# CREATIVE INTERPRETATION BY THE JUDICIARY OF ART. 21 TO THE INDIAN CONSTITUTION

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SUBMITTED BY
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UNDER THE GUIDENCE OF

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(Mr. Bhagwan Ajit Shriram)

# DECLARATION

I undersigned declare that the work embodied in this Ph.D. thesis titled **"Creative Interpretation by The Judiciary of Art. 21 to the Indian Constitution"** forms my own contribution to the research work carried out under the guidance of Dr. Chavan Shankar (M.A., B.Ed., M.Phil., Ph.D.), Vice Principal, Babuji Avad Mahavidhyalaya, Pathardi, Dist. AhmadNagar.

This work has not been submitted for any other degree of this or any other University.

Whenever reference has been made to previous work of others, it has been clearly indicated as such and included in the footnote and bibliography.

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# CERTIFICATE

This is to certify that, the work embodied in this Ph.D. thesis titled **“Creative Interpretation by the Judiciary of Art. 21 to the Indian Constitution”** is original contribution to the research work carried out under the guidance of me by Mr. Bhagwan Ajit Shriram.

I certify that Mr. Bhagwan Ajit Shriram has successfully completed the work.

This work has not been submitted for any other degree of this or any other University.

Whenever reference has been made to previous work of others, it has been clearly indicated as such and included in the footnote and bibliography.

**(Dr. Chavan Shankar)**

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# INTRODUCTION

**1. Statement of the Problem :**

Whether Indian Judiciary has played creative role in the interpretation of Art.21 to the Indian Constitution and whether there is any critical evaluation from the eminent writers?

**2. Significance and objectives of the Study:**

**Introduction:-**

The Constitution has given the powers to three organs –

1. Legislature – is empowered to make Laws which is called as enacted Law.
2. Executive – is empowered to execute Laws which is called as administrative Law.
3. Judiciary - is empowered to interpret the Laws which is called as Precedent. Precedent has two aspects i.e. a. ratio and obitur dicta.

The SC is the guardian of the Constitution. The Constitution has empowered the Apex Court to safeguard the fundamental rights enshrined in Part III of the Constitution. Fundamental Rights are the rights against the mighty powers of the State. The State is defined in Art. 12 to the Constitution.

**Independence of Judiciary –**

The Supreme Court of India is an independent organ and independence of judiciary is one of the important features of the Constitution. It means Judges are appointed on merit, they get salaries and allowances which are charged on consolidated fund of India, appointment of the officers and servants of the Supreme Court is done by Chief Justice of the Supreme Court and it is very difficult to remove the judges of the Supreme Court and High Courts. To remove the judges the simple majority of both the houses plus 2/3 majority of present and voting is required (Art. 124 (4) (5)). This process is called impeachment process.

**Judicial Review –**

Art. 13 specifically states that – Laws inconsistent with or (in derogation of) fundamental rights be void. Second Clause of the same Article prohibited

State from making any law, which took away or abridged the fundamental rights (Part III – Art. 12 to 35)

Art. 246 (3) – State legislature is empowered to make laws for any subjects on the state list. Parliament can makes laws on the subject of State list only in times of emergency. (Art. 352 & 356)

Art. 251 – lays down that Parliament can make laws on the subject of State list under Art. 249 and 250.

The Supreme Court is empowered to declare any law made by the legislature or any act of the executive null and void if it is not in accordance with the Constitution.

Over the years, the Supreme Court has used this power to protect fundamental rights.

**Judicial Activism –**

After 1980s the SC started forcing Legislature and Judiciary to do their mandatory duties when they omitted to do so.

With above weapons in hand the SC departed from the literal interpretation of the Constitution and started interpreting the Constitution in a liberal way.

**Objectives of the study-**

I came across various cases through which the SC evolved Art.21 in a creative way. I became interested in one question i.e. "What happens to the judgements of the SC in the matter of implementation?"

When I came to know that the directions given by the SC in Bonded Labour case and Bhopal Gas case were not implemented in totality I became more interested in pursuing this side of the judgments.

I became more interested to study the effect of enlargement of the ambit of Art. 12 and 21 on other Fundamental Rights.

I came across various books written by authors (like N.A. Palkhiwala, Fali S. Nariman and Arun Shourie) in which some light was thrown by these authors on the questions which were in my mind and so I decided to pursue the matter further through my research.

## 3. REVIEW OF RELATED LITERATURE:

**1. B. P. Dwivedi, *The changing dimension of personal liberty in India*, 1998, Wadaha and Company, Allahabad:**

The author has discussed how the concept of liberty is elaborated in the constitution of England, America, Russia and some other countries. The author has discussed the contribution of International law towards the development of concept of liberty. In historical background he has focused on the evolution of the concept of liberty in British period, in framing the constitution of India and the constitution assembly. Meaning and nature of personal liberty as well as negative and positive liberty, procedural and substantive rights and deprivation and restriction of liberty are discussed in detail. What is the meaning of law? What is the meaning of the procedure established by law, who can claim, against whom it can be claimed, enforcement of right as well as right in emergency is also discussed.

Personal liberty is discussed with right to equality, personal freedoms, rights of detenu and relationship of fundamental rights with directive principles are also focussed. Personal liberty and criminal justice, Personal liberty and the poor and the recent dimensions of liberty are discussed in detail.

**2. Durgadas Basu, *Commentary on the Constitution of India (A comparative treatise on the universal principles of Justice and Constitutional Government with special reference to the organic instrument of India),* 8th Edition, 2008, Lexis Nexis, Butterworths Wadhwa:**

The author has discussed following topics in detail.

Protection of life and personal liberty in other constitutions and in international charters.

Scope of article 21 in India, Review Commission Recommendations, Right against torture, Right to compensation, Right to travel abroad, Right to privacy, Right to work, Art. 14, 19 and 21, Art. 21 and 22, Art. 21 and 23, Art 21 and 359 is also focussed.

Object of Art. 21, the meaning of person, the meaning of life and how human rights and civil liberty are interlinked is focussed.

Life of an unborn child, the concept of free legal aid, right of speedy trial in America and India is discussed.

The meaning of law, meaning of procedure established by law and whether law made under Art. 21 is subject to other fundamental rights.

Constitutionality of capital punishment in America and India is discussed with other articles.

Right to confront witnesses, right to process for producing defence witnesses is discussed with reference to American and Indian scenario.

Right to counsel, right to defence, immunity from cruel punishment is discussed in American as well as Indian context. Other rights under Art. 21 as well as right to education are also discussed.

**3. Dr. J. N. Pandey, *The Constitutional Law of India*, 47th Edition, 2010, Central Law Agency, Allahabad:**

The author has discussed Art. 21 from the case of *A. K. Gopalan* to the case of *Maneka Gandhi* in detail and has thrown the light on the right to travel. How the concept of natural justice and concept of due process of law evolved through judiciary is also discussed.

How the Indian judiciary started interpreting Art. 21 in a positive way and how various rights - like right to environment, right to health and medical assistance, as well as rights of prisoners, right to compensation and right to education etc are inherent under Art.21 is discussed.

86th Amendment Act 2002 and right to education is discussed in detail.

How some other rights evolved through the judgements of Supreme Court is elaborated.

**4. Dr. Subhash Kashyap, *Constitutional Law of India*, 2008, Universal Law Publishing Co. Delhi:**

The author has discussed genesis and growth of the concept of protection of life and personal liberty. Judicial interpretation of – no person, shall be deprived of right to life is discussed in detail.

Right to livelihood, Life Insurance, right to know, right to shelter, welfare legislation, right to pollution free environment, public hanging, rights of

women, use of Bar fetters, Use of hand cuffs, solitary confinement, right to speedy trial is discussed in detail.

Right to education – Genesis and Growth is discussed and there is analysis and comment on the right to education.

**4. Sathe S. P., *Judicial Activism in India – Transgressing Borders and Enforcing and Limits*, 2002, Oxford Univ. Press, Second Impression, 2004, New Delhi:**

Judicial Activism is discussed through historical perspective. Author has discussed post emergency era of judicial activism, growth of PIL and legitimacy of judicial activism. He has thrown light on the evolution of activism by the SC.

Through judicial activism how the apex Court became important in Indian democracy and how it evolved various concepts from other constitutions is discussed in detail.

According to author the power of judicial review is limited.

**5. Dhavan Rajeev, *The Supreme Court of India and Parliamentary Sovereignty (1976)*, Sterling Publishers Pvt. Ltd, 1976:**

The author has discussed the case of *Golakhnath* and *Keshavanand Bharati* in detail. He has discussed the nature of judicial review in constitutional system. To him, the case of *Keshavanand Bharati* should not be seen as a conflict between legislature and judiciary. He has stated that there is no clear explanation about constituent power to amend the constitution under Art. 368. According to the author the power to amend the constitution is a legislative power.

**6. Bhandari M. K, *Basic Structure of Indian constitution* Deep and Deep Publication, Delhi, 1993:**

The author has made the comprehensive study of basic structure doctrine propounded by the Supreme Court in the case of *Keshavanand Bharati*. According to the author the SC has explored nearly thirty essential features of the basic structure doctrine.

The author states that legislature and judiciary should act coherently. To him amendment to the constitution is a serious business and parliament must act carefully in the area of amendment to the constitution.

**7. Gran Ville Austin,** ***Working A Democratic – A History of Indian Experience (1999)*****, Paper Back Edition, Oxford Uni. Press, New Delhi, 2003:**

The author has discussed the course of constitutional reforms from the post Independence period, emergency period till the period of Rajiv Gandhi. He criticised Parliament and Supreme Court for over action and pleaded for proper balance between them. The constitution is a source of political stability and open society. He has commented that social revolution is pursued by the political parties but there is a need to protect the unity and integrity of India also.

**8. Chopra Pran** ***The Supreme Court Vs the Constitution – A challenge to Federalism*****, Saje Publications, New Delahi, 2006:**

In this book various authors have thrown the light on the problem of Parliamentary Sovereignty, the doctrine of basic structure and challenges to Indian federalism.

**a) Mr. N. R. Madhawa** has criticised the basic structure doctrine and supported the supremacy of the Parliament. To him, the proposition that the constitution is what the Judges say it is, cannot be accepted as there is no clarity as to the nature, number and space of basic features which cannot be amended.

**b) Shri. Subhash Kashyap** has discussed in detail the evolution of the doctrine of basic structure. To him this is recent innovation through creative jurisprudence. He has supported the Sovereignty of the people and their representatives. He has cited the quotation of Justice Harilal Kania (The First Chief Justice of India) – "In a democratic country, the people make the law through there legislature and it is not the function of the court to supervise or to correct the laws passed by legislature".

**c) Eminent Advocate Fali. Nariman** has supported the basic structure doctrine. To him the primary control of Government activity is of the people but the power exercised by the Supreme Court rest ultimately upon their tacit approval.

**9. B. D. Dua Manohar,** ***Indian Judiciary and Politics – The Changing Landscape (2007),*****. Publishers and Distributers, New Delhi, 2007:**

The author has discussed the concept of basic structure doctrine, judicial activism and the concept of PIL. There are critics as well as supporters of the

judicial role. The author has discussed the topics such as ecology, secularism, judicial reforms, the role of central executive etc.

**a) Douglas Verney** in his article has given a comparative insight into judicial review in Anglo American and Common Wealth traditions. He has given five types of judicial review-

**Type I-**

This type is very close to **the British** doctrine of sovereignty of Parliament. In Britain judicial review emerged for the short time when Chief Justice Coke in 1610 tried to review royal prerogatives on the basis of common law. The author has criticised common law doctrine. To him in the year 2000 the very notion of Parliamentary supremacy became outdated in practice though not in theory. The Britain is now a member of European Union. The acts of Parliament of Britain are subject to judicial review by European Court.

**Type II-**

Chief Justice Marshall evolved it in **America** and it is typical to American Federal Constitution.

**Type III-**

Imperial judicial review exercised by the **Privy Council** over the colonies controlled by Britain in the period of colonialism.

**Type IV-**

It is a Parliamentary judicial review in **Canada.** The Supreme Court has contributed to lowering of the temperature between a legislature and judiciary by exercising review of Constitutional issues. The Supreme Court has always considered the tradition of Parliamentary supremacy.

**Type V-**

Parlimentary judicial review in **India.** The Supreme Court has challenged the parliamentary supremacy in various cases like *Golaknath* (1967), *Keshavananda Bharati* (1973), *Minvera Mills* (1980), *Bommai* (1994) etc.

**b) Rajiv Dhawan** in his article has discussed four phases of the judgements of the Supreme Court.

**Phase I (1950-1955) -**

In this phase the court raised the issues of the philosophy of the Constitution and empowerment of the people.

**Phase II (1960-1971) -**

The Court faced the executive wing of the Government with great determination.

**Phase III (1972-1975)**

The court expanded the doctrine of the basic structure.

**Phase IV (1977-2000)-**

The phase of judicial activism and PIL.

Dhavan observed that the judiciary has become and institution of governance in its own right- a position (or usurpation) it cannot legitimise unless it responds to some sense of the voice of the people.

**c) Mahendra Pal Sing** has discussed the judicial behaviour into pre emergency period which was marked by economic liberalism and post emergency period which was marked by Constitutionalism, egalitarianism and social justice. To him judiciary must accelerate the pace of accomplishing the goals of social economical and political justice.

In the review of literature it is clear that Supreme Court has widened the ambit of Art. 12 as well as of Art. 21. Through precedents the Supreme Court has evolved Art. 21 and has brought various rights into the ambit of Art. 21.

**4. RESEARCH QUESTIONS**

1. Whether Indian Judiciary has played creative role in the interpretation of Art. 21?
2. Through Art. 21 whether Indian Judiciary has expanded the ambit of Art. 12 and whether there is any valid criticism?
3. Whether through PIL there is evolution of Art. 21?
4. Whether there is any critical evaluation regarding the implementation of the SC's judgements?
5. Whether there is valid criticism on judicial governance?
6. Whether there is valid criticism on legal profession?
7. Whether any solution is suggested for inter-State water dispute by any expert's?
8. Whether the Courts have created any obstacles through interim orders?
9. Whether there is 'interpolation' instead of 'interpretation' in some judgements?

## 5. HYPOTHESIS

1. Indian Judiciary has played creative role in the interpretation of the Art. 21.
2. There is an enlargement of the ambit of Art. 12.
3. Through PIL there is evolution of Art. 21.
4. There is a problem of implementation in some cases due to bureaucracy.
5. Some eminent writers have criticised on Judicial Governance.
6. Legal Profession is criticised by some authors and there is a need to improve professional and educational standard of Legal Profession.
7. Inter-state water dispute can be handled in a different way.
8. Through interim orders the Supreme Court has created some obstacles in the smooth functioning of bureaucracy and Government.
9. There is interpolation instead of interpretation in some judgements.

## 6. METHODOLOGY

Hypothetic deductive method is used to analyse the research topic i.e. **"Creative interpretation by the judiciary of Art.21 to the Indian Constitution."**

The research is primarily analytical and it is a library based. The primary data is collected from the debates of Constitutional Assembly, the debates in Parliament on important Constitutional amendments, the judgements of Supreme Courts on the various Constitutional amendments, on various enacted laws and of executive orders.

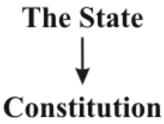
The secondary data consists of various interpretations made in commentaries on the Indian Constitution, the books, articles and research papers published in different journals.

The purpose of research is to critically analyse the problem of implementation of various judgements and the role played by the political class and bureaucracy in this area. An attempt is made to analyse the comments of experts on various judgements of Supreme Court.

Primary Source – Statutory Materials, Government Documents and Reports

Secondary Source **-** Text Books, Periodical writings, Indian Law Journals.

