CHAPTER - V

JUDICIAL ACTIVISM

“Justice is supreme and justice ought to be beneficial for the society so that the society is placed in a better-off situation. Law courts exist for the society to rise up the occasion to do the needful in the matter, and as such may subserve the basic requirement of the society. It is a requirement of the society and the law has to respond to its need.”

Ever since the unfolding of civilization and its graduation to modernity, human existence has moved from police state to welfare state. Republican values emanating from concepts like the rule of law, Judicial Review and independence of the judiciary are cherished in modern democratic polity wedded to good governance. The doctrine of constitutionalism as enshrined in the constitution of India envisages a welfare state where the state is expected to formulate programmes for providing quality life and social security to its people through legislation and administrative action. Under this doctrine of constitutionalism, the judiciary is empowered to mediate between the demands of the Indian state and the civil society, desperately trying to preserve areas of autonomy from government interference.

One of the major motives for which Indians struggled to shape India into an independent nation was the acquisition of various rights in order to do away with the exploitative environment in which they had been living throughout the centuries. The glory of national freedom lies in the fact that the goal is set before itself was not only to fight for the emancipation of the country from the restraints of British rule but also to reconstruct Indian society on the dynamic philosophy

of social revolution. Freedom was not an end in itself. It was only a means to achieve an end, the end being to free India through a new Constitution; to feed the starving millions, to clothe the naked masses and to give every Indian the fullest opportunity to develop himself according to his capacity. In its bid to accomplish the above said motive, Indian Government has been enacting various legislations.

The Indian experience with regard to the executive, adjudicative and legislative instrumentalities since the Independence has been one of exploitation i.e. darkening, misgiving, disappear and exploding which led to adventurist violence. For the effective functioning of democracy it is necessary that every organ of the government should function properly and any deviance or misconduct, abuse or aberration, corruption or delinquency is duly monitored and effective measure must be taken by the social activist, professional leadership and duly appointed agencies to enforce punitive therapeutics when robbed culprits violate moral legal norms.

Since the olden days there has been a lively debate on the functions and role of judiciary in a democratic state. ‘judicial Activism’ has emerged as the pivot around which such debate revolve. But due to one or the other reason the controversy about its definition has not been resolved. There are perhaps two major causes behind it First, the term ‘judicial Activism’ takes on vastly different parlance depending upon who is using it. Some politicians termed it as judicial Anarchy, judicial ‘Over Activism’ and judicial Despotism.

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Laws according to social activist, has a social purpose i.e. betterment of society. Judiciary under Indian constitution is conceived as an arm of the social revolution. Legislature, while emanating a law, can not visualize all situations arising in future and needing the support of law. New situation generally and usually develop and the law has to be so interpreted and applied to solve problems arising out of such situations. In this process, the judicial creativity or craftsmanship is utilized to fill in the gaps between the law as it is and the law as it ought to be built in this process is the proper perception and commitment to proper social values. This judicial creativity is called ‘judicial activism’. In other words it means “an active interpretation of existing legislation by a judge made with a view to enhance the utility of legislation for social betterment.”

Judicial Activism is a powerful weapon which the judges have to wield to subserve the ends of justice by making the law responsive to the felt necessities of the changing times. The scope of judicial activism varies with the courts power of Judicial Review. This scope increases considerably where the power of Judicial Review extends not only over executive action as in the United Kingdom, but also over legislative action as in the United State, and even over constitutional amendment as in India.

Judicial Activism is the search for the spirit of the law when the later of the law appears to be deficient for justice in the cause. The exercise, however, is difficult and delicate and requires great skill to ensure that the result achieved is within the legal framework and amounts to development of the law and it does not erode the credibility of the legal process because of uncertainty or adhocism.

There must be an underlying discernible principle in the decision to provide a precedent for future application in similar situations. It must develop the law by giving it a new dimension to justify its treatment as a judicial decision.\textsuperscript{7}

The judges have been given a heavy responsibility to evolve law in consonance with the changing needs and aspirations of the society and to serve the cause of social justice. Judicial activism is the founding stone of this approach. Recognizing this justice Bhagwati observed:

\begin{quote}
"Judicial activism is now a central feature of every political system that vests adjudicatory power in a free and independent judiciary".\textsuperscript{8}
\end{quote}

Justice J.S. Verma has been more emphatic in laying down the exact norms of sufficient activist criterion. The learned judge has remarked:

\begin{quote}
"Judicial Activism is required only when there is inertia in others. Proper judicial activism is that which brings about results with the least judicial intervention. If everyone else is working we do not have to step in".\textsuperscript{9}
\end{quote}

The term ‘judicial activism’ is very slippery and difficult to define. Various groups differ in their conception of activism Webster’s dictionary assigns the meaning being active to the term ‘activism’. In this sense every judge is, or atleast should be, an activist so long one decides, in whatever way one may choose to decide Justice Krishna Iyer once remarked that every judge was an activist either on forward gear or on the reverse gear.\textsuperscript{10}

The above analysis shows that activism of the judiciary pertains to the political role played by it, like the other two political branches. The justification for the judicial activism comes from the near collapse of responsible

\begin{footnotesize}
\textsuperscript{7} Verma, J.S., \textit{New Dimension of Justice}, Universal Publication, New Delhi, 2000, p. 70.
\textsuperscript{9} \textit{Indian Express}, January 28, 1998.
\textsuperscript{10} Lakshminath, A., op cit p. 59.
\end{footnotesize}
government and the pressures on the judiciary to step in aid which forced the judiciary to respond and to make political or policy-making judgement.\textsuperscript{11}

\section*{1. EVOLUTION OF JUDICIAL ACTIVISM}

Judicial Activism by way of Judicial Review, started in America in \textit{Marbury v. Madison} in 1803, wherein Chief Justice John Marshall declared, “ours is a government law and not of men”. The learned judge underscored the pivotal role of the judiciary in such a regime stating “It is emphatically the province and duty of the Judicial Department to say what the law is”.\textsuperscript{12} The supremacy of law was firmly established in that case and even the law just likes any other man. The power of Judicial Review which thus emerged as a strong weapon in the hands of the judiciary came to stay in the United States of America despite threats of President Roosevelt in the thirties of this century.

Constitution is the Supreme Law of a country. All questions including political question are now determined by Courts of law with the change in society, the law cannot continue to be interpreted and administered with conservative ideas. Justice Cardozo said,\textsuperscript{13}

“The law has its epochs of ebb and flow, the flood tides are on us. The old order may change yielding place to new; but the transition is never an easy process.”

The function of American judiciary was intended to be prescriptive to block the enforcement of an unjust law or action instead of being prescriptive giving directions as to how remedial actions should be taken by the Executive.

\textsuperscript{13} Ibid., p. 15.
In the United States, the concept of judicial activism has often been used as synonymous with “judicial absolutism” “judicial supremacy” “judicial anarchy” and “judicial imperialism”. Judicial Activism has always been used as an antonym of “judicial restraint” also popularly known as judicial conservatism”.\(^\text{14}\)

According to Americans activism means the propensity of federal judges mainly but not always on the Supreme Court, to intervene in the governing process as to substitute their judgement for that of federal and state political officers.\(^\text{15}\)

**Judicial Activism in India**

**Ancient Times: Manu, Kautilya**

Justice is the aim of any community’s political life. One of the aim of democratic government is to make justice available to the humblest citizen. The administration of justice is an essential part of the ruler’s obligation to the ruled. Manu, the great Hindu law-giver, is on record to have said:\(^\text{16}\)

“Where justice wounded by injustice approaches and the judges do not extract the dirt, there (they also) are wounded (by the dirt of injustice) where justice is destroyed by injustice, or truth by falsehood, while the judges look on, there they shall also be destroyed. Justice being violated, destroys; justice, being preserved, preserves therefore justice must not be violated, lest violated justice should destroy us”.

Ancient law givers took sufficient care to make inexpensive and fair justice locally available. Special judicial assemblies were provided to decide cases for which no rule was laid down. The conscience of the local community

\(^{14}\) Reedy, G.B., op. cit, p. 116.
\(^{15}\) Ibid., p. 116.
could be consulted to decide upon cases requiring a balanced approach and wide consideration. Kautilya in his *Arthashastra* referred to the judicial powers of the village headman and his colleagues. He observed: \(^{17}\)

They could fine a cultivator who neglected his work and expel any thief or adulterator out of the village boundary.

*Manusmriti* says: \(^{18}\)

\begin{quote}
पितार्य सुदूर्माता भाया पुत्र: पुरोहितः।

नादण्डयो नाम राजास्ति य स्वर्धमें न लिखिति।
\end{quote}

The king should not leave an offender unpunished, whatever may be his relationship with him. Neither father, nor a teacher, nor a friend, nor mother, nor wife, nor a son, nor a domestic priest should go unpunished for the offence committed.

Our ancient scriptures prescribe the qualification and duties of a judge.

*Atrismriti* (28) says: \(^{19}\)

\begin{quote}
दुश्चल्य दण्डः सुजनस्य पूजा।

न्यायेन काश्य च सच्चालितTouch|।

आप्पचापातीर्थिषु राष्ट्ररक्षा।

पच्छैव यज्ञा: कथिता नुपाणाम।।
\end{quote}

To punish the wicked, to protect the good, to enrich the treasury (exchequer) by just methods, to render justice impartially to the litigants and to protect the kingdom these are five *yajnas* (selfless duties) to be performed by a king (the state).

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17  Ibid., p. 536.  
18  Ibid., p. 369  
19  Ibid, p. 370
Administration of justice was, according to the smritis, one of the most important and obligatory functions of a king. The smritis stressed that the very object with which the institution of ‘kingship’ was conceived and brought into existence was for the enforcement of Dharma by the use of the might of the King (state) and also to punish individual for contravention of Dharma and to give protection and relief to those who were subjected to injury and in whose favour Dharma (law) lay. The Smritis greatly emphasized that It was the responsibility of the king to protect the people through proper and impartial administration of justice and that alone could bring peace and prosperity to the king as well as to the people. Any indifference towards this important function of the king, the Smritis cautioned, would bring calamity to the king himself and to the people as well.20

Dispensation of justice the highest Dharma of judges

All the Dharmasastras and smritis with one voice laid down that dispensation of justice was the highest Dharma of judges.

Manu VIII 12-14

धर्मों विद्वास्त्वधर्ममेण सभाय यत्रोपतिष्ठते ।
इत्य चास्य न कृत्तन्ति विद्वास्तत्र समासाद 
यत्र धर्मों हाधर्ममेण सत्यं यत्रानुलेन च ।
हन्यते प्रक्षमाणाः हतास्तत्र समासाद : । 21

In a case where Dharma (justice) has been injured or made to suffer at the hands of Adharma (injustice) and still the judges fail to remove the injustice, such judges are sure to suffer for their act (or omission) which is Adharma.

Katyana 77:

21 Ibid., p. 495.
A judge should give his decision only in accordance with law and justice. If the king disregards that decisions, the judge incurs no sin.

**Responsibilities of King as the highest Court**

The Smritis emphasized the necessity of the King himself taking the responsibility for the administration of justice. As far as the Kings Court is concerned, any person could approach the King for justice either by way of an original petition or by way of appeal against the decisions given by the Lower Courts. Except when it was unavoidable, owing to preoccupation with other weighty business of the state or for similar valid reasons, the King himself was required to preside over the highest court at the capital and to dispense justice according to law.  

*Katyana 14 :

यत्र कर्माणि नृपति: श्वयं पश्यति धर्मतः।
तत्र साधुसमाचारा गिनेवेसेय: सुखं प्रजा:।

Where the King himself looks into the causes (of people) according to the dictates of Dharma, there the people conduct themselves well live in happiness.

**Pre Constitution Era**

Judicial Activism has been a part of the working of the justice delivery system in India over the ages. The Indian history is evidence of the high sense of justice of the Indian Kings like Vikramaditya, Akbar and Jahangir. They had a very high sense of justice and even the humblest of their subjects had access to
them for redressal of their grievances. They were never wanting in their endeavour to do complete justice to their subjects. These historical facts indicate the inheritance of a rich legacy of dispensation of justice.\textsuperscript{25} Judicial Activism is not new to the India ethos and this ethos continues to prevail in the system of administration of justice even later.

A shining example of judicial Activism dates back to 1893 when justice Mahmood enunciated the principles of natural justice in deciding a criminal appeal. He held that an appeal against conviction could not be decided without hearing the accused in person, if he was not represented by Council. This principle evolved was that no man could be condemned unheard. For the hearing of an appeal it was implicit that the accused must be heard in some manner and if he could not engage a counsel for lack of means, he had to be heard in person and for that person he had to be called from jail to be heard because he was in detention. This view taken by justice Mahmood combined the concept of the ‘right to life and personal liberty’ (Art.21) and ‘access to justice’ (Art. 39A) in the Indian Constitution\textsuperscript{26} so he gave the widest possible interpretation to the relevant law and laid the foundation stone of the judicial activism in India.

**Post Constitution Era**

The framers of Indian Constitution adopted the British model of parliamentary government and made Parliament the focus of political activity in the country and the dominant machinery to realize the goal of social revolution. However they did not make it a sovereign law making body like its English counterpart. They placed as much supremacy as possible in the hand of the legislature, but it had to be restricted because unlike great Britain, India has a

\textsuperscript{25} Verma, J.S., op. cit. p. 62.
\textsuperscript{26} Ibid. p. 71
lengthy written Constitution, a federal distribution of powers and a list of fundamental rights.

