PART – VII
CONCLUSION AND SUGGESTIONS

It is well-known that law in its most general and comprehensive sense, signifies a rule of action and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Without law there can be no order, no peace and no progress. If the individuals of the society are free to act at their pleasure there would be chaos. The importance of law was realised even at the earlier stages of human civilisation as an instrument regulating the conduct and the affair of the society for the common good. Law is experience developed by reason and reason tested by experience. After passing through different stages it has now reached the stage of socialization particularly in country like ours who are committed to secure socialist republic for our people. The reasons and experience have continuously been moulding the law to evoke a legal order in which social, economic and political justice has to be assured to the common citizen particularly the down-trodden in the society and without any discrimination.

Law has many facets and theories which are basically intended to bring out prominently different aspects of human conduct. The concept the theories and the administration of law is not stagnant and has differed from society to society and ages to ages. The law does not exist in vacuum but is concerned with the human conduct of the constituents of the society, of socio-political spheres in the society, cannot survive nor can the same serve the purpose of assuring confidence in the masses for having a welfare state or civilized society. Different philosophers and jurists have stags. Keeping in view the social development of their countries or the society. Such theories and concepts were considered to be revolutionary in the society by socio-politico-economic up-heavals. Law which does be deemed to be the law reflecting the will of the people
wedded to their welfare with the object of serving the society and its individuals. Whatever philosophers of jurisprudence, its common realistic aspect is to do justice be administered according to the orthodox and technical approach but conscience, Justice is not only to be done but it should also appear to have been done. Equality is a pillar of justice founded on the concept that all human beings are equal and entitled to equal treatment. Fairness is the test of justice.

Law and the judges are twin brothers. Without a Judge administration of law is not possible. With the change in the concept of law, there was been a corresponding change in the Institution of the Judge. In the primitive periods when the family which was the smallest unit in the society, was governed by its own code of conduct administered by the head of the family which was the smallest unit in the society, was governed by its own code of conduct administered by the head of the family. The code of conduct of the family was its law and the head of the family a Judge. The scope was widened and the administration of law and the code of conduct became the responsibility and governed a clan and tribe. The head of the Tribe administered the law amongst its members. The law has been administered for a very long time by Ecclesiastical courts in the whole of the World. The Priests, Molvis and Pandits have been administering the law with the force and fear of religious obligations. With the development of law into a science, the present Institution of the Judge came into being entrusted with the task of performing the duties of the administration of law as adopted or enacted. As law signifies the rule of conduct or action applicable to a family, a tribe panchayat and a State, the same had to be administered with the paramount object of serving the purpose of betterment of those for whom such rule of conduct and action was adopted or enacted. It follows, therefore, that the administration of justice is a very solemn duty which should be performed not only with the clean hands but also with clean conscience and should not be influenced by any extraneous considerations. The administration of law must inspire confidence in those for
whom it is adopted or enacted. If the administration of law fails to inspire the confidence of a common man, the Judge would be held failing in his duty of the administration of Justice. The fact that the Judges preside the courts sitting on an elevated platform and robed in glittering costumes should not in any way create an impression of awe inspiring pagentry. The majesty of law should not only be maintained but it should be understood by those for whom it is administered. The judges who are faced with numerous complex disputes, are under an obligation to find an answer acceptable by the society or at least by the majority of the people. For this, judges are bound to give reasons justifying their decisions. In the present society the task of a judge is more comprehensive, complicated and creative. They are not required to administer the law in the orthodox manner and on mere technicalities. Mr. Justice Bhagwati, the then Chief Justice of India, while addressing the commonwealth Law Conference at London, declared:

The task of the Judges takes them deeper into the future—to make decision which will affect the future of social and economic and sometimes even political development and therefore in all humility they have to be aware of the social needs and requirements and economic and political compulsions and to recognise changes taking place in a fast developing society and to develop and adapt law to the changing needs and requirements of the people. And on each occasion when they do so they are expected to provide justifying reasons which must satisfy not only themselves but also critics and jurists, may the society itself, for what they decide. I am stressing all these aspects of the Judicial functions because it is important to remember that no other functionary of the State is subject to such a rigorous from of accountability as the Judges.

