TABLE OF CONTENTS

1 INTRODUCTION 1

2 JUDICIAL ACTIVISM...2

MEANING 2

ORIGIN OF JUDICIAL ACTIVISM IN UNITED STATES 3

ORIGIN OF JUDICIAL ACTIVISM IN INDIA 4

3 JUDICIAL CREATIVITY AND PRECEDENTS...5

STARE DECISIS AND RATIO DECIDENDI...5

PRECEDENTS 7

4 JUDICIAL ACTIVISM AND CREATIVITY OF THE SUPREME COURT 8

ROLE OF ACTIVIST JUDGES IN JUDICIAL CREATIVITY....................................8

JUDICIAL CREATIVITY OF SUPREME COURT OF INDIA...................................9

REFORMATIVE EFFECT OF JUDICIAL CREATIVITY BY SUPREME COURT . 125

CONCLUSION 15

SCOPE AND COVERAGE

- To understand the concept of Judicial Activism and creativity.
- To understand the various provisions of Constitution.
- To show concern for the welfare and dignity of weaker section of the society
- To support rights and freedoms of all individuals
- To seek community improvement through active, democratic participation
- To take responsibility for own personal development and obligations

OBJECTIVES

- The objective of this project is to give a detailed explanation of Judicial creativity.
- This project contains the main heads under which various case laws are discussed
- In this project a detailed purview of Judicial approach towards weaker section is discussed

RESEARCH METHODOLOGY

- This project is purely descriptive and theoretical in nature. Primary and Secondary sources have been used for the successful completion of the same.

JUDICIAL ACTIVISM AND CREATIVITY OF INDIAN SUPREME COURT

1 INTRODUCTION:

Today judicial activism has touched almost each and every aspect of life ranges from human rights issues to maintenance of public roads! Judicial activism means the power of the Supreme Court and the high court but not the sub-ordinate courts to declare the laws as unconstitutional and void. If it infringes or if the law is inconsistent with one or more provisions of the constitution. To the extent of such inconsistency while declaring a law as constitutional and void the courts do not suggest any alternative measures.

The term judicial activism despites its popularity to amongst legal experts, judges, scholars and politicians has not until recently been given an appropriate definition of what the term should mean so that it will not be subject to abuse. The effect of this has been a misconception about what the term is all about. [1]

It means when the Court plays a positive role the court is said to be exhibiting the Judicial Activism‟. There are different opinions about the origin of doctrine of Judicial Activism. Some scholars like Justice M.N. Roy believe that it is born in 1804 when Chief Justice Marshall, the greatest judge of English-speaking world, decided Marbury V Madison. But P.P. Vijayan differs with saying that Marbury V Madison is a case of Judicial Review and not of a Judicial Activism. However he opines that the judicial activism has a hoary past in Dr. Bonham‟s case in which Justice Coke derived doctrine of natural justice in the year 1610. In this context Dr. Suresh Mane observed that "As a result English Courts by its interpretation role extended the necessary protection; but truly, the movement of judicial activism got momentum on the soil of America under the shadow of first ever written Constitution." 1 The role of the judiciary in a modern legal system is immense social significance of Law is in a constant process of flux and development, and though much of this development is due to the enactment of the legislature, the judges and the courts have an essential role to play in developing the law and adopting it to the needs of the Society.[2]

[1] Keenan D. Kmiec, "The Origin and Current Meanings of "Judicial Activism," (2004) 92, Cal. L. Rev., 1441.
[2] Cardozo Benjamin N, The Nature of the Judicial Process, Universal Law Publishing Co.Pvt.Ltd., Delhi, (2019)

Paul Mahoney in offering his own definition of the concept submits that judicial activism exists where the judges modified the law from what was previously stated to be the existing law which often leads to substituting their own decisions from that of the elected representatives of the people.[3] This definition would consider invalid actions or decisions of the judges given for the purpose of seeking the justice in a particular case or to interpret the law in such a way as to conform to social realities thereby not permitting the correction of mistakes in the previous jurisprudence of law.

2 JUDICIAL ACTIVISM:

MEANING

Judicial Activism is considered as a philosophy of administering justice whereby judges allow their personal views about Public Policy, ignoring Precedents. It is an innovative, dynamic and law making role of the court with a forward looking attitude discarding reliance on old cases and also mechanical, conservative and static view.