In the United States, on the other hand Congress has been vested with the legislative powers of the Union, but the Constitution being the ‘Supreme law of the land’ laws passed by the Parliament must be in conformity with the provisions of the Constitution. The Supreme Court of the United States has the power to invalidate a law passed by the Congress not only on the grounds that it transverses legislative jurisdiction but also on the grounds on the inherent ‘goodness’ or ‘badness’ of the law or wisdom of the legislative policy, as covered by flexible undefined and indefinable ‘expression due process’ of law.²⁷

Judicial institution have a sacrosanct role to play not only for resolving inter-se disputes but also to act as balancing mechanism between the conflicting pulls and pressures operating in a society. Courts of law are the products of the Constitution and the instrumentalities for fulfilling the ideals of the state enshrined therein. Their function is to administer justice according to the law and in administer justice according to the law and in doing so, they have to respond to the hopes and aspirations of the people because the people of this country, have committed themselves to secure justice – social, economic and political besides equality and dignity to all.

In human affairs, there is a constant recurring cycle of change and experiment. A society changes as the norms acceptable to the society undergo a change. The judges have been alive to this reality and while discharging their duties have tried to develop and expound the law on those lines while adding within the bounds and limits set out for them in the Constitution.

2. NATURE OF INDIAN POLITY

The Constituent Assembly had the dream of solving the basic problems that beset the people of India. In the scheme of parliamentary democracy adopted in the Constitution, the representative form of government envisages a participatory role of the people in governance. The Constitution also adopts the advanced constitutional practice of resorting to abeyances or silence of the Constitution, by leaving some gaps or grey areas to be filled later by developing healthy conventions in the working of the Constitution. Silences in the Constitution are hedges to prevent rigid postures being taken by the constitutional authorities, promoting a climate conducive for mutual respect to accommodate the viewpoints of others. The concept is of a joint and participatory role of all authorities involved in governance, instead of an exclusive primacy of any one in the process.28

The principle of collective responsibility to serve the common purpose of public good in a liberal democracy is a significant feature. Absolute power in any single public functionary being anathema in a democracy avoided. This is a basic constituent principles of Indian polity.29

Political sovereignty in Indian system vests in the people. The sovereign will of the people finds expression through their chosen representatives in the Parliament. India has a unified judiciary with the Supreme Court at the apex. It is the custodian of individual rights and freedoms, with power of Judicial Review of legislation to determine its validity. It is the final arbiter of the meaning of the Constitution and the laws. The Indian Parliament’s power of

29 Ibid. p. 30.
legislations subject to Judicial Review, unlike that of the British Parliament. Even the power to amend the Constitution is subject to Judicial Review on the limited ground of the indestructible ‘basic structure’.\textsuperscript{30}

The real supremacy in India is of the Constitution, and not of any organ that is a creature of the Constitution. The Constitution has delineated the boundaries of each organ indicating the complementarily between them to serve the constitutional purpose. The claim of supremacy by any of the three organs is misplaced in the constitutional scheme. Dr. Rajendra Prasad as the Chairman in the concluding session of the Constituent Assembly, wherein said:\textsuperscript{31}

“…..whatever the Constitution may or may not provide, the welfare of the country will depend upon the way the country is administered. That will depend upon the men who administer it…..”

Rule of law is the bedrock of democracy, and a principle that controls the exercise of public power. It acts as a constraint on arbitrary exercise of power. A characteristic of the rule of law is best described by the well known adage: “Be you ever so high, the law is above you”. This is Indian constitutional philosophy.\textsuperscript{32}

The claim of supremacy by any one organ \textit{vis-a-vis} the others ignores this warning and is contrary to the spirit of the Constitution. To prevent any acrimony on this account, emphasis was laid in Aristotle’s politics on the education of every citizen in the ‘spirit’ of the Constitution’. This education is an imperative fundamental duty of every citizen.\textsuperscript{33}

\textsuperscript{30} Ibid., p. 30
\textsuperscript{31} Ibid., p. 31.
\textsuperscript{32} Ibid., p. 31.
\textsuperscript{33} Ibid., p. 31.
Separation of Powers

Separation of judiciary from the executive is mandated in Art 50 of the Constitution, with the independence of judiciary as a necessary corollary. The doctrine of separation of powers is an inseparable part of the evolution of democracy itself. The French Philosopher Montesquieu drew the attention of political theorist to the dangers inherent in the concentration of legislative, Executive, and the Judicial powers, in one authority and stressed on the necessity of the concept of checks and balances in constitutional governance. No democracy indeed contemplates conferment of absolute power in any single authority.\(^{34}\)

Separation of power with the system of checks and balances is one of the most significant features of Indian constitutional scheme. Chief justice Balakrishnan observed that, “the Constitution lays down the structure and define the limits and demarcates the role and function of every organ of the state including the judiciary and establishes norms for their inter relationships, checks and balances”.\(^{35}\)

The Indian institutions of governance have been intentionally founded on the principle of separation of powers as a bulwark against tyranny of any or more organs of the State and the Constitution does not give any unlimited power to any organ and all the three principal organs are expected to work in harmony “in a joint and participatory role….instead of an exclusive primacy of any one in the process”, to quote former Chief Justice J.S. Verma. He has further observed that the basic constituent principle of the Indian polity is that no single

\(^{34}\) Ibid., p. 2.
\(^{35}\) Ibid., p. 2.
public functionary will have absolute power, which is anathema in a democracy.\textsuperscript{36}

The consideration before the Constituent Assembly was to preserve and protect the freedom and democratic rights of the people and the supremacy of the popular will in Indian system of governance. The centrality of the will of the people finds its best expression in the Preamble of the Constitution itself. The words, “We the people of India’ and ‘do hereby Adopt, Enact and Give to ourselves this Constitution’ recognize the sovereignty of the people and their primacy in constitutional system and convey its eternal message.\textsuperscript{37}

The Legislature has been accorded a pre-eminent position in Indian constitutional and political set-up, with power to make laws, to exercise control, over the nations’ pursue, to make the Executive accountable to the popular House, and when considered necessary, also to amend the Constitution. But the Legislature has to function within the parameters laid down by the Constitution.\textsuperscript{38}

The framers of the Constitution provide an independent and impartial judiciary as the interpreter of the Constitution and as the custodian of the rights of the citizens through the process of Judicial Review.\textsuperscript{39}

The Constitution does not contemplate a super-organ nor confers an over riding authority on any one organ. No organ has any power to superintend over the exercise of powers and functions of another.\textsuperscript{40}

\textsuperscript{36} Ibid., pp.2-3
\textsuperscript{37} Ibid., p. 3.
\textsuperscript{38} Ibid., p. 3.
\textsuperscript{39} Ibid., p. 3.
\textsuperscript{40} Ibid., p. 3.
It is obvious that all organs of the State would act only according to the constitutional mandate and should not be astute to find any disclosed source of power or authority to expand its own jurisdiction, which will give rise to avoidable conflicts and affect the harmonious functioning of the different organs of the State.\textsuperscript{41}

One of the eminent judges, the Hon’ble Chief Justice B.K. Mukherjee, in the Supreme Court, in \textit{Ram Jawaya Kapur V. State of Punjab} observed:\textsuperscript{42} 

“Our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”

\textbf{3. MEANING OF JUDICIAL ACTIVISM}

There is no precise definition of judicial activism accepted by one and all. However, there is a widely accepted notion that it is related to problems and processes of political development of a country. In other words, judicial activism deals with the political role played by the judiciary, like the other two branches of the State \textit{viz}, the legislature and the executive.\textsuperscript{43}

Activism, as is commonly understood, connotes a policy of vigorous action in pursuit of a cause, especially in politics. Judicial activism, however, has a qualitative connotation also, not merely quantitative. It has, moreover, a ‘public interest’ dimension, generally speaking though ‘private interest’ initiation or motivation cannot altogether be eliminated either. In fact, this concept or phenomenon called judicial activism. The basis must, in any case, be the interpretation of the law, the constitutional Articles or provisions or the legality of any executive action. The interpretation may lead to extension of the scope of law,
or actionable jurisdiction. Judicial activism may even cover, in its sweep, executive inaction also acts of omission, as it were, besides acts of commissions – either inadequately or wrongly. It is the normal function of the judiciary – such things fall within its usual jurisdiction. But in the ultimate analysis, all normal interpretative functions of judiciary do not generally attract the appellation of activism – some do. They depend on the nature, scope and thrust of the judgement the reformistic zeal of the judge.\textsuperscript{44}

Justice H.R. Khanna once said “when the light of law fails, judges are supposed to have some special vision like the third eye of Shiva…They must solve enigmas that no other agency of the government has been able to solve”.\textsuperscript{45}

Prof. Upendra Baxi notes that the term ‘activism’ has been used more in ascriptive sense where judges are evaluated as activists by various groups in terms of their interest, ideologies and values and they are admired or denigrated depending on whether judicial activism is seen as inimical or benign to the protection and promotion of these interests and ideologies and values.\textsuperscript{46}

To justice Bhagwati, the term ‘judicial activism’ is not the term of ‘fashion’ or ‘popularism’, but a term signifying an important source of judicial power, which judges should use for realization of ‘willed result’. He says.\textsuperscript{47}

“The task of the judges takes them deeper into future to make decisions which will affect sometimes even political development and, therefore, in all humility they have to be aware of social needs and requirements and economic and political compulsions and to recognize changes taking place in a fast developing society and to develop and adapt law to the changing needs and requirements of the people. And on each occasion

\begin{footnotesize}
\textsuperscript{45} Ibid., p. 445.
\textsuperscript{46} Lakshminath, A., Op. cit., p. 60
\textsuperscript{47} Ibid., p. 60.
\end{footnotesize}
when they do so, they are expected to provide justifying reasons which must satisfy not only themselves but also critics and jurist, nay the society itself, for what they decide”.

4. REASONS FOR JUDICIAL ACTIVISM

It is very difficult to state precise reasons for the emergence of judicial activism under any Constitution. The following are some of the well accepted reasons which compel a court or a judge to be active while discharging the judicial functions assigned to them either by a Constitution or any other organic law.

Need of Judicial Activism: Call of Hour

Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic development taking place in a country. For a law to be living, it must be growing, and law which regulates life must keep pace with the life. As new situation, arise the law has to be evolved in order to meet the challenge of such new situation. In country like India, where social sense is not developed and where the administration is best with routine the gap between law and justice tends to become too-wide and the community is held to ransom by those who know how to exploit the technicality of law. In a society where freedoms suffer from atrophy, activism is essential for participative public justice therefore, new horizons are needed to evolve a jurisprudence that integrates the traditional schools judicial activism is a new ray of hope it provided justice to those sections of society who were untouched by the social advancement for a period unknown.48

Judicial activism is the core of the judicial process of interpretation of statutes and application of judicial precedents to new cases before the courts by

expansion and developments. It is an accepted role of the judiciary that the courts have the power of Judicial Review over legislative measures, statutory rules and regulations and administrative actions and executive orders, it follows that if the judiciary is to perform its true role and dispose justice, “judicial activism” in that strict sense can not be excluded from the role of the courts as it truly is “judicial creativity.”

Near Collapse of Responsible Government

When the two political branches of the government viz., the Legislature and the Executive fail to discharge their respective functions, there will be a collapse of responsible government. Since a responsible government is the hallmark of a successful democracy and constitutionalism, its collapse warrants many a drastic and unconventional steps. When the legislature fails to make the necessary legislation to suit the changing times and when the governmental agencies fail miserably to perform their administrative functions sincerely and with integrity, it would lead to an erosion in confidence in the Constitution and democracy, among the citizens. In such type of situation, the judiciary legitimately step into the areas usually earmarked for the legislature and executive.

Pressure on judiciary to step in aid

The judiciary cannot remain a silent spectator when the fundamental or other rights of the citizens are trampled by the government or third parties. The judges, as responsible members of the society do feel that they have role to play an ‘ameliorating’ the worsening conditions of the citizen.

