

# **TRANSFORMATIVE CONSTITUTIONALISM : JUDICIAL INTERPRETATION OR JUDICIAL OVERREACH – A CRITIQUE<sup>1</sup>**

## **INTRODUCTION**

“Discretion means, when it is said that something is to be done with the discretion of the authorities, that that discretion is to be done according to the rules of reason and justice, not according to private opinion : according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.”<sup>2</sup> That the Indian Constitution has the salient features which includes (i) A Written Constitution which establishes its supremacy over any Institution created under it, (ii) Distribution of powers amongst three organs of the State, (iii) The co-equal status alongwith the Co-Ordinating Powers of each of the three Organs. So far as essence of Doctrine of Separation of Powers and Courts are concerned it has the two propositions, namely (a) That none of the three organs of Government, Legislative Executive and Judicial can exercise any power which properly belongs to the either of the two, (b) That the Legislature cannot delegate its power. Therefore, the Constitution of India envisages a system of Governance based on the Separation of Powers, even though Constitution does not expressly mention it and therefore, what we commonly refer is that the Judges make the Law or interpret the law, it depends upon the discretion used by the Judge while interpreting the Provisions of the Constitution of India. By the passage of time, it is seen that the Role of Judiciary enlarged by Judicial Review and Accountability of the Judges have been increased. Philosopher of the Constitution have developed the name as The Transformative Constitutionalism, as it is derived from the judicial process.

Constitutionalism in this richer sense of the term is the idea that Government should be limited in its powers and that its authority depends on its observing these limitations.<sup>3</sup>

“If the Legislative and Executive Authorities are one Institution, there will be no freedom. There won’t be freedom anyway if the Judiciary Body is not separated from the Legislative and Executive Authorities”<sup>4</sup> The author has further described that “Constitutionalism” has both descriptive and prescriptive connotations. Used descriptively, it refers chiefly to the historical

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<sup>1</sup> Hitesh N. Dave, University School of Law, Gujarat University, Ahmedabad.

<sup>2</sup> (1891) A.C. 17 Sharp Versus Wakefield - Lord Halsbury L.C, p. 179.

<sup>3</sup> Dr. G. P. Tripathi, Judicial Process, published by Central Law Publications, Frist Edition, 2013.

<sup>4</sup> Charles De Montesquieu.

struggle for constitutional recognition of the people's rights to 'consent' and certain other rights, freedoms and privileges. Used prescriptively its meaning incorporates those features of Government seen as the essential elements of the constitution". Montesquieu while sharing the idea of Separation of Powers, he has further stated that there is no liberty at all, when only one branch has too much power. He came up with this idea of Equally Dividing the Power so that the Government would avoid placing too much power with one Individual or group of people and with the same analogy the three branches i.e. Executive, Legislative and Judiciary have been empowered separately in the Constitution of India, so that no one could start to enact Tyrannical Law, as it could be have the check and balance function. Evolving Role of a Judges one ought to have consider the recent developments in the legal sphere. Justice S.B. Sinha has stated on the issue of Modern Understanding of Separation of Power,<sup>5</sup> "Separation of power in one sense is a limit of active jurisdiction of each organ. But it has another deeper and more relevant purpose, to act as check and balance over the activities of the other organs". Thus, the objectives of the function of the judiciary include, (a) to ensure that all persons are able to live securely under the Rule of Law, (b) to promote, within the proper limits of the judicial function, the observance and the attainment of Human Rights, and (c) to administer the law impartially amongst persons and between persons and the State. That is how the Judges have to interpret the Law. That is called the Judicial Activism and it cannot be clubbed with the Judicial Restraint. Sometimes, the philosopher of the Constitution does believe that in some of the cases, the Courts have overreached the function of the Legislation, however, with the recent development and when we are going towards the modern era Judges have to interrupt and interpret the Provisions of the Constitution of India within the realm of the Constitution.

The Judiciary has the twin role of upholding constitutional values by creatively interpreting the text while remaining within the ambit and respecting the constitutionality mandated separation of powers without overreaching its jurisdiction and venturing into forbidden fields.

