Chapter - VI

CONCLUSIONS AND SUGGESTIONS
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Judicial activism is not an anomaly. It is an indispensable aspect of the dynamics of a constitutional court. It is a counter-majoritarian check on democracy. Judicial activism, however, does not mean governance by the judiciary. Judicial activism must also function within the limits of the judicial process. Within those limits, it performs the function of stigmatizing, as well as legitimizing, the actions of the other bodies of government more often legitimizing than stigmatizing. The words remain the same, but they acquire new meaning as the experience of a nation unfolds and the Supreme Court gives continuity of life and expression to the open-textured expressions in the Constitution, to keep the Constitution abreast of the times. The major criticism of Judicial Activism is that it is unconstitutional as the authority of legislative and executive is usurped by the judiciary which is not elected by the people. The judiciary has encroached upon the jurisdictions of the executive and legislature and other independent and autonomous bodies. Through judicial Activism the Judiciary sometimes enters an area where it has no expertise and competence. In some instances Public interest litigations may be misused for populism by individuals and groups. Judicial Activism may upset the constitutional system of separation of powers along with checks and balances. It cannot be denied that the opinion of a single Judge is essentially a subjective opinion. It cannot be as objective as a decision made around 500 parliamentarians. What is necessary is that each organ of government should discharge its duty duly and according to the constitution and when this happens the courts will also find no reason to interfere in the activities of other departments of government. It is very important to note that it must not lead the government by judiciary. Frequent confrontation between the Legislature, Executive and the Judiciary will also damage our well established
democratic system of governance. Members of both the institution have sworn
to uphold the constitution, which alone is supreme. Both sides will maintain
and respect the line of demarcation of power under the constitution and will
not allow a conflict to develop between them. The judiciary is the weakest
body of the state. It becomes strong only when people repose faith in it. Such
faith constitutes the legitimacy of the Court and of Judicial Activism. Courts
must continuously strive to sustain their legitimacy. Courts do not have to bow
to public pressure, but rather they should stand firm against public pressure.
What sustains legitimacy of judicial activism is not its submission to populism,
but its capacity to withstand such pressure without sacrificing impartiality and
objectivity. Courts must not only be fair, they must appear to be fair. Such
inarticulate and diffused consensus about the impartiality and integrity of the
judiciary is the source of the Court’s legitimacy. How is the Court’s legitimacy
sustained? The myth created by the black letter law tradition, that judges do not
make law but merely finds it or interprets it, sought to immunize the judges
from responsibility for their decisions. Mythologization of the judges also
contributed to sustaining legitimacy. Those myths or devices are of no help in
sustaining the legitimacy of judicial activism. We must expose certain myths.
Similarly, we must de-mythologize the judiciary by declaring that a
constitutional court is a political institution. It is political because it determines
the limits of the powers of other bodies of government. Being political need
not mean being partisan or unprincipled. The Court is political in much the
same way as the President of India is political in his appointment of a Prime
Minister or in the exercise of his discretion. Another de-mythologization is to
admit that judges are human beings, and are as fallible as other human beings.
If we have good judges, then we also have bad judges. Judges are sure to have
their predilections and those predilections are bound to influence their
judgments. The advantage of such de-mythologization is that people accept that judges, like other human beings, are not infallible. The courts themselves have imposed restraints on their own powers in order to minimize the chances of vagaries arising out of subjective lapses or prejudices of the judges. The courts are bound to follow previous precedents; they are bound to follow the decisions of the higher courts; and they are bound to follow certain rules of interpretation. Further, decisions of courts are reasoned and are often subject to appeal or review. These restrictions ensure that any lapse will be minimum. Critiquing the judgments of the courts would further act to correct objectionable judgments. Through such restrictions, the courts sustain their legitimacy. Since the Indian Supreme Court introduced public interest litigation and began an era of socio-economic rights adjudication two decades ago, the term “judicial activism” has repeatedly found its way into evaluations of the Court’s practice. Yet, no methodology has emerged that allows us to do justice to the term and to the nature of the Court’s decision-making. Central to a large part of the argument in this study, one may hope to gain a deeper insight into judicial behavior in the Indian Supreme Court, and understanding judicial behavior, as Judge Richard Posner recently reminded us, “is a key to legal reform.”

The Judiciary cannot take over the functions of the Executive. The Courts themselves must display prudence and moderation and be conscious of the need for comity of instrumentalities as basic to good governance. Judicial activism has to be welcomed and its implications assimilated in letter and spirit. An activist Court is surely far more effective than a legal positivist conservative Court to protect the society against legislative adventurism and executive tyranny. When our chosen representatives have failed to give us a welfare state, let it spring from the Judiciary. The power of judicial review is
recognized as part of the basic structure of the Indian Constitution. The activist role of the Judiciary is implicit in the said power. Judicial activism is a sine qua non of democracy because without an alert and enlightened judiciary, the democracy will be reduced to an empty shell. Judicial activism in its totality cannot be banned. It is obvious that under a constitution, a fundamental feature of which is the rule of law, there cannot be any restraint upon judicial activism in matters in which the legality of executive orders and administrative actions is questioned. The courts are the only forum for those wronged by administrative excesses and executive arbitrariness. Study observed that there is a requirement for a pro-active role of judges and relevant legal professionals for the strategic utilization of judicial activism for ensuring the people's access to justice.

