execution for his part in the 1993 Mumbai blasts case at 3 a.m.

Memon's lawyers and activists cited a SC ruling arguing that after denial of his mercy petition, he could not be hanged for at least 14 days and that as per Maharashtra prison manual there must exists gap between denial of a mercy petition and enforcement which has not been followed in the present case. The SC rejected such arguments on the basis of reasoning that many opportunity had been given to Yakub for filing the petition for mercy after his plea was initially rejected.

The judges then dismissed Memon's plea and was hanged in Nagpur Central Prison just before 7 a.m.

d. JALLIKATTU BAN[5]

Due to inhumane behavior in respect to animals and in respect to the safety of public at large, the AWB of India petitioned the SC for an absolute ban on Jallikattu. On November 27, 2010, the SC granted the Government of TN permission for Jallikattu for five months every year. The SC further directed the DCs to ensure that the animals participating in the festival are duly registered with the AWB. The TN Government directed the organizers to deposit 2

[4] Yakub Abdul Razak Menon v. State of Maharashtra Writ Petition Criminal No. 135 of 2015
[5] Animal Welfare Board of India v. A. Nagaraja & Ors. in Civil Appeal No. 5387 of 2014.

lakhs in event of an injury or accident, and enforced allowing crew of veterinarians to take care of those animals which were harmed during the course of the event.

In 2011, the MoEF issued a statement prohibiting bulls from performing, effectively cancelling the whole festival. However, practice was preserved under the Government of Tamil Nadu. On May 7, 2014, SC abolished the state statute and outright prohibited Jallikattu. The SC stated that any violation of the order would result in animal cruelty punishment under the POCTA, 1960. The court also requested that the GOI alter the legislation prohibiting animal cruelty to include bulls. The SC also found that these events are inhumane because bulls are not meant for such festivals and forcing them to do something which is not natural is forbidden.

The ban was effectively lifted on January 8, 2016, when the MoEF allowed the continuation of the ritual under specified conditions. However, following an appeal filed by the AWB of India and PETA India, the SC put a stay on this order, upholding the prohibition, on 14 January 2016, sparking protests across TN. On July 26, 2016, the SC refused to reconsider its ruling. The WYO protested in Chennai on January 16, 2016, against the stay of the order reversing the ban on holding Jallikattu in TN.

After considering petitions brought by the AWB of India challenging the government's announcement, the SC imposed a stay on January 12, issued notices to the CG and the government of TN, and later declined to withdraw the stay. In response to the ban, hundreds of Jallikattu events were held across TN, and many participants were detained by police. Following the Centre's appeal, the SC postponed the decision in order to avoid chaos.

As a result of these demonstrations, the Governor of TN released a new legislation on 21 January 2017 that approved the continuation of Jallikattu activities. With the Prime Minister's support, the Government of Tamil nadu exempted Jallikattu from POCTA, 1960 on January 23, 2017.

e. NJAC JUDGMENT[6]

On October 16, 2015, the SC issued a landmark decision in which it declared the 99th Consti. Amendment to be void and against the Consti. Of India. It was meant to change the "collegium" dynamics, by which the SC's 3 senior-most judges had ultimate say on judicial appointments, with a NJAC comprised of the law minister, two "eminent persons," and the three judges. In overturning the NJAC, the Court also declared that the collegium system of appointment had been revived and was still in effect. Distinct opinions were authored, Justices Khehar, Lokur, Goel, and Joseph were in majority, whereas Justice Chelameshwar dissented.

Under the old Art. 124 of the Consti. of India, President was to appoint Hon'ble Judges in "consultation" with the Chief Justice and other judges. Second Judges Case, SC held that the word "consultation" should be understood to imply "concurrence". As a consequence, it created the collegium system modifying the role of jud. in appointing judges wherein the senior most 3 judges would have last word. Parliament attempted to bypass the judgment of the Second Judge case by the 99th Amendment amending Art. 124 which constituted the NJAC. The NJAC's composition was specified in Art. 124A whereas Art. 124C entrusted about the selection procedure to parliamentary legislation. In accordance with such amendment, the NJAC Act was drafted. The 99th Amendment was eventually challenged before SC'.

During the course of the arguments, the Union proposed that the subject be referred to larger bench (11 judge) to examine constitutionality. While denying immediate referral, the Court suggested that it will address the issue extensively in its final conclusion. Justices Khehar, Lokur, and Goel's majority opinions w.r.t. the denial of the referral and the determination of unconstitutionality. This created confusion as both issues transgressed into each other.

[6] Supreme Court Advocates-on-Record Association and Anr. v. Union of India, Writ Petition (Civil) No. 13 of 2015.

By refusing referral, the bench effectively asserts that there are no compelling reasons to review The Second Judges Case. In doing so, the bench seeks to demonstrate that the collegium decision in The Second Judges case was appropriate in as much as it is harmonious with the scheme of the Constitution.

In other words, the collegium's legitimacy does not entail the 99th Amendment's unconstitutionality. Unfortunately, the majority of perspectives appear to take the latter as a natural result of the former at various points. This harms the holding's overall structure.

The bench's key holding can be summarized that a) The NJAC undermines the fundamental structure by removing judicial primacy through its veto. b) Judicial supremacy in judicial appointments (with exec. involvement) is also a basic structure feature. c) Judicial appointments, as an essential aspect of judicial independence, are incorporated into the basic structure. d) The collegium allows for Exec. engagement while maintaining judicial primacy. According to this decision, judges will have the final say as members of that Commission - potentially through an express veto power.

f. SHREYA SINGHAL CASE[7]

This is a landmark decision involving section 66 (A) of the IT Act of 2000. This Section never was part of the Act when it was first enacted, but it became effective on October 27, 2009, as a result of an Amendment Act of 2009.

The Petitioners have expressed a slew of concerns about the validity of Section 66A as it suffers from ambiguity and violates rights u/a 14 and 21 because there is no discernible difference between those who use the internet and those who utilize other modes of communication through words spoken or written. To penalize someone for using a specific mode of communication is a discriminatory act in and of itself, and would violate Art. 14 in any scenario.

[7] Shreya Singhal v. UOI, AIR 2015 SC 1523.

In response, the ASG representing CG, supported Section 66A's legality contending that Court should only intervene in the legis. process where a statute manifestly violates the rights granted to individuals under Part-3 of the Consti. and that ambiguity is not a basis for declaring a legislation unconstitutional if legislation is otherwise competent and non-arbitrary. The Consti. does not establish impossibly high requirements for assessing legitimacy. The mere potential of a provision being abused cannot be used to deem a provision illegal. Section 66A may have utilised ambiguous language to address novel techniques of infringing on other people's rights by utilising the internet as a tool. He referenced a vast number of judgements, both from this Court and from other juris., to support his argument.

The Court ruled that section 66A of the IT Act is a derogation to Art. 19(1)(a) and, as such, is an arbitrary measure that violates FR of the people of this country. Provision in question is constitutionally illegal and must be repealed in its entirety. The Court ruled that section 66A of the IT Act is a derogation to Art. 19(1)(a) and, as such, is an arbitrary measure that violates citizens' right to free speech and expression on the internet. As a result, the provision in question is constitutionally illegal and must be repealed in its entirety.

For a variety of reasons, the decision in this case is extremely significant in the history of the SC. In a rare occurrence, the SC has gone so far as to declare a censorship law established by Parliament to be completely invalid. The Judgment broadened the extent of our right to freely express ourselves, while also restricting the States power to rule over us. According to Justice Nariman, freedom of thought and speech is more than just an inspirational ideal; it is also a cardinal principle that is of fundamental importance under our constitutional scheme.

g. DELHI CAR BAN CASE[8]

[8] Order dated 14th September, 2017 in M.A. NO. 567 OF 2016 AND M.A. NO. 1220 OF 2016 IN ORIGINAL APPLICATION No. 21 OF 2014, 95 OF 2015 AND 303 OF 2015 before National Green Tribunal, Principal Bench New Delhi.