## **CONSTITUTIONAL PROVISIONS AND JUDICIAL PROCESS**

Constitution of India and certain Articles puts kind of restrictions on Parliament, such as, no discussion shall take place in Parliament with respect to the conduct of any Judge of Supreme Court or of a High Court in discharge of its Duty and similarly the Courts are also restricted not to inquire into the proceedings of Parliament and Legislature. Article mentioned below of

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<sup>5</sup> State of U.P. v. Jeet S. Bishat, (2007) 6 SCC 586.

the Constitution of India provides the kind of Restrictions, on each organ and also provides the liberty and by that way gives widest power to the Judges to interpret the Provisions of Law :

- 1) Article 122 : Courts not to inquire into the proceedings of Parliament;  
Article 212 : Courts not to inquire into proceedings of the Legislature;

Above two Articles of the Constitution, the Courts have been prohibited from inquiring into the proceedings of the Parliament and Legislature respectively.

Article 361 of the Constitution grants a kind of Immunity to the President or the Governor. It states that the President or the Governor shall not be answerable to any Court for the exercise and performance of the power and duties of his Office, in addition to it, Article 74(2) of the Constitution mandates that the question whether any, and if so, what advice was tendered by Ministers to the Presidents shall not be inquired into by any Court. Therefore, the makers of the Constitution have taken enough care and all possible measures for separation of power and thereby upholding the independence of each organ of the State, whilst, at the same time, keeping the mechanism of 'Checks and Balances' intact so as to uphold the Rule of Law and to maintain the Supremacy of the Constitution.

- 2) In recent times, the Doctrine of Separation of Powers has strong place in the Constitutional Jurisprudence and Interpretation in India. "It is trite that in the Constitutional Scheme adopted in India, besides supremacy of the Constitution, Separation of Power between the Legislature, the Executive and the Judiciary constitutes the basic features of the Constitution".<sup>6</sup>

- 3) Judge's Role is most crucial while interpreting the Constitutional Provisions. Justice Kapadia, while writing the judgment for the Constitutional Bench, observed, "The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adopted to the various crisis of human affairs. A Constitutional Provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional

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<sup>6</sup> State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal, AIR 2010 SC 1476.

provision does not get fossilized but remains flexible enough to meet newly emerges problems and challenges”.<sup>7</sup>

4) Concept of Judicial Review is required to be discussed by citing the celebrated decision of *Marbury v. Madison*<sup>8</sup>, wherein the concept of Judicial Review was established for the first time in the American Constitutional Jurisprudence, the Province of the Court is, solely, to decide on the rights of Individuals, not to inquire how the executive or Executive Officers perform duties in which they have discretion. Questions in their natural political or which are by the Constitution and Laws submitted to the executive can never be made in this Court”. Indian Constitution does take care of the Powers of Judges which is referred to as the Judicial Review in Articles 13, 32, 226, 141, 142 and 144, amongst all, the Article 32, 226 and 142 aptly justify power of Judicial Review, which is evolved in the recent times by the Supreme Court of India, so as (i) to ensure fairness in Legislature cum Administrative Action, thus it is certain that Judicial Review lies only against the decision making procedure and not against the decision itself, (ii) to protect the Constitutionality guaranteed fundamental rights of citizens, and (iii) to Rule on questions of Legislative Competence between the Centre and the States – i.e. and attribute of another cardinal principle of Constitutionalism.<sup>9</sup>

5) The Judges are accountable while delivering the judgments, in the words of Sir Alladi Krishnaswamy Iyer:- “The doctrine of independence is not to be raised to the level of a dogma so as to enable the judiciary to function as a kind of super-legislature or super-executive”. Therefore, it is argued that the idea of “Living Constitution” is an organic document which grows by the passage of time through amendments and judicial interpretation and the power of legislature to amend the Constitution is not unlimited but it throws more power to higher judiciary for smooth functioning of three organs.

## **JUDICIAL ACTIVISM VIS-À-VIS JUDICIAL OVERREACH**

1) One of the best features of the Constitution is that the Judiciary alone has been entrusted with the power and duty to test the Constitutional validity of the Legislative Provisions and the validity of the Administrative Actions. The Courts are empowered to decide and declare any

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<sup>7</sup> M. Nagraj and Ors. v. Union of India, AIR 2007 (SC) 71.

