PART - II
ANALYTICAL APPRECIATION OF THE JUDICIAL ACTIVISM

An analytical approach to the study of the origin and development of the concept of judicial activism would reveal that there is an innate relationship between the rights enumerated in Part III and the directives contained in part IV of Indian Constitution and it is all the more so when the Government is wedded to the achievement of a welfare state. Though it is difficult to define in precise terms the term "Judicial activism" Yet is possible to perceive its concept through the flowing façade in the interpretational approach on the part of judiciary and therefore, its origin has to be traced since the inception of the constitution itself. Indeed, true to the aforesaid statement. Dr. G.B. Reddy, a doyen in the constitutional studies, in his book "Judicial activism in India" frankly concedes with the aforesaid view that precise definition of the concept with the aforesaid view that a precise definition of the concept of "Judicial activism" is to be understood in contradistinction with the term "Judicial restraint". Therefore, it is to be concluded that whenever a progressive approach is perceptible on the part of the judiciary, such a situation would partake a characteristics of judicial activism. And needless to say that judicial review has been the seminal source for this concept of judicial activism in India. And as aforesaid such progressive approach on the part of the judiciary is clearly perceptible in the role of judiciary right from the inception.

The formative period for this concept getting evolved is to be found when there were dissident overtones amongst the fraternity of judges of the superior courts, one inclining to be cautious to travel beyond the language of law and the other trying to keep pace with the constitutional goals undermining the rights of the citizens in the larger interests of society and thus social well being. Though Art.37 of the Constitution contained in part IV thereof contains a bar on the enforceability of the directives through judicial process, yet, to quote jurist H.M. Seervai, it was fundamental importance of these principles which aimed at
the achievement envisioned in the Preamble of the constitution to quote the learned jurist.

"Art. 37 confers no enforceable rights on any person and imposes no obligations on the "State" as widely defined Art.12. The words "Fundamental in the governance of the country' describe in rhetorical languages, hopes, ideals and goals rather than the actual reality of government. The principal object in enacting the directive principles appears to have been so to set standards of achievement before the legislature and the executive the local and other authorities by which their success or failure could be judged. It was also hoped that those failing to implement to the directives might receive a rude awakening at the polls"²

This sum up the nature of the principles contained in Part IV of the constitution, and though there are no legal rights following from these principles or vesting therefore in the citizens, yet there is an obligation, ethical and moral, upon these governing the country to translate the same in reality and abide by them. Realizing importance of these principles the apex court embarked upon to accord the correct position to these principles with the result irreconcilable conflict emerged between the fundamental rights of the citizens and the directive principles and this marks the beginning for formative background for the Judicial activism to emerge. The framers of the constitution were aware of the normality and magnitude of task in case the Govt. was to roll the directive principles into justifiable rights because at the material time at least they seemed utopian ones and therefore, Art.37 per abundant precautions was given place in Part IV of the constitution, but then Justice-social, economic and political was the pathway along with which the Government has to travel and therefore the need and necessity of these principles being retained. The Government’s apathy towards moving or marching in the direction of enacting law for giving effect to these principles and in any case the slow progress in this direction pushed the task of fulfilling these

42
directives upon the Judiciary. It has to perform the role of a ropewalker or an instrument for balancing the interests of the citizens individually and larger public interests. The anxiety is apparent when the court voiced view that in the case of conflict between the directive principles and fundamental rights, it is the former, which must prevail, subordinating the character of fundamental rights. An example of this is to be found in Madras V/s. Champakam Dorairajan in which a note was taken of the need to take into consideration the directive principles as well in the words of S.R. Das J:

The directive principles, which by Art.37 are expressly made unenforceable by a court, cannot override the provisions of Part III, which not with-standing other provisions are expressly made enforceable by appropriate writs, order and directions under Art. 32. The chapter of Fundamental Rights is sacrosanct and not liable to be bridged by any legislative or Executive Act or order except to the extent provided in the appropriate article in Part III. The directive principles have to confirm to and run subsidiary to the chapter on Fundamental Rights. (Emphasis Supplied).

It is to be remembered that this way the earliest case after the commencement of the constitution and the court was interpreting Art.29(2) which finds place in Part III of the constitution. The order of the Govt. reserving seats for admission into Medical colleges on communal lines stood challenged on the ground of its being violative of Art. 29 (2). It was attempted to be justified on the ground that it seeks to implement the directive principle contained in Art.46 which relates to the promotion of educational and economic interests of Schedule Castes, Scheduled Tribes and other weaker sections of the society. Though the decision is in the traditional vein of according primacy to the fundamental rights, yet a note of the directive principles and its place in the scheme of the constitution was taken of, which paved way for further development. The very same judge as Chief Justice of India, though maintaining the very same stance of according primacy to
fundamental rights over directive principles speaks of harmonizing these two sets – which is apparent in the following passage from Hanif Qureshi’s⁴ case.

"Art. 13(2) expressly says that the State shall not make any law which takes away or abridges the rights conferred by Part III our constitution. The directive principles cannot override this categorical restriction imposed on the legislative power of the state.

A harmonious interpretation must be placed upon the constitution and so interpreted it means that the state should certainly implement the directive principles but it must do so in such a way as not to take away or abridge fundamental rights.

(Emphasis Supplied)

From the italicized sentences, it is apparent that even the judiciary was of the opinion that the directives ought to be implemented, but at the same time not in contravention of the fundamental rights of the citizens. For its own part, it would harmonize the situation in a manner suiting to the facts.

In Chandra Bhavan V/s. State of Mysore⁵ Hegde went a step further to highlight the nature of the directive principles to quote "

"The provisions of constitution are not erected as the barriers to progress. They provide a plan for orderly progress towards the social order contemplated by the preamble of the constitution. They do not permit any kind of slavery, social, economic or political. It is a fallacy to think that under our constitution there are only rights and no duties. While rights conferred under Part III are fundamental, the directives given under Part IV are fundamental in the governance of the country. We see no conflict on the whole between the provisions contained in Part III and Part IV. They are complementary and supplementary to each other.

The mandate of the constitution is to build a welfare society in which justice, social, economic and political shall inform all institutions of our
national life. The hopes and aspirations aroused by the constitution will be belied if the minimum needs of the lowest of our Citizen are not met.

(Emphasis supplied)

Though the above views are ex-facie laudable but as far as the provisions of Art.37 are concerned, they must pale into insignificance. But in no uncertain terms, this has given impetus to uphold the fundamental rights of the citizen in constitution with the connected directive principles and helped a lot to expand the scope of various articles of the constitution attuning to the policies of the State and in this sense of the matter is an essential and inseparable facet of the judicial activism on its onward march. To the humble logic of the researcher, one can equally and vehemently contend that this defies the plain language of Art.37 and is dehors the earlier cases on the subject such as Champakam Dorairajan, Kerala Education Bill and Hanif Qureshi. Art.39 with its sub-clauses visualizes the picture of the social order our Constitution has in its contemplation. It is submitted that a better course could have been to cast the Article 37 in a different language with reference financial viability of the state to implement on which score could satisfy the court as to its inability or willingness within certain specific period, but having had the realization well before hand that it may not be possible to achieve the said ideals in the manner the courts would desire, the Legislature has, it appears, intentionally put them beyond the pale of justifiability. The mandate contained in Art.37 is addressed to the state as it is very much clear from the phraseology’ and it shall be the duty of the State to apply principles in making laws. Nothing prevented the Legislatures from enacting law for giving effect to these principles during the period from inception of the constitution. The reasons for the inaction and or failure on their part are inscrutable. It has been held that the Judiciary Is a part of the state and indeed it is so understood in the federal constitutions all over the world. In the Indian context, it is firmly established that the Judiciary is the “State” within the meaning of Art.12 of the constitution. In
Premchand Garg V/s. Excise Commissioner it is held that the supreme court Is “state” within the meaning of Art.12. So also in N.M. Mirajkar V/s. State of Maharashtra and also in A.R. Antulay V/s. R.S. Nayak. If it is so then what is wrong even if Judiciary undertakes to honor the mandate in respect of directive principles by formulating law of its own for purposes of implementing the said directives. Hidayatullah J in the Mirajkar’s case, consistent with this line of reasoning, came to conclude that Judiciary is bound to apply the Directive Principles in making its judgment. And indeed this approach has found with the superior courts and thus directive principles are accorded their proper place in conjunction with fundamental rights.

The Judiciary continuously adopts this line of thinking. In State of Karnataka V/s. Rangnath Reddy V.R. Krishna Iyer J propounded the thesis that “the dialectics of social justice should not be missed if the synthesis of part III and Part IV is to influence sate action and court pronouncements. The Judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension in his complex duties. In Randhir Singh V/s. Union of India O Chinappa Reddy J, read the directive principle of equal pay for equal work into Art. 14 of the constitution, which enjoins the state not to deny any person equality before law and equal protection of law. In Surendra Singh V/s. Engineer-in Chief, CPWD the Judge observed as follows.

“We are not a little surprised that such an argument should be advanced on behalf of the central Government, 36 years after passing of the constitution and 11 years after the Forty Second Amendment, Proclaiming India as a Socialist republic. The Central Government like all organs of the state is committed to the directive Principles of State Policy and Article 39 enshrined the principle of equal pay for equal work. In Randhir Singh V/s. union of India this court had occasion to explain the observations in Kishori Mohan Lal Bakshi V/s Union of India this court had occasion to explain the observations in Kishori Mohan Lal Bakshi V/s. Union of India and to point out how the principle of equal pay to equal work is not
an abstract doctrine and how it is vital and vigorous doctrine accepted throughout the world, particularly by all social countries.

The above passage clearly castigates the dictionary attitude on the part of the legislature and executive well over 36 years is not any progress in the direction of making laws intended to effectuate the directive principles and the endeavor on the part of the Judiciary to be actively alive to the importance of directive principles of state policy is it’s the course of judicial review.

Thus in judicial review itself one finds the mainspring of the judicial activism.

A bird’s eye-view of the expanding horizons of Art.12 of the constitution shows that the Supreme Court has, pondering upon the definition of the expression “State” occurring in Art. 12, widening the scope of judicial review in relation to the acts of the various entities. The expression state and instrumentalities of state, and authorities have received wide meanings so as to include the state, its various departments, corporations, but entities recipient of government grants. On the test of “deep and pervasive control” of the state over the functioning of these entities, the status of such entities is now being tested so as to bring them within the inclusive part of the definition. Indeed it is to be justified, as the very nature of the said definition is inclusive. To quote a few cases : In Electricity Board of Rajasthan V/s. Mohan lal the court held that the Board falls within the definition of the “State”. During the subsequent period, the Universities, Boards Public Officers, Municipalities, Cantonment Boards, Ports, Dockyards, Management’s of the Education Institutions receiving of grants and acting according to the rules of regulations framed under the educational Acts all are brought under the concept of the state for purpose of Judicial review of their actions and this is nothing but an aspect of the judicial activism.
Judicial activism grew out of the realization that the narrow construction of constitutional provisions such as article 21 in A. K. Gopalan V. State of Madras \(^{12}\) was contradictory to its liberal stance in the Kesavananda case. \(^{13}\) If Court had envisioned a more positive role for itself in Indian democracy through the basic structure doctrine, it could no longer continue to adopt a positivist role while interpreting other provisions of the Constitution. Although the Indian judiciary by and large was considered to be impartial and principled, its jurisprudence had been essentially of the property owners, princes, political leaders, and at the most the civil servants. The political opposition also had not much confidence in the Court’s jurisprudence. From Gopalan to Shiv kant Shukla, the dissenters had not received its sympathetic consideration. The legal positivism of the Court had helped the political establishment against dissenters and the property owners against legislation seeking to change property relations. The common man had no stakes in the survival of the Court and the judicial review. He looked on it as a luxury that only the rich could afford. Further, the Court must have realized from its experience during the 1975 emergency that in democracy, high public esteems alone would enable it to withstand the intolerance of a hegemonic executive.

