PART - I
INTRODUCTION

At the outset, it is apt and proper to deal with the concept of ‘Judicial Activism’, a phrase, which has been nomenclatured through the writings by legal experts, during the last two decades or so. Though sporadic or periodical writings on the subject have been there, yet a need to understand it in all its ramifications, connotations and denotation, in a comprehensive manner, is felt to have its basic understanding.

The expression ‘Judicial Activism’ has eluded definition as an abstract term. It is incapable of formulation by definition only. Different people take its meaning in different sense. To some it means “dynamism” of judges, to some it means “Judicial Creativity” to some other it means “innovative interpretation” of law by the judges. Yet to some others it means “Social Revolution” or “Cultural Revolution” being brought about by the judiciary and so on and so forth.

For understanding the scope of this expression, however, the role of judiciary has to be properly understood. The term “activism” somehow or the other brings to mind a concept of “revolution” and that is where the misconception about ‘Judicial Activism’, arises. The judge while indulging in ‘Judicial Activism’, are not supposed to be bringing about any “revolution”. All that they are supposed to be doing in the discharge of their duties is to expand and develop law as to respond to the hopes and aspirations of the people who are looking to the judiciary to give life and content to the law. Judicial institutions have a sacrosanct role to play not only for resolving inter se disputes but also to act as balancing mechanism between the conflicting pulls and pressures operating in a society. Courts of law are the products of the constitution and the instrumentalities for fulfilling the ideals of the state
enshrined therein. Their function is to administer justice according to the law and in doing so, they have to respond to the hopes and aspirations of the people. The judiciary has, therefore, a vital role to play in the task of providing social justice to a large majority of people of this country and to fulfill their hopes and aspirations. Because, the people of this country, in no uncertain terms, have committed themselves to secure justice- social, economical and political- besides equality and dignity to all. The directive principles of the State policy enshrined in part-IV of the constitution of India are paramount for the governance of the country and have commanded the state to secure a social order for the promotion and welfare of the people.

The role of the judiciary as commonly understood is of settling disputes between the adversaries within the limits of the law according to the language of law. In the context of "Judicial Activism", therefore, it is necessary to re-evaluate the functions of the judiciary because of different meanings which have been given to this expression by academicians and jurists. In human affairs there is a constant recurring cycle of change and experiment. A society changes as the norms acceptable to the society under goes a change. Old ideologies and old systems give place to new set of ideologies and new systems which in their turn are replaced by different ideologies and different systems. The judges have to be alive to this reality and while discharging their duties have to develop and expound the law on those lines acting within the bounds and limits set out for them in the constitution.

Etymologically, the antonym of activism could properly be understood as 'dormant' or 'inactive'. There-for-the first question that comes to the mind is - was judiciary inactive during the period from ushering in of the Indian constitution till the nucleus of the concept of 'Judicial Activism', was evolved. The answer is difficult to be given. It is submitted that in the background of functioning of the judiciary under Indian Constitution, it,
appears that the ‘Judicial Activism’, is a misnomer. Indeed, true it is, that the
conservative approaches of the judges presiding over our courts and tribunals
have all along been to interpret the law, abiding the Golden rule or Literal
rule of interpretation, without expanding the scope of their decisions in the
matters adjudicated upon, and declare the law as per or consistent with the
language, of the legislative enactments, a legacy of the British Judicial system,
which came to be followed for some time during the post-constitutional period
and it is still followed, save in exceptional cases. Rights and remedies
 correspond to each other. Only an aggrieved person in terms of violation of any
of his rights, could set the court in motion for the redressal of his grievances.
Indeed the adversary system of judicial process is deeply entrenched in the
functioning of the judicial system in all countries of the world for this reason
only. One who complains about the violation of his rights or denial of his
rights by others results into adjudication, which is common scene in any court
and this scenario is irremovable or irreversible. Thus the dominant role the
judiciary plays is in respect of rights and obligations of the individual and to
adjudicate upon the lis brought before it and it has come to stabilize the
contours of its functioning. Thus it is clear that the judiciary has at all times
been active in this sense and dormant or passive in contradistinction to the
concept of ‘Judicial Activism’. Therefore it has to be concluded that in its
sweep, the said concept can be engrafted upon the judiciary when it makes
certain kinds of departures from the established principle and norms of judicial
functioning. The subject matter or contents of rights of citizens, its existence
and denial of certain rights therefore constitutes the trinity of pillars of the
judicial systems all over the world.
E-VOLUTION AND HISTORICAL BACKGROUND OF 'JUDICIAL ACTIVISM'.

If we look into the historical background, we find that the concept of "Judicial Activism is not of recent past. "Judicial Activism first originated in English courts in the form of concepts like 'equity' and 'natural justice' at a time when there were no safeguards for people in statutory laws. The origin of this institution can be traced in the celebrated pronouncement of Chief Justice Coke in Dr.Bonham's case, wherein, an act of Parliament, confirming the Royal Charter of Physicians gave the incorporated society of physicians, power to impose fines upon members offending against its rules, and half of the fine so realized would go to the Crown and the other half to the society itself. Dr.Bonham who was imprisoned for non-payment of a fine so imposed by the society, brought an action for false imprisonment. The court presided over by Chief Justice Coke decreed the action, holding that the Act was void in as much as it had made the society which was interested in a share of the fine, a prosecutor and judge at the same time which was against common law and reason. Coke asserted that such a law could be subjected to 'Judicial Review', and adjudged void by the court. The next Chief Justice-Hobart reiterated this view in 1615. The doctrine of judicial review, however, did not take root in England because of two reasons: first, the sovereignty of parliament did brook any rival, i.e. the power of parliament of the British people ensured the rule of law without the 'judicial review'. Thus, it failed to create any permanent impression in England, the land of parliamentary sovereignty, it served as a spark in the development of the constitutionalism in modern democratic system. In this way the modern concept of judicial review is, therefore, considered to have taken birth in the United States.

At the time when the constitution of America was to be framed, there arose a controversy as to the organ in which the power to interpret the constitution is to be vested. Due to this controversy no provision was included
therefore, would be enforced by the Supreme Court. It was in Marbury v Madison\textsuperscript{2}, that Chief Justice Marshall in the year 1803, judicially adapted a principle of 'judicial review. Marshall CJ who spoke for the case said,

"Certainly all those\textsuperscript{3} have framed written constitutions contemplated them as forming the fundamental and paramount law of the nation and, consequently...and Act of the Legislature, repugnant to the constitution is void... The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact and must be regarded by the judge, as a fundamental law. It therefore, belongs to them to ascertain its meaning as well as the meaning of any particular Act proceeding from the Legislative body.

The doctrine of 'judicial review as judicially formulated by Marshall CJ, has been reiterated by the judges of repute like, Tanney, Evan Hughes, Harlan Stone, Warren and Burger. Thus it can safely be said that the idea of 'judicial review' sparked in England but was adapted as a jurisprudential concept only in the United States of America.

In that country "Judicial Activism" is as old as the U.S. Federation itself. In its earliest stages it emerged in the form of 'judicial review' in as much as though 'judicial review was not expressly provided for in the American constitution, the courts and particularly the Supreme court of America carved out role of 'judicial review for themselves and started striking down legislative measures of the States as well as federal. Between 1898 and 1937, the American Supreme Court declared 50 Congressional enactments and about 400 State law as unconstitutional.