<sup>8</sup> 5 U.S. 137 (1803).

<sup>9</sup> Dr. Justice B.S. Chahuhan, Judge, Supreme Court of India, on the Legislative Aspect of the Judiciary : Judicial Activism and Judicial Restraint.

of the Statute either the intra-virus or ultra-virus and thereby capable of being nullify an action of executive as unconstitutional. These are the powers refer to as the Judicial Activism. In fact, the definition by the name 'Judicial Activism' is not defined per-se in our Constitution, however, the reference can be found from the Article written by Arthur Schelesinger Jr. in : "The Supreme Court : 1947", published in Fortune Magazine in 1947 who has defined the function of Judiciary, which represents its active role in promoting justice. Judicial Activism, in general, is the assumption of an active role on the part of the Judiciary.<sup>10</sup>

2) Judicial Activism envisages changes in the interpretation of the Constitutional and Statutory Provisions in consonance with dynamics and uncertainties of human affairs and relations. Court must apply the law in a way that makes sense of the temporal nature. Justice Bhagwati while delivering lecture at University of Wisconsin, Madison said : Once it is recognised that the Judges do make law, though not in same manner as the Legislature, it will immediately become apparent why Judges can and should adopt an activist approach. There is no need for Judges to feel shy or apologetic about the law creating roles".

3) To keep the balance of socio economic justice system the accountability is castigated on the Judiciary and Judiciary is empowered to achieve the Constitutional Objectives by evaluating the provisions of law. Courts of Law are creatures of the Constitutions and can act only within the sphere of the Constitution and that can be seen in a Constitution right from Magna Carta, wherein the due process of law was given the primacy. Later on, the invention of the Public Interest Litigation has evolved yet another round of Transformative Constitutionalism.

4) Judiciary occupies a crucial role while giving effect to the Provisions of Law, while interpreting it, as it has to ensure that it should not overreach the statute and at the same time has to see that the Legislature intent or executive powers are not exceeded. In case of violation of any of the Provisions of the Constitution, be it guaranteed under the nature of Fundamental Right or any substantive reliefs, which is either not guaranteed under the Constitution or if the action of the Government doesn't take care of provisions of the Constitution, judiciary has to helm its affairs under Article 226 or 32 of the Constitution of India.

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<sup>10</sup> Surbhi Singhania, on Judicial Activism in India, International Journal of Law, Volume 4; Issue 2; March 2018; Page No. 238-242.

## **RECENT TRENDS AND JUDICIAL APPROACH EMERGES AS TRANSFORMATIVE CONSTITUTION**

1) In fact the Transformation to the Constitution of India has taken place soon after the Introduction of the Constitution of India and by the passage of time the Supreme Court of India has evolved the celebrated Judgments from time to time. As this Article discusses the recent trends of judicial process vis-à-vis transformative constitutionalism, discussion is based on the recent trends of judicial process in India, we should not forget the celebrated judgments of the recent past delivered by the Supreme Court of India in the case of Kalpana Mehta Versus Union of India which is also referred to as the Parliament Standing Committee Case, which discusses horizontal separation of power. A visionary Judge in the recent times amongst the others, who has discussed transformative constitution in the judgment, emphasised on the interpretation of the Article 105 of the Constitution of India and stated that “In finding an answer to the questions in reference, this Court must of necessity travel from a literal and perhaps superficial approach, to an understanding of the essence of what the Constitution seeks to achieve. At one level our Constitution has overseen the transfer of political power from a colonial regime to a regime under law of a democratic republic. Legitimizing the transfer of political power if one, but only one facet of the Constitution. To focus upon it alone is to miss a significant element of the constitutional vision. That vision is of about achieving a social transformation. This transformation which the Constitution seeks to achieve is by placing the individual at the forefront of its endeavours. Crucial to that transformation is the need to reverse the philosophy of the colonial regime, which was founded on the subordination of the individual to the state. Liberty, freedom, dignity and autonomy have meaning because it is to the individual to whom the Constitution holds out an assurance of protecting fundamental human rights. The Constitution is about empowerment. The democratic transformation to which it aspires places the individual at the core of the concerns of governance. For a colonial regime individuals were subordinate to the law. Individuals were subject to the authority of the state and their well being was governed by the acceptance of a destiny wedded to its power. Those assumptions which lay at the foundation of colonial rule have undergone a fundamental transformation for a nation of individuals governed by the Constitution. The Constitution recognises their rights and entitlements. Empowerment of individuals through the enforcement of their rights is the essence of the constitutional purpose. Hence, in understating the issues which have arisen before the Court in the present reference, it is well to remind ourselves that since the Constitution is about transformation and its vision is about empowerment, our reading of