49 Ibid., p. 171.
50 Reddy, G.B., op.cit., p. 117-118.
51 Ibid., p. 118.
Judicial enthusiasm to participate in social reform and change

The judges cannot be idle and silent spectators when the times go on changing. The law is not static but dynamic, the judges participate in the social reform and changes that take place due to the changing times. It has encouraged public interest litigation, also known as social action litigation in India. This liberalized approach of the judiciary would lead to relaxation of certain procedural and customary rules by invoking a court’s jurisdiction which can be directly related to the expansion of judicial power so when courts themselves initiate corrective actions for social ills, there activity becomes indistinguishable from that of the commissioners of grievances.52

Legislative Vacuum

In Administrative law, there is a saying that even if Parliament and all the State Legislatures in India make laws for 24 hours a day and 365 days in a year, the quantum of law cannot be sufficient to the changing needs of the modern society. The same things holds good in respect of many a legislation passed by the competent legislatures. Inspite of the existence of a large quantum of pre and part constitutional laws, there may still be certain areas, which have not been legislated upon. This may be due to inadvertence, lack of explosive to the issues, the absence of legislation or indifference of the legislature.53

The Constitutional Scheme

The Indian Constitution contains numbers of provisions, which give the judiciary enough scope to assert itself and play an active role under Art. 13, the judiciary is implicitly empowered to review the validity of any law on the touch

52 Ibid., p. 118
53 Ibid. p. 119
stone of fundamental rights and to declare the same, void, if it contravenes any of the fundamental rights. Under Art. 32 any person whose fundamental rights are violated, can straightway approach the Supreme Court for the enforcement of those fundamental rights. Thus the Supreme Court has been designated as the guardian of the fundamental rights of the citizens and while playing that role, the Supreme Court often indulges in legitimate judicial legislation and judicial government.\(^{54}\)

5. EXAMPLES OF JUDICIAL ACTIVISM IN INDIA

The Indian judiciary has always commanded considerable respect from the people of this country. The roots of this high regard lie in the impartiality, independence and integrity of the members of the judiciary. Respect for the judiciary is part of the common man’s aspirations for maintaining rule of law and building a just society. The deeper aim of law is creation of a good society. Chankya said “Law and morality sustain the world”.\(^{55}\) The real source of strength of the judiciary lies in public confidence in the institution. The Constitution of India, with its chapters on Fundamental Rights and Directive Principles coupled with the federal system, threw new burdens on the Indian judiciary. The Latin maxim ‘boni judicis est ampliare jurisdictionem’ – It is the duty of a good judge to extend the jurisdiction based as it is on the principle that law must keep pace with the society to retain its relevance for if the society moves but the law remains static, it shall be bad for both. The Indian judiciary has, during the last few decades, acted on the maxim pretty extensively in cases where protection of fundamental rights or basic human rights is concerned.

\(^{54}\) Ibid., p. 120  
The Supreme Court of India started of as a technocratic Court in the 1950s but slowly started acquiring more power through constitutional interpretation.

In the first round of cases, Parliament or the government could silence the Supreme Court through the device of constitutional amendment. The Nehru government was supported by a large majority in each house of Parliament. Therefore, Parliament could easily get the Constitution amended by a special majority prescribed by Art. 368. During Nehru’s tenure as Prime minister, the Constitution underwent seventeen Amendments.\textsuperscript{56}

The progress of the society is dependent upon proper application of law to its needs and since the society realizes more than ever before its rights and obligations, the judiciary has to mould and shape the law to deal with such rights and obligations. The existence of a particular piece of legislation cannot solve the problems of society at large unless the judges interpret and apply the law to ensure its benefit to the right quarters. Initially the court followed a policy of adhering to a narrow doctrine and tended to shy away from development of the law soon after the Constitution came into force in 1950 in \textit{A.K. Gopalan’s}\textsuperscript{57} case, the Supreme Court placed a rather narrow and restrictive interpretation upon Art. 21 of the Constitution. By a Majority, it was held in that case that “….the ‘procedure established’ means procedure established by a law made by the state” and the Court refused to infuse in that procedure the principle of natural justice. The Court also arrived at the conclusion that Article 21 excluded enjoyment of the freedoms guaranteed under Article 19. The judgement was mainly based on the language of the Constitution and the requirements of the particular case before the court.

\textsuperscript{57} A.I.R. 1950
The Interpretational strategy of the Supreme Court of India in Gopalan was positivist because the Courts refused to give wider meaning to the words ‘procedure established by law’ or ‘personal liberty’ in Art. 21 of the Constitution when a court takes into account the Philosophy of law and interprets a statute in terms of not only what it is but also what it ought to be, it is said to have moved towards judicial activism.  

Parliament and the Supreme Court clashed on their interpretations of the provisions on the right to property. The Constituent Assembly had taken utmost care to avoid judicial interference with the programme of economic reforms to which the Congress Party had been committed since the days of the National Movement, the courts did hold the laws authorizing changes in property relations unconstitutional. In *Kameshwar Singh V. State of Bihar* the Patna High Court upheld the objection that the differential rates of compensation tapered down as the value of the land went up, were discriminatory. This decision was a clear example of legal positivism with a hidden class bias. This was a classic case of a judiciary unwilling to confront a legislature which passed a law contrary to an existing fundamental rights namely the right to property. It is a fine example of judicial passivism of the Supreme Court of 1950’s.

In *Shankari Prasad VS. Union of India*, it was argued that a constitutional amendment was ‘law’ for the purpose of Art. 13, therefore it had to be tested on the anvil of the above Article. If it violated any of the Fundamental Rights it should be void. Chief Justice Patanjali Shastri, speaking on behalf of a bench of five judges in a unanimous judgement, rejected that argument outright and held

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58 Sathe, S.P., op.cit., p. 42.
59 A.I.R. 1952 SC 252
60 °AIR 1951 SC 458.
that the word ‘law’ in that Article did not include a constitutional amendment. During Nehru’s time the Constitution went through seventeen amendments. The Seventeenth Amendment, which brought ryotwari estates within the definition of the ‘estate’ in Art. 31(A), became controversial for many reasons. It was, however, after Nehru’s death that the challenge to the constituent power of Parliament was renewed. In *Sajjan Singh Vs. Rajasthan*\(^{61}\) the Court consisting of five judges including himself that a constitutional amendment was not covered by the prohibition of 13(2), two judges, justices Mudholkar and Hidayatullah, expressed serious reservations about that interpretation justice Hidayatullah observed that if fundamental rights were to be really fundamental, they should not become ‘plaything of a special majority’. These two dissents opened the door to future attempts to bring the exercise of the power of constitutional amendment under judicial scrutiny.

The one case, which stands apart from other case, in the matter of judicial activism is *L.C. Golak Nath Vs. State of Punjab*,\(^{62}\) A judges special Bench of the Supreme Court, was called upon to determine the constitutional validity of the Constitution (Seventeenth Amendment), Act, 1964, in the instant case. The Court by a majority of 6:5 gave a very fold decision which had far reaching consequences. The Constitution (seventeenth Amendment) Act, 1964 had amended Art. 31-A of the constitution and included two enactments *viz.* the Punjab security of land Tenures Act, 1953 and the Mysore land Reforms Act, 1962, in the 9th Schedule to the Constitution and had placed them beyond attack. Art. 31-A deals with saving of laws providing for acquisition of estates etc., even

\(^{61}\) AIR 1965, SC 845.
\(^{62}\) AIR 1967 SC 1643.
though they are inconsistent with or take away any of the rights conferred by 14, Art. 19 or Art. 31.

The Court by majority speaking through Subba Rao C.J. declared that:

(i) Constitutional Amendment is a legislative process.

(ii) Amendment is law within the meaning of Art. 13 of the Constitution and

(iii) Parliament has no power from the date of the decision to amend any of the provisions of part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein etc.

The most noticeable aspect of this judgement is that this decision had secured “Paramountcy of fundamental rights” in the Constitution domain and established the principle that even the extra-ordinary process of constitutional amendment would be subject to the Judicial Review on the ground of violation of fundamental rights, guaranteed in Part III of the Constitution. The decision is also important because it has laid down the doctrine of “prospective overruling” for the first time in Indian constitutional jurisprudence. This doctrine explains that any amendment that violated the fundamental rights would be valid for all the past purposes i.e. before Golaknath and that it would be invalid only prospectively. Chief Justice Subba Rao exhibited a very rare judicial Activism in the instant case to enable the fundamental rights to attain supremacy in the Indian Constitution and in the process had overruled two long outstanding judgements on that topic viz. Shankari Prasad Vs. Union of India,63 and Sajjan Singh.

63 AIR 1951 SC 458.
While overruling the aforementioned earlier judgements, the learned Chief justice Suba Rao observed\textsuperscript{64}:

“While ordinarily this Court will be reluctant to reverse its previous decision, it is the duty in the constitutional field to correct itself as early as possible, for otherwise the future progress of the country and the happiness of the people will be at stake (*we are) convinced that the decision in Shankari Prasad’s case, 1952 SCR 89 (AIR 1951 SC 458) is wrong, its pre-eminently a typical error case where this court should overrule it. The longer it holds the field the greater will be the scope for erosion of fundamental rights. As it contains the seeds of destruction of the cherished rights of the people, the sooner it is overruled the better for the country.”

The above observations amply demonstrate a shift in the behaviour of the Supreme Court, from its earlier decisions and it marks watershed in the history of the Supreme Courts judicial activism.

In \textit{R.C. Cooper Vs. Union of India}\textsuperscript{65}, popularly known as the Bank’s Nationalization case, a eleven Judge Special Bench of the Supreme Court, was called upon to decide the validity of the Banking Companies (A acquisition and Transfer of undertakings) Ordinance, 1969 and its modified version namely the Banking Companies (Acquisition and transfer of undertakings) Act of 1969. These two laws were challenged by the petitioner, who was a shareholder as well as a director in some of the nationalized banks. He assailed their validity on the ground that they impair his rights guaranteed under Arts. 14, 19 and 31 of the Constitution. The Court speaking through Justice J.C. Shah for majority declared that the impugned Act was invalid, as it made hostile discrimination against the 14 banks proposed to be nationalized, and prohibited them carrying

\textsuperscript{64} AIR 1967 SC 1643.
\textsuperscript{65} AIR 1970 SC 564
on banking business, whereas the other Banks, Indian and Foreign were permitted to carry on banking business.

The Court further declared that the Act also violated the guarantee of compensation under Art. 31(2) in that it provided for giving certain amounts determined according to principles which were not relevant in the determination of compensation of the undertaking of the named banks.

The Court for the first time declared that “the validity of the law” which authorizes deprivation of property and “a law” which authorizes compulsory acquisition of property for a public purpose must be adjudged by the application of the same tests.”

In *Keshavananda Bharti Vs. State of Kerala*66 Popularly known as the “Fundamental Right Case”, a 13 judge bench of the Supreme Court dealt with the validity of the Constitution Twenty fourth Amendment, Twenty fifth Amendment and the twenty ninth Amendment. The Constitution twenty fourth Amendment Act, 1971 was passed to get over the decision of the Supreme Court in Golakhnath’s case it was held that (i) the ‘law’ under Art. 13(2) includes a Constitution amendment and (ii) Art. 368 of the constitution is related only to the procedure to amend the constitution but did not confer on the Parliament any power to do so. The 24th Amendment expressly empowered the Parliament to amend any provisions of the Constitution including those relating to Fundamental Rights and further made Art. 13 of the Constitution inapplicable to an amendment of the Constitution under Art. 368.

The question before Supreme Court in Keshvananda was whether the decision in Golakh Nath’s case was to be uphold or to be overruled. The special

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66 AIR 1973 SC 1461
bench of the 13 judges unanimously upheld the constitutional validity of the Constitution Twenty fourth Amendment Act, 1971 and in doing so, overruled the prior, decision of the Supreme Court in Golak Nath’s case cleared the way for upholding the validity of the other Constitution Amendment Acts which were questioned before the special bench in the writ petitions. The view of the majority of the special Bench, signed by nine judges out of 13, is as under:

(i) Golak Nath’s case is overruled.

(ii) Art. 368 does not enable Parliament to alter the basic structure or framework of the Constitution; and

(iii) The first part of section 3 of the constitution (Twenty fifth Amendment) Act, 197 is valid. The second part, namely “and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy” is invalid etc.

The majority of the special bench declared that every provision of the Constitution can be amended provided in the result, the basic foundation and structure of the constitution remain the same.

The Supreme Court had succeeded in Golakhnath, in making even a Constitution amendment, amendable to Judicial Review and asserted the Supremacy of the fundamental rights over constitutional amendments, the same court through a larger bench had overruled Golak Nath but assumed to itself an imprecedent power to test the validity of the constitutional Amendment.

On one hand, the Court upheld the validity of the twenty fourth Constitution amendment, 1971 in so far as it excluded a Constitution
amendment from the ambit of ‘law’ and in the process overruled the earlier
decision in Golaknath. On the other hand, the court assumed to itself, the power
to test the validity of a constitution amendment indirectly, i.e. in the garb of
“basic structure” doctrine. This power has no parallel in the modern
constitutional jurisprudence. Even the United States Supreme Court, considered
to be the most powerful Supreme Court in the entire world does not exercise
such power. It is the height of the judicial activism of the nine judges of the
Supreme Court that enabled the Supreme Court to claim such an extra ordinary
power. Perhaps there can be no other better examples of judicial Activism in
India than the one exhibited by the Supreme Court in Keshavananda Bharti.

By inventing the doctrine of basic structure the court has wittingly or
unwittingly disturbed the scheme of separation of powers and the checks and
balances envisaged by the framers of the Constitution. The Legislature, the
Executive and the Judiciary were no longer coordinate authorities as originally
provided for in the Constitution, the judiciary having exerted as the most
powerful limb of the State.  