On April 20, 2015, the SC denied a petition challenging a NGT judgment prohibiting all vehicles older than 15 years from operating on Delhi roads. “Let us assist them (NGT) rather than discourage them,” bench said while dismissing a lawyer's petition to set aside the green panel's verdict. The bench further went on to say that the NGT was "merely reiterating orders issued by Constitutional courts (SC/HCs) in the past."

An advocate, challenged the ruling in the SC on several grounds, including that the NGT lacked authority to consider a case which is in nature of PIL. Debasis Misra, appearing for Advocate Vishaal argued that the fitness of the vehicles can be and should be the criteria from stopping them from plying on roads instead of age of the vehicles. The bench, on the other hand, was unwilling to consider the plea in depth and dismissed it after a brief hearing.

Previously, the NGT stated that, in addition to prohibiting 15-year-old diesel and petrol vehicles, no one shall be authorised to burn plastic or any other material in the open. The NGT further stated that if anyone is discovered openly burning plastic or any other substance, including tree leaves, he will be prosecuted in accordance with the law.

It had said that in all Delhi markets, “tarred roads for ordinary traffic shall not be permitted to be used for parking, hence causing undue traffic congestion.” It also instructed the Delhi government and others to establish an online page where an aggrieved party can post images exhibiting pollution.

The NGT also stated that “immediate actions would be taken by all the Respondents and concerned agencies to establish cycle tracks in Delhi and efforts should be made to encourage cycling in Delhi” in order to reduce vehicle pollution.

h. SEBI – SAHARA CASE[9]

[9] Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603.

SHIC and SIRECL are two unlisted companies managed by the Sahara group worth Rs.2.75 lakh crore that were floated incorporated in 2008. By passing Special resolution u/s 81(1A) of the Companies Act, 1956, the two companies raised over Rs 24,000 crore from approx. 3 crore investors through the issuance of (OFCDS) and mobilized lucrative investments offering. An OFCB is a Bond that people who have invested can convert their shares into equity as per the terms and the conditions of the share. Thus the said instrument would fall under the purview of the SEBI.

One of the group companies, Sahara Prime City Limited, plans to obtain capital by listing its shares on the SEBI. During the prospectus review process, SEBI got a complaint that SG issued certain bonds which were in contravention to RBI/MCA/NHB Rule/Regulation/Guideline. SEBI also received complaints by "Professional Group of Investors Protections" causing SEBI to investigate the matter.

SEBI directed Sahara to reimburse investors because SEBI was convinced that they are violating guidelines as well as key sections of the corporate act. Authority discovered that the company was conducting considerable para-banking activity under the guise of an OFCD while failing to comply with regulatory disclosures and investor protection rules relevant to public issues.

Sahara appealed against the SEBI's order, claiming that because the group companies were not listed, the capital markets regulatory body had no juris. on them. The court denied Sahara's plea and reprimanded it for failing to comply with its directions. Supreme Court ordered the company to provide to SEBI documents pertaining to OFCDs it granted.

Because Sahara has been unable to deposit the amount asked with the authority, SC ordered the Company to provide a BG to the tune of Rs. 20,000 Crore.

This case served as a wake-up call for authorities such as the Income Tax Department and the Enforcement Directorate to pay closer attention to the source of the money. Multiple regulators and enforcement authorities should act

effectively to prevent redundancy and facilitate better resource distribution. The government has constituted the Financial Industry Legis. Reforms Commission (FSLRC), a body of former and serving bureaucrats, to reform and consolidate some 60-odd financial laws. To some extent, SEBI proven to be an effective mechanism in dealing with the matter, although it still has the constraint of regulating unlisted companies in India.

i. ARUNACHAL PRADESH EMERGENCY IMPOSITION CASE[10]

09.12.2015, a handful certain member of assembly addressed the Government of AP, requesting that Assembly Speaker be impeached as they were furious with him as it was perceived as being in on the side of CM of AP. The two were cousins. Despite the fact that the Assembly was not in session, Governor of AP determined that the matter was of utmost importance. An emergency assembly on 16.12.2015 was called to consider the resolution for impeachment. The Opposite party challenged Governor's call for a special session in the HC and then the SC's Consti. Bench. The Centre then moved for President's rule. The Opposite party reacted angrily, claiming that this was the first time Art. 356 was invoked while the case was being tried in court.

Due to rampant abuse by the exec., the SC was forced to intervene in this matter. Consequently, in the S.R. Bommai case, the SC decided in 1994 that courts cannot question the Union Cabinet's advice to the President, but they can question the content behind the President's satisfaction in the context of breaking down of constitutional machinery. It also stated that the application of Art. 356 was justified only when the constitutional mechanism failed, not when the administrative system failed. Since then, the use of this item has declined significantly, since it has instilled dread in the minds of exec.s about the Court invalidating the imposition of the President's Rule.

[10] Nabam Rebia v. Deputy Speaker and ors. In Civil Appeal Nos. 6203-6204 of 2016.

Another instance of this Art. being abused was in the Buta Singh case[11]. Where the Governor endorsed president rule without offering an opportunity to an Alliance that claimed to have a majority. In the Buta Singh case, the SC ruled in January 2006 that the dissolution of the Bihar assembly was null and unconstitutional. It ruled that the governor's report could not be considered mandatorily and must be confirmed by the council of ministers before being utilized to impose President's rule. The "dramatic and excessive action u/a 356" cannot be based exclusively on the Governor's whims and fancies, and the council of ministers should not accept it as "gospel truth."

ACCOUNTABILITY OF JUDGES:

In jud., judges are appointed and not elected. It is frequently maintained that when the jud. declares a piece of law illegal in the exercise of its Jud. rev. juris., it rejects the legislation of a popularly elected Parliament.[12]

Jud. rev. opponents see the jud.'s function as solely resolving conflicts between parties, and they feel that the settlement should be precisely in accordance with the law enacted by the elected legislature. Jud. rev. opponents see the jud.'s function as solely resolving conflicts between parties, and they feel that the settlement should be precisely in accordance with the law enacted by the elected legislature. It is crucial to highlight that the concept of Parliamentary Sovereignty has nearly evaporated since the adoption of the Human Rights Act, 1998 (UK) and the Constitutional Reform Act, 2005, which established the Supreme Court of England. As a result, the power of Jud. rev. has gained legitimacy in the British constitutional structure.

In the Indian scenario, the issue about accountability is baseless. In the words it has been mentioned that:

> "It might be that by giving the jud. an enormous amount of power – a Jud. which may not be controlled by any legislature in any manner except by the means of ultimate removal – we may perhaps be creating a Frankenstein monster which could nullify the intentions of the framers of the Constitution. I have in mind the difference that was experienced in another country."

[11] Rameshwar Prasad & Ors v. Union of India & Anr., Writ Petition (C) 257 of 2005.

[12] B.S. Chauhan, *The Legis. Aspect of the Jud.: Judicial Activism and Judicial Restrain*t, http://www.tnsja.tn.nic.in/Article/BS%20Chauhan%20Speech-%20Lucknow.pdf.

DEVELOPMENTS WHICH INFLUENCED ROLE OF JUDGE:

The SC has been charged with the crucial task of functioning as the ultimate arbitrator of conflicts and the developer of jurisprudence in India. It has also been bestowed with different juris., for achieving what is right and wrong as per Consti.s purposes.

It may be claimed that the founders of the Consti. of USA did not intend to give the jud. such broad powers of Jud. rev.. Few voiced the concern that those appointed as judges might feel independent. Alexander Hamilton, on the other hand, addressed this persuasively:

> "Judicial Review does not suppose a superiority of judicial to Legis. power. It only supposes that the power of the people (Constitution) is superior to both. The intentions of the people would prevail over the intentions of their agents."

Surprisingly, in respect to the scope pertaining to Jud. rev. a constitutional scholar noted:

> "For his part, Marshall in Marbury never claimed a judicial monopoly on constitutional interpretation, nor did he allege judicial supremacy, only authority to interpret the Consti. in cases before the Court**."**

Theory of constitutional democracies is that the Legislature and Exec. interpret the law as well. Accordingly, ratio was not intended to grant the jud. a comprehensive control on interpretation of Constitution. It was stated as:

> "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the exec., or exec. officers, perform duties in which they have discretion. Questions in their natural political, or which are, by the Consti. and laws, submitted to the exec. can never be made in this Court."

