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INDEPENDENCE OF JUDICIARY

Government Of The People, By The People, For The People

AUTHORED BY - E RADHIKA

U.S. president Abraham Lincoln (1809-1865)

The term democracy means “rule by the people”. “The Judiciary was to be an armed of the social revolution upholding the equality that Indians had longed for”. The essence of a federal Constitution is the division of powers between the Central and State Governments. The division is made by a written Constitution which is the Supreme Law of the Land. In order to maintain the supremacy of the Constitution, there must be an independent and impartial authority to decide the disputes between the Centre and the States or the States inter-se. Judiciary under Indian Constitution has been given an independent status. It has been assigned the role of an independent umpire to guard the constitution and thereby ensure that other branches may not exceed their powers and function within the constitutional framework. The judiciary is to interpret the constitution or to adjudicate upon the rights between the parties concerned.¹

‘Judiciary’ is an essential wing of the democracy. The Supreme Court laid down that State should secure the proper obligation’ as per Article 39A of Constitution of India.² Indian Judiciary is the most powerful judiciary in the world, and next only to that of USA, continues to command respect and credibility despite delays and deficiencies, and thus there is a serious obligation cast upon us to secure that credibility, because the Judiciary is the only hope that a person can look to for help when his/her human rights are jeopardized.³

Indian Constitution has given Judiciary an Independence status and acted independently. The dynamics of judiciary travelled beyond the original perceived role of interpreting the law made by the legislature and extended its tentacles to examine the constitutionality of actions in administration, implementation of laws, governance of the society and the life of an individual. The Indian Constitution is not just a piece of paper or an end which initiates socio-juridical

¹Sir A.K. Aiyar, who was one of the framers of the constitution

²Kartarsingh V/s State of Punjab (1994)3SCC569

³T.R. Andhyarujina , Judicial Accountability: India’s Methods and Experience, Judges and Judicial Accountability”, Cyrus Das, K.Chandra, 2004,PP101-130

process to allow opportunities to unfold the full personhood of every human being. Judiciary over a period of time evolved into a public institution and was working to translate the Constitutional goals into reality. The functioning of judiciary became a proactive player in all matters of life of the people of India. The weaknesses, viz., the inefficiency, colossal corruption, mal administration, lack of political will of the other two wings- Legislature and Executive- made the Judiciary very effective and functional. Judiciary under its jural authority safeguard the interest of the citizens.

An Independent Judiciary is a national asset. The judiciary is to interpret the constitution or to adjudicate upon the rights of the parties concerned. The independence of the judiciary has almost become a corner stone in the theories of justice. The Judiciary should be impartial, independent and to be independent of external pressures can protect the rights of the individual and can provide equal justice without fear and favour. The Judiciary has to declare and interpret the law of the land. The role of the judiciary is to protect rule of law and to ensure the supremacy of law.

JUDICIAL PROCESS

The judicial process is a set of interrelated procedures and roles for deciding disputes by an authoritative person or persons whose decisions are regularly obeyed. The disputes are to be decided according to a previously agreed upon set of procedures and in conformity with prescribed rules.

The scope of judicial process expands according to the political philosophy or political science of the State within which the judicial power has to function. Judicial power can only be exercised through lis or actual litigation. The judiciary power unlike other powers in the State, has to be moved in every individual case. It is moved by actions, proceedings, writs and methods of judicial review. It enlarged the scope in financial, industrial, fiscal and taxing areas, labour, economic, technological spheres and also in administrative laws.

LIMITATIONS ON JUDICIAL POWER

1. The judicial power is not concerned with the policy of the law or the statutes which are said to belong to Parliament and Legislatures. The judicial power does not formulate legislative policy but explains and propounds it by interpretation and construction. In

Maneka Gandhi v. Union of India⁴, the Court give interpretation to the meaning of “life and personal liberty’ under Article 21.

In M.C. Mehta v. Union of India⁵, the Court extended the scope of Article 21 and 32 of the Constitution of India.

In Kesavananda Bharati v. State of Kerala⁶, the Court gave Parliament power to amend any part of Constitution of India provided such amendment do not take away the fundamentals rights of the citizen.