Judicial activism is a progressive judicial thinking, developing the law for handling constructively the contemporary problems of the Society[4]. It is a creative thought process through which the court displays vigour, enterprise, initiative pulsating with the urge of creating new and refined principles of Law.

Ironically, as the term "Judicial Activism" is defined in a number of desperate, even contradictory ways scholars and judges recognise this problem yet persist in speaking about the concept without defining it. Thus, the problem continues unabated; people talk past one another, using the same language to convey very different concepts. To say that the idea of Judicial Activism has been around far longer than the term. Before the 20th century, Legal scholars squared off over the concept of Judicial Legislation, (ie,) Judges making positive Law.

[3] Paul Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" (2007) 11, Hum. Rts. L.J. 57, 58.

[4] Dr.G.P.Tripathi, Judicial Process by *Central Law Publications* 2013.

The five core meanings of "judicial activism" are [5]:

(1) Invalidation of the arguably constitutional actions of other branches,

(2) Failure to adhere to precedent,

(3) Judicial "legislation,"

(4) Departures from accepted interpretive methodology, and

(5) result-oriented judging.

ORIGIN OF JUDICIAL ACTIVISM IN UNITED STATES

Arthur Schlesinger Jr. introduced the term "Judicial Activism" to the public in a Fortune magazine article in January 1947. Schlesinger's article profiled all nine Supreme Court justices on the Court at that time and explained the alliances and divisions among them. The article characterized Justices Black, Douglas, Murphy, and Rutlege as the "Judicial Activists" and Justices Frankfurter, Jackson, and Burton as the "Champions of Self Restraint." Justice Reed and Chief Justice Vinson comprised a middle group.[6]

In its early days, the term "judicial activist" sometimes had a positive connotation, much more akin to "*civil rights activist*" than "*judge misusing authority*." For example, references to the late Justice Frank Murphy. Albon P. Man observed that "Murphy's votes in civil rights cases reflect not only his objectivity and independence as a judge but also his position as perhaps the outstanding judicial activist on the Court [6]." Alfred L. Scanlan offered similar praise for Justice Murphy's judicial activism in civil rights issues, answering the criticism that such activism is undemocratic by replying.

First Judicial Use of "Judicial Activism" by Judge Joseph C. Hutcheson, Jr. While the exact origins of the term "judicial activism" in legal scholarship are hard to pin down with certainty, there is no question that Joseph C. Hutcheson, Jr. was the first to use it in a judicial opinion. A hard but dedicated judge who "*barely missed out on an appointment to the Supreme Court which went to Hugo Black*," Judge Hutcheson's contributions to legal scholarship and service on the bench are generally praiseworthy.

---

[5] *The origin and current meanings of "*Judicial Activism" by Keenan D.Kmiec, CLR – 2004

[6] Schlesinger, *supra note* 22, at 74-76.

- *Judge Wilkinson* suggested that judicial activism is alive and well in the United States. In the twentieth century, he explains, it "falls into *three* general stages."

1. *The first stage* was the Lochner era, "beginning roughly with the decision in Lochner v. New York,[7] and continuing through the early New Deal," which "is still widely disparaged for its mobilization of personal judicial preference in opposition to state and federal social welfare legislation."
2. *The second stage* took place during the "Warren and Early Burger Courts," roughly the 1950s through the early 1970s, which "focused on finding new substantive rights in the Constitution and down played that document's structural mandates." As Judge Wilkinson sees it, "Although many of its individual decisions were overdue and salutary, when the era is considered as a whole, the states were relegated to a second-class constitutional status."
3. *Finally, the third stage* of judicial activism "probably began with *New York v. United States and continues into the twenty-first century.*

ORIGIN OF JUDICIAL ACTIVISM IN INDIA

The nature of judicial process in India has undergone a metamorphosis expanding the scope of judicial review legitimately through judicial legislation. Judges have been traditional law makers. The judicial activism has flourished in India and has acquired enormous legitimacy with the Indian public.