Whatever case may be, the power exists. A common practice by Constitutional Courts in the USA where a crucial power is inscribed in the Consti. of USA and challenge the validity of Jud. rev..[13]

Likewise, the SC has frequently upheld the right of Jud. rev., arguing that such a supremacy is intrinsic in the Consti. unless provisions of the Consti. excludes it. It has determined that the authority of Jud. rev. is accessible under the sections of the Consti.

[13] Chauhan, *supra* note 37.

that proclaim its sovereignty.[14]

However, the Consti. of India explicitly states for the authority of Jud. rev. u/a 13, 32, 226, 141, 142, and 144. At the very least, there is no debate about the SC of India's power of Jud. rev. under our constitutional structure. To justify its Jud. rev. power, the SC of India invokes the Constitution's troika clauses, namely Articles 32, 226, and 142. Art. 13(2) states that the CG or SG shall not create any law that deprives or restricts any FRs pertaining to any people. Any violation of the Art. 13(2) shall be void to the degree of such violation. The power of Jud. rev. has evolved so as –

> "(i) To ensure that legis. and administrative action is fair. As a result, it is assured that judicial scrutiny is directed solely at the decision-making process and not at the conclusion itself;
> (ii) To safeguard citizens' constitutionally given fundamental rights; and
> (iii) To rule on issues of legis. competence between the center and the states, which is a feature of another basic premise of Constitutionalism, namely Federalism."

To understand the substantive evolution of necessary rights, it is of utmost importance to re-examine the conceptual difference among their "negative" / "positive" characters.[15] 'Duty of restraint' serves as the base for rights with a 'negative' character. As a result, during 1950s the Consti. of India, certain freedoms and the protection against impairment of life and liberty were primarily seen as putting restriction on both entities and individuals. In contradiction to 'negative' rights, the state policy refer to a number of socioeconomic goals with a 'positive' dimension.[16] Despite the fact that the DPSPss are not legally enforceable, their language is implied in terms of positive responsibilities on entities to facilitate their realization.[17] An essential right's wording reveals whether it is directed at exec., individuals, corporations, or all. In the Consti. of India, for example, rights such as "freedom of speech, assembly, and association" are aimed at the exec. because the text refers to the exec.'s capacity to place reasonable limitations on their application. This indicates that the exec. has a duty not to overstep on such liberties under ordinary circumstances.

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[14] *Id.*
[15] The distinction between the notions of 'negative' and 'positive' rights in legal theory was first prominently discussed by Wesley Newcomb Hohfeld.
[16] SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED – POSITIVE RIGHTS AND POSITIVE DUTIES (2008).
[17] *Id.*

The Jud. have attempted to blur the boundary between 'negative' and 'positive' rights in response to this hierarchy. While the FRs of citizens as stated in the Consti. of India are justifiable before the superior courts. The immediate next part to the FRs deals with the DPSPs which outlines objectives relating to socioeconomic entitlements.[18] The DPSPs seek to create an equal society in which citizens are permitted of the deplorable physical conditions that have previously stopped them from becoming their best identities. They are the creative component of the Consti. and are essential to the country's government. The crucial element, however, is that the DPSPs are 'non-justiciable' but are expected to guide the CG and SG in the correct direction. It is worth noting that, during the time of the Constitution's drafting, some of the clauses that are now part of the DPSPs were part of the Congress party's declaration of FRs. K.M. Munshi (a well-known lawyer and Constituent Assembly member) included in his proposed list of rights provisions safeguarding women and children as well as the right to work, a good pay, and quality of life. As a result, the goal of ensuring these privileges were incorporated into the DPSPs.

The word "strive" in the wording of Art. 38 of the Consti. of India emphasizes the goal of government of equal distribution of resources:

> "We have used it because it is our aim that even when there are circumstances that impede or obstruct the Government from carrying out these directive principles, they must constantly try in the fulfilment of these directives, especially under difficult and unfavorable circumstances. Otherwise, the government may claim that the circumstances are so grave, and the resources so limited, that we can't even make an attempt to move in the direction that the Consti. requires."[19]

As a result, the enforceability of social equality policies, even if expressed in aspirational terms, was never intended to be solely contingent on the availability of resources of states. In certain cases, the Courts have prioritized FRs over DPSPs, while in others, they have imaginatively forged a balance between them. Broadening of the concept of "personal liberty" u/a 21 of the Constitution, which has been used to prevent exec.'s excesses is just an example of the above. The judicially view today encompasses socioeconomic rights for citizens, imposing positive obligations on the Exec..

[18] The framers included 'Directive Principles of State Policy' following the example of the Irish Constitution.
[19] Constituent Assembly Debates, 19-11-1948.

Interestingly judges' interpretations of such socioeconomic right have frequently explicitly indicated in the language of provisions contained in the articles of DPSPs. According to Art. 21 of the Indian Constitution, *"no individual should be robbed of his life or personal liberty unless in accordance with the method established by law."* In the early years of the SC, the meaning of this Art. was that 'personal liberty' may be controlled if legitimate instruction was there. In the case of *A.K. Gopalan v. The State of Madras*[20], the SC found that 'preventive detention' by Police and other exec. agencies were lawful as long as they were authorized by any written provision of any act or ordinance. The Court could not look into the justice of such an act. This restrictive interpretation of Art. 21 held sway for many years. It was thereafter overturned in Maneka Gandhi's case.[21] The SC created a notion of 'inter-relationship of rights' to hold that action of CG or SG that limited FRs should reach the criteria for limitations. In this way, the SC inserted the guarantee of "substantive due process" into Art. 21's text.[22] A recent example is of Right to be forgotten. According to Justice Bhagwati:[23]

> "We believe that the right to life encompasses the right to live with human dignity and everything that entails, namely the bare requirements of life, such as proper sustenance, clothing, and shelter over one's head, as well as facilities for reading, writing, and expressing oneself in many forms."

It was observed in the case of Kesavananda Bharati,[24] that the DPSPs and FRs complement each other and share the same purpose mentioned in the Constitution's Preamble. The SC has often stated that both the FRs and the DPSPs must be construed harmoniously. In addition, in the case of *Unni Krishnan, J.P. v. State of Andhra Pradesh*,[25] bench declared:

> "The provisions of Parts III and IV are supplemental and complimentary to one another, not exclusive of one another, and that fundamental rights are merely a means to an end described in Part IV."

To a large extent, this method of integrating FRs with DPSPs has proven successful. As previously stated, the SC has construed the phrase "protection of life and personal liberty" to include socioeconomic privileges. For example, in *Olga Tellis v. Bombay*

[20] A.K. Gopalan v. State of Madras,1950 AIR 27.
[21] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[22] B.N. KIRPAL ET. AL. (EDS.), SUPREME BUT NOT INFALLIBLE – ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (2000).
[23] Francis Coralie v. Union Territory of Delhi, (1981) 1 SCC 688.
[24] Keshavananda Bharti v. State of Kerala, (1973) 4 SCC 225.
[25] Unni Krishnan, J.P. v. State of Andhra Pradesh, (1993) 1 SCC 645.

Municipal Corporation[26], the SC recognized the pavement dwellers' "right to livelihood and habitation". Whereas in *Parmanand Katara* v. *Union of India,*[27] the SC recognized that access to healthcare is a legally protected right and ruled that a patient in need in an emergency situation cannot be refused by any healthcare professional for immediate medical assistance. In a PIL, the SC held that "right to a clean environment" is extracted from Art. 21.[28]

SC time and again has decided that education should be imparted free of cost and everyone has a right to education for free. This landmark judgment sparked change that placed Art. 21 into the text of the Constitution, effectively free education for children aged 6 to 14 years. In interpreting the bans on forced labor and child labor, the courts have also referred to DPSPs. Although the enforcement of these rights is lacking, the symbolic impact of their constitutional position should not be overlooked.

