CHAPTER II
ROLE OF THE JUDGE:

20.1 Role of a judge: The power of judicial review and the relative autonomy have given scope to judges to have judicial function as protecting a process of structural democratic participation. The more socially and politically accepted view is that the jurisdiction of the Courts should never be ousted.

20.2 Independence of the Judiciary is not an end in itself but a means to an end. The judiciary must be committed to the people as a whole. But that independence should not be abused to treat human beings as things as slaves in Dred Scott case or to say that the convict be hanged before argument as in Butto's execution or to announce death sentences on pro-democracy demonstrators as in China in recent upheavals. The functional freedom and operational autonomy of the judges, being constitutional imperative must be geared to the constitutional goal of social justice to the people as a whole. Equal justice and free legal aid being the motto of the constitution, Article 39A States that "The State shall secure that the operation of the legal system promotes justice, on a basis
of equal opportunity, and shall, in particular provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities).

20.3. It is a fact that in this late twentieth century, the applications of laws of earlier period may have little or no bearing in the face of fastly changing ideas, modes and approaches in the legal system which is catching up the trends consistent with that in the Welfare State of People's democracy as in India, where the Constitution ensures Justice, - social, economic and political, liberty of thought, expression, belief, faith and worship; equality of Status and of opportunity; and to promote among them all, fraternity assuring the dignity of the individual and the unity and integrity of the nation.

20.4. In India, the vast masses, numerous minorities, the weaker sections, the economic challengers and political dissenters must be heard and rescued. The myriad mafia, the communal fanatics, the political
authoritarians and economic oppressors and the exploitation of many hues must meet with Waterloo in Court.
For this under Article 39A of the Constitution of India undertaking sanctioned by the constitution, lawyers and law dispensers have to become creative militants with multidisciplinary skills, prepared to break with heritage and be branded heretics. Industrialists, latifundists, trans-nationals, hoarders, racketeers, high-brow bureaucrats, corrupt and mighty men in power and others of their ilk, including some among the liberal, learned and holy Chauvinists, may frown on activist artists of Social justice. May be, judges may resort to contempt coverup, against uncomfortable brethren and radical lawyers. Revolution and even Constitutional revolution as Abraham Lincoln faced, meets with terrible hostility.

20.5. Goethe also once said that "The greater part of all the mischief in the World arises from the fact that men do not sufficiently understand their own aims. They have undertaken to build a tower and spend no more labour on the foundation than would be necessary to erect a hut".

20.4. According to above, the Judiciary requires a firm
The judicial activism on social philosophy is the crying need for the present day functioning of the legal system. There has been a change from the doctrinaire approach of the Judiciary to the liberal ones all over the world from Blackstone to Denning in England and from Chief Justice Jay to Earl Warren in the USA. Poverty jurisprudence to prevent mass exploitation is gradually getting ways in place of laissez faire rule of law abetting the interests of those well off and the privileged and vested ones. Judges in India should be the repository of intelligence and integrity having socialist philosophy and secular attitudes otherwise the people coming for relief in this secular, socialist, democratic republic will be at bewildering dismay and disgust.
against justice. People often criticise that 'Judges are robed fossils and formalist ignoramuses, unelected, unaccountable, looking backward and westward and innocent of expertise so necessary for modern, complex and creative and informed socio-economic action affecting the masses......'

20.7. The following observation of Justice of V.R. Krishna Iyer will truly reflect the ideas and ideologies that should lead a faithful dispensation of justice in the greater interest of the people at large in this land of Republic.

"The bar must broaden its ken, quicken its conscience, democratise its talent, fight for human rights, vaccinate itself against elitist bias, study its social brief, use dynamic new legal technique and educate the bench to rise to the challenge and deliver collective justice to masses of people by-passing the ballot politics and stalling pollemics of the legislature and the wooden slow speed and file logged processes of the benumbed bureaucracy. .......

........ The democracy of judicial remedies brings public interest litigation into focus. Public interest litigation has a revolutionary edge and demands militant
identification with the common people with a Gandhian singleness of purpose...."