However, how are we to assess the Judicial function? There are some who believe that the Judges can do whatever they like unfettered and unrestricted while other believe that the Judges simply mechanically interpret what the
Legislature transmits as concretised rule. The truth in my opinion lies mid-way between these two extremes. The Judges certainly have no unrestricted and uninhibited power to decide as they like but equally they do not mechanically reflect what the Legislature has said. The task and function of the Judges is not just to mechanically follow the rules laid down by the Legislature but to reconcile them to the wider objectives of justice. Fortunately, these wider objectives of justice have been encapsulated in the constitutions of most of the commonwealth countries. Obviously, therefore, constitutional interpretation plays a very vital role in the discharge of the Judicial function. Since different countries in the commonwealth have different kinds of constitutional structures expectations from the Judges may also vary from country to country though in may view there must always be a common denominator which must inspire the judicial tradition to correlate constitutional interpretation to the demands of social justice. There are three different kinds of constitutional traditions which characterise the judicial function in different parts of the commonwealth and it is necessary to consider the manner in which each of them impinges on the judicial traditions and succeeds or fails in achieving the wider objectives of justice embodied in their respective constitutions.

For securing independence of judiciary in a democratic set up, Justice has to be administered by Judicial discipline governing the discharge of judicial function, coupled with humility, courtesy and respect for views of others.

There is a debate going on in the whole of the world as to whether judges can make or alter the law. There is a school of thought which holds the view that the Judges are not legislators but are only the interpreters of law. The other school of thought considers that law-making is an inherent and inevitable part of the Judicial process. In the political system existing in this country the role of a Judge in interpreting the law legislated by the representatives of the people is more important because the law are virtually enacted by the bureaucrats and
passed by politicians representing the people in the Legislature, who generally do not have the basic concept of the principles of law. A duty of the Legislative process in our country would reveal that the majority of the legislators are ignorant about the development of the Judicial process in the country and lack the aptitude required for legislation. The Representation of people Act, under which the elections are held in this country, do not provide any minimum qualification for a person to contest the elections or subsequent guidelines for acquiring basic knowledge pertaining to the legal jurisprudence. On account of their inability to understand the complicated issues for which the law is made, the inability to understand the language in which the law is enacted and non-existence of the foresight for which such legislation is made, leaves the legislators of our country at the mercy of the bureaucrats who generally do not have any commitment to the cause for which the law is enacted and non-existence of the foresight for which such legislation is made, leaves the legislators of our country at the mercy of the bureaucrats who generally do not have any commitment to the cause for which the law are legislated. Laws made by few in the Legislature are passed in the name of all including those who do not understand the meaning of concept of the legislation to which they have appended their signatures, are left to interpreted by the Judges who are the product of the Judicial process and have a wider concept and indepth about the problems for which the legislation was made. The Judges in our country have, therefore, acted as trend setter in the Legislative process. Even Sir. Fredric Pollock has acknowledged this position when he said that Judges do make and alter the Law, Justice Bhagwati, the then Chief Justice of India, while addressing the commonwealth law conference at London, observed.

Law-making is an inherent and inevitable part of the Judicial process. Even where a judge is concerned with interpretation of a statute, there is ample scope for him to develop and mould the law. It is he, who infuses life and blood into the dry skeleton provided by the Legislature and creates a living
organism appropriate and adequate to meet the needs of the society and by thus making and moulding the law, he takes part in the work of creation. A Judge is not a mimic. Greatness on the bench lies in creativity. The process of Judging is a phase of a never ending movement and something more is expected of a Judge than mere imitative reproduction, lifeless repetition of a mechanical routine. It is for this reason that when a law comes before a Judge, he has to invest it with meaning and content and in this process of interpretation he makes law.

