Chapter - IV

JUDICIAL SYSTEM IN INDIA AND JUDICIAL ACTIVISM
4.1 Introduction

Modern nation-state functions through a set of institutions. Parliament, the judiciary, executive apparatus such as bureaucracy and the police, and the formal structures of union-state relations as well as the electoral system are the set of institutions constituted by the idea of constitutionalism. Their arrangements, dependencies and inter-dependencies are directly shaped by the meta-politico-legal document—i.e., Constitution. The legal system derives its authority from the Constitution and is deeply embedded in the political system; the presence of judiciary substantiates the theory of separation of power wherein the other two organs, viz. legislature and executive stand relatively apart from it. Parliamentary democracy works on the principle of ‘fusion of power,’ and in the making of law, there is direct participation of the legislature and the executive, it is the judiciary that remains independent and strong safeguarding the interests of the citizens by not allowing the other organs to go beyond the Constitution. [1] It acts, therefore, as a check on the arbitrariness and unconstitutionality of the legislature and the executive. Judiciary is the final arbiter in interpreting constitutional arrangements. It is in fact the guardian and conscience keeper of the normative values that are ‘authoritatively allocated by the state.’ The nature of the democracy and development depends much on how the legal system conducts itself to sustain the overall socio-economic and political environment. The Indian Judicial System is one of the oldest legal systems in the world today. It is part of the inheritance India received from the British after more than 200 years of their Colonial rule, and the same is obvious from the many similarities the Indian legal system shares with the English Legal System. The framework of the current legal system has been laid down by the Indian Constitution and the judicial system derives its powers from it. The Constitution of India is the
supreme law of the country, the fountain source of law in India. It came into effect on 26 January 1950 and is the world’s longest written constitution. It not only laid the framework of Indian judicial system, but has also laid out the powers, duties, procedures and structure of the various branches of the Government at the Union and State levels. Moreover, it also has defined the fundamental rights & duties of the people and the directive principles which are the duties of the State. In spite of India adopting the features of a federal system of government, the Constitution has provided for the setting up of a single integrated system of courts to administer both Union and State laws. The Supreme Court is the apex court of India, followed by the various High Courts at the state level which cater to one or more number of states. Below the High Courts, there are the subordinate courts comprising of the District Courts at the district level and other lower courts. An important feature of the Indian Judicial System is that it’s a ‘common law system’. In a common law system, law is developed by the judges through their decisions, orders, or judgments. These are also referred to as precedents. Unlike the British legal system which is entirely based on the common law system, where it had originated from, the Indian system incorporates the common law system along with the statutory law and the regulatory law.

Another important feature of the Indian Judicial system is that our system has been designed on the pattern of the adversarial system. [2] This is to be expected since courts based on the common law system tend to follow the adversarial system of conducting proceedings instead of the inquisitorial system. In an adversarial system, there are two sides in every case and each side presents its arguments to a neutral judge who would then give an order or a judgment based upon the merits of the case. Indian judicial system has adopted features of other legal systems in such a way that they do not conflict
with each other while benefiting the nation and the people. For example, the Supreme Court and the High Courts have the power of judicial review. This is a concept prevalent in the American legal system. According to the concept of judicial review, the legislative and executive actions are subject to the scrutiny of the judiciary and the judiciary can invalidate such actions if they are ultra vires of the Constitutional provisions. In other words, the laws made by the legislative and the rules made by the executive need to be in conformity with the Constitution of India.

4.2 Judiciary - A Conceptual Overview

The judiciary is the branch of government that deals with interpretation of a nation’s laws, resolution of legal conflicts, and judgments for violations of the law. The judiciary, also known as the judicial system, is composed of judges and courts. The judicial system is deliberately kept separate from the nation’s legislative body, such as a parliament or congress, which creates or abolishes the nation’s laws as part of the political process. Attorneys are specialists who study the law in order to help clients navigate the judicial system. Legal systems of various kinds have existed since the dawn of civilization. Precedents of the modern judicial system include ancient Greek and Roman law and the law speakers of medieval Scandinavia. English common law established by the Magna Carta is the most direct ancestor of many current legal systems. France’s Napoleonic Code was also influential in replacing local customs with a set system of laws and courts. By the 18th century, many countries around the world had developed some form of a judiciary. In many nations, the law is established by a constitution or similar document created when the nation was founded. The legislative body then creates further laws that are intended to carry the spirit of the constitution into specific situations. It is the responsibility of the judiciary to determine if these new laws are, in fact,
true to the intent of the constitution. For this reason, judges must be extremely well versed in the laws of the nation. Most begin their careers as attorneys before moving on to the judicial bench. The judiciary is best known for its administration of criminal court cases. Anyone caught violating a law must eventually face a judge, who will determine whether the violation occurred, the severity of the offense, and the penalty. Judges are aided in this process by their understanding of the law, their own interpretation of its meaning, and in some cases by a jury or a panel of fellow judges. The majority of court cases, however, involve civil law, such as trademark or copyright violations, bankruptcy, or individual lawsuits. In the United States, 80 percent of court cases involve civil law, while only 20 percent are criminal cases.

In the U.S. and many other nations, the judiciary contains a hierarchy, with judges in higher courts possessing the authority to change or void prior decisions made by judges from lower courts. This establishes a system of appeals. The loser of a case in a lower court may appeal to a higher court for a reversal of the verdict. As long as they can afford the legal expenses, parties can continue to appeal until they reach the highest court, known as the Supreme Court in the U.S. and the High Court in Australia and other English-speaking nations. The judgments of this highest court can determine not only the final outcome of the case, but in some cases can alter the interpretation of the law itself.

In common law jurisdictions, courts interpret law, including constitutions, statutes, and regulations. They also make law (but in a limited sense, limited to the facts of particular cases) based upon prior case law in areas where the legislature has not made law. For instance, the tort of negligence is not derived from statute law in most common law jurisdictions. The term common law refers to this kind of law. In civil law jurisdictions, courts interpret the law, but
are prohibited from creating law, and thus do not issue rulings more general than the actual case to be judged. Jurisprudence plays a similar role to case law.

In the United States court system, the Supreme Court is the final authority on the interpretation of the federal Constitution and all statutes and regulations created pursuant to it, as well as the constitutionality of the various state laws. In the US federal court system, federal cases are tried in trial courts, known as the US district courts, followed by appellate courts and then the Supreme Court. State courts, which try 98% of litigation, may have different names and organization; trial courts may be called "courts of common plea", appellate courts "superior courts" or "commonwealth courts". The judicial system, whether state or federal, begins with a court of first instance, is appealed to an appellate court, and then ends at the court of last resort.

In France, the final authority on the interpretation of the law is the Council of State for administrative cases, and the Court of Cassation for civil and criminal cases.

In the People's Republic of China, the final authority on the interpretation of the law is the National People's Congress.

Other countries such as Argentina have mixed systems that include lower courts, appeals courts, a cassation court (for criminal law) and a Supreme Court. In this system the Supreme Court is always the final authority, but criminal cases have four stages, one more than civil law does. On the court sits a total of nine justices. This number has been changed several times.

4.3 Formation and Structure of Judiciary

Under our Constitution there is a single integrated system of courts for the Union as well as the States, which administer both union and state laws, and at
the head of the system stands the Supreme Court of India. Below the Supreme Court are the High Courts of different states and under each high court there are 'subordinate courts', i.e., courts subordinate to and under the control of the High Courts.

**Formation of Judiciary**

After the French Revolution, lawmakers stopped interpretation of law by judges, and the legislature was the only body permitted to interpret the law; this prohibition was later overturned by the Code Napoleon. [7]

In civil law jurisdictions at present, judges interpret the law to about the same extent as in common law jurisdictions however it is different than the common law tradition which directly recognizes the limited power to make law. For instance, in France, the jurisprudence constante of the Court of Cassation or the Council of State is equivalent in practice with case law. However, the Louisiana Supreme Court notes the principal difference between the two legal doctrines: a single court decision can provide sufficient foundation for the common law doctrine of stare decisis, however, "a series of adjudicated cases, all in accord, form the basis for jurisprudence constante." [8] Moreover, the Louisiana Court of Appeals has explicitly noted that jurisprudence constante is merely a secondary source of law, which cannot be authoritative and does not rise to the level of stare decisis. [9]

Indian judiciary is a single integrated system of courts for the union as well as the states, which administers both the union and state laws, and at the head of the entire system stands the Supreme Court of India. The development of the judicial system can be traced to the growth of modern-nation states and constitutionalism. During ancient times, the concept of justice was inextricably linked with religion and was embedded in the ascriptive norms of socially stratified
caste groups. Caste panchayats performed the role of judiciary at the local level, which was tied up with the religious laws made by the monarchs. Most of the Kings' courts dispensed justice according to 'dharma', a set of eternal laws rested upon the individual duty to be performed in four stages of life (ashrama) and status of the individual according to his status (varna). The King's power to make laws depended on the religious texts and the King had virtually no power to legislate 'on his own initiative and pleasure'. Ancient state laws were largely customary laws and any deviation from it or contradiction from dharma was rejected by the community. In medieval times, the dictum 'King can do no wrong' was applied and the King arrogated to himself an important role in administering justice. He became the apostle of justice and so the highest judge in the kingdom. Perhaps, the theory of institutionalism guided justice, manifesting gross arbitrariness and authoritarianism. [10]

Modern Judiciary in India

With the advent of the British colonial administration, India witnessed a judicial system introduced on the basis of Angln-Saxon jurisprudence. The Royal Charter of Charles ll of the year 1661 gave the Governor and Council the power to adjudicate both civil and criminal cases according to the laws of England. However, the Regulating Act of 1773 established for the first time the Supreme Court of India in Calcutta, consisting of the Chief Justice and three judges (later reduced to two) appointed by the Crown acting as King's court and not East India Company's court. Later, Supreme Courts were established in Madras and Bombay. The Court held jurisdiction over "His Majesty's subjects". In this period the judicial system had two distinct systems of courts, the English system of Royal Courts, which followed the English law and procedure in the presidencies and the Indian system of Adalat/Sadr courts, which followed the Regulation laws and Personal laws in the provinces. Under
the High Court Act of 1861, these two systems were merged, replacing the Supreme Courts and the native courts (Sadr Dewani Adalat and Sadr Nizamat Adalat) in the presidency towns of Calcutta, Bombay and Madras with High Courts. However, the highest court of appeal was the judicial committee of the Privy Council. British efforts were made to develop the Indian legal system as a unified court system. Indians had neither laws nor courts of their own, and both the courts and laws had been designed to meet the needs of the colonial power.