Having assumed the power to adjudicate the vires of constitutional
amendments, the Supreme Court embarked on re-writing a few provisions of the
Constitution. In L. Chandra Kumar Vs Union of India the court was called
upon to examine the validity of Art. 323-A(2)(d) and 323-B(3)(d) introduced by
the Constitution Forty second Amendments. Act, 1976, which provided for the
creation of Tribunals including the Administrative Tribunals in order to lessen
the heavy burden on High Courts. The impugned provisions purported to
exclude the jurisdiction of all courts (including the High Courts) except the

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68 (1997) 3 SCC 261
jurisdiction of the Supreme Court under Art. 136 with respect to the disputes which were to be adjudicated by the said Tribunals – A seven judge Bench relying on Kesavananda Bharti declared that Judicial Review over legislative and executive action vested in the High Courts under Art. 226 and in the Supreme Court under Art. 32 of the Constitution was part of the basic structure of the Constitution. Therefore, exclusion of power of High Courts under Art. 226 and of the Supreme Court under Art. 32 was not valid. Had the Supreme Court stopped thereby merely striking down the impugned provisions, the status quo ante as it obtained before the Forty second Amendment would have been resorted and an aggrieved person could have straight away moved the High Court under Art. 226 or the Supreme Court under Art. 32 by a writ petitions instead of going to one of the Tribunal set up under Arts. 323-A and 323-B. The Supreme Court fore stalled this possibility by declaring that an aggrieved party should first approach the concerned tribunal and the decision of the tribunal could only be challenged before High Court concerned and not directly before the Supreme Court under Art. 136. These directions restricted the resurrected jurisdiction of High Courts under Art. 226 on the one hand and the jurisdiction of the Supreme Court under Art. 136 on the other. Before Kesavananda Bharti, it was possible for Parliament to step in and set right such anomalies by suitable amendment.

In *R.S.Nayak Vs. A.R. Antulay*69 a Constitution Bench was invited to pronounce on the question whether a Member of a legislative Assembly was a ‘public servant’ within the meaning of Sec. 21 Indian Penal Code (I.P.C.) and as such within the purview of the Prevention of Corruption Act, 1947. After declaring that M.L.A. was not a public servant, the Court *suo motu* requested the

69 (1984) SCR 495
Chief Justice of the Bombay High Court to transfer the case in which the Respondent, a former Chief Minister, was an accused from the Court of special judge, Greater Bombay to the High Court and assign them to a sitting judge of the High Court, for expeditious disposal by holding the trial from day to day. Four years later a larger Bench of seven judges in *A.R.Antulay V. R.S.Nakay*, by a majority decision, corrected the error of issuing such directions without any pleadings, without any arguments, without any prayer, contrary to the law and in contravention of the fundamental rights of the accused under Arts. 14 and 21 of the Constitution by setting aside the same. All the proceedings which took place in the High Court during the interregnum were also set aside. Self correction by a larger bench of the Supreme Court is a rare event and takes a long time causing irreparable loss in the meanwhile. Enormous judicial power coupled with unbridled judicial activism can undermine the credibility of this great institution.

*Kihota Hollohon V. Zachilhu and others* 70

The Supreme Court has used the power derived from the basic structure doctrine carefully. The judicial restraint became manifest in *Kihota Hollohon V. Zachilhu and others*. In this case, the Supreme Court was asked to examine the constitutional validity of the Constitution (Fifty second Amendment) Act. 1985. That amendment inserted the Tenth Schedule, which contained deterrent provisions against defection of members of legislatures. The Schedule defined what was meant by defection and described its consequences. Clause 2(1)(d) provides that if a member of a political party on whose symbol he was elected to the legislature changes his party, he loses his seat in the legislature. If a member

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70 (1992) 1 SCC 309
votes or abstain from voting contrary to the direction of his party or without the permission of the party or without his voting or abstention having been condoned by the party he shall be disqualified from being a member of the legislature.

Art. 105(1) of the Constitution guarantees freedom of speech in Parliament and Art. 194(1) guarantees freedom of speech in the legislature of every state. Clause (2) of each of the above articles confers immunity upon each member of the legislature from judicial proceedings in respect of anything said or any vote given by him in the House. It was contended that clause 2(1)(d) of the Tenth Schedule curbed the freedom of speech of a legislative member. The right to vote, it was asserted, was a concomitant of the right to free speech guaranteed by Article 105 of the Constitution. It was further contended that since freedom of speech in the house was part of the basic structure of the Constitution the above provision of the constitution (Fifty second Amendment) Act in so far as it curtailed such freedom violated the basic structure of the Constitution and was therefore void.

These were formidable objections but it seems the Court did not find them strong enough to make the amendment invalid. The challenge was examined by a bench of five judges. The Court did not express an opinion about the validity of provisions that imposed severe curbs on the freedom of a member to express himself in the House. Freedom of speech of a member guaranteed by Article 105(1) and immunity against civil and criminal action for acts arising out of the exercise of that freedom are the most valuable possessions of a member of the legislature in a democracy. Such freedom and such immunity are granted to a member of the legislature to enable him to discharge his responsibility towards
the people whom he represents. Restricting the freedom of a member to vote as he likes within the House, in order to eliminate unprincipled defection, was like throwing out the baby with bath water.

The basic structure doctrine is the high water mark of judicial Activism. The Indian Supreme Court alone enjoys such power. It has also been claimed by the Supreme Court of Bangladesh such power imposes an onerous burden on the Court. The court has to allow legitimate changes in the Constitution but prevent the erosion of those enduring values that constitute the essence of constitutionalism. Justice Jackson’s oft-quoted aphorism that the Court is not final but it is infallible and it is final because it is apt. The people live with the Court’s infallibility as long as they believe that its erroneous decisions can be corrected and that even its errors are not due to its lack of impartiality or lack of objectivity. There is therefore even greater need to examine how such accountability is reinforced.71

Post Emergency Judicial Activism : Liberty and Good Governance

The post emergency period (1977-98) is known as the period of judicial activism because it was during this period that the Court’s jurisprudence blossomed with doctrinal activity as well as processual innovations. Activism, however, can easily transcend the border of Judicial Review and turn into populism and excessivism. Its populism when doctrinal effervescence goes beyond the institutional capacity of the judiciary to translate the doctrine into reality and its excessivism when a court undertakes responsibilities that should normally be discharged by other co-ordinate organs of the government.72

71 Sathe, S.P., op.cit., p. 98.
72 Ibid., p. 100.
The activist era of the Supreme court has started only after 1975. The advent of judges like justice Krishna Iyer, justice P.N. Bhagwati and justice Chinnapa Reddy among others has opened a new leaf in the jurisprudence, so much so, that Prof. Upendra Baxi observes that India might have become Republic in 1950, but the Supreme Court has become Republic only in 1975.\(^73\)

The activism of the Indian Supreme Court has produced considerable gains, but it was not without pain. The former Chief Justice of Supreme Court of India justice. A.M. Ahmadi has stated that it is not the Supreme Court which has become active. He expressed the belief that activism would be only a temporary phenomenon and that the executive and legislature would sooner than later perform constitutionally ordained functions. The Chief justice J.S. Verma observed that the judicial is like a sharp edge tool which has to be used as a scalped by a skillful Surgeon, to cure the malody.\(^74\)

In *A.D.M. Jabalpur V. Shiv Kant Shukla*\(^75\) popularly known as Fundamental Right case. The Supreme Court of India became the most powerful apex court due to its power to invalidate even a constitutional amendment. Its institutional weakness was ultimately revealed through its decision in the Fundamental Right case. Art. 352 of the Constitution provides for the proclamation of emergency by the President. If he is satisfied that a grave emergency exists whereby the security of India or any part of the territory of India is threatened, whether by war or external aggressions or internal disturbance. During the 1975 emergency, the President had issued an order under Art. 359 of the Constitution suspending the right to move any Court for

\(^74\) Ibid., p. 115.
\(^75\) AIR, 1976 SC 1207.
the enforcement of the fundamental rights guaranteed by Arts. 14, 21, and 22 of the Constitution.

Attorney General Nisen De argued that during emergency, even if the executive shot a person dead or put him in prison, he could not invite the court to examine the validity of such an action what did the suspension of the right to move any court for the enforcement of the fundamental right to life and liberty guaranteed by Art. 21 mean? Did the rule that the executive could not take away an individual’s liberty unless the law authorized it emanates from Art. 21? The respondent wanted the Court to examine whether the acts of detention were in accordance with the provisions of the maintenance of internal security Act (MISA), under which they had been detained.

The Bench consisting of Chief Justice Ray and justice Khanna, Beg, Chandrachud and Bhagwati considered these decisions of the seven High Court, namely Allahabad, Bombay, Delhi, Karnataka, Madhya Pradesh, Punjab, and Rajasthan, that had rejected Attorney General Niren De’s argument that the petitions be rejected in limine (summary). In the Supreme Court, the learned Attorney General was lead on the face of it. It would be bad on the face if it was passed by a person not authorized to pass it or was passed for a purpose outside those mentioned in the Maintenance of Internal Security Act (MISA). It was held by a majority of four against one that the actions of the executive could not be examined by any Court. Justice Khanna dissented.

The decision in the Fundamental Rights case was severely criticized. In Fundamental Right case, the Supreme Court held that the basic principle of rule of law that a person could not be deprived of his liberty unless he had committed any breach of the law did not survive the proclamation of emergency. A Court
that only a few months ago had struck down a constitutional amendment as being against the basic structure of the constitutional amendment in the Prime Minister Election case\textsuperscript{76} did not consider the argument of the respondents that the above principle of rule of law, which was part of the basic structure of the Constitution, could not be whittled down through an order of the President issued under Art. 359.

The Supreme Court had realized that its decision in the Fundamental Rights case had cost it the public esteem that is enjoyed. Although in the Prime Minister Election case it had managed to satisfy both the constituencies of the government and the people, it had failed to satisfy the people's constituency in the Fundamental Rights case.

\textit{Indira Gandhi V. Raj Narayan}\textsuperscript{77}

In 1975 the Election of Mrs. Indira Gandhi was set aside on the ground that she had taken recourse to a corrupt practice as defined in the representation of the people's Act, 1951, known as the Election law. Her opponent put pressure on her to resign, she had appealed to the Supreme Court against the Allahabad High Court's judgement and the Supreme Court had admitted her appeal and stayed the execution of the High Court's decree subject to certain condition Mr. Nani Palkhiwali appeared on her behalf several members of Parliament belonging to the opposition political parties were arrested. Parliament passed several constitutional amendments during that period. The Thirty ninth Amendment said that all disputes regarding the election to Parliament of the persons holding the office of the Prime Minister and the speaker, shall be referred to a body to be appointed by Parliament and this was to apply even to

\textsuperscript{76} AIR 1975, SC 2299
\textsuperscript{77} AIR 1975 SC 2299.
those matters that had been pending or disposed of by the courts according to the
law as it stood before the coming into force of amendment. Clause (4) of article
329-A inserted by the Thirty ninth Amendment. It made a provision by which
validity was conferred on her election. The Supreme Court struck down that
clause of Thirty nine amendment as being violative of the basic structure of the
Constitution.

The decision of the Supreme Court was given during emergency and it
was the finest hour in the life of the Supreme Court. Prime Minister election
case provided social legitimacy to the basic structure doctrine and also provided
legitimacy to the basic structure limitation upon the constituent power of
Parliament.

**Post Emergency Activism : Atonement or Self Legitimation**

The Post emergency judicial activism was probably inspired by the
Court’s realization that its elitist social image would not make it strong enough
to withstand the future onslaught of a powerful political establishment. During
the emergency the Court did 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 fights with the Parliament on the right to property
appeared to them to be a mock fight between an elitist court and a majoritarian
legislature.

President Thomas 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 of achieving results.\textsuperscript{78}

Post emergency judicial activism grew out the realization that the narrow Constitution provision such as Article 21 in \textit{A.K.Gopalan V. State of Madras}\textsuperscript{79} was contradictory to its liberal stance in the \textit{Kesavananda Bharti} case.\textsuperscript{80}

Although the Indian judiciary by and large was considered to be impartial and principled. The Court became much more accessible and its doctrinal law became much more people – oriented. For this it adopted time strategies (i) it reinterpreted the provisions of the fundamental rights more liberally so as to maximize the rights of the people and particularly the disadvantaged sections of society and (ii) it facilitated access to the courts by relaxing its technical rules of locus standi, entertaining letter petitions or acting \textit{Suo modu} and developing a public law, proactive technology for the enforcement of human rights.

\textbf{Personal liberty and judicial Activism}

Right to life and personal liberty is the most important fundamental rights guaranteed in part III of the constitution. The Supreme Court has been encountered with the task of interpretation of various terms used under Article 21 of the Constitution. The progress of the society is dependent upon proper application of law to its needs. Since the society today realizes more than ever before its rights and obligations, the judiciary has to mould and shape the law to deal with such rights and obligations. The mere existence of a particular piece of beneficial legislation cannot solve the problems of the society at large unless the judges interpret and apply the law to ensure its benefit to the right quarters.

\textsuperscript{78} Sathe, S.P., op.cit., p. 106.
\textsuperscript{79} AIR, 1950 SC 27.
\textsuperscript{80} AIR 1973 SC 1461.
Initially the court followed a policy of adhering to a narrow doctrine and tended to shy away from development of the law. Soon after the Constitution came into force in 1950 in A.K. Gopalkan’s case the Supreme Court placed a rather narrow and restrictive interpretation upon Art. 21 of the Constitution. By a majority, it was held in that case that “….. the procedure established by law’ means procedure established by a law made by the State” and the Court refused to infuse in that procedure the principle of natural justice. The Court also arrived at the conclusion that Art. 21 excluded enjoyment of the other freedoms guaranteed under Art. 19. The judgement was mainly based on the language of the Constitution and the requirements of the particular case before the court.

Twenty years after the judgement in Gopalan’s case in 1978, the Supreme Court in Maneka Gandhi’s case pronounced that the procedure contemplated by Art. 21 must be ‘right, just and fair’ and not arbitrary; it must passed the test of reasonableness and the procedure should be in conformity with the principles of natural justice and unless it was so, it would be no procedure at all and the requirement of Art. 21 would not be satisfied.