precepts drawn from a colonial past, including parliamentary privilege, must be subjected to a nuance that facilitates the assertion of rights and access to justice. We no longer live in a political culture based on the subordination of individuals to the authority of the State. Our interpretation of the Constitution must reflect a keen sense of awareness of the basic change which the Constitution has made to the polity and to its governance”.<sup>11</sup>

2) Even, we look at the year 2018, it was treated as the celebrated year so far as the Reforms are concerned. Many judgments on the Transformative Constitutionalism have been delivered by the Hon’ble Apex Court of India, in the year 2018<sup>12</sup> and in recent past, out of which few judgments where in entire trend has been changed and old age tradition and/or belief of the society was transformed. Therefore, the constitution is always referred as the ‘living constitution’, as it is really proved by the Judiciary through Judicial Activism that our Constitution is not a ‘static’ but a ‘Transformative Constitutionalism’.

2.1) Sabarimala case<sup>13</sup> : Devotion cannot be subjected to gender discrimination, women entry allowed in Sabarimala.

2.2) Homosexuality<sup>14</sup> : 157 Year Old Law on Criminalising consensual Homosexual Acts between Adults struck down, Section 377 of the IPC held un-constitutional.

2.3) Aadhaar<sup>15</sup> : Section 33(2), 47 & 57 of Aadhaar Act struck down, National Security Exception gone, private entities cannot demand Aadhaar Data.

2.4) Adultery<sup>16</sup> : Husband is not the master of wife, 158 Year old Adultery under the Section 497 of IPC Struck down.

2.5) Euthanasia<sup>17</sup> : Right to Die with dignity a Fundamental Right, Passive Euthanasia and Living Will Allowed, Guidelines Issued.

2.6) SC / ST Reservation in Promotions<sup>18</sup> : No need to collect quantifiable data of backwardness to give reservation in promotions for SC/STs.

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<sup>11</sup> Kalpana Mehta and Others v. Union of India and Others, (2018) 7 SCC 1.

<sup>12</sup> The Good and Bad : Read 35 Important Supreme Court Judgments of 2018, Live Law News Network.

<sup>13</sup> Indian Young Lawyers’ Association v. State of Kerala, 2018 Supreme SC 959

<sup>14</sup> Navtej Singh v. Union of India, 2018 AIR SC 4321.

<sup>15</sup> Justice K. S. Puttuswamy (Retd) v. Union of India, 2018 Supreme SC 947.

<sup>16</sup> Joseph Shine v. Union of India, 2018 AIR SC 4898.

<sup>17</sup> Common Case (A Regd. Society) v. Union of India, 2018 AIR SC 1665.

<sup>18</sup> Jainail Singh v. Lachhmi Narain Gupta & Ors 2018 AIR SC 4729.

- 2.7) Misuse of Section 498A<sup>19</sup> : SC Modifies the earlier directions issued to prevent misuse of 498A of IPC, ways no to 'welfare committee.
- 2.8) Live Streaming of SC Proceedings<sup>20</sup> : Sunlight is the best disinfectant. Live Streaming of Court Proceedings in larger public interest allowed.
- 2.9) Rafale Probe<sup>21</sup> : Petitions seeking probe in to Rafale Deal Dismissed.
- 2.10) Mob Lynching<sup>22</sup> : Horrendous Acts of Mobocracy can't be allowed become new norm. Lynching Incidents condemned and various directions are issued.
- 2.11) Firecrackers<sup>23</sup> : Complete Ban on Sale of Firecrackers refused, online sale banned. Direction for bursting crackers fixed.
- 2.12) Lt. General's Interference<sup>24</sup> : Lieutenant-General cannot interfere in each and every decision of the Delhi Government.
- 2.13) No Bungalows for Chief Ministers<sup>25</sup> : Ex- Chief Ministers not entitled to Government Bungalows.
- 2.14) Foreign Law Firm Set up in India<sup>26</sup> : Foreign Law Firms can't set up office in India. Foreign Lawyers can advise clients on 'fly in and fly out' basis.
- 2.15) Professional Court Manager<sup>27</sup> : Directions issued for appointment of Professionally qualified Court Manager in all Principal District and Sessions Court for Better Court Administration.