During the emergency the Court could not stand up against the executive on its own. For the common people the Court was an elitist institution that supported the political establishment. Its fight with parliament on the right to property appeared to them to be a mock fight between an elitist court and a majoritarian legislature. A court is after all a weak institution. Jefferson said that a court was the weakest organ of the government because it had control neither over the sword nor over the purse. It becomes strong only when it identifies itself with the disadvantaged minorities and is seen by them as an independent institution and a bulwark against oppression and tyranny. A court must appear to the people to be their protector. It must not only be but must appear to be impartial and principled and capable to achieving results.
Article 21 and Judicial Activism

Article 21 of the Constitution was bound to be the first on the Court’s agenda because its restrictive interpretation in Gopalan and its total demise in Shukla had made the important fundamental right to life and liberty entirely dependent on the sweet will of the parliamentary majority. We saw in Chapter II that the Constituent Assembly had purposely rejected the expression ‘due process of law’, which had been the source of judicial activism in the United States, and had adopted a more specific expression, ‘procedure established by law.’ The Supreme Court of India had interpreted those words very narrowly in Gopalan.

Article 21 of the Constitution says that ‘no person shall be deprived of his life or personal liberty except according to procedure established by law’. In Gopalan, the Supreme Court held that the words ‘personal liberty’ meant only freedom from arbitrary arrest and the words ‘procedure established by law’ meant procedure prescribed by any statute. Article 19, which guaranteed seven fundamental rights, included the right to move freely within the territory of India. The State can impose reasonable restrictions upon that right ‘in the interest of the general public or for the protection of the interests of the Scheduled Tribes.’ It was argued that where a person was detained under a law of preventive detention, his right to move within the territory of India guaranteed by article 19(1) (d) was also restricted and therefore the State should prove that the law of preventive detention was a reasonable restriction upon such freedom in the interests of the general public as was required by article 19(5). The Court, however, held (justice Fazl Ali dissenting) that the rights under article 19 were available only to a person who was free. If a person was arrested not for making a speech, holding an assembly, forming an association, or entering a territory, is arrest had to be according to law and the validity of such arrest or detention could be examined only with reference to his right to personal liberty guaranteed by article 21 and not with reference to any of the rights guaranteed by article 19. The Court made a
distinction between direct restrictions on any of the seven rights guaranteed by article 19 and indirect restrictions on those rights consequent upon his detention. Detention for preventing a person from exercising any of the freedoms guaranteed by article 19(1) was a direct restriction on that freedom but then detention for preventing him from causing breach of public order or subverting the security of the State caused indirect restriction on such freedom. For example, if a person is detained because he was held guilty of theft or murder, the law authorizing his detention (Indian Penal Code) need not be examined from the standpoint of article 19, but if he is detained for committing sedition or obscenity, his detention will have to be valid under article 19 also. In the first case, restriction on the freedoms guaranteed by article 19 is the consequence of the denial of liberty but in the second case, denial of freedoms is the reason for the denial of liberty.

The Court held that articles 19 and 21 had to be read as mutually exclusive. A similar rule of interpretation prevailed in the case of the right to property guaranteed by article 31 and the right to acquire, hold and dispose of property given by article 19(1) (f). Article 31 said that no one shall be deprived of his property except by authority of law and article 19(1) (f) guaranteed the right to acquire, hold, and dispose of property. The latter right was subject to the State’s power to impose reasonable restrictions in the interest of the general public or for the protection of the interests of Scheduled Tribes. The Court had held that where a person was deprived of his property, the right to acquire, hold, and dispose of property was not attracted because that right belonged only to a person who had property. Total deprivation would be governed only by article 31, whereas restriction on acquiring, holding and disposing of property were governed by article 19. The right to hold and dispose of property was available only to a person who had property. If his property was taken away, he could invoke only article 31; if he had property but its use was restricted, he could invoke article 19. Since the Court had held that ‘deprivation’ would attract the liability to pay compensation, it thought that the protection of article 19 was not necessary. But
when the Constitution was amended in 1955 to restrict the liability to pay
compensation only to cases of acquisition of property by the State and to provide
that the Court would not determine the adequacy of compensation, the Court fell
back upon article 19 to lend greater protection to the right to property. In K. K.
Kochuni V. State of Madras and Kerala, 17 it held that where a person was
deprived of his property either by acquisition of property by the State or otherwise,
the law that authorized such acquisition or deprivation must be a reasonable
restriction on the right to hold property given by article 19(1) (f). Incidentally,
article 19(1) (f) was deleted by section 2 of the Constitution (Forty-Fourth

The above interpretation of the relationship between articles 31 and
19(1) (f) of the Constitution was not extended to the relationship between articles
21 and 19(1) (d). In case of personal liberty and the freedoms guaranteed by article
19, the view held in Gopalan continued or operate. In Kharak Singh V. U.P., 18 the
Supreme Court gave wider meaning to the words ‘personal liberty’ so as to
include within its fold the right to privacy. The majority justices held that the
words ‘personal liberty’ in article 21 could not be confined to its negative meaning
as being mere protection from arbitrary arrest but extended to include all aspects
of liberty other than those covered by article 19. It was on the question of
exclusion of freedoms guaranteed by article 19 from the scope of ‘personal
liberty’ that the minority judges disagreed. In another case, 19 Chief Justice Subba
Rao held that the right to personal liberty included the right to go abroad and held
that certain provisions of the Passport Act were unconstitutional and void. The
objection of the Court was to the nonexistence of a law and the procedure for
regulating the grant or denial of passports. The Court said that to go abroad was a
fundamental right as being part of personal liberty and it could be restricted or
regulated by a law. It was in response to this decision that Parliament enacted the
Passport Act, 1967 laying down who can obtain a passport and when it can be
refused and the procedure for applying for a passport.
A major breakthrough came in Maneka Gandhi V. Union of India.\textsuperscript{20} In that case, the passport of Mrs Maneka Gandhi had been impounded and she challenged the validity on the ground that action violated her personal liberty. No hearing had been given to her as to why her passport should not be impounded. The Supreme Court not only gave wider meaning to the words ‘personal liberty’ but also brought in the concept of procedural due process under the words ‘procedure established by law.’ While giving wider meaning to the words ‘personal liberty’ the Court held that the earlier view that ‘personal liberty’ included all attributes of liberty except those mentioned in article 19 stood rejected. Where a law restricted personal liberty, a court would also examine whether such restriction on personal liberty also imposed restrictions on any of the rights given by article 19. The Court held that the right to go abroad was part of ‘personal liberty’. ‘Personal liberty’ included ‘a variety or rights which go to constitute the personal liberty of man.’\textsuperscript{21} in addition to those mentioned in Art-19.

The Court held that impounding of her passport without giving her a hearing was not according to procedure established by law. The procedure that a law must provide must be a just and fair procedure. The rules of natural justice, which is a term used for a fair hearing, are the essential requisites of fair procedure. These rules are : (1) that no one should be a judge in his own cause and (2) that no one should be condemned unheard. The person who decides must be an unbiased person, he should give a clear notice of what he intends to do, and he must give a reasonable opportunity to the person against whom he intends to act to present his defense as to why such an action should not be taken. The words ‘procedure established by law’ must include such procedure. In the present case, the Court was called upon to decide whether Mrs Maneka Gandhi was entitled to a hearing before her passport was impounded. The Court conceded that in some situations where urgent action was needed a prior hearing might not be feasible. In such exceptional situations if a prior hearing was not given, the authorities must give a post-decisional hearing. On the assurance of the learned Attorney General
that a post-decisional hearing would be given soon, the majority, barring justice Beg, held that the government’s action need not be struck down. Justice Beg held that the government’s action need not be struck down. Justice Beg held that the government’s action was unconstitutional and void.

In Maneka Gandhi, the Court clearly overruled Gopalan on the following issues: (1) The law authorizing deprivation of personal liberty would have to be valid not only under article 21 but also under article 19(1)(d); (2) The words ‘life’ and ‘personal liberty’ had wider meanings that would be discovered from time to time; they were open-textured expressions; (3) The words ‘procedure established by law’ meant not the procedure prescribed by law but procedures considered to be just and fair in civilized countries.

The most significant aspect of Maneka Gandhi was that the Court laid down a seminal principle of constitutional interpretation. There cannot be a mere textual construction of the words of the Constitution. Those words are pregnant with meanings that unfold when situations arise. For example, the Constitution mentions the right to freedom of speech and expression but does not mention the right to freedom of the press. The Supreme Court has, however, held that the right to freedom of speech includes the right to freedom of the press.\textsuperscript{22} The Court held that the right to freedom of speech includes the right to receive information also.\textsuperscript{23}

The constitutional expressions are open-textured and it is for the review court to develop newer nuances in the context of emerging situations. The Court would read the Constitution not merely as a statute but as an organic law of the nation. In Francis Coralie Mullin V. Administrator Union Territory of Delhi, Justice Bhagwati said.\textsuperscript{24}

This principle of interpretation which requires that a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilised
but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to a fundamental right enacted by the Constitution.

The word 'life' in article 21 had almost remained neglected till then. In Francis Coralie Mullin, Justice Bhagwati said.25

The fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

**SCOPE AND EXTENT OF HUMAN RIGHTS IN THE CONTEXT OF ARTICLE 21**

The right to life became a canvas for various other human rights such as right to privacy,26 right to development,27 right to gender justice,28 right to fresh water or air,29 right to protection against environmental degradation,30 and right to food and clothing.31 It also includes the right to shelter,32 right to health,33 and right to education.34 While the Court's creativity is laudable, the question that arises is about the practicability of such discourses. Bijaylaxmi Tripati V. Managing Committee W. W. Hostel35 decided by the Orissa High Court, shows how activism of the Supreme Court can be misunderstood at the lower levels. A hostel for workingwomen was managed by a society registered under the Societies Registration Act. The petitioners were inmates of the hostel for three years. The hostel authorities found that those women did not comply with the disciplinary conditions of the hostel and therefore asked them to leave. The petitioners approached the High Court saying that their right to livelihood, which was part of their right to live with dignity, had been violated.