The Supreme Court not only gave under 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 Art. 19 stood rejected. When a law restricts personal liberty, a court also examines whether such restriction on personal liberty also imposed restrictions on any of the rights

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82 AIR 1950 SC 27.
83 AIR 1978 SC 597
given by article 19. The court held that the right to go abroad was part of ‘Personal liberty’. ‘Personal liberty’ included ‘a variety of rights which go to constitute the Personal liberty of man 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.

6. STRUCTURAL MALFUNCTIONING : ACTIVISM ENTERS POLITICAL THICKET

_D.C. Wadwha V. State of Bihar._

Under Art. 123 and 213 of the Constitution, the President and the Governor respectively can issue an ordinance when neither of the houses of Parliament or the State legislature is in session. Such an ordinance remains in force only till the expiration of six weeks from the reassembly of Parliament or the state legislature or till a resolution disapproving it is passed by both houses of Parliament or the State Legislature after its reassembly. Dr. Wadhwa found that ordinances were issued and allowed to expire upon completion of the period of six weeks from the reassembly of the legislature and then again re-promulgated after the session of legislature was over this was a fraud on the Constitution. Although the matter he brought before the Court was of great importance, it should have been brought before the legislature because such clandestine re-promulgation of ordinance was an affront to the legislature and the legislature alone should have corrected it and reprimanded the government.

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84 AIR 1987, SC 579.
But no member of the legislature had taken this up. The only justification for the Courts intervention was that such fraudulent re-promulgation of ordinances was a gross violation of the Constitution. The Supreme Court held that the petition was maintainable since the grievances were not regarding validity of any particular ordinance but the general unconstitutional practice for the Government of Bihar and any public spirited citizen could approach the court through PIL for promotion and preservation of rule of law and for prevention of the abuse of public power and any person can maintain a petition under Article 32 it is the right of every citizen to insist that he should be ruled by laws made in accordance with the Constitution and not laws made by the executive in violation of the constitutional provisions.

Bhagwati, CJ held that the essence of rule of law lay in the exercise of public power within constitutional limit. If a practice was adopted by the executive which was in flagrant and systematic violation of constitutional limitations, a member of public would have sufficient interest to challenge such practice. The power to promulgate ordinance was essentially a power to be used to meet an extraordinary situation and it could not be allowed to be “preserved to serve political ends”. The ordinance raj was thus nipped into the bud by the Supreme Court through PIL.

*S.P. Gupta Vs. Union of India*:85

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

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85 AIR 1982 SC 149.
judiciary, the Court had held by majority of three against two that a judge could be transferred without his consent.

**The Supreme court Advocates – on Record Association V. Union of India:**

A bench of nine judges by a majority overruled the S.P. Gupta’s decision and declared that the final decision in the matter of selection of judges and transfer of High Court judges rest with the judiciary and the Union government is bound to accept and act upon its ultimate decision. The larger bench upheld the primacy of the Chief Justice of India by holding that Chief Justice should ascertain the views of the two senior most judges of the Supreme Court and communicate the collective opinion of all the three to the President who will be found by it.

**Judicial Activism against abuse of Power**

The year 1996 will be remembered as year of great despair. It was the year of the most shocking variety of scams and swindles, corruption and crime and during this period the Court appears to be getting more active in matters of political and economic corruption in high places. It ordered the investigation and prosecution of crimes involving political figures including a former Prime Minister and some Chief Ministers.

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

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86 AIR 1994 52 268.
Jain diaries. During the regime of Mr. Rao, the court’s activism flourished against corruption and abuse of power. This increased the power of the court as against the other organs of government.

In this case Vineet Narain Vs. Union of India the country witnessed a new dimension of judicial Activism. A journalist invoked the jurisdiction of the Supreme Court by way of Public interest litigation under Art. 32 of the Constitution praying for a direction to get the alleged offences disclosed by the entries in two diaries and two note books seized from Surendra Kumar Jain and his two brothers relating to Hawala transactions and payments made to several political leaders investigated and ensure that the culprits were dealt with according to law. The Court held a number of sittings in camera to monitor the investigations conducted by the Central Bureau Investigation (C.B.I.) and finally closed the case after the C.B.I. had submitted the charge sheets in the criminal court concerned. In the final judgement the Supreme Court directed the Union of India to take steps to give statutory status to the Central Vigilance Commission and to bring the CBI under the purview of the CVC so as to ensure functional autonomy and independent investigation without any interference from the Government. Chief justice Verma Speaking for the court observed that ‘none stands above the law’. Previously, the Supreme Court on a number of occasions, had declared that it was not competent for a court of law to give finding directions to the legislature to enact a law, legislation being the exclusive function of Parliament or of a State legislature. The decision in Vineet Narain is by a Bench of three Hon’ble judges. It makes a radical departure from the earlier law. The judgement was delivered in good faith with the best of

89 Sathe, S.P., op.cit., p. 145.
90 AIR, 1998 SC 889.
intentions to tackle corruption in high places and it had a salutary effect on politicians occupying high positions in various governments and enthused the people at large and generated a feeling that the Supreme Court would not tolerate corruption in high places.

While these are the positive aspects, the anticlimax came when another Bench of three judges in *CBI Vs. V.C. Shukla and others*91 upheld the orders of the Delhi High Court discharging V.C. Shukla, L.K. Advani and in the same Jain Hawala cases holding that the entries made in the diaries and notebooks of Jain Brothers were not acceptable and reliable evidence in the eye of law to base a conviction. If the Bench in Vineet Narain’s case had paid due attention to the nature of evidence on account of which presumable the CBI was reluctant to proceed further the numerous sittings involving precious judicial time could have been avoided and the damage caused to the reputations of the concerned accused on account of the extensive media publicity could have been averted. Reputations once destroyed by judicial intervention, cannot be revived or restored fully by orders of discharge passed years later. Notwithstanding the positive aspects of the proceedings in Vineet Narain’s case and the laudable intentions of the Hon’ble judges, it is doubtful whether the court laid down sound law in jurisprudential terms. Even though Parliament enacted a law giving effect to the directions of the Supreme Court showing due deference, the fact remains that the Court has to some extent exceeded its powers and entered the domain of legislation which the Constitution has expressly reserved for Parliament.

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In *K. Veeraswami V. Union of India*\(^{92}\)

A Constitution Bench by a majority held that, if a question arose as to sanction for prosecution of a judge in any criminal case the President of India should consult the Chief justice of India and pay due regard to the opinion expressed the view that a binding direction could not be issued by the court on the basis of the provisions of the case.

*P.V. Narasimha Rao Vs. State*\(^{93}\) the Court by a majority directed that sanction for prosecution of Member of Parliaments under Section 19(1) of the P.C. Act, 1988 shall be obtained from the Chairman of Rajya Sabha/Speaker, Loksabha, as the case may be, until Parliament amends the Act and specifies a competent authority S.P. Barucha, J., on behalf of the minority, disagreed with the said direction, and held that M.Ps cannot be prosecuted for offences under Section 7, 10, 11 and 13 of the P.C. Act, 1988, because of want of an authority competent to grant sanction thereto, and rightly expressed the hope that Parliament would address itself to the task of removing this lacuna with due expedition. It is thus clear that opinion is divided among judges themselves; while some of them indulged in law making by filling up gaps in legislation, the dissenting judges in both K. Veeraswami and P.V. Narasimha Rao cases struck to the correct stand that it was the function of legislature and not the judiciary, to remove the lacuna.

Many advocates and academicians in India support judicial activism as a natural role of judiciary under the Constitution of India. Rajander Sachar without mincing words affirms: “The activism of the court is a command of the

\(^{92}\) (1991) 3 SCC 626

\(^{93}\) (1998) 4 SCC 626.
Constitution which judges must honour, if they are to be true to their oath.”

Former Chief justice, A.M. Ahmadi, thinks that the judicial activist aggressive role will be temporary and attributes this role to degeneration of Parliament’s conduct which is a corrective measure and cites the examples of Mandal agitation and Ayodhya crisis.

Another supporter of judicial activism, Raju Ramachandran locates in the Constitution: “The higher form of judicial activism is written into the Constitution itself. It is a necessary ingredient of a written federal Constitution”. He traces the source of judicial activism to the decline in the role played by the other two institution.

**Article 356: Center’s Hegemony Challenged**

*S.R. Bommai V. India* 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 Bhartiya Janta Party Government in Uttar Pradesh. The President acting on the advice of 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

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95  Ibid., p. 30.
96  Ibid. p. 33.
97  AIR 1994 SC 1918.
taken up together in S.R. Bommai V. India. The Court 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 government had come to office, the Court choose not to disturb the arrangement. But the Court warned that it might not happen that way in future. Bommai gave power to the Courts to prevent the manifest abuse of Article 356.

Judicial activism has to be distinguish from judicial populism and judicial excessivism. The Court has encroached upon the sphere allotted to the legislature while correcting the distortions in the functioning of the constitutional process. 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 over reached itself and has also indulged in populism. Inspite 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 courts, sometimes reluctantly and sometimes because there was no better alternative. But the court has so continuously sustain legitimacy of its power and its decisions. Although the court is a political institution in so far as it determines 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 PIL, which the court has adopted, has doubtless helped the court to acquire such social and political legitimacy.\(^98\)

\(^98\) Sathe S.P., op. cit. p. 160.
7. PUBLIC INTEREST LITIGATION

Social Action litigation and public interest litigation are the terms used interchangeably in India. The term public interest litigation in India substantially differs from that in the United States. Prof. Upendra Baxi pointed out that American public interest litigation was funded by government and private foundation and its focus was not so much on State repression or government lawlessness as on public participation in governmental decision making. He therefore insisted that the Indian phenomenon described as PIL should be described as social action litigation.

Evolution of Public Interest Litigation

The Public Interest Litigation in India is an aspect of post emergency period and it has been primarily judge – induced and judge led. It has paved way for the public spirited persons and organizations to fight for the cause of those who are not in a position to approach the court by themselves. The flexibility of jurisdiction, the easy access it provides to the litigant and the range of issues that it permits to be dealt with, have made it an essential area of the functioning of the Supreme Court particularly in its evident transformation into a dominant organ of the state effectively keeping in check, the executive. The Public Interest Litigation has made immense contribution for the minimization of many ills playing the Indian society mainly due to the inefficiency or indifference of the administration.

The concept of PIL was explained by justice V.R.Krishna Iyer for the first time in 1976 in *Mumbai Kamgar Sabha Vs. Abdul Bhai*\(^\text{102}\) while granting standing to an association of workers as such on behalf of individual workers for the claim of some bonus. Krishna Iyer, J. expressed his concern for community orientation of public interest litigation in contra-distinction to the traditional private law litigation and observed:

“Test litigation, representative actions, probono publico, broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral procedural shortcomings. Public interest is promoted by a spacious construction of locus standi in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualization of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker less litigation, consistent with fair process, is the aim of adjective law.”

By this judgement the essence of the concept of PIL was initiated by J. Krishna Iyer and was further strengthened by him in a number of cases.

**Concept of P.I.L.**

According to the jurisprudence of Art. 32 of the Constitution of India, “The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed”. Ordinarily, only the aggrieved party has the right to seek redress under Art. 32.

**The S.P. Gupta case laid down the criteria to activise the PIL Process.**

Justice P.N. Bhagwati in *S.P. Gupta V Union of India*\(^\text{103}\) articulated the concept of PIL as follows: “Where a legal wrong or a legal injury is caused to a

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\(^{102}\) AIR 1976, SC 1465.

\(^{103}\) AIR 1982 SC 149
person or to a determinate class of persons by reason of violation of any constitutional or contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons by reasons of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of public can maintain an application for an appropriate directions, order or writ in the High Court under Art. 226 and in case any breach of fundamental rights of such persons or determinate class of persons, in this Court under Art.32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons.”

The PIL has liberalized the process, even by sending a letter, newspaper cutting or research study or a report to any judge or the court and the court treated it as a petition and passed orders in that connection.\textsuperscript{104}

Justice Ahmadi, had once described the Supreme Court as the world’s most powerful court because of its widening ranging, vast jurisdiction. Apart from its original, appellate, civil, criminal and advisory jurisdictions, it has the power to entertain petitions even from ordinary people who otherwise cannot approach it due to financial and a host of other constraints.\textsuperscript{105}

PIL has allowed the matter of under trials, convicted prisoners, women and children in jail or reformative homes, bonded and migrant labourers, unorganized labour, landless agricultural labour, landless agriculture farmers, etc., to move the court. In such cases the cause of action included, state


repression, governmental lawlessness, administrative deviance, exploitation of the under privileged exploitation of nodular resources and pollution of environment, etc. These development brings one point clearly that is, the PIL has taken the cause of the poor and oppressed to the apex court.\textsuperscript{106}

**Public Interest Litigation its areas of Operation**

If certain infringement of law, injury to public interest, public loss due to official apathy, inaction or manipulation or dereliction of duty as ordained by the authoritative rules or statutes which are co relatable to public interest, being offensive to or destructive of it, will all fall within the PIL jurisdiction and judgement given in such cases, in view of their impact and end result or even visibility in forms of reduction or elimination of the “original sin” are often categorized as pronouncements belonging to the area of “judicial activism”. Some of the area where so termed judicial activism, emanating from PIL, has been in evidence cover subjects like environment pollution, social ills – like dowry death, bride burning, bonded labour, child labour, custodial death, police torture (Bhagalpur Blinding case) and other forms of atrocities on prisoners/jail inmates, nonpayment on the part of Ministers/Prime Ministers for private use of public air craft, public compensations or official bodies. There have been cases where other individual fundamental rights as enshrined in Part III of the Constitution have formed part of PIL as they had under public repercussions such PIL cases may be taken directly to Supreme Court where constitutional infringement is involved private, i.e. individual rights included. They can also be taken up in High Court.\textsuperscript{107}

\textsuperscript{106} Chaudhry, Manmauji Pawaan, op. cit. p. 343.
\textsuperscript{107} Dey Bata K., op. cit. p. 443.
Its Rationale

Usually, the courts take cognizance of a case when complaint is made by the person affected. This is the question of locus standi, that is, whether a person not involved or affected in any case has any legal justification or ground to take up some one else case in the Constitution on others behalf. They were reluctant to accept or admit such cases.