According to Hon'ble Mr.Justice A.M.Ahmadi, the former Chief Justice of India, the initial years of the Supreme Court of India saw the adoption of an approach characterized by caution and circumspection.[8] The expanding role of judiciary in law making in recent times has major reasons such as growth of parliamentary system and statutory intervention in the expansion of legislation has brought about a parallel expansion of judge-made law. This can be better understood by analyzing certain vital factors like degree of creativity, the modes, limits and legitimacy of law making through courts. By reason of judicial activism, much good or harm could be brought about by the Judges by resorting to innovative interpretation. Since judicial

[7] 198 U.S. 45 (1905).

[8] . Justice A.M.Ahmadi, Judicial Process: *Social Legitimacy and Institutional Viability*, (1996) 4 SCC (J) p.4

interpretation always involves some degree of law making, the creative character of judicial function and the degree of creativity depends on the most activist and dynamic nature of the judge.

Judicial activism in India has not been a spontaneous development. It is the consequence of a situation which necessitated it. When the Parliament enacted laws and the laws were intended to cover new fact situations, the judges' creativity and innovation revived in the matter of filling in the gaps. Apart from filling in the gaps in the legislation, the judges revived their creativity in all other areas which were not covered by legislation. The activist judges to an extent laid down law to fill the vacuum created by the legislature.

Some prominent Indian legal luminaries who adorned the bench of Supreme Court like Justice V.R.Krishna Iyer, Justice P.N.Bhagwati, Justice O.Chinnappa Reddy, Justice J.S.Verma, Justice Kuldip Singh, Justice A.S.Anand have sensitized the democratic principles in the country and played an important role by way of judicial activism and judicial creativity with their able umpiring and proactive judgments. Judicial activism earned a human face in India by liberalizing access to justice and under their leadership the Supreme Court gained in stature and legitimacy. It is pertinent to quote Rajeev Dhavan's observation on Indian judiciary who states that "Owing to indigenous pressure, the court has been mechanical in its approach to the problem on which it was called upon to adjudicate. The Supreme Court rarely exhibited any activist tendency before the eighties more precisely before emergency 1975."[9]

3 JUDICIAL CREATIVITY AND PRECEDENTS

STARE DECISIS AND RATIO DECIDENDI

Stare Decisis is Latin phrase. It means **to stand by the decided cases to uphold the precedent, to maintain a former adjudication.** The purpose is to have uniformity for having certainty. It is based on the public policy. Public policy is the major objectives of any legal system

[9] Rajeev Dhavan: The Supreme Court of India - A Socio Legal Critique of its juristic techniques (Bombay 2018p.421)

are certainty, predictability and stability. The maxim is "*Stare decisis et non quieta movere*". Means – to stand by the decision and not to disturb what is settled. "Those things which have been no often adjudged ought to rest in peace".The Supreme Court of India is not bound by its own earlier decision. It can overrule prospectively as well as retrospectively. Infact, the case law is a source of knowledge, provides basis of arguments, expounds the implications of law and sometimes even supplies the want of the legislatures.

The purpose of the judiciary is to implement the statutes in all its intents and implications. In doing so, the judges introduce their own philosophies and attitudes of life which is reflected in their judgments. The part of the judgment is called precedent which is rationale of the decision is called "*ratio decidendi*" of the case due to this ratio, a case is remembered and acknowledged as Law.

There are two theories of practices that are seen among the Judges, they are:

1) Declaratory Theory
2) Constitutive Theory

Judges declare law that already exists incognito. They find it and apply to case before them. This view is based on the judicial process as it has been Savigny (German), Maine (English), Hugo (German), Burke (English), Bicko (Italy), Montesquieu (France) subscribe to this thought.

- The reality in law is first, decision according to the law is thereafter.

According to constitutive theory, a judge is not a legislator and cannot be so, but laws are not made only by Legislatures

Article 145 of the Constitution of India empowers The Supreme Court of India to make rules for regulating practice and procedure by rules of court. The objections against the judge making laws are based on Separation of Power which has not been accepted in India in the way it operates in European Countries (France) and U.S.A.

Lord Becon stated that in new cases (*Unprecedented*) where statutory guidance is not available, where the constitution does not help the judge, the judges place reliance of Logic, reasoning and

analogy, philosophy, custom, tradition to decide the new case. It is the permissible by judicial process. Justice Cardozo, approved these in “Judicial Process”.