There is a lack of understanding and scholarship in India on the concept and application of judicial activism and protection of human rights. The Judges 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 traditionalized 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. Public Interest Litigation (PIL) is well established in India. It should not be confined only in the fundamental rights -- part III of the
Constitution of India. The scope of judicial activism should be practiced in each organ of human rights.

Recently the country has seen instances of beneficial judicial activism to a great extent. High profile politician Shibu Soren has been convicted for a murder committed in 1994. Tinsel world celebrity Sanjay Dutt of Gandhigiri fame has been convicted of offences under the Arms Act committed in 1993. Navjyot Sidhu, an ex-cricketer with a gift of the gab has been convicted for a road rage killing committed 18 years ago. Finally and most reassuringly for the public, the Delhi High Court has reversed a perverse decision of a lower court in the notorious case of murder of Jessica Lall some seven years ago. Manu Sharma's acquittal was a patent miscarriage of justice and there was a shrill public outcry. On appeal, The High Court has convicted Sharma, despite Ram Jethmalani's last minute pyro-techniques on behalf of Sharma. No doubt the mills of God (or justice) grind slowly "but they do so exceedingly small".

Whatever be the criticisms against judicial activism, it cannot be disputed that judicial activism has done a lot to ameliorate the conditions of the masses in the country. It has set right a number of wrongs committed by the states as well as by individuals. The common people are very often denied the protection of law due to delayed functioning of the courts, also called judicial inertia or judicial tardiness. Judicial activism has started the process to remove these occasional aberrations too. This can be furthered only by honest and forthright judicial activism and not by running down the judiciary in the eyes of the public. The greatest asset and the strongest weapon in the armoury of the judiciary is the confidence it commands and the faith it inspires in the minds of the people in its capacity to do even-handed justice and keep the scales in balance in any dispute.
The Chief Justice of India (Retd.) Adarsh Sen Anand has realized that the real source of strength of the judiciary lies in the public confidence in it and the judges have to ensure that this confidence is not lost. As Justice J.S. Verma has referred: “Judicial activism is a sharp-edged tool which has to be used as a scalpel by a skilful surgeon to cure the malady. Not as a Rampuri knife which can kill.”

Judicial activism is a noble concept and a necessary tool for attaining justice and achieving social transformation. In carrying out their constitutional interpretative role, courts must therefore employ modes of interpretation that are consistent with an activist approach to the interpretation of the Constitution. It is only those modes of interpretation that take into account the purposes or objects of the Constitution; the context and the overarching principles on which the Constitution was founded; as well as the values underlying the inclusion of a particular right in the Constitution - that are truly consistent with an activist nature of interpreting the Constitution. These modes include the broad, liberal approach and the contextual, purposive approach.

However, it must be emphasized that an activist approach to the interpretation of the Constitution should not be construed as permitting the courts to do as they please. In carrying out their constitutional interpretative role, courts must avoid overstepping their judicial boundaries and venture into the realm of the Legislature and the Executive, as that would be tantamount to usurping the legislative functions of the two political arms of government. Of course it has been argued that courts that employ judicial activism in carrying out their statutory interpretative roles are undemocratic as unelected judges may interfere with laws or policies of democratically elected governments. Without wishing to open up a debate on how the so-called elected legislators have at times abused their elected status and numbers to enact laws or come up with
policies that may not in themselves pass the real test of democracy due to the politicization of issues that legislators are at times obsessed with in the legislative process; it suffices to state that the element of being elected alone does not make all the difference. For instance, are judges who are elected (such as those in some states in the United States of America) free to interfere with laws or tamper with government policies as they please, just because they were elected? Obviously the answer is no.

Therefore, the sheer fact of being elected or their numbers alone does not give the Executive and the Legislature the exclusive prerogative of enacting any laws, without the watchful eye of the courts. If that was the case, then the framers of the Constitution of Republic of South Africa and that of Nigeria, as it is in other countries, would not have subjected the legislative and other powers of these two political arms of government to the Constitution and the jurisdiction of the courts. Additionally, although the concept of judicial activism has been criticized in favour of the concept of judicial restraint in that the latter conforms to the democratic concept of separation of powers as compared to the former; it must be pointed out that undue reliance on the rigid concept of judicial restraint may not only defeat the ends of justice, but equally ignores another important aspect of democracy - the principle of "checks and balances" which courts are constitutionally mandated to perform in order to check legislative encroachment or excesses as well as executive abuse.

Moreover, judicial restraint, with its emphasis on the literal interpretation of legislation, translates into sterility and rigidity in the interpretation of the Constitution, whilst the Constitution itself is dynamic.