The concept of basic feature of the constitution of India, Principles of Natural Justice, Public Interest or Social Action Litigation, Law relating to environments and pollution, bonded labour, Dowry deaths, Bank Nationalisation case, etc are some of the instances which shows that the judges in our country did legislate law even by implication. Such legislation may be termed as creative interpretation of the statue but the fact remains that while delivering judgements in the aforesaid matters, the Judges have departed from the orthodox rule of interpreting the law technically by rising to the occasion to safeguard the interest of the society prevalent at a particular time. The scope of such legislation is inherent in our constitution itself where it is declared that:

We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens. Justice, social economic and political.

The Judges being the creation of the Constitution are under an obligation to up-hold its sovereignty by doing justice, social economic and political to secure liberty of thought, expression, belief, faith and workshop and equality of status and opportunity. If the Legislature fails in the duty to achieve the object enshrined in the Preamble of the Constitution of India or enacts law contrary to the fundamental rights enshrined in Part III of the constitution, the Judges are under an obligation not only to quash such an enactment but also to provide a guideline for achieving the objectives for which the people of India
adopted, enacted and gave to themselves the constitution. Even Benjamin N. Cardozo, the eminent Jurist is his treatise. THE NATURE OF THE JUDICIAL PROCESS, admitted that Judge made law was one of the existing realities of life.

Whereas it is true that Judges have been contribution by the Judgements providing guidelines which have been termed as creative judgements and sometimes have given directions to the extent of legislation, it cannot be accepted as a general principle that the Judges enjoined with the duty to legislate the law and usurp the powers of the Parliament. In a democratic polity the three organs of the state, i.e. the Legislature, the Executive and the Judiciary have their specified roles to play. The sepertation of the powers are distinct and even confined in water-tight compartments. The Judges cannot substitute the Judiciary for the functions of the Legislature. The criticism that the Judges should not in anyway interfere with the working of the Legislature, if accepted, in our country could amount to depriving the Judges of their right to interpret law according to the aspirations of the people, the duties enjoined upon them under the constitution and the need for the society.

The bureaucratic traditions of judicial process according to which judges are expected to rely on the text alone completely governing the social, political and economic consideration, in my opinion cannot be accepted in this country. Dealing with this problem the then chief Justice of India, Mr. Bhagwati held.

Such an approach does not tackle the problem of concealed preference and biases in the structure of the statue itself. If the Judge is simply required to transmit rather than evaluate these preference and basis, we have a very week theory of the judicial function. Here, judges are seen as wholly subordinate to the legislature. Their job is visualized as mechanical rather than creative. Under such an approach Judges are the transmitters of both justice and injustice with even handed facility. No one would respect Judges or the Judicial function if they
felt that all the Judges did was to mechanically transmit rules unseasoned by justice or equity. Judges cannot just interpret statues in a mechanical fashion unconcerned with the consequences of their decision or to use the words of Holmes, J. with the potential radiation's of the decision they are making. The Judges must examine the concealed preference and basis in the statue and their effect and balance them out in a way consistent with an overall pattern of social justice.

Even though Article 368 of the constitution of India provides that Parliament may in exercise of its constituent power amend by way of addition, various or repeal any provision of this constitution in accordance with the procedure laid down in that Article, yet the Supreme Court of India in Golak Nath's case1 held that Parliament could not amend the fundamental rights by declaring that the constitutions (Seventh Amendment) Act. 1964 insofar as it took away or abridged the fundamental rights was void under Art.13(2) of the constitution. Similarly, in Kesavananda no power to amend the constitution which resulted in altering the basic foundation and structure of the constitution. Even though it is not provided either under the constitution or by any other enactment yet the powers of the parliament have been restricted by the Judges from changing the foundation and structure of the constitution. In view of that Judgement the parliament has no power to make any amendment even in the constitution which amount to do away with the supremacy of the constitution, republican and democratic form of the Government, secular character of the constitution, sepration of power between the legislature, the executive and the judiciary and federal character of the constitution and the like.