- The laws relating to trust, notice, fraud are creation of equity.
- Gray says “*that the power to interpret law is not different from power to make law. Infact, it is the judge who has final word to say what law on any point and this is real Law making and person doing it lawfully is true law maker*”.
- Hale held, “Judges only declare what law is, they do not make it, but, uphold rule of law, they develop law and in doing so, they make law,

PRECEDENTS

Precedent played a significant role in ensuring that ideals like creativity, stability and uniformity gave the law a garb of reasonableness and legitimacy. The pleas for judicial creativity within the precedent regime continued with Mansfield clarifying that the spirit of the case and not the letter of particular precedents make law.

According to Holmes, the need of the law to evolve and develop by defining the judges' role to be confined from 'molecular to molar motions'. He agrees that judges do, in substance, legislate, but they do so interstitially that is they legislate within the gaps left by the law made by the 1egislature.[10]

The judge made law may not be so perfect because of the personal thinking, attitude, and the consciousness of the judge lies the subconscious force of humanness, the likes, dislikes, prejudices, instincts, habits and convictions. For this reason it is necessary to subject judicial creative requires constant testing, revision and readjustment.

[10] THE COMMON LAW, By Oliver Wendell Holmes, Jr. 1881

4 JUDICIAL ACTIVISM AND CREATIVITY OF THE SUPREME COURT

ROLE OF ACTIVIST JUDGES IN JUDICIAL CREATIVITY

The activist judges play a vital role in exhibiting their judicial creativity and they subjected the new legislation to their creative skills by introducing very many principles of interpretation. Judicial creativity requires a great skill and high creative ability. The judges evolved a number of principles while interpreting the Constitutional provisions, especially in respect of the provisions relating to fundamental rights.

The recent trend adopted by the Supreme Court has been to interpret our fundamental rights in the light of international conventions which are yet to be enacted in to our domestic laws. In all these cases the judges of the Apex Court excelled in their creative skills. Anyone who analyses the judicial process of the Supreme Court and High Courts would conclude that judicial process has developed some finest principles and Courts have made tremendous contribution in establishment of a rule of law society in India and enhanced the people's quality of life. Creativity in law through judicial process is one area that is greatly benefited by the innovative and creative interpretation of the Supreme Court and High Courts. Therefore the Creativity of the Supreme Court and High Courts shall always remain as a high benchmark of judicial creativity in India.

On the contrary, it is also possible that in the process of creativity and innovation, there could sometimes be some errors, but such errors could be corrected or modified or refined either in appeal, or in a latter case, and the latter judgment would be one step more in the progress of the law.

Cardozo while analyzing judicial process[11] concludes that there is an element of creation and discovery where the judge can play a creative role in matter of constitutional interpretations. Each case coming before the judge has its own peculiarities requiring application of fresh mind and skill.

[11] Prof (Dr.) A.Raghunadha Reddy: From Jurisprudence to Jurimetrics: A Critical Evaluation of the Emerging Tools in the Judicial Process,

The judge has constantly to be a creative artist. His work, therefore, requires constant thinking and display of talent and creativity.[12]

When judges interpret the law or a constitution by not merely giving effect to the literal meaning of the word, but trying to provide an interpretation consistent with the spirit of that statute or constitution, they are said to be activist judges. The function of the higher courts in this country has not been limited to exploring what the Constitution-makers meant when they wrote those words but also to develop and adapt the law so as to meet the challenges of contemporary problems of the society and respond to the needs of the society.

JUDICIAL CREATIVITY OF SUPREME COURT OF INDIA

A written constitution is not a self-executing document, and meanings of several provisions may not always be self-evident. The Courts cannot interpret a statute, much less a constitution, in a mechanistic manner. In the case of a statute, a court must determine the actual intent of the authors. In the case of a Constitution, a court must sustain the constitution's relevance to changing social, economic, and political scenarios. The courts must adopt a judicially positivist and pro-activist liberal approach in constitutional interpretation since the law-creative function of the judges is very well recognised now.