Though 'Judicial Review first appeared in America in 1780, in the case of Holmes v Walton\textsuperscript{3} in which the Supreme Court of New Jersey State refused to carry out an Act of the Legislature providing for the trial of a designated class of offenders by a jury of six, whereas the court held that the State constitution contemplated a common law jury of twelve and thus, the
Legislative measure of a state was struck down by a State Supreme Court. The concept of 'judicial review' formally developed into a doctrine in 1803 in hallowed and revered Marbury v Madison which has been called "the rib of the constitution" and wherein delivering opinion of the court, Chief Justice Marshall said "it is emphatically the province and duty of the judicial department to say what the law is." If the great case of Marbury V Madison had pronounced a different view, judicial review might not have been arisen and constitutional history of the world would have been different and opposition to legislative omnipotence would have been futile. Chief Justice Marshall concluded that the particular phraseology of the constitution of America confirms and strengthens the principle supposed to be essential to all written constitutions of the world. If there was conflict between a law made by the Congress and the provisions in the constitution, it was the duty of court to enforce the constitution and ignore the law. The twin concept of "Judicial Revie" and "Judicial Activism" were thus born. The process of the development of the concept of 'judicial review by the American Supreme Court can be best illustrated by how the law laid down in Dred Scott v Standford holding that a Negro was the property of his master and not a 'citizen', and, therefore, could not sue and thereby legitimizing 'slavery' and discrimination on the grounds of 'color' and 'creed', was cast away, a century later, in Brown v Board of Education, when it was said that 'slavery' is a 'de-humnasing', despicable institution denying human dignity to such an extent that no court of law can uphold it and was given a decent burial in Bakke's case. This happened because the value which guided the society when Dred Scott's case came to be decided had undergone a sea change and could not stand the scrutiny of the age when the judgment in the Brown's case or the Bakke's case was given. The period of "Judicial Activism" in its present sense commenced in America from 1954 and reached its culmination point during the fifties and sixties when it sent shock waves into judicial and
political worlds and shook the nation morally and politically and set it on rethinking and re-evaluating its established institutions and moral standards. By a series of judgments after Brown v Board of Education, the Supreme Court abolished all the laws, which legally segregated the Negroes in almost all the fields of public activity. The court opined in Runyon v M.C.Crary opined that even the non-aided private schools could not refuse admission to Negroes. The Court also held in several judgments that even tax exempted private parks have no right to bar the Negroes as mass recreation by the use of parks is plainly in the public domain. However the distinctions of being the most weeping of the judgments of the Supreme Court goes to Baker v Carr, in the field of equality whereby the Supreme Court has ordered the re-apportionment of election constituencies as the voting population has become extremely unproportional due to urbanization of America after the last 1901 apportionment. In this judgment it demolished the doctrine of “political question” by holding that if in a political problem, a constitutional question calling for judicial determination arises, the court cannot shirk its responsibility by hiding itself behind the thicket of the “political question” More recently in 1973 in Roe v Wade, the Supreme Court has ruled that the restrictive abortion legislation violates the constitutional due process. Recently the U.S.Supreme Court has given a very original activist ruling that teasing of the working woman in their offices by their bosses and colleagues violates their right to equality in matters of services enshrined in the constitution.

As far as India is concerned, the origin of “Judicial Activism can be traced way back in 1893. Support can be drawn for this proposition from the observation or views of hon’ble Justice Micheal Kirby of the High Court of Australia, expressed by him while answering the concept of “Judicial Activism” in the seminar held under the aegis of the Bar Association of India on 6th Jan.1997, when his lordship traced the beginning of “Judicial Activism
in India way back in 1893, referring to a judgment per Justice Mehmoood of the Allahabad High Court, which said to have sown the seeds of "Judicial Activism in India. To a question put to his Lordship, the exact answer given by him is reproduced below.

"The judiciary will continue to respond to the changing needs of the times that is how Activism has evolved. Let me dispel the popular impression that judicial activity began less than two decades ago. The truth is way back in 1893, Justice Mehmoood of the Allahabad High Court delivered a dissenting judgment, which sowed the seeds of 'Activism' in India. It was a case of an under-trial who could not afford to engage a lawyer. So the question was whether the court decides his case by merely looking at his papers. Mehmoood held that the pre-condition of case 'being heard' (as opposed to being merely read) would be fulfilled only when somebody speaks. Just look at how that man treated the law as a living organism. That is the spirit in which judges in Activism even today"

It is indeed true that the major reason for the so called 'Activism' is to be found to begin with, in the progressive interpretational source, judges venturing upon rendering interpretation consistent with the intention, objects and aims behind conferral of rights on the citizenry. Dissent and departure with the established cannons and tenets in the process of judicial functioning appear to have invited the appellations of "Judicial Activism" attributed to the judiciary, progressive interpretation of statute by some far-minded and envisioned judges, giving effect to the true spirit of the law being responsible for it. So it is proper to first scrutinize as to what are the spheres in which activity is to be found is perceptible.

It is submitted that Montesquieu's theory of separation of powers and compartmentalization of the totality of the functions of the state is adapted in every democratic constitution. Under this concept of separation of powers, the functions are divided and entrusted to the different wings of the State. The
Legislatures to enact laws, The Executive to implement them and the Judiciary to put on correct interpretation and declare the correct law on a particular subject. Though, ostensibly the principle of the separation of powers is apparently adapted in the Indian constitution yet this is not, in reality so. The Constitution itself makes allowance for overlapping of mutually allocated functions amongst the three wings of the State. Viz. the Legislature, the Executive and the Judiciary. Instances of this nature are to be found in the fact that Executive is also entrusted with the duty or responsibility of drafting subordinate or delegated legislation without doing any damage or overstepping the limits permissible under the parent legislation. It is in this sense that one finds that the Executive in addition to its primary duty of implementing the various laws enacted by the parliament and or the State Legislatures as the case may be, is also discharging the legislative function to a limited function. Similarly the Speaker of the Parliament discharges a legislative function in the situations when the privileges and the immunities of the members of the House are violated. Further the parliament itself may some times act as a judicial body. This can be proved when we ask the question as to whom is the judiciary accountable. The answer lies in Art-124(4) and 217(10)(b) of the Constitution which says that a judge of the Supreme Court or High Court can be impeached on the ground of proved misbehavior or incapacity and the power in this regard lies with the Parliament. When a judge impeached the Parliament acts as a judicial body and its members must decide the guilt or otherwise of the judge facing the indictment. Our Parliament has already discharged such judicial function in the impeachment proceeding against Justice V.Ramaswamy. Instances of the judges of the hon’ble Supreme Court of India in their interpretational functions also lay down the law through their decision and thus in a sense this tends to be a legislative function.

Needless for this researcher to submit that the precedents formulate themselves as a law binding on the subordinate judiciary in its
observance. Art-141 of the constitution of India itself mandated this legal position. Thus we have a picture on the canvass of Indian Constitution where the Executive, the Legislature and the Judiciary engage themselves in over-reacting their functional limits and amalgamate into each other though within certain limit and to some extent in spite of this fullest understanding about the confines of their functional spheres situations arise when these wings over-reach their respective limits, the background for conflict is formed. Thus the flexibility is quite apparent and it is for this reason that the Indian Constitution is characterized as a flexible one.