Similarly, even though according to the orthodox technical rules of procedure an aggrieved person having a cause of action against any individual or society could alone approach a court of law for redressal of his grievances yet by the judicial process and activism the concept of the public interest litigation has
emerged which has been admitted, acknowledged and acted upon in this country. There has been a criticism by the vested interest about the public interest litigation which is sometimes termed as social action litigation that such litigation was unnecessarily burdening the courts and adding to the already staggering arrears of cases and if encouraged would amount to denial of justice to those who have real problem and grievances against the state, Authorities or the Institution. While considering such a criticism the Supreme Court of India in People’s Union of Democratic Right V. Union of India 3 held:

There is misconception in the minds of some lawyers, journalists and men in public life that public litigation is unnecessarily cluttering up the files of the courts and adding to the already staggering arrears of cases which are pending for long years and it should not therefore be encouraged by the court. It is true that there are large arrears pending in the courts but, that cannot be any reason for denying access to justice to the poor and weaker sections of the community. The time has now come when the courts must become the courts for the poor and struggling masses of this country. They must shed their character as upholders of the established order and the status quo. They must be sensitised to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations. It is through public interest litigation that the problems of the poor are now coming to the forefront and the entire theatre of the law is changing. It holds our greatest possibilities for the future.

Getting justice is not the privilege of few and the judicial process has made it possible for public in general to knock at the doors of justice for the redress of the grievances of the public or a defined section of the society. A wrong impression has been created by some people that public interest litigation is used as a matter of revenge, vengeance, or veductive ness. The courts in this country have been reluctant to initiate action on false and frivolous complaints made by vested interest with the object of serving their personal interest or advancing their
political cause. The courts have been exercising powers in the public interest litigation very cautiously and for a definite purpose as have been set forth by the Supreme Court and other High Courts in the country in various judgements. In Bandhua Mukti Morcha\textsuperscript{4} Hon'ble Justice R.S. Pathak at his lordship then was, cautioned that when a complaint is received from a citizen whose ascendants and status of communication are so uncertain that no sense of responsibility can, without anything more, be attributed to the communication, it should be insisted that such a communication must be accompanied by a document or evidence indicating that the allegations made therein were made with a sense of responsibility by a person who has taken due care and cautions to verify those allegations before making them. The courts must be vigilant against the abuse of its process. Under exceptional circumstances such insistence could be waived of.

The administration of criminal law is a very solemn duty of the Judges. The purpose and object of the administration of such law is the maintenance of peace and order in the society and for the welfare of its constituents. Whereas the law contemplates that no innocent person should be deprived of his life and liberty. It also postulates that the criminals should not go scot-free merely on the ground of technicalities or imaginative considerations. The deteriorating law and order situation in the world generally and in this country particularly casts a very heavy duty upon the Judges to way off the apprehensions of the common men. The approach adopted should be reasonable and consistent with the objects of achieving a welfare state free from criminals and violators of law. If the criminals are dealt with leniently completely ignoring the object of preserving law and peace, the same would result in chaos in the society. The staggering figure showing the increase of crime in the society in alarming not only for the judicial institution but for the whole of mankind. Whereas the law postulates that no person should be convicted unless the offence is proved to its hilt, and the benefit of all reasonable doubts should be given to the accused it does
not mean that the criminals should be treated as the guests of the courts and benefit of all doubts irrespective of the fact whether they are reasonable or not should be given to them. The sense of insecurity presently prevalent has to be removed for which people look with greater expectation to the institution of the judiciary. Crime is the first child of man conceived and born not with his wishes. The growth of such illegitimate child has to be curtailed and circumscribed.

Whereas the growth of the constitutional law is spread over about four decades, the administration of criminal jurisprudence is spread over centuries. Crime is basically the product of socio-economic and political conditions in country. The Judges are called upon not to ignore such conditions and keep in mind the growing lawlessness.

The people have been taking advantage of the lacunae in our judicial system and taking shelter under the old orthodox rules of interpretation to get acquittals with the result that the crime has risen. A time has come when the courts have to administer criminal law with utmost restrain and be influenced by the hyper-technicalities of judicial process.