[26] Olga Tellis v. Bombay Municipal Corporation, 1986 AIR 180.
[27] Parmanand Katara v. Union of India, AIR 1989 SC 2039.
[28] M.C. Mehta v. Union of India, (1996) 4 SCC 750.

CHAPTER 3

JUDICIAL RESTRAINT: LIMITATION OF SUPREME COURT

> "There is no liberty where judicial power is not separated from both legis. and exec. power. If judicial and legis. powers are not separated, power over the life and liberty of citizens would be arbitrary, because the judge would also be a legislator. If it were not separated from exec. power, the judge would have the strength of an oppressor."

Montesquieu, pleaded for a structure of government various wings of government use different commands to dodge concentrations of power and to reserve individual liberty, the legislature should enact laws, the exec. should execute or implement, and the jud. should resolve issues in accordance with the laws enacted by the legislature. This is called as the doctrine of SOP.[1]

Just as excessive judicial intervention impedes smooth governance, a stand of restraint has a negative influence on the system.[2] Just as excessive Jud. Actis would have a negative impact on the Jud.'s own position, excessive check would have a self-defeating impact. Smart judicial policies must be a combination of activism and reluctance, the precise characteristics of which vary according to the needs of the situation, should be welcomed. The jud. may not vagrant into the dominion of political choices.[3]

The function of the superior courts according to the Consti. places a great duty on it as a guard to protect the basic structure of the Consti. and the rights of citizens. To defend law and to bind power for public at large, the Court must act within their judicially acceptable limit.[4] It is observed that:

> "True sometimes the Courts have gone beyond the scope of their powers. They have entertained matters they ought not to have entertained, and they have been guilty of populism as well as adventurism in violation of the doctrine of separation of powers. Such

[1] *The notion of Judicial Activism and Judicial Restraint in Indian Milieu* http://aygrt.isrj.org/colorArticles/5338.pdf.
[2] N.K. JAYAKUMAR, JUDICIAL PROCESS LIMITATIONS AND LEEWAYS (1997).
[3] *Judicial Activism v. Judicial Restraint*, LEGAL SERVICE INDIA http://www.legalservicesindia.com/article/article/judicial-activism-v-judicial-restraint-96-1.
[4] Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664.

> excesses ought to be prevented or minimized through judicial self-restraint. But in the present Indian Scenario, excessive restraint and doctrinaire regard for separation of powers could also be disastrous. Ultimately what a court should entertain and what should not must be governed by proper exercise of judicial discretion".[5]

A creative jud. is required to defend and conserve the significance of our constitution, and such judicial interference should be done with clear vision and intelligence.

SEPARATION OF POWERS AND THE CONSTI. OF INDIA:

In terms of jud., Prof. D.D. Basu describes the aspect of the doctrine of SOP as follows: -

> "In the eyes of the courts, the application of the doctrine may involve two propositions:
> (a) that none of the three branches of government, Legis., Exec., and Judicial, have any power that should be exercised by the other two;
> (b) that the legislature's authority cannot be delegated."

Though nothing is mentioned anywhere in the Consti. India's governance system is based on the SOP. For example, Art. 53(1) confers President and Art. 50 states unequivocally that the State should take relevant decisions to differentiate the jud. and the exec.. SOP is one of the fundamental features of the Indian Constitution, as correctly stated by the SC in the case of State of Bihar v. Bal Mukund Shah.[6]

In *Ram Jawaya Kapur & Ors. v. the State of Punjab*[7], the SC, therefore, observed:

> "The Indian Consti. does not recognise the doctrine of separation of powers in its unmitigated solidity, but the features of the various parts or branches of government have been sufficiently differentiated, and thus it can very well be said that our Consti. does not begin to consider the assumption, by one organ or part of the State, of functions that essentially belong to another."

The doctrine of SOP has not been implemented in its traditional and strict sense. However, the Indian Consti. sought to protect each of these organs from being

[5] S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BOARDERS AND ENFORCING LIMITS *(* 2nd ed ; 2002).
[6] State of Bihar v. Bal Mukund Shah, (2000) 4 SCC 640.
[7] Ram Jawaya Kapur & Ors. v. the State of Punjab, AIR 1955 SC 549.

encumbered by the other departments of state. This is quite well based on diverse articles of the Consti. like placing some restrictions on Parliament u/a 121. It claims that there shall not be any debate taking effect in Parliament regarding the conduct of any SC or HC Judge in the discharge of his duties. Art. 211 of the Indian Consti. contains a similar provision regarding state legislatures.[8] The Consti. highlights the doctrine of SOP as u/a 122 and Art. 212 wherein the court are not to inquire into conduct of Parliament and legislation respectively.

Furthermore, Art. 361 - Consti. grants protection to the President or Governor. Whereas Art. 74 (2) of the Consti. states that no court shall inquire into whether any, and if so, what advice was given to the President by Ministers. These regulations are illustrative enough to conclude that the Consti. makers went to great lengths to ensure a robust form of SOP under the Consti. preserving the independence of each organ and preserving the system of 'Checks and Balances' to preserve the Rule of Law and the supremacy of Consti..[9]

Subsequently, in *L. C. Golak Nath & Ors. v. State of Punjab & Anr.*[10], The SC reaffirmed its position on the SOP by saying:

> *"The legislature, exec., and jud. are all established by the constitution. It precisely delineates their jurisdiction and expects them to exercise their respective powers without exceeding their authority. They should only work in the areas that have been assigned to them"*

Indian constitutional jurisprudence now accepts the doctrine of separation of power. This is clear from the SC's ruling in *State of West Bengal & Ors. v. Committee for the Protection of Democratic Rights in West Bengal & Ors.*[11] -

> "It is common knowledge that, in addition to the supremacy of the constitution, the separation of powers between the legislature, the exec.,

[8] *Supra.*
[9] *Supra.*
[10] I. C. Golak Nath & Ors. v. State of Punjab & Anr., AIR 1967 SC 1643.
[11] State of West Bengal & Ors. v. Committee for Protection of Democratic Rights, West Bengal & Ors., AIR 2010 SC 1476.

and the jud. is one of the fundamental features of the Indian constitutional scheme."

Supreme Court has failed to respect Consti. while adopting activism

Supporters of Jud. Res have argued that some solutions devised by the SC, such as "continuous mandamus," illustrate the jud.'s inability to perceive Jud. Res and that the jud. operates as if it were chief amongst the equivalents.[12] There is no democracy or Consti. that grants the jud. ultimate control. A judicial act motivated solely on selfish reasons are to be considered illegal and void and that such decisions or acts are to be cured at an early stage rather than waiting for it to damage the system.[13]

Court has stood the test of time because it is pragmatic and prudent, and it is a highly esteemed example of an active jud. in a democratic setting.[14] The SC's involvement has only served to safeguard the citizenry—particularly the weak and oppressed—from unconstitutional acts of the legislature and the administration. As a result, Jud. Actis has proven to be a significant weapon for the court in improving our democracy. The SC has substantially improved our FRs jurisprudence by employing it deliberately and cautiously. Far from Montesquieu's assertions, the Indian jud.'s involvement has undeniably improved our understanding of liberty and served to alleviate the suffering of many oppressed people.[15]

[12] *Supra.*
[13] *Id.*
[14] *Supra.*
[15] *Id.*

CHAPTER- 4

JUDICIAL ACTIVISM VERSUS JUDICIAL RESTRAINT

Judges should be innovative in their interpretations rather than mechanistic while judicially reviewing any legislation. A written constitution, according to Justice Cardozo, "state or ought to state not rules for the passing hour but ideals for an increasing future."[1] Courts interpreting the Consti. may not simply adapt the law to the facts presented to it. When a Consti. includes a bill of rights, the scope of judicial inventiveness widens. As a result, judges who interpret a FRs must explain the concept and ideology that underpins the FRs. When courts interpret any legislation or a constitution, they are considered to be activists because they aim to make sense of the law that is compatible to the tune and meaning for which it was written rather than just the literal meaning of the words.[2]

In his own words, Justice Krishna Iyer noted, "A Nineteenth-Century book, when applied to Twentieth-Century situations, cannot be understood by signals from the grave."[3] In *Rajendra Prasad v State of U.P.*[4], he opined - legal wording is bare mechanical / incur crisscross misrepresentation, Parliament has the primary obligation to enact required sections by making relevant changes.

