"Man is not merely a tool-maker, he is also a pattern maker. He looks at the world and finds that things supersede one another in perpetual succession. All things are subject to the domination of time. Therefore, man asks the question whether the cosmic process has any meaning, whether life has any purpose, whether history tends any way or is a mere absurdity." S. Radha Krishnan.

Change is the law of nature. Nothing is permanent and absolute in this transitory world. Today, we are living in the time of the 'parenthesis', the time between eras, between the past and the future, as rightly said by John Naisbitt. In such unstable situation, the vital issue of our concern is: Should we adhere to the original design of our sacred document as advocated by Edward Meese that is, to follow textually the Constitution of the nation or should we go for a change by adopting an absolutely new covenant framed by the present generation?

Perusal of the exploration of the Constitutions of the World's two biggest democracies namely the United States of America and the India in the context of two fundamental human rights, that are, Right to Freedom of Speech and Expression & Right to Life And Personal Liberty, demonstrate that with the passage of time both these Freedoms have been shaped into so many

2. See MEGA TRENDS by Naisbitt, John (1984) p. 249. According to Naisbitt: "It is as though we have bracketed off the present from both the past and the future, for we are neither here nor there we are clinging to the known past in fear of the unknown future. The Time of the parenthesis is a time of change and questioning".
3. Whereas the Constitution of the United States is the gift of the eighteenth century wisdom, the Indian Constitution is the contribution of the present century sagaciousness.
different patterns with the tool of judicial review that probably could never have been visualised by their framers. This spurt in the exercise of the power of review of legislative and executive actions by the Supreme Court of both the democracies whereas on the one hand has proved as a boon to the common man for whom the apex court has become the only saviour in the rapidly moving society with top-down decline in values, on the other hand this so-called judicial activism is being apprehended as an encroachment on the territory of the executive and legislative departments of the government. The ever-increasing liberalist or so-called non-interpretivist approach of the Court, particularly in relation to the issue of fundamental human rights is being seen in various quarters as the judiciary becoming all powerful, assuming the role of 'super-legislature', quite contrary to the original design of the Constitution of the land. According to the critics of liberalist approach, the architects of the Constitution contrived an ideal State wherein the judiciary had to play a limited role. Judges must follow the

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4. Recently Justice P.B. Sawant, Chairman of the Press Council of India, while addressing a symposium in N. Delhi on Sep. 22, 1995 defined Judicial Activism as "that action of the judiciary which tends to encroach on the legislative and executive fields". See "Judicial activism: A Study in Perspective" by Rajes war, T.V. The Tribune Nov. 16, 1995.

5. In America, the so-called critics of liberalism and advocates of Interpretivist approach mainly are Meese, Justice Taney, Justice Black, Wolfe, Mc Douell, John Agresto, Robert Bork, Jehkins, Justice Rehnquist Philip Kurland, Walter berns, Justice Burger, Levinson etc. Prominent advocates of preservitism in India have been Justice Kania Chandrachud, Justice Hidayatullah etc. See Supra Ch. II & III for details.
Constitution according to its terms which command that Constitutional changes come by democratic means, and not through government by judiciary. As repeatedly said by Frederick Douglas, the former slave who became a leading abolitionist lateron that: "____ Intentions of those who framed the Constitution _____ be they good or bad, for slavery or against slavery, they are to be respected so far, and so far only, as we find those intentions plainly stated in the Constitution".  

He also asserted that: "the paper itself, and only the paper itself, with its own plainly - written purposes, is the Constitution. It must stand or fall, flourish or fade, on its own individual and self-declared character and objects".  

Charles Summer also was aware of the fact that: "Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any

6. See Government by Judiciary by Berger, Raoul (1977) pp 366-367. Also see Supra Ch. III; Mr. Atul Setalwad also Stated in the recent past that Indian Courts were asserting powers, with general public support, over the legislature and the executive, which were not contemplated in the Constitution and are unthinkable in the USA, where the Courts punctiliously respected the powers of Congress, accepted the concept of executive privilege and avoid pronouncing on political questions. Mr. Setalwad has warned that if the present trend continued, there would be a strong reaction affecting the position of an independent judiciary which would be a calamity. See Supranote 4, Rajaswar, T.V.


8. Ibid 469; Justice Goldberg also said while deciding one of the case that: " ------- Our Constitutional duty is to construe, not to rewrite or amend the Constitution. ------- Our Sworn duty to construe the Constitution requires, however, that we read it to effectuate the intent and the purposes of the Framers". 332 U.S. 46, 72-75 (1947). Justice Iredell also laid emphasis upon the need for the existence of textual "Constitutional provisions" clearly limiting legislative power. See Calder v. Bull (1978) 3 U.S. (3 Dall) 386.
place is open to doubt -------- we can not err of we turn to the framers; and their authority increases in proportion to the evidence which they left on the question".

Justice H.R. Khanna, one of the distinguished former justices of the Indian Apex Court also do not seemingly favour the idea of Constituting a new Constituent Assembly to make new Constitution for the Indian Republic. For him, the reason being that country at present is devoid of the leaders of the stature and vision of Pt. J.L. Nehru, Dr. Rajendra Prasad, Sardar Patel etc.10 Criticising the transgression of the Court, Mr. Justice Khanna has stated, "If mankind while passing through the successive stages of political consciousness has done away with despotism of kings and dictators, it would be puerile to expect it to put up with despotism of the judiciary. Of the different types of despotism, judicial despotism is not only inexcusable, it is also most irrational".11

It is also alleged that substitution by the Court of its own meaning to the Constitutional text as framed originally might amount to re-writing of the Constitution as in a government of

9. Quoted by Berger, Raoul Supranote 06 at p. 372. Charles Summer was the archradical of the 39th Congress; Even President Roosevelt invited for "a Supreme Court which will do Justice under the Constitution not over it" In his Radio Address on March 9, 1937, defending his Court - packing plan, he contended that the America had "reached the point as a Nation where we must take action to save the Constitution from the Supreme Court and "the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself". See American Constitutional Interpretation by Murphy, Walter F., Fleming, James and Harris, William.