The above judgments are few of the examples of judicial activism passed by the Apex Court in recent past.

3) Of course, there shall be criticism of all the transformation, so the above judgments are also not exception to the criticism from the society at large and besides, the critics received from all angle of the society, the judiciary has proved its role as transformative judiciary.

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<sup>19</sup> Social Action Forum for Manav Adhikar v. Union of India, 2018 AIR SC 4273.

<sup>20</sup> Swapnil Tripathi v. Supreme Court of India, 2018 SC 4806.

<sup>21</sup> Manohar Lal Sharma v. Narendra Damodar Das Modi, 2018 Supreme SC 1252.

<sup>22</sup> Tehseen S. Poonawalla v. Union of India, 2018 AIR SC 3354.

<sup>23</sup> Arjun Gopal & Ors v. Union of India, 2018 AIR SC 5731.

<sup>24</sup> Govt of NCT of Delhi v. Union of India, 2018 Supreme SC 699.

<sup>25</sup> Lok Prahari v. State of Uttar Pradesh, 2018 AIR SC 2209.

<sup>26</sup> Bar Council of India v. A. K. Balaji, 2018 AIR SC 1382.

<sup>27</sup> All India Judges Association v. Union of India, 2018 Supreme SC 668.



## CONCLUSION

Courts by using the tool of Judicial Activism pronounce certain enactments ultra-vires, sometimes, struck-down administrative action and sometimes imposes restrictions, guidelines, directions etc. However, despite, issuing guidelines, its compliances was not taken up seriously by the Courts, like, say for one of the example, what is seen in *Vishakha's* case<sup>28</sup> in the year 1997, it was not followed, as the directives / guidelines has seen the colour of law/statute only after 16 years as the Criminal Law (Amendment Act), 2013 was passed wherein the provision pertains to combating harassment at workplaces were introduced. Similarly, in the case of D. K. Basu's directions were not complied in strictu-sensu, as there were ample cases seen by the Courts violating the guidelines and punishing police and punitive actions were taken. At the same time, it would not be out of place to state that certain regional, socio-economic, financial, religious issues, like Water Treaty between two States, sale of liquor on Highways, Dance Bar Case, Ganga River Pollution case, Bursting of Firecracker, Uploading of FIRs on Website, non-interference in the GST Act, Noteban case, Playing of Folkdance (Garba) in Gujarat, Sabarimala Case, Triple Talaq Case, Jallikattu, Ban of Dahi Handi, are the examples wherein judiciary has acted pro-actively. However, while abolishing the Adultery laws, pendency of such cases in various courts etc., post-directions issues and the sentimental and societal effect, for which judiciary ought to have taken care while passing the judgments and incorporating inherent and in-built mechanism of compliance and enforcement of it, was forgotten. Sometime, it is also difficult to comply the said directions, as the Special Courts or separate machinery is not created, so the Courts ought to have taken care of the issues, while passing directions, guidelines, making the provisions ultra-vires and even while upholding the constitutional validity or vires of the Act etc. In yet another example, on the subject of no automatic arrest given in the case of Arnesh Kumar<sup>29</sup>, so far as the case of Registration of First Information Report (FIR) issued in the case of Lalita Kumari<sup>30</sup>, registration of FIR was made mandatory in case the offence is declared of cognizable and non-bailable in nature, however, Judgment passed by the Apex Court in the case of Social Action Forum for Manav Adhika & Anr, the petition filed under Article 32 of the Constitution of India focussing on 498-A of the IPC, it was considered by the Court that the judgments passed in Rajesh Sharma's<sup>31</sup> case mandating constitution of Committee was required to be modified, as it was not the task of the

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<sup>28</sup> *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241.