**<u>EvaluatIon and Interpretation of Data</u> :**




1

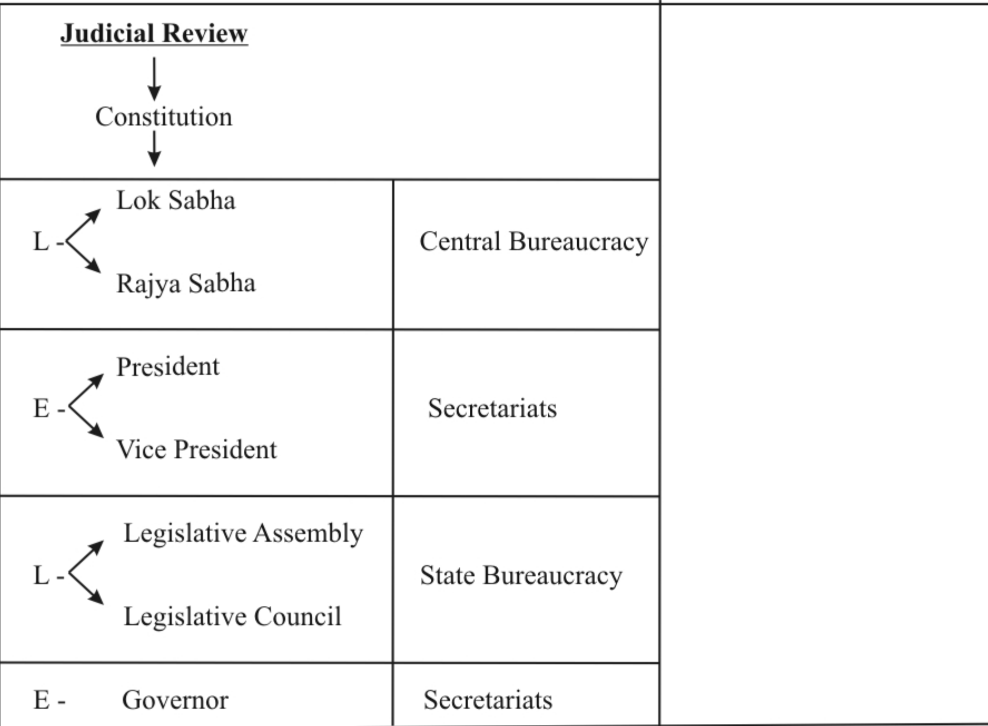
| | | |
|---|---|---|
| L — Lok Sabha / Rajya Sabha | Central Bureaucracy | Agencies of the State doing following functions ↓ 1. Quasi Federal 2. Function of high Public Interest & Public Importance 3. Agencies established by Statutes 4.Public Corp. etc. |
| L — Legislative Assembly / Legislative Council | State Bureaucracy | |
| E — President / Vice President | Secretariats | |
| E - Governor | Secretariats | |

| | | |
|---|---|---|
| **Decenralisation of Powers**<br>1. Mahanagar Palika<br>2. Nagarpalika A,B,C | Bureaucracy | |
| **Village Administration**<br>1. Zilla Parishad<br>2. Panchayat Samiti<br>3. Gram Panchayat | | |

**2**

| **Independence of Judiciary**<br>↓<br>Constitution<br>↓<br>L - Lok Sabha / Rajya Sabha | Central Bureaucracy | |
|---|---|---|
| E - President / Vice President | Secretariats | |
| L - Legislative Assembly / Legislative Council | State Bureaucracy | |
| E - Governor | Secretariats | |
| ↓<br>**No Control of L and E on Judiciary** | | |

**3**




**Judiciary can declare any act of L or and action of E as ultra virus if it is not according to the Constitution.**

**4**

| **Judicial Activism** ↓ Constitution ↓ | |
|---|---|
| L - Lok Sabha / Rajya Sabha | Central Bureaucracy |
| E - President / Vice President | Secretariats |
| L - Legislative Assembly / Legislative Council | State Bureaucracy |
| E - Governor | Secretariats |

**Judiciary can force L, E and agencies of the State to do mandatory duties when they omit to do so.**

## 8. SCOPE AND LIMITATIONS OF THE STUDY

Since 1950 the Supreme Court has gone through various phases. After emergency period the Supreme Court started evolving new doctrines. The Court started enlarging the ambit of Art.12, Art.21 and of other Fundamental Rights. The period of judicial activism and of PIL contributed towards the development of Art.21. The Court started bringing various rights within the ambit of Art.21.

I was interested in the study of the effect of these judgements of the Supreme Court on the society. Through critical analysis of experts on the judgements of Supreme Court in their various books I perceived that there are various problems which are discussed by critics in the matter of implementation of the judgements of the Supreme Court.

Weak political class, lethargic bureaucracy and literal interpretation of words made the implementation of the decision of the Supreme Court difficult. To have a more insight into these problems I took the decision to have a research from these angles.

India is the largest democratic country in the world. It is every Indians responsibility to respect our constitution and to help constitutionalism. If Supreme Court is giving the proper judgements then it is the one of the symptom of healthy constitutionalism but these judgements some times are nullified due to lack of proper implementation. Non implementation of the judgements of Supreme Court, conflicting judgements of the Supreme Court and the problem of judicial governance is likely to create problem for democracy and constitutionalism.

As the research is doctrinal the limitations of the same are inherent i.e. no field work is possible, very difficult to have interview method, questionnaire method, sample method etc.

The study is not exhaustive as there is vast scattered literature on the research topic.

In the present thesis an attempt will be made to study the judgements of SC on fundamental rights through various angles.

Art.21 is studied under following heads –

1. Evolution of fundamental rights before 1950 (Ist Chapter)

2. Creative interpretation of Art.21 by the Judiciary (IInd Chapter)

3. Effect of an Act (MNAREGA) and a bill (On land acquisition) on Art.21 (IIIrd Chapter)

4. Some recent judgments of the SC on Art.21 (IVth Chapter)

5. Comments on Experts on various subjects (Vth Chapter)

i) Effect of lethargic bureaucracy on the judgements

ii) Effect of weak political class on the judgements

iii) Effect of widening the ambit of Art. 12 on Art. 14, 19, 21 and other rights and positive as well as negative side of the effect.

iv) Effect of delay and stay orders on the rights of the people.

v) Effect of non-implementation of the judgements of the Supreme Court and the fate of contempt of Court writ petitions.

In the thesis the comments of the experts like Arun Shourie, Nani Palkhiwala and Fali S. Nariman on the judgements of Supreme Court are discussed.

## ABBREVIATIONS

| | | |
|---|---|---|
| AIR | - | All India Reports |
| All E.R. | - | All England Law Reports |
| Bom L.R. | - | Bombay Law Reports |
| C.J.I. | - | Chief Justice of India |
| Govt. | - | Government |
| HC | - | High Court |
| ILR | - | Indian Law Report |
| JT | - | Judgement Today (Journal on SC cases) |
| SC | - | Supreme Court |
| SCA | - | Supreme Court Appeals |
| SCC | - | Supreme Court Cases |
| SCJ | - | Supreme Court Journals |
| SCR | - | Supreme Court Reports |
| SCW | - | Supreme Court Weekly |
| U.T. | - | Union Territory |

## SOME IMPORTANT TERMS

**Enacted Law** – It means Law enacted by the Competent Legislature i.e. Central or State Legislature

**Ad Law -** Means Law enacted by Executive wing of the Govt.

**Precedent –** It means Judge made Law.

**Ratio** – The binding principle evolved by the Supreme Court or High Court in deciding particular case.

**Obtier Dicta –** The Statement made by the Judges of the Supreme Court or High Court in deciding a particular case which was not necessary.

**State** - The State has four elements i.e. Population, Territory, Government and Sovereignty.

**Executive** - It means Executive wing of the Govt.

**Judiciary** - It means organ empowered to interpret the law made by the Legislature, the Executive and other agencies of the State.

**Sovereign -** It means sovereign power to make laws, to execute the laws and to interpret the laws.

**Government** - It means Legislature, Executive and other agencies of the State.

**Fundamental Right** - It means the right conferred by the Constitution. The right which is given against the mighty power of the State.

**Constitution** - The highest law of the land which decides the structures, powers and functions of legislature, executive and judiciary. The highest law of the land which decides Separation of Powers between L.E.J. and Division of Powers between Central and State Govts.

**Amendment** - It means to change existing law or Constitutional Law

**Judgement** – The reasons given by the Judge for decree or order.

**Decree** - The formal expression of an adjudication which decides conclusively the rights, liabilities and duties of the parties to the Suit or Porceeding.

**Order -** It can come from any authority.

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# CHAPTER I

## EVOLUTION OF FUNDAMENTAL RIGHTS

# CHAPTER – I

# EVOLUTION OF FUNDAMENTAL RIGHTS

## 1. INTRODUCTION :

Human Rights are the rights of an individual. They impose limitation on the power of the State. History of man is the history of his struggle against the 'mighty Sate'.

Against 'mighty state' a man was humble meek and week, many times was subject to political oppression and ruthless laws. Even if the king was good he could be described as a 'benevolent dictator'.

In the background of absolute monarchs in Europe, Machiavelli (1469-1527) wrote his book "Prince" in the praise of Lorenzo Di Medici and his dynasty. Jean Bodin (1530-1596) also advocated a similar theory. For him the sovereign was "the absolute and perpetual power" of the state. According to him "the sovereign prince has no authority to violate laws of God and Nature. When a contract is made by the Prince with his subjects the natural law prescribes that agreement is to be kept".

However, Protestants attacked all kinds of absolutisms and advocated limitations on the power of king.

Meanwhile civil war broke out in England due to the conflict between the parliamentarians on one hand and the Royalist supporting King Charles I on the other. Ultimately Charles I was arrested and was publically hanged in London on January 30, 1649. It was the first middle-class revolution. The Divine Right theory fell to the ground. As a result a new brand of political thinker arose both in England and in Europe with their respective novel theories, and most important of them were Hobbes, Locke and Rousseau.

### THOMAS HOBBES (1588-1679) :

He wrote 'Leviathan' According to Hobbes man was egoistic, selfish, brute and self centered. There was constant war of all with all and each with each.

Due to fear of death and to end the war like situation men entered in to contract and they created a sovereign king. King was not party to the contract. People surrendered all their rights to the king except the right to the life.

According to Hobbes law made by the king i.e. positive law must be consistent with the law of nature i. e. higher law.

For Hobbes monarchy created in this way was the best form of Government.

**JOHN LOCKE (1632-1704):**

According to Locke in the state of nature people were social and rational. There was peace in the society. To protect right to life, liberty and property people entered into two contracts. One contract was among the people and the second contract was between king and the people. Locke was in favor of limited government. If king violated the right of people then the people were allowed to revolt against the king.

In the contract of Hobbes there was only one contract and king was not party to the contract. And to Hobbes there was no right to revolt against the king. But in theory of Locke the right to revolt is given to the public against the king if king violated the rights of the people.

A similar theory was also advocated in ancient India by Kautilya who said:- "in the happiness of his subjects lies the king's happiness, in their welfare. His welfare; whatever pleases himself the king shall not consider as good, but whatever pleases his subjects, the king shall consider as good: (Kautilya's Arth Shastra Chapter XIX tr. By Dr. Shamasastry at p.39; (1915, ED-1988)). Manu goes further ad says "The king himself also is liable to be punished for an offence, with one thousand times more penalty than what would be inflicted on an ordinary citizen". (Manusmriti – chap. 8 verse 336).

For Jean Jacques Rousseau (1712-1778) the people themselves are sovereign. Every citizen is a miniature sovereign and he resigns his part of sovereignty in favor of a body politic as per social contract and the said body

politic, as an organic unit 'possessed of a will' and this General Will, is the 'source of laws'.

For Rousseau 'property' is a form of private dominion and it is required to be under control by the General Will, for the sake of public interest of the community'. He believed in equal distribution of property.

Rousseau's concepts of liberty, Equality and Fraternity became the slogans of the French Revolution.

Locke's theory was accepted by American Revolutionary forces.

Declaration of Human Rights by the United *Nations* in 1948, owes their sources to the political theories propounded by Hobbes, Locke and Rousseau. Being part of United Nations Organizations India has inherited the Western Political philosophy in her constitution. Accordingly these Human Rights found their way into the Indian Constitution through part III and part IV of the Constitution. As a result we find Locke's theory in part III of the Constitution on Fundamental Rights and Rousseau's in the part IV on Directive principles of State Policy. The concept of Liberty, Equality and Fraternity of the French Revolution have become part of Indian Human Rights in the form of Fundamental Rights. (Forward by J. Raikote B. S to the Ph. D. thesis of Dr. Sharda D. Nirvani (Enforcement of Human Rights through PIL, Karnataka Institute for Law and parliamentary Reforms 2008.)

## 2. EVOLUTION OF FUNDAMENTAL RIGHTS IN INDIA:

In this Chapter an attempt is made to discuss the evolution of fundamental rights in India.

### A. During Freedom Struggle:

The idea of fundamental rights originated in the nineteenth century. During the British regime in India, the Indian National congress started the agitation for the recognition of civil rights. However the constitutional recognition of the fundamental rights came in the year 1895. The first explicit

demand for fundamental rights appeared in the Constitution of India Bill, 1895 (Rao Shiv B. , *The Framing of India's Constitution Volume,* new Delhi: The Indian Institute of Public Administration, 1996. p5-14). Thereafter, the Indian National Congress was expressing the wishes of the people of India through various Bills, testaments, schemes, reports and resolutions. (Hansaria B. L., *Right to life and liberty Under the constitution :* A Critical Analysis of Article 21, (Mumbai : N. M. Tripathi pvt. Ltd.) p4.)

The Constitutions of Indian Bill 1895, which is believed to have been inspired by Lokmanya Tilak, visualized a Constitution guaranteeing to every citizen certain basis rights, subject to reasonable legal restrictions, including the rights (a) to "take part in the affairs of his country." (b) to "express his thoughts by words or writings, and publish them in print without liability to censure" (c) to have 'in his house an inviolable asylum" (d) to "enjoy his property" and (e) of "equality before the law".

The demand for rights was revived in the beginning of the twentieth century. A series of Congress Resolutions adopted between 1917 and 1919 repeated the demand for civil rights and equality of status with Englishmen. The resolution of the system of trial by Jury: and for the right of Indians "to claim that no less than one half of the Jurors should be their own countrymen" (Chakrabarthy and Bhattacharya, A resolution of 1917: *Congress in evolution Calcutta*: The book company ltd. 1940), p.19)

The commonwealth of India bill, 1925 in the preparation of which Mrs. Annie Besant had played an important part enumerated fundamental rights which were almost identical in scope and nature with those adopted by the Irish Free State in its Constitution of 1921. "The following shall be the fundamental rights of every person (a) liberty of person and security of his dwelling and property, (b) Freedom of conscience and the free profession and practice of religion, (c) free expression of opinion and the right of assembly peaceably and without arms and of forming associations and unions, (d) free elementary education, (e) use of roads, public places, courts of justice and the like." By the mid twenties, the demand of the Indians no long aimed at establishing the rights of Indian vis-a-vis Englishmen, goal that was to be achieved through the independence Movement; the purpose however was to assure liberty among Indians (The Commonwealth of

India Bill 1925 was another demand by the Indian National Congress for fundamental rights. Article 8 of the bill embodied several fundamental rights).

In 1927 the appointment of the Simon Commission impelled the Indian National Congress to set up a committee to draft a constitution on the basis of a declaration of rights. The committee set up in 1928 suggested that fundamental rights should be incorporated in the future constitution of India.

In December 1927 the forty-third annual session of the congress at Madras passed a resolution empowering the working committee to co-opt and confer with similar committees to be appointed by other organizations and "to draft a swaraj Constitution for India, on the basis of a Declaration of Rights".

Pursuant to the above resolution, the Motilal Nehru Committee was appointed, which submitted its report in august 1928. The committee observed that "conditions obtaining in the Irish Free State approximated broadly to those prevailing in India, and the first concern of the people of Ireland, as of the people of India, is to secre fundamental rights hitherto denied to them." Clause 4 of the Nehru Report set out nineteen fundamental rights. Next development was the Karachi Resolution for the adaptation of the fundamental rights by the congress session in 1931, "in order to end the exploitation of the masses". Political freedom must include the real economic freedom of the starving millions. In all the three sessions of the Round Table conference that preceded the making of the Government of India act, 1935 discussions were held on the subject of Fundamental rights and the leaders made concerted efforts for the inclusion of a Bill of Rights in the proposed Constitution Act. (Reddi Sarojini P. *Judicial Review and Fundamental Rights* (New Delhi National Publishing House 1976)p 10).

The next stage of development was the appointment of Sapru committee by an all parties Conference in 1944-45.

The Sapru Committee with Sir Tej Bahadur Sapru as its chairman published report in 1945 recommending that the declaration of fundamental rights was absolutely necessary. Sapru report gave a standing warning to all, that what the constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civil rights,

equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of the ordinary application of life (The Sapru report Delhi. P.260). The committee envisaged justifiable and non-justifiable rights but did not suggest which rights should be included in the future constitution. The issue was left to framers of the Constitution.

The British Cabinet Mission in 1946 envisaged a Constituent Assembly for framing of Constitution of India.

In 1945 a non-party committee of intellectuals, of which Sir Tej Bahadur Sapru was the chairman, reiterated the demand for fundamental rights. The Sapru Committee rested its demand on the ground that in the "Peculiar circumstances of India fundamental rights are necessary; not only as assurances and guarantees to the minorities but also for prescribing a standard of conduct for the legislature, the government and the courts."

In answer to the British Cabinet mission's plan of may 1946 the Congress working committee passed a resolution in that month reiterating that among the objectives of the committee were "the guarantee of the fundamental rights of each individual so that he may have full and equal opportunities of growth, and further that each community should have opportunity to live the life of its choice within the larger framework".

**B**. **Constituent Assembly and Fundamental Rights:**

A few extracts from the Constituent Assembly Debates would serve to illustrate the great sense honor which actuated the labors of the outstanding men who framed our Constitution.

**Brajeshwar Prasad –** said in the Constituent assembly on 10 October 1949:

"A nation that sacrifices vital principles, that does not stand by its pledged word, has no future in politics."

"I do not know what kind of people will be there in the future parliament of India. In the heat of extremism or at the altar of some radical ideology, they may like to do away with the provisions which we have made in the Articles of

the constitution. Our leaders have made certain commitments. We stand by them. We are Sovereign and not the future parliament. We can fetter the discretion of the Executive, Judiciary or parliament. It is for this purpose that we are drawing up the Constitution."

**Sardar Vallabhbhai patel –** said on the same day, referring to the guarantees which had been given to the covenanted services:

"Have you read history? Or, is it that you do not care for recent history after you have begun to make history? If you do that, then I tell you we have a dark future, Learn to stand upon your pledged word…. Can you go behind these things? Have morals no place in the new Parliament? Is that how we are going to begin our new freedom?

"Do not take a lathi and say, 'Who is to give you a guarantee? We are a Supreme parliament.' Have you supremacy for this kind of thing? – To go behind your word? – If you do that, that supremacy will go down in a few days."