Justice Krishna Iyer and justice Bhagwati were acknowledged champions of the new Philosophy of judicial activism in India, which has been assimilated by and absorbed into judicial activism. Their efforts have been to demolish some of the inherited notions of judicial restraint which were major stumbling blocks in the way of their concept of judicial Activism and to empower the judicial system to have recourse to new strategies, new tools and new remedies to serve the goal of delivering social justice. Their contribution in access jurisprudence lies in giving a status and credibility to Public Interest Litigation unprecedented in the judicial history of so called developed countries of the world.  

PIL as a Tool of Access of ‘Poor man’ to justice

The former Chief Justice of India, A.M. Ahmadi, had once described the Supreme Court as the world’s most powerful court because of its wide ranging and vast jurisdiction.

PIL is different from the normal writ jurisdiction litigation in the following aspects (1) the courts allowed informality of procedure by entertaining letters written to judges or to the court as petition or took cognizance of matters on their own Suo moto and substituted inquisitorial processes in place of the adversary processes wherever necessary for the disposal of matter; (2) the rules

108 Jain Sampat, op. cit. p. 60
of *locus standi*, which meant the rules regarding the eligibility of a person to invoke the jurisdiction of the courts, were relaxed, (3) new relief and remedies were developed to do justice.¹⁰⁹

The Court responded in *Sunil Batra V. Delhi Administration*¹¹⁰ to a letter written by Sunil Batra, a prison inmate drawing its attention to the miserable lot of a fellow prisoner who was being subjected to unbearable physical torture by the prison authorities. The prisoners had scribbled the letter on a piece of paper and managed to have it sent to justice Krishna Iyer, judge of the Supreme Court. The learned judge responded to that letter and from that response emerged the first judicial discourse on prisoners right. Justice Bhagwati while dealing with a petition filed by advocate Kapila Hingorani regarding inordinately long periods of under trial detention suffered by some accused criminals obtained information about a large number of people who suffered from such detentions which sometimes for exceeded the longest period to imprisonment prescribed as punishment for the offence they charged with. He took up the issue and held in *Hussain Ara Khatoon Vs. Bihar*¹¹¹ that right to speedy trial was part of the right to be governed by the procedure established by law guaranteed by Art. 21 of the Constitution and directed courts and the governments on how trials should be speeded up.

In *Bandhua Mukti Morcha V. India*¹¹² In this case the justice Bhagwati said:

“There is no limitation in the words of clause (1) of Article 32 that the fundamental right which is sought to be enforced by moving the Supreme Court should be one belonging to the person who moves the Supreme Court nor does it say that the Supreme Court should be moved only by a Particular kind of proceeding.”

¹⁰⁹ Sathe, S.P., op. cit. 203.
¹¹⁰ AIR 1978 SC 1675
¹¹¹ AIR 1979, SC 1360
¹¹² AIR 1984, SC 802
The learned judge observed that wherever there was violation of a fundamental right, any one could move the Supreme Court for the enforcement of that right. This was, however, further qualified by the following words:113

Of course, the court would not, in the exercise of its discretion, intervene at the instance of a meddlesome interloper or busybody and would ordinarily insist that only a person whose fundamental right is violated should be allowed to activise the court.

This was the rule but exceptions had to be made where the actual victim lacked either the knowledge of his rights or the resources for approaching the court and some public spirited persons or social action group moved the court on his behalf. The Court could not close its doors to genuine complainants of violations of rights, in order to keep out ‘a meddlesome interloper’ or ‘busybody’.

In the year 1981, the concept of *locus standi* was further developed by justice Krishna Iyer and Chandrachud, C.J. in *Fertilizer corporation Kamgar Union Vs. Union of India*114 The question in this case was whether the workers in a factory owned by governments had *locus standi* to question the legality and or validity of the sale of certain; plants and equipment of a factory, by the management. The court approved the theory of public interest litigation as a part of the process of participative justice on moral grounds, and if disallowed it could endanger the rule of law itself. The association of workers was granted standing on behalf of individual workers as such for the claim of some bonus also.

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113 AIR 1984, SC 802
114 AIR 1981 SC 344.
Complete Liberalization of *Locus Standi* leading towards institutionalization of PIL

The scope of PIL was thus enlarged to a greater extent by justice Bhagwati who proved to be the architect of PIL jurisprudence in India in his remarkable judgement in S.P. Gupta Vs. Union of India, he observed:\(^{115}\)

“Where a legal wrong or a legal injury is caused or threatened to a person or to a determinate class of persons, and such person or determinate class of persons is by reason of poverty, helplessness or disability, or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Art. 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.”

PIL has allowed the matter of under trials, convicted prisoners, women and children in jail or reformative homes, bonded and migrant labourers, unorganized labour, landless agricultural labour, landless agricultural farmers, etc, to move the court. In such cases, the cause of action included, state repression, governmental lawlessness, administrative deviance, exploitation of the underprivileged, exploitation of natural resources and pollution of environment etc.

Public interest litigation is a cooperative and collaborative effort on the part of the petitioner, court and the state to provide the poor with their due entitlements. It has emerged as a challenge to provide an occasion and opportunity to the judiciary, government and its officials to examine a large number of issues concerning disadvantaged lot. PIL is now a major need for
redressing public injury, enforcing public duty, protecting social collective rights and interest, and indicating public interest for the upliftment of the society.\textsuperscript{116}

**More and more interference of judiciary in the executive and legislative Domain:**

**Rameshwar Prasad Vs. Union of India:**\textsuperscript{117}

The Supreme Court declared the dissolution of Bihar Assembly on May 23, 2005 unconstitutional. The proclamation under Art. 356 and dissolution of Bihar Assembly were challenged in the Supreme Court. The challenge was entertained and fresh elections were not interrupted. The fresh electoral verdict was clearly against the exercise of power under Art.356. The majority judgement was delivered by Chief justice Y.K. Sabharwal and justice B.N. Agarwal and Ashok Bhan. Justice Arijit Pasayat and K.G. Balakrishnan dissented and held the dissolution constitutional.

The Supreme Court delivered a divided judgement after the electoral verdict. The majority judges did not indicate how the Governor ought to conduct himself if he or she is faced with two or more conflicting claims. If the Governor considers the splits in the recognized political parties in the Assembly, he or she would be examining the legality of the splits and that would be unacceptable to the majority judges.

According to them, under the Antidefection Act, the Governor has no role to play in such a situation and the Governor should not be concerned about its possible violation before swearing in a new government. On the other hand, all

\textsuperscript{116} Jain Sampat, op.cit. p. 487
\textsuperscript{117} AIR 2006 SC 980
the five judges implicitly agree that if there are no claims, the Governor has no option. But to dissolve the Assembly, even before it meets for the first time, and such a dissolution would be valid.

The majority judges infer from the May 21, 2005, report of Buta Singh as the Governor of Bihar that he believed that seventeen or eighteen MLAs belonging to the Lok Janshakti Party (LJP) were moving towards the Janata Dal, which would mean that the later was in a position to stake its claim to form the government. They described as arbitrary two assumptions of Buta Singh as contained in his report that the move was itself indicative of various allurements having been offered to the LJP, MLAs and that the claim that might be staked to form a government would affect the constitutional provisions and safeguards built therein, and distort the verdict of the people.

From this, the majority judges concluded that Buta Singh attempts was to prevent one way or the other the formation of the government by a Political party, an area wholly prohibited insofar as the functions, duties and obligations of the Governor are concerned. It was thus a wholly unconstitutional act. Therefore, they said, the proclamation of May 23, 2005, dissolving the Assembly was unconstitutional and fastened the blame on Bihar Governor for his report saying that it misled the Union government. However, the Governor alone was criticized and not the Union government.

_T.M.A. Pai Foundation V. State of Karnataka_\textsuperscript{118}

In this case, the majority, by overruling the earlier 5 judges bench decision of the Supreme Court in _Unni Krishna_\textsuperscript{119}, held that all citizens have the

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\textsuperscript{118} 2002 (9) SC 25; 2002 (8) SCC 481

\textsuperscript{119} 1993(1) SCC 645
fundamental rights to establish and administer educational institutions under Article 19(1)(g), and the term ‘occupation’ in this Article comprehends the establish and running of educational institutions and the state regulation of admissions in such institutions would not be regarded as an unreasonable restriction on the fundamental right to carry on business under Article 19(6) of the Constitution. However, the unaided educational institutions were clearly and completely kept outside the intervention of the state under Article 19(6). This is evident from the subsequent decision of the Supreme Court in P.A. Inamdar, which had explained the ambit of T.M.A. Pai Foundation and held that as regards unaided educational institutions, the state has no control and such institutions are free to admit students of their own choice. It is this limitation on the power of the state, which was sought to be removed by the Parliament through the 93rd Amendment Act of the Constitution. In this predicament, the court held Article 15(5) as perfectly constitutional and not in violation of basic structure of the Constitution, but only with respect to state maintained or aided educational institutions. The majority court excluded un-aided private educational institution, from consideration by simply saying that was not the issue before them and this “left open to be decided in an appropriate case. The issue of reservation policy came into focus recently with the passing of the constitution (Ninety third Amendment) Act, 2005 and enactment of the Central Educational Institutions (Reservation in admission) Act of 2006 (No. 5 of 2007), introducing reservation of seats for the other backward classes (OBCs) /socially and educationally backward classes (SEBCs) of citizens to the extent of 27%. The constitutional validity of both the 93rd constitutional amendment and the law enacted there under, namely the Act of 2007, were challenged before the
Supreme Court in number of writ petitions. Since the emotive issue of reservation directly or indirectly impinges upon the interest of ‘millions of citizens of this country’, for its find determination, the matter came up before the Constitution bench of five judges of the Supreme Court in Ashok Kumar Thakur Vs. Union of India and others.¹²¹

The Ninety third Constitutional amendment was challenged before the Supreme Court in Ashok Kumar Thakur, introduced a new clause (5) in Article 15, which provides,

Nothing in this Article or in sub-clause (g) of clause (1) of Article 19 shall prevent the state from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the schedule castes or the schedule tribes in so far as such special provisions relate to their admission to the educational institutions including private educational institutions, whether aided or unaided by the state, other than the minority educational institutions referred to in clause (1) of Article 30.

To promote the educational advancement of the socially and educationally backward classes of citizens, i.e., the OBCs or the schedule castes and schedule Tribes in matters of admission of students belonging to these categories in unaided educational institutions other than the minority educational institutions referred to clause (1) of Article 30 of the constitution it is proposed to amplify Art. 15. The new clause (5) shall enable the Parliament as well as the State legislatures to make appropriate laws for the purposes mentioned above.

In this background the “fundamental question” arose in Ashok Kumar Thakur was whether clause (5) inserted by the Ninety third constitutional amendment and the Act 5 of 2007 enacted by the Parliament in pursuance of that

¹²¹ (2008) 6 SCC J
amendment are in consonance with “the other provisions of the constitution”, or whether their impact runs contrary to the constitutional aim of achieving a casteless and classless society.

The five judge constitution bench, headed by chief justice K.C., Balakrishnan, thus upheld the validity of the Ninety third Amendment, to the constitution passed 2005, which enables the Central government to introduce reservation in educational institutions.

The Central Educational Institutions (Reservation in Admission) Act of 2006 (No. 5 of 2007) was passed pursuant to Art. 15(5) in order to reserve seats, inter alia for other backward classes (OBCs) in central educational institutions. But the Central government has hitherto neither determined the class or classes of citizens who are entitled to get reservation of seats in central educational institutions nor has laid down any standard or criterion for determining the status of OBCs for admission purposes. In courts view, “before carrying out constitutional amendments the Union of India must clearly target its beneficiaries. It is erroneous to make the law first and “thereafter target the laws beneficiaries”.

Following this prescription, the Court desired the government to use the “Post Sawhney Vs. Union of India criteria as a template”, for determining OBCs and thereby also excluding the ‘creamy layers’ from OBCs. This led the court to identify the beneficiaries of reservation for admission purposes on the analogy of office memorandum issued by the Government of India on September 8, 1993, for providing reservation for backward classes to the extent of 27% for making appointments.
The office memorandum spells out the groups of exclusion from which some workable principles could be obstructed. However, while doing so, the court introduced a caution by observing that the same principle ‘need not to be strictly followed in case of reservation envisaged under Article 15(5) of the constitution.” Besides, since section 2(g) of the Act 5 of 2007 does not define backward class by excluding ‘creamy layer’ from its ambit, it “must be deemed to have been such backward class by applying the principle of exclusion of ‘creamy layer’.