<sup>29</sup> *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

<sup>30</sup> *Lalita Kumar v. State of UP*, 2014 AIR SC 187.

<sup>31</sup> *Rajesh Sharma & Anr V State of UP & Anr* AIR 2017 SC 3869

Committee. So, all the directions issued by the Courts does not necessarily complied with peremptorily, as it would have many issues, like, association of religious belief, lack of proper infrastructure, police machinery is not techno savvy, adequate staff to handle the cases and in absence of proper administrative action, sometimes it is seen that the directions remain the directions only.

So it the need of the hour that when such guidelines issued by the Supreme court of India, it may also take care of compliance and enforcement part and it has to be followed by the Executives, Legislature, without any second thought. There is no check and balance post-issuance of guidelines except filing of the cases in courts, which shall burden the court with further litigations.

There is an impact of the Judicial Activism, as the judges play very pivotal role in justice delivery system. Impact of the Judicial Activism is noticeable but it is always remained double-edged sword<sup>32</sup>.

That Supreme Court of India in the case of<sup>33</sup> reiterated its limitations by observing that “Judges must know their limits and must not try to run the Government. They must have modesty and humility and not behave like Emperors. There is broad separation of powers under the Constitution and each organ of the State – the legislature, the executive and the judiciary must have respect for the others and must not encroach into each other’s domains”.

So, it is not true to say that the Supreme Court in its Judicial Activism failed to respect the constitution, but are issuing directions only and not making the legislation. As it was aptly observed in the Rajesh Sharma’s case “Function of this Court is not to legislate but only to interpret the law. No Doubt in doing so laying down of norms a sometimes un-avoidable”.

So, following Challenges emerges which required to be curbed by the Judiciary while playing role of pro-active judiciary and these are the suggestions on the implementation issues, such are :

- a. ignorance of past judgments (precedents);
- b. implementation issues<sup>34</sup> because of lack of infrastructure;

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<sup>32</sup> Md. Mostafizur Rahman, Roshna Zahan Badhon, A Critical Analysis on Judicial Activism and Overreach - ISOR Journal of Humanities and Social Sciences, Volume 23, Issue 8, p. 45-53.

<sup>33</sup> Divisional Manager, Aravali Golf Course V Chander Haas, (2008) 1 SCC 683.

<sup>34</sup> Shri Justice P. Sathasivam, Hon’ble Governor of Kerala, State Government Bound to Implement Sabarimala Verdict : Keral Guv, while addressing on the Republic day 26<sup>th</sup> January, 2019.

- c. sentimental issues, custom, usage, religious belief associated with the society;
- d. unnecessary interference in the policy matters of the government or non-interference where it required particularly where the decision of the government touches the mass and people at large have the effect of such legislature, executive notification;
- e. issuance of directives without proper empirical data and scientific references;
- f. aftermath of the judgment and impact on society, public violence, regional feelings;
- g. While Struck-off the provisions, judiciary ought to take care, parliament should not nullify the direction or mould the ultra-vires provisions by bringing back in the form of amendment or new legislation so as to make it vires in the new statute, even if, it is done, the judiciary should take pro-active decision on such new statute, immediately;
- h. Political manoeuvring and will of politics should not nullify the decision of the Courts for “personal interest” or interest of “few influential people”;
- i. Strict implementation, adjudication, compliance of directions so as to see that in case of reporting non-implementation or non-compliance strict action should be taken for non-implementation by an automated process, so as to lessen the burden on judiciary and such in-built mechanism be created in the judgment itself;
- j. Establishment of Special Courts/Tribunals while delivering certain kind of dictum so as to yield and achieve effective result;
- k. Constitutional Morality should not be compromised by the Executives and Parliament while obeying the directions and implementing the judgments;

So it is suggested that though, the year 2018 was celebrated year for the Judicial Activism, but, its compliances and aftermath which is an evitable things, could be possibly injuncted.