20.8. We have found that Leslie G. Scarman in his writing on 'Human Rights' remarked that 'The Indian Constitution has the advantage of having been written in the 20th Century. It meets head-on the problem of economic and social rights; it is not confined, as the 18th Century U.S. Constitution was, to the safeguarding of political and civil rights........... The Judicial function in Britain is an emanation of royal power and was by the Act of Settlement and Bill of Rights of 1688/9 effectually subjected to the legislative sovereignty of Parliament. As per Blackstone's analysis, the Judges are rightly included in King and Lords and democracy is represented by the House of Commons. Since the time of Montesquieu, the division of the Government into three functions legislative, executive and judicial has been made but they are rigorously separate. The highest level of the three functions are exercised by the sovereign in Parliament. The great nineteenth century Judge, Willes J. put it, "We (the Judges) sit here as servants of the Queen and the legislature". There is in the United Kingdom no public law but only conventions accepted by Parliament.
Yet the force of events is compelling the judges to develop an administrative law. A constitutional mechanism strong enough to prevent absolute power from lodging in anyone group of Society or institution coupled with a plain declaration of the rights and duties of man in society is the most required one to survive as the jus naturale of mankind or the jus gentium of all races as without which the civilised nation can hardly survive.

20.9. In 1950, the member States of the Council of Europe signed the European Convention of Human Rights and Fundamental Freedoms. The United Kingdom ratified it in 1953. The U.K. became internationally bound as a Sovereign State to apply the convention. But as the convention was not incorporated in the internal laws of the United Kingdom and necessarily, there is a gap developing between the requirements of English law and the obligations of the United Kingdom. The embarrassment is all the more acute because the aggrieved individuals can get their grievances heard and adjudicated upon by the European Court of Human Rights.

20.10. Whereas, in the United States of America, there
is a constitution embodying a declaration of fundamental rights and imposing a duty to protect and enforce them upon the judiciary at the top of which is the Supreme Court, the existence of which is protected by the Constitution. Canada and Australia have also written Constitutions and a Supreme Court—Canada has also a separate Bill of Rights. But the formulation and/or incorporation of human rights as constitutional rights as being safeguarded even against infringement by the legislature has not been fully developed. Further the system of checks and balances, inherent in the separation of the three functions of the State as being curb on abuse of power is also not available in the U.K. The lack of human rights for convicted prisoners in Britain was exposed by the European Court in Golder's Case, where a prison rule, which had the effect of preventing a prisoner from obtaining a legal advice without Home Secretary's consent (which in Golder's case was withheld) was declared an infringement of the European convention. It was really a pitifully explorably state of affair where no principle existed to help Mr. Golder who was so rightless similar was the case when the Sunday Times was prevented from publishing an article on the manufacture of thalidomide
drug at a time when the litigation against the manufacturer was pending. The Court of Appeal had striven to achieve a balance of the public interests involved - the one of justice and the other of the freedom of the press but the House of Lords ruled in favour of no press comments on the facts of a case while still sub-judice. The European Court, in effect, preferred the view of the Court of Appeal, though they were careful not to challenge the correctness of the Lord's ruling in English law. They merely said that the State of English law, as revealed by Lords was inconsistent with the convention.

In the United Kingdom, in the matter of discrimination, the Parliament has intervened and the Sex Discrimination Act 1975 and the Race Relations Act 1976 are now in force. The Commission for Racial Equality and the Equal opportunities Commission are now operating in their respective fields to help, inter-alia, legal aid and advice to the victims of racial discrimination. The direct result of the two statues is that the business of protecting the human rights of Women and racial minorities has become a routine operation undertaken by an independent administrative agency subject only to the supervision of the Courts and to the duty of report to Parliament.
An illustration of conflict in the field of human rights is to be found in Bakke vs. University of California. Here Allan Bakke, a 38 year old white Engineer decided to change career and applied to the medical school at the University of California's Davis Campus, near the State Capital of Sacramento. But despite two years of applying in 1973 and 1974, Bakke was turned down while the school proceeded to admit 16 members of minority races whom Bakke claimed were less qualified.

In it, at issue was the constitutionality of "affirmative action" programmes to help America's long deprived minorities, particularly the blacks, to catch up with the rest of society. Bakke contended that he had a victim of reverse discrimination. The case went up to the U.S. Supreme Court but ended up in June, 1978 in such a split fashion that the opinion of just one of the nine Supreme Court justices was allowed to prevail, Justice Lewis F. Powell, the one in the middle, held, while admitting reverse discrimination in favour of Bakke, that the University acted constitutionally in pursuing future 'affirmative action' programmes to help disadvantaged minorities provided race and ethnic origin formed only part of its selection process. Two Codes of Law - Bill of Rights and
the Civil Rights legislation, had to be considered by the Supreme Court. Later in Kaiser Aluminium & Chemical Corporation -Vs- Weber (1979) 99 SC 2721, an employer’s recruiting programme in favour of disadvantaged minority groups in the local work force was held valid.