The Government of India Act of 1935 (section 200) set up the Federal Court of India to act as an intermediate appellant between High courts and the Privy Council in regard to matters involving the interpretation of the Indian Constitution. It was not to 'pronounce any judgment other than a declaratory judgment' which meant that it could declare what the law was but did not have authority to exact compliance with its decisions. The Federal Court's power of 'judicial review' was largely a paper work and therefore a body with very limited power. Despite the restrictions placed on it, the Federal Court continued to function till 26th January 1950, when independent India's Constitution came into force. In the meantime, the Constituent Assembly became busy drafting the basic framework of the legal system and judiciary.

**Structure of Judiciary**

The members of the Constituent Assembly envisaged the judiciary as the bastion of rights and justice. They wanted to insulate the courts from attempted coercion from forces within and outside the government. Sapru Committee Report on judiciary and the Constituent Assembly's ad hoc committee on the Supreme Court report formed the bulk of the guidelines for judiciary. A.K. Ayyar, K. Santhanam, M.A. Ayyangar, Tej Bahadur Sapru,
B.N. Rau, K.M. Munshi, Saadulla and B.R. Ambedkar played important roles in shaping the judicial system of India. The unitary judicial system seems to have been accepted with the least questioning. The Supreme Court was to have a special, countrywide responsibility for the protection of individual rights. Ambedkar was perhaps the greatest apostle in the Assembly of what he described as 'one single integrated judiciary having jurisdiction and providing remedies in all cases arising under the Constitutional law, the Civil, or the criminal law, essential to maintain the unity of the country'.

Under our Constitution there is a single integrated system of courts for the Union as well as the States, which administer both union and state laws, and at the head of the system stands the Supreme Court of India. Below the Supreme Court are the High Courts of different states and under each high court there are 'subordinate courts', i.e., courts subordinate to and under the control of the High Courts.

**Judiciary Structure in India**

- Supreme Court of India
- High Court (in each of the states)
- District & Session Judges' Court (In Districts)
- Subordinate Judges' Court (Civil)
- Munsiffs' Courts
- Nyaya Panchayats
- Provincial small cause court
- Court of Session (Criminal)
- Subordinate Magistrates' Courts
• Judicial Magistrates
• Executive Magistrates
• Panchayat Adalts
• Metropolitan Magistrate's Court (In Metropolitan areas)
• City Civil and Session Courts Presidency small cause court

India has a quasi-federal structure with 29 States further sub-divided into about 601 administrative Districts. The Judicial system however has a unified structure. The Supreme Court, the High Courts and the lower Courts constitute a single Judiciary. Broadly there is a three-tier division.

Each District has a District Court and each State a High Court. The Supreme Court of India is the Apex Court. Each State has its own laws constituting Courts subordinate to the District Courts. Besides, a number of judicial Tribunals have been set up in specialized areas. The significant Tribunals are: Company Law Board; Monopolistic and Restrictive Trade Practices Commission; Securities Appellate Tribunal; Consumer Protection Forum; Board for Industrial and Financial Reconstruction; Customs and Excise Control Tribunal; Tax Tribunal; etc. These Tribunals function under the supervisory jurisdiction of the High Court where they may be situated.

The Indian judiciary has a reputation of being independent and non-partisan. Judges are not appointed on political considerations. They enjoy a high standing in society. India has a unified all India Bar and an advocate enrolled with any State Bar Council can practice and appear in any court of the land including the Supreme Court of India. However for doing any acting work in the Supreme Court a qualifying examination (called an ‘Advocate on Record’
exam) needs to be cleared. Foreign lawyers are not permitted to appear in Courts (unless qualified), though they can appear in arbitrations.

**Practice and Procedure:**

The influence of the British Judicial System continues in significant aspects. The official language for Court proceedings in the High Court & the Supreme Court is English. Lawyers don a gown and a band as part of their uniform and Judges are addressed as “My Lord”. The procedural law of the land as well as most commercial and corporate laws is modeled on English laws. English case law is often referred to and relied upon both by lawyers and judges. As in England, a certain class of litigation lawyers is designated as “Senior Advocates” (equivalent to QCs). They do not deal with clients directly and take instructions only through solicitors. Certain lawyers however, follow a mixed practice i.e., both plead and act in relation to court matters. There is a great tradition and emphasis on oral arguments. Counsels are seldom restrained in oral arguments and complex hearings may well take days of arguments to conclude. Specialization is relatively a new phenomenon. Most lawyers have a wide-ranging practice.

**Arbitration:**

In 1996, arbitration got an impetus with the enactment of the Arbitration and Conciliation Act. This is based on the UNCITRAL Model Rules. The earlier enactment of 1940 was widely considered ineffective. With the enactment of the new law, arbitration has gained in popularity and is fast becoming the preferred route for settlement of commercial disputes. India does not have a separate Arbitration Lawyers Bar. Generally, court lawyers are engaged for arbitrations that are conducted over the weekends or after court hours. Often retired High Court or Supreme Court Judges are appointed as arbitrators. The
Indian Council of Arbitration, promoted by the Ministry of Commerce is a leading Institute for administration of arbitrations. However, due to its low payment scales for arbitrators, it is not suitable for large international arbitrations.

4.4 The Supreme Court

The Supreme Court is the highest court of law in India. It has appellate jurisdiction over the high court’s and is the highest tribunal of the land. The law declared by the Supreme Court is binding on all small courts within the territory of India. It has the final authority to interpret the Constitution. Thus, independence and integrity, the powers and functions and judicial review are the issues of utmost importance concerned with the Supreme Court.

Composition and Appointments

The Supreme Court consists of the Chief Justice of India and not more than twenty-five other judges. There can be ad hoc judges for a temporary period due to lack of quorum of the permanent judges. However, Parliament has the power to make laws regulating the constitution, organisation, jurisdiction and powers of the Supreme Court. The Constitution makes it clear that the President shall appoint the Chief Justice of India after consultation with such judges of the Supreme Court and of High Courts as he may deem necessary. And in the case of the appointment of other judges of the Supreme Court, consultation with the Chief Justice, in addition to judges is obligatory.

A person shall not be qualified for appointment as a judge of the Supreme Court unless he is:

a) a citizen of India, and b) either

i) a distinguished jurist; or ii) has been a High Court judge for at
least 5 years, or iii) has been an Advocate of a High Court for at least 10 years.

Once appointed, a judge holds office until he attains 65 years of age. He may resign his office by writing addressed to the President or he may be removed by the President upon an address to that effect being passed by a special majority of each House of the Parliament on grounds of 'proved misbehaviour' and 'incapacity'.

The salaries and allowances of the judges are fixed high in order to secure their independence, efficiency and impartiality. The Constitution also provides that the salaries of the judges cannot be changed to their disadvantage, except in times of a financial emergency. The administrative expenses of the Supreme Court, the salaries, allowances, etc., of the judges are charged on the Consolidated Fund of India. In order to shield the judges from political controversies, the Constitution empowers the court to initiate contempt proceedings against those who impute motives to the judge in the discharge of their official duties. Even the Parliament cannot discuss the conduct of a judge except when a resolution for his removal is before it.

**Power of the Supreme Court**

The Supreme Court has vast jurisdiction and its position is strengthened by the fact that it acts as a court of appeal, as a guardian of the Constitution and as a reviewer of its own judgments. Article 141 declares that the law laid down by the Supreme Court shall be binding on all courts within the territory of India. Its jurisdiction is divided into four categories:

a) **Original Jurisdiction and Writ jurisdiction**

Article 131 gives the Supreme Court exclusive and original jurisdiction in a dispute between the Union and a State, or between one State and another, or between group of states and others. It acts, therefore, as a Federal Court, i.e., the parties
to the dispute should be units of a federation. No other court in India has the power to entertain such disputes.

Supreme Court is the guardian of Fundamental Rights and thus has non-exclusive original jurisdiction as the protector of Fundamental Rights. It has the power to issue writs, such as *Habeas Corpus, Quo Warranto, Prohibition, Certiorari* and *Mandamus*. In addition to issuing these writs, the Supreme Court is empowered to issue appropriate directions and orders to the executive. Article 32 of the Constitution gives citizens the right to move to the Supreme Court directly for the enforcement of any of the Fundamental Rights enumerated in part III of the Constitution.