**Acharya J. B. Kripalani –** spoke eloquently in the Constituent Assembly on 17 October 1949:

"I want this House to remember that what we have enunciated are not merely legal, constitutional and formal principles, but moral principles; moral principles have got to be lived in life. They have to be lived, whether it is in private life or it is in public life, whether it is in commercial life, political life or the life of an administrator. They have to be lived throughout. These things we have to remember if our Constitution is to succeed" (Palkhiwala N. A. – *Our Constitution – Defaced and Defiled,* Mac Millen, 1974, p.11-12).

The Constituent Assembly's first ever meeting on 9th December 1946 was a fulfillment of long cherished hope, and it is symbolized the commencement iof great task of framing the Constitution of India.

In furtherance of this task, the Constituent Assembly on 24 January 1947 voted to form the Advisory Committee, on adaptation of a resolution moved by Pandit Govind Ballabh Pant. (CAD Vol. 11 p.325).

The Advisory Committee in turn set up five sub committees on Fundamental Rights.

The Fundamental Rights Sub-Committee was faced with a problem of balancing the individual liberty vis-à-vis social control. The Liberty was necessary for fulfillment of Individual's personality and social control for the peace and security of society. The members found that although there was some disagreement on technique, there was little difference on principles. The members of the Sub-Committee quickly decided that the Fundamental Rights should be justifiable, that they should be included in the Constitution and they decided what form these rights should take and also included within the rights the legal methods by which they could be secured.

## C. Post Constitutional period and Human Rights:-

The historical and political developments in India made it inevitable that a Bill of Rights or Fundamental Rights should be enacted in our constitution. (Seervai H. M., *Constitution law of India* Fourth Ed. Vol I, Delhi: Universal Book traders, 1997, P.347).

Part III of the Constitution embodies those rights. The rights embedded in this part are ensured as effective guarantees against the state action (Dr. Rajput Ram, "*'Fundamental Rights"*, in Hidaytulla, ED., Constitutional Law of India Vol. 1, (new Delhi: Arnold Heinemann, 984). p.150).

It has been aptly observed that 'enshrining of these rights makes our constitution sublime', *A.K. Gopalan* v. *State of Madras* (AIR 1950 SC 88).

The observations of Dr. B. R. Ambedkar on the object and purpose of Fundamental Rights in the Constitution were very clear when he said:

"The object of the Fundamental Rights is twofold. First, that every citizen must be in a position to claim those rights, Secondly, they must be binding upon every authority. I shall presently explain what the word authority means – every authority which has got either the power to make laws or the power to have discretion vested in it" (C. A. D. Vol II, 1948-49, p610).

The promulgation of the Constitution on 26th January 1950 was a watershed in the history of the development of human rights in India. The preamble, the Fundamental Rights and the Directive principle of State policy together provide the basic human rights to the people of India (Indian institute of human rights – *State of Human Rights of India* 1, (2000 (New Delhi), at p.6).

The Courts too have played a positive role in incorporating and enforcing the rights through judicial construction. The Supreme Court of India in particular through judicial interpretation has widened the horizon of these rights in India.

The fundamental rights are in general, those rights of the citizens, or those negative obligations of the state not to encroached on individual liberty, that have become well known since drafting of the Bill of Rights of the American constitution. These fundamental rights are divided into 6 parts: the right to equality, the right to freedom, the right against exploitation, the right to the freedom of religion, cultural, and educational rights and the right to constitutional remedies.

A fundamental right is inviolable (Subject to the qualification defined in the constitution), whereas non Fundamental rights possesses no such characteristic (Shukla V. N., *Constitution of India,* 10th Ed. N. P. Singh. (Lucknow: Eastern Book Company 2001) p.42).

Fundamental rights are limitation on the power of the legislature as well as executive.

The Supreme Court under Article 32 and High Courts under Article 226 are under a duty to grant relief for violation of a substantive fundamental right.

The framers of the Constitution wanted to incorporate a guarantee of fundamental right so that they might impose limitations on the arbitrary exercise of power by any organ of the state. This object has been secured in the Constitution in several ways under Article 12, Article 13 (2), Article 32 and Article 245 (1).

Initially, the attitude of judiciary in India towards the Directive principles was not favorable and it had nullified much important legislation embodying

socio-economic reforms. With the passage of time, however, there has been a shift in the attitude of the Judiciary towards socio-economic rights contained in the Part IV of the Constitution, as the court felt the need for change in its earlier outlook. *State of Bihar* v. *Kameshwar Singh* (AIR 1952 SC 226).

Under the Indian Constitution Directive Principles of State policy are jural postulates (achievable goals). Until recently the Directives were not considered seriously by the courts because of the strict legalistic positive approach adopted by them. The recent innovative approach of the court provides the basis for the meaningful understanding of the human rights. The SC started seeing these directive principles as a basis for meaningful enforcement of fundamental rights and thus the scope of rights to life and personal liberty under Article 21, in particular, were widened. This trend is also seen in a number of public interest matters decided by the courts.

Our Constitution makers provided for a built-in mechanism by which every debt, however big or small, owing by the Government would be duly discharged. Any creditor of the Government can file a suit for recovery of a debt, and once a decree is obtained the amount becomes automatically charged on the Consolidated Fund of India under Article 112 of the Constitution, and Article 113 provides that even parliament has no right to vote upon it.

In his closing address to the Constituent Assembly, Dr B. R. Ambedkar emphasized that the principles of liberty, equality and fraternity were not to be treated as separate entities but as a trinity. They formed the union or trinity in the sense that to divorce one from another was to defeat the very purpose of democracy. Liberty could not be divorced from equality. Equality could not be divorced from liberty. Nor could equality and liberty be divorced from fraternity. Without equality, liberty would produce supremacy of law. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality would not become a natural course of things. Accordingly, the constitution puts due emphasis on equality, fraternity and liberty. The preamble declares that the Constitution of India has been adopted by the people to promote justice, liberty, equality and fraternity. Several constitutional provisions amongst – the fundamental rights also protect these values.

## 3. The Supreme Court and Fundamental Rights:

### A. Introduction:

The entrenched fundamental rights have a duel aspect –

1. These rights can be enforced through the courts.

2. The Government cannot take any action, administrative or legislative, by which a fundamental right may be infringed. The Law curtailing or infringing an entrenched right would be declared to be unconstitutional. An entrenched right, can be done away with only by way of constitutional amendment.

The Supreme Court discharges a multi-faceted role in relation to the fundamental rights. In the first place, it acts as the protector and guardian of these rights. In the second place, it acts as the interpreter of fundamental rights and in the third place; it has been seeking to integrate directive principles with fundamental rights.

### B. The Supreme Court as Guardian of Fundamental Rights:

As the protector and guardian of fundamental rights, from the very beginning the Supreme Court has adopted the stance that it acts as the 'sentinel on the qui vive vis-à-vis fundamental rights' and has stressed this role in several cases. The Constitution underlines this role of the Court through Article 32 (1), which reads:-

"The Supreme Court shall have power to issue directions or orders or writs, including writ in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this article."

The Constitution-makers made the right of a citizen to move the Supreme Court under Article 32, and claim an appropriate writ against the unconstitutional infringement of his fundamental rights, itself a fundamental right, *Daryao* v. *State of Uttar Pradesh* (AIR 1961 SC 1457).

The fundamental rights are intended not only to protect individual's rights, but they are based on high public policy. Liberty of the individual and the protection of his fundamental rights are the very essence of the democratic way of life adopted by the Constitution, and it is the privilege and the duty of the Court to uphold those rights. The Court would naturally refuse to circumscribe them or to curtail them except as provided by the Constitution itself.

In the very first year of the Constitution coming into force, the Supreme Court emphasized in *Romesh Thappar* v. *State of Madras.* (AIR 1959 SC 124), that this Court is thus constituted the protector and guardian of the fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights'.

The protective role of the Supreme Court, has in course of time manifested itself in the following ways, namely

i. declaration of a law as unconstitutional in case it comes in conflict with fundamental rights;

ii. prohibition on an individual from bartering away his fundamental rights;

iii. non - amenability of the constitutional provisions guaranteeing fundamental rights;

iv. protection of its own protective function from being demanded either by legislation or constitutional amendment.

**i. Constitutionality of a Statute:**

Article 13 gives teeth to the fundamental rights and makes them justifiable. Article 13(2) declares that the State 'shall not make any law' which takes away or abridges the fundamental rights: and a law contravening a fundamental right is, to the extent of the contravention, void.

The court performs the onerous task of declaring an Act of the legislature unconstitutional if it infringes a fundamental right.

Fundamental rights are claimed mostly against the State, and the State is defined by Article 12 in an expansive manner.

The Court has the function of ensuring that no statute violates a fundamental right. A statute is declared unconstitutional and void if it conflicts with a fundamental right. A void statute is unenforceable, devoid of any legal force; courts take no notice of such a statute, *Behram* v. *State of Bombay and* in *State of Gujarat* v. *Shri Ambika Mills* (AIR 1955 SC 123, AIR 1974 SC 1300).

The Supreme Court figuratively characterized this role of the court as that of a sentinel on the qui vive, *State of Madras* v. *V. G. Row* (AIR 1952 SC 196).

The Courts do not declare a statute unconstitutional lightly, generally leaning towards the constitutionality of a statute on the premise that a legislature understands the needs of the people.

To adjudicate whether a statute is inconsistent with a fundamental right, the Supreme Court has expounded several formulae. One such formula is that a law cannot be challenged under a fundamental right unless the law is directly in respect of the fundamental right concerned. Thus a law can be attacked under Article 19 (1) (a) (freedom of speech), if it directly abridges the freedom of speech; but if it touches the article only incidentally or indirectly, it cannot be challenged under this Article, *naresh* v. *State of Maharashtra* (AIR 1967 SC 1).

Another test applied in some cased, is that of 'pith, and substance'. It involves determining what is the 'pith and substance' of the law in question and which fundamental right does it affect, *State of Bombay* v. *RMDC, Dwarkadas* v. *Solapur Mills* (AIR 1957 SC 699, AIR 1954 SC 119).

In some cases, the test of 'real effect and impact' of the impugned legislation on the fundamental right in question has been applied. In *re the kerala Education Bill, Express Newspapers* v. *India: R. C. Cooper* v. *Union; Sakal papers v. Union* (AIR 1958 SC 956; AIR 1958 SC 578; AIR 1970 SC 564; AIR 1963 SC 305).

Clearly, the Supreme Court keeps a number of options open to itself. This gives to the judicial review some flexibility ands elasticity and to the courts a good deal of maneuverability in discharging their function of judicial review.

**ii. Waiver of Fundamental Rights:-**

Earlier, the Supreme Court was faced with the question :

Can a person waive any of his fundamental rights?

In *Behram* v. *State of Bombay*, (AIR 1955 SC 123) Justice Venkatrama Ayyar, divided the fundamental rights into two broad categories; rights conferring benefits on individual, and rights conferring benefits on general public. The judge opined that a law would not be a nullity but merely unenforceable if it was repugnant with a fundamental right in the former category, and that the affected individual could waive such unconstitutionality, in which case the law would apply to him.

For example, the right guaranteed under Article 19 (1) (F) was for the benefit of property-owners. When a law was found to infringe this provision it was open to any person whose right had been infringed to waive his fundamental right (Article 19 (1) f which was replaced in 1978).

In case of such a waiver, the law in question could be enforced against the individual concerned. The majority on the bench, however, repudiated this view, holding that the fundamental rights were not put in the Constitution merely for individual benefit. These rights were there as a matter of public policy and, therefore, the doctrine of waiver could have no application in case of fundamental rights. A citizen could not invite discrimination by telling the State 'you can discriminate'. Or get convicted by waiving the protection given to him under Article 20 and Article 21.

Waiver of fundamental rights was discussed more fully by the Court in *Basheshar Nath* v. *Income-tax Commissioner* (AIR 1959 SC 149).

The case was referred to the Income-Tax Investigation Commission under section 5 (1) of the relevant Act. After the commission had decided upon the amount of concealed income, the petitioner agreed on 5 September 1954, as a settlement, to pay in monthly installments over Rs.3 lakh by way of tax and penalty, In 1955, the Court declared Sec. 5 (1) ultra virus of Article 14.

1. The petitioner thereupon challenged the settlement between him and the commission, but the plea of waiver was raised against him. The Court uphold the petitioner's contention. But in their judgments the judges expounded several views regarding waiver of fundamental right.

2. Article 14 cannot be waived.

3. A view, somewhat broader than the first, was that none of the fundamental rights can be waived by any person. A large majority of the people in India are economically poor, educationally backward and politically not yet conscious of their rights. Individually or even collectively, they cannot be pitted against the State and, therefore, it is the duty of the judiciary to protect their rights against themselves.

4. In view of the majority decision, it is now established that an individual cannot waive any of his fundamental rights (N. L. Nathanson, 'Waiver of Constitutional Rights in Indian and American Constitutional Law' 4 JILI (1962) 157).

5. This proposition has been applied in a number of cases. For example, the Bombay High Court has stated: 'The State cannot arrogate to itself a right o commit breach of the fundamental rights of any person by resorting to principles of waiver or estoppels or other similar principles' *Yusuf Ali Abdulla Fazalbhoy* v. M. *S. Kasbekar* (AIR 1982 Bom 135).

Similarly, the Gauhati High Court has explained that the fundamental rights have been embedded in the Constitution not merely for the benefit of a particular individual but also as matter of constitutional policy and for public good, and therefore the doctrine of waiver or acquiescence cannot be applied thereto. 'A citizen cannot voluntarily get discrimination or waive his fundamental right against discrimination' as the right of not being discriminated against is enshrined in Article 14 and is a fundamental right *Omega Advertising Agency* v. *State Electricity Board* (AIR 1982 Gau.3).

It may be of interest to know that in the USA, a fundamental, right can be waived, *Pierce Oil Corporation* v. *Phoenix Refining Co.* (259 U. S. 125 (1922)).

The doctrine of non-waiver developed by the Supreme Court of India is a manifestation of its role of protector of the fundamental rights.

**iii. Fundamental Rights and Constitutional Amendment:**

This question pertains to the 'protective' role of the Supreme Court because apprehension has been expressed that if the fundamental rights are held to be amendable., then, in course of time, all fundamental rights may be abolished and a democratic system may thus be converted into a dictatorial regime.

Within a year of the Constitution coming into force, in *Shakari Prasad Singh* v. *Union of India,* (AIR 1951 SC 458), the question was raised whether the Constitution (First Amendment) Act, 1951, seeking to curtail the right to property guaranteed by Article 31, was constitutionally valid. The argument against its validity was that Article 13 (2) prohibited enactment of a law infringing or abrogating a fundamental right. The word 'law' in Article 13 (2), it was argued, included any law, even a law amending the Constitution and, therefore, the validity of such a law could be assessed with reference to the fundamental rights which it could not infringe. (Article 13(2) – Put some limitation on Government Regarding part III).

Adopting a literal interpretation of the Constitution given in *A. K. Gopalan* v. *State of Madras* (AIR 1950 SCR 88, AIR 1951 SC 26).

The Court rejected the argument and ruled that – Article 13 must be read subject to Article 368. The Court disagreed with the view that the fundamental rights were sacrosanct. Inviolable and beyond the reach of the process of constitutional amendment as laid down in Article 368.

The Court adopted a similar view in 1964 in *Sajjan Singh* v. *State of Rajasthan* (AIR 1965 SC 845) when it upheld the validity of the Constitution (Seventeenth Amendment) Act, 1964, again adversely affecting the fundamental right to property. The majority reiterated the conclusion of the court on the question of relationship between Article 13 and Article 368, as expressed in Shankari Prasad. But the minority raised doubts whether Article 13 would not control Article 368. Justice Hidaytullah observed : "It would require stronger

reasons than those given in *Shankari Prasad's case* (AIR 1951 SC 458) to make me accept the view that fundamental rights were not really fundamental but were intended to be within the power s of amendment in common with the other parts of the constitution and without the concurrence of the States' because 'the Constitution gives so many assurances in part III that it would be difficult to think that they were playthings of a special majority."

Justice Mudholkar another minority judge, adopted a much broader argument. His basic argument was that every constitution has certain fundamental features which could not be changed.

*Golak Nath,* the next case, was based on justice Hidayatullah's argument of non - amendability of fundamental rights while *Kesavananda* was based on Justice Mudholkar's argument of basic features.

*Golak Nath Case* (AIR 1967 SC 1643), arose in 1967, eleven judges participated in the decision and they were divided 6:5. Over-ruling the earlier judgments in *Shankari Prasad* and *Sajjan Singh* the majority now adopted the view that the fundamental rights, embodied in part III of the Constitution, had been given a 'transcendental position' by the Constitution, so that no authority functioning under the Constitution, including parliament exercising the amending power under Article 368, would be competent to amend the fundamental rights. The majority went even further and asserted that the amending process in Article 368 was merely 'legislative' and not 'constituent' in nature. This was the crux of the whole argument.