"Many of the Judges of England have said that they do not make law," Lord Denning observed. The rule of law does not remain still. It is constantly moving. When this is recognized, the Judge's task is elevated to a higher level. He must actively endeavor to shape the law to meet the demands of the period. He can't just be a mechanic or a professional who is making the wall without having a proper design for the same. Civilised society itself is dependent on his labour."[5]

[1] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, (1921).
[2] Vishaka & Ors. v. State of Rajasthan & Ors., AIR 1997 SC 3011.
[3] DAVID PANNICK, JUDICIAL REVIEW OF THE DEATH PENALTY, (1st ed. 1982). Also held in Rajendra Prasad v State of U. P., AIR 1979 SC 916.
[4] Rajendra Prasad v State of U.P.,1979 AIR 916.
[5] *Id.*

The SC of India in *Charles Sobhraj's case*[6] it was stated that a Consti. should not be construed in light of the views or ideas of its framers, but rather in light of the every growing society.[7]

According to Consti. "No person shall be deprived of his life or personal liberty unless according to the procedure established by law," resulted in huge enlargement of substantive rights.[8] He correctly characterizes and interprets as "the Indian version of the American idea of due process of law," however the scale of the Indian Court's extension into the substantive area significantly outweighs that of USA. The Jud. of India's relatively unblemished emergence in last few years as a leading man in the commanding of residential significances may be accredited in large part to a constitutional ideology that inspires all institutes to be actively engaged in the realization of specific sociopolitical objectives. Consequently, Jud. Actis is mandated by the constitution.

While restraining the use of Jud. Actis, Justice M. K. Mukherjee stated, "...to invoke Jud. Actis to set at nought legis. judgement is subversive of constitutional balance and comity of instrumentalities."[9] It is believed that, proof of overdoing something by judiciary will be apparent and cannot be ignored. "It must be conceded that the boundary between acceptable judicial involvement and judicial excess is frequently hazy... courts do things because they can, not because they are right, legal, or just," he concludes.[10] In his piece headlined "The Rise of the Hero Judge," John Gava warned against the use of Jud. Actis. He thinks that the most awful outcome of activity will be that jud. will lose public trust in their most crucial attribute - the notion that they are unbiased referees making decisions as per the relevant laws.[11]

Nonetheless, it is important to note that till the time, the legislative and the executive don't work the way they are supposed to, the Courts are going to proceed with activism as they are doing right now as the state machineries are not working properly.[12]

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[6] Charles Sobraj v. The Superintendent, Central Jail, Tihar, New Delhi, 1979 (1) SCR 512.
[7] *Id.*
[8] S.K. VERMA, K.KUSUM, FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH (2003).
[9] State of Gujarat v Dilipbhai Nathjibhai Patel, AIR 1998 SC 1429.
[10] Justice Verma J. S., 'Judicial Activism Should Be Neither Judicial Ad Hocism Nor Judicial Tyranny' as published in The Indian Express, 06th April 2007.
[11] Justice M. D. Kirby, *Judicial Activism*, 23 Commw. L. Bull. 1224 (1997).
[12] M.V. PYLEE, CONSTITUTIONAL GOVERNMENT IN INDIA, (2004).

Art. 21 of the Indian Consti. guarantees the right to life and personal liberty. As previously stated in Gopalan's[13] case, the SC maintained the constitutionality of a pre-Constitutional preventive detention law, reasoning that once the deprivation was legalised, Art. 21 could not be considered to be violated. One of the justices explicitly alluded to the Constituent Assembly arguments to demonstrate that the model of the Americans was explicitly disapproved from the writers of the Constitution. Due process clause was watered down during the Constituent Assembly's debates in response to American warnings. Instead, the Assembly approved a "any procedure" clause, allowing a person's life and liberty to be restricted by any legal procedure." The SC decided Government might cause problem to any individual for any reason whatsoever even if permitted by the law; such law had to also pass the non-arbitrary test, Art. 14 is violated because it is non-discriminatory. Fali S. Nariman contends that Maneka Gandhi reinstated a certain process, which was not forming part of the Consti., when analyzing the Constitution's life and liberty provision.[14] The case exemplifies Consti. as "living document" that needs to be interpreted according to "the felt demands of the times." As a result, the SC declared that "the content of American due process has been incorporated into the conservative text of the Constitution."[15] This is one of the finest pieces of Jud. Actis in Indian constitutional history.

Following a thorough examination and global survey of the strict liability principle, In an eloquent decision, Justice Markandey Katju, speaking for the court, stated Judges should seek for different standards while determining responsibility from case to case.[16] The Hon'ble Court ruled authorities are obligated to re-compensate under strict liability because "because such public authorities support the public, it is unjust to leave the outcome of a non-negligent accident to fall unexpectedly on a particular person rather than spreading it among the community generally." The particular decision makes an excellent precedent for Jud. Actis. The decision will bring much-needed relief to millions of individuals, notably those from the middle and lower classes who commute by train.

[13] A.K. Gopalan v. State of Madras, AIR 1950 SC 27.
[14] FALI S.NARIMAN, THE 'DOCTRINE' VERSUS 'MAJORITARIANISM' IN PRAN CHOPRA'S THE SUPREME COURT VERSUS THE CONSTI. – A CHALLENGE TO FEDERALISM (2006).
[15] Ranjan Dwivedi v Union of India, AIR 1983 SC 624.
[16] Sorabjee Soli J., 'Commendable Judicial Activism' The Indian Express, May 11, 2008

Sathe contends - Jud. Actis is part of jud. rev..[17] The jud. is the State's weakest organ. It only becomes powerful when people believe in it. Such public trust underpins the legitimacy of the Court and Jud. Actis. Courts must always try to maintain their legitimacy. They are not required to yield to public pressure, but rather to stand steady in the face of any pressure.[18]

He further contends that Judges can't go into a statue, let alone the consti., mechanically. Wherein there is a case of statute, a court must evaluate the writers' genuine intent. Ld. Judge should provide the language of a Consti. with "continuity of life and expression."[19] A constitutional bench is not bound by the founding fathers' original intentions. Without such Jud. Actis, a Consti. would become deadened and orphaned. Furthermore, the Consti. must be fleshed out, which basically means that people have to do their own fighting and achieve the things they want to. Ideas, feelings, and wants evolve in tandem with society, the economy, and technology. In other words,

On the other hand, it is contended that the inability of political leaders in exec. to fulfil their jobs correctly, and hence the action of courts in offering respite from not so appropriate governance is not a ground to support the courts' enlargement of its powers via innovative '*(mis)interpretations'*.[20] Whatsoever be the desirable outcomes of jud. rev. and judgment the aim never justifies means.[21] However, understanding the constitutional interpretation of FRs in India requires understanding the human condition for which the prayer for the claim is made. Various different equations talks poor people at degrees of destitution in which minimum requirements or any source of income are not guaranteed. Furthermore, the primary goal of democracy is to optimize welfare. The unique characteristics of society and institutions, as well as the seriousness of the issues before the courts, undoubtedly contribute to the demand for "Jud. Actis."[22]

ARGUMENTS FOR SUPPORT AND AGAINST THE CONCEPT

[17] S. P. SATHE, JUDICIAL ACTIVISM IN INDIA – TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002).
[18] Jeewan Reddy B. P. and Dhavan Rajeev, *'The Jurisprudence of Human Rights'* in David M. Beatty, Human Rights and Judicial Review: A Comparative Perspective Vol. 34 International Studies in Human Rights (Martinus Nijhoff Publishers, Netherlands 1994) 151.
[19] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, (1921).
[20] PRAN CHOPRA, THE SUPREME COURT VERSUS THE CONSTI. – A CHALLENGE TO FEDERALISM (2006).
[21] *Id.*
[22] Justice M. D. Kirby, *Judicial Activism,* 23 Commw. L. Bull. 1224 (1997).