*b) Advisory Jurisdiction*

Article 143 of the Constitution vests the President the power to seek advice regarding any question of law or fact of public importance, or cases belonging to the disputes arising out of pre-constitution treaties and agreements which are excluded from its original jurisdiction. This jurisdiction does not involve a *lis*, the advisory opinion is not binding on the government, it is not executable as a judgment of the court and the court may reserve its opinion in controversial political cases as in the Babri Masjid case.

c) *Appellate Jurisdiction*

The Supreme Court is the highest court of appeal from all courts. Its appellate jurisdiction may be divided into

i) cases involving interpretation of the Constitution - civil, criminal or otherwise ii) civil cases, irrespective of any Constitutional question, and iii) Criminal cases, irrespective of any Constitutional question.

Article 132 provides for an appeal to the Supreme Court by the High Court
certification, the Supreme Court may grant special leave to the appeal. Article 133 provides for an appeal in civil cases, and article 134 provides the Supreme Court with appellate jurisdiction in criminal matters. However, the Supreme Court has the special appellate jurisdiction to grant, in its discretion, special leave appeal from any judgment, decree, sentence or order in any case or matter passed or made by any court or tribunal.

d) Review Jurisdiction

The Supreme Court has the power to review any judgment pronounced or order made by it. Article 137 provides for review of judgment or orders by the Supreme Court wherein, subject to the provisions of any law made by the Parliament or any rules made under Article 145, the Supreme Court shall have the power to review any judgment pronounced or made by it. However, the Supreme Court jurisdiction may be enlarged with respect to any of the matters in the Union List as Parliament may by law confer. Parliament may, by law, also enlarge or can impose limitations on the powers and functions exercised by the Supreme Court. Since Parliament and the Judiciary are created by the Constitution, such aforesaid acts must lead to harmonious relationship between the two, and must not lead to altering the basic structure of the Constitution. Moreover, all these powers can also be suspended or superseded whenever there is a declaration of emergency in the country.

4.5 High Courts

There shall be High Court for each state (Article 214), and every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself (Article 215). However, Parliament may, by law, establish a common High Court for two or more states and a Union Territory (Article 231). Every High Court shall consist of a Chief Justice and
such other judges as the President may from time to time deem it necessary to
appoint. Provisions for additional judges and acting judges being appointed by the
President are also given in the Constitution. The President, while appointing the
judges shall consult the Chief Justice of India, the Governor of the State and also
the Chief Justice of that High Court in the matter of appointment of a judge other
than the Chief Justice. A judge of a High Court shall hold office until the age of 62
years. A judge can vacate the seat by resigning, by being appointed a judge of the
Supreme Court or by being transferred to any other High Court by the President.
A judge can be removed by the President on grounds of misbehaviour or
incapacity in the same manner in which a judge of the Supreme Court is
removed.

**Power of High Courts**

The jurisdiction of the High Court of a state is co-terminus with the territorial
limits of that state. The original jurisdiction of High court includes the
enforcement of the Fundamental Rights, settlement of disputes relating to the
election to the Union and State legislatures and jurisdiction over revenue matters.
Its appellate jurisdiction extends to both civil and criminal matters. On the civil
side, an appeal to the High Court is either a first appeal or second appeal.

The criminal appellate jurisdiction consists of appeals from the
decisions of:

a) a session judge, or an additional session judge where the sentence is
of imprisonment exceeding 7 years

b) an assistant session judge, metropolitan Magistrate of other judicial
Magistrate in certain certified cases other than 'petty' cases.

The writ jurisdiction of High Court means issuance of writs/orders for the
enforcement of Fundamental Rights and also in cases of ordinary legal rights. High
Court also has the power to superintend all other courts and tribunals, except those dealing with armed forces. It can also frame rules and issue instructions for guidance from time to time with directions for speedier and effective judicial remedy. High Court also has the power to transfer cases to itself from subordinate courts concerning the interpretation of the Constitution. However, the Parliament, by law, may extend the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from, any Union Territory. High Courts' power of original and appellate jurisdiction is also circumscribed by the creation of Central Administrative Tribunals, with respect to services under the Union and it has no power to invalidate a Central Act, rule, notification or order made by any administrative authority of the Union.

Subordinate Courts

The hierarchies of courts that lie subordinate to High Courts are referred to as subordinate courts. It is for the state governments to enact for the creation of subordinate courts. The nomenclature of these subordinate courts differs from state to state but broadly there is uniformity in terms of the organisational structure.

Below the High Courts, there are District Courts for each district, and has appellate jurisdiction in the district. Under the district courts, there are the lower courts such as the Additional District Court, Sub Court, Munsiff Magistrate Court, Court of Special Judicial Magistrate of II class, Court of Special Judicial Magistrate of I class, Court of Special Munsiff Magistrate for Factories Act and labour laws, etc. Below the subordinate courts, at the grass root levels are the Panchayat Courts (Nyaya Panchayat, Gram Panchayat, Panchayat Adalat, etc.). These are, however, not considered as courts under the purview of the criminal courts jurisdiction.
District Courts can take cognizance of original matters under special status. The Governor, in consultation with the High Court, makes appointments pertaining to the district courts. Appointment of persons other than the District Judges to the judicial service of a state is made by the Governor in accordance with the rules made by him in that behalf after consultation with the High Court and the State Public Service Commission. The High Court exercises administrative control over the district courts and the courts subordinate to them, in matters as posting, promotions and granting of leave to all persons belonging to the state judicial service.

4.6 Judicial Review and Public Interest Litigation (PIL)

Judicial Review means the power of the judiciary to pronounce upon the Constitutional validity of the acts of public authorities, both executive and legislature. In any democratic society, judicial review is the soul of the system because without it democracy and the rule of law cannot be maintained. Judicial review in India is an integral part of the Constitution and constitutes the 'basic structure' of the Constitution. The whole law of judicial review has been developed by judges on a case to case basis. Consequently, the right of seeking judicial review depends on the facts of each individual case; however, there cannot be a review of an abstract proposition of law.

Though 'judicial review' does not find mention in our Constitution, this power has been derived by the judiciary from various provisions. Firstly, judiciary power to interpret the constitution and especially the limits on Fundamental Rights vis-à-vis Article 13(2) that suggests that any law contravening the Fundamental Rights would be declared void. It is the duty of the Supreme Court to safeguard and protect the Fundamental Rights of people and thus it is invested with the power of judicial review under Article 32 and to interpret the Constitution.
The Supreme Court's power of judicial review extends to Constitutional Amendments. However, Constitutional Amendment review by judiciary in relation to Fundamental Rights and its legal validity has been a contentious political issue. Parliament can amend the Constitution under Article 368 but such amendments should not take away or violate Fundamental Rights and any law made in contravention with this rule shall be void. (Article 13)

Before Golaknath case (1967) the courts held that a Constitutional Amendment is not law within the meaning of Article 13 and hence, would not be held void if it violated any fundamental right. In Golaknath case it was settled that

i) all amendments be law [13 (3)]

ii) Fundamental Rights are transcendental and immutable, so cannot be amended, nonetheless to amend Fundamental Rights a new Constituent Assembly needs to be convened, and iii) Constitutional Amendment is an ordinary legislative power.

In 1971, Parliament, by the 24th Constitutional Amendment, reversed the Golaknath judgments by declaring Constitutional Amendments made under Article 368, not to be as 'law' within the meaning of Article 13 and the validity of the Constitutional Amendment Act shall not be open to question on the ground that it takes away or affects Fundamental Rights [Art.368 (3)]. In 1972, the Parliament passed the 25th Constitutional Amendment Act allowing the legislature to encroach on Fundamental Rights if it was said to be done pursuant to giving effect to the Directive Principles of State Policy. The 28th Amendment Act ended the recognition granted to former rulers of Indian states and their privy purses were abolished. In the famous Keshavnanda Bharati case, 1973, the court held that the Parliament could amend even the Fundamental Rights, but it and not competent to alter the 'basic structure' was or 'framework' of the Constitution. The 42 Amendment Act (1976)
declared that Article 368 was not subject to judicial review by inserting clause (4) and (5) in Article 368. However, in 1980 in Minerva Mills case, court struck down clause (4) and (5) from Article 368 and maintained that judicial review is the basic feature of the Indian Constitutional system which cannot be taken away even by amending the constitution. The Supreme Court, since then, has been defining the 'basic structure' case by case.

Public Interest Litigation (PIL) is a socio-economic movement generated by the judiciary to reach justice especially to the weaker sections of the society. The idea came from 'ratio popularis' of the Roman jurisprudence, which allowed court access to every citizen in matters of public wrongs. The purpose of PIL is not the enforcement of the right of one person against the other but to reach justice to the deprived sections of the society. The court is not exercising any extra-constitutional jurisdiction and is now firmly rooted in Article 14, i.e., protection against all arbitrariness and lawlessness in administrative actions, and Article 21 that provides for protection of life embodying everything that goes for a dignified living, including rightful concern for others and Directive Principles applying to weaker sections.

The granting of the right to PIL has led to plethora of litigations in the courts, indicative of the development of democratic rights by the judiciary. S.P. Sathe has suggested that the Supreme Court has been working under these patterns:

i) Interpretational thrusts with a view to extending judicial control over other organs of the state to ensure liberty, dignity, equality and justice to the individual and greater accountability of the governing institutions.

ii) Interpretational strategies with a view to facilitate social change, which
would promote greater protection of the minorities, weaker sections of the society and political and religious dissenters.

iii) Innovating new methods for increasing access to justice (like PIL and Lok Adalats)

The judiciary must find ways and means to clear burgeoning pending cases. In this judiciary, as an organisation, needs specialisation and differentiation in order to solve the cases. Lok Adalats and tribunals must be made more effective. Judiciary must appoint judges on merit basis and all adhocism must go. As the Tenth Law Commission has suggested, Constitutional Courts and the zonal courts of appeals may be constituted. A working democracy requires an independent judiciary well co-ordinated by an effective executive and a responsible legislature.