In Indira Gandhi v. Union of India⁷, the Supreme Court held that clause 4 of 39th amendment as unconstitutional and void as it was rightly denied of the right to equality enshrined in Article 14. The judges and the courts sometime express the view what the law should be and in what way the law should be amended, corrected and reformed, that is more or less by way of obiter dictum and the occasion for saying so is always the existing difficulties which are presented to the courts and judges in dealing with the present state of law on a particular point that arises before them for decision.

2. Public movements and public controversies as such are not within the frame of reference of the judicial power. It can only resolve an actual conflict between specific litigants and definite parties. It does not deal with the mass or the mob. It does not decide general public grievances as such, but decides specific complaints. Advisory jurisdiction is severally limited. But its importance lies in the fact that it is a new juristic approach about the function of the courts and judges. It has both critics and supporters.
3. The judicial power is exercised ex post facto. It intervenes after the event and even in quatum actions, where before the act, the danger in fact appears. Therefore judicial power is in its nature archaic and not prophetic. It cannot anticipate. It is powerless to act. It is necessarily occasional in its very nature and not perpetual in its current.
4. Judicial power operates inter parties and acts in personam and in the very limited spheres such as status and testament where its voice is in rem, it is at best a personal proclamation and not a public for general application. Resjudicata silences parties and their representatives but not those who are parties.
5. The judicial power not only creates law but it is created by it. It is itself the creature of law and statues and is therefore bound by their terms and conditions. As a part such law,

⁴AIR 1978 SC597,

⁵AIR (1987)4 SCC463

⁶AIR 1973 SC1461

⁷AIR 1975 SC2299

judicial power is normally bound by its own precedents and stare decisis.

6. The judicial power also accepts the limitations of the well – settled principles of natural justice and its own machinery and process of discovery, investigation and evidence to find out truth and justice are inspired by such principles.
7. The judicial power is not political power. The judicial power can only act on given materials and cannot create matter, event, or situation. The political power is elective and represents the voice of the people. The judicial power is non-elective and in that sense non- representative and reflects the conscience and not the voice of the people and acts more as a brake than as the chariot.

INTERNAL CHECKS AND BALANCES IN JUDICIAL POWER

The judicial power is hierarchical and graded with original, appellate, revisional and superintending powers. It provides its own checks and balances and the judicial power accepts the limitations of its self- correcting processes.

JUDICIAL PROCESS AND CONTINUITY OF LIFE

The judicial power lends continuity of life to the society. Though the judiciary acts as and when occasion arises, it weaves the texture of continuity of life in State and Society. Neither Parliament nor legislatures are permanent. They come and go at every General Election at periodic intervals. The judiciary is permanent. It is the standing symbol of continuity in the midst of flux. It is the eternal sentinel therefore of the continuity of life, and the general custodian of law and order in society. The judiciary is the meeting point of justice in theory and practice. The judiciary prevents the disruptive forces, both statutory and behavioristic in State and Society and thus help in the continuity of life and structure.

Statutes are disjointed. They are disunited. They are often contradictory. They are topical and never thematic. They are therefore sectional, isolated and never total. It is therefore the necessary role of the judiciary to interpret and construe the divergent statutes to render law whole and continuous, by harmonizing contradictions, by bridging the gaps of isolation and by providing a continuous context and a consistent theme. Statutes are mere words. The judiciary gives them meaning and force in their actual impact of life. Parliament and Legislatures breed statutes but it is the judiciary which has the responsibility of bringing up and training that young breed into responsible meaningful and effective family of mature legal adolescents, united to the common

purpose of continuous service and welfare of the State and the Society.

The independence of the judiciary has almost become a corner stone in the theories of justice. The Judge has to be independent of external pressures but not impervious to the message and the mood of the time. The balance between the two is difficult to keep and at the same time is the very core of the judicial process. He has to hold the balance between the executive and the legislature. Even within his own field of judicial progress he has to compose many inconsistencies. The recent tendency of expecting from the courts and Judges to decide what essentially political questions are is a new phenomenon in the philosophy and work of the courts. To a large extent in constitutional interpretation, however undesirable, it may be, the Judge in the modern age has to face both political overtones and undertones. The orthodox pattern of his have broken down to bring in the waves of public political controversies sur-charged with economic explosives to the shore of the courts. The judicial decision has become very much more controversial than what it used to be in the past.

POWER UNDER ARTICLE 142

Recognizing the imperative need for the establishment of an independent judiciary to promote and protect the constitutional goals of the judicial review and safeguarding the Rule of Law.