11. Mr. Justice Khanna has also directed that the governance of a country or a State is a task assigned by the Constitution to the Government which is responsible to the duly elected legislature. See Supranote 04. Rajeswar, T.V.
limited powers[^12] the power of each organ is well-specified.

In the Virginia Ratification Convention, Lee observed: "When a question arises with respect to the legality of any power, the question will be, "Is it enumerated in the Constitution? --- It is otherwise arbitrary and unconstitutional."

Even Hamilton, knowing that there existed considerable judicial review when the United States Supreme Court declared that the War of 1812 was unconstitutional.
Indian framers has been contrary to their American counterparts, where the Bill of Rights were incorporated in the Constitution in an absolutist manner and whatsoever restraints are imposed either on these Rights or on the so-called review power of the Courts, which is also not explicitly mentioned in the Constitution, are self-created by the apex court, but nonetheless, are in harmony with the general spirit intention of its framers.\textsuperscript{17}

Inspite of all the limitations or so-called checks, the apex courts in both the democracies by playing an activist role, have made tremendous deviations in the originally guaranteed Right to Freedom of speech and expression and Right to Life and Personal Liberty.

In the \textit{United States}, it is alleged that the Court has flouted the will of the framers and substituted an interpretation under cover of the so-called "due-process clause" and "equal protection clause".

In America most of the deviations have been made during the \textit{Warren era} of 1960s, which till date is remembered as the most activist period in the judicial history of the American Supreme Court. It was during this period, that the law of libel was virtually nationalised which before it has been almost a matter for the State Courts. It was during this time the test of obscenity was propounded through various rulings, each time

\begin{flushright}
\textsuperscript{17} \text{See F.N. 118 Supra Ch. II}
\end{flushright}
narrowing down the meaning of obscenity. In the area of Life and Liberty, the Warren Court's Libertarianism fashioned our Constitutional right of Privacy by striking down birth control law as unconstitutional as being violative of married couple's right to "Liberty" without due process of law.

The Burger Court which succeeded The Warren Court in 1969, in spite of being 'strict Constructionists' as being appointee of President Nixon could not turn back the clock by reversing landmark rulings of its activist predecessor Warren Court.

It only retracted little bit from the Warren Court's Liberalism with respect to free speech clause of the First Amendment but overall created various significant deviations in it like awarding of protection to symbolic Speech, Commercial advertising, by rejecting Jacobellis definition of obscenity that the material in question be "utterly without redeeming social value", it laid down another principle, whether, under contemporary community standards, a work appealed to a prurient


20. Along with Burger, President Nixon appointed three more conservative judges namely Backmun, Powell and William Rehnquist (the present C.J.).
interest and lacked "serious, artistic, political or scientific value". In relation to libellous speech, initially the Burger Court applied Warren's era New York Times test of 'actual malice' but lateron, it ruled that private individuals defamed by false publication need not prove 'actual malice' in order to receive damages. On the issue of validity of prior-restraint on freedom of press, in celebrated Pentagon Papers case in 1971, the Burger court rejected the Government's attempt to impose prior-restraint on the publication of the Defense Department's inside history of the Indo-China War, but few years later in 1980 case of Snepp, the Court approved an instance of Prior-restraint. Even on the question of Free Access of Press to the Trial Proceedings, the Burger Court had adopted somewhat fluctuating approach while in one case in 1976, it allowed Free Access to Press for reporting about the trial, in 1979 it denied to claim of journalists to a Constitutional right under the First and Sixth Amendments to attend the hearing in question but again switched over to 1976 position in 1980 in celebrated Richmond New Paper Case by saying that in the absence of compelling circumstances suggesting otherwise, the public had a right to


attend the kind of criminal trials that had historically been open to it.24

It was also during the Burger era that the historic and till date debatable ruling on legality of abortion was given in 1973 wherein the Court recognised woman’s right to abortion as a part of her right of privacy under Fourteenth Amendment.25 This abortion verdict was followed by a number of other cases relating to abortion issue such as validity of spousal and parental consent or judicial consent, states interests in health regulation etc. and also stirred the debate over literalist and liberalist theory of Constitutional decision making.26

Infact this activism of Warren and Burger Courts respectively was being seen as the Court assuming the role of ‘Super-legislature’, and this being against the originally designed Constitution whereunder following separation of Power theory with its checks and balances, it has been laid down that public policy should be ascertained by elected legislatures

24. See Nebraska Press Association v. Stuart (1976); Gannett Co. v. De Pasquale (1979); Richmond Newspapers Inc. v. Virginia (1980); Also see Branzburg v. Hayes (1972) where the Court rejected claim of journalistic privilege of withholding identity of source of information on the ground that public interest in administration of Justice outweighed any possible burden. See Supra Ch. V for detail.


rather than by unelected Courts.\textsuperscript{27}

After the resignation of Mr. Justice Burger in 1986, William Rehnquist, another Conservatist, succeeded him as the Chief Justice of the U.S. Apex Court.\textsuperscript{28} And the present Rehnquist Court it seems by embracing doctrines of legal positivism has adopted mainly a defensible theoretical approach to its job of Constitutional interpretations and so far has checked itself from transgressing its power of review unnecessarily. Rather, the fore-going study shows that in the areas of free speech clause and freedom of Life and Liberty, the present Supreme Court is trying to introduce only the all declining morality in law through its rulings.