20.12. John Bell viewed the role of a Judge on the consensus model propounded by him which considers the judge as spokesman for the community and its values. As per Lord Rodoliffe – The Law and its Compass (1960) read with Shaw -Vs- DPP 412 268 per Viscount Simonds – the judges have to look for "some more fundamental assessment of human values and the purposes of society". This accords with the view that the function of the judiciary in society is to protect its fundamental structure, rather than altering it. Sometimes, Judges have been troubled by the proper scope and application of their powers by having differences of opinion amongst themselves.

20.13. Lord Atkin in Liversidge -Vs- Anderson (1942) 413 AC 206 had vigorous dissent and enmity between judges

411. (1979) 99 SC 2721
412. (1962) AC 220, 268
413. (1942) AC 206.
which by no means was a rare phenomenon. The post-war
Supreme Court was embittered and polarised by the personal
quarrel conducted, in public, by Justice Black and Justice
Jackson. In India, Justice Krishna Iyer caused discomfiture
and distress to at least one of his colleagues, Justice
Tulzapurkar, for introducing concepts, ideas and language
that have no proper place in judicial pronouncements\textsuperscript{414} -
Manohor -Vs- Marotras. Justice Krishna Iyer answered his
critics by stressing the importance of "socio-economic
apercus; refusing to accept that "judicial judgment shall
be a dry statement of facts and a drier of law and
arguing that it was the role of the Court to communicate
to its constituency, 'the glow of life giving principles
rooted in social sciences and translated into juristic
rules which legitimated one institution functionally\textsuperscript{415}
at 1004 organic Chemical Industries Ltd v Union of India.
His judgments have arguments for the protections of human
rights in India - Maneka Gandhi -Vs- Union of India (1978) 1
SCC 248 at 328\textsuperscript{416} we may refer to the famous controversy
on this which was between Lord Denning and the House of
Lords about whether Judges can fill gaps left by the
Legislature. The House of Lords thought they could not-
(1951)2 ALL\textsuperscript{417} ER 839 Mayor -Vs- St.Melions Rural District
Council -Vs- Newport Corporation and The Discipline of
of law (1979)-Lord Denning.

\textsuperscript{414} AIR 1979 SC 1084 - 95
\textsuperscript{415} AIR 1979 SC 1803 at 1804
\textsuperscript{416} (1978) 1 SCC 148 at 328
\textsuperscript{417} (1951)2 ALLER dynamic 839
20.14. There is one view held in Public Utilities Commission v. Poliak by Justice Frankfurter who took no part in the decision that a judge must think dispassionately and submerge private feeling on every aspect of a case. In this case, the US Supreme Court upheld the constitutionality of the Policy of a street Railway which had installed in its passenger Vehicle loudspeakers for the broadcasting of music and commercials. The Court rejected the contention that the broadcasts offended against the guarantees of free speech and due process of law. Here Justice Douglas dissented.

20.15. Patrick Devlin distinguishes between activist and dynamic law making. Activist law making takes ideas from the public consensus and is permissible. Dynamism requires the application of ideas in advance of the consensus. Many decisions have social implications and judges should be instructed on the likely consequences that may be good or bad economically. They may involve hardship on this or that section of the community. Accordingly, as per Lord Denning, the judges should bear in mind the above consequences. The great historian Lord Acton

418. (1952) 343 US 451 (1978)
said 'All power tends to corrupt. Total power corrupts absolutely'. Let the judges be trusted to control the exercise of such power.

20.16. Law is not just process. It is overtly ideological in nature and designed to inspire general faith and elicit consent. It has a very powerful sway over society. Here we refer to the Constitutive ideology in which social life and processes are described. The law identifies who may have rights and duties. It determines the relationship between persons, things and processes. What is constituted has to be both explained "as well as altered to meet new pressures. This processes of explanation and change are the functions of conceptive ideology, Lawyers, judges and jurists are the designers of such ideology and the process of social change.

20.17. In the case of public interest actions, the traditional 'privatistic' approach to adversarial system of litigation to restore the aggrieved party against his adversary with effects of judicial decision not to go beyond the sphere of actual parties in the proceeding, is found inadequate in restoring the interest of the collective
right. The duties here are twofold, one from the point of ideological party representing on behalf of the class or sub-class of person and not of himself in which case the freedom is limited to see to the collective interest and on the other hand the judge is responsible for insuring that the party's procedural behaviour remains throughout the proceeding as of 'public cause'. Professor Homburger correctly put it as under:

'The most distinctive feature of class litigation.... may be the uncommonly active role which the judge must play in the control and supervision of the proceedings. The public interest in the prosecution of class actions is far greater than in ordinary civil litigation. It is the Court's function to protect that interest as well the interests of the absent members of the class. The successful management of a class action, therefore, requires a procedure that leans more towards court prosecution than ordinarily is the case in American system.'