The petition ought to have been rejected on the ground that the respondents were a society and not covered by the word 'State' in article 12 against which the fundamental rights could be invoked. Further, there could not be
any fundamental right to live in a hostel. The hostel was a facility for working women but it could never be considered to be a concomitant of the right to livelihood. It would also be questionable whether the right to live guarantee by article 21 could be stretched to comprehend the right to livelihood. It is doubtless the moral duty of the State to see that everyone gets enough for his livelihood. But I can become an enforceable fundamental right only when the state of the economy is such as to sustain the financial burden. The majority, however, upheld the claim of the petitioners that they had the right to live in the hostel because their livelihood depended upon their living in the hostel. It was held by the majority that even though the Mahila Samiti was a private society registered under the Societies Registration Act, since it undertook to provide housing to working women, and such an obligation was of public nature, it was amenable to the writ jurisdiction of the Court. Justice K. C. Jagadeb Roy dissented and held that article 21 was total inapplicable. Both the majority and the minority justices agreed in upholding the action of the mahila samiti on merit because according to the majority the right had been denied according to procedure established by law and according to the minority there was no right at all. To hold that one’s fundamental right to life included the right to live in a hostel was a travesty of the fundamental right.

Judicial process is essentially efficient in preventing encroachments on rights or liberties. But can it create new rights that require positive action in terms of allocation of resources? It is doubtless true that every person should be entitled to fresh water or should be able to breathe fresh air. But where water is so highly polluted and most of the cities of India are suffering from air pollution, can a normative judicial declaration that those rights are part of the guaranteed fundamental right help in mitigating the suffering of the people who are in fact denied those rights? It is submitted that the judicial process is suited essentially for the enforcement of first generation human rights, which consisted of don’ts against the government. If a person is illegally arrested, a court can set him free by issuing a writ of habeas corpus. If a person’s property is taken without the authority of
law, a court can order prohibition of such an act. But can a court by its order provide fresh potable water or fresh air? Can a court by its order say that everyone must have a shelter? When a Court tries to do so, it has to enter into contradictions.

In Olga Tellis V. Bombay Municipal Corporation,\textsuperscript{36} the Court admitted at the abstract level that everyone had the right to shelter as part of his right to live. But the Court was faced with persons who were living on footpaths and had to be removed in order to clear the footpaths for pedestrians. Therefore, the Court said that the Bombay Municipal Corporation could evict them by issuing a notice and following the procedure laid down under the Bombay Municipal Corporation Act. So the right shelter, as a fundamental right, turned out to be a platitude when it could be dispensed with by the corporation after following the proper procedure. In Mohini Jain V. Karnataka,\textsuperscript{37} the Supreme Court held that right to education was included within right to life. The Court, realising the impracticability of such a proposition, tried to narrow down the dictum in Unni Krishnan V. A. P.,\textsuperscript{38} where it said that the right to live included the right to primary education. Here again, we find that the Court has verged on populism. The Constitution in one of the directive principles of state policy specifically enjoins on the State to provide within a period of ten years free and compulsory primary education for all children below the age of fourteen years.\textsuperscript{39} It is not for the Court to convert a directive principle of state policy into a fundamental right. Moreover, even if it does so, it will merely amount to conversion of a non-enforceable directive principle into a non-enforceable fundamental right. Where the literacy rate has been around fifty percent, to say that all Indian people have a fundamental right to primary education is an exercise in romanticism. These are second generation human rights, which consist of social and economic rights of a positive nature and have to be backed up by political action. The rights such as right to education or right to livelihood can be a reality only when the State allocates resources for providing education or jobs to people. This will depend
upon the economic polices that the State pursues. Justice P. B. Swant Speaking in Delhi Development Horticulture Employee’s’ Union V. Delhi Administration observed. 40

This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it and not because it considers it any the less fundamental to life. Advisedly, therefore, it has been placed in the chapter on Directive Principles.

After the Universal Declaration of Human Rights, which for the first time included social and economic rights (articles 22 to 28), efforts were made to translate them into enforceable rights. Two separate covenants, the International Covenant on Civil and Political Rights (ICCPR), were adopted by 1966. It took such a long time because the world community was divided on the priority to be given to either. The Western countries felt that the first generation human rights, which were civil liberties, ought to be guaranteed first but the Communist and Socialist countries insisted that without social and economic rights, the civil liberties were mere platitudes. The western countries on the other hand feared that the guarantees of social and economic rights legitimize State intervention in social and economic spheres to the extent of bringing in totalitarianism. Ultimately it was decided to divide the rights into legal rights and program rights. The legal rights were those that had already been incorporated in the constitutions of various countries and that could be enforced by courts. The program rights were those that needed to be translated into reality by the respective states. The makers of the Indian Constitution seem to have visualized such an arrangement when they provided for enforceable rights under the heading ‘Fundamental Rights’ and the program rights under the heading ‘Directive Principles of State Policy.’ The Constitution specifically states that the directive principles, though not enforceable by courts, would nevertheless be fundamental in the governance of the country. 41
It could be said that mere judicial declaration of such rights creates and illusion in the minds of the people that those rights are already in existence—that might diminish their will to fight for them through political action. The government too is happy that the judiciary is doing everything for it and it does not have to do anything. Such a negative fallout may, however, be partly mitigated by the desire for those rights that judicial declaration may create and the political action for securing them that may be propelled by that desire. The relationship between judicial activism and political action is quite complex. Political action may use judicial intervention for legitimizing its claims and judicial discourse may spur political action for securing certain claims. Each one catalyses and also complements the other.

Judicial Activism And Right to Personal Liberty

The word ‘personal liberty’ acquired a new dimension where prisoners’ rights were debated. Are prisoners entitled to any rights? Are they denuded of all the fundamental rights? Earlier, the Court had held that a prisoner did not lose his right to freedom of speech during his incarceration. In Charles Sobraj and Sunil Batra, it was held that a prisoner was not denuded of his fundamental rights such as right to equality or right to life or personal liberty beyond what had been taken away by the nature of the imprisonment itself. The Court held that even a prisoner was entitled to be treated according to the prison rules and even the prison rules could not be violative of his fundamental rights such as right to equality or right to life or personal liberty. A prisoner certainly could not be subjected to inhuman torture during his imprisonment. He was also entitled to other rights such as freedom of relation. The exercise of the fundamental rights would of course be restricted in so far as he is under detention. For example, he will not be able to attend a meeting or address a meeting because detention itself inhibits his movements out of the prison except on parole.

The right to personal liberty has also included various women’s rights such as the right not to be asked information about menstrual cycles or pregnancies on
applications for jobs in the public sector, the right to the sanctity of her body (rape was held to be not only an offence under criminal law but an onslaught on personal liberty), and presumption of chastity and the right not to subject a child to paternity test unless prima facie case of no access to the husband of the mother during the period of conception was proved.

PROCEDURE ESTABLISHED BY LAW:

The words ‘procedure established by law’ were also construed liberally to include all those essential aspects of procedure that constitute the due process of law. True, the makers of the Constitution had purposely avoided the use of that expression because they were apprehensive of the import of the substantive due process concept into the Constitution. But procedural due process provides the essentials of the rule of law. In Gopalan, the Court had held that the procedure established by law meant the procedure prescribed by the enacted law. Between the two meanings of the word ‘law’, namely ‘lex’ (enacted law) and ‘jus’ (justice), the Court had chosen the former and rejected the latter. A person’s liberty could be taken away by law and by such procedure as was provided by the law. A court had no power to ask whether the law or the procedure was fair or just. But now the court held that the procedure to be provided by the law must contain the essentials of fair procedure, which meant the principles of natural justice. The word ‘established’ did not mean ‘prescribed’, it meant ‘institutionalized’. Such institutionalization takes place through a long tradition and practice. The Court therefore acquired the power to decide whether proper procedure was prescribed by the legislature and followed by the executive.

The Court held that a person was entitled to a speedy investigation and trial and therefore long detention of a person as an under trail prisoner was violative of the ‘procedure established by law.’ However, in each case the court will decide whether the time taken for investigation could be considered delay. On facts it may be held that it was not delay. Sometimes delay may be caused by the
accused himself. In such a case he will not be allowed to say that because of delay the prosecution should be quashed, because that would amount to helping him to evade the law.\textsuperscript{51}

Although the Constitution says that every arrested person is entitled to consult a lawyer of his choice,\textsuperscript{52} the Court had earlier held that was a mere permissive provision and did not necessarily cast a burden on the State to provide free legal aid.\textsuperscript{49} But after the Forty-Second Amendment inserted a clause enjoining upon the State an obligation to provide free legal aid into the Constitution,\textsuperscript{53} the Court held that provision of free legal aid was an essential aspect of the procedure established by law.\textsuperscript{54} In another case, the Court held that handcuffing of prisoners was violative of the procedure established by law.\textsuperscript{55}

The three expressions in article 21, namely ‘life’, ‘personal liberty’, and ‘procedure established by law’, have thus been construed by the supreme Court in an expansive manner so as to afford to the individual the due process of law as understood in the United States. Although that clause was purposely avoided by the makers of the Constitution, it has been brought into the Constitution through judicial interpretation. The activism of the Supreme court of India was similar to the activism of the US Supreme Court during the 1950s and the 1960s in cases such as Mapp V. Ohio\textsuperscript{56} and Gideon V. Wainwright.\textsuperscript{57} In Mapp, the US Supreme Court had held that evidence collected through illegal searchers could not be admissible as evidence and in Gideon, it held that without legal aid to the accused no conviction in a criminal case could be upheld.

**THE JUDGES CASE:**

In S.P. Gupta V. President of India,\textsuperscript{58} the Court was asked to decide the legality of transfer of judges and also to specify the procedure for the appointment of judges of the High Court and the Supreme Court so as to preserve and strengthen the independence of the judiciary. Since the supersession of the
judges in 1973, the question of judicial appointment was agitating the minds of lawyers, judges, and civil libertarians. Should the government have an ultimate say in the appointment of judges? Should the government have absolute power to transfer High Court judges from one High Court to another? Since the government was the major litigant, it was felt that such power should not vest in the government alone.

The same question came before the Court again in 1993 at the instance of a lawyer’s association and later through a Presidential reference. The Supreme Court entertained this matter on petitions by lawyers without asking which of their rights had been violated. Did the petitioners who were lawyers have a fundamental right that the judges should not be arbitrarily transferred from one High Court to another? Did the citizens have such a right? The independence of the judiciary is doubtless a condition precedent for the existence of the rule of law and every citizen’s life and liberty is secure only when there is rule of law. When the Court entertained this matter and laid down norms for the appointment of judges, it was doing so because those matters pertained to the independence of the judiciary. If the judiciary is not independent, there will be no fundamental rights and there will be no life or liberty or procedure established by law. The Court was thus implying that, an independent judiciary being the essential requisite of the protection of the fundamental rights, judicial review could go into questions of transfer and appointment of the judges. The Court thereby recognized the right to an independent judiciary as a concomitant of the right to honest and efficient governance.

It is submitted that this is a far-fetched view of the connection between independence of the judiciary and enforcement of the fundamental rights. If such a view is to be taken, it could as well be said that democracy is essential for the enforcement of fundamental rights and therefore all questions regarding the democratic process are matters concerning the enforcement of fundamental rights. Such an interpretation totally ignores that the Constitution envisages separation of
powers, and that preservation of democracy is as much the concern of the legislature and the executive as of the judiciary. By the 1993 decision, the Court vested power of appointment of judges in the collegium of judges consisting of the Chief Justice and two senior judges of the Supreme Court. By its opinion given on reference under article 143 of the Constitution, the Court widened the collegium to four senior judges of the Supreme Court instead of two.