Judges all levels of the judicial hierarchy, have great discretion, as to how they should decide the case before them. It has to exercise within the Constitutional norms or the statutory principles governing.

The Sky is the limit when victims of injury and injustice. The Supreme Court has Art.142 with a unique amplitude of residually relief delivery power. We have miles to go and promises to keep if the new century is to redeem our justice, dignity and the freedom of down trodden people.⁸

We have upon us the whole armour of the Constitution and the walk from henceforth in its enlightened ways, wearing the breastplate of its protecting provisions and flashing the flaming sword of its inspiration⁹

⁸ Justice V.R.Krishna Iyer, the Majesty of the Judiciary, Universal Law Publishing Co., Delhi, 2007.

⁹Virendra Singh v. State of UP AIR 1954 SC 447 at Page 454.

The State shall take steps to separate the judiciary from the executive in the public services of the State¹⁰. Article 50 has been said to constitute the “conscience of the Constitution”¹¹. There are three basic pillars in our constitutional governance i.e., the Executive, the Legislature and the Judiciary. Even without the express provisions of separation of powers between the Legislature, Executive and Judiciary, the doctrine is an entrenched principle of equality enshrined in Article 14 of Constitution of India. Independence of Judiciary from the Executive and Legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution. The superior Judiciary is empowered by the Constitution to declare a law made by the Legislature void if it is found to have transgressed the Constitutional limitation or if it infringed the rights enshrined in Part III of the Constitution. Legislature cannot declare any decision of court of law to be void or of no effect.

It can, however, pass an amending Act to remedy the defect pointed out by a court of law or on coming to know of it aliunde. A court’s decision must always bind unless the conditions on which are so fundamentally altered that the decision could not have been given in the altered circumstances. If the Legislature has the power over the subject matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, depends upon the fact whether the Legislature possesses the competence which it claims over the subject matter and whether in making the validating law, it removes the defect which the court has found in the existing law. The law enacted by the Legislature may apparently seem to be within the competence but yet in substance, if it is shown as an attempt to interfere with the judicial process, such law may be invalidated being in breach of doctrine of separation of powers.

Independence of Judiciary is a part of the basic structure of the Constitution and cannot be permitted to be adversely impacted by policy making or even by legislative power. The Constitutional ethos of independent judiciary cannot be permitted to be diluted by acts of implied intervention or undue interference by the Executive in the impartial administration of justice, directly or indirectly. For the Judiciary to be impartial and independent and to serve the constitutional goals, the judge must act fairly, reasonably, free of fear and favour.

¹⁰ Article 50 Separation of judiciary from executive

¹¹ Union of India v. Sankalchand, AIR 1977 SC 2328.

The doctrine of separation of powers and independence of judiciary, which are the structural ethos of the Constitution, it is expected that the legislative power and more particularly the subordinate power ought not to be exercised so as to obstruct these basic fundamental principles. The exercise of subordinate legislative power, which by means necessary implication, encroaches upon the Independence of Judiciary would have to be declared on the touch stone of it being violative or otherwise if the basic structure.¹²

The Independence of Judiciary is one of the significant features of the Constitution. Any policy or decision of the Government which would undermine or destroy the independence of Judiciary would not only be opposed to public policy, but also upon the basic structure of the Constitution. The State policies should neither defeat nor cause impediment in the discharge of judicial functions. The domain of judicial field are to be discharged by judiciary and that too effectively. It is the constitutional duty of the Supreme Court to ensure maintenance of the independence of judiciary as well as the effectiveness of the justice delivery system in the country. In India there is no strict separation of power of Governmental powers. The Court possesses the power as a matter of Constitutional mandate. The court is the guardian of powers.

In *Fenn Walter v. Union of India*¹³, in this case Supreme Court considered the question regarding the circumstances under which a sitting judge of a High Court could be appointed as Commission or as Tribunal, since such appointment is likely to affect the independence of judiciary.

In *UOI v. Delhi High Court*¹⁴, the Delhi High Court held that Recovery of debts Due to Banks and Financial Institution Act 1993 was unconstitutional because it eroded the independence of judiciary by curtailing the jurisdiction of the civil courts because the High Court had no role to play in the appointment of Presiding Officers. Reversing the decision Supreme Court said that there is no reason to presume that Tribunals appointed under Arts.323-A and 323-B would not be independent or that the independence of the Judiciary would stand eroded particularly when the Presiding Officers were required to be qualified to be judges and all decisions were subject to judicial review.