4.7 Judiciary and Role of Judiciary

The judiciary (also known as the judicial system) is the system of courts that interprets and applies the law in the name of the state. The judiciary also provides a mechanism for the resolution of disputes. Under the doctrine of the separation of powers, the judiciary generally does not make law (that is, in a plenary fashion, which is the responsibility of the legislature) or enforce law (which is the responsibility of the executive), but rather interprets law and applies it to the facts of each case. This branch of the state is often tasked with ensuring equal justice under law. It usually consists of a court of final appeal (called the "Supreme court" or "Constitutional court"), together with lower courts. In many jurisdictions the judicial branch has the power to change laws through the process of judicial review. Courts with judicial review power may annul the laws and rules of the state when it finds them incompatible with a higher norm, such as primary legislation, the provisions of the constitution or international law. Judges constitute a critical force for interpretation and
implementation of a constitution, thus de facto in common law countries creating the body of constitutional law. In the US during recent decades the judiciary became active in economic issues related with economic rights established by constitution because "economics may provide insight into questions that bear on the proper legal interpretation".[11] Since many countries with transitional political and economic systems continue treating their constitutions as abstract legal documents disengaged from the economic policy of the state, practice of judicial review of economic acts of executive and legislative branches have begun to grow.

In the 1980s, the Supreme Court of India for almost a decade had been encouraging public interest litigation on behalf of the poor and oppressed by using a very broad interpretation of several articles of the Indian Constitution. [12]

Budget of the judiciary in many transitional and developing countries is almost completely controlled by the executive. The latter undermines the separation of powers, as it creates a critical financial dependence of the judiciary. The proper national wealth distribution including the government spending on the judiciary is subject of the constitutional economics. It is important to distinguish between the two methods of corruption of the judiciary: the state (through budget planning and various privileges), and the private. [13]

The term "judiciary" is also used to refer collectively to the personnel, such as judges, magistrates and other adjudicators, who form the core of a judiciary (sometimes referred to as a "bench"), as well as the staffs who keeps the system running smoothly. [14]
The Role of Judiciary in India

In a democracy, the role of judiciary is crucial. Judiciary is a faithful keeper of the constitutional assurances. An independent and impartial judiciary can make the legal system vibrant. Our Indian judiciary can be regarded as a creative judiciary. Credibility of judicial process ultimately depends on the manner of doing administration of justice. Justice K. Subba Rao explains the function of the judiciary as thus

- It is a balancing wheel of the federation;
- It keeps equilibrium between fundamental rights and social justice;
- It forms all forms of authorities within the bounds;
- It controls the Administrative Tribunals.

Justice - Social, economic and political is clearly laid down in the preamble as the guiding principle of the constitution. Social justice is the main concept on which our constitution is built. Part III and IV of Indian constitution are significant in the direction of Social Justice and economic development of the citizens. Judiciary can promote social justice through its judgments. In other sense, they are under an obligation to do so. While applying judicial discretion in adjudication, judiciary should be so cautious. And prime importance should be to promote social justice. Supreme Court had itself suggested in one of the early and landmark case (Bandhu Mukti Morcha v Union of India 1984) 1 SCC 161, 234) that is a great merit in the court proceedings to decide an issue on the basis of strict legal principle and avoiding carefully the influence of purely emotional appeal. For that alone gives the decision of the court a direction which is certain and unaltering, and that especial permanence in legal jurisprudence which makes it a base for the next step forward in the further
progress of the law. Indeed both certainty of substance and certainty of
direction are indispensable requirement in the development of the law and
invest it with credibility which commands public confidence in its legitimacy.

The Court must take care to see that it does not overstep the limits of its
judicial function and trespass into areas which are reserved to the executive
and the legislature by the constitution. Clear violation of constitutional or
statutory provision must be interfered by the apex judiciary. If a considered
policy decision has been taken which is not in conflict with any law or is not
malafide, it will not be in Public Interest to require the court to go into and
investigate those areas which are the function of the executive. When two or
more options or views are possible and after considering them the government
takes a policy decision it is then not the function of the court to go into the
matter a fresh and in a way, sit in appeal over such a policy decision (Balco v.
Union of India (2002) 2 SCC 333) .whatever method adopted by judiciary in
adjudication, it must be the procedure known to the judicial tenets. It is proper
to conclude with the note adopted by Justice Ranganatha Misra in the case of
Dr. P. Nalla Thampy Thera v. Union of India as follows

"We think it proper to conclude our decision by remembering the famous
saying of Herry Peter Broughan with certain adaptations: "It was the boast of
Augustus that he found Rome of bricks and left it of Marble". But how noble
will be the boast of the citizens of free India of today when they shall have it to
say that they found law dear and left it cheaper; found it sealed book and left it
a living letter; found it the patrimony of the rich and left it the inheritance of
the poor; found it the two edged sword of craft and oppression and left it the
staff of honesty and the shield of innocence. "It is only in a country of that
order that the common man will have his voice heard."
4.8 Changing Role of the Indian Judiciary

A strong ambivalence clouds the public image of the Indian judiciary. On a superficial level, it reflects the shaky state of India’s democracy. Both are basically in place, but both are also seriously troubled. Galanter (1984: 500) summarizes the public’s perception as follows: “Courts in India are viewed with a curious ambivalence; they are simultaneously fountains of justice and cesspools of manipulation. Litigation is widely regarded as infested with dishonesty and corruption. But courts, especially High Courts are among the most respected and trusted institutions.”

To judge by recent literature, this ambivalence has increased. On the one hand, judicial activism is seen as a sign of hope to set shortcomings right. Social awareness, insistence on human rights and the attempt to check governmental lawlessness are said to have transformed the Supreme Court of India into a Supreme Court for Indians’ (Baxi 1994a: 143, his emphasis). In the words of a former Supreme Court Justice, “the judiciary has ensured that howsoever high you may otherwise be, the law is above you” (Khanna, 1999:25).

On the other hand, symptoms of inefficiency haunt the courts as they do other state institutions. The courts are not free of corruption. The legal process is even said to have become ‘more and more intractable, dilatory, whimsical and protective of the criminal and law breaker having influence or financial clout’ (Anand, 1996: 16).

There are serious complaints of ‘widely reported allegations of judicial misconduct and a disconcerting compromise of integrity and impartiality’ (Jethmalani, 1999: 22).
This mixed picture is reinforced by a recent assessment of a high ranking expert group including a former chief justice of the Indian Supreme Court, A.M. Ahmadi (Chodosh et al., 1997:5): [20]

Widespread and profound backlog and delay currently undermine the fundamental priorities of a law-based society. Backlog and delay in the resolution of civil disputes in India erode public trust and confidence in legal institutions, and act as significant barriers to India's chosen path to social justice and economic development. The inability to enter final legal decisions within a reasonable time renders state action functionally immune, turns obligations to perform contractual duties into effective rights to breach with impunity, and devalues remedies eventually provided. In sum, the inability to resolve disputes in a timely manner eviscerates public and private rights and obligations. While it is acknowledged that trials are delayed throughout the world, the authors go on to state that 'nowhere, however, does backlog and delay appear to be more accentuated than in modern-day India'.

The same essay, however, mentions signs of hope. Most important, it suggests that court administrations and case management be reformed. Such reforms should dramatically enhance the efficiency of the judiciary. They include computerization, systematic classification of cases, comprehensive tracking of ongoing proceedings, and similar measures. The essay stresses the remarkable success of reforms along these lines that were initiated by A.M. Ahmadi in the Supreme Court: 'These initiatives dramatically reduced the Supreme Court caseload from approximately 120,000 cases in October 1994 to 28,000 cases in September 1996. The essay also places hope on alternative dispute settlement through, for instance, lok adalats, or people's courts. Chodosh et al. stress the relevance of a trustworthy and efficient judiciary for a 'diverse and exploding population, the largest democracy and the seventh largest national market in
the world'. They mention 'the recent drive toward greater accountability in public administration' and the relevance of judicial reliability in view of 'post-1991 market reforms'. In a nutshell, their analysis once again reflects the exigencies of functional differentiation and modernization.

4.9 Judicial Activism: An Overview

To begin, let us ask: What is judicial activism? How does it work in a modern society? In a modern democratic state; among the three instrumentalities constituting the state and executing its functions: the executive, the legislature and the judiciary; the last holds neither the power of the purse nor the sword, yet it's the only one that can seek to prevent the excesses of the executive and the legislature and act for protection and enforcement of their rights and as a keeper of their liberties.

Simply put, judicial activism depicts the pro-active role played by the judiciary in ensuring that rights and liberties of citizens are protected. Through judicial activism, the court moves beyond its normal role of a mere adjudicator of disputes and becomes a player in the system of the country, laying down principles and guidelines that the executive must carry out. It must be remembered though that performing this role requires the court to display fine balancing skills. While protecting the fundamental human rights of the people, the judiciary must constantly guard itself against the dangers of judicial populism.

Justice V.R. Krishna Iyer once remarked: 'THE LAW, substantive and procedural, never stands still even as life, societal life, ever is in locomotion.' But the vitality of law as a living organism largely depends on the judge's ability to pour life into the law when the occasion demands by making new inroads in law. Common law could not have grown if judges had hesitated to

175
enter the arena of judicial activism. Would judicial review of statute law have been possible if Chief Justice Marshall had in *Malbury v. Madison* confined judiciary’s role to faithfully interpreting the cold print of legislative enactment? Would the reach of Articles 14 and 21 of our constitution have been what it is today if judges had not treated them expansively? No one can deny, with the changing social environment, the interpretation of constitutional and legislative provisions must also change. Holmes says in ‘The Path of the Law’ (1897), 5 ‘we do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.’