In must be remembered that the literal rule has its basis in the assumption that words used in legislation are used with precision because "such is the skill of
parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy". Unfortunately, it is on the basis of this assumption that advocates of the concept of judicial restraint argue that the function of a court is to look for the intention of Parliament from the sole medium of the words used in a statute and no more. However, the search for the intention of Parliament is not as easy as portrayed by the literal approach to the construction of legislation, because if such was the case then the need for courts and judging would have been superfluous. If it is accepted that laws are neither sufficiently detailed to be able to cover every possible situation, nor is it politically feasible to avoid contradictions or inconsistencies in a Constitution especially considering that a Constitution is a product of political compromise, often hastily and broadly drafted, vague and insufficiently explicit- then it should also be accepted that the employment of judicial activism, whilst respecting the legislative supremacy of Parliament and the policy making autonomy of the Executive, has the potential to eliminate the uncertainties, absurdities, technicalities, ambiguities, or the inconsistencies inherent in the Constitution, and that ultimately judicial activism is a necessary tool for courts to attain justice and achieve social transformation, through their interpretation of the Constitution, as well as socio-economic rights vis-à-vis government policies, without necessarily usurping the legislative functions of Parliament and the Executive. The recognition of inherent dignity and of the equal and inalienable rights of the citizens is the foundation of freedom, justice and peace in the world. A new epoch for the individual, the protection of his human rights and fundamental freedoms and the evolution of contemporary human rights jurisprudence started after the Second World War and are still continuing. The main reasons for this historic development were the unprecedented cruelty and horrors of the
Second World War. Ever since the end of the Second World War, promoting the respect for, and observance of, human rights and fundamental freedoms everywhere in the world has become major concern of the international community. The United Nations has made a matchless contribution in this regard. The United Nations has set out the international standard for the protection and promotion of human rights. Of course, the pre-Second World War developments had already laid down the foundation for the development of human rights.

The human rights provisions run "like a golden thread" through the entire UN Charter. And much of the credit for this goes to the various determined non-governmental organizations at the San Francisco Conference. The concern of the United Nations for the protection and promotion of human rights is very much evident from the fact that United Nations Charter makes repeated reference to human rights and fundamental freedoms. In the Preamble, the people of the United Nations expressed their determination "to reaffirm faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and of nations large and small". The protection of human rights is one of the main objectives of the United Nations. This is further evident from the purposes of the United Nations which are proclaimed in article 1 of the U.N. Charter. Article 1(3) of the U.N. Charter specifically highlights that one of the purposes of the U.N. is to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race sex, language or religion. It is important to note here that all the members of the United Nations have taken pledge to take joint and separate action in co-operation with the Organization to achieve the purposes of United Nations. It was left to the General Assembly and the Economic and Social Council to take appropriate steps for the realization of human rights and
fundamental freedoms for all. The Economic and Social Council has established the "Human Rights Commission", the "Commission on the Status of Women" and the "Sub-Commission on Prevention of Discrimination and Protection of Minorities". All these U.N. bodies have done very well in the area of protection and promotion of human rights of the people. In order to make them more effective in their functioning it is suggested that they should meet more frequently and perhaps for longer periods. They should be more ready to undertake public debate on the human rights situation in individual countries.

It is submitted that the repeated references to human rights and fundamental freedoms in the various provisions of the U.N. Charter and particularly in the preamble and purposes of the Charter, creates a binding obligation on all the States to respect, protect and promote the human rights and fundamental freedoms. The violation of human rights and other fundamental freedoms is no longer a matter which is essentially within the domestic jurisdiction of the concerned Member State. In the modern world it would be quite absurd to say or assert that massive or systematic violation of human rights or fundamental freedoms by the State of its own nationals is a matter within its exclusive "domestic jurisdiction". In other words, the U.N. Charter, by incorporating the human rights clauses in it, has internationalized the human rights issue. Any nation or member State violating the human rights can be said to be violating the U.N. Charter. However, the main drawback of the United Nations was that it did not create any independent enforcement mechanism. Nor did it define the "human rights" and "fundamental freedoms". Though the International Court of Justice is an integral part of the Charter, yet there is no provision which grants any right to the individual to file a petition against the violation of the human rights. To some extent this drawback has been removed by adopting the
"1503procedure" as a result of the resolution of the Economic and Social Council in 1970. But the confidentiality aspect of the "1503 procedure" has been one of the greatest defects.

The Universal Declaration of Human Rights was the first landmark in contemporary history in the development of the concept of human rights. The very fact that it was adopted by a big majority and without any direct opposition shows that it was a remarkable achievement. One of the most important features of the Universal Declaration of Human Rights is that it not only gave contents to the various human rights and fundamental freedoms, but it also contained in it all the "three generations" of human rights, i.e., civil and political rights: economic, social and cultural rights and the collective rights. It also set forth, in general terms, the admissible limitations. This means that if any State imposes any restrictions which are outside the scope of the Declaration then that would amount to violation of the Declaration. The omission of right to "protection of minorities" in the Declaration is a surprising one. The Universal Declaration of Human Rights was passed by a resolution of the General Assembly and originally it was thought that it did not create any binding obligation on the States. But in our submission, it has become, over the years, not only a part of customary international law but also it has all the attribute of juscogens. Whatever may be the legal status and significance of the Declaration, however, it cannot be denied that it provided the basic philosophy for many legally binding international instruments including the two Covenants. Another importance of the Declaration is that it formed the basis for enacting regional Conventions of Human Rights such as European Convention on Human Rights and Fundamental Freedoms, 1950 and American Convention on Human Rights, 1969. The Declaration has also influenced the drafting of various Constitutions of the world and Indian Constitution is one of
them. So much so that even the judges of the International Court of Justice have made the principles of the Declaration as the basis for their opinion.