Judges who interpret a written constitution cannot merely apply the law to the facts that come before them. The scope of judicial creativity expands the degree of activism when a constitution contains a bill of rights. In the words of Justice Benjamin Cardozo, a court must give to the words of a constitution "a continuity of life and expression."[13]

The liberal, purposive, law-creative interpretation of the constitution must be used by the courts "with insight in to social values, and with suppleness of adaptation to changing needs."[14] It is a matter of judicial attitudes and choices as to how the judges approach the task of constitutional interpretation. The

[12] All India Judges' Association v. Union of India AIR 1993 SC 2493

[13] Benjamin N.Cardozo, The Nature of the Judicial Process (1927) p.92-94

[14] Kariapper v Wijesinha (1968) AC 717

degree of necessary creativity might be well higher in constitutional adjudication than is usually the case for ordinary statutory adjudication.[15]The higher judiciary in India has been endowed with the onerous task of upholding the fundamental rights of the citizens. Therefore the judicial interpretation and enforcement of social rights necessarily implies a high degree of creativity by virtue of the activist approach of higher judiciary in construing and declaring the fundamental rights.

The judiciary in a constitutional democracy can play an active role through the medium of judicial review. This proposition is squarely applicable to the Indian context and it is evident from the judicial precedents that the judiciary especially the Supreme Court has started playing an activist role occasionally from its rulings in cases such as *A.K.Gopalan v. State of Madras* [16] and the activist role of the Indian judiciary was clearly evident in *Golak Nath v. State of Punjab* [17].

The high water mark of judicial activism in India has been reached by the Court in the landmark case of *Kesavananda Bharati v. State of Kerala* [18] popularly known as Fundamental Rights Case wherein the Supreme Court propounded the Doctrine of Basic Structure through its judicial creativity and activist approach.

In the infamous decision in ***A.D.M. Jabalpur v. Shukla***[19] famously known as Habeas Corpus Case, the Supreme Court used its active judicial power permitted civil liberties in Part III to be suspended during the Emergency. Therefore, permitting civil liberties to be suspended during the Emergency would arguably have constituted deference both to the intent of the framers of the Constitution and to legislative wisdom or judicial restraint.

Thus judicial activism during the Emergency was clearly the need of the hour and it had a strong moral basis after Emergency and the judges ought to have been activist. In a series of decisions, starting with ***Menaka Gandhi v. Union of India,***[20] the court widened the ambit of constitutional provisions and held that the provisions of Part III should be given widest possible interpretation to

[15] Mauro Cappelletti, The Judicial Process in Comparative Perspective, p.29
[16] AIR 1951 SC 21
[17] AIR 1962 SC 723
[18] AIR 1973 SC 1461
[19] AIR 1976 SC 1207
[10] AIR 1978 SC 597

expand the reach of fundamental rights rather than to attenuate their meaning and content. In the post–Menaka period court's activism blossomed and flourished with doctrinal creativity and processual innovations.

The Supreme Court has infused new vigor in the moribund Article 21 by giving an expansive interpretation to the word 'life' as therein as meaning not only mere 'animal existence' but 'live with human dignity'. The Supreme Court has thus infused a qualitative concept in Article 21 as a result of which this constitutional provision has become a reservoir of Fundamental Rights.

The Supreme Court of India developed a vast jurisprudence of interpretation of Constitutional provisions and other statutes. Over the years, the Supreme Court has culled out several un-enumerated rights as being implied within the enumerated fundamental rights contained in Part III of the constitution. The Apex Court widened the ambit of constitutional provisions to enforce the human rights of citizens and sought to bring the Indian law in conformity with the global trends in human rights jurisprudence. Simultaneously, it introduced processual innovations with a view to making itself more accessible to disadvantaged sections of the society giving rise to the phenomenon of Public Interest Litigation. The judiciary has moved beyond being a mere legal institution; its decisions have tremendous social, political and economic ramifications.

The judicial creativity in constitutional interpretation is not only confined to explore the true intent of ***Article 21***, the horizon of activist approach of higher judiciary extends interalia to other provisions enshrined in Part III of the Constitution. A classic example of this judicial activism and innovativeness in interpreting ***Article 14*** could be well explained by referring to the landmark case of the Supreme Court in *E.P.Royappa v. State of Tamil Nadu* [21], the Apex Court challenged the traditional concept of equality which was based on reasonable classification and has laid down a new concept of equality. Justice P.N.Bhagwati delivering the judgment on behalf of himself, Justice Y.V.Chandrachud and Justice V.R.Krishna Iyer, propounded the new concept of equality in the following words "Equality is a dynamic concept with many aspects and dimensions and it cannot be '*cribbed, cabined and confined*' within traditional and doctrinaire limits."