The Indian Supreme Court is widely known for its thrust towards judicial activism. Despite the popular impression that judicial activity began less than two decades ago; the roots can be traced way back to 1893 when Justice Mehmood of Allahabad High Court delivered a dissenting judgment, sowing the seed of activism in India. It was a case of an under trial who could not afford to engage a lawyer. So the question was whether the court could decide his case by merely looking at his papers. Remarkably, the law was treated as a ‘living’ organism for the protection of the rights of the disadvantaged. However, at the same time, the judiciary should always be conscious about the range of its powers and should generally be seen to exercise them with restraint within the constitutional parameters without unduly treading onto the path of the executive and the legislature. Though, in recent times, there have been complaints that the judiciary in general and the Supreme Court in particular has taken over the administration of the country by entering into the domain of the executive, one can safely say that except in a few stray cases, the court has only intervened when it has found executive action wanting. Before getting into the thrust of the discussion on the role of judicial activism played by the Indian Supreme Court in the context of the protection and preservation of
human rights, let us briefly dwell on the experiences of the judiciary in the United States and in Britain, both having played a major role in the development of the judicial process the world over.

Judicial activism can be described when the judiciary steps in to the shoes of the executive or the legislature and embarks on the works and privileges of the other two organs rather than interpretation of law. This topic has assumed immense significance because today everything from river pollution to the selection of the cricket team and even the disposal of waste has become the purview of Judicial Activism. The Supreme Court of India in a recent judgment on May 5, 2010 in Selvi vs. Karnataka considered the constitutionality of the investigative Narco analysis technique holding it permissible only when the subject consents to its use. The decision taken by the Supreme Court of India about the 9th Schedule of the constitution deserves great attention. It was an example of excessive judicial Activism. In this case, one of the most controversial judgments of the Supreme Court was that the ninth schedule of the Constitution was open to judicial Review. The common citizens have discovered great relief in Judicial Activism because of the inefficient administration and nonperforming of the other organs of Government and the wide spread corruption and criminality in the political sphere. In many cases the courts acted in the right direction but in certain instances it made upset the constitutional system of separation of powers. Today judicial activism has touched almost each and every aspect of life ranges from human rights issues to maintenance of public roads!

4.10 Judicial Activism: Conceptual Framework

Judicial activism has always been a source of heated debate, especially in the light of recent developments in this regard. Over the last few years with
various controversial decisions, judges of the Supreme Court as well as various High Courts have once again triggered off the debate that has always generated a lot of heat. But still, what the term “judicial activism” actually connotes is still a mystery. From the inception of legal history till date, various critics have given various definitions of judicial activism, which are not only different but also contradictory. This is an attempt to bring out the exact connotation of “judicial activism” and to find out its effects on today’s changing society.

Although the idea of judicial activism has been around for quite some time, the term judicial activism was first introduced to the public by Arthur Schlesinger Jr. in his article which appeared in fortune Magazine in January 1947. He referred to the judges of the U.S. Supreme Court and explained different views held by them, Justice Black, Justice Douglas, Justice Murphy and Justice Rutledge were described as judicial activists who believed that the Supreme Court can play an affirmative role in promoting social welfare. Justice Frankfurter, Justice Jackson and Justice Burton appeared as champions of self restraint who argued that the judiciary should not go beyond its established but limited role and respect the principle of separation of powers as embodied in the U.S. Constitution. The critics held the view that judicial activism paves way for an unwanted intrusion by the courts into the realm which is reserved for political branches of government.

The term judicial activism has been defined differently by legal scholars. In order to reach a considered conclusion it would be pertinent to refer different legal sources. In the Harper Collins Dictionary of American Government and Politics, the term judicial activism has been defined as the making of new public policies through the decision of judges. Black’s Law Dictionary defines it as a philosophy of judicial decision making whereby the judges allow their
personal views about public policy, among other factors, to guide their
decisions."

While in the US, both the views are prevalent, in the developing world, the
view commonly held is that the courts should function as an instrument to
achieve desired social results. It is widely believed that the judges should not
hesitate to go beyond their traditional role as interpreters of the Constitution
and laws in order to assume a role as independent trustees on behalf of society.
The reason for widespread acceptance of this view is that in these countries the
executive and legislature have failed to ensure good governance and provide a
fair deal to their citizens. It shows how judiciary has been able to keep up the
standards of good governance in the face of corruption, failed political process,
incompetent elite and lack of respect for human rights.

4.11 Nature and Scope of Judicial Activism

It must from the outset be made clear that the concept of judicial activism does
not lend itself to an exact definition. [21] It has variously been defined as, a
philosophy advocating that judges should interpret the Constitution to reflect
contemporary conditions and values; [22] when courts do not confine
themselves to reasonable interpretations of law, but instead create law or when
courts do not limit their ruling to the dispute before them, but instead establish
a new rule to apply broadly to issues not presented in the specific action.[23]
At the core of the concept is the notion that in deciding a case judges
(particularly those of the appellate court) may, or some advocate must, reform
the law if the existing rules or principles appear defective. On such a view,
judges should not hesitate to go beyond their traditional role as interpreters of
the constitution and laws given to them by others in order to assume a role as
independent policy makers or independent "trustees" on behalf of society. The
array of existing disparate, even contradictory, ways of defining the concept has made its meaning increasingly unclear. This concept is traditionally the opposite of the concept of judicial restraint, whereby the courts interpret the Constitution and any law to avoid second guessing the policy decisions made by other governmental institutions such as Parliament, and the President within their constitutional spheres of authority. On such a view, judges have no popular mandate to act as policy makers and should defer to the decisions of the elected "political" branches of the government in matters of policy making so long as these policymakers stay within the limits of their powers as defined by the Constitution. We are not going to indulge in the on-going debate on the pros and cons of these two concepts but will start from the premise that judicial activism is a reality and deal with it accordingly.

4.12 Judicial Activism Theories

As far as the origin and evolution of judicial activism go, there are two theories behind the whole concept. They are: (i) Theory of Vacuum Filling and (ii) Theory of Social Want.

Theory of Vacuum Filling
The Theory of Vacuum Filling states that a power vacuum is created in the governance system due to the inaction and laziness of any one organ. When such a vacuum is formed, it is against the good being of the nation and may cause disaster to the democratic set up of the country. Hence, nature does not permit this vacuum to continue and other organs of governance expand their horizons and take up this vacuum. In this case, the vacuum is created by the inactivity, incompetence, disregard of law, negligence, corruption, utter indiscipline and lack of character among the two organs of governance viz. the legislature and the executive (Subhash C. Kashyap, 1997). Hence the
remaining organ of the governance system i.e. the judiciary is left with no other alternative but to expand its horizons and fill up the vacuums created by the executive and the legislature. Thus according to this theory, the so-called hyper-activism of the judiciary is a result of filling up of the vacuum or the void created by the non-activism of the legislature and the executive.

**Theory of Social Want**

The Theory of Social Want states that judicial activism emerged due to the failure of the existing legislations to cope up with the existing situations and problems in the country. When the existing legislations failed to provide any pathway, it became incumbent upon the judiciary to take on itself the problems of the oppressed and to find a way to solve them. The only way left to them within the framework of governance to achieve this end was to provide non-conventional interpretations to the existing legislations, so as to apply them for greater good. Hence judicial activism emerged. The supporters of this theory opine that “judicial activism plays a vital role in bringing in the societal transformation. It is the judicial wing of the state that injects life into law and supplies the missing links in the legislation... Having been armed with the power of review, the judiciary comes to acquire the status of a catalyst on change.” (Shailja Chander, 1998) [27]

4.13 Judicial Activism in India

The term “judicial activism” was coined for the first time by Arthur Schlesinger Jr. in his article "The Supreme Court:1947," published in Fortune magazine in 1947. Though the history of judicial activism dates back to 1803 when concept of Judicial review was evolved by chief justice Marshall in celebrated case of Marbury v/s Madison. The emergence of judicial review gave birth to a new movement which is known as judicial activism. Black Law
Dictionary defines judicial activism as a "philosophy of judicial decision making whereby judges allows their personal views about public policy among other factors to guide their decision".

Exercise of unconventional jurisprudence or creative approach of judiciary can be called as judicial activism for a instance in India the Supreme Court has treated even a letter as a writ petition and has passed appropriate orders. This concept has turned into a important means to enhance the applicability of a particular legislation for social betterment and also to bring improvement in the concerned state machinery. Judicial activism has turned a judge into a social activist, environmental activist, political activist etc. Basic purpose is, to bring the justice to the poor people at their doorstep.

**Position in India**

Unlike American constitution, Indian constitution itself provides scope or we can say that makes space for emergence of judicial activism by virtue of Articles 13, 32, 226,141, 142. But this term was explained and recognized by the Supreme Court in Golaknath's case wherein the court laid down the judicial principle of Prospective Overruling by giving wider beneficial interpretation of Article 13of the constitution. In real sense the history of judicial activism in India began in late seventies when the strict rule of locus standi was given a final rest in S.P Gupta vs. Union of India [28], popularly known as Judges transfer case. In this case Justice Bhagwati better known as champion of PIL, inter alia observed "where a legal wrong or legal injury is caused or threatened to a person or determinate class of persons and as such person or determinate class of person is by reason of poverty ,helplessness or disability of socially or economically disadvantaged position ,unable to approach the court of relief ;any member of public can maintain an application
for an appropriate direction, order or writ in the High Court under Art 226 and in Supreme Court under Art 32, seeking judicial redress for the legal wrong or injury caused to such person."