Adverting back to the inroads made by these wings into each other's spheres, the judiciary playing a dynamic role in interpreting statutes consistent with the rights-content, it has invited the appellation of active and thus came to be called over-active and this process, by some jurists is named as 'Judicial Activism'. In a strict sense to the humble and reasoned thinking of this researcher it is normal for the progressive minded judges to see that the rights conferred on the citizens are effectively realized and are given effect to and the privileges imparted to them. Some of the judges, beginning with Justice V.R.Krishna Iyer, Justice P.N.Bhagwati, in 1980 onwards were aflame with this spirit of adapting the art of interpreting statutes in an utilitarian and progressive manner rather than to supinely tolerate the existence of mere rights in statute books and they came of the traditional cocoon of conservative approaches. They ventured to relegate to insignificance certain established norms of procedures and practices prevalent in the judicial functioning. Such instances of adventurism are to be found in according less importance to the traditional doctrine of Locus Standi adapting liberal interpretative approach towards fundamental rights, according primacy to Directive Principles over fundamental Rights and ultimately making the few of them justifiable in conjunction with certain Fundamental Rights such as Article-14, Art-19, Art-21, Art-22, Art-29 and Art-30. While doing this the
Indian Higher judiciary viz. the Supreme and the High Courts having been invested with plenary and untrammeled jurisdiction and as sentinels or protectors of the Fundamental Rights of the citizens came in open for a conflicting situations with the other two wings i.e. the Executive and the Legislature and mustered up courage to give appropriate directions to the Executive to fulfill the cherished goals, the rights of the citizens are respected, honored and the benefits there under are percolated to the citizenry belonging to the downtrodden, weak, passive and infirm strata of the society and indeed a great measure of praise is required to be given to the Indian Judiciary for the dynamism it has shown in rendering certain decisions of vital importance which by now are serving as the solid foundation and concrete basis for the achievement of the constitutional goals of achieving a welfare state.

The researcher submits that law cannot be static and stagnant and has act as an instrument of social change and for the purposes of balancing the conflicting interests of the various segments of the society which in ultimate analysis would bring in peace, security, safety of life and property and general satisfaction of well-being in the entire fabric of the society- the ends coveted by law in the Benthamite phraseology. This in essence is the core content of “Judicial Activism” and the Indian Judiciary is on its march.

“Judicial Activism” is familiar to the judges, scholars and layman as it develops and it is therefore not possible to contain its meaning in precise manner. Its conceptual understanding will have to be understood with reference to corresponding developments in the times to come. However, practically it has penetrated into every branch of law, Constitutional, Civil and Criminal, Environmental, Industrial and Family laws and therefore naturally the present concept thereof is confined to these laws and their respective fields. It is submitted that it is the higher judiciary i.e. the Supreme Court and the High courts which alone can play a dynamic role in sustaining the continuity of “Judicial Activism” by virtue of the jurisdiction vested in them, the subordinate
judiciary being not clothed with the kind of jurisdictions required to play such a role besides being contained in the limits to which it is confined for this purpose a birds eye view of the background of Indian Judiciary is essential to be appreciated. Article-124(1) of the Constitution of India states that, there shall be supreme court of India consisting of a chief Justice of India and until Parliament by law prescribes a larger number, of not more than seven other judges. It is a court of records and is having power to punish for contempt of itself. It can proceed in these matters even suo-moto. Of much importance is the jurisdiction of the Supreme Court. Article 131 confers upon the Supreme Court original jurisdiction in any dispute between the Government of India and one or more States! Or in its appellate jurisdiction the apex court has the power to entertain an appeal from any judgment, decree or final order of a High Court in civil criminal or other proceedings upon certification by the concerned High court that the case involves a substantial question of law as o the interpretation of the Constitution such a certificate has to be applied for under Article- 134-A of the Constitution. Under Art-134 the Supreme Court is given jurisdiction to entertain an appeal from any judgment, final order or sentence in a criminal proceedings of a High Court if the High Court has reversed an order of acquittal of an accused person and sentenced him to death, or has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death. And above all discretionary power are vested in Supreme Court, under Article –136, notwithstanding the provisions of the foregoing Articles to entertain in its power of granting special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter, passed or made by any court or tribunal, save respecting Armed Forces. Thus the variety of jurisdictions conferred under the Constitution, makes the position of the Supreme Court invulnerable as far as dispensation of justice in a realistic sense is concerned. Article-137 of the Constitution clothes the Supreme Court to
review its own judgments. Though Art-32 of the constitution is a remedial right in the sense that it confers upon citizens the right to move the supreme court for enforcement of Fundamental Rights incorporated in part-III of the Constitution, yet at the same it confers upon the said court what is known as writ jurisdiction in as much as Art-32(2) empowers the Supreme Court to issue the writs, directions or orders in the nature Habeas Corpus, Mandamus, Prohibition, Quo warranto and Certiorari, for the purposes of the enforcement of Fundamental Rights. It is important in this behalf that there is provision under Art-139 of the Constitution to the effect that the parliament by law confer upon the Supreme Court powers to issue directions, orders or writs including the writs in nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them for any purposes other than those mentioned in clause (2) of Art-32. Thus it is clear that the framers of the Constitution intended to clothe the Supreme Court with all pervading judicial power in the matter of dispensation of justice in a realistic sense. Support can be drawn for this observation from the provisions of Art-140, which provides for conferring upon the Supreme Court by law of Parliament such supplemental powers, as may appear to be necessary or desirable for the purpose of enabling it to exercise the jurisdiction conferred upon it under the constitution in a more effective manner. Art-141 of the Constitution of India states that the law declared by the Supreme Court shall be binding on all courts within territory of India. A difference between the enacted law by the legislature and the one declared by the Supreme Court in the course of its interpretative functions is to be deciphered here.

The law declared by the supreme Court is through its monumental decisions and is very well known to the jurists, judges, academicians and lawyers, as precedents, which are followed by all the courts subordinate to the Supreme Court in similar cases pending before them, for the simple reason that the Constitution by Art-141 itself imparts it a binding
character. The effect of this is that there comes into existence uniformity in interpretation of law and what is known as legal discipline. Thus the Supreme Court can alter the law enacted by the legislatures in the course of its function to interpret legislation\textsuperscript{11}. The precedent is classified into two parts, the ratio decided and obiter dicta, while the former part is binding the latter is not though entitled to be respected as persuasive to the subordinate judiciary\textsuperscript{12}. In point of time a later precedent is required to be followed though contrary to an earlier one. What is interesting is the words 'all courts occurring in Art-141 of the constitution do not include the Supreme itself, leaving thereby the freedom to the Supreme Court vary, modify or over rule its earlier decisions, in the interest of laying down the corrected one and dispensation of justice. Under Art-143 of the Constitution of India, the Supreme Court has to discharge advisory function, upon the President referring any question of public importance for its opinion. A summary of the provisions cited supra leaves no doubt that the position of the Supreme Court is unique one.