[21] AIR 1974 SC 555

The Supreme Court has set aside the classic formulation of the "***Doctrine of reasonable classification***" as held in the case of *Anwar Ali Sarkar v. State of West Bengal.*[22] reformulated in *Ram Krishna Dalmia v. Justice Tendolkar.*[23] and in "**In re Special Courts Bill, 1978**," held the field and became formally recognised as the touchstone for testing legislative and executive violations of ***Article 14***. The Apex Court has rightly admitted that Article 14 of the Constitution of India has received a liberal interpretation over the years. Its scope has also been expanded by creative interpretation of the Court.[24] Thus the activist approach of Supreme Court paved way for introducing a new dimension of right to equality by setting aside the mechanical notion of traditional juridical concept.

The Supreme Court keeping in tune with the technological advancements in a phased manner is applying the tools of creativity to forge the interpretation of Constitution to suit the societal needs in the present era of technology. The Apex Court has observed that creative interpretation of the provisions of the statute demands that with the advance in science and technology, the Court should read the provisions of a statute in such a manner so as to give effect thereto.

A Constitution Bench of the Apex Court has observed that the permissible judicial creativity in tune with the Constitutional objectivity is essential to the interpretation of the Constitutional provisions so that the dominant values may be discovered.[25]

REFORMATIVE EFFECT OF JUDICIAL CREATIVITY BY SUPREME COURT

A great transformation has come about in the judicial attitude towards the protection of personal liberty in the post-emergency period. The Court has re-interpreted Article 21 and practically overruled A.K.Gopalan's case in Menaka Gandhi which can be regarded as a highly creative judicial pronouncement on the part of the Supreme Court. Judicial activism of the post-emergency

[22] AIR 1952 SC 75
[23] AIR 1958 SC 538
[24] Food Corporation of India v. M/s. Seil Ltd. AIR 2008 SC 1101
[25] Indra Sawhney v. Union of India AIR 1993 SC 477

period means liberal interpretation of constitutional provisions like Articles 21 and 14, and reconceptualization of the judicial process by making it more accessible and participatory.[26]

The most significant aspect of Menaka Gandhi was that the Court laid down a seminal principle of constitutional interpretation. The Court held that there cannot be a mere textual construction of the words of the Constitution. Those words are significant with meanings that unfold when different situations arise. Another strategy adopted by the Supreme Court with a creative fashion to expand the ambit of Article 21 and to imply certain bundle of rights.

However, judicial activism in India has now taken on an interesting face. The courts in India pursue a form of review which can be described as best as 'dialogic' – a term used famously by *Peter Hogg and Allison Bushell* in the context of the *Canadian Supreme Court's decisions*. The Indian Supreme Court has enforced socio-economic rights, though they are not considered enforceable by the Constitution such as the right against malnutrition and the right to shelter. The judiciary has started issuing guidelines increasingly in legislative spheres, one such occasion in a landmark judgment in *Vishaka v. State of Rajasthan*.[27]

The Supreme Court has laid down exhaustive guidelines to prevent sexual harassment of working women in work places until a suitable legislation is enacted for the purpose. The Court relied on International Conventions and made a significant interpretation of guarantee of gender equality, right to work with human dignity and safeguards against sexual harassment implicit under *Articles 14, 15(3), 19(1)(a)* and *21* of the Constitution and filled the gap in legislative vacuum.