In the domain of Free Speech Clause, the present Court followed \textit{New York Times} 'Actual malice' test in libellous speech case and it also upheld the state statute prohibiting the intentional appearance in nudity in public places by calling it obscene and against public order & Morality.\textsuperscript{29}

\textsuperscript{27} The advocates of literalist or interpretivist approach started using the term "imperial judiciary", during the Berger era to describe scope of judicial power. See Supra Ch. II & III; Also see \textit{The American Constitution : Its Origins And Development (6th Indian Ed.)} Kelly, Alfred, Harbinsen, Winfred A Belz, Herman pp 735-736.

\textsuperscript{28} As has alrready been seen in Ch. II & III, the appointment of Mr. Justice Rehnquist by the conservative President Ronald Reagan was a calculated move as he wanted to pull the nine-member Supreme Court away from its slight liberal inclination. See Supra Ch. II & III.

\textsuperscript{29} See \textit{Hustler Magazine v. Falwell} (1988); \textit{Barnes v. Glen Theatre} (1991) etc. see Supra Ch. V. for details.
Amongst the few significant rulings leading to development in the area of free speech is sensational national flag-burning case of 1989 when the Court invalidated Texas State Statute penalising desecration of the flag.\textsuperscript{30} The Court, in other case, afforded protection to 'Hate Speech' as part of Free Speech.\textsuperscript{31} The Court also narrowed down the ambit of right of privacy in relation to a free speech clause when it allowed the disclosure of name of rape victim by the press on the ground that the truthful disclosure of private facts of person can be punished under First Amendment only when "narrowly tailored to a state interest of the highest order and not otherwise".\textsuperscript{32}

In the area of neo-substantive due process and Right to life and personal liberty, in 1989, the Rehnquist Court just stepped short of overturning the till date controversial landmark Roe decision, when it turned back to the original intent theory by upholding the Constitutionality of State statute of Missouri regulating the performance of abortion, virtually giving the power to the States to restrict abortion right even during the First trimester of the pregnancy.\textsuperscript{33} In another case on abortion issue, the Court upheld the two-parent notice requirement combined with a judicial bypass through which notification requirement to parents can be done away with.\textsuperscript{34} But again

\textsuperscript{30} Texas v. Johnson (1989). Also see U.S. v. Eichman (1990) Supra Ch. V.


\textsuperscript{33} Webster v. Reproductive health Services (1989) Supra Ch.V.

\textsuperscript{34} Hodgson v. Minnesota (1990) Supra Ch. V.
through Casey’s case, the Rehnquist Court reaffirmed the Roe’s essential holding recognising woman’s right to choose to have an abortion before viability.

In another challenging novel issue the Court refused to grant unconventional sexual life style like homosexuality status of Constitutional right to privacy as it being against the original intent and concept of ordered liberty. In this case the court also directed that it should resist itself from expanding the substantive due-process in relation to fundamental rights. Otherwise "the judiciary necessarily takes to itself further authority to govern the Country without express Constitutional authority. This ruling shows the Court leaning towards Conservatism.

In the area of Right to life, the Court has held that the 'Due Process' clause of the Fourteenth Amendment confers a significant liberty interest in avoiding unwanted medical treatment. In another remarkable ruling the Court upholding state Court’s decision of not allowing ailing, living in coma patient’s parents plea of Euthansia, asserted that the State’s unqualified interest in the preservation of human life does not violate the Constitution.

It can be said that the approach of the Rehnquist Supreme Court is to preserve the original values and design of the

35. Planned Parenthood of S.E. Pennsylvania v. Casey (1992) Supra Ch. V.
founding fathers particularly in relation to safeguarding of basic human rights.

Alike the American apex Court, the Indian Supreme Court’s decisions in relation to fundamental rights have gradually shown leaning towards liberalism and egalitarianism. But the First decades from its inception reflect the Court’s leaning towards interpretivist or conservative theory of interpretation in relation to both above-discussed freedom of speech and expression and Right to Life and Personal Liberty. In the Second decade of 1960s of its functioning, the Indian Summit Court sought to establish government by judiciary by rendering liberal interpretation to the various Constitutional provisions and as has been seen already, Chief Justice Subba Rao became a pioneer in this direction particularly in relation to human rights. But in the field of freedom of speech and Expression, during 1950s and 1960s the Summit Court has not given any verdict which can be labelled as deviation from the original design as all the rulings of this period have been given in accordance with reasonable restrictions as laid down in clause (2) of Article 19 in relation to freedom of speech and expression except that it did not allow violent & disorderly demonstration and Right to strike being made part of freedom of speech and expression as guaranteed by Art. 19 (1) (a) and 19 (1) (b).

35. See Romesh Thapar and Brij Bhushan cases 1950 and Gopalan v. State of Madras (1950) K.M. Menon v. State of Bombay (1951) etc. see Supra Ch. VI for details.