Since it is the role played by the Supreme Court and the various High Courts in developing the concept of Judicial Activism, a reference to the High Courts, their functions and jurisdictional ambit is necessary. Art-214 of the Constitution states that there shall be a High Court for each state. Art-215 states that every High Court shall be court of record and shall have all the powers including the power to punish for contempt of itself. This provision is identical with the one in relation to the Supreme Court. Under Art-226 of the Constitution of India, the High Courts are empowered to issue to any person or authority including the Government within its territorial jurisdiction, directions, orders or writs, including the writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo warranto and Certiorari or any of them for the enforcement of any of the rights conferred by part-III and for any other purpose. Art-226 has been held to be a part of basic structure and is unalterable or unamendable by the Parliament. It is noteworthy here that the
jurisdiction of the High Courts in issuing the prerogative writs is the same as that of the Supreme Court, yet the words' and for any other purposes' occurring at the fag end of the text of Art-226, enlarges its extent as compared to the jurisdiction of the Supreme Court which can only issue prerogative writs in their proper form and sense and this leads to a conclusion that the jurisdiction of the High Court under Art-226 of the Constitution is more extensive or greater that that of the Supreme Court, in this behalf. Besides above, Under Art-227 of the Constitution the High Courts are conferred with power of superintendence over all courts and tribunals through out the territories in relation to which it exercises its jurisdiction, and this supervisory jurisdiction extends over to both administrative and judicial spheres. However, tribunals constituted by or under any law relating to Armed Forces are outside the jurisdiction of High Court under Art-227.

In exercising the jurisdiction under Art-227 the chief concern of the High Court is to see that there is no miscarriage of justice at the instance of the courts/tribunals subordinate to it. Thus this jurisdiction of the High Court is an extant one, but in its self restraint, is exercised only in cases which are decided without jurisdiction in the courts below and tribunals, or are against the principles of natural justice or where there is non exercise of the jurisdiction vesting in them or where there is a flagrant violation of law. Articles 233 to 237 deal with the constitution of subordinate judiciary viz. the district courts and below, which are not dealt with herein for the obvious reason.

THE PROBABLE REASONS FOR "JUDICIAL ACTIVISM".

The researcher submits that there cannot be a fixed or precise reason for "Judicial Activism" that can be universally accepted. All that can be
said about the reasons for “Judicial Activism” is that if the other two wings of the State viz. The Legislature and The Executive fail in their respective constitutional function of securing to the people of this country, justice-social, economical and political besides equality and dignity to all then the people of this country expects the judiciary to step in iad and deliver justice to them. It is here that we can be able to trace the probable reasons for “Judicial Activism”.

The following are some of the well-accepted reasons, which compel a court or a judge to be active while discharging the judicial functions assigned to them either by a constitution or any other organic law.

A very prominent reason can be a near collapse of a responsible government particularly when the two wings i.e. the Legislature and the Executive fails to discharge their respective functions; there will be a near collapse of responsible government. Since a responsible government is the hallmark of a successful democracy and constitutionalism, its collapse warrants many drastic and unconventional steps. When the Legislature fails to make the necessary legislation to suit the changing times and needs of the people and when the Executive fails to perform their administrative functions sincerely and with integrity, it will lead to an erosion in confidence in the constitution and the democracy, among the citizens. In such an extra-ordinary scenario, the judiciary may legitimately step into the areas usually earmarked for the legislature and Executive. The result is the ‘judicial legislation’ and ‘government by judiciary’.

This is because the Legislatures are, however not best fitted for the role of adapting the law to the necessities of the time, the legislative process is too slow and the legislative always divided by politics, slowed down by periodical elections and overburdened by myriad other legislative activities. A constitutional document is even less suited to this task, for the philosophy and the ideologies underlying it must of necessity be expressed in broad and general terms and the process of amending the constitution is too cumbersome
and time consuming to meet the immediate needs. The task must therefore, of necessity fall upon the courts, because the courts can by the process of judicial interpretation adapt the law to suit the needs of the society.

When the above scenario of indifference on the part of legislature and the executive exists in the country, the people are bound to loose their confidence in the system of governance and would expect the judiciary to come to their aid. In the recent past it has become fully established that the judiciary cannot remain a silent spectator when the government or third parties trample the fundamental or other rights of the citizens. He judges as responsible members of the society do feel that they have a role to play in ameliorating the worsening conditions of the citizens. As Prof: Upendra Baxi has rightly highlighted, the Indian nation is obsessed with 'judicial salvation'\textsuperscript{15}. It has become natural for the citizens to look up to the judiciary to step in their aid and to protect their fundamental rights and freedoms. This mounts tremendous pressure on the whole to do something for the suffering masses. It may lead to an activist role being taken up by the judiciary.

As has been pointed out that the judges cannot be idle or silent spectators when the times go on changing. As the persons involved in interpreting and applying a law which is not static but dynamic, the judges would like to participate in the social reforms and changes that take place due to the changing times. Under such circumstances, the judiciary has itself claimed to be active participant in social reformative changes. It has encouraged and at times initiated Public Interest Litigation (PIL), also known as Social Action Litigation (SAL) in India. In such cases the courts have discarded the traditional and necessary constrains on themselves such as the requirements of standing, ripeness of the case and adversarial forms of litigation and have assumed the functions of investigator, counselor and monitor of administration.
In spite of a large quantum of legislation in India, there may still be certain areas, which has not been legislated upon. This may be due to inadvertence, lack of exposure to the issues, the absence of legislation or indifference of the legislature. Thus when a competent Legislature fails to act legislatively and make a necessary law to meet the needs of the society, the courts often indulge in judicial legislation. In this context, judicial legislation has to be understood as an incident to statutory interpretation. The courts often have acted to fill the void created by the legislature’s abdication of legislative responsibility.

The Constitution of India itself contains a number of provisions, which give the judiciary enough scope to assert itself and play an active role. Under Article 13, 32, 131, 142, 145, 129, 136, 143, 226 etc. makes it abundantly clear that the judiciary in India in general and the Supreme Court in particular has vast powers under the constitution and has enough scope for being active, and to uphold the cardinal principle of constitutionalism.

The Supreme Court of India is the final arbiter and umpire as to the validity of law. Under Article-141, the Supreme Court has the power to declare any law and the said declaration has the force of an authoritative precedent, binding on all other courts in India, of course except the Supreme Court itself. The final authority of the Supreme Court to decide the validity of a law, gives the Court a great discretionary power without any accountability whatsoever and a consequent development is the “Judicial Activism”.

The Constitution of India has designated the higher judiciary as the guardian of the fundamental rights of the citizens. A cumulative study of Articles 13, 32 and 226 makes it very clear that the higher judiciary in India has been endowed with the onerous task of upholding the fundamental rights of the citizens.

The greatest asset and the strongest weapon in the armory of the judiciary is the confidence it commands and the faith it inspires in the minds of the people in its capacity to do even handed justice and keep the scales in
balance in dispute\textsuperscript{16}. A study shows that there is an extra-ordinary high level of support for the judiciary in India, probably in no other country has any segment of the elite public ever demonstrated such overwhelming general esteem for a flagship constitutional court, or for any other major institution. This clearly shows the public confidence and trust reposed by the people of India in the Supreme Court as the ultimate guardian of their rights and liberties. The Supreme has withstood the test of times through the devise of “Judicial Activism.

There are certain social groups like civil rights group, citizens for environmental action, women rights group consumer rights groups, etc. apart from some other individuals which are responsible for activating “Judicial Activism”.

One more probable reason can be the general feelings of the society in the country today. The collective will of the society today wants that if the rich sleeps in luxury apartments, the poor should at least sleep with a roof over their heads; if the rich eat both the bread and the cake, the poor should at least eat bread; if the rich leave in opulence, the poor should at least be able to afford the basic comforts of life and to secure this social justice “Judicial Activism” is necessary. If “Judicial Activism is opposed and denied to the courts then a vacuum will be created in the society and tyranny and lawlessness will step in to fill that vacuum. Therefore this justifies “Judicial Activism”.