20.18. The traditional principle of res judicata as being called 'the last refuge of individualism' in civil litigation cannot prevail if diffuse rights are to be protected by the Courts. Even the concept of 'fluid recovery'
as seriously condemned by the Court of Appeals of the Second Circuit in its review of *Eisen* does not appear to be out of line in this light since the ideological plaintiff is not suing merely to have his own damage restored but rather to have the wrongdoer provide indemnification for the damage he has caused to the groups, class or society as a whole. In the field of diffuse rights recovery should tend to cover the total damages caused by the defendant, rather than merely the damages suffered by the plaintiff. The concept of fluid recovery is one manifestation of this idea and rejecting of that concept would imply rejection of one essential feature of effective protection of diffuse rights. Indeed a focus on the total damages caused by the injurer rather than on individuals who are damaged increases the likelihood that an economically 'optimal' level of the injury-causing activity will be reached. As Professor Calabresi has pointed out what matters from an economic viewpoint is not the compensation of the individuals but the assignment of the correct market value to the injury causing activity. Although Federal Courts appeared to reject the concept after the decision in *Eisen* -Vs- Carlisle and Jacquierin. Later the 'Parens Patriae' bill allowed fluid recovery when the State Attorney General brought suit.

419. 479 F 2d 1005
A change about the right to be hard from individual to social due process has been significant to bring about social justice.

A most drastic expression of the attachment to traditional views of the judicial rule can be found in Justice Powell's concurring opinion in United States vs. Richardson. The central points of opinion are that 'relaxation of standing requirements is directly related to the expansion of judicial power' and that such relaxation would significantly alter the allocation of power at the national level, with a shift away from the democratic form of Government. Justice Powell's concern about the expansion of the judicial power, however, apparently neglects that such expansion is but one fact of a general expansion of governmental power in modern times of all branches of government. The ever increasing powers of the legislative and executive branches justify and, indeed, necessitate a corresponding broadening of judicial power in order to maintain a balanced system. But the growth of modern welfare Govt. and the parallel growth of socio-economic interdependence of groups, categories and classes of citizens call for a corresponding growth of the task of "Judicial protection". As for the

420. 418'US 166, 180-96 (1974)
"shift away" from democracy, the opposite is correct in the sense that democracy ensures access to justice in respect of citizens to vindicate legal rights—old and new individual, and meta individual and it is one in which societal including governmental legal duties can be judicially enforced since judicial protection is what assures the "rule of law". Also democratic government is one in which people have a sense of participation, a sense that a distant legislatures and administrative apparatus so frequently alienate. Judges are required daily to adjudicate concrete 'cases and controversies' the bureaucratic insulation that separates from society is not so predominant in the case of judges who are to face daily the problems of individual and society and the public interest litigation is no 'case and controversy' than traditional two-party litigation.

20.20. The principle 'audi et alteram partem' is the most fundamental in the constitution of many countries including the United States of America. Modern bills of rights e.g. European convention of human rights and the most ancient aphorism of human wisdom that a put
by Aristophanes 24 centuries ago, 'a judgment shall not be made before the arguments of both sides are heard'. Strictly construed due process would seem to require that adequate notice which is necessary ingredient of the right to be heard be given to all the individual members of the class who are to be affected by the decision. This individualistic concept of fair hearing is often made impossible for application in the case of 'diffuse rights' from the point of high amount of expenses involved and want of identification and thus with the need of the societies, adaptation with the new circumstances having meta individual rights, the individualistic vision of procedural due process should give way to, or be integrated with, a social and collective concept of due process to assure judicial vindication of the new rights. Hence the right to be heard must indeed be preserved and guaranteed not to all the members of the class but to the ideological party. This party, if adequately represented, shall be allowed to act for the entire class including those members who are not identified. If representative litigation is allowed, they would simply be unable to go to Court individually. A French loi of 1972 is an example in the field of representation of racial minorities and
another example is provided by 1970 Italian Statute in the field of labour disputes. A degree of judicial discretion and flexibility is unavoidable at the present rudimentary phase of our experience in the public interest litigation. In it the judge must measure the plaintiff's seriousness and hence his adequacy as a representative. The past history of the plaintiff, the internal organisation, the funding sources and the statutory objectives are the yardsticks.