What is the guarantee that independence of the judiciary shall remain safe if the final power of appointment of judges is vested in a collegium of judges? we do not know of any democratic country in which he has power of appointing the judges vests in the judiciary itself. The judiciary should be independent but does it have to be completely autonomous in democracy? Should judges not be accountable to someone? Why should the Court arrogate to itself the power to decide how judges should be appointed? Why should Parliament not legislate a constitutional amendment to lay down more objective procedures for appointment of judges? Judicial activism here amounted to judicial expansionism because the Court expanded its own powers. Under the guise of interpretation of the Constitution, can the Supreme Court change the basic structure of the Constitution? The basic structure consists of division of powers and functions between the Parliament, the executive, and the judiciary. The Court claimed a power to itself that the basic structure of the Constitution did not envisage.

The Court seems to have made its forum available for complaints against government lawlessness and allowed a person to complain against government lawlessness and allowed a person to complain against government lawlessness by invoking its jurisdiction. In the above cases, the Court had to construe the constitutional provisions regarding the appointment of judges (articles 124 and 217 of the Constitution) and point out what procedures had to be followed for making such appointments. But in Sri Kumar Pandma Prasad v India, the Court was actually required to cancel an appointment of a person as a judge because he did not possess the qualifications prescribed by the Constitution for
such appointment. In All India Judges Association V. Union of India, the Supreme Court issued directions to the government to create an all-India judicial service so as to bring about uniform conditions of service for members of the subordinate judiciary throughout the country. Was the Court competent to ask the government to set up an all-India judicial service? This was a policy question requiring a constitutional amendment. Should the Court tell Parliament what policy it should adopt? The Court clearly exceeded its authority.
Similarly, when the state governments acted lackadaisically regarding the appointment of district forums in each district as required by the Consumer Protection Act, 1986, Common Cause, a registered social action organization, approached the Court under article 32 and obtained directions asking the state governments to appoint district forums and inform them when they could entrust the work of consumer cases to the existing district judge. The Consumer Protection Act provides for speedier, inexpensive and informal process of adjudication for the redressal of consumer grievances. By traditional legal standards, the government had discretion to set up the district forums. But the Court mandated the state government to set up district forums in each district because having access to a tribunal for grievance redressal was part of the right to efficient and honest governance. By another petition, the Court was asked to set free all under trial prisoners against whom cases has been pending for a long time. The Court gave directions as to which cases should be quashed and how arrears of cases could be reduced. By a subsequent petition, changes in the earlier order were obtained. There has been improvement neither in the appointment of the consumer courts nor in the arrears of cases. If the arrears in the Supreme Court have been reduced, it was because of the used of modern technology and better management skills employed by the two chief justices, Justice Venkatachalliah and Justice Ahmadi.

How could Professor Wadhwa move the Supreme Court under article 32 against the practice of re-promulgation of the ordinances in Bihar? How could lawyers move the Supreme Court to prevent arbitrary transfers of judges and politicization of the appointment of judges? How could Common Cause, a registered society, invite judicial intervention in the arrears of cases in courts? How could Common Cause obtain orders from the Supreme Court to the state governments to appoint consumer district forums in each district? In none of these cases did the Court ask the petitioners the threshold question as to which fundamental right of theirs had been violated. As long as lawlessness was of the
nature of mere non-compliance with the mandatory provisions of the law, it could be taken care of though routine administrative law. But the problems that came to the Court were such as could not have been dealt with under the traditional administrative law. The Court seems to have taken upon itself the function of correcting the systemic malfunctioning. The Court had to go into what is generally known as the area of political questions.

In recent years, the Court has gone to the extent of suggesting how the Central Bureau of Intelligence (CBI) should be structured.\textsuperscript{70} this was also because an independent and efficient CBI was necessary for efficient and honest governance. It may be mentioned that article 8 of the Universal Declaration of Human Rights provides that everyone has the right to an effective remedy by the competent tribunals for acts violating the Fundamental rights granted to him by the Constitution or law.

**Judicial Activism and Right to Equality:**

Another site for judicial activism has been article 14 of the Constitution, which guarantees the right to equality before the law and equal protection of law. Equality before the law does not mean mathematical equality. Human beings as well as objects or causes need to be treated differently and such different treatment does not necessarily result in denial of equality before the law. Children, women, backward classes, and the physically handicapped need to be given different as well as preferential treatment. The poor need to be treated differently from the rich. Equality before the law means that equals should be treated equally but unequal should not be treated equally. Therefore, the doctrine of equality does not prevent the legislature from classifying people for different treatment. Such classification has to be reasonable. The theory of reasonable classification is that you can treat a group of people differently if (1) that groups is distinct from others and (2) the criteria of choosing such a group are rationally
related to the object of the act. It deals with three questions: (1) who are treated differently, (2) why are they treated differently, and (3) what is the different treatment? The theory requires that ‘who’ and ‘why’ should be rationally related to each other. In legal language, they should have the nexus.

In Balaji V. Mysore, Justice Gajendragadkar, as he then was, ignored the nexus formula and held that reservations for weaker sections of society enjoined by article 15(4) of the Constitution should not exceed fifty percent of the total number of seats available for distribution because otherwise the right to equality itself would be eclipsed. Article 15(1) says that the State shall not discriminate on the basis of religion, caste, sex or place of birth. Article 15(4) was added by the Constitution (First Amendment) Act, 1951, which says that nothing in that article or in article 29(2) (which provides that no citizen shall be denied admission to any educational institution maintained by the State or receiving aid out of State funds on the ground of religion, race, caste, language, or any of them) shall prevent the State from making any special provision for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

In this case, the Court was not merely examining the provisions of a statute to decide whether it offended the right to equality. The Court had to construe the two provisions of the Constitution contained in clauses (1) and (4) of article 15 and further examine the proportion of the protective discrimination for backward classes with the overriding right to equality given by article 14. Articles 15 and 16 are species of article 14 and have to be in consonance with that article. Balaji therefore declared that although caste may be one of the factors used for identifying who is backward. It shall not be the sole criterion. This resulted from the reading of classes (1) and (4) of article 15 together. It meant that protective discrimination in favors of the socially and educationally backward classes of people and particularly the Scheduled Castes and the Scheduled Tribes shall onto
be considered discrimination on the ground of caste, even though caste would be one of the factors for identifying who is backward.

Here the Court had to make sure that classification was not made exclusively on any of the grounds forbidden by article 15(1), namely, religion, caste, sex, or place of birth. Further, the Court had to make sure that such special provision for the backward classes did not make the right to equality guaranteed by article 14 (the State shall not deny equality before the law and equal protection of law) nugatory. Here the Court was not satisfied by merely examining whether the criterion of classification, namely social and educational backwardness, was related to the achievement of the objective of advancement of the interests of such backward people, but went into whether so much reservation was not antithetical to the ideal of equality that the Constitution guarantees. The Court did not say that so much reservation was not necessary for achieving the purpose of advancement of the interests of the socially and educationally backward class of people. It said that such protective discrimination must have a proportion to the totality of the opportunities that are available to the people in general. In other words, the Court applied what is known as the proportionality test for deciding whether so much reservation was desirable against the total perspective of the right to equality.

We find that the Court adopted the same approach in Indra Sawney V. India,\(^72\) where it held that reservations should not exceed fifty percent of the total number of posts and that creamy layers among the backward classes should be excluded from reservation. This decision was given in response to a petition made against the order of the V. P. Singh government to reserve twenty-seven percent of posts in government service for backward classes made on the recommendation of the Mandal Commission.
DOCTRINE OF ARBITRARINESS:

In the post-emergency period, the Court seems to have seized a much greater power under a new doctrine called the doctrine of arbitrariness to weed out substantive inequality. In E. P. Royappa V. State of Tamil Nadu, Justice Bhagwati speaking on behalf of himself, Justice Chandrachud, and Justice Krishna Iyer held that an action that was arbitrary was per se violative of equality. While explaining this new doctrine in Ajay Hasia V. Khalid Mujib, Justice Bhagwati said. It was for the first time in E.P. Royappa V. State of Tamil Nadu that this Court laid bare a new dimension of Article 14 and pointed out that article has highly activist magnitude and it embodies a guarantee against arbitrariness. Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within traditional and doctrinaire limits.

Seervai has criticized this new doctrine. He says. No doubt arbitrary actions ordinarily violate equality; but it is simply not true that whatever violates equality must be arbitrary.

Seervai observes that ‘in a liberal democratic Constitution like ours, it would be inappropriate to characterize laws as arbitrary.’

Seervai’s objection that not all acts that violate the right to equality can be called arbitrary is unassailable. We, however, do not agree that in a liberal democratic constitution like ours, it would be inappropriate to characterize laws as arbitrary. The Constitution itself has given power to the courts to decide whether restrictions on any of the rights guaranteed by article 19 are ‘reasonable’. If a court can declare a law an unreasonable restriction on a right guaranteed by article 19, as it did in State of Madras V. V. G. Row, where an arbitrary power to ban an association given to the State was held to be unreasonable, there is no reason why a law cannot be declared to be arbitrary under article 14. The terms ‘unreasonable’ and ‘arbitrary’ have often been used synonymously in law. But certainly, the
doctrine of arbitrariness cannot totally replace the doctrine of reasonable classification because there might be situations in which a law may not be arbitrary and yet may violate the right to equality. The doctrine of arbitrariness will enable the Court to probe into the substantive equality, which may elude it under the doctrine of reasonable classification. In fact, the test suggested by Professor Tripathi, which requires the Court to examine whether the kind of different treatment and the extent of different treatment (the ‘what’ element) are related, would have been a much more reliable test for determining the validity of a legislative or administrative action as against the right to equality. That test in our opinion would have given greater scope for judicial review without making the outcome of the judicial review as unpredictable as it might become under the test of arbitrariness.

The right to equality often raises important questions in relation to three types of inequalities that exist in Indian society. One is social inequality produced by the caste system, the second is gender inequality, which is universal but exists in India with strong roots in religion and tradition, and the third is economic inequality.

SOCIAL INEQUALITY:

Social inequality arising out of the caste system has been attacked through provisions for equality and protective discrimination for backward classes. We have already surveyed some cases decided by the Supreme Court on caste-based discrimination. In general, the Court has been most liberal on the question of compensatory discrimination in favour of the backward classes. In this area it has given unreserved support to the policy of protective discrimination in favour of the backward classes.79 The Court has, however, tried to check populism that is likely to hijack social justice. It has always tried to maintain a balance between protective discrimination and right to equality.80
GENDER EQUALITY:

On gender, the Supreme Court adopted a very formalistic approach in the early cases. In Air India International V. Nargesh Mirza, the Supreme Court upheld a provision of the Air India International's service rule that forbade air hostesses to get married before completing four years of service when no similar prohibition existed for male stewards. The Supreme Court was impressed by the argument advanced on behalf of Air India that such a service condition subserved the cause of population control. The Court did not feel like asking why a similar prohibition would help control the growth of population. The Supreme Court, however, held invalid another service condition contained in those regulations. The regulation required an airhostess to resign her job on becoming pregnant. Here also the population control argument might have appealed to the judges had Air India agreed to the suggestion of their counsel to make such resignation obligatory upon the third pregnancy instead of the first pregnancy.