POWERS OF JUDICIAL REVIEW:

It is generally asserted that the institution of judicial review originated in America, but a deeper analysis reveals that this is true only in a very limited sense because historically, the origin of this institution can be
traced in the celebrated pronouncement of Chief Justice Coke in Dr. Bonham’s case⁴ wherein an act of parliament confirming the Royal Charter of physicians gave the incorporated society of Physicians, power to impose fines upon members offending against its rules, and half of the fine so realized would go to the crown and the other half to the society itself. Dr. Bonham, who was imprisoned for non-payment of a fine so imposed by the society, brought an action for false imprisonment. The court presided over by Chief Justice Coke, decreed the action, holding that the Act was void in as much as it had made the society, which was interested in a share of the fine, a prosecutor and judge at the same time, which was against common law and reason. Coke asserted that such a law could be subjected to Judicial Review and adjudged void by the court. This view was reiterated by the next Chief Justice Hobart in 1615¹⁷.

In the United States of America, Chief Justice Marshall in spite of the fact that no provision is found in American Constitution conferring power of Judicial Review, judicially adapted the principle of Judicial Review in 1803 in Marbury v Madison¹⁸ and spoke thus in the said case:

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation and consequently... an Act of legislator, repugnant to the constitution is vide... the interpretation of the law is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judge, as a fundamental law. It, therefore belongs to them to ascertain its meaning as well as the meaning of any particular Act proceeding from the legislative body.

The judges of repute like Tanney, Evan Hughes, Harlan Stone, Warren and Burger etc have reiterated the doctrine of judicial review as judicially formulated by Chief Justice Marshall. Thus it can safely be said that the idea of judicial review sparked in England but was adapted as a jurisprudential concept on in America. Presently the Americans have adapted judicial review not only as an essential and integral principle of their
constitutional jurisprudence but also have shown the light of its undisputed requirement to other constitutional systems like India.

In India the proper position of judiciary and its power of judicial review should be understood in the light of the governmental structure adapted by the framers of the constitution. The framers of the constitution adapted a via media between the American style of judicial supremacy and the English principle of Parliamentary sovereignty. The Power of Judicially review is expressly mentions in the Constitution itself and is not implied one like that of the American Constitution.

This is an absolutely important power vested in the Supreme Court and the High Courts under the Indian Constitution by exercise of which the mentioned courts keep the legislative and the executive wings of the state within their permissible limits as far as their actions are concerned. This power is also held to be a part of the ‘basic structure’ of our constitution and hence can neither be abridged or taken away. The source for Judicial Review of legislative action of the States legislative wing is to be found in Art-13 (2) of the constitution, which reads as under:

13(1) All laws enforced in the territory of India immediately before the commencement of this constitution, in so far as they are inconsistent with the provisions of this part, shall to the extent of such inconsistency be void.

(2) The state shall not make any law, which takes away or abridges the rights conferred by this part and any law made in contravention of this clause, shall, to the extent of the contravention be void.

(3) In this Article unless the context otherwise requires;
   a. “Law” includes any ordinance, order, by-law, rule, regulation, notification, custom, or usage, having in the territory of India, the force of law.
   b. “Laws enforce” includes law passed or made by legislature or other competent Authority in the territory of India before the commencement of the
Constitution and not repealed notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

Thus it would be seen that the power of Judicial Review of legislation is exercisable in respect of pre-constitutional and post-constitutional laws to the extent they are in contravention of the rights in part-III of the Constitution. As regards the Executive actions, the Supreme Court and the High Courts quash the same on the ground of arbitrariness or lack of authority. Thus Judicial Review of both the legislative and Executive actions is within the jurisdiction of the superior judiciary, viz. The Supreme Court and the High Courts. In spite of this imposing jurisdiction, the superior judiciary in its wisdom has been practicing self-restraint in a number of matters while exercising its jurisdiction- one of such was in the contracts with the government or instrumentalities of it. In the realm of private contracts, but for the provisions of Art-12, in the interpretation of which also there is much more liberal view now-a-days than in the early phase of its functioning, the judiciary is maintaining absolute self restraint on the ground that alternative remedies in the form of civil suits are available. Even in the cases involving contractual disputes, either entered into with government or instrumentalities of State, it has been slow enough unless there are compelling circumstances for interfering with such lis.

For some time, in the early phase of their functioning the Supreme Court and the High courts were guided by the loadstar of literal rule of interpretation in the sense it confined to interpreting the enacted provisions in the manner consistent with the linguistic text of the law.

This view was deeply entrenched in the functioning of the judiciary for the reason that the judges presiding over the courts were committed to the fact that the legislature has used the phraseology in an enactment, in its full wisdom and adventurism was not called for. Many a times, in following the above rule, the expanding meanings that should have
been accorded were not gathered, consistent with the intention of the legislatures. The impact of the declaratory lingered on well, but came to be discouraged in the course of time. It is perceptible in the following passage “Crucially important, as its functions are, the decision making process has peculiarities of its own it operates under various substantive as well as procedural limitations. Judiciary has been called the least dangerous branch and the weakest of the three organs because it has no influence over the sword or the purse but merely judgment.” Analyzing the judicial and legislative processes in a comparative perspective, a leading jurist of our times has observed.

“It is the traditional framework within the judge operates and the fact that his whole professional training and background tend to induce caution that nearly every where cause courts to ‘soft pedal’ the creative side of their activities. Nor indeed, even if one acknowledges the creative side of the judicial process, can one ignore the element of fundamental truth which resides in such an asseveration, for the constricted framework within which judicial legislation functions, renders the different in kind from ordinary legislation. The legislature apart from any constitutions limitations legally if not defacto is free to make innovations as it sees fit and deal in an abstract way with all future cases; a court on the other hand is limited on the actual issues and the parties before it, and is to an extent restricted by the scope of legal aid and operates within a traditional framework and subject to the force of professional opinion of what is a good law and the possibility of being reversed in appeal.”

If judiciary tends to show too much activism in keeping the legislature under control that may lead to accusation of judicial oligarchy, and head for confrontation between the legislature and the judiciary, which is not likely to enhance the prestige of the judiciary. Thus the judiciary has to follow the path of auto-limitation and to ward off the exposure to criticism. Again it has to take into account the consequences of its cavalier role lest chaos is
caused in the legislative and administrative wings of the State. It is for this reason that the judiciary was slow or rather reluctant to show Activism in its functioning. Fortunately for us, the Indian judges, realizing the role of the judiciary in the concept of welfare state, have come out of this traditional cocoon. Having wedded to the concept of welfare state envisioned by the framers of the constitution with reference to the preamble, the fundamental rights and the directive principles, interpretation consistent with the objects before the legislature in enacting the laws was a legitimate expectation from the judiciary. However the progressive attitude of the judiciary in tilting its decisions in favor of the citizens also produced sharp differences between the aforesaid two wings of the State. The best illustration of this can be found in the story of transitions and departures with reference to the provisions of Art-31 of the constitution. The failure of the judiciary to act in consonance with the objective of the legislature finally brought into perception the bickering situation between these two organs. The text of art-31 (2) originally enacted read thus:

“No property movable or immovable including any interest taken in, or in any company owing any commercial or industrial undertaking shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition unless the law provides for the compensation for the property taken possession of or acquired and either fixes the amount of compensation or specifies the principle on which, and the manner in which, the compensation is to be determined or given.”