**PIL and Judicial activism**

Public interest litigation means "litigation in the interest of public" entered judicial process in 1970. This type of litigation was innovated by judges to provide "equal access" to the unprivileged section of the society. The idea of PIL came from actio popularis of the Roman jurisprudence which allowed court access to every citizen in matters of public wrong. Development of PIL has provided significant assistance in making the judicial activism meaningful. On account of this type of litigation the court has found opportunity to give directions in public interest and enforce the public duties. [29]

**Judicial activism and the Constitution**

Articles 13, 32, 226, 141, 142 are of considerable importance in judicial activism. Article 32 makes the Supreme Court as the protector and guarantor of the fundamental rights. Article 13 conferred wide power of judicial review to the Apex court. In the exercise of the judicial review it can examine the constitutionality of executive or legislative act. the high courts have also the same power in this regard.

Art 141 indicates that the power of the Supreme Court is to declare the law and not enact it, but in the course of its function to interpret the law, it alters the law. Art 142 enables the Supreme Court in exercise of its jurisdiction to pass such order or make such order as is necessary for doing complete justice in any cause or matter pending before it. Through these Articles the supreme court as well as high courts have played a significant role in redressal of several social issues, environmental issues etc.
4.14 Legitimacy

The Supreme Court of India has become the most powerful apex court in the world. Unlike the Supreme Court of the United States, the House of Lords in England, or the highest courts in Canada or Australia, the Supreme Court of India may review a constitutional amendment and strike it down if it undermines the basic structure of the Constitution. The realist school of jurisprudence uncovered the myth that judges merely declare or interpret pre-existing law. The realist school of jurisprudence stated that judges make law and the law is what the courts say it is. This "legal skepticism" was a reaction to Austin's definition of law as a command of the political sovereign. According to analytical jurisprudence, a court merely applies or interprets existing law. The American realist school of jurisprudence asserted that the judges made law, though interstitially. Jerome Frank, Justice Holmes, Justice Cardozo, and Justice Karl Lewellyn were the chief exponents of this school. The Indian Supreme Court not only makes law, as understood in the sense of realist jurisprudence, but actually legislates. Judicial law making in the realist sense is what the Court does when it expands the meanings of the words "personal liberty," "due process of law," or "freedom of speech and expression."[30]

The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the pre-existing law. In reality, this distinction is impractical and does not exist. Construed broadly it merely means that one body of the state should not perform a function that essentially belongs to another body. While lawmaking through interpretation and expansion of the meaning of open textured expressions like "due process of law," "equal protection of law," or "freedom of speech and expression" is a legitimate
judicial function, the Supreme Court’s creation of entirely new laws through
directions, as in the above mentioned cases, is not a legitimate judicial
function.

After surveying Indian Supreme Court case law, we arrive at the conclusion
that the Court has clearly transcended the limits of the judicial function and has
undertaken functions which really belong to either the legislature or the
executive. Its decisions clearly violate the limits imposed by the doctrine of
separation of powers. A court is not equipped with the skills and the
competence to discharge functions that essentially belong to other coordinate
bodies of government. Its institutional equipment is inadequate for undertaking
legislative or administrative functions. It cannot create positive rights such as
the right to work, the right to education, or the right to shelter. It does not have
the equipment for monitoring the various steps that are required for the
abolition of child labor. It cannot stop entirely the degradation of the
environment or government lawlessness. Its actions in these areas are bound to
be symbolic. Admitting all these aspects, therefore, judicial activism is
welcomed not only by individuals and social activists, but also by the
government and other political players, like the politic all parties and civil
servants. None of the political players have protested against judicial intrusion
into matters that essentially belonged to the executive. Some feeble whispers
are heard, but they are from those whose vested interests are adversely
affected. On the other hand, the political establishment is showing unusual
deferece to the decisions of the Court. Whether it is the limitation by the basic
structure doctrine on Parliament’s constituent power under Article 368 of the
Constitution, or the limitations upon the President’s power under Article 356,
the political establishment has considered itself bound to function within the
limits drawn by the Supreme Court. Generally, the people believe that the
government and other authorities must abide by the decisions of the Court. The general population and political players believe that in matters involving conflict between various competing interests, the courts are better arbiters than politicians. And by political players, I mean not only the central and the state governments and political parties, but also various constitutional authorities such as the President, the Election Commission, the National Human Rights Commission, and the statutory authorities including the tribunals, commissions and regulatory agencies.

Legitimacy: Conceptualization

John Austin defined law as a command of the sovereign enforced through sanction. According to Austin, it is coercive power that distinguishes law from fashions, habits, or even customs. Austin did not make any distinction between good law and bad law. To him, even a bad law was law if it fulfilled the three characteristics of law:

(1) it was a command; (2) it was issued by the sovereign authority; and (3) it was backed by a sanction. H.L.A. Hart, a critic of analytical jurisprudence, asks whether an order from a gunman demanding a bank teller to hand over his cash was law. The order of the gunman was also backed by a sanction, i.e., the fear of death. Was the gunman a sovereign? Austin defines sovereign as a person or authority that is subordinate to none and is obeyed by all. At the particular point of time when the gunman orders the bank teller to hand over the cash, he is obeyed by everyone who is under his threat and he is not required to obey anyone. The difference between the gunman and a political sovereign is that the gunman is not considered to be a lawful authority and his command is obeyed out of fear of death alone. According to Hart, the bank teller obeyed the gunman because he was “obliged” to do so. He did not have
an obligation to obey. What is the difference between "being obliged to obey" and "having an obligation to obey?" The bank teller is obliged to obey but does not have an obligation to obey. Hart further says: "It is, however, equally certain that we should misdescribe the situation if we said 'on these facts' that [the bank teller] 'had an obligation' or a 'duty' to hand over the money. So from the start it is clear that we need something else for an understanding of the idea of obligation. There is a difference, yet to be explained, between the assertion that someone was obliged to do something and the assertion that he had an obligation to do it."

A sovereign is considered to be a legitimate authority. A legitimate authority is one who is obeyed not only because one "is obliged to do so" but also because one feels that he is "under an obligation to do so." Professor Hart was a linguistic philosopher and by drawing a distinction between "being obliged to act" and "having an obligation to act," he points out the difference between compliance with an order because of fear and compliance with an order because such an order is considered to be binding. A gunman is obeyed only because there is fear of death. A sovereign may also be obeyed because there is fear of punishment, but that punishment is considered to be prescribed by a legitimate authority. It is the "obligation to act" that arises from the legitimacy of an order. A sovereign that is appointed or elected by law is considered legitimate. Legal validity is a prerequisite to legitimacy. When we say that a law is valid, we mean that it is made by an authority competent to make it and that it is made in accordance with the procedure prescribed therefore. The difference between power and authority is similarly significant. The gunman has power, but no authority. The sovereign is supposed to have power and authority. Sometimes the sovereign lacks power, but possesses authority. For example, under the Constitution, the President of India has to act on the aid and
advice of the Council of Ministers. The President has power to return the advice once but if the cabinet persists in giving that advice, he must accept it and act in accordance with it. Thus, the president may not have the power but he has the authority. The ultimate order must be in the name of the President; otherwise, it is not legitimate.

According to Max Weber, the most common form of legitimacy is “the belief in legality, i.e., the acquiescence in enactments which are formally correct and which have been made in the accustomed manner”. [31] While validity is essentially a legal concept, legitimacy is a sociological concept. Validity is determined in terms of legality and it is also a prerequisite of legitimacy. However, a law maybe valid and yet lack legitimacy. For example, when Gandhi refused to obey a law he considered unjust, he delegitimized the colonial law and sought to legitimize conscientious objection to an unjust law. Although the law was valid because it had been enacted by a competent authority, it was divested of its legitimacy in the eyes of a large number of Indians because of its unjust character. When Tilak was sentenced to six years of imprisonment for the offense of sedition, he stated that although he was guilty in a civil court, he was innocent in a higher court, a divine court. Unlike Gandhi, Tilak did not plead guilty to the charge of sedition but asserted that what he wrote or said did not amount to sedition. Gandhi’s approach was based on morality (natural law) whereas Tilak appealed to the concept of the rule of law—the basis of English law. [32] Both, however, protested against the positivist law which they saw as unjust.

The justness of the law was determined by applying moral parameters. In legal theory, the concept of natural law has always acted as a moral scale for the evaluation of a positive law. Where a positive law manifestly runs counter to natural law, it loses its legitimacy. When German generals pleaded that they
participated in the extermination of the Jews under orders of superiors given under valid German laws, the Nuremberg tribunal, set up by the Allies to try war criminals after the end of the Second World War, rejected that plea on the ground that their crimes against humanity could not be justified under any law. The tribunal therefore held that even a valid law could not give authority for such heinous crimes. The decision of the Nuremberg tribunal, though erroneous from the standpoint of legal positivism, was right according to a widely shared consensus which emerged after the War. That consensus lent legitimacy to the decision of the Nuremberg tribunal.

In India, although the declaration of emergency in 1975 and the subsequent curbs on liberty imposed through various orders of the President were legally valid, they obviously lacked legitimacy in the eyes of those who felt they were excessive. This was evidenced from the fact that even Mrs. Gandhi herself was not sure of the legitimacy of the emergency regime and therefore wanted to secure legitimacy for her rule through the elections that she announced in 1977. Legitimacy therefore means: (1) legal validity; (2) a widely shared feeling among the people that they have a duty to obey the law; and (3) actual obedience of the law by a large number of people.