In our Constitution, three wings of Government are enshrined, and each of these three wings of

¹² Minister of Health and welfare, Maharashtra v. S.C. Malte, (2012) 13 SCC 118: (2012) 12 SCALE 480.

¹³ AIR 2002 SC 2679 : (2002)6 SCC 184.

¹⁴ AIR 2002 SC 1479: (2002)4 SCC 275.

Government has to work independently in spite of the fact that they are inter connected with each other. Justice Krishan Iyer observed for distinction that judiciary has to draw the line between individual liberty and social control. The objective of justice is deeply enshrined in the Preamble of the Constitution of India

In *S.P. Gupta Vs Union of India*¹⁵, the Constitution Bench of the Supreme Court held that; Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says Be you ever so high, the law is above you. This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we roust keep in mind while interpreting the relevant provisions of the Constitution

In *Supreme Court Advocates-on-Record Association & Anr. Vs Union of India*¹⁶ declared: Independence of Judiciary is the sine qua non of democracy. So long as the Judiciary remains truly distinct from both the Legislature and the Executive, the general power of the people can never be endangered from any quarters. Montesquieu in his book *Spirit of Laws* observed there is no liberty, if the power of judging be not separated from the legislative and the Executive powers.

An Independent Judiciary is a national asset. The progress of the society is dependent upon the proper application of to its needs. In the case of *I.C. Golaknath v. State of Punjab*, the Supreme Court ruled that Art 368 of the Constitution only provided for the procedure to amend the Constitution and was not to be construed as any independent source of power. It was opined that the amendment to the Constitution made by the Parliament could not encroach upon Fundamental rights and if they did so the amendments had to be declared void by reason of Art 13(2) of the Constitution.

Constitutional evolution by the judiciary, Article 21 came to protect a wide range of interests covering almost every field of human life. In *Madhav Hoskots case*¹⁷, it was held that providing

¹⁵ 1982 (2) SCC 831

¹⁶ *Second Judges Appointment Case*, Writ Petition (Civil) 1303 of 1987

¹⁷ AIR 1978 SC 1548

free legal service to the poor and needy was an essential element of the ‘reasonable, fair and just procedure’.

In Hussainara Khatoons¹⁸ case, while considering the plight of the under trial in jail, speedy trial was held to be an integral and essential part of the ‘right to life and liberty’ contained in Article 21 of the Constitution of India.

In Nandini Satpathy v. P.L.Dani¹⁹, The Supreme Court held that an accused has the right to consult a lawyer during interrogation and that the right not to make self-incriminatory statements should be widely interpreted to cover the pretrial stage also.

In Sheela Barse v. State of Maharashtra²⁰, The Supreme Court laid down certain safeguards for arrested persons.

In Bandhu Mukthi Morchas²¹ case, the Supreme Court held that right to life guaranteed by Article 21 included the right to live with human dignity, free from exploitation.

In Bihar Legal Support Society v. The Chief Justice of India and others²², in this case the court was concerned about the underprivileged and poor sections of the society.

In Charles Sobraj v. Supdt., Central Jail²³, the right not to be held in fetters.

In T.V. Vatheeswaran v. State of Tamil Nadu²⁴, the right against handcuffing.

In Nilabati Behera v. State of Orissa²⁵, the right against custodial violence.

In O.K.Basu v. State of West Bengal²⁶, the rights of the arrested person.

In Vishaka v. State of Rajasthan²⁷, the right of the female employee not to be sexually harassed at the place of work.

In Subhash Kumar v. State of Bihar²⁸, the right to pollution free water and air is also a facet of Article 21.

The Court has expanded the ambit and scope of Article 21 so as to include within its fold the right to live with human dignity.

¹⁸ AIR 1979 SC 1819

¹⁹ AIR 1978 SC 1025.

²⁰ 1983 (2) SCC 96.

²¹ AIR 1984 SC 802.

²² AIR 1987 SC 38.

²³ 1978(4) SCC 104.

²⁴ 1983(2) SCC 68.er

²⁵ 1993 (2) SCC 746.