On the other hand, the minority upheld the power of Parliament to amend fundamental rights. The minority stuck to the arguments which had already been developed in *Shankari Prasad* and *Sajjan Singh.*

The question of amendment of fundamental rights came before the Court once again in *Kesarvanda Bharati* v. *State of Kerala* (AIR 1973 SC 1461) – The Court ruled by majority that parliament is competent to amend under Article 368 fundamental rights just as any other part of the Constitution, subject to the doctrine that the 'basic' or 'fundamental' features of the Constitution cannot be amended. The majority ruled that while Parliament can amend any constitutional

provision by virtue of Article 368, such a power if not absolute and unlimited and that the courts can still go into the question whether or not an amendment destroys a fundamental or basic feature of the constitution. An amendment which does so will be constitutionally invalid. The justification for this view is that Article 368 uses the expression 'amend', which has a restrictive connotation, and cannot comprise a fundamental change in the Constitution. The formulation 'amendment of the Constitution in Article 368 could not have the effect of destroying or abrogating the basic structure of the constitution' means that while fundamental rights entirely may not be regarded as non-amendable. Some of these rights may be characterized as constituting the 'basic' feature of the Constitution, and hence are non - amendable.

Therefore, while the *Golak Nath* formulation was rigid in so far as it rendered all fundamental rights non-amendable, the *Kesavanada* ruling is somewhat flexible, leaving it for the Court to decide from case to case which fundamental right is to be treated as a 'basic' feature. The right to property has not been treated as such and, therefore, it has been abrogated. On the other hand, the right to personal liberty (Article 21) or the right to equality (Article 14 and Article 15) may be regarded as 'basic' features of the Constitution.

The doctrine of 'basic' feature has not been very well established in Indian constitutional jurisprudence and has been reiterated in several cases - *Indira Nehru Gandhi* v. *Raj narain; Minerva Mills Ltd* v. *Union of India; Waman Rao* v. *Union of India* (AIR 1975 SC 2299; AIR 1980 SC 1789; AIR 1981 SC 271).

**iv. Judicial Review :**

Judicial review is a 'basic' feature of the Constitution. Depriving the Court of its power of judicial review would mean that the fundamental rights become non - enforceable. The US Constitution does not specifically provide for judicial review. But, 1803, in *Marbury* v. *Madison* (1 Cranch 137 (American Court)) – the Supreme Court of America asserted that it would review the constitutionality of the congressional Acts. Chief Justice Marshall, expounded the theory of judicial review of the constitutionality of Acts of Congress.

As Justice Khanna, emphasized in the case of *Kesavananda* :-

"As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened… Judicial review has thus become an integral part of our constitutional system."

In the case of *Minerva Mills*, Chief Justice Chandrachud, speaking for the majority, observed:

"It is the function of the Judges, nay their duty, to pronounce upon the validity of laws, If courts are totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are a writ in water. A controlled constitution will then become uncontrolled."

Chief Justice Ahmadi, – Speaking on behalf of a bench of seven judges in *L. Chandra Kumar* v. *Union of India* (AIR 1980 2AN WR 109) has recently observed:

"The Judges of the Supreme Court have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive to not, in the discharge of their functions, transgress constitutional limitations. We, therefore, hold that the power of judicial review over legislative action vested in the High Court under Article 226 and in this court, under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore the power of the High Court and the Supreme Court to test the constitutional validity of legislation can never be ousted or excluded."

The position now is that in respect of the power of Judicial review, the jurisdiction of the High Court's under Article 226 and Article 227 cannot be excluded even by a constitutional amendment. The same principle applies to the power of the Supreme Court under Article 32. Accordingly, the Supreme Court has declared unconstitutional clause 2(d) of Article 323 - A clause 3(d) of Article 323B, to the extent they exclude jurisdiction of the High Court's and the Supreme

Court under Article 226, Article 227, and Article 32. The Court has observed in this connection:

"The Jurisdiction conferred upon the High Court under Article 226 and Article 227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Court and Tribunals may perform a supplemental role in discharging the powers conferred by Article 226, Article 227 and, the Article 32 of the Constitution."

**4. The Supreme Court as interpreter of Fundamental Rights: -**

As Justice Bhagwati, observed In *State of Rajasthan* v. *Union of India* (AIR 1977 SC 1361):

"The Supreme Court is the 'ultimate interpreter' of the Constitution. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law".

As the interpreter of the fundamental rights provisions in the Constitution, the Court has, by and large, interpreted these provisions in liberal manner. The Court has laid emphasis on this aspect from time to time.

For instance, in *Pathumma* v. *State of Kerala* (AIR 1978 SC 771) -

The Court stated: 'This Court while acting as a sentinel on the Qui Vive to protect fundamental rights, guaranteed to the citizen of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society'. The court added in *Pathumma* that, 'in interpreting the constitution, the judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid'.

In interpreting the fundamental rights, the Supreme Court has displayed judicial creativity of a high order. Out of the innumerable creative opinions delivered by the court, a few are mentioned below. The high - water mark of judicial creativity was reached in such cases as *Golaknath, Kesavnanda Bharti* and *Maneka Gandhi*. The court does not seek to conceal its law creating role in

the area of constitutional jurisprudence. For example, in *Golak Nath,* Chief Justice Subba Rao claimed openly a law-making role for the Supreme Courts in the following words.

"Article 32 and Article 141 and Article 142 are couched in such wide and elastic terms as to enable this court to formulate legal doctrines to meet the ends of justice. To deny this power to the Supreme Court on the basis of some outmoded theory that the Court only finds the law but does not make it is to make ineffective the powerful instrument of Justice placed in the hands of the highest judiciary of this country".

**Conclusion:-**

The evolution of fundamental rights in India is discussed in this chapter in detail.

# CHAPTER II

## PROTECTION OF LIFE AND PERSONAL LIBERTY (ARTICLE 21)

# CHAPTER II

## PROTECTION OF LIFE ANDPERSONAL LIBERTY (ARTICLE 21)

An attempt is made to discuss how the Supreme Court started evolving Article 21 through various judgments by interpreting the Fundamental Rights in liberal way.

### INTRODUCION : ARTICLE 21

"No person shall be deprived of his life or personal liberty except according to procedure established by Law."

Prior to *Maneka Gandhi's* decision. Article 21 guaranteed to citizens only protection against the arbitrary action of the executive and not from legislative action. The state could interfere with the liberty by a valid law. But after the *Maneka Gandhi's* decision Article 21 now protects not only from the executive action but from the legislative action also. A person can be deprived of his life and personal liberty if two conditions are complied with first, there must be a law and second, there must be a procedure prescribed by that law, provided that the procedure is just , fair and reasonable ( AIR 1981 SC 746).

The Fifth Amendment of the American Constitution also provided that – "No person shall be deprived of his life and personal liberty, except according to the procedure established by law." The Fourteenth Amendment imposes a similar limitation on the State Authorities.

The right guaranteed in Article 21 is available to 'Citizens' as well as to 'Non-citizens'.

### PERSONAL LIBERTY: MEANING AND SCOPE PRIOR TO *MANEKA GANDHI'S* DECISION –

The meaning of the word "personal liberty" come up for consideration of the Supreme Court for the first time in *A. K. Gopalan v. Union of India* (AIR 1950 SC 88) the petitioner, *A. K. Gopalan,* a communist leader was detained under the

Preventive Detention Act – 1950. The Petitioner challenged the validity of his detention under the Act on the Grounds –

1. That this was violation of Article 19 (1) (d), Article 21 and Article 19 (5).
2. The restrictions must be reasonable under Article 19 (5).
3. That Article 19 (1) and Article 21 should be read together because Article 19 (1) dealt with substantive rights and Article 21 dealt with procedural rights.

In Article 21 “Procedure established by law” meant “Due procedure of Law” of the American Constitution which includes the principles of natural justice and since the impugned law does not satisfy the requirement of due process it is invalid.

Rejecting both the contention, the Supreme Court by the majority held that the “personal Liberty” in Article 21 mean nothing more than the liberty of the physical body, that is, freedom from arrest and detention without the authority of Law.

The majority took the view that Article 19 to 21 deals with different aspects of “Liberty”. Article 21 is guarantee against deprivation (total loss) of personal liberty while Article 19 afford protection against unreasonable restrictions (which is only partial control) on the right of movement. Freedom guaranteed by Article 19 can be enjoyed by a citizen only when he is a freeman and not if his personal liberty is deprived under a valid law.

In *Gopalan* the Supreme Court interpreted the law as State made law and rejected the plea that by the term ‘law’ in Article 21 meant not the State made law but ‘jus natural’ or the principal of natural justice.

Justice Fazaal Ali, however, in his dissenting judgment held that the Act was liable to be challenged as violating the provisions of Article 19. He gave a wide and comprehensive meaning to the words ‘personal liberty’ as consisting of freedom of movement and locomotion. Therefore, any law which deprives a person of his personal liberty must satisfy requirements of both the Article 19 and Article 21.

This interpretation in *Gopalan's case* has not been followed by the Supreme Court in its later decisions. In *Kharak Singh's case* (AIR 1963 SC 1295) it was held that 'Personal Liberty' was not only limited to bodily restraint or confinement to prisons only, Article 19 (1) deals with particular species or attributes of that freedom, 'Personal Liberty' in Article 21 takes in and comprise the residue.

The expression life means Human Life and not the life of an animal.

Finally in *Maneka Gandhi* v. *Union of India* (AIR 1978 SC 597) the Supreme Court has not only overruled *Gopalan's case* but has widened the scope of the words 'Personal Liberty' considerably.

**Justice Bhagwati said :**

"The attempt of the Court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction."

The Court laid down great stress on the procedural safeguards. The procedure must satisfy the requirement of natural justice, that is, it must be just, fair and reasonable.

In *Kharak Singh* v. *State of UP* (AIR 1963 SC 1295), it was held that domiciliary visits of the policemen were an invasion of personal liberty.

In *Munn* v. *Illinois* (1876 94 US 113), the provision equality prohibits the mutilation of the body or amputation of an arm or leg.

In *Govind* v. *State of MP* (AIR 1975 SC 1379) the Supreme Court held that, M. P. Police Regulations 855 and 856 authorising domiciliary visits were constitutional as they have the force of law.

In *Kharak Singh's case* (AIR 1963 SC 1295) the validity of a similar Police Regulation was challenged. The regulations were declared unconstitutional

because they did not have the force of law. On the other hand, in *Govind's* case the validity of similar Police regulations was upheld as they had the force of law.

**1. RIGHT TO TRAVEL ABROAD :**

In *Satwant Singh* v. *Assistant Passport Office, New Delhi* ( AIR 1967 SC 1836) the Supreme Court held that, the 'Right to travel abroad' was part of a person's 'Personal Liberty' within the meaning of Article 21. Person could not be deprived of his right to travel abroad except according to procedure established by law.

***MANEKA GANDHI'S CASE* – NEW DIMENSION :-**

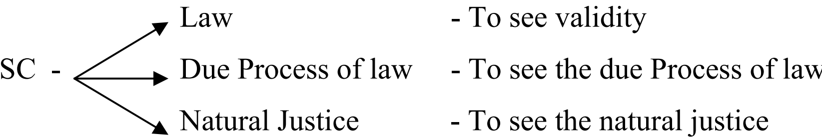
In *Maneka Gandhi's case,* the Petitioner's passport was impounded by the Central Government under section 10 (3) (c) of the Passport Act , 1967. The act authorized the government to do so if it was necessary 'In the interest of general public.' The Petitioner challenged the validity of the said order on the grounds that, section 10 (3) (c) was violation of Article 14, 19 (1) (a) and (g) and Article 21.

Thus Article 21 requires the following conditions to be fulfilled before a person is deprived of the property :-

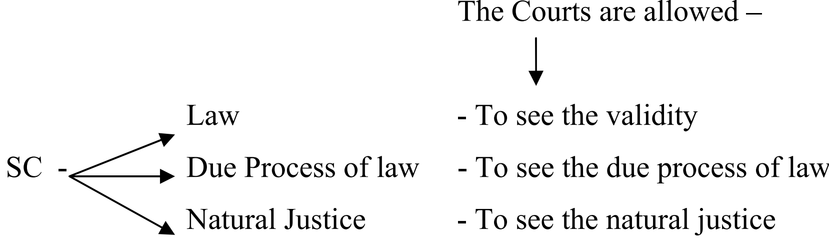
1. There must be a valid Law.
2. The Law must provide a procedure.
3. The procedure must be just, fair and reasonable.
4. The Law must satisfy the requirements of Article 14 and 19 i. e. it must be reasonable.

**PRIOR TO THE CASE OF *MANEKA GANDHI* :-**

The Courts were not allowed –



**AFTER THE CASE OF *MANEKA GANDHI* :-**




**Inter-relation of Article 14, Article 19 and Article 21**

**Old View**: In *Gopalan's case,* it was held that Article 19 and Article 21 dealt with different subjects. That so long as a law of preventive detention satisfies the requirements of Article 22 it would not be required to meet the challenges of Article 19.

**Present View:** In *Maneka Gandhi's case,* the Supreme Court has overruled the view expressed by majority in *Gopalan's case* and held that Article 21 is controlled by Article 19.

In *Sunil Batra* v. *Delhi Administration* (AIR 1978 SC 1675) Supreme Court held that after *Maneka Gandhi's case* the Court can look into the validity of the Law as well as procedure prescribed by Law.

In *Nand Lal* v. *State of Panjab* (AIR 1981 SC 2041) Court applying the *Maneka Gandhi's case* principle, held that the procedure adopted by the advisory board was arbitrary and illegal and consequently, the detention order was liable to be quashed.

It is true that, Article 21 is worded in negative terms but it is now well settled that Article 21 has both negative and affirmative dimension. Positive rights are very well conferred under Article 21. The following rights are held to be covered under Article 21.

## 2. RIGHT TO LIVE WITH HUMAN DIGNITY :

Thus in *Maneka Gandhi's case* the Court gave a new dimension to Article 21. It held that the right to live is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. Elaborating the same view the Court in *Francis coralie* v. *Union Territory of Delhi* (AIR 1981 SC 746) said that, the right to live is not restricted to mere animal existence. It means something more than just physical survival.

The Supreme Court in *people's Union For Democratic Rights* v. *Union of India* (AIR 182 SC 1473) held that non-payment of minimum wages to the workers employed in various Asiad Projects in Delhi was a denial to them of their right to live. The Supreme Court held that the non implementation by the private contractors and non-enforcement by the State Authorities of the provisions of various labour laws violated the Fundamental Right of workers i. e. to live with human dignity.

They had Fundamental Right to minimum wages, drinking water, shelter, crèches, medical aid and safety in the respective occupations covered by the various welfare legislations.

In *State of Maharashtra* v. *Chandrabhan* (1983 (3) SCC 387) the Supreme Court struck down a provision of the Bombay Civil Service Rules, 1959 which provided for payment of only nominal subsistence allowance of Rs. 1 per month to a suspended Government Servant upon his conviction during the pendency of his appeal as unconstitutional on the ground that it was violative of Article 21.

In *Neeraja Chaudhari* v. *State of M P* (AIR 1984 SC 1099), Justice Bhagwati held that under the Bonded Labour System (Abolition) Act, 1976 it is not enough merely to identify and release bonded laborers but it is more important that they must be rehabilitated as without rehabilitation they would be driven to poverty, helplessness and despair thus into serfdom once again.

In *Chandra Raja Kumari* v. *Police Commissioner Hyderabad* (AIR 1998 AP 302) it has been held that the right to live includes right to live with human

dignity or decency and, therefore, holding of beauty contest is repugnant to dignity or decency of women and it offends Article 21. The Government is empowered to prohibit the contest as objectionable performance under Section 3 of the Andra Pradesh Objectionable Performances Prohibitions Act, 1956, if it is grossly indecent or obscene or intended for blackmailing.

**NON-CITIZENS ALSO ENTITLED TO RIGHT TO LIFE (CHAKMAS MIGRANTS CASE):**

In *National Human Rights Commission* v. *State of Arunachal Pradesh* (1996 (1) SCC 742) the Supreme Court has held that the Sate is bound to protect the life and liberty of every human being whether he is citizen or non-citizen. In this case Public Interest Litigation was filed by the National Human Rights Commission under Article 32 for enforcing the rights under Article 21 of about 65,000 Chakmas. The facts of the case was that a large number of Chakmas who migrated from East Pakistan (now Bangladesh) in 1964, first settled in Asam and Tripura and became Indian Citizen in due course. Since the State of Assam had expressed its inability to rehabilitate all of them then about 65,000 of them were shifted to the State of Arunachal Pradesh. They have been residing in the State for more than 3 decades and have raised their families in the State. Their children were born in India. They have developed close social, religious and economic ties. The All Arunachal Pradesh Student Union (AAPSU) had threatened to forcibly expel them from the State. Since all efforts to tackle the problem of their security had failed, the National Human Rights Commission was compelled to approach the Supreme Court for appropriate relief.

The Supreme Court held that the State is bound to protect life and liberty of every being whether citizen or non-citizen. It is the constitutional duty of the State to safeguard the life, health and well being of Chakmas. The Court directed the State of Arunachal Pradesh to take all possible steps to ensure safety of their life and personal liberty. They shall be protected and any attempt to forcibly evict or drive them out of state by All Arunachal Pradesh Student Union must be repelled by force considered necessary to carry out the direction of the Court.

The Court also directed the State to pay to the Petitioner, Human Rights Commission, Rs. 10,000/- as cost of the petition for bringing the matter before the Court.

**3. RIGHT TO LIVELIHOOD:**

In *Sodon Singh* v. *New Delhi Municipal Committee* (AIR 1989 SC 1988) the Supreme Court held that the right to carry on any trade or business is not included in the concept of life and personal liberty. Article 21 is not attracted in the case of trade and business.