A. Adjudication should be based on personality rather than institutionalization.

Jud. Actis gives Judges titles like "pro-labor," "anti-labor," "pro-tenant," "anti-tenant," "progressive," "conservative," etc. All this because of the wideness / depth which Jud. Actis are determined by individual Judge's own preferences and perception of what "social justice" entails. As a result, it is more focused on the behavior of the person instead of being directed toward “justice according to law,” for which the Courts are instituted. Decisions based on the character of a judge allows lawyers and litigants to "forum shop." The courts would administer justice based on the Judge's preferences in place of “justice according to law”.

B. Institutional resource diversion

Instead of playing the constitutionally prescribed job and devoting its resources to that role, the SC's adoption of a non-traditional, activist role has diverted its attention and resources. Jud. Actis limits the Court's institutional resources, as it does in cases of "continued mandamus," in which it must conduct constant surveillance and oversight over exec. authorities. It also distracts Judges' time, talent, and energy into routes which are neither requisite nor qualified to circumnavigate due to a lack of competence, skill, or resources.

C. Judicial blunders and Expediency

The legis. and exec. branches of the body politic, which have fundamental competency, are becoming increasingly neglected. Judges of the High Court, which are not that qualified to deal with socio-politico-economic problems, have taken everything under their control and are passing orders thinking it as it is one of their duties to do so. In an abstract sense, mere expediency or the need for instant justice is scarcely a reason by deciding matters where numerous issues are involved wherein the Judges are not equipped to decide the same.

D. The institution's credibility

As we have seen, the SC's proclivity to rule on problems that involve simply political considerations has resulted in instances in which the Court has had to back down. As we have already seen, the most disconcerting occurrence is problem of one codified

civil law, in which the Court was forced to later discount its original activist observations.

While activist rulings may provide immediate and transient relief, if they do not address the core cause of the problem, the institution loses credibility and respect among the other branches and people at large, in my opinion. In *Baker v. Carr*[23], Justice Felix Frankfurter stated:

> "There is nothing judicially unseemlier or more self-defeating than for this Court to make in terrorem statements, to engage in purely empty rhetoric, ringing a word of promise to the ear but certain to disappoint the hope."

E. Delays, backlogs, and exploitation of PIL

The Courts, who are as it is burdened by the backlog of the litigation pending before it under various laws have now to delegate their time deciding various public interest litigation which majority is filed under the guise of gaining some benefit for a private party. That the judges apart from having backlog of thousand of cases also have to perform their duty as "social engineers." With the right intention of getting justice for all and for the betterment of the oppressed sectors, Judges have abandoned the principle of locus standi and has allowed everyone to enter the gates of the Court, that they themselves cannot manage what they had initially started. The situation was addressed by US Chief Justice John Roberts in a letter to the Supreme Court of USA, which hears only a small percentage of the cases heard by the SC:

> "As long as the Court believes it is ultimately responsible for managing all parts of our society, it will understandably be overburdened."

Oblivious of the fact that the Courts do not have the power or the right to do something, the Judges took the responsibility by looking after many actions of the State that are solely the province of the exec. branch. Habitually, people have stopped finding fault with the result, but the primary question remains is that reasoning used to arrive at those results are legally sound.

The SC is endowed with special powers u/a 32, 136, and 142 of the Constitution. Art. 226, on the other hand, bestows on the HCs all-powerful writ juris. Extraordinary

[23] Baker v. Carr, 369 U.S. 186 (1962).

abilities should only be used for extraordinary times. Its regular use reduces its effectiveness and creates an odd appearance.

There are a significant number of fake litigations that masquerade as PIL but are actually collusive, profiteering, or speculative. In my opinion, the SC should not act as a "umpire to arguments involving harmless, empty shadows," as Justice Felix Frankfurter put it.[24] In fact, many devious litigants utilize the courts to harm their rivals, the 'P' in 'PIL' frequently indicates "profit," "publicity," or "persecution." The regular use of PIL for suspicious objectives may have effect on businesspersons, who may be afraid of initiating new venture.

A DEFENCE OF 'JUDICIAL ACTIVISM'

Of course, rise qua 'Jud. Actis' has boosted the public prominence of India's higher jud.. However, arguments are frequently advanced in opposition to the inclusion of 'aspirational' DPSPs within the scope of judicial enforcement.

It is argued that exec.s are disproportionately loaded by the expenditures associated with the responsibilities, given that the framers specified these requirements as DPSPs for practical reasons. When it comes to constitutional adjudication, this criticism echoes the well-known notion of "Jud. Res."

On the other hand, calls for some introspection on the part of judges. The legal recognition of socioeconomic goals as basic rights has been challenged as an unviable literary exercise with little influence on grass-root reality. In consequence, the inability and unwillingness of authorities to preserve such ambitious rights may have a negative impact on public opinions of the jud.'s competence and legitimacy.[25]

The enactment of normative rights is always fraught with the potential of ineffective enforcement. However, we must consider if weak application of law is more than enough cause to forgo the remedy by which fulfilment improves socio-economic of well-being. One may recall argument of Mr. Rosceo Poound that law is nothing but an instrument of social change. Explicit incorporation of legal rights is a successful long-term strategy for combating social problems. Rights have importance at every level of

[24] Poe v. Ullman, 367 US 497 (1961).
[25] Jeffrey Usman, Non-justiciable Directive Principles: A constitutional design defect, 15 MICHIGAN STATE J. INT'L L. 643 (2007).

the Consti. protection that extends past pragmatic considerations concerning their tangible execution.[26] The pre-independence authority in the India adopted legal intrusions on a regular basis to dismay regressive and unfair societal beliefs such as Sati and child marriage. Despite continuous difficulties in enforcing these laws, pre-independence authorities have played an essential role in diminishing the prevalence of discriminatory customs in the long run. It is obvious, in a limited period of time, no authority of law can be enough of a deterrence, but in the longer period, the sheer existence of such authority contributes to the formation of public opinion against the same behaviors.[27]

Even yet habits like untouchability, child labor, etc have not been completely eliminated, our Consti. outlawing them serve as the foundation for legal and socio-political initiatives to combat them. The SC has adopted the significance of establishing normative principles that promote societal reform.

PROBLEMS IN THE EXERCISE OF JUDICIAL ACTIVITY VIA PUBLIC INTEREST LITIGATION

(1) **Causing a disruption in the constitutional balance of power:** Even though Indian Consti. does not adhere to rigid SOP, it does contain the notion of checks and balances, which the Courts even must adhere to. However, on several cases, the courts did not practice limitation and adjudicated, settle policy disputes, take over governance, or monitor exec. agencies. Prof. M. P. Jain warns against such a trend: ‘‘PIL is a weapon that must be used with great care and restraint; the courts must keep in mind that under the pretence of rectifying a public grievance, PIL does not impinge on the sphere reserved by the Consti. to the exec. and the legislature.” Furthermore, there has been a lack of consistency in that, in some situations, the SC did not hesitant to intervene on policy issues, while in others, it hid behind the shield of policy issues. For example, the jud. participated to combat sexual harassment and custodial torture, as well as to govern foreigner adoption of children, but it did not intervene to incorporate a

[26] Mark Tushnet, *Social Welfare Rights and the forms of Judicial Review*, 82 TEXAS L. REV. 1895 (2004).
[27] S.B. Burman, *Symbolic dimensions of the enforcement of law*, 3 BRIT J. L. SOC. 204 (1976).

UCC, battles ragging in educational institutions, adjust the height of the Narmada dam, or provide a humane face to liberalization-disinvestment policies. The judicial decisions provide no clear or good theoretical justification for such selective intervention.

It is also questionable whether the jud. has been (or will be) able to improve the responsibility of the other two branches of government through PIL. In reality, the judicial intrusion of exec. and legis. responsibilities may make these institutions more unaccountable, because they know the court will always step in if they fail to act.