20.21. In the opinion of the M. Cappelletti, the common law world was unaffected by reactive effects of feudalism and intermediate societies unlike United States where social and meta-individual rights were asserted and devices like *amicus curiae briefs*, *representative standing*, and group legal services have developed to fight with the new situation. Common law activism in 'remedial law making' affected the American innovation as 'fluid recovery' but there were basic developments and trends shared in common by all modern societies. The progressive decline of a two party and laissez faire concept of civil justice became visible all where in the world and the need for more activist judiciary was strongly felt. New social rights are now
no more mere charities and non-justiciable privileges and Golberg – Vs- Kelly421 is an American milestone in this new development. A similar developments have occurred in other countries as well through both legislation and adjudication. A 'new property' has emerged and with it a new role for the courts as well as the need to reconsider and adapt old principles and structures of civil litigation which have proved unsuitable to that new role. Even a newer type of property like 'rights without a holder' that often share with social and welfare rights coupled with affirmative state action. Public interest litigation in India can be seen as an improvement on the American doctrine of Standing which has before it two distinct issues, the petitioner's motivation to present such case and an injury requiring judicial redress whereas the Supreme Court of India has allowed any member of the public to seek judicial redress for a legal wrong caused to 'a person or to a determinate Class of persons who are, by reason of poverty, helplessness or disability or socially or economically disadvantaged position is unable to approach the Court directly.' This modification of the traditional locus standi could be termed representative standing by assuming that the petitioner is accorded standing as the representative of another person or group of persons.

421. 397 US 254 (1970)
20.22. It is the judicial creativity which has expanded representative standing to groups of persons who are not free to approach courts due to socio-economic factors. In Hussainara Khatoon-^s- State of Bihar \(^{422}\), although the case carries the names of actual prisoners, the petitioner, here was actually Hingorani herself on the unlawful detention of 18 undertrial prisoners. This was essentially a habeas corpus case filed by Kapila Hingorani as the prisoners could not approach the courts. This has necessarily dispensed with the traditional requirement of standing for the petitioner to be motivated by self interest to present the case and this innovation could be viewed as the modified form of class action. Now it appears that the representative standing may be by class representative of traditional made who is also a member of the class or it may be by such representative who is not so member of the class. In the latter class, the names of the members of the class are given as petitioners though they are not before the Court. There is another variant of this mode of class action litigation in which case both actual class members, pavement and slum dwellers as in Olga Tellis-^vs- Bombay Municipal Corporation \(^{423}\) are included as petitioners being the

\(^{422}\) AIR 1979 SC 1360 Supra note at
\(^{423}\) AIR 1986 SC 180
class members and outsiders as journalists and members of civil liberties organisation. However it stands to this that in class representation of cases, the suffering petitioners are not required to attend before the Court as we have seen in Bhagalpur blinding case i.e. Khatri -Vs- State of Bihar in lepers case in Gobindram -Vs- Union of India W.P. 202 10 of 1985.

20.23. Whatever may be the rationale of standing towards the expansion of judicial function in the matter of public interest litigation, it is the reformist approach which stands to gain the interests of the petitioners who are ill organised to approach the courts due to ignorance and poverty. In Forward Construction Company Vs- Prabhat Mandal, the Court observed that in the public interest litigation unlike enforcing the right of one individual against another as in ordinary litigation it is intended to prosecute and vindicate public interest which demands that violation of constitutional or legal rights of a large number of people, who are poor, ignorant or socially and economically in disadvantaged position, should not go unnoticed, unredressed,

Supra note at 424. AIR 1981 SC 928
for that would be destructive of the rule of law. In fact, when a petitioner sues to benefit weaker sections of the Society, actually he does it for redressing a public injury. In the American Counterpart, there is provision for Attorney of the Class action, who acts for the interest of the class, where for the 'ideological' plaintiff such scope is limited in aspirational and existential interests worthy of legal protection.

20.24. The expansive view of judicial freedom in India is based on the right given by the Constitution. Sometimes, it has stretched so far that the correlation between the rights or claims made and remedies offered by the courts is attenuated. Indian Courts try to give reliefs at the preliminary stage of hearing considering the gravity of the situation and the harms that the defendants had caused to the plaintiffs in the past where the preponderance of getting reliefs are also apparently visible as otherwise the public interest will suffer in the tussle between rights and wrongs. In Rural Litigation and Entitlement Kendra Dehra Dun -Vs- State of U.P. the Supreme Court considered and resolved that competing policies, priorities and issues