The dynamics of judicial process has a new enforcement dimension which includes 'rights mobilization' without which the rights and interests of the poor and illiterate silent majority would become sterile.[28] The Supreme Court has not confined itself to judge-made law in the traditional sense of the term, but has embarked upon legislation to fill in the gaps left by legislature. The role

---

[26] S.P.Sathe, Judicial Activism: The Indian Experience, Journal of Indian School of Political Economy (1998 & 1999), Journal of Law & Policy (2001, Vol.6:29), P.51

[27] AIR 1997 SC 3011

[28] I.P.Massey, Administrative Law, (Eastern Book Company, Lucknow, 5th Edn, 2001) Pg. 261

of judicial interpretation has to play far more active, creative and purposeful role in deciding what is according to law. The judiciary by invoking its activist approach with a camouflage of creativity laid down detailed guidelines on various spheres of law including the process of inter-country adoptions,[29] rehabilitation of children of commercial sex workers,[30] and the procedure to be followed by police officers prior to arrest, mildly similar to the American Miranda rights propounded 'Basu rights'[31]. Thus, when a competent legislative fails to act legislatively and make a necessary law to meet the societal needs, the courts play an active role and often indulge in judicial legislation to fill the void created by the legislature's abdication of responsibility.

While the Part IV deals with the Directive Principles of State Policy that largely enumerate objectives pertaining to socio-economic entitlements. They are the creative part of the Constitution, and fundamental to the governance of the country. However, the key feature is that the *Directive Principles* are non-justiciable.[32] Despite the fact that the Constitution did not permit socio-economic rights to be justiciable or enforceable, the Indian judiciary taught that express constitutional provisions may not necessarily translate in to social legitimacy.

The principle of harmonious construction in interpreting the relationship between Part III and Part IV of the Constitution has been reiterated in number of cases[33] decided by the Supreme Court and consistently maintained that the Fundamental Rights and the Directive Principles of State Policy constitute the conscience of the constitution. The judiciary under our constitutional scheme has to take up a positive and creative function in securing socio-economic justice to the people.

In *State of Bihar v. Bal Mukund Sah*[34] it was held that the judiciary has, therefore, a socio-economic destination and a creative function. In *S. P. Gupta v. President of India*[35] it was held that the judiciary cannot remain a mere bystander or spectator but it must become an active participant

---

[29] Laxmikant Pandey v Union of India, AIR 1987 SC 232
[30] Gaurav Jain v Union of India, AIR 1997 SC 3021
[31] D.K.Basu v State of West Bengal, AIR 1997 SC 610
[32] Justice K.G.Balakrishnan, *Constitutional Control Praxis in the present day*, Lecture at Brazilian Supreme Court Pg.5
[33] Minerva Mills Ltd. v Union of India, AIR 1980 SC 1789
[34] AIR 2000 SC 1296
[35] AIR 1982 SC 149

in the judicial process ready to use law in the service of social justice through, a pro-active goal oriented approach. It was emphasized that the judiciary has to adopt a positive and creative approach.

The Supreme Court, in its creative role under ***Article 141*** and the creative elements implicit in the very process of determining ratio decidendi, it is not surprising that judicial process has not been crippled in the discharge of its duty to keep the law abreast of the times, by the traditionalist theory of stare decisis.[36]

The Supreme Court has observed that any legal system, especially one evolving in a developing country, might permit judges to play a creative role and innovate to ensure justice without doing violence to the norms set by legislation. The role of the Court is creative rather than passive, and it assumes a more positive attitude in determining facts and circumstances of each case.

The Apex Court goes to say that notwithstanding the conventional principle that the duty of judges is to expound and not to legislate. The Courts have taken the view that the judicial art of interpretation and appraisal is imbued with creativity.[37]

5 CONCLUSION

The focus of study in this assignment is on judicial creativity in interpreting provisions in certain crucial areas in the Constitution of India. Judicial innovation was essential to adapt the constitutional provisions to modern changed context. "Creativity of the Court has been mainly in the creation and introduction of certain new concepts not found in any specific provision of the Constitution which, but were essential for its meaningful interpretation"[108]. Independence of the judiciary, basic structure and certain elements of social justice are cherished.

The second aspect of creativity lies in the attempt of the Court to construe provisions in the Constitution with a view to upholding and maintaining the concepts so infused into the

[36] A.Laxminath, Precedent in Indian Law, *Second Edition*, 2005, Pg.32
[37] Bhatia International v. Bulk Trading S. A., AIR 2002 SC 1432

Constitution. Introduction of those concepts into the Constitution by Supreme Court is necessary and is justified. The Supreme Court was successful in its attempt in construing the constitutional provisions in tune with the judicially introduced concepts with the aid of the Tools and Techniques under the heads of Judicial Activism