Gandhi's passive resistance was based on challenging the latter two requirements. It was aimed at delegitimization of colonial law, which was unjust and unfair. At the same time, Gandhi avoided the growth of anarchy by volunteering to suffer punishment for his disobedience of the law. Submission to the punishment prescribed by the law tended to legitimate the rule of law, but also tended to de-legitimate the colonial law. It also legitimated the right to peaceful protest against a law that was considered to be a bad law.
4.15 Recent examples of Judicial Activism

2G Spectrum and commonwealth scam cases are glaring examples to show that how PIL can be used to check the menace of corruption in Indian Administration. In both these cases matter was initiated at the instance of public spirited person by way of PIL. On 2nd February 2012 the SC court has taken an unprecedented step and cancelled 122 2G licenses distributed by government in 2008 to different telecom companies. [34]

Often criticised for alleged judicial overreach, the Supreme Court justified its order cancelling 122 licenses for 2G-spectrum, saying it was duty-bound to strike down policies that violate constitutional principles or were contrary to public interest. An apex court bench said this was needed to "ensure that the institutional integrity is not compromised by those in whom the people have reposed trust and who have taken oath to discharge duties in accordance with the Constitution and the law without fear or favour, affection or ill will and who, as any other citizen, enjoy fundamental rights but is bound to perform duties." It said, "There cannot be any quarrel with the proposition that the court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies.

"However, when it is clearly demonstrated before the court that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters." the bench added.
Referring to the PILs filed by the Centre for Public Interest Litigation and Janata Party chief Subramanian Swamy, it said: "When matters like these are brought before the judicial constituent of the State by public spirited citizens, it becomes the duty of the Court to exercise its power in larger public interest..."

While admitting that TRAI was an expert body assigned with important functions under the 1997 TRAI Act, the bench said, the TRAI in making recommendations cannot overlook the basic constitutional principles and recommend which should deny majority of people from participating in the distribution of state property. [35]

Holding that spectrum was a natural resources, the court said natural resources "are vested with the government as a matter of trust in the name of the people of India, and it is the solemn duty of the state to protect the national interest, and natural resources must always be used in interest of the country and not private interest." In Noida land acquisition case the Supreme Court cancelled the acquisition of land by U.P government as it was acquired for industrial purpose but it was given to builders for making apartments. The court ordered that land should be revert back to farmers from whom land was acquired. Often Supreme Court and different high courts pass order for CBI investigation in several cases. Under the law these power lies with the governments. This is again an example of judicial activism. The Supreme Court has also played a significant role in case relating 2002 Gujarat riot.

4.16 Judicial Activism in Other Countries

Judicial activism in the form of public interest litigation has proved to be an effective means for the protection of civil rights in India. It provides justice to the most deprived sections of the society and the executive is forced to show responsibility towards the rights of the citizens. Despite a Constitutional form
of government which stands for rule of law and protects the rights of citizens the Indian democracy has not been able to remove the exploitation and discrimination against the poor. Although there have been several legislative efforts but due to their poor implementation they couldn't produce the desired results. The government has not been able to ensure the economic and social well-being of its citizens. The poorer economic conditions have led to economic exploitation of poorest elements of Indian society. The people are forced to work at low wages, employ their children to supplement their income and engage in bonded labour. Millions are denied subsistence wages despite the minimum wage act on the Statute. Children still work in carpet weaving or glass factories and serve as domestic help despite laws against child labour. Hundreds of thousands including children suffer in bondage despite the Bonded Labour (Abolition) Act 1976.

According to Human Rights Watch the Indian political system has supported a rule of law but remained indifferent towards law enforcement. Indian law-enforcement agencies are quite notorious for their brutality and corruption. They are often involved in criminal activities such as killing of suspects and torture of prisoners. These terrible conditions forced the judiciary to come to the rescue of the affected people by developing a novel system which is known as public interest litigation. Two judges, Justice Bhagwati and Justice Krishna Iyer played an important role in the development of PIL. Keeping in view the indifference and apathy of the administration towards the condition of the people and the fact that the judicial procedure was too tedious to be of any help in getting judicial relief they declared that anyone whose fundamental rights have been violated can directly bring the issue before the court by writing a letter.
Highlighting the role of judiciary, Justice Bhagwati observed as under, the judiciary has to play a vital and important role not only in preventing and remedying abuse and misuse of power but also in eliminating exploitation and injustice, for this purpose it is necessary to make procedural innovation in order to meet the challenges posed by this new role of an active and committed judiciary. Under this philosophy, judiciary looks an active role in addressing the human rights issues. In a number of noteworthy cases, the courts set precedents which heralded new role of judiciary in social policy-an area that was earlier considered to be the sole domain of executive and the legislature. In Hussainara Khatoon case, the court provided relief to prisoners and asserted that speedy trial is a fundamental right of every citizen, In Anil Yadav vs. State of Bihar and Khatri vs. State of Bihar the court took stringent action against the police brutality and provided quick relief. Similarly PIL has been used to provide relief to bonded labourers. With the initiative of various civil society organizations courts have been able to identify and rehabilitate hundreds of bonded people. A similar stance has been taken by the judiciary on issues such as low wages, environmental protection, violation of people’s rights and corruption. Through PIL, the judiciary has been able to hold the political elite accountable. In this regard, the most noteworthy was JMM bribery case in which former Indian PM Narisma Rao was prosecuted.

Mexico and Argentina have undergone a similar experience, in these countries: it is mainly the problem of 'democratic deficit' which has given rise to judicial activism. There is a widespread perception and belief that the government, though democratically elected is too far removed from the public sentiment. Most of the public policies are not arrived at through a broad discussion and consensus among all the stakeholders. This is the result of a detached technocratic assessment which reflects the preferences of powerful elites. Due
to lack of participation opportunities, the courts provide the only forum where the policy decisions can be contested, on the issues of Constitutionality or public interest litigation.

Apart from Mexico and Argentina, the entire Latin America has witnessed a radical change which the judiciary has brought about by way of strengthening the region's democratic political system and the situation relating to rule of law in a case study it was aptly stated as under:

“The judicial activism may also reflect issues of regime, or at least governmental legitimacy, where the political class is seen as being too mired in unacceptable levels of corruption and graft. A dramatic example of this is the operation of Mano Pulitti (Clean Hands) in Italy, leading to a spectacular redefinition of Italian political landscapes as the justice system stepped in to sort out the mess of corruption within the political class. In Latin America, the whole question of corruption and Impunity in public office represents a major obstacle for democratic consolidation”.

Catalina Smulovitz in Discovery of law made a similar observation:

“In the face of democratic deficit of representative government the law and invocation of the law through judicial institutions can become an instrument of civil society empowerment. Courts act as an equalizing institution through which social grievances can be
addressed which otherwise do not have access to political channels of representation”.

Another noteworthy example which needs consideration is that of Israeli judiciary. The absence of a written Constitution has not deterred Israeli Judiciary from developing a system of judicial review over administrative actions. Since the creation of the State, the courts, led by the Supreme Court, developed a wide array of principles and doctrines in order to review the actions of the bureaucracy, military and other administrative institutions.

Before 1980's Supreme Court avoided getting embroiled in political controversies. However, the 1980's saw a major shift in almost all aspects of judicial review. There was a dramatic change in principles concerning access to courts and the rule of law. In its landmark decision in:

Ressler vs. Minister of Defense, Justice Aharon Barak said, “any human action is susceptible to determination by a legal norm and there is no action regarding which there is no legal norm determining it. There is no legal vacuum, in which actions are taken without the law having anything to say about them. The law encompasses any action... the fact that an issue is strictly political does not change the fact that such an issue is also a legal issue.

4.17 Limits of Judicial Activism

Today, everything from river pollution to the selection of the cricket team has become the purview of judicial activism. Is it time to put the genie back in the bottle and confine the courts’ public interest jurisdiction to its original purpose of ensuring justice to the poor and exploited?

All judges have subjective opinions. Their views have a bearing on judgments delivered. So, regardless of the appearance of neutrality, the values and beliefs of the judiciary play a major role in the life of the nation. In that sense, the
judiciary actively pushes things in a certain direction. For example, immediately after Independence the courts' approach was one of protection of the rights of property, and this led to the striking down of land reform legislations.

There has always been a tussle between Parliament and the judiciary, leading to various constitutional amendments that, in turn, have been challenged in the courts. However, the genesis of 'judicial activism' lies in the evolution of public interest litigation. Under the Indian Constitution, the Supreme Court and high courts can be approached in case of a violation of fundamental rights. However, it was the person whose rights had been directly affected who could petition the court. This rule, prohibiting the filing of cases on behalf of other individuals, was followed for almost three decades.

In 1979, a small news item in the Indian Express, describing the plight of undertrial prisoners who had been languishing for periods longer than the maximum punishment prescribed, led an advocate to file a petition in the Supreme Court. The court entertained this petition on behalf of the prisoners, and various directions to provide relief were given in the Bihar under trials case.

Thereafter, the court entertained a number of representative petitions in the areas of custodial death, prisoners' rights, and abolition of bonded labour, condition of mental homes, workers' rights, occupational health and related issues. The rationale was that fundamental rights remained on paper for a large number of marginalized sections of society that were not in any position to come to court. Therefore, public-spirited persons could file petitions on behalf of these poor and exploited classes of people. Even letters describing the plight of the dispossessed were entertained, and relief given.
Public Interest Litigations (PILs) evolved as an innovative departure from the rules, in tune with the socio-economic condition of our society. Even in the field of environmental jurisprudence, in cases like the Bhopal gas leak incident in 1984, in Delhi, the court evolved principles of corporate liability and awarded compensation to the injured workers and people living around the factory. Those were the heydays of judicial activism, with socially-oriented judges like Krishna Iyer, P N Bhagwati and Chinnappa Reddy.