This, however, does not mean that the courts have to adhere to the dogmatic consideration for arriving at the conclusion to ascertain the existence of a circumstance allegedly relied by the prosecution. The hyper-technicalities or figments of imaginations couched in sweet pills of a liar cannot be allowed to divest the court of its responsibility of sifting and weighing the evidence in order to arrive at the conclusions regarding the existence or otherwise on particular social position of the victim and the accused, the larger interests of the society particularly keeping in view the law and order problem, the degrading values of life inherent in our economic system which have many a times resulted in failure of the cases on account of the better position of the accused on the basic of economically being well placed. The criminal trail cannot be treated as a drama or a scene form a stunt feature film. The realities of life have to be kept in the mind.
while appreciating the evidence for arriving at the conclusion with respect to each of the circumstances relied upon by the prosecution in particular case which connects the accused with the commission of the crime. It does not however mean that the courts should always make an effort to give latitude to the prosecution and try to hold which the prosecution has failed to prove at the trial. The traditional, dogmatic, hypertechnical approach has to be replaced by rational, realistic and genuine approach for administering justice in a criminal trial. Criminal Jurisprudence cannot be considered to be a utopian but have to be considered a part and parcel of the human Civilization and the realities of life. The courts in the country cannot ignore the erosion of values of life which are a common feature of the present economical system. Such erosion cannot be given a bonus by giving a latitude to those who are guilty of polluting the society and the mankind.

The Supreme Court had already cautioned in State of Punjab v. Jaggir Singh 5, wherein it was held.

A criminal trial is not like a family tale wherein one is free to give flight to ones' imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an invent in real life and is the product of inter play of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yard-stick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex-facie trust-worthy on grounds which are fanciful or in the nature of conjectures.

The judicial activism must be directed towards the achieving of social justice. The task is most complex and challenging in the words of Hon’ble the then Chief Justice of India, Mr. Bhagwati.
The modern judiciary cannot afford to hide behind notions of legal justice and plead incapacity when social justice issues are addressed to it. This challenge is an important one, not just because Judges owe a duty to do justice with a view to creating and moulding a just society, but because a modern judiciary can no longer obtain social and political legitimacy without making a substantial contribution to issue of social justice.

The alarming law and order situation in the country, the growing rate of crime, the incapacity to deal with such menace by the law enforcing agencies and the hyper-technical approach adopted by the judiciary need immediate overhauling and put on alert all those committed to the cause of justice to re-evaluate the concept of the administration of the criminal law.

There is a need of overhauling of the agencies connected with the administration of law which is an uphill task. Be it as it may, the occasion has come when the jurists in our country, the legislators and the judges have to deliberate and give new direction if the society has to be preserved and made free from fear created by few lawlessness and frustrated individuals.

In India, judicial activism, as the socio-economic and political conditions of the country are, has been and is required to be more radical and as it has greater role to play in the face of the lack of will on the part of the executive and legislative wings. The period of social idealism of those wings is over long age and the things have come to such a pass that our leaders who are assigned the role of initiating and implementing legislation for fulfilling the ideals and objectives of socio-economic change enshrined in the mandate of the constitution and in world human rights movement, have become so opportunistic that they do not consider anything immoral or improper if it helps them to assume power and to keep it. They are compromising all the goals, principles and ideals of our constitution and freedom by compromising with rank fundamentalist, obscurantist, communal, regionalist opportunists and capitalist elements and do not abhor the use of even
hardened criminals to assure their return. As a consequence, it is the judiciary and judiciary alone which can be looked to contemplate and order initiation of measures for socio-economic change and protect right and liberties of minorities and weaker sections. The executive and legislative wings are, on the contrary, out to undo what little good the activist judiciary is able to do for the redressal of the long standing social and economic grievances of weaker, non-vocal helpless and defenceless sections. The worst and shameful illustration of this reactionary and opportunistic approach to power is the notorious "Muslim Women’s Protection (after divorce) Act, 1986. Our national leadership reluctantly thought of ameliorating the lot of the divorced women by enacting in section 125 of criminal procedure code that even divorced women would be entitled to get maintenance from their erstwhile husbands until they re-marry. But apparently under pressure from reactionary lobby deprived such Muslim women by providing an escape exit for defaulting Muslim husbands by enacting clause (3) of section 127 and thus violating Article 14 of the constitution. The role of equalizer fell to the activist Supreme Court when it practically held section 127(3) unavailable to the Muslim husbans for escaping the responsibility placed on them by the society, in Shah Bano's case 30. The recent authority of the Supreme Court31 is a landmark whereby the Supreme court has opined that though there is no provision for interim maintenance when proceeding filed by indigent wife or children for grant of maintenance are pending. Considering delay in such proceedings and extent of expenditure involved had made such a provision absolute necessity but the legislature had not risen to be made laws, the only pre-condition in the original Article 21 of constitution for taking them away was the ordinary law, and has thus kept them only as ordinary legal rights even while placing the article in Part III of the constitution as it did not provide the protective iron, wall of Article 13 to Article 2, whereas the fundamental rights are called so simply because they cannot be taken away by ordinary legislation, the constituent assembly had deliberately
kept these rights to life and liberty subject only to ordinary law. It is, the activist Supreme Court which has accorded these rights the status of fundamental rights in the true sense of the term by its pronouncement in Maneka Gandhi’s case. As such, it can be safely asserted the people of India owe the fundamental rights to life and liberty to the Supreme Court and not to the constituent assembly. Not only this, the Supreme Court has come to the rescue of the fundamental rights and democratic and republican values enshrined in our constitution and has insulated them against erosion and destruction through legislative device of amendment by pronouncing the doctrine of basic structure in Kesavananda Bharti 33 and giving it final shape in Indira Gandhi v. Raj Narain 34.