425. AIR 1985 SC 652
of resources the need for development, environmental conservation, preserving jobs and protracting substantial business investments - in deciding to close a number of limestone quarries in the Missouri Hills and to allow others to continue operating under detailed conditions. In rendering the judgment, it had the help of geological experts. In Hussainara Khatoon -Vs- State of Bihar 426 significant interim relief was the urgent requirements as prayed for in the Writ petition which the Courts had permitted in a number interim orders for the release of all prisoners in the State of Bihar who had been awaiting trial for a longer period than the maximum sentence for which they could be convicted and directed that free legal aid be given to all indigent accused and imposed on the Magistrates the need for speedy trials with the direction that the under-trial prisoners be informed by the Magistrates of their right to bail and legal aid and also ordered release of all under-trial prisoners in Bihar for whom investigations have been pending for more than six months without an extension being granted by the Magistrate. Similarly, in the Bhagalpur blinding Case- Khatri -Vs- State of Bihar - AIR 1981 SC 928, the Court ordered the State of Bihar

Supra note at 426. AIR 1979 SC 1360.
to provide medical and rehabilitative services to the blinded prisoners. All evictions of pavement dwellers and demolition of hutments on public land in Bombay were halted by the Supreme Court for four years following filing of writ petition in Olga Telis and the Court also ordered than that a massive programme of low housing income scheme in Bombay be pursued earnestly and implemented without delay by the State.- It is also noticed that in State of Himachal Pradesh -Vs- A Parent of a Student of Medical College, Simla (The Ragging Case) the High Court had appointed a Commission to investigate the petitioner's complaint of harassment (ragging) of fresh Medical Students by older students. One of the Commission's recommendations was that the State Government should introduce legislation to making ragging a criminal offence, modelled on similar Acts of other states. In State of Himachal Pradesh -Vs- W.R. Sharma, the Supreme Court agreed with the High Court and observed that "the persons who applied to the High Court..... are persons affected by the absence of usable road because they are poor Harijan residents of the area, their access by communication, indeed to life outside is obstructed, and/or prevented by the absence of road... For residents of

427. AIR 1986 SC 847
hilly areas, access to road is access to life itself. The Supreme Court approved of that the High Court brought about "an urgency in executive lethargy" by encouraging expenditure of already appropriated funds on further construction. Here the Supreme Court gave due judicial deference to the doctrine of separation of powers and emphasized the remedial action in public interest litigation must be done with caution and within limits. In Bandhu Mukti Morcha, a "welter of agitated, controversy" surrounded the issue of public interest litigation. According to Justice Pathak, the expansive remedial schemes of the Court should cautiously be made.

20.25. In Barse Case, a journalist's letter complained of custodial violence to five women confined in the Bombay City jail. The Court issued guidelines applicable to the entire State of Maharashtra requiring that: the State (i) to work with District Legal Aid Committees to assure that all undertrial prisoners receive free legal aid, (ii) to distribute pamphlets to prisoners on their right to bail (iii) to inform each prisoner's designated friend or relative of the arrest and (iv) to use only women police officers to guard and interrogate female
suspects. The Courts' directions were on its sense of what the undertrial prisoners generally need; But U.S. Supreme Court's decision in Frank L. Rizzo -Vs- Gerald G. Goode 428 where as small number of complaints of police brutality not even proved, resulted in a system-wide reform instead of individual compensation. In William B. Milliken -Vs- Ronald Bradley there was an order that suburban school districts, mostly white, should exchange a percentage of their students with the Detroit School system, mostly black, in order to give Detroit Students a racially integrated education. But the Court pointed out that there was no finding that the Suburban School districts had violated the rights of the Detroit students. Here, even though the inter-city student exchange was the only remedy capable of curing the results of racial discrimination in Detroit, the remedy was not available for the lack of an enforceable right against a necessary party for the remedy. It appeared that the prevailing American practice in Law wanted massive evidentiary proof against illegal conduct and granted relief only against non-compliance of legal duty.

428. 423 US 362 (1976)
20.26. The question of standing is pertinent to the issue of accountability. The limitation about the standing to parties confines the issues that can be raised before the Courts as well as the range of litigants who can raise them. This narrow view about standing may necessarily cut short the work load of the court and limit the range of social and public issues which can be agitated. Thus it may confine the Court's inquiry to narrow issues of individual rights rather than broader issues of social or public controversy. The Constitution of India has broadened the scope of the Judiciary by enlarging the rights of the citizens against the onslaughts of civil and human rights. The People's Union of Civil Liberties in their annual Conference in Calcutta in June 1989 have demanded immediate revision of the jail Code and the related manuals which curb the rights of citizens. They have reported about 82 lock up deaths from West Bengal in the last twelve years. In 1988 alone, 19 such cases were reported from this State and 24 from Uttar Pradesh. We have also noticed the oppression on Harijans who were prevented entry into Nathdwara temple to worship in Rajasthan. In October, 1988, the two-member-bench consisting of Chief Justice, J.S. Verma and Justice Farooq Hassen gave the
direction that the practice of purification of Harijans alone before permitting them to enter the temple for worship by making them wear 'Kanthimala' sprinkling them with 'Gangajal' and giving them 'tulsidal' be discontinued forthwith. The practice, the Court observed, violated the rights of equality guaranteed under Articles 14, 15 and 17 of the Constitution. In this case, two public interest petitions, filed separately by two Advocates—Mr. Satya Narayan Chouhury and Mr. P.L. Mimroth—under Article 226 of the Constitution.