36. See Kameshwar Prasad v. State of Bihar (1962), O.K. Ghosh (1963) Radheshyam (1965) etc. For other cases see Supra Ch. VI for details.
In the sphere of Right to life and Personal Liberty during 50s and 60s the apex court narrowly construed the clause "procedure established by law" in accordance with the text of the Constitutional provision and adopted the doctrine of exclusivity not actually agreed to accept the inter-relationship of Article 21 with other fundamental rights in particularly those guaranteed by Articles 14, 19 & 22. The Court during this period initially construed literally the expression 'personal liberty' which according to it was only limited to or concerning the physical person of the individual as visualised by the founding fathers who deliberately qualified the word 'Liberty' by 'personal' making it narrower concept but gradually in the decade of 60s little bit expanded its meaning in Kharak Singh's case. 37

With the onset of decade of 1970s, there was the spurt in the power of judicial review and during this period, the Summit Court produced several Liberal justices who were committed to goal-oriented socialism and human rights jurisprudence and out of whom, prominent are Justice P.N. Bhagwati and Justice K. Iyer.38

In the area of freedom of Speech and Expression amongst the significant rulings of this period is Bennet Coleman Co. case wherein the Court striking down the government's newsprint control policy said that compulsory fixing page limit under the newsprint policy amounts to unreasonable restriction and violative of Art. 19 (1) (a).39 The Court in 1975 even


38. See Supra Ch. II for details.

39. See Supra Ch. II for details.

40. Bennet Coleman Co. v. 401 (1973) Supra Ch. VI for details.
projected the necessity of Right to know, Right to access to
information while dealing with the case of *State of U.P. v. Raj
Narain*.40

And in the domain of Right to life and Personal Liberty,
the creativeness of the Court interpreted it so liberally that it
virtually converted the negatively written into a regime of
positive human rights unknown previously in the Constitutional
Interpretation. Before showing its positivism, the Court gave
negative ruling of *Habeas Corpus* where in the Court following
narrow Construction of 'Procedure established by law' as laid
down in *Gopalan’s* case, gave a sort of supremacy to the executive
by upholding the presidential order of internal emergency
suspending operation of article 21.41

But the entire position was changed with the
revolutionary verdict of *Maneka Gandhi’s* case, where delivering
the majority verdict, Justice Bhagwati laid emphasis upon the
fact of giving broad, liberal interpretation to the fundamental
rights keeping in account their importance and made principles of
natural justice as an essential part of the 'procedure

40. *State of U.P. v. Raj Narain (1975)* Supra Ch. VI for
details.

41. *A.D.M. Jabalpur v. S. Shukla* (1976). Also followed in
established by law' and thereby expanded the scope of Art. 21 so much that any action thereafter which has been seen as unjust, unfair or unreasonable, has invited wrath of the Court and been declared unconstitutional. In fact through Maneka the Court in a way introduced the concept of "due process" clause into the Indian Constitution much against the original intent of the founding fathers. The judgement has brought into Indian Constitutional jurisprudence the principle of procedural as well as substantive due process on American Pattern and has proved as a boon in the subsequent growth of Indian Constitutional Law. It is evident from other rulings of the decade in relation to prisoners rights.

Through which the Court in reality become the champion of have-nots under-trials and introduced Right to free legal aid as part of Article 21. Right to bail, Prisoners Right to wages were also made part of Right to life & personal liberty. In relation to the constitutionality of Death Penalty during the seventees, whereas the apex court in Jagmohan's & Ediga Annamma cases upheld its validity, being in accordance with the procedure established by law, in Rajendra Prasad case Justice K. Iyer made slight deviation by holding that capital sentence would not be justified unless it was shown that the criminal was dangerous to the society. In Dalbir Singh the Court though through Justice K. Iyer further advocated that imposition of death penalty being


violative of individual dignity should be abolished, yet the Court did not abolish it and followed the majority ruling of **Rajendra Prasad** case of giving "special reasons" wherever the death sentence was to be imposed and said it is function of the parliament to impose "Death sentence on death sentence".

During this time the Court gave recognition to an unenumerated right to privacy as a part of right to personal liberty in **Gobind’s** case. This Judicial activism of **Post-Maneka** period kept on growing in the decade of **1980s** also. In 1980s, in relation to Article 19(1) (a), the Court introduced various innovations such as Right to thinkout or Right to form opinion, Right to unpopular speech, fully elevated ‘Right to know’, and Right to access to information’ to the status of Constitutional right to free speech and expression, and even made ‘Right to remain silent’ as part of free speech while deciding the constitutionality of singing of National Anthem.

The Court also employed contempt of Court restriction on free speech clause in various cases but the Court did emphasise the point that the Court will not intervene with the reasonable and fair criticism which is necessary for the proper administration of Justice.


45. Ibid (Dalbir Singh. pp 1385-1386.


In relation to Right to life and Personal Liberty, the decade of 1980s is full of innovations and deviations. The Court further expanded the ambit of Right to privacy when it laid down not only guidelines regarding the mode of police surveillance, but also indirectly considered the right to privacy in the sphere of matrimonial conjugal right u/s 9 of Hindu Marriage Act. The Court also made significant deviation when it held that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is an infringement of Article 21. Giving its broad interpretation, during this decade, the Court stated too that Right to life also includes right to live with human dignity and all that goes along with it, namely the bare necessities of life, Right to Livelihood. The Court also even made right to maintenance and improvement of public health as part of the right to live with human dignity. It also said that it is doctor’s obligation to give immediate medical aid to protect the precious life of the injured without waiting for completion of legal formalities as Art. 21 casts the obligation on the State to preserve life.