In India, the executive which firmly controls the legislature are begged down in trivialities and compromises with unscrupulous communal regional and obscurantist forces with the object of keeping themselves in power and have not time or will to initiate legislation or executive action necessary for soci-economic change without which political freedom has no meaning, some of these problems are radical land reforms and amelioration of the miserable conditions of farm labour and industrial and other labour, atrocities against weaker sections like women children and backward section of society, abolition or atleast rationalization of court fees ad implementation of Universal Declaration of Human Rights and scores of other international convenants on human rights. This will have to be performed by judiciary by playing an activist role by quashing all the laws which are not helpful in achievement of constitutional goal of equality enshrined in fundamental rights and those of socio-economic change in directive principles of state policy. International Convenants on human rights can be made enforceable by the higher judiciary particularly by supreme court by returning an authority that all the human rights covenants and other agreements are Supreme Law of the land and will prevail over the Municipal laws. In India, law is silent on this aspect. The result is that human values enshrined in Universal Declaration of
Human Rights and other convenants on human rights like convenants on rights of Refugees, Convenant on Reduction of Statelessness, Covenant on Rights of Child, Covenant on Rights of Women etc. cannot be enforced against the union of State Governments.

The legislature not only is irresponsible to the problems of defenseless minorities and on the contrary it resorts to its legislative power to make laws to suppress the minorities and weaker sections when it suits its political expediency, legislators cannot be relied for social change and defence of minorities and weaker sections which is the first and prime function of a truly democratic government.

The Executive and Legislative wings not only transfer the problems of minorities and weaker sections of society to the judiciary, they even get assistance of the judiciary to solve the problems which legitimately should have been solved by the former, when political expediency did not suit them to solve those problems themselves.

In their activist role as protector of rights of helpless minorities and weaker sections, the court will have to draw upon their own learning of jurisprudence and world movement of human rights and constitutional developments. They cannot draw from any tradition in Indian History as there is no tradition of equality and egalitarianism in India history. If there is any tradition in India at all, it is of inequality, suppressing and oppression of weaker section and untouchables and religious and communal intolerance.

The spirit and values of equality, egalitarianism and secularism are very recent and are still extremely fragmented and superfluous and cannot legitimately be called a tradition, and, as such, he so-called Indian tradition of religious tolerance and dignity of man is only a myth.