In *Delhi Development Horticulture Employees Union* v. *Delhi Administration* (AIR 1992 SC 789) the Supreme Court held that workmen employed on daily wages under the Jawahar Rozgar Yojna has no right to automatic regulations even though they have put in work for 240 or more days.

In *D. K. Yadav* v. *J. M. A*. (1993 (3) SCC 258) the Supreme Court has held that the right to life enshrined under Article 21 includes the right to livelihood and termination of the service of a worker without giving him reasonable opportunity of hearing is unjust, arbitrary and illegal. The procedure prescribed for depriving a person of livelihood must meet the requirement of Article 14, that is, it must be right, just and fair and not arbitrary, fanciful or oppressive.

In *All India Imam Organisation* v. *Union of India* (AIR 1993 SC 2086) the Supreme Court has held Imams who are in charge of religious activities of Mosque are entitled to emoluments even in absence of statutory provisions in Wakf Act, 1954. In a number of cases it has been held that right to life enshrined in Article 21 means right to live with human dignity.

In *Olga Tellis* v. *Bombay Muncipal Corporation* (AIR 1986 SC 180), popularly known as the ‘Pavement Dwellers Case’, the Supreme Court has finally ruled that the word ‘life’ in Article 21 include the ‘right to livelihood’ also. The Court said that “No person can live without the means of livelihood. If the right to livelihood is not treated as a part of the Constitutional Right to life the easiest ways of depriving a person of his right to life would be to deprive him of his

means of livelihood. Article 39 (a) and 41 require the State to secure to the citizen an adequate means of livelihood and the right to work.

**SUBSISTANCE ALLOWANCE:**

*Caption M Paul Anthony* v. *Bharat Gold Mines Ltd.* (AIR 1999 SC 1416)

Employment's right to subsistence allowance during his suspension from service pending an enquiry, as considered as a feature of his fundamental right to life. In this case the respondent was suspended pending enquiry in a criminal offence. On his acquittal the Court observed that, suspension order passed by the corporation is only pending enquiry in to criminal offence and it merges with the order of acquittal or discharge.

**RIGH OF ELECTRICITY IS RIGHT TO LIFE:**

In *M. K. Acharaya* v. *C. M. D. W. B. S. E. Distribution Co. Ltd.* (AIR 2008 Kal 47) the Court held that the right to electricity is right to life and liberty in terms of Article 21. In modern days no one can survive without electricity.

**4. RIGHT TO SHELTER:**

In *Chameli Singh* v. *State of U.P.* (1996 (2) SCC 549) it has been held that the right to shelter is a fundamental right under Article 21. In any organized society, the right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to benefit himself. Right to live includes in any society the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society. All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights and Convention or under the Constitution of India cannot be exercised without the basic human rights. Shelter for human being, therefore, is not a mere protection of his life and limb. It is home where he had opportunity to grow physically, mentally, intellectually and spiritually. Right to shelter includes adequate living place, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civil amenities like roads etc. so as to have easy

access to his daily avocation. The right to shelter does not mean a mere right to a roof over one's head but right to the entire infrastructure necessary to live and develop as a human being.

**5. RIGHT TO HEALTH AND MEDICAL ASSISTANCE :**

In *Parmananda Katara* v. *Union of India* (AIR 1989 SC 2039) it has been held that it is professional obligation of all doctors, whether government or private, to extend medical aid to the injured immediately to preserve life without waiting legal formalities to be complied with by the police under Criminal Procedure Code. Article 21 casts the obligation on the state to preserve life. It is the obligation of those who are in charge of the health of the community to preserve life so that the innocent may be protected and the guilty may be punished. Social law do not contemplate death by negligence. No law or state action can intervene to delay the discharge of this paramount obligation of the members of the medical profession. The Court directed that the decision of the Court must be published in all journals reporting decisions of this Court and adequate publicity highlighting these aspects should be given by the national media. The Medical Council must send copies of this judgment to every medical college affiliated to it.

In *Paschim Bang Khet Mazdoor Samiti* v. *State of West Bengal* (1996 (4) SCC 37) following *Paramanad Katara's* ruling the Supreme Court has held that denial of medical aid by government hospital to an injuried person on the ground of non-availability of beds amounted to violation of right to life under Article 21. The Petitioner, Hakim Singh had fallen from a running train and had suffered serious head injury and brain hemorrhage. He was admitted in a private hospital as an indoor patient and he had incur an expenditure of Rs. 17,000/- in his treatment. The Court directed the State to pay Rs. 25,000/- to the petitioner as compensation.

In *Consumer Education and Research Centre* v. *Union of India* (1995 (3) SCC 42) Supreme Court held that – the life of the workman is meaningful and purposeful with dignity of person. It has a much wider meaning which includes

right to livelihood, better standard of life, hygienic conditions in workplace and leisure.

The Court has laid down following guidelines to be followed by all asbestos industries (in the country there were about 74 asbestos industries).

1. All asbestos industries must make health insurance of workers employed.

2. Every worker suffering is entitled for compensation of Rs. 1,00,000/-. All asbestos industries must maintain the health record of every worker up to a minimum period of 40 years from the beginning of employment or 15 years after retirement or cessation of the employment whichever was later.

3. "Membrane Filter Test" to detect asbestos fiber should be adopted by all the factories at par with Metalliferrous Mines Regulation, 1961 and Vienna Convention.

4. All the Factories whether covered by the Employee's State Insurance Act or workmen's Compensation Act or otherwise, should insure health coverage to every worker.

5. To review after every 10 years.

6. The standards of permissible exposure limit value of fiber in tune with the international standard.

7. The authorities to consider inclusion of small scale industries engaged in the manufacture of asbestos or its ancillary products.

In *Kirloskar Brothers Ltd.* v. *Employee's State Insurance Corporation* (1996 (2) SCC 682) the Supreme Court held that private industries must take care of the workmen and they must provide facilities and opportunities for health and vigor.

In *State of Panjab* v. *Mohinder Singh Chawla* (AIR 1997 SC 1225) the right to life in Article 21 includes the right to health and the State employees are entitled to medical reimbursement of expenses for treatment and room rent

charges both in approved specialized hospital outside the Government hospitals. Since the facility of the treatment was not available in the State and the patient was sent for treatment in the AIIMS at New Delhi. The Court held that the State has to bear the expenses for the Government servant's treatment while in service or after retirement from service.

In *Vincent Parikurlangara* v. *Union of India* (1987 (2) SCC 165) the Supreme Court held that, the right to maintenance and improvement of public health is included in the right to live with dignity enshrined in Article 21. A health body is the very foundation of all human activities. In a welfare State this is the obligation of the State to ensure the creation and sustaining of conditions congenial to good health.

**COMPENSATION FOR MEDICAL NEGLIGENCE: CHILD BORN DESPITE STERILISATION:**

In *Naval* v. *Union of India* (AIR 2009 RAJ 63) the petitioner gave birth to the child despite sterilization operation. It was prima facie negligence on the part of the doctor. The petitioner was entitled to compensation.

**6. ENVIRONMENTAL RIGHTS AND ARTICLE 21:-**

**RIGHT TO GET POLLUTION FREE WATER AND AIR"**

In *Subhas Kumar* v. *State of Bihar* (AIR 1991 SC 420) it has been held that Public Interest Litigation is maintainable for ensuring enjoyment of pollution free water and air which is included in the 'right to live' under Article 21.

**PROTECTION OF ECOLOGY AND ENVIRONMENTAL POLLUTION:**

In *Rural Litigation and Entitlement Kendra* v. *State of Uttar Pradesh* (1985 (2) SCC 431) the Court ordered the closure of certain lime stone quarries on the ground that there were serious deficiencies regarding safety. The Court appointed a committee suggested for the purpose of inspecting certain lime stone quarries. The Committee suggested the closure of certain categories of stone quarries having regard to adverse impact of mining operations therein. Large

scale pollution was caused by lime stone quarries adversely affecting the safety and health of the people living in the area.

In *Shri Ram Food and Fertilizer* v. *Union of India* (1986 (2) SCC 176) the Supreme Court directed the company manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in its neighborhood, to take all necessary safety measures before reopening the plant. There was a leakage of Chlorine gas from the plant resulting in death of one person and causing hardship to workers and residents of the locality. This was due to the negligence of the management in maintenance and operation of the caustic chlorine plant of the company. The matter was brought before the Court through Public Interest Litigation. The management was directed to deposit a sum with the Registrar of the Court of Rs. 20,00,000/- by way of security for payment of compensation claims. In addition bank guarantee for a sum of Rs. 15,00,000/- was also directed to be deposited which shall be paid in case of any escape of Chlorine gas within a period of 3 years from the date of the judgment resulting in death or injury to any workmen or any person living in the vicinity. Subject to this condition the Court allowed the partial reopening of the plant.

In *M. C. Mehta* v. *Union of India* (1987 (4) SCC 463) the Supreme Court ordered the closure of tanneries at Jammu near Kanpur, polluting the river Ganga. The matter was brought to the notice of the Court by the petitioner, a social worker, through Public Interest Litigation.

The Court said that notwithstanding the comprehensive provisions contained in the Water (Prevention and Control of Pollution) Act and the Environmental (Protection) Act, no effective steps were taken by the Government to stop the grave public nuisance caused by the tanneries at Jammu (Kanpur). In the circumstances, it was held that the Court was entitled to order the closure of tanneries unless they took steps to set up treatment plants.

In *M. C. Mehta (2)* v. *Union of India* (1988 (1) SCC 171) the Petitioner brought a Public Interest Litigation against Ganga water pollution requiring the Court to issue appropriate directions for the prevention of Ganga water pollution. He claimed that although Parliament and the State Legislatures have passed

several laws imposing duties on the Central and State Boards constituted under the Water (Prevention and Control Of Pollution) Act and the municipalities under the Uttar Pradesh Nagar Palika Adhiniyam, they have just remained on paper and no proper action had been taken pursuant thereto. The Supreme Court held that the petitioner although not a riparian owner (living on the river side) was entitled to move the Court for the enforcement of various statutory provisions which impose duties on the municipal and other authorities.

The above directions apply mutatis mutandis to all other Mahapalikas and Municipalities which have the jurisdiction over the areas through which the river Ganga flows.

In *Indian Council For Enviro-Legal Action* v. *Union of India* (1996 (3) SCC 212) the Supreme Court has held that if the action of private corporate bodies a person's fundamental right is violated the Court would not accept the argument that it is not 'State" within the meaning of Article 12 and therefore action cannot be taken against it. If the Court finds that the Government or Authorities concerned have not taken the action required of them by law and this resulted in violation of right to life of the citizens it will be the duty of the Court to intervene. In this case an environmentalist organization filed a Writ Petition under Article 32 before the Court complaining the plight of people living in the vicinity of chemical industrial plants in India and requesting for appropriate remedial measures.

In *M. C. Mehta* v. *Union of India (Taj Mahal Case)* (1996 (4) SCC 150) the Supreme Court ordered the shifting of 168 hazardous industries operating in Delhi as they were causing danger to the ecology and directed that they be reallocated in the Master Plan for Delhi. The Court directed these industries to close down with effect from 30.11.1996. The Court gave necessary specific direction for the rights and benefits of the workmen employed in these industries.

In *Council for Enviro-legal Action* v. *Union of India* (1996 (5) SCC 281) the Court issued appropriate orders and directions for implementing and enforcing the law to protect ecology. The petition was filed by a registered voluntary organization working for the cause of environmental protection in

India as a Public Interest Litigation complaining ecological degradation in coastal areas. It was contented that the Government was not implementing its own Notification which was issued to regulate activities in the said zone. It was said that there was blatant violation of this Notification and industries were being set up causing serious damage to the environment and ecology of that area. It was held the matter be raised before the concerned State High Courts which shall issue necessary orders or directions.

In *Vellore Citizen's Welfare Forum* v. *Union of India* (1996 (5) SCC 650) the petitioner, Vellore Citizen's Welfare Forum, filed a writ petition by way of Public Interest Litigation drawing the attention of the Court towards the pollution caused by enormous discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu. The tanneries were discharging untreated effluent into agriculture fields, Waterways, open lands and river water unfit for human consumption, contaminating the subsoil water and had spoiled the physical and chemical properties of the soil making it unfit for agriculture purposes.

The Supreme Court held that such industries though are of vital importance to the country's development but they cannot be allowed to destroy the ecology, degrade the environment and pose a health hazard and cannot be permitted to continue their operation unless they set up pollution control devices. The Court held that the "precautionary principle" and the "Polluter Pays Principle", is essential feature of "sustainable development".

In *S. Jagannath* v. *Union of India* (AIR 1997 SC 811) the Court held that prohibition from using the waste land, wet lands for prawn farming and the constitution of a National Coastal Management Authority to safeguard the marine life and coastal areas is essential. It was contended that a large member of private and multinational companies have started setting up Shrimp farm in the coastal areas of the country causing serious threat to the environment and ecology of these areas.

The Court held that setting up of Shrimp (small fish) culture farms within the prohibited areas and in ecology fragile coastal areas have adverse effect on

environment and coastal ecology and economics and, therefore, they cannot be permitted to operate. Shrimp culture industry is neither 'directly related to waterfront' nor 'directly needing foreshore facilities' and cannot be allowed to be set up anywhere in the Coastal Regulation Zone under CRZ Notification. The damage caused to ecology and economics by the aquaculture farming is higher than the earning from the sale of coastal aquaculture produce. The Court further held that the traditional type of Shrimp farming is environmentally benign and pollution free. But the modern technological type of farming using chemical to create more produce create pollution and degrading effect on the environment and ecology and therefore, such type of Shrimp Farming cannot be permitted.

**MINING IN ARIVALLI HILLS RANGE BANNED:**

In *M. C. Mehta* v. *Union of India* (AIR 2004 SC 4016) the court made it clear that the mining activity can be permitted only on the basis of sustainable development and on compliance of stringent conditions. The Arivalli Hill Range has to be protected at any cost. The Court said that the development and protection of environment are not enemies. Development is possible on principles of sustainable development. A balance has to be maintained. If an activity is allowed to go ahead there may be irreparable damage to the environment and if it is stopped there may be irreparable damage to the economic interest. In case of doubt, however, protection of environment has to be precedence over the economic interest. Precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not necessary that there should be direct evidence of harm to the environment.

**IN THE NAME OF URBAN DEVELOPMENT ENVIRONMENT CANNOT BE DESTROYED:**

In *Intellectual Forum Tirupathi* v. *State of Andra Pradesh* (AIR 2006 SC 1350), the Supreme Court has held that under Article 21 and Article 51A it is the constitutional obligation of the Government to protect and preserve the environment. In the case the appeal was filed in the Supreme Court by a registered society, called Intellectual Forum, against the decision of the High Court of Andra Pradesh dismissing their Writ Petition. They contented that the

High Court had given precedence to the economic growth by the two tanks situated in the suburbs of Tirupathi Town which is a world renowned pilgrim centre and the only source of water for that area. The lakhs of pilgrims visit Tirupathi every year. The Government of Andra Pradesh issued orders for alienation of Avilala tank bed area to Andra Pradesh Housing Board for housing purposes. The society filed a writ petition in the High Court challenging the Government orders allocating tank bed area land to Andra Pradesh Housing Board. On behalf of the Government, it was contented that the High Court dismissed the petition on the ground that there was no illegality in the action of the Government. The Supreme Court reversed the decision of the High Court and stayed the Government order for alienating lands in the vicinity of the above tanks and directed the board to stop further construction. The Court held that the above tanks are important for protection of environment and supply of water to those areas. The Government is responsible to protect and preserve historical tanks on the basis of 'sustainable development' and 'public trust' and under Article 21 and 48A and 51A. It is the Constitutional obligation of the Government. 'Sustainable Development' as defined in the World Commission on Environment and Development Report, means development that meets the needs of the present without compromising ability of future generations to meet their own needs.

## 7. PRISONER'S RIGHT AND ARTICLE 21:

In *D. B. M. Patnaik* v. *State of Andra Pradesh* (AIR 1974 SC 2092) the petitioners, who were naxalite under trial prisoners, were undergoing the sentence in the Central Jail, Vishakapatnam. They contented that the armed police guards posted around the jail and the live wire electrical mechanism fixed on the top of the jail was an infringement of their right to 'life and personal liberty' guaranteed by Article 21. The Court said, 'A convict has no right, more than anyone else, to dictate, where guard to be posted to prevent the escape of prisoners. The installation of live wire mechanism does not offend their right. It is a preventive measure.

In *Babu Singh* v. *State of Uttar Pradesh* (AIR 1978 SC 527), it was held that 'refusal to grant bail' in a murder case without reasonable ground would amount to deprivation of personal liberty under Article 21.

**RIGHT TO FREE LEGAL AID:**

In *M. H. Hoskot* v. *State of Maharashtra* (AIR 1978 SC 1548), the Supreme Court applied the ruling of *Maneka Gandhi's case.* Every step that makes the right of appeal fruitful is obligatory and every action or inaction which nullifies it is unfair and therefore offends Article 21. There are two ingredients of a right of appeal:

1. Service of a copy of a judgment to the prisoner in time to enable him to file an appeal, and

2. Provision of free legal service to a prisoner who is indigent or otherwise disabled from securing legal assistance.

These are State's responsibility under Article 21. Any Jailor who by indifference withholds the copy violates Article 21 and may make the imprisonment illegal. Jail Manuals should be updated and State must provide a copy of the judgment. Justice Krishna Iyer declared –'This is the State's duty and not Government's charity'.