51. Francis Coralie Mullin case (1981); PUDR v. U.O.I (1982); Bandhua Mukti Morcha (1984); Olgatelli (1986); Vikram Deo Singh Tomar (1988), Supra Ch. VI for details.
The Summit Court also created revolution in the field of Environment when it established through various remarkable decisions that Right to live in Pollution Free environment is part of Article 21.53

On question of validity of Death Sentence, the Court made further deviation when in historic Bachan Singh case, overruling Rajendra Prasad ruling, it upheld S. 302 of the penal code as an alternative punishment for murder & not being violative of Articles 19 & 21 but it should be imposed only "in the rarest of rare cases".54

But in Mithu’s case the Court again stood for abolition of death penalty, when it struck down S.303 of the penal code which provided mandatory death sentence to life sentencer who commit murder while undergoing imprisonment as being violative of Arts. 14 & 20 of the Constitution.55 Showing its positive approach the Court even recognised convicts right to life & personal liberty at the execution stage of death sentence when it held that any delay irrespective of reason in the execution of death sentence is against ‘procedure established by law’, but unfortunately deviated from its stand in subsequent ruling of Sher Singh but again upheld Vathees-waran ruling in Javed Ahmad’s case making it clear that delay of 2 years or more in the execution of death sentence, is good ground for getting it


54. Bachan Singh case (198 ); Kehar Singh (1989) etc. Supra Ch. VI.

quashed under Art. 21. And Lastly, the matter was set at rest in Triveniben case where overuling again Vatheswaran, the Court held that no fixed period of delay could be held to be sufficient to commute death sentence into life imprisonment.56

The Summit Court further expanded the Prison - Right jurisprudence when it widened the scope of writ of habeas Corpus which now could be evoked even to save the prisoners from inhuman treatment. The Court even declared Hand cuffing as violative of Art. 21 and also in one case denounced ‘third degree’ methods of the police as infringement of Art. 21.57 The Court directed all State Government to grant free legal aid to the poor accused as it is implicit in Art.21.58 Right to speedy trial was also given further impetus in the Champa Lal Shah’s verdict, it made right to socialise as part of prisoners basic right to life.59 In remarkable decision of Sheela Barse, the Court come forward to render help to women and children prisoners when it laid down detailed guidelines to be followed by the state administration to


57. Sunil Batra No. (2) (1980); Sudipt Mazumdar (1983); Prem Shankar Shukla (1980); Kadra Pahadiya (1981);


protect them from possible torture or ill treatment.\textsuperscript{60} \textbf{Rudul Shah’s case} brought a revolutionary break in the "Human rights jurisprudence" when the Court recognised for the first time right to compensation for the violation of right to life and liberty and it was followed in various subsequent rulings both giving compensation to person from illegal detention but also made compensation part of Art. 21 against its violation by private body or person.\textsuperscript{61}

The present \textbf{decade of 1990s} is also not devoid of liberal rulings of the Summit Court. With regard to freedom of speech and expression, the Court has recently created history when it through other liberal, human right activist Justice Kuldip Singh ruled that the publication of "Commercial advertisements is a part of the fundamental right to free speech and expression" and allowed Tata Yellow Pages to publish advertisements alongside Mahanagar Telephone Nigam Ltd., which previously held a monopoly over them.\textsuperscript{62}

In another positive verdict, the Court once again added teeth to unenumerated right to privacy when it held that no one can publish anything concerning the person’s family, marriage.

\begin{enumerate}
\item[62.] See \textit{The Tribune Aug 5,1995} Through this ruling, the Court has repudiated its 1960s ruling of \textit{Hamdard Dawakhana} case Supra Ch. VI for details. Infact the year 1995 can be termed as the year of the rise of Justice Kuldip Singh who by his trend-setting verdicts ranging from garbage disposal by Municipal authorities Delhi, in order to
\end{enumerate}
children, motherhood, childbearing & education etc. without his consent whether such publication is truthful or otherwise. But if such publication is based upon public report, including Court records, it becomes unobjectionable.63

In another celebrated case, the court held that the government had no right to monopolise broadcasting as it is violative of 19 (1)(a) & upheld the right of the Cricket Association of Bengal to sell the telecast rights of Cricket matches to Trans World International. The Court held Airwaves are public property.64

In the province of Right to life and personal liberty the Court made positive interpretation by making right to education as part of right to life because it is vital for assuring individual's dignity.65 The Court also did a commendable job when it extended the right to privacy under Art. 21 to an unchaste woman.66

Further through its dynamism, the Supreme Court has also recognised the right to health to a worker as a part of his right to life.67 It also extended the scope of Right to livelihood and

- clean up the Country's capital,
- to validity of house allotment,
- to the conferring of country's highest civilian awards like Padma awards has virtually been pushing back traditionally established frontiers of all the time.

64. See **Secretary, Minister of I & B, G.O.I. vs. Cricket Assco., Bengal** (1995). Supra Ch. VI for detail.
therefore, of right to work.\footnote{68}

The Summit Court has further added impetus to right to live in pollution free environment in various public interest litigation cases. In fact, it ll not be wrong if we call the year 1995 as the year of public interest litigation\footnote{69} in the Indian Judicial history.

Increasing more the scope of Right to compensation as part of Art. 21, the apex court in \textit{Nilabati Behera} while awarding compensation to the petitioner, made a deviation by lifting the state immunity from the purview of public law and also made explicit distinction between the public law proceedings and private law proceedings, stating that the defense of sovereign immunity is alien & in applicable to the concept of guarantees of fundamental rights.\footnote{70}

Another remarkable opinion of this decade, is where the Court declaring S.309 of the Penal Code relating to Attempt to suicide as violative of Art. 21 being cruel & irrational provision, held that Right to live under Art. 21, can be said to include the right not to live a forced life.\footnote{71} The Court also

\footnote{68. Delhi Development Horticulture Employees Union (1992) P.K. Yadav (1993); M.J. Sivani (1995) etc.}

\footnote{69. Subash Kumar v. State of Bihar (1991), Even very recently, the Court went to the extent of telling the Delhi Municipal Corporation that it would ask private parties to maintain the cleanliness of the capital if the Corporation found the job beyond its means. Also see infra Ch. VI for more details.}

\footnote{70. Nilabati behara case (1993) See Supra Ch. VI for detail.}

\footnote{71. R. Rathinam Naqbhushan Patnaik v. U.O.I. (1994) case Supra Ch VI for details.}
strengthened the law against police torture & handcuffing as being unfair under Art. 21. The Court laid down detailed guidelines for speedy trial of an accused in criminal case though it refused to fix any time limit for trial of offences.