It was rightly realized that economic, social and cultural rights cannot be ensured without economic and technical assistance, education and planning. Therefore, taking the realistic view, the State Parties ratifying the International Covenant on Economic, Social and Cultural Rights, undertook to take steps "to the maximum of its available resources" in order to achieve" progressively the full realization" of these rights. Since each State will invariably face different problems and since no two states are likely to have the same "available resources", different criteria will have to be applied to different states in determining whether they are living up to their treaty obligation. The Covenant not merely lists the economic, social and cultural rights, but it also describes and defines them in considerable detail and set out the steps that should be taken to achieve their realization. Power has also been given to the States to impose limitations on the enjoyment of these economic, social and cultural rights but such limitations on the enjoyment of these rights have to be compatible with the economic, social and cultural rights and for promoting the general welfare of the people.

The measure of implementation contained in Part IV of the Covenant is "periodic reports" system. The Covenant does not establish any inter-state or individual complaint system. It is worth noting that the Covenant on Civil and Political Rights imposes an "immediate obligation" on the State Parties ratifying it, "to respect and ensure" the rights it proclaims and to take whatever other measures are required to achieve that goal. The ensuring of civil and political rights cannot be postponed indefinitely and as such there is no difficulty which comes in the way of their implementation. Further, merely declaring or announcing civil and political rights of the people without an
"effective remedy will be like a "rope of sand" which in no way can help in achieving the Obligations of the States under the Charter of the United Nations, i.e., to promote universal respect for, and observance of human rights and freedoms. Therefore, the Covenant rightly contains a provision under which the State Parties undertake to ensure all persons "effective remedy" against violation of their rights or freedoms notwithstanding that the violation has been committed by persons acting in an official capacity.

The rights enshrined in the Covenant are in more detail as compared to the Universal Declaration of Human Rights but they are not absolute rights. They are also subject to certain limitations which the State may impose. However, to ensure that these limitations may not abrogate the rights given in the Covenant, different grounds on which the limitations can be imposed have also been mentioned in the Covenant. It may also be mentioned that while the Universal Declaration of Human Rights does not deal with the question of minorities, the Covenant on Civil and Political Rights specifically deals with it and protects the rights of the minorities.

The implementation measure provided under the Covenant is the "Reporting Procedure". The State Parties are required to submit their reports to the Human Rights Committee on the progress they have made in the employment of these rights. In this way, the measures adopted by each State Party for ensuring civil and political rights to its people, are brought to the notice of the international community. However, no individual petition can be entertained under the Covenant on Civil and Political Rights. To meet this requirement, Optional Protocol to the Covenant on Civil and Political Rights has been enacted and the individuals of those States Parties which have ratified it can file the individual complaint as well.
It is submitted that it is beyond any doubt that all the civil and political rights are inherent important rights of the people which must be ensured to them. Therefore, it is desirable that the Optional Protocol should not remain merely as "Optional" but it should be ratified by all the State Parties to the Covenant on Civil and Political Rights.

Similarly, the Second Optional Protocol to the Covenant on Civil and Political Rights aiming at the abolition of death penalty should also be ratified by all the State Parties to the Covenant. In India death sentence is imposed under the law only in "rarest of rare" cases and at different times the Courts have also shown trends for its abolition. It is, therefore, suggested that India too should ratify this.

Whatever may be the status of the Covenants and the Optional Protocols, they remain the most important international instruments relating to human rights.

The late Secretary General of the United Nations, U Thant, rightly stressed the importance of the adoption of the International Covenants in the following words:

"Today's decisions are the culmination and the outcome of sustained and complex preparatory work to which the United Nations has devoted itself since 1947. It was then decided that human rights and fundamental freedoms which had been referred to in general terms in the Charter and which were soon to be proclaimed "standards of achievement" in the Universal Declaration of Human Rights must be made the subject matter of legally binding obligations in international treaties ....in the philosophy of the United Nations, respect for human rights is one of the main foundations of freedom, justice and peace in the world .."

It is true that the International Covenants and Optional Protocols constitute a positive, effective and realistic step towards the international protection of the
individual. They embody principles which profoundly affect the relationship between man and man, between the citizen and his state and between State and State. The Universal Declaration of Human Rights and the Covenants should be used as a shield for the protection and promotion of the human rights and fundamental freedoms of the individual without any discrimination or distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status of that dignity to which man is born.

When the General Assembly adopted and proclaimed the Universal Declaration of Human Rights, the Indian Constitution was in the process of making in the Constituent Assembly. Viewed from the Indian standpoint, human rights have been synthesized, as it were, into an integrated fabric by the preambular promise and various Constitutional clauses of the National Charter of 1950. In other words, the tryst to make the India's Constitution a viable instrument of the Indian People's salvation, and to secure all persons basic human rights, is implicit from the preambular promise, fundamental rights, and directive principles of state policy, fundamental duties and various other provisions of the Constitution. Most of the human rights and fundamental freedoms declared in the Universal Declaration of Human Rights and the two Covenants are the building blocks of the rights enshrined in the Indian Constitution.