In Sowmithri Vishu V. India, the Court upheld section 497 of the IPC, which punished adultery. A man defines adultery as an illicit sexual intercourse with a married woman. If a man has illicit relation with an unmarried woman, it does not amount to adultery. Further, only the man is punishable but not the woman with whom such illicit relations exist. In matrimonial law, adultery is a ground of divorce for either of the spouses. The Court saw no inequality on the ground of sex in the above provision though it was clear that the section treated the wife as the property of the man and adultery was essentially an offence against the husband. The validity of the section was challenged on the ground that it was based on woman's subordination and therefore clearly violated the guarantee of equality before the law (article 14) and no discrimination on the ground of sex (article 15(1). The Court rejected that challenge and held that there was no discrimination on the ground of sex. The Court did not ask whether there was discrimination on the ground of gender. Although the Constitution forbids
discrimination on the ground of sex, discrimination on the ground of gender is even worse and a court must strike it down as being against equality. There cannot be reasonable classification on the ground of gender. Classification on the basis of gender is per se unreasonable.

However, we find that a much more liberal view of gender equality was taken by Chief Justice R S. Verma in Visaka v. Rajasthan,83 where it was observed that sexual harassment of a working woman at the work place was contrary to gender equality guaranteed by article 15 and it also offended woman’s right to be gainfully employed guaranteed by article 19 (1) (g).

ECONOMIC INEQUALITY:

Economic inequality was the issue in legislation relating to property relations and although the courts acted legalistically on right to property, there has been no confrontation between the Court and the Parliament on that issue for the last twenty years. In recent years the courts have been activist in respect of right to equality in educational opportunities. Most of the cases pertained to disciplines such as medicine and engineering. These two disciplines offered the best opportunities of earning wealth and social prestige. Since facilities for such education were bound to be limited in view of the large investment required, admissions could be given only to a few. Discrimination in admission was always alleged and those matters went to court. In this area, judicial activism has verged on populism. The courts sometimes ordered the examining bodies to admit students for examination even when they had not completed their terms in an institution recognized by such a body. Once they were admitted to the examination, the results were also ordered to be declared and some people got their degree even though they had not gone through the requisite course of education in the prescribed manner.
The nebulous test of arbitrariness has again enabled the Court to reach some undesirable results. In 1984, the Supreme Court held in Pradeep Jain V. India\textsuperscript{114} that an all-India competitive entrance test must be held for selecting students for admission to super-specialty courses such as neurosurgery in medicine. The Court observed that reservation for local students or students of the institution from which they had passed the graduate examination should be restricted to seventy percent in the case of undergraduate and fifty percent in the case of post-graduate. All other seats must be filled on merit through an entrance test held on an all-India basis. Even after more than a decade since that decision was given, that order of the court has not been implemented because it is grossly impractical. Besides its impracticability, even as a policy, there was nothing commendable in it. Why should such artificial gestures of national integration be imported in matters such as admission to educational institutions? It was a matter of policy that should have been left to the legislature, educational institutions, and the government. The legislature should follow the policy of admission to neighboring colleges. There will doubtless be greater national integration if people are not forced out of heir homes to a distant place. Integration depends on uniform development of all regions of India. This was a case in which, in our opinion, the Court clearly exceeded the limits of judicial review.

In Mohini Jain v. State of Karnataka\textsuperscript{84} the Supreme Court held that right to education was a fundamental right, being part of the right to live. Justice Kuldip Singh went to the extent of saying that it was the duty of the Indian State to provide opportunities for education by opening as many institutions as might be required for satisfying the needs of all those who aspired to acquire education. This would have created an impossible situation.\textsuperscript{85}

In Unni Krishna v. A.P.,\textsuperscript{86} the Supreme Court, realizing the onerous burden that such a norm would impose on the economy, tried to narrow down the scope of its dictum by limiting it to primary education. In that case, the scheme of abolition of capitation fee for admission to professional colleges was challenged.
Admission to professional colleges became difficult because of the rush for admissions and comparatively fewer seats available. Some state governments allowed private educational institutions to start medical and engineering colleges. Such colleges charged higher fees than the government colleges. The Court might have upheld this on the ground that those who went to private colleges had to pay more; how much the government could decide more. This would have doubtless resulted in inequality because the richer students would get more opportunities of education than the poorer students. But then the Court could not help it because such inequality was a mere reflection of the inequality that existed in society. The Court could either ban all the private colleges or allow them to charge higher fees. They would not have survived on the fees that were charged by the government colleges. Education in government institutions was subsidized. If the State could not subsidize education in private colleges, it had to allow them to charge such higher fees as were required for meeting the costs of education.

What the Court did, however, was to legislate that all the private institutions shall charge different fees for half of the students. Half the seats were called ‘free seats’ and the other half was called ‘payment seats’. Free seats were those for which normal fee payable in a government college would be paid and the payment seats were those of which a higher fee, almost four to five times the normal fee, could be charged. All the seats were to be filled in on merit. The court attempted to increase the opportunities for students who could not pay higher fees because, in addition to government-run institutions, they could also try their luck for a ‘free seat’ in a private college. The main flaw in the scheme was that the different treatment given to those who applied for free seats was not based on any reasonable classification. Applicants who were among the first fifty percent could get their education at a lower fee. The higher fee was not related to the economic conditions of a student. So the richer students got twice the opportunity. They could try for a free seat and if they did not succeed in getting it, they could try for
a payment seat, whereas a poor student could not try for a payment seat after having failed to get a free seat.

Should the law mitigate inequality or should it increase it? In our respectful submission, the solution suggested by the Court was neither just nor consistent with the ideal of equality. This was because the judicial process is not the proper process for legislating on such a complex issue. Several options could have been tried if the matter had been dealt with by the legislature. The entire fee structure in higher education could have been revised. The policy of subsidizing higher education needed to be re-examined. All this could not be done through judicial process and therefore the Court clearly acted beyond the scope of judicial review.

JUDICIAL ACTIVISM AGAINST MISUSE OF POWER:

The first case of misuse of power by a minister arose when Chief Minister Kairon of Punjab took action against a physician on fictitious charges of corruption. The Supreme Court went into the relationship between the Chief Minister and the physician and had quashed the proceedings on the ground that the Chief Minister had acted maliciously because of the latter’s refusal to render some personal services to him. That was the first case of abuse of power. In the second notable case, a few years later, it was held that Chief Minister A.R. Antulay of Maharashtra had misused the power given to him by the Essential Commodities Act to control the supply and distribution of essential commodities, which in this case was cement. Instead of allotting cement to the needy and in accordance with the priorities laid down under the law, he had allotted it to those who gave donations to a foundation set up by him in the name of Prime Minister Indira Gandhi. The nazrana culture (which means giving gifts to political superiors, a typical trait of a feudal order) had proliferated by then. The High Court of Bombay
struck down those orders of allotment and asked the chief minister to allot cement in accordance with the criteria laid down under the law.\(^{87}\)

We have two recent cases in which two highly placed politicians were involved. Both were held to be instances of abuse of discretion. One is Common Cause, A registered Society v. Union of India\(^{84}\) and the second is Shiv Sagar Tiwari v. India.\(^{89}\) We will discuss these two cases in detail because they show how judicial review became active against abuse of power.

**PETROL PUMPS CASE:**

In Common Cause, A Registered Society v. Union of India\(^{86}\) (hereinafter called Satish Sharm case), the Court heard a petition by a social action organization known as Common Cause. In pursuance to a news item that appeared in a national newspaper, the director of Common Cause filed a public interest writ petition challenging the allotments of retail outlets for petroleum products (petrol pumps) made by the then minister of state for petroleum and natural gas, exercising the powers of the Central government. Petrol pumps were to be allotted to poor or unemployed people. The Court observed that six of the allottees were related to various officials working with the minister. One was the mother of the minister’s driver, another was the relation of the private secretary to the minister two were related to the additional private secretary, and one was the wife of an additional private secretary. Two allottees were related to politicians, one was the son of Mr. Buta Singh, who was the home minister, and another the son of Shir Hollohon, minister in he state of Nagaland. The remaining seven allottees were members of the Oil Selection Boards or their relations, one of whom was the son of a retired judge who happened to be the chairman of the Oil Selection Board. Justice Kuldip Singh, disgusted at such blatant nepotism, said.\(^{90}\)

The minister has made the allotments either on the ground of poverty or unemployment. Assuming that the allottees belong to either of these
two categories then how he minister has selected them out of millions of poor and unemployed in this country...no criteria was fixed, no guidelines were kept in view, no one knew how many petrol pumps were available for allotment, applications were not invited and he allotments of petrol pumps were made in an arbitrary and discriminatory manner.

After perusing the names of the beneficiaries, the learned judge further observed.91

It is obvious that Chap. Satish Sharma was personally interested in making allotments of petrol pumps in favour of all these 15 persons. He made allotments in favour of relations of his personal staff under the influence of the staff on wholly extraneous considerations. The allotments to the sons of the ministers were only to oblige the ministers. The allotments to the members of the Oil Selection Boards and their Chairman’s relations have been done to influence them and to have favours from them. All these allotments are wholly arbitrary, nepotistic and are motivated by extraneous considerations.

The Court ordered that all those allotments should stand cancelled and that each of the petrol pumps should be disposed of by way of public auction. The original allottees could participate in the auction and the petrol pumps should be allotted to the highest bidder. The Court asked Sharma to pay Rs. 50 lakh as compensation and also issued a show cause notice why he should not be prosecuted for criminal breach of trust. In another judgment, the Court laid down the law on the liability of a public servant for such misuse of power.92

Allotment of Government Houses:

In Shiv Sagar Tiwari v. Union of India,93 a writ petition filed by a lawyer on the basis of a newspaper report about large-scale out-of-turn allotment of government houses came up for hearing. In Delhi, there was great scarcity of houses for government servants. Employees of class III and IV were required to
wait twenty to twenty-vie years to get a house. If a government servant did not get a government quarter, he had to pay exorbitant rent, which ate away a large chunk of his salary. Although rules for the allotment of government houses existed, the ministry or the department was given power to relax the rules and could deal with a case in order to avoid undue hardship to any person. Here again it was found that Minister of Urban Development Sheila Kaul had allotted government houses to friends or persons who were related to her servants. This was held to be not only gross abuse of the discretion given to the minister to make exceptions to the rules in case of exceptional hardship but criminal breach of trust. The Court asked her to pay Rs. 60 lakh as exemplary damages.  

The Court then went on to decide how the occupants who had been allotted those quarters illegally should be dealt with. Some would have to pay higher rent with retrospective effect, some would be evicted, and some would be shifted to the lower category houses they had occupied before coming to the bigger houses. The Court laid down a detailed procedure for eviction and recovery of rent and transfer to the lower type of house.