20.27. It was reported on May 26, 1989 in 'The Statesman' that the nation's Capital Delhi has become a spectre of pollution. A study by Delhi Group of environmentalist has produced some extremely disturbing findings about pollution of every kind in the nation's Capital. The waters of the Yamuna are excessively contaminated because of threatened industrial waste diverted into it through 17 major drains, over and above the nearly 100 million gallons of untreated sewerage that flow daily into the river. It is also polluted by at least a part of the Capital's urban garbage amounting to some 3000 tones daily. The air is polluted by emissions from over 72,000
industrial units as well as the Capital's large thermal plants and its automobiles numbering over two million. Pollution caused by the use of chemicals and pesticides has increased too, particularly since there has been a progressive reduction in green cover. Noise pollution, mainly caused by poorly maintained vehicles had grown enormously and Delhi probably has the highest noise pollution with the noise level in some parts of the city exceeding 80 decibels, which is 20 above the safe level and could cause serious health problems to those who are constantly exposed to it. This appalling state of affairs is no different in other metropolises. Thus the Governments at the Centre and the States are miserably inactive in combating with these menaces which are eating up the vitals of the urban population in India. The Pollution Control Boards of the Centre and the States are there but no effective measures are being taken up to utter surprise. In some extreme cases, the Government and the Municipalities have been asked to take up certain specific steps in public interest litigations but that are very inadequate to cope with this burning problems engulfing humanities.

20.28. The Common law of England was judge made law.
In Omychund -Vs- Barker, 2b English, Report 15, 22-23 (Ch 1744), Lord Mansfield observed that "a statute can seldom take in all cases, therefore, the common law that works itself pure by rules drawn from the fountain of justice is for this reason superior to an Act of Parliament". Though there are great judicial boldness and creativity in England yet America was no less in such dynamism in which the United States was always declaring that its Constitutional decision were open to re-examination but the House of Lords was denying its authority to overrule its own prior decisions.

20.29. The judicial activity now has extended to welfare administration, prison administration, mental hospital administration, education and employment policy, road building, bridge building, natural resource management, recreation/sanitation facilities, protection against misuse of public funds. It was found in America that Federal District Courts have laid down elaborate standard for food handling, hospital operations, recreation facilities, inmate employment and education, sanitation and laundry, painting, lighting, plumbing and renovation in some prisons -Wide Hamilton -Vs- Schvio, Hodge -Vs- Dodd. The Courts there have equally established

429. IA 21, 53/ 26 ER 15, 22, 23 (Ch. 1744)
430. 26 ER 15, 22, 23
432. Prison L Repr 263 (1972)
comprehensive programmes of care and treatment for the mentally ill confined in Hospitals - vide Wyatt - vs - Aderholt. The courts have ordered the equalisation of school expenditures on teachers' salaries - vide Hobson Vs- Hansen and also established hearing procedures for public school discipline cases - vide Goss Vs. Lopez. They further decided that bilingual education must be provided for Mexican - American - Children vide Sima Vs- Portales Municipal Schools. On the ground of environmental protections, the Courts have enjoined the construction of roads and bridges and suspended performance requirements for automobile tyres and air bags - Scherr -Vs Volpe (7th Cir 1972) D.C. Federation of Civic Associations -Vs- Volpe.

A disaster loan programme by Farmers Home Administration was restored by Courts' order - Biren -Vs- Butz. Forest service was stopped to stop clear cutting of timber in West Virginia Division of Isaac Walton League Vs- Butz.

433. 503 F 2d 1305 (1973)
434. 327 F. Supp 844 (DDC-1971)
435. 419 US 565 (1975)
436. 499 F 2d 820 (1974)
437. 466 F 2d 1027 (7th Cir 1972)
438. 459 F 2d 1231 (1972)
439. 357 F Supp 1'43 (1973)
440. 367 F Supp 422 (1975)
20.30. In the post Alyeska period in America there was pressure on the organised bar to contribute to public interest representation. Award of courts allowing Attorney’s fees and expert witness fees in public interest cases and gradual relaxation in the funding of public interest law firms have distinctly acted as a great boost and Alexis de Tocqueville observed in 'Democracy in America' vol-1, interalia, the Spirit of the law, which is produced in the schools and courts of Justice thus gradually penetrated beyond their walls into the bosom of the society where it descends to the lowest classes. The American proclivity to think of social problems in legal terms and to judicialise everything from wage claims to community conflicts makes it only natural to accord judges a major share in the making of social policy.