The Supreme Court, thus excluded ‘creamy layer’ that was impliedly included both by virtue of 93rd constitutional amendment and the Act 5 of 2007 passed there under. The court said that the parameters laid down for identifying the creamy layer among the OBCs for jobs under the office memorandum of September 8, 1993, will be applicable for identifying the socially and educationally backward classes.

Four out of five judges who wrote separate judgements are chief justice Arijit Pasayat justice R.V.Raveendran and justice Dalveer Bhandari justice C.K. Thakker and justice Pasayat wrote a common judgement. The Bench upheld the validity of the Constitution (Ninety third Amendment) Act 2005, empowering the Centre to come out with the special law for OBC quota in institutions of higher learning with the said order reservation in these institutions will go up to 49.5 percent.

Justice Bhandari called for excluding children of former and sitting MPs and MLAs from the benefit of OBC quota. The Court held that for applying the parameter for identification of SEBC, the creamy layer has to be excluded as per
the office memorandum of September 8, 1993 which included wards of persons, holding constitutional posts and government official under various categories.

Chief Justice Bala Krishna said that “the plea of the petitioner that the legislation itself was intended to place a section of the community as part of the vote catching mechanism is not a legally acceptable plea and its only to be rejected”. He further stated that identification of backward class is not based on caste only but poverty, social, backwardness, economic backwardness, all are criteria for determination of backwardness”. Justice R.V. Raveendram also shared this view. On the same issue, justice Arijit Pasayat and C.K. Thakker said that determination of backward class can be done by excluding the creamy layer and necessary data must be obtained by the center and the state government.

Justice Pasayat said that “for the determination of backward classes notification should be issued by the centre and it should be open to challenge on the ground of wrongful exclusion and inclusion”.

The Bench rejected the contention that 10+2 should be the yardstick for determining educational backwardness. Chief Justice Bhandari was of the view that once a candidate is graduates from a university he will be educational forward and will ineligible for special benefits under Art. 15(5) of the Constitution for post-graduate and any further studies thereafter. The court held that “creamy layer” from amongst the OBCs will remain out of the quotas’ ambit and a review of the quota would have to be done every five years.

The decision by a five judge constitution bench headed by Chief justice K.G.Balkrishnan is to be implemented with effect from 2007s onwards. This would imply that Indian Institute of Technology (IITs) and Indian Institute of Management (IIMs), which were to declares results for the 2008-209 academic
session will have to factor in 27% quota for OBC candidates, before announcing the results. The bench arrived at the decision after concluding that the 93rd amendment made in the constitution, empowering the centre to formulate special laws for OBC reservation in educational institutions of higher learning was “not violative of the basic structure of the constitution.” Similarly, it also held that the legislation passed by the United Progressive Alliance (UPA) government in 2006, providing for OBC quota did not go against the grain of the Constitution.

The only divergent view was relating to the constitutional validity of 93rd amendment in relation to private unaided institutions, with four judges leaving the issue open since none of those institutions had approached the court. Justice Bhandari, however, held that ‘imposing reservation on unaided institution violates the ‘basic structure’ as it would deprive citizens of their fundamental right “to carry on an occupation.”

Raja Ram Pal V. The Hon’ble Speaker Lok Sabha :122

Parliament expelled 11 MPs for taking cash to ask questions in the House. 11 MPs from four mainstream political parties were shown on television accepting money to raise questions in Parliament. BJP accounted for six of the MPs (five Lok Sabha and one Rajya Sabha), the BSP three while Congress Party RJD accounted for one member each.

The 11 expelled MPs caught taking bribes on camera in the cash for query sting operation filed a writ petition in the Delhi High Court challenging their expulsion from Parliament. In their petition filed through counsel Nawal Kishore Jha, the expelled MPs Narendra Kumar Kushwar (Mirjapur, UP) and

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122 2007 (1) scale 241.
Manoj Kumar (Palmur, RJD) wanted the court to set aside the order of Lok Sabha Speaker Somnath Chatterjee and restore their membership. The Petition contended that the action of Parliament be expel them was “unconstitutional, justice were not observed It was claimed that the MPs were not provided with any opportunity to present their defence and the entire action smacked of arbitrariness. They also argued that the Pawan Bansal committee had no locus standi to conduct the enquiry and recommend action against MPs.

The Lok Sabha Speaker Somnath Chatterji said the courts have no jurisdiction on Parliament expelling MPs and said he would not respond to any judicial notices in the matter. He rejected the criticism that the expulsion of MPs in the cash for query seam was hasty and that the issue should have been referred to the Privileges committee or the Ethics committee of Parliament. He said that he had the highest respect for the judiciary and it was a question of discipline and Parliament had the authority under the Constitution to decide on how to discipline errant MPs. It was a question of discipline and had the authority under the Constitution to decide on how to discipline errant MPs. “In this matter, under the Constitution, Parliament is the supreme authority”.

The Supreme Court upheld Parliament’s right to expel members for misconduct. A five judge constitution, by a majority of four to one, held that Parliament has power to expel erring MPs and upheld the expulsion of ten Lok Sabha members and one Rajya Sabha member. The Bench headed by Chief Justice Y.K. Sabharwal said the procedure adopted by Parliament in expelling the members cannot be said to be illegal. The judgement sets to rest apprehensions that the apex court could play a proactive role after it entertained the petitions by the MPs challenging the punishment for them.
Speaker Somnath Chatterji had refused to accept a notice from the court on the petitions and it was the government which had appeared in the matter. The Supreme Court said there was no violation of fundamental rights of expelled MPs in general as proper opportunities were given to them before the inquiry committee constituted by Lok Sabha speaker. Besides (ii) justices K.G. Balakrisnan, CK Thakker and D.K. Jain were part of majority verdicts. The lone dissenting judgement was given by justice R.V. Raveendran who said Parliament has no power to expel MPs since the Constitution did not have any such provisions. The Bench said that while adjudicating the matter it was not concerned with financial gains of the expelled MPs but with their expulsion and its legalities.

Most legal experts, however, agree that Parliament is well within its rights to expel members. Article 105 of the Constitution states that the powers, privileges and immunities of each House of Parliament and its members shall, until defined by Parliament, be those enjoyed before the coming into force of the Forty fourth Amendment Act. Under this Article, the legislature has enjoyed the privileges of expelling errant members and there is no need for the court to intervene unless there are very good reasons for doing so.

The Court has taken care to emphasize that the privileges of Parliament are not absolute. The Court held that the right to freedom of speech much yield to the specific power of Parliament to control its proceedings and what should be published, but not the right to life or liberty under Article 21. The latest decisions holds that the Courts can scrutinize “the validity of the action of the legislature trespassing on the fundamental rights of citizens”. More specifically, it would be the duty of the court to examine any instance of infringement of the
fundamental rights under Article 20 or 21 of any member or non member. The restraints on freedom of speech in relation to legislatures as well as courts are a matter of continuing concern, particularly in the context of the functioning of a vigorous democracy. They need to be addressed through a law or a judicial decision. Meanwhile, both the judiciary and the legislatures would do well to exercise their contempt powers only when absolutely needed for their functioning.

7. MERIT OF JUDICIAL ACTIVISM

The goal of the constitution, enunciated by worthy founding fathers in its Preamble, is to secure to the people of India “justice social, economic and political; liberty of thought, expression, belief, faith and worship, and equality of status and of opportunity”. For achieving this goal, the Constitution has created three state organs, the legislature, the Executive and the judiciary. Parliament and the State legislatures have, by and large, performed their duty fairly satisfactorily; they have enacted many laws touching the lives of the citizens, in particular the weak and vulnerable sections. But the Executive has failed, in a large measures, to implement these laws in letter and in spirit – far reasons which need not be gone into here. In such a state of affairs, if a complaint is brought before court mainly the High Courts and Supreme Court that a particular law or provision or scheme is not being implemented properly and a direction is asked for its implementation than the court discharge its duty because the judiciary is also an organ of the state ordained by the Constitution to achieve the goals set out in the Preamble and part III & IV.¹²³

¹²³ The Hindu, 30 April 2008.
Indian Constitution adopts the broad concept of a welfare state. A welfare state is generally sensitive to all angles of public. Hence, public well being is the ultimate object of a welfare state. Here judiciary plays the role of active sentinel. It has to be satisfied that all the constitutional ideals and concepts are being executed between the public generally. Courts are denoted to play more active role leaving unnecessary technicalities and traditions. It is a practical but untraditional mode of performance of constitutional liability adopted by judiciary in the arena of welfare concept.\textsuperscript{124}

The necessity for judicial intervention arises when the citizen complains about unfair treatment or violation of his rights at the hands of the executive or the legislature. In case, where the executive refuses to carry out the legislative will or ignores or thrusts the legislative will, it is surely legitimate for courts to step in and ensure compliance with the legislative mandate judiciary is always moved by an aggrieved person after traditional routes have failed to redress his grievances. When the court is apprised of and is satisfied about gross violations of basic human rights, it cannot fold its hands. It must respond to the knock of the oppressed and the downtrodden for justice with a positive response by adopting certain operational principles within the parameters of the Constitution and pass appropriate directions in order to render full and effective relief. Judicial Activism reinforces the strength of democracy and reaffirms the faith of the public in the Rule of law.\textsuperscript{125}

The expansion of the authority enjoyed by unelected bodies has been a staggering worldwide trend in recent years. From waste management - clean air,
and education policy to property rights and religious liberty as well as many administrative matters, it is hard to think of a single issue relevant to politics or policy on which the courts of India have not left their mark. The Supreme Court has set itself up as the final arbiter of the Constitution, scrutinizing even amendments made to that document by Parliament.

The weakness of the political process provides fertile soil for judicial activism, and judges keen to compensate for their failure to defend democratic principles during the 1975-77 emergency have avidly taken up the task of preserving the republic. In many instances, the executive has almost invited the judiciary to play a leading role. State governments often seek judicial dispensation as a source of political cover when unpopular decisions have to be made. But such power as the Indian courts have acquired mostly confirms the dictum that power flows to those who choose to exercise it. Judicial Activism depicts the active role of judiciary in promoting justice. One hand it is equated with judicial creativity, on the other, labelled as judicial terrorism.

The liberal rule of locus standi has helped social actions group to come to court on behalf of disadvantaged section of the society groups such as the people’s union for civil liberties, people’s union for Democratic Rights etc, similarly under trial prisoners, prison inmates, unorganized labour founded labour, pavement dweller, children prosecuted under the juvenile justice Act, children of prostitutes and women in protective custody were able to receive the courts attention. The court also went into allegations of the killing of innocent people or suspected accused through false encounters, death of persons in police custody because of fortune, the case of binding prisoners by the police, for

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controlling occupational health hazards and diseases to workers in asbestos industry for banning import, production and distribution and sale of insecticides that causes health hazards.  

The judiciary is uniquely placed in the matrix of Power structure within the system of governance judges are not elected but clearly have the power and indeed the responsibility to check the exercise of powers and actions of elected representatives and appointed officials. The judiciary as an institution is vastly respected, notwithstanding huge challenges in ensuring access to justice, judicial process and issues of transparency and accountability. It is vested with ensuring that he rights and freedom of the people are protected and the powers exercised by the government in adopting policies are in accordance with the Constitution other legislation.

If democracy is to become meaningful in India, it should be based on two important factors: enforcement of the rule of law and the reform of the political system – each dwelling upon the other. The judiciary is well suited to support both these initiatives.

Extreme of anything is bad. Doctrine of separation of power and doctrine of Checks and Balance is inevitable for healthy democracy. It is believed that judicial Activism is breaking the doctrine of separation of power and in balance of power can be resulted into arbitrary uncontrolled and despot judiciary. Executive and legislative organ allege that judiciary is unnecessarily interfering in their functions but one has not to forget the fact that judicial activism has done a lot to this country. Hence, there should be a balance between judicial

127 Saxena, Aviral, op. cit. p. 49.
129 Ibid.
activism and judicial restraint.\textsuperscript{130} Judicial activism is something, which could be termed as ‘the Aristotle effect’ Aristotle abhors a vacuum. If any agency in any society becomes dysfunctional, the nature, which abhors this vacuum, would make other agencies to rush to fill it up.\textsuperscript{131}

\section*{9. DEMERITS OF JUDICIAL ACTIVISM}

Judicial activism is an essential part of judicial function but in recent years. There has been criticism of judicial activism. The opponents of judicial activism are naturally the supporters of judicial self-restraint. In the history of the U.S. Supreme Court, four justice stand out as leading advocates of judicial restraint. They are justices Oliver Wendell Holmes, Louis Brandles, Marlan F. stone, and Felix Frankfurter. They argued through their judgements that the power of the Supreme Court to declare laws unconstitutional should be used sparingly and that justice’s of the court must accord maximum respect to legislative acts. They repeatedly expressed the opinion that the political process was the best method to resolve disputes where values confronted, and that it was a contradiction in democracy for oligarchic court. To set itself against the elected legislature or to act in its stead.\textsuperscript{132} The philosophy of judicial restraint is reflected in one of the early dissents of justice Holmes, who summed up the essence of judicial self restraint in propounding his “reasonable man” thesis. He said, “the court should nullify legislative acts, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe

\textsuperscript{131} Ibid. p. 48.
fundamental principles as they have been understood by the traditions of our people and our laws”.