The award of damages against the minister was the most unorthodox step taken by the Court. In strict legal terms it could be asked whether the Court had such powers and whether the proper procedures had been followed before imposing such a liability on the minister. But the Court’s activist stance against corruption and misuse of power received over whelming public appreciation. There was a feeling widely shared that the fetish of legality should not come in the way of the Court’s tirade against misuse of power by ministers. Such misuse did not happen for the first time in these cases. It must have been happening all these years. The fact that the Court had now decided to stand up against it appeared reassuring and therefore the people were willing to overlook the legal niceties. This was of course a populist action of the Court.

Legally the decision was an example of intuitive justice in which several principles of justice had been by passed. Can a public servant be held
liable for erroneous exercise of power? If it is abuse of power, involving mala fide action, can he personally be held liable? If the liability is for a tort, can a writ court award compensation? The Supreme Court of India has been awarding compensation to persons whose fundamental rights had been violated by unlawful state action.95 But in the Satish Sharma case, abuse of discretion had adversely affected not any particular individual but the public interest. The compensation would not have gone to any victim of government action because those were amorphous entities; it would have gone to the State treasury. Should compensation be awarded in favour of the State and against a public official? By using government largesse so as to favour some people, the minister had clearly abused his discretionary power. The writ court could certainly quash such an action. But can a court ask him to pay exemplary damages? The order for exemplary damages doubtless quenched the thirst for revenge that arises from a feeling of anger against such abuse of power by the minister in the community. But should a court decide matters on such populist considerations when it flies in the face of basic postulates of justice?

In a later case,96 the Court realized it and overruled its earlier decision and asked the government to refund the fine paid by Sharma. Such judicial populism in the long run harms the legitimacy of the judicial process. When populism prevails over legal requisites, the rule of law suffers and it in the long run adversely affects the legal cultural. True, a large number of people who are alleged to have abused their powers go unpunished. This demoralizes the law-abiding, who sometimes come to feel that quick justice even if arbitrary is preferable to injustice. But quick justice has a tendency to be unjust. The better course is to undertake law reform that will provide quick justice without sacrificing the essentials of justicing. In India, unfortunately, there has been a weak tradition of tort litigation. Awards of compensation under the writ jurisdiction can be nothing more than tokenism. Such awards are useful as tokens
but they should be confined to violations of fundamental rights. For determining substantive claims to tortuous liability, the mainstream justice system needs to be strengthened and expedited.

The reversal of the Satish Sharma decision is bound to delegitimize judicial activism. The earlier decision, though faulty, had created unrealistic expectations from the Court. The Court's later realism is bound to deflate the earlier supporters of judicial activism. Consistency of judicial decisions is an important aspect in the legitimization of the judicial decisions. The reversal of a previous decision in which the Court had come down against abuse of power might be interpreted as the Court's softness towards corruption and abuse of power. The image of a court admitting that its previous decision was wrong when the wrong decision was so highly profiled has a negative fall-out.

Judicial activism became much more visible when writ petitions were filed in the Supreme Court complaining that proper investigation of offences alleged against some high political dignitaries, whose names had appeared in the Jain diaries, were not progressing satisfactorily. The petitions also raised a question as to how similar investigations should be conducted in future. In Vineet Narain v. India, Chief Justice Verma reflected.97

Everyone against whom there is reasonable suspicion of committing a crime has to be treated equally and similarly under the law and probity in public life is of great significance. The constitution and working of investigative agencies revealed the lacuna of its inability to perform whenever powerful persons were involved. For this reason, a close examination of the constitution of these agencies and their control assumes significance. No doubt, the overall control of the agencies and responsibility of their functioning has to be in the executive, but then a scheme giving the needed insulation from extraneous influences even of the controlling executive, is imperative.
In this case, the Court went into the structure of the CBI and suggested procedure for selecting its chief. The Court monitored the proceedings through what was called ‘continuing mandamus’. The Court further clarified that such monitoring would end the moment a charge-sheet was filed in respect of a particular investigation and that the ordinary processes of the law would then take over. In laying down the structure of the CBI and stating how the Vigilance Commissioner should be appointed, the Court doubtless exceeded its powers. But this judicial excessivism was received well. This was again because any such intervention in matters of corruption was unknown in India and the people, having lost faith in other organs of government, chose to take recourse to judicial process even though it meant governance by the judiciary.

JUDICIAL ACTIVISM AND ARTICLE 356:

Article 356 of the Constitution provides that when the President of India is satisfied that the government of a state is not functioning ‘in accordance with the provisions of this Constitution’, he may by proclamation (1) assume to himself all or any of the functions of the government of the state and all or any of the powers vested in or execrable by the governor or any body or authority in the state other than the legislature of the state and (2) declare that the powers of the state legislature shall be exercisable by or under the authority of Parliament. The article, however, does not authorize the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of the Constitution relating to High Courts. A proclamation must be laid before both houses of Parliament and ceases to operate at the expiration of two months if it is not approved by both houses of Parliament within such period. After its approval by both houses of Parliament, the proclamation remains valid for six months from the date of issue. It can be extended for another six months if such extension is approved by both houses of Parliament. However, the total period for which the proclamation remains
operative cannot exceed three years.\textsuperscript{102} This is popularly known as President's rule. This power was supposed to be exercised with great restraint and in exceptional circumstances. Dismissal of a state government elected for a term was supposed to be a rare phenomenon. One democratically elected government dismissing another equally democratically elected government is negation of democracy as well as federalism.

Since the Congress Party for many years had an overwhelming majority in Parliament and in most of the states there was for all practical purposes a one-party rule. Article 356 was invoked more often than it should have been and mostly for removing the governments of opposition parties. The Communist Party's government in Kerala was dismissed in 1959 though it had a majority support in the legislature. The summary table given by the Lok Sabha Secretariat to the Supreme Court in S. R. Bommai v. India\textsuperscript{100} showed that President's rule was imposed eighty-two times on the states and thirteen times on the union territories till 1991. Out of the total of ninety-five times that article 356 was invoked, on twenty-three occasions the assemblies were dissolved on the advice of the Chief Ministers or due to their resignations. On eighteen occasions they were merely suspended and subsequently revived.\textsuperscript{103}

When the Janata government came to power in 1977, it dismissed nine state governments and dissolved their assemblies in one stroke on the ground that the ruling party in those states, which was the Congress Party, had suffered defeat in the elections to the Lok Sabha. The real motive behind such dismissal was to have those state assemblies re-elected with the majority of the seats going to the Janata Party, which would have ensured the election its nominee to the office of the President of India. The election to that office was to take place in the near future. Unfortunately, when suits were filed under article \textsuperscript{104} of the Constitution (which is a jurisdiction for Centre-state disputes) by the affected state governments, the Supreme Court in State of Rajasthan v. Union of India\textsuperscript{105} dismissed those suits. Although the Court held that the action of the President
under article 356 was subject to judicial review and could be held invalid if the President acted ultra vires or mala fide, in the present case, the proposed action was held to be neither ultra vires nor mala fide. The judges seemed to approve of the action of the President. Justice Bhagwati observed that normally, if the ruling party faiired badly in an election to the Lok Sabha, it would not be a ground for dismissing that government by invoking article 356. But the situation prevailing after the election to the Sixth Lok Sabha was ‘wholly different’ in his opinion. The learned judge said.106

This is not a case where just an ordinary defeat has been suffered by the ruling party in a State in the elections to the Lok Sabha. There has been a total rout of candidates belonging to the ruling party. Never in the history of this country has such a clear and unequivocal verdict been given by the people, never a more massive vote of no-confidence in the ruling party. When there is such crushing defeat suffered by the ruling party and the people have expressed themselves categorically against its policies, it is symptomatic of complete alienation between the government and the people.

The Court could have held that it would not decide the legality of the President’s action because it was not justifiable. But after saying that the matter was justifiable, its endorsement of the action, which was palpably the worst possible abuse of article 356, was indefensible.107

When the Janata government fell, and the Indira Gandhi Congress came back, it repeated the same exercise against the state governments ruled by the Janata Party and its allies. It did not have any apprehensions because the Supreme Court had not objected to previous such action by the Janata government.

As the Congress Party’s hegemony came to an end and various regional parties came up in several states, the question of article 356 became critical. A commission was appointed under the chairmanship of Justice Sarkaria to study Centre-state relations. It made valuable recommendations in that regard,
particularly about the use of article 356. The Commission stated that dismissal of a state government on the ground that the ruling party had lost in the election to the Lok Sabha was clearly wrong and should not be done.

JUDICIAL ACTIVISM AND POLITICS

For a long time a demand had been made by some Hindu organizations for shifting the mosques at Ayodhya, Mathura and Kashi (holy places of the Hindus) and building temples on their sites. It was contended that temples stood on those sites before the invasion of India by Muslim rulers and that the temples were demolished and mosques built on those sites after the Muslim invasion. The Hindu Right wanted to restore those temples on those very sites. Historically, whether the temples stood on those sites on which mosques were at present located was disputed. In recent years, the BJP had openly supported that demand. The espousal of that demand had helped that party to increase its strength in Parliament and state legislatures. In Uttar Pradesh, Madhya Pradesh, Rajasthan and Himachal Pradesh, the BJP was the ruling party. The BJP government in Uttar Pradesh had promised the Supreme Court that the status quo would not change until the Court decided the issue.

On 6 December 1992, the Babri Masjid was demolished by the volunteers of the Vishwa Hindu Parishad and Bajrang Dal, with the connivance of the BJP government in Uttar Pradesh. After the demolition, the chief minister of Uttar Pradesh resigned. The President, acting on the advice of the council of ministers of the Central government, dismissed the BJP governments in the states of Madhya Pradesh, Rajasthan and Himachal Pradesh. Three governments had been dismissed earlier under article 356, in Karnataka, Meghalaya, and Nagaland, for different reasons. Chief Minister S. r. Bommai of Karnataka had filed a petition against the dismissal of his government. Subsequently, other state governments and the three BJP governments that were dismissed also filed
petitions against their dismissal. All cases of dismissal of state governments under article 356 were taken up together in S. R. Bommai v. India.\textsuperscript{110}

In Bommai, a nine-judge bench (Pandian, Ahmadi, Kuldip Singh, J. V. Verma, P. B. Sawant, K. Ramaswami, S. C. Agrawal, Yogeshwar Dayal, and B. P. Jeevan Reddy jj.) heard the matter. It was held by a majority of six judges against three that dismissal of the governments of Karnataka, Meghalaya and Nagaland was unconstitutional and void. However, since fresh elections in those states had already been held and new governments. But the Court warned that it might not happen that way in future. Justice P. B. Sawant said.\textsuperscript{111}

There is no reason why the council of Ministers and the Legislative Assembly should not stand restored as a consequence of the invalidation of the proclamation, the same being the normal legal effect of the invalid action.