Undoubtedly the text of the original Art-31 smacks off ambiguity as the matters of fixing the compensation and or specifying the principles for its determination were left to the exclusive discretion of the Executive. Subsequently, the question respecting the quantum of compensation came upon the anvil of Supreme Court in West Bengal V Bella Bannerjee, the first to confront with by the judiciary was whether the said question was justifiable
and the substantive meaning of the word ‘compensation’ as well. The apex court, in the tenure of protecting the right to property, held that both the “compensation “ was justifiable and it should mean just equivalent of the property expropriated or acquired and this laid down the ground for a ruffling and strain between the legislature on the one hand and the judiciary on the other. In the aforesaid case the Supreme Court in effect held that the word compensation meant jus: equivalent or full indemnification, although brethren judges in minority struck a discordant note. Patanjali Shastry CJ, was guided by the principle that, in interpreting the provisions of our constitution we should go by the plain words 22,

The constitution (First amendment) Act of 1951 introduced articles 31-a and 31-b and the Art-31-a placed beyond the preview of judicial review certain enactments/laws by placing them under the protective umbrella of Ninth Schedule thus barring Judicial Review. The exact wording of art-31.a is reproduced below:

Art-31.a (1) Notwithstanding anything contained in Art-13, no law providing for –

(a) The acquisition by the State any estate or of any rights therein or the extinguishments or modification of any such rights, or

(b) The taking over of the management of any property by the state for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) The amalgamation of two or more corporations, either in the public interest or in order to secure the proper management of any of the corporations, or
(d) The extinguishments or modification of any rights of managing agents, secretaries, and treasurers, managing directors, directors or managers of corporations or any voting rights of share holders thereof, or

(e) The extinguishments or modifications of any rights accruing by virtue of any agreement, lease or license for the purposes of searching for or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or license,

Shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Art-14, Art-19, ... provided that where such law is made by the legislature of State the provisions of this Article shall not apply thereto unless such law having been reserved for the consideration of the president has received his accent.

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the state to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant therein unless the law relating to the acquisition of such land, building, or structure provides for payment of compensation at a rate which shall not be less than the market value thereof.

(2) In this Art-

(a) The expression “Estate” shall, in relation to any local area have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include:
(i) Any jagir, inam, or muafi or similar grant and in the States of Tamil Nadu and Kerala any janman right;

(ii) Any land held under ryotwari settlement

(iii) Any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pastures or sites or buildings or other structures occupied by cultivators of land, agricultural laborers and village artisans.

(b) The expression “rights” in relation to an estate shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure holder, raiyet, under-raiyet or any intermediary and any rights or privileges in respect of land revenue.

The above text is complete with the passing of constitution (first amendment) Act, 1951 and later amended by the constitution (Forth) amendment act 1955, and both the amendments were given retrospective effect from the commencement of the constitution.”

It is thus clear that the above amendments were brought about to save the laws meant to achieve the goals in the Directive Principles, from the attack on the ground that no compensation was provided for or only illusory compensation was provided for, affecting adversely the principle of Judicial Review or restricting the scope thereof.

Art-31-(b): Without prejudice to the generality of the provisions contained in Art-31-(a), none of the acts and regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void or ever to have become void on the ground that such Act, regulation or provision, is inconsistent with or takes away or abridges any of the rights conferred by, any provisions of this part and notwithstanding any judgment, decree or order of
any court or tribunal to subject to the power of any competent legislature to repeal or amend it, continue in force.

Art-31-(b) Aims at the very same objects which actuated the incretion of Art-31-(a), though independent of the letter. It purports to restrict the judicial review of the legislation aiming at the achievement of constitutional goals set out in the Directive Principles and indeed this is all the more clear by incretion of Art-31-(c) which reads as under:

Art-31-(c) Notwithstanding anything contained in Art-13, no law giving effect to the policy of the state towards securing all or any of the principles laid down in part-IV shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Art-14, Art-19, and no law containing a declaration that it is for giving effect to said policy shall be called in question in any court on the ground that it does not give effect to such policy. As aforesaid, the attitude of the Supreme Court seemed to respect the right to property entitled in favor of the land owners giving a setback to the governments intention to push forward its constitutional goals in the Directives, one of them to acquire private property for public purpose at a price less than what it could have commanded. The above approach on the part of the supreme court was clear in the decisions of Subodh Gopal⁹, Bella Bannerjee¹⁰, Dwarka das Shrinivas V Solapur spinning and weaving Co. ltd. Wherein the state was enjoined to pay the full indemnification or compensation in case citizens were to deprived of their private property for public purposes. The parliament chose to undo these decisions by bringing about the forth amendment to the constitution in the 1954 itself during which the aforesaid three cases were decided by the Supreme Court. Art-31-(a) was inserted in the constitution (First) amendment Act of 1951 and clauses (b) to (e) thereof by the constitution (Forth) amendment Act of 1955. Art-31-(b) was
inserted in the constitution (First) amendment Act of 1951 and Art-31-(c) was inserted in the constitution (Twenty Fifth) amendment Act of 1971 while the First and forth amendments were retrospective, the twenty fifth amendment was effective from 29th Jan 1972. The background responsible for these amendments is important to be perceived for the purposes of the attitudes they exhibit on the part of the Legislature and executive on one hand and the Judiciary on the other. The Supreme Court already held that the question of compensation and its adequacy justiciable

Further in spite of the fourth amendment providing for exclusion of the jurisdiction held as to the justifiability of the “compensation” the supreme court would interfere in cases where the compensation provided was illusory in R.C.Cooper V union of India the supreme court again reiterated its anxiety to safeguard the right to property which is clearly brought out by the following passage;

“Compensation being the equivalent in terms of money of the property compulsorily acquired, the principle for determination of compensation is intended to award to the expropriated the value of the property acquired. We are unable to that a principle specified by the parliament for determining compensation of the property acquired is conclusive. If that view is accepted, the Parliament will be invested with a charter of arbitrariness and by abuse of legislative process, the constitution guarantee of the right to compensation may be severely impaired.”