All these rulings clearly show that the Indian Apex Court has come of age and has introduced so many deviations that it seems today as the only place not only to get justice but also to get the laws made. Infact, the present Justice Ahmadi Court, alike Justice Rehnquist Court in the United States can be said to have so far adhered to & maintained prosaic Constitutional balance of power.

This above discussed activist role of judiciary has created fear of the setting up of government by judiciary both in the United States and in India, which is quite contrary to the original vision of the Constitutions of these nations. The moot point is : Whether the Court’s activist approach can really be seen as usurpation of the powers of the other two wings of the Govt. by exceeding its original role of interpreting the legal and Constitutional provisions? And, secondly, is it feasible to turn the clock back or to stick to original design of the Constitutional document by resorting to interpretivist approach as voiced by Edward Meese and other conservatists.

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74. Even Justice Story gave warning once that if the Court may substitute its own meaning for that of the framers it may rewrite the Constitution without limit. Supranote 06 Berger Raoul p. 370. Supra Ch. III & III also

In India, commenting on the Court’s verdict on the ambit of Presidential powers under Art. 356 in S.R. Bommai case of 1994, Mr. Madhu Limaye felt that we were about to enthrone "the theory of judicial sovereignty". See Supranote 04.
Indian Political Leaders have also observed in the recent past that the Supreme Court should not became the country’s "third legislature".

Regarding the First question of the Transgression by the Court of its original role, we have seen already that the power of judicial review being exercised by the Supreme Court is well laid down in Article III of the U.S. Constitution and more explicitly mentioned in Articles 13, 32, 131 to 136, 143, 226, 245 & 246. In India, Article 141 amounts in a way to Constitutional acknowledgement of a judicial creativity and the apex court has declared the power of judicial review as the 'basic' feature of the Indian Constitution that cannot be damaged or destroyed by amendment process under Art. 368 of the Constitution.75

Even non-justiciable right enumerated in Article 39-A of the Indian Constitution guarantees every citizen the right to access to the Court.76

In the light of these provisions, if it is alleged that the Court is becoming 'Super - legislature' or 'third - legislature' by its activist approach, then it is wrong and unreasonable aspersion. What in reality the Court is doing is the judicious use of the power of judicial review within the

75. See Supra Ch. II for details.
76. And quoting this Art 39-A, one of the sitting activist Justice of the Indian Apex Court Mr. Justice Kuldip Singh said : "Judicial Activism is a misnomer. What we are doing is our duty under the Constitution". See "Common Man's Judge" The Tribune Dec 10, 1995.
limits of the Constitutional document. Whatever verdict has been
given by the Indian apex Court till date is not the violation in
any respect of the vision of the founding-father and is very much
within the limits of 'Theory of Basic structure' as propounded by
the Court itself in the historic Fundamental Rights case. The
creation of so-called new Rights such as Right to Education,
Right to Health and Right to living in Pollution Free
Environment', are not against the basic design of social-welfare
state concept in India. The Constituent Assembly debates make it
evident that though the framers did not explicitly incorporate
many significant issues as part of fundamental human rights yet
they assumed their existence such as not specifically laying down
term 'Freedom of press' in Art. 19(1)(a) which they presumed to be
covered under the expression "Freedom of Speech and Expression.
Similarly non-inclusion of Right to live with human dignity,
Right to education as part of Art. 21 in the original
Constitution can in no way be called as act of deliberate
omission or reluctant attitude on part of the founding-fathers.
Had it been the case, they would not have discussed the concept
of justice, equality and fraternity in the very Preamble of the
Constitution and would not have included the chapter of Directive
Principles of State Policy in the Constitution. Same is also
ture in the context of the Constitution of United States of
America whose architect also never wanted to put any kind of curb
on the development of human rights jurisprudence and therefore,
incorporated Bill of Rights in an absolutist fashion. Another
well-established defense of judicial activism is the need for
preventing possible tyranny of the majority. According to this
view the adoption of the Constitution was a democratic act, and so its protection against the legislative or Executive violations through institution of judicial review is also democratic. As has been examined that in the United States, the process of policy-making role of the Court which started developing between 1890 to 1937, got firmly rooted by 1960s and it was believed that it was a means of keeping the American Society true to its basic principles. In America, in fact, the judicial activism was the response to a constitutional command especially to protect freedoms of Bill of Rights.\textsuperscript{77}

In India it has been seen that the real thrust to the apex court's activist approach was given after the lifting of dark period of Internal Emergency of 1975 and after the revolutionary verdict of \textit{Maneka Gandhi} case of 1978. Since \textit{Maneka}, the Court has not looked back and has always come forward to provide justice to the Common Indian.

Furthermore, there are many situations when the Court has to examine activity where noone has engaged in thoughtful contemplation of Constitutional requirements before acting whereas it is a pre-condition of Constitutionalism that officials take due regard of the constraints upon them before acting. And, in the absence of such consideration, judicial over-sight provides the only guarantee that "the Constitution" will be considered at all.\textsuperscript{78} This is what has been taking place in India.