It is interesting that the learned judge relied upon the decision of the Supreme Court to Pakistan in Mian Muhammad Nawaz Sharif v. President of Pakistan and others\textsuperscript{112} for the above proposition. The Court however, upheld the dismissal of three BJP governments in Madhya Pradesh, Rajasthan and Himachal Pradesh. Bommai is the most important and politically significant decision of the Court since Kesavananda Bharati.\textsuperscript{113} Whereas in Kesavananda Bharati the Court asserted the power of review of the exercise of the constituent power by Parliament, in Bommai the Court asserted its power of judicial review over the exercise of power by the President under article 356 of the Constitution. Till then the Court had claimed a limited power of judicial review over the exercise of power by President under article 123 (ordinance-making power),\textsuperscript{114} article 352 (power to declare an emergency),\textsuperscript{115} and article 356 (power to impose president’s rule).\textsuperscript{116} These articles confer power on the President and they are to exercised on the advice of the council of ministers. The powers are essentially political in nature and therefore the Constitution had entrusted control over their exercise to Parliament. Political process rather than judicial process was supposed to be relied upon to prevent abuse of power.
The judges differed on the scope the judicial review of the exercise of power under article 356. The Supreme Court has laid down tests for determining the proper exercise of discretionary power in the Barium Chemical Ltd. V. The company Law Board. Which were similar to those laid down by the House of Lords in England in the Wednesbury's case. Justice Ahmadi wondered whether the tests laid down to determine the validity of the exercise of administrative discretion could be applied to the exercise of discretion by the President under article 356 of the Constitution. The judge said.

It must be remembered that the power conferred by Article 356 is of an extraordinary nature to be exercised in grave emergencies and, therefore, the exercise of such power cannot be equated to the power exercised in administrative law field and cannot, therefore, be tested by the same yardstick. Several imponderables would enter consideration and govern the ultimate decision, which would be based not only on events that have preceded the decision, but would also depend on likely consequences to follow and therefore it would be wholly incorrect to view the exercise of the President's satisfaction on par with the satisfaction recorded by Executive Officer in the exercise of administrative control.

The learned Judge came to the conclusion that it was difficult to hold that the decision of the President was justiciable to the same extent as the decision of any administrative authority. It could be challenged on the limited ground that the action was mala fide or ultra vires article 356 itself.

Justice Verma (as he then was), speaking on behalf of himself and Justice Yogeshwar Dayal and agreeing with the above view of Justice Ahmadi, observed. The ultimate opinion formed in such case, would be mostly a subjective political judgment. There are no judicially manageable standards for scrutinizing such materials (which are the basis of the subjective satisfaction of
the president) and resolving such a controversy. By its very nature such controversy cannot be justiciable.

Justice P. B. Sawant writing on behalf of himself and Justice Kuldip Singh observed that democracy and federalism were the essential features of the Constitution and the power vested de jure in the President and de facto in the Council of Ministers by article 356 had ‘all the latent capacity to emasculate the two basic features of the Constitution’ and therefore it was necessary to scrutinize the materials on the basis of which the advice was given and the President formed his satisfaction ‘more closely and circumspectly’. The judge, however, further qualified the scope of judicial review, namely illegality, irrationality, and mala fides. He therefore went further than Justices Ahmadi and Verna in including irrationality as a ground of judicial review. What did he mean by irrationality? Did he also envisage disproportionality of the actions of the President? The learned judge conceded that it was possible for the President to use only some of the requisite powers vested in him under article 356 (1). He did not have to use all the powers to meet all the situations whatever the kind and degree of the failure of the constitutional machinery in the State. He said that ‘whether in a particular situation, the extent of powers used is proper and justifiable is a question which would remain debatable and beyond judicially discoverable and manageable standards.’ If the validity of an action is to be judged by the test of proportionality, how can a court escape examining it on merits? But going into merits would mean undertaking an evaluation of the political decision of the President by the Court. Such evaluation could not be except by political parameters. The learned judge, it seems was not willing to admit this. Therefore he took recourse to a more traditional strategy when he said that ‘unless the exercise of the executive power is so palpably irrational or mala fide as to invite judicial intervention, the Court would not undertake such an examination. It means that the Court would defer to the judgement of he President regarding proportionality unless the action appears to it to be palpably irrational or mala fide. Can a court

86
say that an action is palpably irrational or mala fide without going into the political aspects of the President’s decision and the power equation between the ruling party at the Center and the ruling party at the state? Will such an examination of the President’s decision not take the Court into the political arena, which it seems the judges wanted to steer clear of? This fear was expressed in the following words. ¹²³

There is every risk and fear of the Court undertaking upon itself the task of evaluating with fine scales and through its own lenses the comparative merits of one rather than the other measure. The Court will thus travel unwittingly into the political arena and subject itself more readily to the charges of encroaching upon policy making. The ‘political thicket’ objection sticks more easily in such circumstances.

Justice B. Jeevan Reddy, speaking on behalf of himself and Justice Agrawala, conceded that regarding the scope of the judicial review ‘there is not and there cannot be, a uniform rule applicable to all cases. It is bound to vary depending upon the subject-matter, nature of the right and various other factors.’¹⁶⁸ He further said that the principles of judicial review of administrative action settled in the Barium Chemicals case could not ipso facto apply to the exercise of constitutional power under article 356. He asserted that the proclamation under article 356 (1) was not immune from judicial review, ‘though the parameters thereof may vary from an ordinary case of subjective satisfaction.’¹²⁵ The learned judge therefore laid down the following judicial policy.¹²⁶

In other words, the truth or correctness of the material on which the President’s satisfaction is based cannot be questioned by the Court nor will it go into the adequacy of the material. It will also not substitute its opinion for that of the President even if some of the material on which the action is taken is found to
be irrelevant, the Court would still not interfere so long as there is some relevant material sustaining the action.

Justice Ramaswami also held that since the exercise of the power under article 356 was a constitutional exercise, the normal rules regarding the validity of the decision taken by subordinate officers or quasi-judicial authorities would not apply to the decision of the President under article 356. He said.¹²⁷

[Judicial review] is a delicate task, though loaded with political over-tones, to be exercised with circumspection and great care. In deciding finally the validity of the proclamation, there cannot be any hard and fast rules or fixed set of rules or principles as to when the President’s satisfaction is justiciable and valid.

A perusal of the judicial opinions of the nine judges tells us that while Justices Ahmad, Verma, and Yogeshwar Dayal were clearly of the opinion that there could not be judicial review of the President’s action except on the grounds of its being ultra vires or mala fide, Justices B. Jeevan Reddy, Agrawala and Ramaswami were of the view that although the President’s action was subject to judicial review, such review would not be like the review of any other administrative action but has to be much more restrained and there has to be stronger presumption of constitutionality than in ordinary cases of judicial review of administrative action. The other three judges (Sawant, Kuldip Singh and Pandian) were of the view that judicial review of the President’s action would be of the same nature as that of any other administrative action. It is submitted that unlike judicial review of an administrative action taken by an administrative official, judicial review of what the President had done under article 356 was essentially review of a political action and had to be on a different plane.
One of the most crucial suggestions made by Justice B. Jeevan Reddy, which we also find in the judgment of Justice Sawant, is that the legislative assembly should not be dissolved until Parliament had approved the proclamation. Justice Sawant observed that the President had no power to dissolve the legislative assembly of the state till the proclamation was approved by the houses of Parliament under article 356 (3). The President may have power only to suspend the legislative assembly under clause (2) © of article 356. Clause (3) of article 356, which requires approval of both the houses of Parliament, was a check upon the exercise of power by the President under clause (1). The judges made it clear that even if Parliament approved the proclamation, that would not inhibit the Court from declaring it unconstitutional and void if it was so. Keeping the assembly in suspended animation until Parliament approved the proclamation was one way of strengthening the parliamentary control.

Although the judges defined the scope of judicial review differently, they did evaluate the impugned actions on merit and upheld three actions in respect of Madhya Pradesh, Himachal Pradesh and Rajasthan and held invalid the actions in respect of Karnataka, Meghalaya and Nagaland. In the case of Karnataka, Meghalaya and Nagaland, the Court found that the governors had acted partially and had not ascertained whether the chief minister enjoyed the confidence of the legislature according to proper procedure. The Court observed that in all cases where it was claimed that support to the ministry was withdrawn by some legislators, the proper course was to test the strength of the ministry on the floor of the House. In the case of Meghalaya, the Court criticized the governor’s unnecessary anxiety to dismiss the ministry. In the case of the governments of Madhya Pradesh, Rajasthan and Himachal Pradesh, the Court took into account the philosophy of the BJP, which was the ruling party in those states, the open support that the party and even persons in government gave to the demolition of the Babri Masjid and the reluctance of the governments to act
against organizations such as the RSS that had been declared illegal. It came to the conclusion that the President’s satisfaction that the governments in those states did not function in accordance with the Constitution had enough substance. Therefore those actions were held to be valid. Secularism, according to the judges, was part of the basic structure of the Constitution and therefore if a state government could not sustain secularism, it could not function in accordance with Constitution. The view that secularism was part of the basic structure of the Constitution was shared by all nine judges.

A perusal of the Court’s decisions regarding those three states clearly shows that a decision whether action under article 356 proper was judged not by legal parameters but by political parameters. When judges use political parameters, such parameters have to be neutral and not partisan. Political parameters of the Court have to be more objective and impartial than those of the executive. Likewise, the President of India also has to apply political parameters while considering the advice of the Council of Ministers to dismiss a government. Twice in recent years, the President has asked the Council of Ministers to reconsider its advice to dismiss the state governments, once in Uttar Pradesh and again in Bihar. Such decisions are also taken by the President by applying political parameters. Political parameters applied by the President are similar to those applied by the Court because they are applied by an independent authority who is supposed to oversee the act of the executive (Council of Ministers) objectively from the standpoint of justice.

Bommai gave power to the courts to prevent the manifest abuse of article 356. The evidence of such power was revealed in a case in which the Allahabad High Court intervened to prevent abuse of power by the Governor in 1997. In Uttar Pradesh the Bahujan Samaj Party (BSP) and the BJP had reached an understanding about sharing the chief minister for six months and then, according to the understanding between the two parties, Kalyan Singh of the BJP was sworn in as chief minister. The BSP, however, withdrew its support to the government
soon thereafter. The Governor asked Kalyan Singh to prove his majority, which he did on 21 October 1997 with the help of a break-away group of twenty-two MLAs from the Congress, which named itself ‘Loktantrik Congress’ and another break-away group from the BSP, which called itself ‘Loktantrik BSP’. Subsequently, the Governor received a letter from twelve members of the Loktantrik Congress that they were withdrawing their support of the Kalyan Singh government. The Governor made inquiries and on being satisfied that Kalyan Singh had lost the support of the House and the Loktantrik leader Jagdambika Pal was in a position to obtain the support of the majority, dismissed Kalyan Singh and appointed Jagdambika Pal as Chief Minister. Kalyan Singh after failing to persuade the Governor not to take such a decision approached the Allahabad High Court, which stayed the order of the Governor dismissing Kalyan Singh and appointing Pal as chief minister. The status quo was ordered to be maintained. Pal appealed to the Supreme Court, which sustained the decision of the Allahabad High Court and ordered that the test as to who enjoyed the majority support in the House be taken on the floor of the House on the very day on which such support was to be obtained by Pal as per the Governor’s order. A new phenomenon of a composite vote of confidence was introduced through judicial process.  