In India the cause of stagnation in social and economic change is the order of priorities and preferences in our constitution in as much as the revolutionary values and aspirations of the teeming millions which should have
got first priority and should have been justifiable rights have been only termed as
directive principles and have been given only secondary place. Social change can
be accelerated only if they are given a status not only equal to but even higher than
fundamental rights. This will never be done by the legislature. It is the Supreme
Court which has raised their place in our constitutional set up. But that is not
sufficient. Only a clear radical authority of the summit court declaring that
directive principles of the constitution are enforceable in the courts will herald a
new revolution era in India. Of course it will not be easy for the judicaary alone to
initiate measures in enforcement of the directive principles. Social action groups,
jurists, scholars, administrators will all have to honestly contribute in this
endeavor. There is no doubt that the critics of “Judicial Activism” and the
fundemantallists in the country will not tolerate this and it is for this reason that a
joint effort is necessary. As according one hyphesis, “Judicial Activism” will
flourish only if social action groups gain strength in the society.

The creative role of Judges will augur well for the underdog and
underprivileged masses in India.

The creative role of the judges is a symbol of revolt by the Judges
against the inaction by the legislature to adapt the law to the needs of the society.

The activist role by the Judges will help to improve the Indian Legal
System and also help in making the Judiciary more independent.

Judicial activism definitely helps in checking the Governmental
lawlessness.

A kaleidoscopic view of the jurisprudentially dimensions over the
years has demonstrated that the law evolves. In this evolutionary process, it has
been seen that the judiciary, including the Apex Court, and the jurists have placed
a dynamic role in adapting the law to the needs of the time. It is a movement from
status to contract; from idealism to realism; from analytical view of law to social
engineering or functional approach to jurisprudence, and in short form judicial passivists to judicial activist movement.

It is remarkable to note that the Apex Court of India has been striving to do away with legislative as well as executive Vedana through constitutional Karuna while applying matrix of Judicial Activism. Apex court’s pronouncement illustrate modern trends and ideas. Expansible phrase of Art. 21 affords ample scope for a just decision.

It is quite hard to say whether the activist role of judicial legislation is feasible or desirable. In practice, it is rarely that men like angles whether in the administration or in the courts. 129. An activist role may some times be benevolent for hapless, destitute, downtrodden, underprivileged, poor, weaker sections and have-nots. One thing is certain that in its quest for socio-economic justice, it should not become an unruly horse.

Without resorting to a preference in favour of any particular value choice and thereby inviting criticism of entering into the constitutionally forbidden area of judicial activism, the court can always draw lines at new angles by dexterously resorting to innovative interpretative process.

In this ongoing comples of adjudicatory process, the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the constitution meaningful and reality. Therefore, the judge is required to take judicial notice of the social and economic ramifications, consistent with the theory of law “ (emphasis added)

The permanent value embodied in the constitution need interpretation in the context of the changing social and economic conditions which are transitory in nature. The constitutional court undertakes the delicate task of reconciling the
permanent with the transitory. It is the duty of the executive to implement faithfully the laws made by the legislature. When the executive fails to discharge its obligations, it becomes the primordial duty of the judiciary to compel the executive to perform its lawful functions. In the recent times, much of the criticism aired against the judiciary concern this area. When crimes are committed by men in power and attempts are made to conceal them by rendering the official machinery ineffective, recourse to judiciary becomes inevitable. It becomes the duty of the judiciary to take cognizance of the executive’s lapses and issue appropriate directions as to the method and manner in which the executive should act as ordained by the constitution and laws. If the judiciary fails to respond, it would be guilty of violating the constitution a treason indeed.

Neither the political executive which is responsible for laying down the policy nor the permanent executive comprising civil servants who are enjoined to carry out the polices of the executive can act in any manner contrary to what the constitution prescribes. When all the three organs of the State... Legislature, executive and judiciary—owe their existence to the constitution, no single organ can claim immunity for accountability.

Judicial creativity even when it takes the form of judicial activism should not result in rewriting of the constitution or any legislative enactments. Reconciliation of the permanent values embodied in the constitution with the transitional and changing requirements of the society must not result in undermining the integrity of the constitution. Any attempt leading to such a consequence would destroy the very structure of the constitutional institutions. Conscious of the primordial fact that the constitution is the supreme document, the mechanism under which law must be made and governance of the country carried on. The judiciary must play its activist role. No constitututional value propounded by the judiciary should run counter to any explicitly stated constitutional
obligations or rights. In the name of doing justice and taking shelter under insititutional self-righteousness, the judiciary cannot act in a manner distrubing the delicate balance between the three wings of the State.