In *State of Maharashtra* v. *M. P. Vashi* (1995 (5) SCC 730), the Court has widened the scope of the free legal aid. The Court held it is necessary to have well trained lawyers in the country. The Government must afford grants in aid to duly recognized private law colleges like government recognized law colleges.

In *Suk Das* v. *Union Territory of Arunachal Pradesh* (1986 (5) SCC 401) the Court held that failure to provide free legal aid to an accused at the State cost, unless refused by the accused, would vitiate the trial. He need not apply for the same. Free legal aid at the State cost is a fundamental right of a person accused of an offence and right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. This right cannot be denied to him on the ground that he has failed to apply for it. The Magistrate is under an obligation to

inform the accused of this right and inquire that – whether he wishes to be represented on the State's cost.

The appellant was tried and sentenced to two years imprisonment under Section 506 read with Section 34 of Indian Penal Code. He was not represented at the trail by any lawyer by reason of his inability to afford legal representation. The High Court held that the trial was not vitiated since no application was made by him. On appeal the Supreme Court set aside the conviction on the ground that he was not provided legal aid at the trial which was violation of Article 21.

In *Veena Sheti* v. *State of Bihar* (AIR 1983 PAT 399), the Free Legal Aid Committee Hazaribagh brought to the notice of the Court through a letter about the illegal detention of certain prisoners in the Hazaribagh Jail for two or three decades without any justification. At the time of their detention prisoners were declared insane but afterwards they became sane but due to the inaction of authorities to take steps to release them they remained in jails for 20 to 37 years. It was held that the prisoners remained in jail for no fault to their but because of callous and lethargic attitude of the authorities and therefore entitled to be released forthwith.

**RIGHT AGAINST SOLITARY CONFINEMENT:**

In *Sunit Batra (No 1)* v. *Delhi I Administration* (AIR 1980 SC 1579), the Court held that continuously keeping a prisoner in fetters day and night reduces the prisoner from a human being to an animal and that this treatment was cruel and unusual.

**RIGHT TO SPEEDY TRIAL:**

In *Hussainara Khatoon (No.1)* v. *Home Secretary, State of Bihar* (AIR 1979 SC 1360), a petition for a writ of Habeas Corpus was filed by number of under-trial prisoners who were in jails in the State of Bihar for years awaiting their trial. The Supreme Court held that, "right to a speedy trial" a fundamental right is implicit in the guarantee of life and personal liberty enshrined in Article 21. Speedy trail is the essence of criminal justice. In United States speedy trial is

one of the constitutionally guaranteed right under the Sixth Amendment. Justice Bhagwati held that, although unlike the American Constitution speedy trail is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21. No procedure which does not ensure a reasonable quick trial can be regarded as 'reasonable, fair or just'. For this reason the Court ordered the Bihar Government to release forthwith the under-trial prisoners on their personal bonds.

In *Husianara Khatoon (No2)* (AIR 1979 SC 1377) *and Husinara Khatoon (No 3) cases,* the Court reiterated the same view.

In *Abdul Rahiman Antuley* v. *R. S. Nayak* (AIR 1992 SC 1630), the Supreme Court has laid down detail guidelines for speedy trial of an accused in a criminal case but it declined to fix any time limit for trial of offences. The burden lies on the prosecution to justify and explain the delay. The court held that right to speedy trail flowing from Article 21 is available to accused at all stages namely the stage of investigation, inquiry, trial, appeal, revision and retrial.

The concerns underlying the right to speedy trial from the point of view of the accused are:

1. The period of remand and pre-conviction detention should be as short as possible.

2. The worry, anxiety, expense and disturbance to his vocation and peace resulting from an unduly prolonged investigation, inquiry or trial shall be minimal; and

3. Undue delay may result in impairment of the ability of the accused to defend himself whether on account of death, disappearance or non availability of witnesses or otherwise.

In *Raghubir Singh* v. *State of Bihar* (1986 (4) SCC 481), the Court held that the right of a speedy trial is one of the dimensions of the fundamental right to life and liberty guaranteed by Article 21. But the question whether the right to speedy trial was infringed depends upon various factors. Was the delay owing to the

nature of the case? Was the delay caused by the prosecuting agency? Was it due to the tactics of the defence? Etc.

In *Sunil Batra (No2)* v. *Delhi Administration* (AIR 1980 SC 1579), it was held that the practice of keeping under-trails with convicts in jails offended the test of reasonableness in Article 19 and fairness in Article 21. The under-trials are presumed innocent until convicted and if they are kept with criminals in jail it violates the test of fairness of Article 21.

**DELAY IN SPEEDY JUSTICE VIOLATES ARTICLE 21:**

In *Moses Wilson* v. *Karturba* (AIR 2008 SC 379), the Supreme Court expressed the concern in delay in disposal of cases and directed the concerned authorities to do needful. In this case, a suit was filed in 1947 for a sum of Rs. 7000/- and continued for 60 years and had not been disposed of until now. The Court expressed deep concern at the delay in disposing of cases in courts. The Court remarked because of delay in disposal of cases people of this country are losing faith in the Judiciary. This situation should be set right as soon as possible.

In *Vakil Prasad Singh* v. *State of Bihar* (AIR 2009 SC 1822), the court has again emphasized the need for speedy investigation and trial and of constitutional protection enshrined in Article 21.

**RIGHT AGAINST HAND CUFFING:**

In *Prem Shankar* v. *Delhi Administration* (AIR 1988 SC 1535), the Supreme Court added yet another projectile in its armoury to be used against the war for prison reforms and prisoners rights. The Court held handcuffing is inhuman and unreasonable.

In *Sunil Gupta* v. *State of Madhya Pradesh* (1990 (3) SCC 119), the petitioners were educated person and social workers, who were remanded to judicial custody and were taken to court from jail and back from court to the prison by the escort party handcuffed. They had staged a 'dharana' for a public cause and voluntarily submitted themselves for arrest. They had no tendency to escape from the jail. In fact, they even refused to come out on bail but chose to

continue in prison for the public cause. It was held that the act of handcuffing was violating Article 21.

In *Citizen for Democracy* v. *State of Assam* (1995 (3) SCC 743), the Supreme Court expressed serious concern over the violation of the law laid down by that Court in *Prem Shankar Shukla's case* against handcuffing of under trail or convicted prisoners by the police authorities. In the instance case, Mr. Kuldip Nayar an eminent journalist in his capacity as president of "Citizen For Democracy" through a letter brought out to the notice of the court that the 7 TADA detunes lodged in the hospital in the State of Assam were handcuffed and tied with a long rope to check their movement. Security guards were also posted outside the hospital. The Court treated the letter as a petition under Article 32 and held that handcuffing and in addition tying with the ropes of the patient – prisoners who are lodged in the hospital is inhuman and in violation of human rights guaranteed to an individual under international law and the law of the land.

**RIGHT AGAINST INHUMAN TREATMENT:**

In *Kishre Singh* v. *State of Rajasthan* (AIR 1981 SC 625), the Supreme Court held that the use of "Third Degree" method by police is violative of Article 21 and directed the Government to take necessary steps to educate the police so as to inculcate a respect for the human person. The court also held that the punishment of solitary confinement for a long period from 8 to 11 months and putting bar fetters on the prisoner in jail for several days on flimsy ground like 'loitering in the prison', 'behaving insolently and in an uncivilised manner', 'tearing of his history ticket' must be regarded as barbarous and against human dignity and hence violative of Article 21, Article 19 and Article 14. Torture and ill – treatment of women suspects in police lockups has been held to be violative of Article 21. The Court gave detail instruction to concerned authorities for providing security and safety in police lockup and particularly to women suspects.

Female suspect should be kept in separate police lockups and not in the same in which male accused are detained and should be guarded by female constables. The Court directed the I. G. Prisons and State Board of Legal Aid

Advice Committee to provide legal assistance to the poor and indigent accused (male and female) whether they are under – trial or convicted prisoners, *Sheela Barse* v. *State of Maharashtra* (AIR 1983 SC 378).

**RIGHT TO MEMPBERS OF PROTECTIVE HOMES :**

In *Vikram Deo Singh Tomar* v. *State of Bihar* (AIR 1988 SC 1782), through a Public Interest Litigation it was brought to the notice of the Court that the female inmates of the 'Care Home Patna' were compelled to live in inhuman conditions in an old ruined building. They are illiterate and are provided with insufficient and poor quality food and no medical attention is afforded to them. The Supreme Court held that, 'the right to live with human dignity' is the fundamental right of every citizen and the State is under duty to provide at least the minimum conditions ensuring human dignity. Accordingly the Court directed the State to take immediate steps for the welfare of inmate of 'Care Home Patna'. Pending construction of new building, the Court directed that the existing building must be renovated and sufficient amenities by way of living rooms, bathrooms and toilets within the building and adequate water and electricity etc., must be provided. The Court also directed the State to appoint a full time Superintendent to take care of the home and to ensure that a doctor visits the home daily.

In *S. R. Kapoor* v. *Union of India* (AIR 1990 SC 752), where through Public Interest Litigation mismanagement of hospital for mental disease located at Shadara in Delhi was brought to the notice of the Court. The Court directed that the Government of India to take over its management from Delhi Administration and to take steps to improve its working on the lines of institution run by NIMHANS at Bangalore.

**RIGHT AGAINST DELAYED EXECUTION :**

In *T. V. Vatheeswaran* v. *State of Tamilnadu* (AIR 1981 SC 643), two Judge Bench of the Supreme Court held that, delay in execution of death

sentence exceeding 2 years would be sufficient ground to invoke the protection of Article 21 and the death sentence would be commuted to life imprisonment.

In *Sher Singh* v. *State of Panjab* (AIR 1983 SC 4635), the three Judge Bench of the Supreme Court agreed with this view that prolonged delay in the execution of a death sentence was an important consideration for invoking Article 21 for judging whether sentence should be allowed to be executed or should be converted into sentence of imprisonment. Prolonged detention to await the execution of a sentence of death is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the death sentence. However, the Court held that this cannot be applied as a rule in every case and each case should be decided on its own facts. The Court should consider whether the delay was due to the conduct of the convict (where he pursues series of legal remedies), the nature of offence, its impact on the society, its likelihood of repetition, before deciding to commute the death penalty into a sentence of life imprisonment.

In the instance case, the delay was found to be due to the conduct of the convict and therefore it was held that the death sentence was not liable to be quashed. Accordingly, the Court overruled the decision in *T. V. Vatheeswaran* v. *State of Tamil Nadu.*

But where there is delay in execution of death sentence of more than 2 years and the conduct and behavior of the accused in the jail, evident from the report of the jail authorities show that he was showing genuine repentance it was held that the death sentence could be commuted to life imprisonment in *Javed Ahmad* v. *State of Maharashtra* (AIR 1985 SC 231).

Finally, in *Triveni Beg* v. *State of Gujrat* (AIR 1989 SC 142), the five Judge Bench of the Supreme Court has set the matter at rest and held that undue long delay in execution of the death sentence will entitle the condemned person to approach the Court for conversion of death sentence into the life imprisonment, but before doing so the Court will examine the nature of delay and circumstances of the case. No fixed period of delay could be held to make the sentence of death in executable. In the present case the death penalty of the accused was converted into life imprisonment.

In *Madhu Mehta* v. *Union of India* (1989 (4) SCC 62), the mercy petition of the petitioner who was sentenced to death was pending before the President of India for about 8 to 9 years. The matter was brought to the notice of the Court by Madhu Mehta, the National Convener of death of Hindustani Andolan. Following Triveni Ben's decision the Court directed the death sentence to be commuted to life imprisonment as there were no sufficient reasons to justify such a long delay.

**RIGHT TO INTERVIEW:**

In *Francis Coralis* v. *Union Territory of Delhi* (AIR 1981 SC 746), the Supreme Court held that the right of detune to have interview with his lawyer and family member is part of his 'personal liberty' guaranteed by Article 21 and cannot be interfered with except in accordance with reasonable, fair and just procedure established by law. The Court held that the provisions of the COFEPOSA which permitted only one interview in a month to detune with members of his family were violation of Article 14 and Article 21 are unconstitutional and void.

**FAIR TRIAL INCLUDES FAIR INVESTIGATION:**

In *Nirmal Singh Kahlon* v. *State of Punjab* (AIR 2009 SC 984), the Court has held that fair trial includes fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental rights of an accused under Article 21. But the State has a larger obligation, i. e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime thus is equally entitled to a fair investigation.

**8. SENTENCE OF DEATH AND ARTICLE 21:**

In *Jagmohan Singh* v. *Uttar Pradesh* (AIR 1973 SC 947), the petitioner challenged the validity of death sentence on the ground that it was violative of Article 19 and 21 because it did not provide any procedure. It was contended that the procedure prescribed under Criminal Procedure Code was confined only to findings of guilt and not awarding death sentence. The Supreme Court held that the choice of awarding death sentence is done in accordance with the procedure

established by the law. The Judge makes the choice between capital sentence or imprisonment of life on the basis of circumstances and facts and nature of crime brought on record during trail. Accordingly, the Court held that capital punishment was not violative of Articles 14, 19 and21 and was therefore constitutionally valid.

But in the case of *Rajendra Prasad* v. *State of Uttar Pradesh* (AIR 1979 SC 916), Justice Krishna Iyer, held that capital punishment would not be justified unless it was shown that the criminal was dangerous to the society. He held that giving discretion to the Judge to make choice between death sentence and life imprisonment on "special reason" under Section 354 (3) of Criminal Procedure Code, would be violative of Article 14 which condemns arbitrariness. He pleaded for the abolition of death penalty an retention of it only for punishing "white collar offences".

Justice Sen in his dissenting judgment, held that the question is to be decided by Parliament and not by the Court. It is submitted that the minority judgment is correct because – after the amendment in the Criminal Procedure Code and the decision in *Jagmohan Singh's* case the death penalty is only an exception and the life imprisonment is the rule. The discretion to make choice between the two punishments is left to the Judges and not to the Executive.

In *Bachan Singh* v. *State of Punjab* (AIR 1980 SC 898), the Supreme Court (Justice Bhagwati Dissenting) has overruled *Rajendra Prasad's* decision and has held that the provision of death penalty under Section 302 of Indian Penal Code as an alternative punishment for murder is not violative of Article 21. The death penalty for the offence of murder dose not violate the basic feature of the Constitution. The International Covenant of Civil and Political Rights to which India has become party in 1979 do not abolish imposition of death penalty in all circumstances. All that is required is that –

1. Death penalty should not be arbitrarily inflicted.

2. It should be imposed only for most serious crimes.

In *Deena* v. *Union of India* (1983 (4) SCC 645), the constitutional validity of section 354 (5) of Criminal Procedural Code, 1973 was challenged on the ground that hanging by rope as prescribed by this section was barbarous, inhuman and degrading and therefore violative of Article 21. It was urged that State must provide a humane and dignified method for executing death sentence. The Court unanimously held that the method prescribed by Section 354 (5) for executing death sentence by hanging by rope dose not violate Article 21. Relying on the report of U K Royal Commission, 1949, the opinion of the Director General of Health Services of India, the 35th report of the Law Commission, opinion of Prison Advisors and Forensic medicine, the Court held that hanging by rope is the best and least painful method of carrying out the death sentence than any other methods. The Judges declared that neither electrocution, nor lethal gas, or shooting, nor even the lethal injunction has "any distinct advantage" over the system of hanging by rope.

In *Attorney General of India* v. *Lachma Devi* (AIR 1986 SC 467), it has been held that the execution of death sentence by public hanging is barbaric and violative of Article 21. It is true that the crime of which the accused have been found guilty is barbaric, but a barbaric crime does not have to be visited with a barbaric penalty such as public hanging.

**PROTECTION AGAINST ILLEGAL ARREST, DETENTIONS AND CUSTODIAL DEATH:**

In *Joginderr Kumar* v. *State of Uttar Pradesh* (1994 (4) SCC 260), the Court has held that a person is not liable to be arrested merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the Police Officer effecting the arrest that such arrest was necessary and justified.

In the instant case, a practicing lawyer was called to the Police Station in connection with a case under inquiry on 7/1/1994. On not receiving any satisfactory account of his whereabouts the family member of the detained lawyer filed a Habeas Corpus Petition before the Supreme Court and in compliance with the notice, the lawyer was produced on 14/1/1994 before the Court. The Police

contended that the lawyer was not in detention but was only assisting the Police to detect some cases. The Court held that though at this stage the relief in Habeas Corpus could not be granted yet the Supreme Court laid down certain requirements to be followed by the Police before arresting a person.

In *Jolly George Vaghese* v. *Bank of Cochin* (AIR 1980 SC 470), it has been held that the arrest and detention of an honest Judgment – Debtor in civil prison, who has no means to pay the debt in absence of mala fide and dishonesty, violates Article 11 of the International Covenant on Civil and Political Right and Article 21 of the Constitution.

In *D. K. Basu* v. *State of West Bengal* (AIR 1997 SC 610), the Supreme Court has laid down detailed guideline to be followed by the Central and State investigation and security agencies in all cases of arrest and detention. The matter was brought before the Court by Dr. D. K. Basu, Executive Chairman of the Legal Aid Services, a non political organization West Bengal through a Public Interest Litigation. He addressed a letter to the chief Justice drawing his attention to certain news items published in the Telegraph and Statesman and Indian Express regarding deaths in Police Lockups and Custody. This letter was treated as a Writ Petition by the Court. The Court held that it is violation of Article 21 and gave the detail guidelines in the matter.