Gradually, however, the court began entertaining public interest petitions that were not solely on behalf of the exploited sections. Some of the petitions dealt with social ills like corruption and the criminalisation of politics. Others were about the protection of ancient monuments like the Taj Mahal, the tombs of Zauq and Ghalib. River pollution, destruction of forests, waste management and environmental conservation began to constitute another huge chunk of PILs.

People turned to the judiciary as a panacea for all ills, and the courts seem to have accepted their own omnipotence. Cases like the hawala, Bofors and fodder scam are all household names today. And yet, corruption is prevalent in the courts themselves, and the apex court has not been able to cleanse its own backyard while attempting to root out corruption from the entire country.

Today, PIL is an ever-expanding universe. Any and everything, from the selection of the cricket team to the construction of a flyover, falls within its domain. Simultaneously, a large number of funded and non-funded CSOs, in the shape of committees, centres and human rights networks with the primary objective of filing PILs, have mushroomed and are part of the litigating constellation.
From the PIL's humble beginnings as champion of the poor and exploited, public interest litigation is moving in a diametrically opposite direction. There was a time when the courts would provide relief from the harsh, arbitrary actions of the executive, reflected in, say, the grant of a stay on the demolition of slums on grounds of lack of a rehabilitation plan or hardship of the monsoons, or school examinations. Today, slum demolitions are being directed on orders from the courts. In fact, the tables have turned. Today, it's the executive and legislature that are trying to put a relief and rehabilitation scheme in place before such demolitions. The courts, on the other hand, are declaring that demolitions should be carried out immediately, rendering scores of people homeless.

A similar trend is reflected in a large number of PIL areas. Thus, in the decision to shift heavy industries out of Delhi, the court heard public interest litigant M C Mehta, the owners of the industries, and the government, but denied the opportunity to be heard to the workers whose right to life and livelihood was going to be affected by the decision.

Protection of the environment is an area in PIL where the people versus environment paradigm have been constructed. But in cases such as the ongoing Godavarman case, the judiciary issued directions to evict tribals and other villagers from sanctuaries, national parks and tiger reserves. The right to life and livelihood of thousands of people residing in these areas does not find much place in the developing environmental jurisprudence.

The declining authority of the legislature and executive has led to ever-increasing activism by the judiciary in these areas. The role of the judiciary was understood to be interpreting the laws made by the legislature. However, the Supreme Court evolved the doctrine that in areas where no law had been
made by the legislature, the judiciary could create a law to address the problems and issues raised in petitions. For instance, in the absence of legislation, the court laid down guidelines and mechanisms with respect to sexual harassment in the workplace, in the famous Vishakha judgment. In the sphere of environmental jurisprudence, the Supreme Court created the five-member Central Empowered Committee (CEC) which functions like a judicial body and gives recommendations. Generally, appointment to statutory bodies created under legislation is a prerogative of the executive. However, on the recent issue of appointments to the Forest Advisory Committee, the judges reacted with indignation to the environment ministry's rejection of the names suggested by the CEC and endorsed by the court. The Supreme Court has been, and remains, a political institution. The role it plays varies with the nature of the polity, the strength and stability of the Centre, and the prevalent mood in the country. Today, in an era of coalition politics, a weak and wilting Centre, and the eroded credibility of the legislature and executive, the judiciary has taken centrestage. But is it time to put the genie back in the bottle and confine the courts' public interest jurisdiction to its original purpose of being permissible solely on behalf of the poor and exploited?

4.18 Criticism of Judicial Activism

The concept of judicial activism has been put under scanner by the critic since its inception. It has been criticized on several counts. One such criticism is that the PIL strategy is a status quoits approach of the court to avoid any change in the system and so it is a painkilling strategy which does not treat the disease. It is argued that the problems of the poor, disadvantaged and the deprived cannot be solved by any trickle down method, therefore whatever the court is doing in PIL is merely symbolic, simply to earn a legitimacy for itself which it has lost over the years.
The critics have further argued that because of judicial activism, separation of power has been under stake. The judiciary is interfering in the field of executive and several times it has become difficult for executive to deal with a new kind of problem with new strategy as it is anticipated that judiciary will struck down this type of strategy.

It is further argued that by extending its jurisdiction through PIL the court is trying to bite more than what it can chew. Lawyers have started complaining that much of the court's time is being consumed by PIL and hence for the court a postcard are more important than a fifty-page affidavit. It is further argued that at a time when the figures of pending cases before the courts are astronomical, this new area of litigation would spell a total collapse of the judicial system in India as it would open floodgates of litigation. However, the history of PIL in India does not support this apprehension. Contrary to the popular belief fresh PIL filing has registered a decline in the subsequent years.

According to one opinion, the misuse of PIL has reached ridiculous limits and petitions are being filed all over the country before the writ courts for matters like student and teacher strike, shortage of buses, lack of cleanliness in hospitals, irregularities in stock exchange, painting of road signs, Dengue fever, examinations and admissions in universities and college etc. one can go on but the list will not be exhaustive. Classical case came up when PIL petition was filed in Delhi High Court to seek direction to the United Front Government at the centre (1997) to form a coalition cabinet with the congress. A petition (1999) was filed for invalidating no-confidence vote against the Vajpayee Government. [36]

Power and publicity apart, many judges have to entertain PIL because of the liberalization of the rule of locus standi and the concept of social justice for the
poor, oppressed and exploited sections of the society. Thus indiscriminate use of this strategy is bringing it into disrepute because it has become the privilege of the privileged to have access to the court. In fact, majority of the petitions either should not have been filed or should not have been entertained. PIL must be confined to cases where justice is to be reached to that section of the society which cannot come to the court due to socio-economic handicap or where a matter of grave public concern is involved. [37]

Conclusion Remarks

Even if all these criticism is valid no one would suggest abolishing this strategy which the courts have innovated to reach justice to the deprived section of the society. Anything contrary would be like suggesting the abolition of marriage in order to solve the problem of divorce. This socio-economic movement generated by court has at least kept alive the hope of the people for justice and thus has weaned people away from self-help or seeking redress through a private system of justice. It is necessary for sustaining the democratic system and the establishment of a rule of law in society. Therefore, one has to be both adventurous and cautious in this respect and the judiciary has to keep on learning mostly by experience. Indian courts are a cornerstone of our democracy, distinctive for the transparency, predictability and accountability of their process. In a democratic country like India, the role of judiciary is significant. Judiciary administers justice according to law. It is required to promote justice in adjudicatory process. Credibility of judicial process ultimately depends on the manner of doing administration of justice. Judiciary can promote social justice through its judgments. Otherwise common man will suffer a lot. In a democracy, the legal system and the judiciary are important constituents within the larger political milieu. The modern judiciary in India derives its sources from the Constitution, and acts as a check on the arbitrary
decisions of the legislature and the executive. The Constituent Assembly foresaw the significance of Judiciary as a guardian of rights and justice. While the Supreme Court is the highest court of law in India, whose decisions are equally binding on all, the High Courts and the Subordinate Courts ensure justice at the state and district levels respectively. The provision for judicial review and public interest litigation ensure that the rule of law is maintained, thereby providing for a dignified living and rightful concern for all. The critics of judicial activism should remember the fact that in India until the Public Interest Litigation was developed by the Supreme Court; justice was only a remote and even theoretical proposition for the mass of illiterate, underprivileged and exploited persons in the country. At a time of crucial, social and economic transformation, the judicial process has a part to play as a midwife of change. The issue of Public Interest Litigation touches a matter of the highest importance literally affecting the quality of life of millions of Indians. Besides this, it will also spread wide the canvas of judicial popular support and moral authority especially at a time when other institutions of governance are facing a legitimate crisis.

The need for judicial activism was also stressed in the task of balancing interest of ethnic groups as both the executive and the legislature would invariably reflect the aspirations of the majority community. Judicial inaction in such circumstances could aggravate perceptions of injustice and eventually lead to violence. It was perhaps as much recognition of these dangers as it was a response to considerations of social justice that witnessed the growth of Public Interest Litigation in India. It is true that the independence of the judiciary is the first concern of the constitution but how far a judge can go is not without limits. Court is called upon to dispense justice according to the constitution and the law of the land. Therefore, in activity it must not forget the
limits of its power that call for self-restraint and in periods of restraint it must not be unmindful of its constitutional duty and obligation. Fact remains that the judiciary in India has performed well, lapses notwithstanding. There is a lack of understanding and scholarship in India on the concept and application of judicial activism and the Judge cannot act arbitrarily rather they should act judicially. When the judges approach the law going beyond the two persons or two parties of the case or suit effectively, then it is called 'Judicial Activism'. Judicial Activism can be the best tool for the protection of human rights but the State is the main culprit for the violation of human rights. Existing poor mechanism of the protection of Human Rights in India and breaking down of the 'Rule of Law' are great problems for a sound judicial activism. Disappearance, cross-fire are regularly being traditionalised and girls are being victimized in the safe custody which are the gross violation of human rights. Sometimes someone is detained unlawfully and at last the court says that 'you are free now' which cannot be a good practice of judicial activism. However, Judges are in better place to be an activist of human rights. Thus, the unit broadly analyses the structure, process, behavior and interaction of the judiciary within a broad framework to achieve the goals of development and democracy and also discuss about the theoretical framework of Judicial Activism. Next chapter deals with the evaluating Judicial Activism and Protection of human rights.

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205