The preamble to the Constitution of India concisely sets out quintessence of human rights which represents the aspiration of the people, who have established the Constitution. From the preamble to the Constitution, it is evident that India is a "sovereign, socialist, secular, democratic Republic". It contains the objectives of securing every citizen: justice of social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality
of status and opportunity; and to promote among them all Fraternity assuring the dignity of the individual and unity and integrity of the Nation. The spirit of brotherhood assuring the dignity of the individual and unity and integrity of the nation is sought to be achieved by abolition of untouchability, Abolition of titles, prohibition of traffic in human beings and many other provisions. It may be noted that the preamble to the Constitution of India assures all among other things "dignity of the individual". Human rights are part and parcel of human dignity. The importance of the human dignity as an essential aspect of the human rights is well exemplified by its inclusion in the Universal Declaration of Human Rights as well as in the two Covenants. Part III of the Constitution contains a long list of fundamental rights given to the people in India which represent the basic rights of the people. Most of the human rights which find their reflection in the Indian Constitution, such as, right to equality, right to freedoms and right to life constitute the "basic structure" of the Indian Constitution and hence they cannot be abrogated even by a constitutional amendment. The principle of reasonableness, which is an essential element of equality or non-arbitrariness, pervades article 14 of the Constitution, like a brooding omnipresence. Article 14 strikes at arbitrariness in State action and ensures fairness and equal treatment to all which is an essential aspect of human rights; The right to life and personal liberty is most fundamental of all basic human rights. It has been assured to all persons in India under article 21 of the Constitution. It can be taken away only by "procedure established by law". Through the dynamics of judicial mutation in the interpretation of article 21 of the Constitution, it has been given the widest possible meaning. It is now well established that "law" as well as the "procedure" must be "just, fair and reasonable" before a person could be deprived of his life or personal liberty. In other words, through judicial interpretation, "substantive due process" as well
as "procedural due process" have become an integral part of the Indian Constitution. The right to 'live' does not mean merely physical existence but it includes within its ambit the "right to live with human dignity. In order to make human rights a living reality for the people of India, the judiciary has interpreted in article 21 various unenumerated rights. The essence of all these developments has been briefly enunciated by the Supreme Court as under:

The preamble sets the human tone and temper of the Founding Document and highlights justice, equality and the dignity of the individual. Article 14 interdicts arbitrary treatment, discriminatory dealings and capricious cruelty. Article 19 prescribes restrictions on free movement unless in the interests of the general public. Article 21 after the Landmark case in Maneka Gandhi (A.I.R. 1978 S.C. 597), followed by Sunil Batra (A.I.R. 1978 S.C. 1675) is the sanctuary of human values, prescribes fair procedure and forbids barbarities, punitive or processual. Such is the apercu, if we may generalise.

Article 22 provides protection against arrest and detention in certain cases. It prescribes the minimum procedure which must be followed whenever any person is arrested or detained. The Indian Constitution permits the enactment of preventive detention laws in certain circumstances. However, the protections are also provided in article 22 (4) to (7) of the Constitution in case a person is detained under any preventive detention law. It may be noted that ever since 1950, i.e., from the date of the commencement of Constitution, India had preventive detention law except for two brief gaps between January 1970 and May 1971 and then from March 1977 till October 1980 when the President of India promulgated the National Security Ordinance, 1980. When the people of India experienced the gravest abuse of the preventive detention power and
violation of human rights during 1975 emergency in utter disregard of law and when even the judicial attitude was not in favour of the detainees, the then prevailing preventive detention law "Maintenance of Internal Security Act, 1971" (MISA) was repealed and article 22 (4) to (7) was amended so as to provide more effective protection to the detainees in future. These changes were brought by the Constitution (Forty-fourth Amendment) Act, 1978 which provided that the changes in article 22 (4) to (7) shall come into force as and when official notification is issued by the Government of India. Now more than sixteen years have gone but the government has not brought into force the amended provisions of article 22. One fails to understand as to why the government has not issued such a notification till date. If the government is serious about the violation of human rights of the people during the preventive detention, then it is suggested that the amended clauses of article 22 should be brought into force without any further delay. In this regard even the judicial attitude has also not been so encouraging. It has refused to issue mandamus to the government for the enforcement of amended article 22 (4) to (7) of the Constitution.

No doubt, the Supreme Court has upheld the Constitutional validity of the Terrorist and Disruptive Activities (Prevention) Act, 1987, popularly known as "TADA" preventive detention law, but it was considered as a "black law" and a large number of human rights violations were alleged under this preventive detention law. So much so that even the Home Minister of the country conceded that TADA was used by the police in cases where the normal laws of the land could be applied. It was as good an admission as any that the draconian law was misused extensively. TADA was a convenient sledge hammer with which every "undesirable activity could be squashed. TADA has been used against the agitating farmers, petty criminals, minors, women, trade
unionists and political opponents and thus their human rights have been violated. People belonging to the minority communities have come in for special attention. Since the onus of providing one's innocence lay on the victim, the jingle "fill it, shut it and forget it" very well applied to jails housing the TADA detenues. It may be noted that this Act was passed and supposed to be a temporary measure to deal with people like Punjab militants who operated beyond the pale of normal laws but over the years its use had been fully supplanted by its misuse. If there had been a breakdown of the judicial process which has rendered the regular laws of the land useless, the remedy did not lie in laws like TADA. There is need for strengthening the general policing system itself. With the large number of human rights violations under TADA, it had become a shame on our Constitutional democratic Republic where the human rights are of great importance and must be protected in all cases. It was for this reason that the Parliament was forced not to extend it further. Now government has prevailed good sense and TADA is replaced.

Freedom from exploitation, right to freedom of religion and protection to the minorities by protecting their cultural and educational rights, has also been guaranteed by the Constitution. However, the painful gap between preachment and performance can be best stated in the following words of Tolstoy:

The abolition of Slavery has gone on for a long time. Rome abolished Slavery. America abolished it and we did but only the words were abolished, not the things.