²⁶ 1997 (1) SCC 416.

²⁷ 1997 (6) SCC 241.

²⁸ 1991(1) SCC 598

In *Nilabati Behera v. State of Orissa*²⁹, in this case the court mounts the relief by granting compensation in proceedings under article 32 or 226 of the constitution seeking enforcement or protection of fundamental right it does so under the public law by way of penalizing the wrong doer and fixing the liability for the public wrong on the state which has failed in its public duty the fundamental rights of the citizen.

Access to justice to protect their fundamental rights was almost illusory for the weaker sections of Indian humanity due to their poverty, ignorance and illiteracy. To them, rights and benefits confirmed by the constitution meant nothing. Because of their handicapped, they lacked capacity to assert their rights. Thus, majority of the people of our country were subjected to denial of justice. The judiciary regarded it as its duty to come to the rescue of the under privileged to help them to reap the benefits of economic and social entitlements. The strategy of public interest litigation was evolved to bring justice within the reach of the under privileged classes.

JUDICIAL REVIEW

It is the power exerted by the courts of a country to examine the actions of the legislatures, executive and administrative arms of government and to ensure that such actions conform to the provisions of the nation's Constitution. It has two important functions, like, of legitimizing government action and the protection of constitution against any undue encroachment by the government. It is the interpretational and observer roles of the Indian judiciary. *Suo Moto* cases and with the discontinuation of the principle of *Locus Standi*, have allowed the judiciary to intervene in many public issues, even when there is no complaint from the aggrieved party.

JUDICIAL REVIEW AND CONSTITUTIONAL PROVISIONS

There is no direct and express provision in the constitution empowering the courts to invalidate laws, but the constitution has imposed definite limitations upon each of the organs, the transgression of which would make the law void. The court is entrusted with the task of deciding whether any of the constitutional limitations has been transgressed or not.

Some provisions in the constitution supporting the process of judicial review are:

Article 372 (1) establishes the judicial review of the pre-constitution legislation.

²⁹ 1993 (2) SCC 746.

Article 13 declares that any law which contravenes any of the provisions of the part of Fundamental Rights shall be void.

Articles 32 and 226 entrusts the roles of the protector and guarantor of fundamental rights to the Supreme and High Courts.

Article 251 and 254 states that in case of inconsistency between union and state laws, the state law shall be void.

Article 246 (3) ensures the state legislature's exclusive powers on matters pertaining to the State List.

Article 245 states that the powers of both Parliament and State legislatures are subject to the provisions of the constitution.

Articles 131-136 entrusts the court with the power to adjudicate disputes between individuals, between individuals and the state, between the states and the union; but the court may be required to interpret the provisions of the constitution and the interpretation given by the Supreme Court becomes the law honoured by all courts of the land.

Article 137 gives a special power to the SC to review any judgment pronounced or order made by it. An order passed in a criminal case can be reviewed and set aside only if there are errors apparent on the record.

POWER OF JUDICIAL REVIEW

The constitution divides power between different organs and prescribes limitations on the power of parliament, the state legislature and the executive, it also provides for an impartial umpire in the shape of an independent judiciary to resolve the inevitable disputes over the boundaries of constitutional power which arise in the process of government. The founding fathers entrusted this power of judicial review exclusively to the judiciary. It is not generally appreciated that when a court invalidates legislation, it neither approves nor condemns any legislative policy, nor is it concerned with its wisdom or expediency. It merely determines whether the legislation is in conformity with or contrary to the provision of the constitution. When the court strikes down an executive order, it does so not in a spirit of confrontation but to assert its superiority in discharge of its constitutional duties and the majesty of the law. Likewise, when it upholds legislation or vindicates the executive, the court does not play a second fiddle to the Government. In all those cases, the court discharges its duty as a judicial sentinel, guarding the Ark of the Constitution. The courts do not interfere with the policy matters of the executive unless the policy is either against the Constitution or some statute or is actuated by malafide.

Where the executive refuses to carry out the legislative will or ignores or thwarts the legislative will, it is surely legitimate for courts to step in and ensure compliance with the legislative mandate. Judiciary is always moved by an aggrieved person when the traditional routes have failed.