In this very same decision the Supreme Court clearly imported that the compensation for the acquired property should not be illusory or at the whims of the legislature but ought to be justifiable. It submitted in the background of legal position obtaining them, the interpretation and assertion of jurisdiction by the Supreme Court in this behalf cannot be faulted with, though
voices contrary to it were heard in various cases at the instance of minority judges. The Parliament brought twenty fifth amendment in act of 1971 referred to above, which provided that irrespective of the provision of Art-13, no law giving effect to the policy of the State towards securing all or any of the principle laid down in part-IV. Viz. Directive Principles of State policy shall be deemed to be void on the ground that it is inconsistent or takes away or abridges any of the rights conferred by Art-14 or Art-19 and no law containing a declaration that it is for giving effect to the Directive principles or for giving effect to the policy respecting the principles laid down in part-IV of the constitution shall be called in question in any court on the ground that it does not give effect to such policy. Thus this made a measure inroad into the judicial power of the Supreme Court and the High Courts in as much as outer of their jurisdiction of Judicial Review was sought. Besides, irrespective of the fact whether law so declared it self may not in reality have any nexus with the implementation of any of the directives. That aside it meant that all the Directives contained I part IV are covered and obviously the legislative activity can only be revolving around the epicenter of these Directives. This was indeed an un-thought of situation. Therefore the Supreme Court in Keshavanand’s case formulated the theory of ‘basic structure’ of the constitution in respect of which certain features of the constitution inclusive of Judicial review had to be salvaged from the draconian clutches of the legislature. The said principle has been reiterated in the Minerva Mills\textsuperscript{12} case. In Indira Gandhi’s case the Supreme Court identified rule of law, democracy and judicial Review as essential features of ‘basic structure. Now the position i: that any amendment of the constitution is liable to be interfered with by courts on the ground that it affects one or the other of the ‘basic features of the constitution. In this way scope of the power of Judicial Review of the courts extends not only to ordinary legislation or executive action, but also to amending power to the parliament.
But at the same time it does not mean that this power of the court is not subject to any limitation. The powers of Judicial review is expressly precluded by some of the provisions of the constitution, Articles 31(a), 31(b), read with Ninth Schedule, 31(c), 74(2), 122, 212, 105, 194, 232(a), 232(b), 239(a), 359, 361, 361(a), 363, 368(4) 2 (5), and tenth schedule, apart from these limitations there are certain other limitations actual lis or litigation, purely political questions, legislative limitations i.e. a finality clause, standing limitation, territorial limitations(Supreme Court is not a subject to this limitation), unreasonable delay or latches, alternative remedy, self imposed limitation.. The limitations on the Judicial Review power to the courts with a view that indiscriminate use of power may paralyze the entire governmental system in no time. Although the scope of judicial review has widened, yet it is subject to above limitations.

To sum up, in democratic systems having written constitutions the institution of judiciary and its power of Judicial Review are the barometers, which registers the rise and fall of independence and freedom in human society. Thus the Power of Judicial Review under written constitution is indispensable and can help to promote constitutionalism, to maintain rule of law and to establish humane society, which is our constitutional mandate also.

Law relating to fundamental rights has been in the process of development and that process continues. It is true that in A.K. Gopalan's case that the Supreme Court placed a rather narrow and restrictive interpretation upon Article 21 of the constitution but let us not forget that the court appears to have been, at that time, clearly influenced by the changes made by the drafting committee to the original drafted article and the case was being decided on first impressions. The drafted article read: "No person shall be deprived on his life and personal liberty without due process of law. The drafting committee appointed by the constituent Assembly recommended that the substitution of the expression "without due process of law" by the expression "except
according to the procedure established by law”. By a majority, it was held in Gopalan’s case that “the procedure established by law, mean procedure established by law made by the state” and the court refused to infuse that procedure with the principles of natural justice. The court also arrived at the conclusion that article 21 excluded enjoyment of the freedoms guaranteed under Article 19 because Article 19, according to the court, postulated legal capacity to exercise the rights guarantee by it. Gopalan’s case was decided soon after the constitution came into force, about 52 years ago and at that time the judgment was considered as a quite progressive by same. The law has not remained static since then as indeed, it could not remain static. It is in the process of being developed and expanded and that is being done through judiciary’s creative process. The doctrine of exclusivity of fundamental rights as evolved in Gopalan’s case was thrown over board by the same court about two decades later in Banks Nationalization case and four years later in 1974, in Hardhan Shahs case, the supreme judged the constitutionality of preventive detention with reference to Article 19 also. Life of law, generally speaking, is not logic but experience and experience is the basic for the development and expansion of law. The judgment delivered by the Supreme court between 1950 and 1970, were mainly based on the language of the constitution and the requirements of the particular case before the court. The judges confined themselves to deciding the case without sermonizing or resorting to some mystic concept or other concepts, which were not found in the language of the constitution. In none of the Judgments, however, can it be said that “personal” or “political” philosophy of the judges was reflected let alone advocated. As a matter of fact those judgments laid down sound and firm foundations for the development and further expansion of the law for the future judges. 28 years after the judgment in Gopalan’s case, the supreme court in Maneka Gandhi’s case pronounced in a remarkable judgment that the procedure contemplated by Article 21 must be “right, just and fair” and not arbitrary, it must pass the test
of reasonableness and the procedure should be in conformity with the principles of natural justice and unless it was so, it would be no procedure at all and the requirement of Art.21 would not be satisfied. It, therefore the experience and precedents been so evolved as to find out the needs of the society and to apply the existing legal system to such needs. Responding to the changing times and aspirations of the people, the judiciary with a view to see that the fundamental rights embodied in the constitution of India have a meaning for the down-trodden and under privileged classes, pronounced yet another judgment in Madhav Haskot’s²⁵ case where it held that free legal service to the poor and needy was an essential element of the reasonable, fair and just procedure.” Again in Hussainara Khatoon’s²⁶ cases while considering the plight of the undertrials in jail, speedy trial was also 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 Bandhua Muktee Morcha’s²⁷ cases, the Supreme Court held that right to life guaranteed by Article 21 included the right to live with human dignity free from exploitation. The concern of the courts for the under-privileged and the poor sections of the society is again apathy reflected in Bihar Legal Support Society V. The Chief Justice of India and other¹³. The court said.

... that the weaker sections of Indian humanity have been deprived on justice for long, long years: they have had no access to justice on account of their poverty, ignorance and illiteracy. They are not aware of the rights and benefits conferred upon them by the constitution and the law. On account of their socially and economically disadvantaged position they lack the capacity to assert their rights and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice. The majority of the people of our country are subjected to this denial of access to justice and overtaken by despair and helplessness, they continue to remain victims of an exploitative society where
economic power is concentrated in the hands of a few and it is used for perpetuation of domination over large masses of human beings. This court has always, therefore, regarded it as its duty to come to rescue of those deprived or vulnerable sections of Indian Humanity in order to help them release their economic and social entitlements and to bring to an end their oppression and exploitation. The strategy of public interest litigation has been evolved by this court with a view to bringing justice within the easy reach of the poor and the disadvantaged section of the community. This court has always shown the greatest concern and anxiety for the welfare of the large masses of people in the county who are living a life of want and destitution, misery and suffering and has become a symbol of the hopes and aspirations of millions of people in the country.

In none of these cases, which have given a broader interpretation of Article 21, by looking to its intent and purpose can it be said that the court was legislating. The court was merely adopting certain principles and applying the same within the framework of the law. The change came with the change of outlook of the psychology of the citizen – who no longer considers himself to be a subject in a dependency by a free citizen in a democracy entitled to all the rights given to him by the constitution and the relation by the courts that the constitution commands them also to so interpret the law as to advance the ideals enshrined in the constitution. The judiciary has, thus, been rendering judgments, which are in tune and temper with the legislative intent while keeping pace with time.

Also new contents are being provided to criminal justice resulting in prison reforms and humanitarian treatment to the prisoners and the undertrials. The doctrine of equality has been employed to provide equal pay for equal work. Ecology, public health and environment are receiving attention at the hands of the courts. Exploitation of children, women and labor is
receiving the concern in deserves. Executive is being made more and more to realize its responsibilities. All this is a part of judicial creativity.