The bonded labour is still found in different parts of the country. However, the steps taken by the government and the judicial attitude in their identification, liberation and rehabilitation are on the happy note.

The talk of human rights and declaring them as fundamental rights will be meaningless unless they can be enforced by effective machinery. If there is
no effective remedy against the violation of human rights, there are no effective human rights in the real sense. Article 32 of the Constitution provides an effective remedy against the violation of any of the fundamental rights. The Supreme Court has been conferred with the power to issue any order, direction or writ for the enforcement of the fundamental right. Thus, this constitutes a very important provision of the Indian Constitution.

Another positive feature of the Indian Constitution is that even during the emergency, the right to move to the Court for the enforcement of articles 20 and 21, which confer the basic human rights, cannot be suspended. This safeguard is against the possibility of misuse of the power during the period of emergency.

The Indian Constitution also contains a separate Part IV dealing with directive principles of state policy. This part of the Constitution represents the "second generation" of human rights, i.e., economic, social and cultural rights. Though these directive principles of state policy are not enforceable yet it is the duty of all the three organs of the state to apply them in the making of laws. They serve as the guidelines for actions on the part of all the three organs of the State. If the state takes any action which is contrary to the directive principles of state policy then the same may be declared as unconstitutional. Though the Constitution contains a specific provision for free and compulsory education for children until they complete the age of fourteen years and this provision was supposed to be implemented within ten years from the commencement of the Constitution, yet it has not been implemented in its true spirit. It is suggested that this provision should be implemented in its true spirit and primary education must contain topics about the human rights, because education lend dignity to a man. It seeks to build up the personality of the pupil by assisting his physical, intellectual, moral and emotional development. If the
children are made aware about the human rights then it will help in protecting and promoting the human rights of the future generation.

In 1976, the Indian Constitution incorporated a specific provision for the protection and improvement of the environment. Thus, Indian Constitution is one of the very few constitutions of the world in which the protection of the environment has been raised to the status of constitutional law. In other words, the Indian Constitution also contains provisions relating to the "third generation" of human rights which are very important not only from the individual point of view but also from the point of view of the community at large.

It is worth noting that the Indian Constitution also put certain fundamental duties on the citizens of the country. The basic aim of these duties is to protect the human rights of the people and to enable other people to enjoy the benefit of Part III of the Constitution.

India can feel proud of its independent judicial system. In fact, the independence of judiciary is the "live wire" of our judicial system. The Indian Judiciary, particularly the Apex Court, has shown a lot of judicial activism and it has been performing positive and creative function in the securing and promoting human rights to the people. The Supreme Court and the High Courts can pass any order, direction or issue writ of any kind in appropriate cases.

The Supreme Court can pass an order or decree which may be necessary for doing "complete justice" in any cause or matter before it. The judiciary has used these powers and interpreted the various constitutional provisions so as to ensure the protection of human rights to the people.

One of the most important outcome of the judicial activism has been that the phrase "procedure established by law" in article 21 dealing with right to life and personal liberty has been interpreted to mean that both "procedure" as well
as "law" should be "just, fair and reasonable". The Court rightly read articles 14 and 19 of the Constitution in article 21 in order to make the "procedure" under "procedure established by law" as "just, fair and reasonable". It was this new approach which has been applied by the judiciary to protect the human rights of the people. In this regard the following observations of Justice Krishna Iyer are worth noting:

The high value of human dignity and the worth of human person enshrined in art. 21 read with arts. 14 and 19, obligates the State not to incarcerate except under law which is just, fair and reasonable in processual essence.

The Apex Court, from A.K Gopalan to Kartar Singh through Maneka Gandhi case has adopted a new approach to the expression "procedure established by law" which has marked water shed in the history of development of human rights In our country. This approach provides protection not only against executive action but also against legislation and any law, which deprives the person of his human right, would be invalid unless it prescribes a procedure for such deprivation which is "reasonable, fair and just".

Another important development which has come from the judicial platform through judicial activism is the "public, interest litigation". Justice was only remote and theoretical proposition for the mass of illiterate, underprivileged and exploited persons before public interest litigation was made as a part of our constitutional jurisprudence through judicial activism. This new approach has given relief to the prisoners, under trials, workers, bonded labourers, women, children and many others who earlier could not approach the Supreme Court due to ignorance of their rights or economic or any other disability. The public interest litigation has not only liberalized the rule of locus standi but it has also made possible to police the corridors of power and prevented violation of
human rights. The importance of public interest litigation has rightly been explained by Justice Bhagwati in the following words:

Public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable section of the community.

Thus, the highest judiciary has used the instrument of public interest litigation to allow the public spirited persons to come forward and become God Fathers for the protection of human rights of the poor and ignorant. The judiciary has also been very cautious in entertaining public interest litigations. From case to case it has evolved various principles. Frivolous or vexatious writ petitions in the name of public interest litigations, filed *mala rule* and arising out of enemity between the parties have not been allowed. In short, the concept of public interest litigation which has been fostered by judicial activism has become an increasingly important one setting up valuable and respectable records especially in the arena of human rights and particularly for the "unre presented and under-represented."