The new jurisprudence that has emerged in the recent times has undoubtedly contributed in a great measures to the well-being of the society. People, in general now firmly believe that if any institution or authority acts in a manner not permitted by the constitution, the judiciary will step in to set right the wrong.

Judicial activist fervour should not flood the field constitutionally earmarked for the legislature and the executive. That would spell disaster. Judges cannot be legislators-they have neither the mandate of the people nor the practice wisdom to guage the needs of different sections of society. They are forbidden from assuming the role of administrators. Governmental machinery cannot be run by the Judges. Any populist views aired by judges would undermine their authority and distrub the institutional balance.

Fidelity to a political or social philosphy not discernible from the constitutional objectives in the discharge of judicial functions Is not activism. It is subversion of the constitution . Any judicial act which is politically suspect, morally indefensible and constitutionally illegitimate must be curbed.

Judicial activism characterised by moderation and self-restraint is bound to restore the faith of people in the efficacy of the democratic institutions which alone, in turn, will activate the executive and the legislature to function effectively under the vigilant eye of the judiciary as ordained by the constitution.

A common criticism we hear about judicial activism is that in the name of interpreting the provision of the constitution and legislative enactments, the judiciary often rewrites them without explicitely starting so and in this process, some of the personal opinions of the judges metamorphose into legal principles
and constitutional values. One other fact of this line of criticism is that in the name of judicial activism, the theory of separation of powers is overthrown and the judiciary is undermining the authority of the legislature and the executive by encroaching upon the spheres reserved for them. Critics openly assert that the constitution provides for checks and balances in order to pre-empt concentration of power by an branch not confined in it by the constitution.

The modern judge of the common law, in India, is controlled in any temptation to activism. The judge's boldest ambitions are held in check by opportunity, need, inclination and the judicial method of judges, the community expects honesty, integrity and learning. Increasing, it also expects efficiency, timeliness and attention to case management. Prejudice and partiality have no place in the judicial function. The people have a right to expect the judge to be calm, objective and neutral.

Society is slowly and somewhat reluctantly coming to realise that the "fairytale" of the declaratory theory of the judicial function is false and always was. But there is no clear divide which marks off the limits of judicial creativity and activism. Our communities have come to understand that some measure of "Judicial activism" is not only permissible but is traditional in our system of law. Moreover, it is beneficial to the noble cause of justice under the law. The challenge for modern judges is to find where the line lies in a particular case, at a particular time and place. Each judge knows that limits exist. Most would agree with the recent remarks of Justice Anthony Kennedy, of the United State Supreme Court, that a society that leaves all or most of its hardest decision to the courts is a weak society. The burdens which society casts on its judges are greater today than ever before. The judges, are the servants of the law and of our societies. They must continue to find the sources of our discipline in legal authority. But when new problems arise, when the common law has no exactly analogous decision or where (as it so often the case) the privilege to decline the obligation of decision.
Sometimes they will err, for that is inherent in the human condition. But if they search for the solution to the particular case with the illumination of legal authority, legal principle and legal policy and are sometimes called “Judicial Activists”, they must accept that appellation with fortitude. Activism has limit as every one of us knows. But in a real sense the common law itself is the product of “Judicial Activists”.

This Researcher hopes that this thesis would make positive contributions to evoke a sense of confidence among the masses of our country and would associate the judiciary in checking the erosion of values in the administration of Justice. Let us be very frank to admit that the confidence of the common man in the institution of judiciary is shaking and if effective preventive steps with the aspirations of the people are not taken the institution of judiciary may collapse. The jurists, the Scholars of law, Administrators of Law enforcing Agency, Professors, Teachers, Judiciary and the common man are under an obligation to contribute positively for securing the establishment of a society which is free from fear to life and danger of exploitation of the common man. A Welfare Society in which our constitution goals of justice-social economic and political along with guaranteed freedom, liberty, equality and dignity to all the citizens are realized.