\textsuperscript{77} See for details see Supranote 27 Kelly belz, Harbinson pp 660-661.

\textsuperscript{78} According to Charles Black, the strongest argument for judicial oversight should be labeled as "judicial view", rather than judicial review".

Contd...
at present, where the Executive whose task is to enforce laws is seen as neglecting its duty which in return led to aggravation of the common man’s problems, decline in law and order situation forcing the people to look up to the apex court as the ultimate temple of justice. Further, even after the Court’s rulings, it has been examined that the decisions are not implemented by the bureaucracy. This disobedience of the Court’s orders has rendered further strength to the Court’s activism which has made its presence felt by directing punishments on several occasions under the Contempt of Courts Act which till 1980s were lying almost in a dormant state. We must remember that laws are powerful tool of social change and if laws are not being implemented then the power is vested in the Courts only to resolve the situation through the tool of judicial review.

Moreover, till the Court is exercising this power of review in the positive sense, rendering helping hand to the people and work for their welfare, it cannot be labelled as something bad. As rightly said by Prof. Lawrence Tribe that the only power judges have is of pen. They do not have the power of the sword or the purse. Hence, the legitimacy of the judicial role is secured by the fact that judges cannot themselves take action to enforce the law laid down by them.79 In the Indian

In his The People And The Court, Charles Black stated: "We entrusted the task of constitutional interpretation to the Courts because we conceived of the Constitution as law, and because it is the business of the Courts to resolve interpretative problems arising in law. A law which is applied by a Court, but is not to be interpreted by a Court, is a solecism simply unknown to our conceptions of legality and the legal process". See "Structure and Relationship in Constitutional law" by Black, Charles (1969) pp 88-89.

79. According to Prof. Tribe; the judgement of the Court performs an important function, because it evolves a Contd...
Context, it seems quite true as is evident from the non-implementation of various significant decisions of the Summit Court particularly in relation to Article 21 of the Constitution, where due to Paucity of economic resources and mainly due to lack of political will, it has not become feasible, to put into practise, the interpretation of 'Right to life and Personal Liberty' as given by the Court sofar. It seems that the Court may put any interpretation on Article 21, but that is not going to make any tangible differences for millions of Indians. And it proves the saying that orders which cannot be enforced become orders passed only for effect.

So far as the Second moot point concerning the following the original design of the Constitution and judging the Court by the Constitution that is the Court should realise their sole duty of only interpreting the original text of the Covenant and to enforce the views of the framers it has to be seen in the background of the radically changing world political, social Scenario. And, the fore-going study reveals that though both the American and Indian Constitutions were framed by the men of Wisdom and foresight, who did not want a static but an organic, living document for the future generations, the document that could be easily adopting according to the required situation, and so, not only included the provision for amendment of the Constitution but also empowered the judiciary to see the proper functioning of the sacred document. They had a hope that their future representatives, who alike them, will be men of integrity

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rationale for governmental action and determines the legitimacy of such action. See Law India Vol I (1992) pp 6, 10.
and honesty will infuse life into this "lifeless machine of the Constitution", keeping in account the interest of the nation before them.\textsuperscript{80}

Unfortunately, in both the democracies, there has been seen constant decline in overall political, moral values of the representatives of the people, particularly in India, where the Constitution is fast losing its credibility since the varied power-wielders lightly play with its provisions in the pursuit of their political goals and ambitions. Today, fault lies not in the Constitution or in the spirit of the Constitution due to constant decline in value system of the society, it is rightly stated that men have proved smaller than assumed by the makers of the Constitution.\textsuperscript{81} In this frustrating state of affairs, the only recourse has been in the form of judiciary girding up its loins through actively using its review power, to be a representative institution and in this activist role the Court has given birth to new values such as the right to privacy.\textsuperscript{82}

\textsuperscript{80.} See Dr. Rajendra Prasad's valedictory address to the Constituent Assembly in \textit{The Framing of India's Constitution : A study} ed. Rao, B. Shiva pp 840-841.

\textsuperscript{81.} "Changing Scenario : Revamp the Constitution" by Sahay, S. \textit{The Tribune} Jan. 25, 1995.

\textsuperscript{82.} Mr. Robert Bork, another prominent conservatist has vehemently criticised the introduction of unenumerated Right to privacy by the Court as for him "the sole task of the judge is only to translate the framers' or the legislators' morality into a rule to cover unforeseen circumstances. That continuing and self-conscious renunciation of power, that is the morality of the jurist". Quoted is \textit{Constitutional Faith} by Levinson, San Ford 1988) p. 84.
If we remember the maxim that law which regulates life must keep pace with the life, it can not afford to be static while life marches on. Moreover, old ideologies and old systems give place to new set of ideologies and new systems because when the norms acceptable to the society undergo a change, a society also changes accordingly. And judges have to be aware of this reality while interpreting the Constitutional provisions.