Personal liberty and human dignity are the most cherished values of our constitutional jurisprudence. They are the necessary epitomes which help in the development of an individual's personality and in the realization of human rights. The right to life under article 21 of the Constitution means right to live with human dignity and free from all kinds of exploitations. Article 23 also prohibits traffic in human beings and *beggar* or forced labour. But still various instances of bonded labour have been brought to the focus of the Courts. Article 23 of the Constitution strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values. The Supreme Court from *Bandhua Mukti Morcha case* to
Public Union for Civil Liberties has shown deep concern for the basic human rights of the bonded labourers and issued suitable directions for ensuring the protection and promotion of their human rights to live with human dignity. Children constitute the weakest and most vulnerable section of human society. They become easy target for violation of their human rights. The judiciary in India has shown deep concern for the protection of human rights of these children. The Court has directed that the children below the age of 14 years should not be employed in hazardous industries which threaten their life because of their tender age. The court has protected them from exploitation through the practice of inter-country adoption. They have been protected from exploitation in jail because incarceration in jail has a dehumanizing effect and it is harmful to the growth and development of children. The Court has also shown deep concern to the children of prostitutes, and prevented them from sexual assault.

The judiciary has also followed the human rights approach to environment protection through various constitutional mandates. It has been rightly held that right to live in healthy environment is a part of right to life under article 21 of the Constitution. The Supreme Court has rightly observed:

"In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under articles 21, 48-A and 51-A (g). It is the duty of the State to take effective steps to protect the guaranteed constitutional rights".

The Supreme Court has also laid stress on the environmental education at all levels and thus judicial activism has led to the development of a new "environmental human rights jurisprudence" in India.

The talk of human rights would become meaningless unless a person is provided with legal aid to enable him to have access to justice in case of
violation of his human rights. This is a formidable challenge in a country of India's size and heterogeneity where more than half of the population is steeped in poverty, destitution and illiteracy. The judiciary has again played an important role and expanded the scope of legal aid and held that it must be held to be implicit in article 21 of the Constitution and thus enforceable in the Court of law. It is a necessary *sine qua non* of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the very foundation of democracy and rule of law. It has been rightly held that right to free legal aid is not conditional upon the application of the accused for such assistance. It is obligatory on the Magistrate or the Session Judge to inform the accused that he is entitled to free legal service at state expense. Otherwise, it would be mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal aid. Further, competent advocates capable of handling complex cases and not the raw entrants to bar should be appointed as *amicus curiae*.

In most of the countries, human rights violations are generally due to police atrocities in one form or the other. The judicial activism has not only protected the human rights of the people in such cases but it has also led to the development of "exemplary compensation jurisprudence".

In our submission, whenever human rights violation takes place due to the atrocities by police, military or paramilitary forces then the persons involved for the violation of human rights or responsible for such atrocities should be personally held liable to pay the compensation to the victims. This will have some deterrent effect on them. In most of the cases in which the Supreme Court has granted compensation to the victim of violation of human rights, it was left open to the government to initiate appropriate action against the guilty officials. It is submitted that it should not be left open to the government to
recover the amount of compensation from the guilty officials. In fact he should be made "personally liable".

From the perusal of the various judicial decisions in which the Court has shown its judicial wisdom for protecting the people from violation of their human rights, it appears that everything is in order in India. However, the Court has itself admitted openly that it is heart-rending to note that day in and day out we come across with the news of blood curdling incidents of police brutality and atrocities, alleged to have been committed, in utter disregard and in all breaches of humanitarian law and universal human rights as well as in total negation of the Constitutional guarantees and human decency.

A judicial system which provides for independent judges reveals, perhaps better than any other institution, the perfect equilibrium between liberty of the individual and the power of the State. We are proud of fact that the Court in India are sentinels on the qui-vive and guardians of human rights and common man looks upon them as' their protectors. The judges who man the Courts have to come far word openly whenever any act of violation of human rights is brought to their knowledge. Even the government officials should take steps in protecting and promoting the human rights and whenever any human rights violation is brought to their notice, they should intervene immediately to protect such violation of human rights.

It is also becoming increasingly evident that human rights observance is a 'sine quo non' of economic development as well as an integral part of good governance and democratic development and "National Human Rights Institutions" are a necessary corollary of the democratic machinery of the government. They are a means of democratic empowerment for those who are less powerful and less advantaged.
In India various abortive attempts have been made from 1968 to 1989 to establish the institution of *Lokpal* (Ombudsman) in the centre by introducing different Bills in the Parliament. After massive public movement led by Anna Hazare the present government passed the Lokpal Bill from both house of the parliament and it is with the President for ascent. It is heartening to note that some states have established the *Lok Ayukta* at their own state level.

However, in order to meet the national as well as international demand for the constitution of Human Rights Commission, the Indian Parliament passed "The Protection of Human Rights Act, 1993". The National Human Rights Commission has already been established. But the States have yet to establish "State Human Rights Commissions". It is suggested that "State Human Rights Commissions" should also be established at the earliest. Because it may not be possible for one single Human Rights Institution to deal with all the complaints of human rights violation. In a very short span of time the National Human Rights Commission has been receiving many complaints of human rights violation from all parts of the country and its work load has already increased beyond proportions. Thus, it becomes all the more necessary to establish "State Human Rights Commissions" at the earliest.