Bommai has doubtless restrained political parties from making partisan use of article 356. It has had another effect. The President of India, who till recently as a rule signed the order advised by the Council of Ministers, started asking questions and even returned the advice for the dismissal of the state governments, once in Uttar Pradesh and again in Bihar. Another reason for the restrained use of article 356 is the emergence of coalition politics. It may not be easy to get a proclamation approved by both houses of Parliament. Every ally of the previous ruling coalition wanted dismissal of the State government of the state to which it belonged. It gave its support on the condition of such unconstitutional use of article 356. The major partner of the coalition, namely the BJP, could not
oblige its partners because of the Bommai decision. The activist President and the activist Supreme Court have imposed constraints on the use of article 356. One may criticize the Court for acting politically in Bommai but one cannot deny that the Court's politics has helped the politics of governance become more principled and democratic. Recently, when the Union Cabinet advised the President to dismiss the Rabri Devi government in Bihar, it took care not to recommend the dissolution of the legislative assembly and the home minister quoted Bommai in support of such decision. Ultimately, the Central government had to revoke the proclamation since it was sure to be defeated in the Rajya Sabha. This showed that the parliamentary process had become active.

The self-contradiction among India judges is that they have to take political decisions while denying that they do so. The decisions regarding the basic structure of the Constitution as well as regarding the validity of the Presidential actions under article 356 are doubtless political. The declaration in Bommai that secularism was part of the basic structure of the Constitution was doubtless made with a view to forewarning the majoritarian forces against undertaking any amendment of the Constitution that eroded secularism. However, he decisions of the Court that an appeal to Hindutva did not amount to an appeal on the ground of religion in election cases 129 have undermined the concept of secularism. The decision in Bommai has infused greater objectivity in the use of article 356. Judicial review of the political decisions of the President is bound to produce political decisions. It will have to take into account the political realities and must appear to be neutral toward political parties. Political decisions of the Court have to be different from the political decisions of the government or Parliament.

The Indian Bar and the judiciary will have to free themselves from the colonial hangover against being political. The word 'political' has acquired a pejorative connotation all over the world. Yet democracy is politics and the Court as upholder of democracy has to evaluate and judge political decisions of the co-
ordinate organs of government. We find that sometimes the judges do recognize this. For example, in Indra Sawney v. India, Justice Sawant said. 130

Constitution being essentially a political document has to be interpreted to meet ‘the felt necessities of the time.’ To interpret it ignoring the social, political, economic and cultural realities, is to interpret it not as a vibrant document alive to the social situation but as an immutable cold letter of law unconcerned with the realities.

Political decision-making by the Court must be distinguished from the politics of the judiciary, which is not absent. The common people also must not imagine that judges are superhuman. The reality is that they also have feet of clay. There is politics in the appointment of judges, but it is not to such politics within the judiciary that we are referring. We are referring to political decisions made by the Court while considering the validity of the acts of Parliament or the President. The political decisions of the court will have to be informed by the philosophy of individual liberty, social justice, equality, and democracy.

Judicial activism has to be distinguished from judicial populism and judicial excessivism. We have pointed out how the Court has encroached upon the sphere allotted to the legislature while correcting the distortions in the functioning of the constitutional process and how it has made populist declarations of rights such as the right to education. If judges are going to evaluate political decisions, they must be equipped with the knowledge and skills required for that purpose. Judicial activism requires a delicate combination of discretion, tact, and vision. The Court must know its institutional limitations and must have a full understanding of the resources that it can use to enforce its decisions. The Supreme Court of India has at times overreached itself and has also indulged in populism. In spite of this, it continues to be in a commanding position as a constitutional authority. People as well as the political establishment have
acquiesced in the expanded functions of the Court, sometimes reluctantly and sometimes because there was no better alternative. But the Court has to continuously sustain the legitimacy of its power and its decisions. Although the Court is a political institution in so far as it determines the limits of power of various governing institutions, the legitimacy of its own power depends upon its image as a politically neutral and independent adjudicator. For this it must appear to be a real defender of the people and their rights. The technology of public interest litigation, which the Court

THE IMPACT OF JUDICIAL ACTIVISM:

Impact of Supreme Court decisions on the Parliament or Legislature:
The Parliament or the Legislature receives the impact of a Supreme Court decision directly and indirectly.
The direct impact of decision is experienced when the court rebuffs Legislation as unconstitutional or construes a statute so far beyond what Legislature wanted that it becomes apparent the court felt the measure to be unwise or unreasonable.
The indirect impact is experienced subsequent to a direct consequence on some state of the Union that is when a State or local action has been declared unconstitutional. The Legislature itself may be offended, there wide spread local indignation, some powerful interests might be hurt and they are not slow to convey their anguish to the Court.
When a Supreme decision irks Parliament directly or indirectly, Parliament has ample power to retaliate. The weaponry it can field against the Court is impressive. Among the heavier artillery, parliament can initiate the constitutional amending process to undo a Court decision or to curtail the courts power. In the medium range it can redo a law that the Court knocked down or curtail court jurisdiction by statute. Some times the retribution could be classified as
harassment or terrorism of the Legislature. For instance Parliament direct darts and arrows at the place where it stings the most to the Judiciary.

In a series of landmark cases the Supreme Court set forth its great dissatisfaction with Police procedures of search and seizure and with the treatment of arrestees in the police station. The Courts foremost objective in these cases was to thwart police tactics that brazenly trod upon the rights of the citizens. Judges who sit on the Supreme Court and the High Courts find crime waves on more appealing than any one else, and one can presume that the justices were sufficiently sensitive to the police contention that their practices were necessary to check criminal behavior. By its decisions the Courts rejected this argument and said infact that crime rates would not necessarily soar if policemen kept within constitutional bounds. Moreover we can assume that even if the justices did believe that there would be an increase in the crime rate, they also believed that it would not be so great an evil as to outweigh the degree of harm inherent in continuing the current degree of abuse of the constitutional rights of the citizens by the police themselves. In any event several decision in protection of the civil liberties of the citizens against the police accesses were made and several question as to their impact have been raised. Like to what extent have the police actually changed their practices. To what extent has any change in police practices affected their ability to make arrests, get important evidence and obtain confessions and to what extent has the crime rate been altered? If at all? The answers to these questions cannot be generalized for being accepted universally because the impact of the decisions from the higher judiciary varies in India from case to case, region to region depending upon many factors.

A general hypothesis as far as the impact of “Judicial Activism through the decisions of the Supreme Court and the High Courts can be enlisted below:

1) A line of cases will have greater impact than a single case decided by the Courts.
2) Decision in which precedent is over-ruled will create more resistance than one in which there is no over-ruuling.

3) Non-compliance will be greater when there is an economic component than when there is not.

4) Decisions invalidating procedural defects are more frequently evaded than are decision on substantive law.

5) Where the basis for a decision is made clear, compliance will be greater than when it is not made clear.

6) Continued denial of certiorari with respect to a given subject will shift activity from the judicial system to other political arenas.

7) Attempts to curb the court are less likely to be successful when intensely held economic or civil liberties interests are involved than when Center-State relations or separation of powers questions are decided by the court.

8) The broader the decision the greater the impact and the broader the non-compliance.

9) Compliance will be more immediate when courts provide clear guidelines than when they do not.

10) The greater the technicality of the language of a decision the smaller the impact.

11) Ambiguity in Supreme Court rulings decreases compliance.

12) Where there is no clear agreement on the meaning of a decision, compliance is less than where there is such agreement.

13) Non-compliance will be greater when dissenting and/or concurring opinions exists than in unanimous decisions.

14) The broader the scope of a holding, the more difficult evasion becomes.

15) A Supreme Court decision based on the constitution will receive less attack and greater compliance than a decision grounded on statute, the Courts supervisory authority, or other basis.
16) The greater the number of channels through which decisions is reported the greater the impact.

17) Information about the specifics of how to comply with a decision will bring greater impact than general discussion of a case.

18) Reporting of immediate negative reaction tends to increase non-compliance.

19) If a strong political majority backs up the relevant social policy, judicial decisions in accordance with it are readily acceptable.

20) The greater the number of levels of government or the number of people affected the greater the noncompliance.

21) Compliance is more likely to be delayed if resisters see a chance of victory in reversing the court decision than if they do not.

22) Where it is unclear that the Court would now follow a prior decision, compliance with that decision will decrease.

23) Friction between parties or between factions of parties increases noncompliance and action directed at reversal of the courts decision.

24) A decision will be more likely to bring action if it disturbs the balance between interests than if it affects an interest without affecting others.

25) Attempts to reverse the court decision will be more frequent when it is felt the court has mis-interpreted the intent of another branch than when this is not the case.

26) Impact will be greater when efforts are made to follow up a decision of the Courts than when such efforts are not made.

27) Where past decisions have not been enforced, resistance to present decisions will be great.

28) Failure to obtain reversal of disliked decisions will give rise to attacks on the court for later decisions.

29) Compliance is more likely when some reviewing body is available to those complaining of noncompliance.
30) Units of governments are less likely to comply with court rulings than are individuals.
31) Judges are more likely to follow Supreme Court Opinions than are other government officials.
32) The Courts legitimacy is increased when people agree with its specific rulings.
33) Belief in Judicial neutrality and belief that judges on find rather than make law increase acceptance of decisions.
34) Those who consider the courts authority legitimate will be more likely to comply with its rulings than those who do not.

The impact of Judicial Activism on individuals, aggrieved and interested persons with regard to their rights and on the society at large has been tremendous.
We can say that it is due to Judicial Activism of the courts, particularly the Supreme Court and High Courts that the common man of our country looks upon the judiciary as the protector and guardian of the constitution, their fundamental rights and liberties.
Judicial Activism has made aware the ignorant and poor masses of our country of the basic human rights.
Judicial Activism has widened the concept of locus standi, thereby opening the doors of the temples of justice to all those who cannot afford to reach the courts for the redressal of the violation of their rights.
Judicial Activism has encouraged the poor to raise their voice before the courts for the protection of their fundamental and legal rights.
Judicial activism has made the individuals to make collective actions for effective remedy through Public Interest Litigation or Social Interest Litigation.
Judicial Activism has lead to the abolition of several legislations which prove to be a big threat to public interest.

And it is due to such impact of Judicial activism that the poor and downtrodden people of this country could assert and enjoy several rights which were not even thought of in the past, like, right to dignified life, right to privacy, right to go abroad, right to shelter, rights of prisoners to have interview, right to speedy trial, right of the under-trial not to be hand cuffed, right to fair trial right against illegal detention, right against torture and custodial violence, right to free legal aid, right to inmates of prisons and protective homes, right to education, right to health, right to livelihood, right against cruel and inhuman punishment, rights provided to an accused when under detention, right to pollution environment, rights providing freedom to bonded labor, right to treatment and medical assistance in medico-legal cases, right to monetary compensation for violation of fundamental rights, right to safe drinking water, rights protecting the interests of the consumers, right to equal pay for equal work, etc... etc...

Thus there are a number of such rights and many more which could be made available to the common man in this country as guaranteed by the constitution solely due to the judiciary stepping in aid for the poor, needy and helpless common man of this country through it’s Activism.