**FOLLOWING ARE THE GUIDELINES LAID DOWN BY THE COURT:**

1. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to have an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained.

2. Police Officer shall inform the arrested person when he is brought to the Police Station of this right.

3. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power flow from Article 21 and Article 22 and therefore they must be enforced strictly.

4. Guidelines given by the Supreme Court in all cases of arrest and detention-

a. The Police Officer should bear accurate visible and clear identification and name with their designation. The particular of all such Police Personnel who handle interrogation of the arrestee must be recorded in the register.

b. The Police Officer carrying out the arrest of the arrestee prepare a memo of arrest at the time of arrest and such memo to be attested by at least one witness, who may either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It is to be counter signed by the arrestee and it should contain the time and place of arrest.

c. The time, place of arrest and venue of custody of the arrestee must be notified by the Police where the next friend or relative off the arrestee lives outside the district or town through the Legal Aid Organization in the District and the Police Station of that area concerned telegraphically within a period of 8 to 12 hours after the arrest.

d. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name o the next friend of these persons who has been informed of the arrest and the name of the particulars of the Police Officials in whose custody the arrestee is.

e. The arrestee should when he so requests, be also examined at the time of arrest and major and minor injuries, if any present on his or her body must be recorded at that time. The "inspection memo" must be signed by the arrestee and the police officer affecting the arrest and its copy provided to the arrestee.

f. The arrestee is to be subjected to medical examination by a trained doctor every 48 hours during his detention in custody, by a doctor of the panel approved doctors appointed by Director, Health Services of the State or

Union Territory concerned. Director, health services to prepare such a panel for all Tahsil and districts as well.

g. Copies of all documents including the memo of arrest should be sent to the Magistrate for his record. The arrestee may be permitted to meet his lawyer during interrogations, though not through out the interrogation.

h. A Police Control room should be provided at all District and State Head – Quarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the Officer causing the arrest, within 12 hours of effecting the arrest and at the Police Control Room, it should be displayed on a conspicuous notice board.

## 9. COMPENSATION FOR VIOLATION OF ARTICLE 21:

In *Rudal Shah* v. *State of Bihar* (1983 (4) SCC 141), the Supreme Court has held that the Court has power to award monetary compensation in appropriate cases where there has been violation of the constitutional right of citizens. In the present case the Supreme Court directed the Bihar Government to pay 'compensation' of Rs. 30,000 to Rudal Shah who had to remain in the jail for 14 years because of the irresponsible behavior of the State Government Officers even after his acquittal. He was acquitted by the Session Court on 30th June 1968, but was released from jail only on 16th October 1982 when the Court intervened. Describing this state of affairs as "sordid and disturbing" the Court asked the Patna High Court to find out if there were any other detunes suffering a fate similar to Rudal Shah. Thus it is clear from this ruling that the Court can order payment of compensation to victims of State violence.

In *Bhim Singh* v. *State of Jammu Kashmir* (1985 (4) SCC 677), the Court awarded a sum of Rs. 50,000 to the Petitioner as compensation for the violation of his constitutional right of personal liberty under Article 21. MLA was arrested and detained in police custody and deliberately prevented from attending Session of the Legislative Assembly.

In *People's Union for Democratic Rights* v. *Police Commissioner, Delhi Headquarter* (1989 (4) SCC 730), a laborer was taken to the Police Station for doing some work. He was severely beaten when he demanded wages and ultimately succumbed to the injuries. It was held that the State was liable to pay compensation of Rs. 75,000.

In *Saheli* v. *Commissioner of Police* (AIR 1990 SC 513), the Supreme Court directed the Delhi Administration to pay Rs. 75000 as exemplary compensation to the mother of 9 year old child who died due to beating by the Police Officer.

In *State of Maharashtra* v. *Ravikant S. Patil* (1991 (2) SCC 373), an under trial prisoner was handcuffed and paraded on streets. He was suspected to be involved in a murder case. A local newspaper carried a news item that he was taken in a procession from Police Station through the main streets of the city for the purpose of investigation. The Bombay High Court held that hand cuffing and parading of the petitioner was unwarranted and violation of Article 21 and directed the Inspector of Police who was responsible for this, to pay Rs. 10000 by way of compensation. It also directed that this act of violation of Article 21 should also be entered in his service record.

The Supreme Court upheld the judgment of the High Court directing a payment of compensation but held that the Police Officer was not personally liable as he acted as an official.

In *Nilabati Behera* v. *State of Orissa* (1993 (2) SCC 746), the Supreme Court awarded compensation of Rs. 1,50,000/- to the mother of the deceased who died in the Police Custody due to beating. The Police version was that the deceased had escaped from police custody at about 3 am by chewing off rope and thereafter his body was found at the railway track. On the basis of evidence and medical report it was found that the deceased had died due to beating.

In *Chiranjit Kaur* v. *Union of India* (1994 (2) SCC 1), an Army Officer died in service due to negligence of Army Officers resulting in great mental agony and physical and financial hardship to the widow of the deceased and two

minor children. The Court awarded the widow of the deceased a compensation o Rs. 6,00,000/- as well as special Family Pension and Children Allowance.

In *Shakuntala Devi* v. *Delhi Electric Supply Undertaking* (1995 (2) SCC 369), the petitioner' husband died when he came into contact with the live electric wire while returning from the place of employment and got electrocuted. The live electric wire was lying open in the field in a rainy season and was not repaired in spit of many complaints. The Court held the Delhi Electric Supply Undertaking liable for the negligence and awarded compensation of ex-gratia amount to the widow and her minor Children.

In *Kewal Pali* v. *State of Uttar Pradesh* (1995 (3) SCC 600), the Court has awarded compensation to the widow of a convict who was killed in jail by a co-accused while serving his sentence under Section 302 of Indian Penal Code as it resulted in deprivation of his life contrary to law and in violation of Article 21. His death was caused due to the failure of jail authorities to protect him. Accordingly, the Court directed the Government to pay a compensation of Rs. 1,00,000/- to the widow and children of the deceased.

Compensation has been awarded in cases, **inter alia,** of –

a. Death or injury caused by Police atrocities, such as unlawful assault, *Saheli* v.*C. P.* (AIR 1990 SC 513), or unjustifiable firing on an innocent mob, *Ega* v. *Government of Andra Pradesh* (AIR 1993 Cr. LJ 691), or death in Police Custody, *Golkha* v. *D. G. P.* (AIR 1992 Cr. LJ 2901).

b. Preventing a Member of the Legislature from attending its session by detaining him high handedly and maliciously, *Bhim* v. *State of Jammu Kashmir* (1985 (4) SCC 677).

c. Arresting a person on the basis of alleged recovery of arms an ammunitions and manipulating records to that effect by the police, *Mohd. Sahid* v. *Government of NCT, Delhi* (AIR 1998 SC 2023).

d. Abduction and elimination of seven persons by police party misusing the official position to take private revenge, *Inder Shingh* v. *State of Panjab* (1995 (3) SCC 702).

e. Compensation was awarded in cases where an under trial lunatic prisoner was languishing in jail for more than thirty years without any treatment *R. D. Upadhyay* v. *State of Andra Pradesh* (AIR 2000 SC 1946).

f. Negligence of jail authorities in taking timely preventive action, which caused the death of an under trial prisoner *Nurthy Devi* v. *State of Delhi* (1998 (9) SCC 604).

g. Loss of life due to dereliction of duty by Government servants. In the case of rape, robbery and murder in running trains, the guard and motorman refusing to stop train in spite of the alarm chain was pulled. The Court held that the railways, has failed to take reasonable care as was expected from a common carrier *P. A. Narayanan* v. *Union of India* (1998 (3) SCC 67).

h. in the case of negligence of Government Officials, the State is vicariously liable and it cannot claim any immunity, *N. Nagendra Rao* v. *State of Andra Pradesh* (AIR 1994 SC 2633).

i. A six year child died due to falling in 'uncovered sewerage tank'. Court directed the State Government to pay compensation granting liberty to the Government to take proceedings to claim the said amount from any other authority which may be responsible for keeping the sewerage tank open, *Kumari* v. *State of Tamil Nadu* (AIR 1992 SC 2069).

j. A public functionary if acts maliciously or oppressively and the exercise of power results in harassment and agony, then it is not exercise of power, but its abuse. No law gives protection in such cases. Compensation or damages may arise even the officer discharges his duty honestly and bona fide. But when it arises due to arbitrary or capricious individual character and assumes social significance. Award of compensation for harassment by public authority not only compensates individual, satisfies him

personally, but helps in curing social evil *Lucknow Development Authority* v. *M. K. Gupta* (AIR 1994 SC 787).

k. After filing habeas corpus petition, the detune was released, but the petition does not become in fractious. The petition can be proceeded to determine whether the petitioner was entitled to compensation as a public remedy under Article 21 *Arvinder Singh Bagga* v. *State of Uttar Pradesh* (1995 (Supp-3) SCC 716).

l. In the case of riot, the state is not necessarily liable in every case where there is loss of life or damage to the property during rioting. Where, however, it is established that the Officers of the State ordained with duty of maintaining law and order have failed to protect the life and property of person and such failure amounts to dereliction of duty, the State bound to compensate the victim. Such law can be enforced by public law remedy of common law remedy. Where necessary facts to establish culpable negligence on the part of the official are available, the High Court under Article 226 can issue appropriate directions, *P. P. M. Thangiah Nadar Firm* v. *Government of Tamil Nadu* ((2006) 5 CTC 97 (FB) Mad).

**POLICE ATROCITIES AND CUSTODIAL DEATH:**

In *Shakila Abdul Gaffar* v. *Vasant Raghunath Dhokale* (AIR 2003 SC 4567), death due to police atrocity – the Court awarded compensation of Rs. 1,00,000/-.

**COMPENSATION TO PERSONS KILLED IN 'FAKE ENCOUNTER':**

In *People's Union for Civil Liberties* v. *Union of India* (AIR 1997 SC 1203), the petitioner, People's Union for Civil Liberties, filed a Writ Petition under Article 32 of the Constitution for issuing appropriate direction for instituting a judicial inquiry into the fake encounter by Imphal Police in which two persons were killed, to direct appropriate action to be taken against the erring Officials and to award compensation to the members of the family of deceased. The Police Authorities denied the allegation of 'fake encounter'. The Supreme

Court held that killing of two persons in fake encounter by the police was clear violation of the right of life guaranteed in Article 21 and the defense of sovereign immunity do not apply in such case. The Court awarded Rs. 1,00,000/- as compensation for each deceased.

**COMPENSATION FOR RAPE VICTIMS:**

In *Delhi Domestic Working Women's Forum* v. *Union of India* (AIR 1995 1 SC 40), the Petitioner Women's Forum through a Public Interest Litigation brought the pathetic condition of four domestic women servants who were raped by seven army personnel in a running train while travelling by the Muri Express from Ranchi to Delhi. The victims were helpless tribal women belonging to State of Bihar. Notwithstanding the occurrence of such barbaric assault on the person and dignity of women neither the Central Government nor the State Government has bestowed any serious attention as to the need for rehabilitation and the Court expressed serious concern about the increase of crimes against women in recent times suggested that the defects in criminal laws be removed soon.

The Court observed as follows:

"The defects in the present system are complaints are handled roughly and are not given such attention as is warranted. The victims, more often than not, are humiliated by the police. The victims have invariably found rape trials a bad experience. The experience of giving evidence in the Court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly the Court proceedings added to and prolonged the psychological stress they had to suffer as a result of the rape itself."

In view of this, the Court laid down the following guidelines for trial of rape cases –

1. The complainants of sexual assaults cases should be provided with legal representation. A person must be well acquainted with criminal justice. Advocate's role to explain to her the nature of proceedings, to prepare her for the

case, to assist her in the police station and in court, to provide her with guidance as to how to obtain help from other agencies, for example, medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interest in the police station represents her till the end of the case.

2. Legal assistance at the Police Station.

3. The Police should be under a duty to inform the victim of her right to representation before any questions were asked to her and the Police report should state that the victim was so informed.

4. A list of advocates willing to act in these cases should be kept at the Police Station.

5. The advocate shall be appointed by the Court on application by the Police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay advocates would be authorized to act at the Police Station before leave of the Court was sought or obtained.

6. In all rape trial anonymity (name not to be disclosed) of the victim must be maintained.

7. It is necessary to set Criminal Inquiries Coompensation Board. Rape victims frequently incur substantial loss. some are too terrorized to continue in employment.

8. Compensation for victims to be awarded by the Court conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board to take into account pain, sufferings and shock as well as the loss of earnings due to pregnancy and child birth if this accrued as a result of rape.

The National Commission for Women was asked to frame schemes for compensation and rehabilitation to ensure justice to victims of such crimes. The

Union of India to examine and take necessary steps to implement them at the earliest.

**GANG RAPE ON BANGLADESHI WOMAN – COMPENSATION CAN BE GIVEN UNDER PUBLIC LAW:**

In *Chairman, Railway Board* v. *Chandrima Das* (AIR 2000 SC 988), the Supreme Court has held that where a foreign national, a Bangladeshi woman was raped compensation can be granted under Public Law (Constitution) for violation of fundamental rights, on the ground of Domestic Jurisdiction based on constitutional provisions and Human Rights Jurisprudence.

As regards the question whether Fundamental Rights are available to foreign nationals or not, the Court held that the relief can be granted to the victim for two reasons, firstly, on ground of Domestic Jurisprudence based on constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948 which has the international recognition.

According to the tenor of the language used in Article 21 it will be available not only to every citizen of this country, but also to a 'person' who may not be a citizen of the country.

**INTERIM COMPENSATION TO RAPE VICTIM:**

In *Bodhisathwa Gautam* v. *Sublira Chakraborty* (1996 (1) SCC 490), the accused induced the complainant and cohabited with her, giving her a false assurance of marriage but also fraudulently went through a certain marriage ceremony and made the complainant to believe that she was a lawful married wife of the accused.

The Supreme Court held that,

"Woman also have the right to life and liberty; they also have the right to be respected as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life".

Rape is a crime against basic human rights and is also violative of the victim's most cherished of the fundamental rights, normally, the right to life contained in Article 21.

## 10. PREVENTION OF SEXUAL HARASSMENT OF WORKING WOMEN:

In *Vishaka* v. *State of Rajasthan* (AIR 1997 SC 3011), the Supreme Court has laid down exhaustive guidelines to prevent sexual harassment of working women in places of their work until legislation is enacted for this purpose. The Court held that it is the duty of the employer or other responsible person in work – places or other institutions, whether public or private, to prevent sexual harassment of working women.

A Writ Petition filed by Vishaka, a non governmental organization working for "gender equality" by way of Public Interest Litigation, seeking enforcement of Fundamental Rights of working women under Article 14, 19 and 21. The Court relied on International Conventions and norms which are significant in interpretation of guarantee of gender equality, the right to work with human dignity in Article 14, 15, 19 (1) (a) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. The immediate cause for filing the petition was alleged brutal gang rape of a social worker of Rajasthan. The Supreme Court, in absence of enacted law to provide for effective enforcement of basic human rights of gender equality and guarantee against sexual harassment, laid down the following guidelines –

1. All employers persons in charge of work place whether in the public or private sector, should take appropriate steps to prevent sexual harassment without prejudice to the generality of his obligation, he should take the following steps –

a. Express prohibition of sexual harassment which include physical contact and advances; a demand or request for sexual favours; sexually colored remarks; showing pornographic or any other unwelcome physical, verbal or non – verbal conduct of sexual nature.

b. The rule or regulation of Government and Public sector Bodies relating to conduct and discipline should include rules prohibiting sexual harassment and provide for appropriate penalties.

c. As regards to private employers, steps to be taken to include the aforesaid prohibitions in the Standing Orders under the Industrial Employment (Standing Orders) Act, 1946.

d. Appropriate work conditions should be provided in respect of work leisure, health and hygiene to further ensure that there is no hostile environment towards women at work place and no woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

2. Where such conduct amounts to specific offences under the Indian Penal Code or under any other law, the employer to initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

3. The victims of sexual harassment to have the option to seek transfer of the perpetrator or their own transfer.

This decision of the Court will go a long way in increasing a sense of security in the minds of working women that their honour and dignity will be safe in their place of work.

In *Apparel Export Promotion Council* v. *A. K. Chopra* (AIR 1999 SC 625), is the first case in which the Supreme Court applied the law laid down in Vishaka Case and upheld the dismissal from service of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexual harassment of a subordinate female employee at the place of work on the ground that it violated her fundamental right guaranteed by Article 21. The Court said that each attempt of sexual harassment of female at the place of work results in violation of the fundamental right to Gender Equality in Article 14 and Article21.