Overuse-induced indifference: Even if the grievance is of public concern, PIL should not be the first step in resolving it. PIL must not be permitted to become a routine occurrence that is not treated seriously by the Bench, the Bar, and, most importantly, the populace in order to stay effective. ‘‘The abuse of PIL for every possible public purpose may undermine the original commitment to apply this remedy strictly for upholding the human rights of victims and disadvantaged groups." If civil society and disadvantaged groups lose trust in the effectiveness of PIL, it will be doomed. Based on the aforementioned issues, the Jud. must create and execute specific measures to ensure that the integrity of Jud. Actis in the country is preserved while also addressing the concerns of all classes of stakeholders in a fair and judicious manner.

(2) **Use of limited judicial resources in an inefficient manner:** The PIL, if properly administered, has the ability to help to the efficient resolution of people's problems. However, given that India has a far lower per capita judge population than many other nations, and given that the Indian SC and HCs are dealing with a massive backlog of cases, it is mystifying that the jud. have failed to prohibit frivolous PILs. In reality, by enabling dubious PIL litigants to waste the courts' time and energy, the courts may be infringing individuals’ right to a quick trial. Such individual may be waiting for the assertion of their private rights via traditional adversarial litigation. A related issue is that courts are taking an inordinate amount of time to resolve even PIL matters. As a result, ‘‘many leading judgements may have just academic significance.' The fact that

courts take years to resolve cases may also indicate that courts were not the best platform for dealing with the issues at hand as PIL.

(3) **Justice symbolism:** Another key issue when it comes to litigation of public at large is that most of the time it just provides justice on paper and not in real life. There are two aspects of this problem that should be mentioned here. First, the jud. is frequently unable to guarantee that its rules or directions in PIL cases are followed, such as in cases involving sexual harassment at work (Vishaka) or police arrest procedures. Without a doubt, further empirical study is required to evaluate the extent of compliance and the impact of the SC's directions. However, court intervention in these situations appears to have made little progress in reducing sexual harassment of women and restricting police brutality in matters of arrest and detention. The futility of converting DPSPs into FRs and so making them justiciable is the second example of symbolic justice. Recognizing rights that cannot be enforced or fulfilled accomplishes little. It might be argued that defining rights that cannot be enforced devalues the very concept of rights as trump. ‘‘A court may talk of right to life as including right to food, education, health, housing, and a slew other social rights without precisely specifying who has the obligation and how such duty to deliver positive social benefits may be enforced," Singh observes. As a result, the PIL project may mislead underprivileged members of society into believing that justice has been served, but without actually improving their circumstances.

(4) **Secondary goal:** In PIL, public is replaced by private or publicity. One of the main reasons why the courts embraced PIL was its use in serving the public interest. However, it is questionable whether PIL is still committed to that purpose. As we have seen, nearly any matter is presented before the courts under the pretence of public interest due to the allures that PIL jurisprudence provides (e.g., inexpensive, quick response, and high impact). Of course, distinguishing between ‘‘public" and ‘‘private" interests is not always straightforward, but courts have not properly imposed the prerequisite that PILs are to be intended at promoting public interest. Desai and Muralidhar believes that *‘‘PIL is being exploited by those protesting for private grievances in the name of public interest and seeking notoriety rather than advocating for public concerns.”* The

word ‘‘public" in a PIL should not be replaced by ‘‘private". The jud. have to ensure the same by enforcing stricter gatekeeping.

(5) **Populism in the courts**: Judges are human, but it would be awful if they admitted PIL claims because they raised a problem that is (or may become) popular in society. In a democracy, however, the desire to become people's judges should not prevent admitting PIL cases that have a substantial public interest but are possibly unpopular. The concern of judicial populism is not only intellectual, as Dwivedi J. observed in *Kesavananda Bharati v State of Kerala*[28]:

> ‘‘The court is not elected by the people and is not accountable to them in the way that the House of People is. However, it will gain a permanent position in the hearts of the people and increase its moral authority if it can change the focus of judicial review away from the numerical idea of minority protection and toward the humanitarian concept of protecting the weaker sections of the population"

It is argued that courts should refrain from viewing themselves as crusaders lawfully obligated to correct all democratic failures. They do not have this authority, nor are they capable of achieving this purpose.

CREDITABILITY OF BOTH CONCEPTS

The conventional legal premise was that only someone whose personal right had been violated could submit case before the Hon’ble Court. Which means that the person who is aggrieved by the inaction of the state has to demonstrate that how he is aggrieved by the inaction personally. However, SC abandoned this premise, and since then, there has been a flood of cases in HCs and the SC.[29] Thus, the SC noted in *State of Uttaranchal v. Balwant Singh*[30], “This Court recognized that for millennia, a major segment of society had been denied justice due to great poverty, ignorance, discrimination, and illiteracy. This court has primarily supported and propelled PIL in order to provide access to justice to the impoverished, deprived, vulnerable, discriminated, and marginalized segments of society. This case is the result of this Court's strong and intense desire to carry out its bounden duty and constitutional mandate”.

[28] Supra.
[29] AIR 1982 SC 149.
[30] State of Uttaranchal v. Balwant Singh, AIR 2010 S.C. 2550.

Case of *Common Cause v. Union of India*[31], Hon'ble Court has decided with respect to modern day, many courts habitually entertain PIL in huge numbers in issues that are generally frivolous or driven by extraneous motives. PIL has mostly evolved into "PIL," "Private Interest Litigation," "Politics Interest Litigation," or the most recent trend, "Paise Income Litigation." A large portion of litigation involving public. is actually not for the public but for their own personal gain. Often, one businessman will file a P.I.L. against a competitor businessman in order to injure him.

When the court unjustifiably attempts to exercise exec. and legis. functions in the guise of Jud. Actis, the delicate balance in the Consti. is upset, prompting protests from politicians and others. As a result, it is critical for the jud. to exhibit restraint and not attempt to perform the tasks of the Exec. or the Legis.. In the Aravalli Golf Club case, the Court made the following observation in Common Cause:-

"Public Interest Litigation, which began as a valuable judicial instrument to assist the impoverished and weaker elements of society who could not afford to come to Court, has evolved over time, mainly evolved into an uncontrollable Frankenstein and a nuisance that threatens to block the dockets of the supreme court, obstructing the hearing of actual and regular cases that have been waiting to be heard for years."

In a public speech, Justice A.S. Anand, former Chief Justice of India, advised that in order to prevent Jud. Actis from devolving into "judicial adventurism," judges must be careful and self-disciplined in the performance of their judicial powers. Unpredictability is the worst outcome of Jud. Actis. Unless judges exhibit discipline, each judge can become a law unto himself and issue orders based on his personal whims, resulting in pandemonium. Many people have raised their concerns about some recent SC decisions.

Judicial Activism

A. Kesavananda Bharati would not have existed if there had been judicial constraint.

There may be times in judicial history when courts must make drastic, rapid, and even radical changes to the law by marginalizing the notion of *"justice according to law."* Extreme circumstances may need dramatic measures, but only in unusual cases. Throughout reality, in the fifty-odd years of our Constitution, I can only recall one such instance. This was the point at which the president and legislature conspired to exploit

[31] Common Cause v. Union of India, (2008) 5 SCC 511.

the Consti. to undermine the Consti. itself. As a result, the SC's *"Basic Structure Doctrine"* in Kesavananda Bharati is a permissible exercise of judicial legislation as *necessitas non habet legem*[32].

The Indian Consti. provides for a broad SOP, as outlined in *Aravalli Golf Course Divisional Manager v. Chander Haas, 2008*. The Indian Consti. does not make the jud. a super legislator or a substitute for the failure of the other two organs. As a result, the jud. must define its own boundaries.

One incidence of Jud. Res can be seen in the case of *State of Rajasthan v. Union of India*[33] wherein the bench refused to entertain a petition as it was concerning political issue. Whereas in *S.R. Bommai v. Union of India*[34] the bench observed that in cases where the political issue predominates then jud. rev. is not feasible. Because the use of power under Article 356 constituted a political concern, the judge should not intervene. It is difficult to develop criteria to analyze political judgments, and if the jud. do so, they will be entering the political thicket and challenging political wisdom, which the court must prevent.