Liberalization of the concept of locus standi, to make access to the court easy is also an example of the changing attitude of the courts. Previously, a person whose rights were taken away or who was adversely affected alone had the right to knock at the doors of the courts. However, over the past few years the concept of access to justice has undergone radical transformations and with the emergence of a welfare state, a movement towards recognizing in an every increasing measure the social and economic rights which are necessary to make effective civil rights is in the process of development and this process has given rise to the acceptance of what has come to be known as “Public Interest Litigation”. If a person on account of poverty, illiteracy, incapacity or other like factors is unable to seek redress, the existence of his rights would be meaningless. To see that their rights become effective, there may be a public body interested in securing justice to such people and courts have permitted such a public body or a public spirited person to raise the issue in a court under the “Public Interest Litigation”, which is a new method accepted by the courts for compelling the government to do its duty under the law so as to make available to the citizens their rights guaranteed under the constitution. It is in this manner that the promises which are there in the constitution are being translated into reality, within the limits of the law, by the judiciary by indulging in “Creativity”.

A very authoritative exposition of law with regard to locus standi in “public interest litigation” came to be propounded by the Supreme Court in S.P. Gupta and Others v. Union of India28 popularly known as the Judges transfer case”. The Supreme Court noticed the evolutionary aspect of the rule of locus standi and the various stages through which it had passed. It advocated a broader approach to be adopted for the rule of locus standi.
.. to utilize the initiative and zeal of public-minded persons-to move the courts to act for a general or group interest, even though they may not be directly injured in their own rights. Upholding the locus standi of the petitioners, the judges agreed with unanimity that the courts were no longer bound by the rigid rule of locus standi where the question involved is injury to public interest. It would be profitable in this connection to notice the following observations of the Supreme Court from that case.

... We would, therefore, hold that any member of the public having sufficient interest could maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objective law.

While making a strong plea for broad basing concept of locus standi, Mr. Justice Bhagwati warned that if no one can have a standing to maintain an action for judicial redress in respect of public wrong or public injury, not only will the cause of justice suffer by the people not having any judicial remedy to redress such public wrong or public injury, may turn to the streets and in that process, the rule of law will be seriously impaired. He, therefore, advocated that it was absolutely essential that the rule of law must wean the people away from the lawless street and bring them to the court of law.

"Public Interest Litigation " has thus come to be accepted as a new method, which to some extent can redress public injuries or the government or its instrumentalities compelled to their own duty in the interest of the citizen. Public interest litigation, of course, has many limitations, the
primary one being the availability of financial resources to encourage public
interest litigation for the benefit of the people at large. Wherefrom and how the
finance has to come, needs to be properly spelt out, so that public interest
litigation does not suffer a set back for lack of resources. The Supreme Court
has in a large number of cases interfered at the asking of public-spirited citizen,
not directly aggrieved, as in S.P. Gupta’s case or even at the asking of a
prisoner as in Sunil Batra’s case 29. Relief was granted to the inmates of Agra
Protective Home 16 on being moved by Dr. Upender Baxi. Again relief was
granted to the workmen at the request of people’s Union for Democratic Rights
so that they could get at least the minimum wages and work with dignity in the
Asiad Workers’s 30 case. Again Mr. Justice Pathak, as His Lordship (the Chief
Justice) then was, concurred with Mr. Justice Bhagwati in overruling the
preliminary objection of non-maintainability of a petition moved under the
public interest litigation in Bandhua Mukte Morcha’s case 18 by holding that
the doctrine of locus standi has been enlarged in this country to provide
reasonably possible access to justice to a large sections of the public for whom
so far it had only been a dream. Relief was, thus, given to be bounded labor.
The court found that the State Governments were under an obligation not only
to ensure release of the Bonded Labor. But also to rehabilitate them under the
Bonded Labor System Abolition Act 1976. The court directed the Govt. of
Haryana to draw up a scheme or program for a better and more meaningful
rehabilitation of the freed laborers. The court voiced its concern at the denial of
minimum wages and even the basic facility of pure drinking water to
workmen. In another case, of the Pavement Dwellers of Bombay Olga Tellis
V. Bombay Municipal Corporation 31 the court held that the right to life
guaranteed by Article 21 includes the right to livelihood and that the eviction
of the pavement dwellers who work for gain in the vicinity would inevitably
lead to the deprivation of the means of their livelihood. The Supreme Court,
however, had to balance the considerations of city planning and environment
as against unplanned development and to resolve the interests of the pavement dwellers and slum dwellers which came into conflict with the interest of pedestrian walking on the Bombay streets and even after holding that their removal would result in deprivation of livelihood gave no relief as such to them. Thus, let alone “Creativity” even “activism” has its limitations. In the cases where public interest litigation was allowed its play, the beneficiaries were persons who because of their poverty or other handicaps could not approach the courts and if the court had not interfered through the public interest litigation moved by persons or bodies not directly aggrieved, they would have never got what was their legitimate due under the constitution and the law and was being denied to them by those who were under a legal or statutory obligation to provide the same to them.

The High Court of Jammu & Kashmir has also interfered in public interest litigation where the interests of such sections of the society were involved who could not for reasons for poverty or otherwise, individually or even collectively, approach the court. In Viklang Chatras Trust’s 32 case, on a petition moved by a public spirited body who brought it to the notice of the court that the stipend which has been fixed for the handicapped children under a scheme formulated by the State Government had not been paid for years and they were on that account suffering, the court by a writ of mandamus, commanded the State Government to pay the arrears within a specified time. The State responded the huge arrears amount to lacks of rupees which had accumulated over the years were released for the benefit of the handicapped children not only of District Akhnoor, from where the petition had been received, but of all the handicapped children throughout the state.

The court had an occasion to issue certain directions to the State Government when it was brought to its notice that because of their inability to get the “movement passes” from the District Magistrates during the curfew imposed in Jammu and Srinagar, because of certain disturbances, the “ailing
infirm and sick” were facing great hardship for going to the hospitals or seeking medical aid, on writ petitions filed by Shri. Bhim Singh and Mirwaz Moulvi Farooq. Being of the view that the right to life as guaranteed by Article 21 of the constitution would be illusory and ineffective unless the right to receive medical aid was made available to those who were in need of it. The court directed the State Government that facilities to provide medical aid to reach the hospitals or the dispensaries etc. as the case may be, with an attendant in relaxation of the curfew rules. The court directed the State Government that they should broadcast through radio as also through the public announcement system that any person in need of medical aid could telephone the police control room or the nearest police station and that ambulance facility would be provided to him and in case where telephone facility was not readily available, it was directed that any constable or police officer on beat duty could be informed by the needy and it was his duty then to communicate to the control room through telephone or wireless. The order was made applicable through another order to all such areas where “Curfew” may be imposed or be in force throughout the State. The court had, thus acted at the behest of “public spirited persons’ to provide relief to all such citizens who were in the need of medical aid when none of them had actually moved the court for the redressal of his own grievances. Thus, the court in the process was instrumental in making the state aware of its statutory obligations to provide for the health care of the citizens which very often recedes in the background in times of crisis when the law and order breaks down and the guardians of law while trying to secure the larger interest of restoring normalcy at times forget that they owe duty to the ailing also which cannot be ignored.

The cross-roads which came into being with reference to the limits of the powers of these two important segments or organs of the government viz. the Legislature and the Executive on the one hand and the Judiciary on the other, continues on. A way out to balance them by a demarcating line is essentially to
be evolved and will get evolved in the course of time as progressive
developments are taking place in this sphere, which is the subject matter of the
next chapter.