According to Owen Fiss, raising of any possibility that the Constitution is immoral shows "a moment of crisis in the life of a Constitution". And it is duty of the judge to avoid such crisis by reading the moral as well as the legal text. And judiciary has special role to interpret Constitutional text, and render thereby specific and concrete the public morality as embodied in that text.\(^{83}\)

Lastly, we must not forget that ultimately it is the people who are the real judge of actions of all three wings of the government since "We - the people" have framed and dedicated this Constitution for our welfare. Since the legitimacy of the judicial decisions depend on their social utility and adequacy, judges have to expound the law taking into account this factor of providing justice to the people. It is ultimately the conscientious individual, and not the Supreme Court, who is the ultimate interpreter of the Constitution. And it is the province and duty of the citizen to declare what the law is, as said by Ronald Dworkin. If he feels that the Court has erred while

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\(^{83}\) Ibid pp 58-59.
deciding a vital issue touching fundamental personal or political rights, a man is within his social rights in refusing to accept that decision as conclusive. Because "a citizen's allegiance is to the law, not to any person's view of what the law is." 84 In this context, to make judges accountable to the people ultimately, whose judicial independence normally means freedom from political accountability, Prof. Tribe has proposed that this object of judges conduct being subject to public scrutiny, could be achieved only if the public were allowed to attend the trial. 85 In fact, calls for disclosure of the Court's real role have been made by both proponents and opponents of judicial "adaptation" of the Constitution. As said Justice Frankfurter once: "Scholarly exposure of the Court's abuse of its powers, would "bring about a shift in the Court's viewpoint". 86

It is submitted, that this proposition of making judges

84. Taking Rights Seriously by Dworkin, Ronald (1977) pp 214-215. Though Dworkin is in favor of giving judicial decisions respectful consideration yet for him to reject the ultimate authority of the Supreme Court is not in the least to reject the binding authority of the Constitution. For him, the American Version of Constitutionalism "does not make the decision of any court conclusive. Sometimes even after a contrary Supreme Court ruling, an individual may still reasonably believe that the law is on his side.

85. See Supranote 79 p. 7 Though process of impeachment as provided in the Constitution, the erred judge can be brough to books yet impeachment is a cumbersome process.

86. Supra note 06 pp 416-416. Every Raoul Berger has supported this thought of judges being accountable to people as he said "If government by judiciary is necessary to preserve the spirit of democracy, let it be submitted in plain spoken fashion to the people ___the ultimate Sovereign for their approval" at p. 48; Justice Krishna Iyer also said that law must become the gravestone of the old and the corner stone of the new, an instrument of the people, for the people and by the people. See of Law and Life by Iyer, V.R. Krishna (1979) p. 135.
accountable to the people ultimately as legislature is accountable to the people who can throw out the government in next elections if they feel it not working for the welfare of the masses, seems good on paper but needs elaborate discussion on the point, modalities will have to be chalked out. In the Indian Context, presently it seems that the judiciary though in theory concede the citizen’s right to examine the integrity of the judicial process, yet in practice itself is obliterating this right of the people, by the way it has started administering the contempt law. Today, the Indian citizen is in for trouble if he opens his mouth against any act or order of the judiciary. It is submitted that the Court should not be too touchy regarding reactions to its functioning and rather welcome the healthy criticism which is sine-qua-non of the open democratic society.

To sum up, it can be said that the Constitutions as framed in both the democracies are good and what the Supreme Court has done is the judicious use of the power of judicial review, within the originally designed set up. The allegation of it, acting as a ‘super-legislature’ is mainly made by those narrow-minded, conservative political leaders who are scared of their being subjected to work within the limits of the Constitutional Powers and not to misuse them. Moreover, we must not forget as the study has revealed that the founding fathers of both democracies never desired Constitution to be static document. **Thomas Jefferson** believed in the possibility of progress and in improvement of existing condition. For him, man was a free agent, the sole architect of his destiny. To quote Jefferson:
"As new discoveries are made, new truths disclosed, and manners and opinion change with the change of circumstances, institutions must advance also and keep pace with the times. Each generation has a right to choose for itself the form of government it believes the most promotive of its own happiness."87

As also said by the great Indian Sage and philosopher Sri Aurobindo:

"----- Developments into forms is an imperative rule of effective manifestation; yet all truth and practice too strictly formulated becomes old and loses much, if not all, of its virtue; it must be constantly renovated by fresh streams of the spirit revivifying the dead or dying vehicle and changing it, if it is to acquire a new life. To be perpetually reborn is the condition of a material immortality ----- "88

Today, people are looking for more plausible answers to their problems, they want a more responsive system, clean of all kinds of pollution in the over-all environment where the basic necessities would be available without long arm of corruption reaching out to them. Today, things have actually deteriorated to such that there is need for rejuvenation and reconstruction. We have to move away from sterility of the old concepts that are fast becoming irrelevant since progress which is possible only under the conditions of sincerity, integrity, stability, which have almost got extinct presently. There is need to adopt balancing approach by each one of us in general and by our

87. Quoted in The Genius of America Padover, Saulk (1962) p. 78; Even Pt. J.L. Nehru said: "There is no permanence in the Constitution ____ If you make anything rigid and permanent, you stop nation’s growth, the growth of a living organic people ____ What we may do today may not be wholly applicable tomorrow ____" Quoted in Commentary on the Constitution of India by Basu DD (1956) Vol. II p. 584.

88. The Synthesis of Yoga by Sri Aurobindo (1984) p.1 Sri Aurobindo is the propounder of Integral Yoga, the key of all the worldly problems.
representatives in the government and judiciary in particular. Though judicial fiats cannot achieve much yet the duty of the judge, as has already been examined is to poise the scales of justice "unmoved by the powers" and undisturbed by the hubbub of the multitude. But as rightly said by Mr. Palkhivala, that judicial pronouncements cannot be a cover for inadequacy of government. No government is entitled to shift the responsibility which the Constitution has squarely placed upon its shoulders, to any other agency of the State which was created for completely different purpose. Finally, once again it is emphasised that it is not viable to stick to original design unless each one of us strive for progress of 'self', since the ultimate reality of the human life is 'know thyself'. It is indeed a very difficult task but we must remember Chinese proverb that: "A journey of a thousand miles begins with one step".

89. *We, the Nation: The Lost Decades* by Palkhivala, Nana A. (1994) p 73.