B. Judicial restraint is a 'rightist' mindset.

One of the accusations levelled at Jud. Res is that it is "pro-government," "pro-rich," and "anti-social justice," and hence a "rightist" worldview. It is a common misperception that Jud. Actis stems from "left" or "right" oriented beliefs, two labels with ambiguous implications at best. Jud. Actis is nothing more than hopping the barrier. The point that it's by the "right" or "left" is largely irrelevant because what an activist Judge perceives to be the correct ideology is what matters, with "leftist" or "rightist" being mere chance. Indeed, as previously stated, the "New Deal" cases, the Habeas Corpus ruling, the "Hindutva" judgments, and the pro-slavery verdict are all examples of activist Judges with a "rightist" worldview.

Most of the time, the Judge's personal worldview becomes fitted to the prevalent discourse. The Consti. requires judges to frequently play a counter-majoritarian role in order to avoid unjustifiable exec. or legis. intrusions on people' textually defined FRs,

[32] Latin term for: "Necessity has no law".
[33] *Supra*.
[34] *Supra*.

or to prevent misuse of representative democracy. Jud. Actis, as demonstrated in the Habeas Corpus decision, can completely weaken judicial independence and run counter to the court's constitutional responsibility to determine matters "without fear or favor."

C. Judicial restraint is a philosophy of activism.

Accepting Jud. Res or legal centrism as a judicial philosophy in and of itself should be easy. A Judge is not free to deliver justice as he sees fit, but is compelled to do so in accordance with the law. As the TOI pointed out in an editorial:

> "Judges are supposed to be modest interpreters of the law, not emperors who adjudicate on a whim. We need faceless, impassive judges, empathetic but disciplined legislators, and an administration that recognizes the legislature's primacy and the jud.'s independence. Unfortunately, technical Judges are hard to come by in India. Some people facilitate weddings between rapists and their victims. Others become dedicated municipal officials. Courts are supposed to be more serious than Bollywood portrays them to be."[35]

Given that "justice according to law" may create good results in a few circumstances, "justice according to law" yields a decision that is consistent with solidified public opinion more frequently than not. If "justice according to law" was so repugnant, we would have witnessed a reform in India and the abolition of the Constitution. This is a conclusive evidence that "justice according to law" and "justice without fear or favor" is the proper method.

[35] Editorial, *The Interpreters*: *Jud. should not stray from the rule book, TIMES OF INDIA*, 17-9-2005 at p. 24.

CHAPTER 5

CONCLUSION

Testing of Hypothesis

Jud. Actis refers to judicial decisions that are believed on ones beliefs and motivations instead of established rules. The basic meaning of Jud. Actis, as well as which specific rulings qualify as activist, is a contentious political topic. The issue of Jud. Actis is inextricably linked to constitutional interpretation, legis. construction, and the SOP.

Jud. Res basically means approach that makes the judges work in four corners of law.

The researcher discovered the following results while testing the hypothesis:

1. The concept of Jud. Actis has been evolved from the English Law.

   Result:- Such hypothesis is proved to be true while examining various old English law judgments.

2. There is no written law on Jud. Actis or Jud. Res, but it is expounded in different judgments of Courts with the passage of time.

   Result:-Such hypothesis is proved to be true while examining various judgments. There is no enactment or reference in the Consti. of India and legislations of India.

3. The dignity of Court and rule of law can be maintained only if the balance is maintained between activism and restraint.
   Result:-Such hypothesis is proved to be true as without striking balance, the rule of law cannot be established. The said hypothesis was proved by discussing advantages and disadvantages of Jud. Actis and Jud. Res.

4. The Jud. has always been stringent in maintaining the principle of SOP and exercise its Jud. Res.

Result:- The said hypothesis hasn't proved to be true. Though the courts do maintain SOP and exert Jud. Res, unfortunately and fortunately this is not always the case. It is sometimes in the greater good of the society if Jud. Res is not exerted and Jud. Actis is adopted without violation Rule of law and Constitutional Law. We have discussed various judgments wherein the courts have intervened whenever there is a substantial and apparent breach of FR.

Conclusion and Suggestion

When it comes to Consti., authors involved in the judiciary will take considerable measures to defer to the lawmaking. Former Associate Justice Oliver Holmes Jr. is regarded as one of the philosophy's early significant proponents. Former Associate Justice Felix Frankfurter, a Democrat nominated by President Franklin D. Roosevelt, is widely regarded as an example of Jud. Res.

The Jud. cannot take over the Exec.'s functions. The Courts themselves must exercise discretion and moderation, and be mindful of the importance of comity of instrumentalities as a fundamental tenet of good government. Judicial activity must be welcomed and its ramifications must be accepted in both letter and spirit. To defend society from legis. adventurism and exec. tyranny, an activist Court is unquestionably far more successful than a legal positivist conservative Court. When our elected leaders fail to provide us with a welfare state, let the Jud. step in.

The authority of jud. rev. is recognised as part of the Indian Constitution's basic structure. The said power implies the Jud.'s activist role. Jud. Actis is a requirement for democracy because democracy will be reduced to an empty shell if the jud. is not alert and educated. Jud. Actis in its entirety cannot be prohibited. It is self-evident that under a Consti. whose primary element is the rule of law, there can be no restraint on Jud. Actis in cases where the legality of exec. orders and administrative measures is called into doubt.

Jud. Actis is hardly an outlier. It is a fundamental component of the functioning of a constitutional court.[1] It is a check on democracy by a counter-majoritarian majority.

[1] S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 Wash. U. J. L. & Pol'y 029 (2001).

Jud. Actis, on the other hand, does not imply judicial governance. Jud. Actis must also operate within the confines of the legal system.

The jud. is the state's weakest link. It only becomes powerful when people believe in it.[2] Such belief underpins the Court's and Jud. Actis's legitimacy. Courts must work hard to maintain their legitimacy. Courts are not required to yield to public pressure, but rather to stand steady in the face of it. What supports Jud. Actis's legitimacy is not its subordination to populism, but rather its ability to withstand such pressure without compromising impartiality and objectivity. The source of the Court's legitimacy is an inarticulate and widespread consensus about the impartiality and integrity of the jud.. Courts must not only be fair, but must appear to be so.

As long as the Court displays such unusual deference to lawmakers and maintains a two-tiered approach to constitutional rights, the ratchet will only move in one direction—upward. Setting appropriate outside boundaries may be a smart place to start when government expansion is exponential. The difficulty, however, is that the bounds for economic liberty and property rights are placed so far out that, for all practical purposes, courts relinquish practically unfettered control to government. Bureaucrats become skilled at maximising their influence just beyond the line. As a result, there is a thriving regulatory regime that all too often abandons abused property owners and businesspeople without recourse.

If economic liberty and property rights are to be restored to their appropriate place in the constitutional constellation, the courts must go beyond just establishing these outer limits; they must actually resurrect fundamental safeguards. Jud. Actis and abdication have stripped fundamental liberties from the Constitution; continuous and ethical judicial engagement is required to rehabilitate them. Respect for stare decisis must not imply an unwillingness to reconsider incorrectly decided cases; rather, it must imply a respect for order that allows for as smooth a transition as feasible while also fulfilling the courts' role to recognize constitutional restrictions on government authority.

Deference to legislatures makes sense with constitutional limits in place. Through the discussions of elected representatives, liberals, conservatives, and others can compete to determine policy. While the rights of the minority are respected, the wishes of the

[2] Available at http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1443&context= wujlp.

majority can triumph. And, with their rights protected, businesses and small property owners can refocus their efforts on constructive activity rather than fighting unjust laws and regulations.

To summarise Jud. Actis in India, Dr. A.S. Anand, Chief Justice of India, remarked:

> "…. the Supreme Court is the custodian of the Indian Consti. and exercises judicial control over the acts of both the legislature and the exec.."

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