20.31. The Courts' decisions in Griggs Vs- Duke Power Co. 441, Chief Justice Burger interpreted the Civil Rights Act of 1964 and required elimination of tests for employment in respect of black employees unless the test bears a demonstrable relationship to successful job performance. The Act had forbidden job discrimination on grounds of "race, colour, religion

441, 401 US 424
sex or national origin". The legislative history shows that the Congress was at pains and intended the opposite of the results of the Court in this decisional interpretation. In Lau vs Nichols there was a variation and the decision erroneously required "bilingual - bicultural action rather than remedial instruction in English for Spanish speaking and Chinese origin pupils although legislative history did not support that view of interpretation.

20.32. In appraising judicial capacity, Sir Geoffrey Vickers in "The Art of Judgment" aptly spelled out that in the unpredictable area of life where "wisdom lies in masterful administration of the unforeseen and rigidity is to be feared and flexibility is to be prized. What we see that the Courts are dependent on litigants for ignition whereas legislators and administrators have no such requirements. Traditionally the Judges are more confined within the issue raised on canons of judicial restraint and threshold doctrines. The legislators often hesitate to innovate, they prefer to wait and see.

20.33. As for judicial immunities, "it is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges shall be at liberty to exercise their functions with independence and without fear of consequences" - Scott vs Stansfield.

It is also a fact that no action would lie that an action would lie against a judge for what he has done judicially though it might be erroneous - Hammond vs Howell (1868), and further no action for acts done or words spoken by a judge while he is working within the jurisdiction, however malicious, corrupt, or aggressive, be the acts or words complained of. - Anderson vs Gorrie: 444 K & L 236. A justice cannot be sued in respect of his performance of administrative duties unless it is proved that he acted maliciously and without probable cause - Justices Protection Act 1848. It extends also to Tribunals and a Court Martial. So, a judge cannot be held liable if he exceeds

443. (1868) LR 3 Ex 220.
444. (1895) 1QB 668
his jurisdiction owing to a mistake of fact unless he had knowledge that he was acting beyond his jurisdiction - Calder Vs Halket - Houlden Vs Smith but he is criminally liable for corruption and misconduct. The High Courts can exercise extra ordinary jurisdiction in any suit or trial as they have power to withdraw a suit from a subordinate court before themselves for trial and determination. The Supreme Court of India has three kinds of jurisdiction viz, original, appellate and advisory. The provisions relating to High Courts and Supreme Court are enshrined in the Constitution of India. The judicial officers are protected by the Judicial Officers Protection Act.

But in this connection, one must not miss to mention that a Judge is 'Dharmavatar', the incarnation of Dharma and he can do no wrong. A judge, being watch dog of the Constitution, should not be allowed to erode values attached to the judiciary where an aura of honesty, purity and integrity is supposed to be around it. Where there is an exception that should be firmly handled. In recent appeal in

444. (1839) 3 Moo (Pc) 28
K. Veeraswami vs Union of India and others 445 (J.T. 1991(3) 36 page 198) it was held by a majority view of four against one that a Judge of the Supreme Court or a Judge of a High Court can be prosecuted for having committed an offence of criminal misconduct under section 5(1)(e) of the Prevention of Corruption Act, 1947. Here Mr. K. Veeraswami, Chief Justice of Madras could not satisfactorily account for disproportionate assets and accordingly committed the offence of criminal misconduct under clause (e) of Section 5(1) which is punishable under section 5(2) of the Prevention of Corruption Act. Similarly, the case of Mr. Justice Rameswamy, a sitting Judge of the Supreme Court gave rise to another serious controversy. For the first time in the Judicial history of the country, a motion for impeachment was brought before the then Parliament by the required number of M.Ps against a sitting judge of the Supreme Court and the Speaker issued a notice. The controversy ultimately was brought before the Supreme Court to determine whether the notice would be valid or not. Usually, the judicial scandal has always been regarded as far more deplorable than a scandal involved either with the Executive or a member of the Legislature as they be found guilty without
apparently endangering the foundation of the State but a Judge must keep himself absolutely above suspicion to preserve the impartiality and independence of the judiciary. Accordingly, the appointment process should be under strict control.