The present National Human Rights Commission, with Justice Ranganath Misra as its Chairperson, has already started showing positive results. When Amnesty International criticized India on the question of human rights violation, particularly in the State of Jammu and Kashmir and in North-Eastern States, Justice Ranganath Misra rightly advised the government to allow Amnesty to send its team to those states to see how the law is operating there amidst the chaos created by terrorists and sub-versionists. His approach, it is submitted, is not merely moralistic but also it is pragmatic and transparently honest. Justice Misra wanted Amnesty to visit Kashmir and see the plight of
the victims who do not figure in its assessments of "the criminality of Indian State". They are the terrorists' victims—civil, military and paramilitary, besides hapless citizens. Justice Misra has gone to the extent of saying that if the government does not ask the Amnesty International to visit Kashmir, he would extend a "personal invitation" to its member's to come and see how Commission functions. The approach of the Chairperson of the Commission is open and positive and it must be welcomed.

Militancy is a violent curse. Its votaries choose their time and target. They kill, maim incapacitate and disappear. Those who have to take stock of the situation after such incidents are expected to react with restraint. They ought to allow the legal system to absorb the shocks of the tragedies and act according to the provisions in the rule book.

Many a time in human history, great societies have crumbled into oblivion through their failure to realize the significance of crisis situations operating within them. In this regard Justice Pandian has rightly remarked:

"True, our is a country which stands tallest even in troubled times, the country that clings to fundamental principles of human rights, the country that cherishes its constitutional heritage and rejects simple solutions that comp rotated the values that lie at the root of our democratic system".

We have number of policies, programs and planned activities undertaken by the government for human rights protection. It is also to be understood that human rights protection becomes a priority need due to the acts of all of us that is the human beings. It may be said that the human rights and fundamental freedoms recognized by the Indian Constitution and relevant laws are being protected enforced by the forward looking legislature, dynamic executive and by the independent judiciary.
Judicial activism is not opium but a pervasive power and a ‘brooding omnipresence’. Even on environmental conservation and right to education, bonded labour, gender justice, paedo-justice and free legal aid while in state custody, judicial activism has enlivened life and liberty and made the court a power at the service of the people. The judge is no ‘ineffectual angel’ in the presence of rank injustice nor indeed is he a knight errant adventuring for pleasure into forbidden fields. Law jurisprudence to uphold rights and liberties necessitates the adoption of a different approach by the judiciary, while grappling with issues of public importance. The court looks to the provisions of the constitution for guidance. Part IV of the constitution, which contains the Directive Principles of State Policy, is of specific importance while dealing with public law litigation. Let us look at a final instance. Article 37 of the Indian Constitution states that the principles enshrined in Part IV is fundamental for the governance of the country and the state is duty-bound to implement them. In practice, however sufficient effort has not been initiated to implement most of these principles. Article 45 is a case in point. It required the state to set up within 10 years a system to provide free and compulsory education to all children below 14 years. After more than 30 years beyond the prescribed 10-year period, when the Supreme Court realized that this objective remained unfulfilled, it considered the right to education an element of the right to life guaranteed by Article 21 and directed its compliance. When dereliction of constitutional obligations and gross violations of human rights are brought to the notice of the court, it is expected to act and act purposively and positively to provide relief, real and not illusory, to the parties who seek enforcement of their fundamental right. We must pay heed to Justice Cardozo’s wise observation that the philosophy of common law has at its heart, the philosophy of pragmatism. Its thrust is relative, not absolute. Judges must not
throw to the winds the advantages of consistency and uniformity to do justice in the particular case. The judge’s task is particularly difficult in the field of public interest litigation. That is because in a large number of such cases the material is wanting and whatever little material is placed, is usually unfiltered. The entire proceeding tends to become inquisitorial in character with the judge, or judges, playing a pro-active, participatory role. The role of the judiciary is extremely delicate in such cases because it must not appear to be playing to the gallery or playing a role which may be described as partisan. Great care must be taken to ensure that while the judge or judges play a participatory role, they do not appear to be entering the arena or give the impression of bias to the opposite party. It must also be realized that the position of the opposite party in such cases is precarious, in that, it has to meet with allegations, which are incomplete and often half-baked. Therefore, while in public interest litigations the opposite party is always at the receiving end, a fair chance to put forth its defense must be ensured to such a party, and the judge or judges hearing such cases, not give the impression that they have prejudged that issue. That is the caution which the judge or judges must administer unto himself/herself and exercise jurisdiction. It is indeed true that, of late, many issues that can be described as socio-political or religio-political or eco-political are brought to court. Some of them do have far-reaching consequences and affect the social fabric of the nation. Courts have, fortunately, while trying to steer clear of areas falling within the political thickets, not hesitated to exercise jurisdiction in appropriate cases. The courts have taken up causes of the poor, the underprivileged and the exploited, often acting on newspaper reports. Upholding the rule of law, it has made human rights accessible to some of the most marginalized sections of the Indian citizenry. And this is no mean achievement. There can be no doubt that the judiciary should be in the
forefront of humanity's repudiation of such acts of terror perpetrated on certain segments of the citizen. In fact, judges by their oath are obliged to do so. In the conscientious exercise of that discretion by judges, lies the guarantee of the proper governance of the country as a democratic nature of equal citizens whose rights and freedoms are effectively protected by the rule of law.

Besides, there is need for good governance and effective cooperation with governmental organizations in implementing programmes for the protection of human rights in India. Last but not the least, there is need for a broad-based and united people's movement along with effective jurisprudence to act promptly on matters that affect the masses.