Judicial activism encompasses an area of legislative vacuum in the field of human rights. Judicial activism reinforces the strength of democracy and reaffirms the faith of the public in the Rule of Law. If the judiciary was also to shut its door to the citizen who finds the Legislatures as not responding and executive indifferent, the citizen would take to the streets and that would be bad both for the Rule of Law and democratic functioning of the society.

CHALLENGES

(I) THE NEED FOR RESTRAINT AND CAUTION

Judicial activism and judicial restraint are two sides of the same coin. It is essential that judicial restraint in the exercise of its functions is of equal importance for the judiciary while discharging its judicial obligations under the Constitution. The decisions of the courts should be within the limits of judicial legitimacy. Judiciary casts a great obligation to defend the values of the Constitution and the rights of Indians. The judiciary can act only as an Alarm clock and not as a time keeper.

(II) ACCOUNTABILITY AND TRANSPARENCY

Rule of law sustained democracy and independent judiciary is assigned the task of maintaining Rule of Law. The impartiality and independence of the judiciary depends on the high standards of conduct followed by judges. The courts act for the people who have reposed confidence in them and therefore the greatest threat to the independence of the judiciary is the erosion of credibility of the judiciary in public mind, for whatever reasons.

(III) SPEEDY JUSTICE

One of the greatest challenges is the failure of judiciary to deliver justice expeditiously. Many attempts at improvement of the situation have been made but there is no denying fact that this continues to remain the central challenge facing the Indian judiciary. The lack of a speedy dispute resolution system has a direct impact on the level of lawlessness in our society.

(IV) THE CHALLENGE OF EXPENSIVE JUSTICE

The poor, backward and weaker sections of the society do it feel that they have equal opportunities for securing justice because of their socio-economic conditions. The Government has demonstrated its bonafide and resolve in that behalf by enforcing and supporting Legal Services Authorities Act, aims at providing a protective umbrella to the weaker sections of the society, against all injustices and giving it adequate funds. National Legal Services Authority is introducing various schemes to ensure speedy and inexpensive justice to the poor and the down trodden people.

(V) ADMINISTRATION OF CRIMINAL JUSTICE

The administration of criminal justice appears to be at cross roads. Large scale acquittals are eroding people's confidence in the effectiveness of criminal justice system. When people see persons accused of heinous and ghastly offences getting acquitted, they believe that either the courts are too liberal or pro criminal or are not functioning the way they ought to function. The courts must respond to the society's cry for justice and punish the guilty by a proper and judicious approach to assess the evidence.

CONCLUSION

Judiciary was not at all meant to give to it a supreme status as compared to the other co "ordinate organs. Judiciary is to act as a watchdog to oversee and prods to keep the other organs with in the constitutional bounds. Only an impartial and independent judiciary can protect the rights of the individual and can provide equal justice without fear and favour. Judicial independence is a prerequisite for every judge whose oath of office requires him to act without fear or favour, affection of ill-will and to uphold the Constitution and laws of the country. There are many constitutional and institutional devices to sear the independence of the judiciary, such as life tenure or tenure for good behavior, and non-votible and times of service and contempt procedures.

The courts act as a custodian of the fundamental rights. The growing functions of the modern state, judicial intervention in the process of making administrative decisions and executing them has also increased. If the judiciary surpasses the line of the powers set for it in the name of judicial activism, it could be rightly said that the judiciary then begins to invalidate the concept of separation of powers set out in the Constitution. The legislature function and duty is making of laws, to fill the gap of laws and to implement them in a proper manner is responsibility of the executive. So that the only work remaining for the judiciary is interpretations. Only a fine

equilibrium between these government bodies can sustain the constitutional values.

BIBLIOGRAPHY

Constitutional Law of India by Dr. J. N. Pandey Central Law Agency

Law and Development in Latin America: A Case Book by Kenneth L Karst, Kenneth L. Karst, Keith S. Rosenn.

JUDICIAL ACTIVISM IN INDIA by S.P.SATHE

THE INDIAN CONSTITUTION CORNER STONE OF A NATION by GRANVILLE AUSTIN.

WEBSTER on INDEPENDENCE OF JUDICIARY.

CONSTITUTIONAL AND ADMINISTRATIVE LAW by A.W.BRADLEY AND K.D.EWING

13th edition.

www.legalserviceindia.com/legal/article-35-doctrine-of-separation-of-powers.html

Encyclopedia .com