There must be certainty in law so that men are enable to plan their affair according to rule of law and with certitude of what the legal consequences of their action would be, while judicial activism introduces an element of confusion so that people are tempted to take their chance, gambling upon the hazards of the courts and putting in jeopardy many transactions which had been concluded on the basis of what the law then was. In all Constitution changes in laws are bring about by legislature and not by the judges, but the judges are arrogating to themselves a function which appertains to another constitutional organ.

Judicial Activism, which is certainly the best of democracy, has not to be unbridled. Judicial activism was not to lead to judiciary tyranny, as the judiciary is vulnerable in certain important respects. The executive can always change its constitutional views by nomination of persons having different ideas to court when vacancies occur.

The critics asserts that court have started legislating by giving directions. Since any direction coming from court is binding on the state. A court is not equipped with expertise and competence of governance, which coordinates organs of government traditionally have. There may be instances where in its anxiety to do public good, the courts have exceeded limits. The judicial decisions suffer from inflexibility. This could be seen from the fact that the court becomes functions officio and can not mould its decisions with the needs of changing times, which the legislature and executive can always do. The court

133 Lochner vs New York, 198 U.S. 45 (74) (1904).
cannot have recourse to the innovative technique of issuing continuing *mandamus* in all cases. Courts do not have any machinery of their own for implementing their decisions. The only power available is one of the contempt, which cannot be exercised always. Also, higher assumption of responsibility by the judiciary has the deleterious affect of weakening other wings of governance which is not a good indication of otherwise healthy constitutional democracy. Judicial activism is justifiable upto that extent only where it protects the public against executive inefficiency. Beyond that, it is unjustifiable for democracy. Executive should be conscious about its liability towards public. Judiciary should have a limitation. It cannot become an option of executive. There are so many pending cases in courts and the courts would have to concentrate on their judicial duty also.\(^\text{135}\)

The exercise of judicial activism by the judges has not been entirely flawless. There do exist certain drawbacks in the exercise of judicial activism by the judges. Judicial activism encroaching on the powers of the legislature and the executive has been disapproved by many including Lok Sabha speaker Somnath Chaterji. On February 19, 2008 while speaking at the function organized by High Court Bar Association at Nagpur, he asked the judiciary not to become a super legislature saying it should not overstep into the matters of legislature and encroach upon spheres remarked for other organs of democracy. A popular criticism of judicial activism is that non-elected official should not be allowed to usurp the power conferred by the people on their elected representatives.\(^\text{136}\)

\(^{135}\) Saxena Aviral, op. cit. p. 50.

A common criticism of judicial system as a whole and judicial activism especially, is the lack of accountability on the part of the judges. Detractors of judicial activism hold that neither democracy nor the rule of law can exist when the law is merely what judges say it should be. They argue that the discretion of judges must be limited. When the judges become popular through judicial activism they want to become politicians. It is dangerous for democratic system.\textsuperscript{137}

The judicial activism will have a detrimental effect on our democratic order. The people are losing their a faith in their political leadership, bureaucracy and governmental mechanism. No one is spared of a serious suspicion, not even the Prime Minister of the country. This emerging ideology will prove fatal for the basic democratic norms. Moreover, the judicial intervention in legislative or executive domain has endanger the system of checks and balances and has proved to be the main threat to the system of separation of powers in India.

Justice Kuldip Singh, former judge of the `Supreme Court of India, felt that although the judiciary is independent, there may still some flaws in it. The Constitution does not contemplate a super organ an over-riding authority on any one organs. No organ has any power to superintend over the exercise of powers and functions of another, unless the Constitution strictly mandates. All organs of the state should act only according to the constitutional mandate and should not be astute to find any undisclosed source of power or authority to expand its own jurisdiction, which will give rise to avoidable conflicts and affect the harmonious functioning of the different organs of the state.\textsuperscript{138}

\textsuperscript{137} Ibid., p. 31.
In the early years of the Republic, the Supreme Court had already recognized that the Indian legislature had a distinctly superior position *vis-à-vis* the other organs of the state. The justice S.R. Das, who later adorned the office of the Chief justice of India with great luster in the famous case of *A.K. Gopalan V. State of Madras*\(^{139}\) made it very clear that:

“Although our constitution has imposed some limitations…. It has left our Parliament and State legislature supreme in their respective legislative fields. In the main subject to limitations…. Our Constitution has preferred the supremacy of the legislature to that of the judiciary… and the Court has no authority to question the wisdom or policy of the law duly made by the appropriate legislature…. And this is a basic fact which the Court must not overlook.”

Similarly, commenting on the nature of separation of powers delineated by Indian constitution, one of the most eminent judges, the Hon’ble chief justice B.K. Mukherjea, in the Supreme Court in *Ram Jawaya V. State of Punjab*\(^{140}\) “Our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”

The Prime Minister Manmohan Singh said the dividing line between judicial activism and judicial overreach is a thin one. As an example, competing action by State authorities through the power of *mandamus* is an inherent power vested in the judiciary. However, substituting *mandamus* with the take over of functions of another organ may, at times become a case of over reach. These are

\(^{139}\) AIR 1950, SC 27.
\(^{140}\) AIR 1955 SC 549.
all delicate issues, which need to be addressed cautiously. All organs, including the judiciary must ensure that the dividing line between them is not breached.\textsuperscript{141}

Such matters come to the judiciary in the grab of PIL which need greater scrutiny to satisfy the test of confides of the cause as well as of the petitioner. It is time the Supreme Court framed rules to ensures consistency in the approach of the Court in all PILs giving statuary for the several judicial made on this behalf. The High Court has to follow the same practice by amending their rules to prevent adhocism and inconsistency.\textsuperscript{142}

The Hon’ble Supreme Court has itself construed that the concept of separation of powers is a “basic feature” of the Constitution. That being so, necessarily each organ of the State has separate areas of functioning, into which no other organ can enter or intervene. Unless permitted by the constitution itself, and if it so does, it will be contrary to one of the basic feature our Constitution and that includes the judiciary also.

The Supreme Court has not made any real breakthrough inspite of its all activism and effort, in preventing frivolous cases from being entertained by the lower courts and adding to an already congested judicial system.\textsuperscript{143} “There are many cases, including Public Interest Litigations, which on the face of it, are frivolous. Many of them are only for propaganda or to win cheap publicity,” says former chief justice of India V.N. Khare. “They do nothing more than clog the already overburned justice delivery mechanism.”\textsuperscript{144}

The Chief Justice of India K.G.Bala Krishnan, declared that the judicial innovation of the late 1980s PILs to hold the government accountable for

\textsuperscript{141} Kaur, Harinderjit, op. cit. p. 31.
\textsuperscript{142} Ibid. pp. 31-32.
\textsuperscript{143} Times of India, 19 Jan. 2007
\textsuperscript{144} Ibid.
deprivation of the downtrodden, who lacked the wherewithal to approach Courts for enforcement of their rights, is no longer the panacea for all systemic ills.\textsuperscript{145}

The former Chief Justice of India Justice Ahmadi has stated that the judicial activism has the potential to transcend the border of Judicial Review and turn into populism and excessivism. “Activism”, according to him, is populism what doctrinal effervescence transcends the institutional capacity of the judiciary to translate the doctrine into reality, and it is excessivism what a court undertakes responsibilities normally discharged by other coordinate organs of the government.\textsuperscript{146}

The Hon’ble Mr. Justice Markandey Katju of the Supreme Court has while dealing with some matters before him, is reported to have observed, that “it has become a fashion to file PILs raising almost all matters before the Court which normally fell within the domain of the executive. The judiciary must know its limits, otherwise there would be a reaction.”\textsuperscript{147}

Whatever the criticism be as a matter of fact the judiciary has done a strenuous job to ameliorate the human sufferings. Those who oppose the growing judicial activism of the higher Court, do not realize that it has proved a boon for common men. It has set a number of wrongs committed by the states as well as individual.\textsuperscript{148} There should be no fear from judicial activism, rather the common people, very often denied of the protection of the law because of the delayed functioning of the Courts, have long been fed up with what may be called judicial inertia or judicial tardiness. Judicial activism has started the process to remove these occasional aberrations too. And this can be furthered

\textsuperscript{145} \textit{Times of India}, 16 May, 2007
\textsuperscript{146} Chaterjee, Somnath: op. cit. p. 8.
\textsuperscript{147} Ibid., p. 10
only by honest forthright judicial activism and no by running down the judiciary in the eyes of the public.

In a democratic system of governance the most effective watchdog is the people. Institutions help when the public is vigilant. The greatest asset and the strongest weapon in the armory of father judiciary is the confidence it commands and the faith it inspires in the minds of the people in its capacity to even handed justice and keep the scales in balance in any dispute. Judiciary in India has by and large enjoyed immense public confidence. Nevertheless, the judicial authorities are not immune to public scrutiny. Even Former Chief Justice of India Adarsh Sen Anand has realized that the real source of strength of the judiciary in the public confidence in it. And the judges have to ensure that this confidence is not lost. It is the fear of grounds well of public opinion that will prevent the democracy from judicial over stepping.

The Supreme Court plays a vital role in Indian Democracy. It is the highest Court in the Indian judicial system and one of the three coequal branches of the national government. It has primacy, though not exclusive, responsibility for interpreting the Indian Constitution and for defining the scope and content of its key positions. As a principal guardian of the Constitution, the court is frequently called upon to assess the validity of statutes passed by legislative majorities.

To reaffirm the faith of the people in the rule of law, to preserve democracy and confirm the belief that there is a remedy under the law for every injury and a solution for every problem this exercise by the judiciary is essential.

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Where the validity of an act is challenged before a court of law, the judiciary is required to consider the constitutionality of the statute on the touchstone of the parameters fixed by the Constitution. It is no reflection either on the government or on the Parliament that their views as to constitutionality are again being reviewed by the judiciary. In interpreting the existing law, that is to say, what the law is, the Courts are required to keep the particular situation in view and interpret the law so as to provide a solution to the particular problem to the possible extent. This is a legitimate exercise by the judiciary and its constitutional obligation by virtue of the role assigned to it in the constitutional scheme. The gaps in the existing law which are filled by updating the law result in the evolution of justice principle, which in due course of time get incorporated in the law of the land and thereby promote the growth of law.

Judicial institutions have a sacrosanct role to play not only for resolving *inter-se* disputes but also to act as a balancing mechanism between the conflicting pulls and pressures operating in a society. Courts of law are the products of the Constitution and the instrumentalities for fulfilling the ideals of the state enshrined therein. Their function is to administer justice according to the law and in doing so, they need to respond to the hopes and aspirations of the people because the people of this country, in no certain terms, have committed themselves to secure justice – social, economic and political besides equality and dignity to all.

The legislature, when it enacts the law is naturally unable to visualize all the situations to which it would apply in future. In the myriad situations which arise thereafter there are some occasions when the existing law appears to be deficient to provide for the felt needs of the time. In such a situation the role of the judiciary is to interpret and expound the law to provide for those situations
as well within the scope of law, since the rule of law must prevail and that does not permit any vacuum.

When the citizens of this country had been denied access to justice for long years then the judiciary forged a potent weapon by way of Public Interest Litigation. The Supreme Court ruled that for those who, as a class, cannot agitate their legal problems by themselves for reasons of poverty or disability or illiteracy and ignorance, any member of the public acting bonafide can maintain an action for judicial redress.

It is mainly this expanded role and more particularly the expansion of the jurisdictional limits of the courts exercising Judicial Review, which has been given the title of “judicial Activism” by those who are critical of this expanded role of judiciary. It must respond to the knock of the oppressed and the downtrodden for justice by adopting certain operational principles within the parameters of the Constitution and pass appropriate directions in order to render full and effective relief. If the judiciary was also to shut its door to the citizen who finds the legislature as not responding and the executive indifferent, the citizen would take to the streets and that would be bad for the rule of law and democratic functioning of the state.

The former Chief Justice of India Y.K. Sabharwal said on the powers of judiciary *vis-à-vis* Parliament. “There is a difference of perception, but it is healthy for judiciary. Relationship between judiciary, legislature and executive should not be cosy.” It is very dangerous as it may come in the way of taking independent decisions.

When governance is at its lowest ebb and executive does not function or enforce laws and corporation/municipalities are in capable of providing basic
necessities of good living, when public utilities cannot provide pure drinking water, pure air because of uncontrolled pollution and non-enforcement of laws/regulations, public health is nobody’s concern in officialdom, law makers are insensitive and inactive. Million of men in the metropolis may in the entire country governed by them, some one is required and somebody has to intervene to save life, life’s quality and grace; to protect society from civilisational collapse, and to restore sanity in men.

Cl. Krishna Iyer CJ wrote pertinently:

The Supreme Court never creates law, it discovers and declares…. Which is the glorious genius of our Paramount law. This curial tow de force, has made the judiciary at once a constitutional instrument of democratic justice…. But acting as a sentinel and swordsman when injury and injustice afflicts any individual, or group, local community or nationality the country and its economy, national sovereignty and secular stability. This jurisdiction is not a vacuous jural power nor vagarious judicial omnipotence. It is jurisprudence as its functional, though yet nascent, finest but in the fullness of time, it may well blossom through the Courts liberative activism… within the boundaries of Suprema lex and conformability to judicial ethos, there are large spaces, almost virgin, where the justice system may operates to fulfill the goals in the Preamble and Articles of the constitution.