**11. CHILDREN LIVING IN JAIL WITH PRISONER MOTHER: DIRECTION FOR SAFEGUARDING THEIR WELFARE:**

In *R. D. Upadhayay* v. *State of Andhra Pradesh* (AIR 2006 SC 1946), a Writ Petition was filed by the Women's Action Research and Legal Action for Women highlighting the plight of children living in jails with their prisoner mother and requesting the Court to pass appropriate directions for their proper care, welfare and development. It was said that in spite of several constitutional provisions and laws made there under, such as Article 15, 15 (3), 21 A, 14, 21, 23, 39 (e), 39 (f), 42, 45, 46, 47 and laws such as Guardian And Wards Act 1890, Child Marriage Restraint Act, 1929, Factories Act, 1948, Hindu Adoption And Maintenances Act, 1956, Prohibition of Offenders Act, 1958, Orphanages and other Charitable Homes (Supervision and Control) Act, 1960, Child Labour (Prohibition and Regulatory) Act, 1986, Juvenile Justice (Care and Protection of Children) Act 2000 etc. and National Policy of the State and its commitment of Government of India to United Nations Convention of Rights of Children, the plight of Children particularly living in jails has not been improved. The Supreme Court showing serious concern issued detail directions for their interest regarding food, shelter, medical care, clothing, education and recreation facilities which are declared to be child's right. The Court also issued directions as regards to their diet. The Court held that before sending to jail a woman who is pregnant the authorities concerned must ensure that jail in question has basic minimum child delivery as well as for providing prre natal and post natal care for both, the mother and child. Birth of child should not be recorded as born in 'prison'. It shall be registered in a local birth registration office. Child above 6 years is not to be kept with female prisoners. The Court directed that the jail Manual must be amended suitably sa as to incorporate these changes.

## 12. RIGHT TO FOOD:

### STARVATION DEATH: STATE TO PROVIDE FREE FOOD:

In *PUCL* v. *Union of India* (AIR 2000 (5) SC ALE 30), the Supreme Court has held that the people who are starving because of their inability to purchase foods grains have right to get food under Article 21 and therefore they ought to be provided the same free of cost by the States out of surplus stock lying with the States particularly when it is unused and jotting. The Court directed the States to

make surplus food grains lying in godowns available to all of them immediately through PDS shops to avoid starvation and mal – nourishment.

Article 21 in its true meaning includes the basic right to food, clothing and shelter, *Chameli Singh* v. *State of Uttar Pradesh* (1996 (2) SCC 459), *Pachim Banga Khet Majdoor Samittee* v. *State of West Bangal* (1996 (4) SCC 37), *Francis Coralie Mullin* v. *Union Territory of Delhi* (1981 (1) SCC 746) it is indeed surprising that the justifiability of the specific right to food as an integral right under Article 21 had never been articulated or enforced until 2001, *Kishan Pattnayak* v. *State Of Orissa* (1989 Supp (1) SCC 258).

In 2001, there was a massive drought in several States in India especially Orissa, Rajasthan and Madhya Pradesh. The poor were starving in the drought – hit villages; the Central Government had excess food grains in its storehouses, which were not being distributed. The agitation in the country over lack of access to food grains took rapid momentum after shocking incidents of death due to starvation.

**THE RIGHT TO FOOD PETITION:**

A Public Interest Petition was filed by the People's Union for Civil Liberties (PUCL) in April 2001.

The right to food petition raised three major questions:

1. Starvation deaths had become a national phenomenon while there is a surplus stock of food grains in government granaries.

2. Does not the right to life under Article 21 include the right to food?

3. Does not the State has a duty to provide food especially in situations of drought to people who are not in a position to purchase food?

The petition demanded the immediate release of food stocks for drought relief, provision of work for every able – bodied person and the increase in quota of food grains under the Public Distribution Scheme (PDS) for every person.

### THE SUPREME COURT AND ENFORCEMENT:

The Supreme Court expressed serious concern and broadened the scope of the petition from the initially mentioned six drought – affected States, to include the entire country.

### FOOD DISTRIBUTION SCHEMES MADE INTO ENTITLEMENTS:

The Court in an unprecedented interim order on 28th November 2001 (www.geocities.com/righttofood/orders/nov28) – directed all the State Governments and Union of India to effectively enforce following different Centrally – sponsored food schemes to the poor. These food security schemes were declared as entitlements (rights) of the poor, and the Court also laid down very specific time limits for the implementation of these schemes with the responsibility on the States to submit compliance affidavits to the Court.

**These include –**

1. The Antyodaya Anna Yojna,
2. The Annapurna Scheme and several employment schemes,
3. The Integrated Child Development Services (ICDS) Program,
4. The National Midday Meal Program,
5. The National Old Age Pension Scheme,
6. The National Maternity Benefit Scheme and
7. The National Family Benefit Scheme Providing food for work.

Of the above schemes, the most significant is the order directing all State Governments to provide cooked midday meals in all Government Schools by January 2002. Midday meal with a minimum content of 300 calories and 8 – 12 grams of protein each day of school for a minimum of 200 days in a year. Governments providing dry rations instead of cooked meals must within three months start providing cooked meals in all government and government aided

primary schools in at least half the districts of the State (in order of poverty) and must within a further period of three months extend the provision of cooked meals to the remaining parts of the State.

In addition All State Governments were directed to take their 'entire allotment of food grains from the Central Government under the various schemes and disburse the same in accordance with the schemes'.

The Supreme Court went several steps further in directing strict implementation of already formulated schemes within fixed time – frames, to make them entitlements and to ensure accountability.

With a view to ensuring adequate food to the poorest of the poor, the Supreme Court in March 2002 asked all States and Union Territories to respond to an application seeking the framing of wage employment schemes such as the Sampoorna Gramin Rozgar Yojna (SGRY) ensuring the right to work to adults in rural areas.

On 8th May 2002, the Supreme Court agreed on a system of monitoring. The Bench also added that the States are to provide funds utilization certificate before the money is released for use.

**ENFORCEMENT OF THE RIGHT TO FOOD:**

The orders of the Supreme Court in the right to food petition are already being implemented at the ground level. Since the beginning of the 2002 academic year, a daily attendance of children in the schools has also increased and this was attributed to the midday meals (R. Khera Midday Meals in Rajsthan The Hindu, Benglore (13/11/2002)).

These orders of the Supreme Court bear great relevance for social rights jurisprudence. Pleas on financial constraints did not seem to have affected the Court in making this order for enforcement of the right to food.

There is increasing recognition worldwide that food and nutrition is a human right and thus there is a legal obligation to assure that all people are adequately nourished (G. Kent. The Human Right to Food in India (2002)).

Ground – level reports and surveys done for the implementation of the Supreme Court orders are indeed encouraging and several State Governments along with the NGO's are actually implementing the several schemes although by no means is the implementation of all the schemes perfect in any way, and there remains a lot of scope for further improvement.

## 13. EMERGENCY AND ARTICLE 21:

Prior to the 44th Amendment the Constitution provided for the suspension of the right guaranteed by Article 21. Under Article 359 the President is empowered by Order to suspend the right to move any court for the enforcement of right conferred by Article 21. For the first time, Article was suspended during the Emergency arising out of the Chinese attack in 1962. In 1971 it was suspended for the second time when Pakistan attacked India. In 1976, this Article was again suspended when the Government headed by Prime Minister Indira Gandhi declared emergency on the ground of internal disturbance.

In *A. D. M. Jabalpur* v. *S. Shukla* ( AIR 1976 SC 1207), popularly known as the Habeas Corpus Case, it was held that Article 21 was the sole repository of the right to life and personal liberty and if the right to move court for the enforcement of that right was suspended by the Presidential Oder under Article 359 the detenue had no 'locus standi' to file a Writ petition for challenging the legality of their detention.

## 44TH AMENDMENT AND ARTICLE 21:

The 44th amendment has amended Article 359 which now provides that the enforcement of the right to life and liberty under Article 21 cannot be suspended by the Presidential Order. This amendment is intended to prevent the re – occurrence of the situation in future which arose in the Habeas Corpus Case.

In view of the 44th amendment, the *A. M. D. Jabalpur* v. *S. Shukla* is no longer a good law.

**14. RIGHT TO EDUCATION:**

In *Mohini Jain* v. *State of Karnatak* (1992 (3) SCC 666), popularly known as the 'Capitation Fee Case', the Supreme Court has held that the right to education is a fundamental right under article 21 which can not be denied to a citizen by charging higher fee known as capitation fee. The right to education flows directly from right to life.

The education in India has never been a commodity for sale, their Lordship declared.

In *Unni Krishnan* v. *State of Andhra Pradesh* (1993 (1) SCC 654), the Supreme Court held that right to education is fundamental right under Article 21. But as regards its content the Court partly overruled the Mohini Jain Case and held that the right to free education is available only to children until they complete the age of 14 years. Mohini Jain's Case was not right in holding that charging of any amount must be described as capitation fee. The majority, held that admission to all recognized private educational institutions particularly medical and engineering shall be based on merit, but 50 % of seats in all professional colleges be filled by candidates prepared to pay a higher fee. The Court held there shall be no quota reserved for the management or for any family, caste or community which may have established such college. The criteria of eligibility and all other conditions shall be the same in respect of both "free Seats" and "payment seats".

In *TMA Pai Foundation* v. *State of Karnataka* (AIR 2003 SC 355), an eleven Judge Constitutional Bench of the Supreme Court has overruled the *Unni Krishnan's* decision partly. The Court held that the Scheme relating to admission and the fixing of fee were not correct and to that extent they are overruled.

The Supreme Court in *Unni Krishnan Case* declared that the right to education for the children of the age of 6 to 14 is a fundamental right. Even after

this, there was no improvement. A demand was being raised from all corners to make education a fundamental right. Consequently, the Government enacted Constitution (86th Amendment) Act, 2002 which made education a fundamental right.

Making education compulsory would not solve the problem. The only alternative is to encourage Non – Governmental Organisations to come forward and participate in it to fulfill the mandate of the Constitution. Of course, the government must help them and see that teachers and employees working in these private educational institutions get minimum salary to survive and make the scheme successful.

In the absence of these initiatives, it is doubtful that the constitutional mandate to provide free education to all children in order to become able citizens of the country would be successful. Private public schools have become centers for exploitation.

**PASSPORT FOR EDUCATIONAL PURPOSE:**

In *Francis Manjooram and others* v. *Government of India, Ministry of external affairs* (AIR 1996 Ker. 20).

A young graduate in medicine and surgery, obtained facilities for higher training and study in the USA and applied for a passport. The application was rejected and he challenged the validity of that rejection. The question was – Whether the state can have such a consideration namely, the country's own need to retain qualified personal within itself?

The Court observed that, on the basis of State's responsibility owned to another State in the comity of nations whether the State has to consider any detriment which its citizen – applicant might cause to the country to which he proposes to travel? The Court held that, the denial of a passport amounts to violation of Article 19 (1) (d) and 21.

## 15. RIGHT TO PRIVACY:

In *R. Rajagopal* v. *State of Tamil Nadu* (1994 (6) SCC 632), popularly known as "Auto Shankar's Case". The Supreme Court has expressly held the "right to privacy" or the right to be let alone is guaranteed by Article 21. A citizen has a right to safeguard the privacy of his own, his family, person concerned would be liable in action for damages. However, position may be different if he voluntarily puts into controversy or voluntarily invites or raise a controversy.

This rule is subject to an exception that if any publications of such matters are based on public record including Court record it will be unobjectionable.

An exception in the interests of decency under Article 19 (2) in the following cases, viz., a female who is the victim of a sexual assault, kidnapping, abduction or a like offence should not further be subjected to the indignity by publishing her name in press or media.

The exception is that the right to privacy or the remedy of action for damages is simply not available to public officials as long as the criticism concerns the discharge of their public duties.

Autobiography written by the prisoner cannot be retained on the ground that it is defamatory. The Officers can take action if publication is false.

In *State of Maharashtra* v. *Madhukar Narayan* (AIR 1991 SC 207), it has been held that the right to privacy is available to the prostitute also.

In *Mr. X* v. *Mr. Z Hospital* (AIR 1995 SC 495), it was held that to disclose that the appellant was suffering from AIDS the doctor has not violated the right to privacy.

In *Mrs. X* v. *Mr. Z* (AIR 2002 Delhi 217), it was held that when adultery has been alleged for divorce and if husband is demanding the DNA test of preserved fetus – then there is no violation of Article 21.

**CHILD CUSTODY:**

In *L.Chandran* v. *Venkatlakshmi* (AIR 1900 AP 1), the father's right to custody of his child was contended as absolute and unqualified. It was held that child is a person within the meaning of Article 21 and it has right to its life. Recognition of father's unlimited right to the custody of the child would almost reduce the child to the position of a chattel.

**MOSQUITO – MENACE:**

In *Niyamakendram, Kochi* v. *Secretory, Corporation of Kochi* (AIR 1997 Ker. 152), the Court held that, a responsible local body constituted for the purpose of preserving public health cannot shrink from its duty by pleading financial inability.

**VALIDITY OF SECTION 9 OF HINDU MARRIAGE ACT, 1955:**

In *Smt. Hanrinder Kaur* v. *Harmonder Singh Choudhry* (AIR 1984 Delhi 66), section 9 of the Hindu Marriage Act, 1955 founding the matrimonial relief of restitution of conjugal rights is held to be not violation of Article 14 and 21. In domestic affairs, like matrimonial life and its privacy, there is no question of importing Article 21.

**DUTY OF DISCLOSURE:**

*People's Union for Civil Liberties* v. *Union of India* (AIR 2002 SC 456), is a case under the Prevention of Terrorism Act, 2002, where it was held that any person can be compelled to furnish the information about terrorist acts and in that context, the Supreme Court made the following observations – "Section 39 of the code of Criminal Procedure, 1973 casts a duty upon every person to furnish information regarding offences. Criminal justice system cannot function without the co-operation of people. Rather it is the duty of everybody to assist the State in detection of the crime and bringing criminal to justice. Withholding such information cannot be traced to right to privacy, which itself is not an absolute right *Sharda* v. *Dharmpal* (2003 (4) SCC 493). "Right to privacy is subservient to that of security of the State".

**OVERLOADING SCHOOL BUS VIOLATION OF ARTICLE 21:**

In *Swapan Kumar Saha* v. *South Point Montessary High School and others* (AIR 2008 (NOC) 136 (GAU)), the Gauhati High Court held that the school management is under obligation to provide safe journey to children to school. The Court held that the overloading of school bus is violation of the right of school children. The Court directed the State to take remedial measures to enforce provisions of Motor Vehicle Act. The Court issued direction to school authorities to comply with the provisions of the Act.

**RIGHT TO LIFE AND DONATION OF AN ORGAN:**

In *Smt. Sumakurian Mathava* v. *Secretary Medical and Health Building Saifabad and others* (AIR 2008 (NOC) 374), the Court held that donation of organ by husband to his ailing father cannot be objected to by wife on the ground of violation of her fundamental right to life under Article 21. No material has been produced in support of her assertion that donation of part of liver would affect health of donor. Moreover, the act of husband who is a private individual is not comprehended by Article 21 and consequently not amenable to judicial review under Article 226.

**BAN ON SMOKING IN PUBLIC:**

In *Murali S. Deora* (AIR 2002 SC 40), the Court considering the adverse effect of smoking on smoker and other persons directed the Central and State Government to issue orders banning smoking in public places. A non – smokers is afflicted by various diseases including lung cancer or heart disease only because he has to go to public place.

**VIRGINITY TEST VIOLATES RIGHT TO PRIVACY UNDER ARTICLE 21:**

In *Surjit Singh Thind* v. *Kanwaljit Kaur* (AIR 2003 P&H 353), the wife filed a petition for a decree of nullity of marriage on the ground that the marriage has never been consummated because the husband was impotent. In order to prove that the wife was not virgin the husband filed an application for her

medical examination. The Court held that allowing the medical examination of a woman's virginity violates her right to privacy under Article 21.

**SURVELLANCE:**

In *Malak Singh* v. *State of Punjab* (AIR 1981 SC 760), the Supreme Court held that under Section 23 of the Punjab Police Act it was the duty of the Police Officers to keep surveillance over bad characters and habitual offenders for the purpose of preventing crimes. So long as surveillance is for the purpose of prevention of crimes and confined to the limits prescribed by Rule 23 (7) of the Punjab Police Rule, a person cannot complain against the inclusion of his name in the surveillance register.

**PUBLICATION:**

In *State of Maharashtra* v. *Prabhakar Pandurang* (AIR 1986 SC 424), the petitioner was detained in jail under the Preventive Detention Act. He wrote a scientific book in prison and sought permission from the Government to sent it to his wife for publication. The Government refused permission to him. The Court held that this was an infringement of his personal liberty as the restriction was not authorized by the Preventive Detention Act.

**DIVORCE PETITION:**

Husband tapping conversation of his wife with others seeking to produce in Court, violates her right to privacy under Article 21.

In *Rayala M. Bhuvaneshwari* v. *Nagaphainender Rayala* (AIR 2008 AP 98), the petitioner filed a divorce petition in the Court against his wife and to substantiate his case sought to produce a hard disc relating to the conversation of his wife recorded in US with others. She denied some portions of the conversation. The Court held that the act of tapping by the husband of conversation of his wife with others without her knowledge was illegal and amounted to infringement of her right to privacy under Article 21.

In *Pragati Varghare* v. *Cyril George Varghese* (AIR 1978 SC 1675), Mumbai High Court has struck down Section 10 of the Indian Divorce Act, 1869 under which a Christian wife had to prove adultery along with cruelty or desertion while seeking a divorce on the ground that it violates the fundamental right if Christian woman guaranteed under Article 21, 15 and 14.

The Court also struck down sections 17 and 20 of the Act which, stipulated that an annulment or divorce passed by a District Court needed to be confirmed by a 3 Judge Bench of the High Court. The Court held Section 10 compels the wife, who has been deserted or treated with cruelty to continue her life with a man she hates. Such a life is sub – human. There is denial to dissolve the marriage has broken down irretrievably.

**TELEPHONE – TAPPING: AN INVASION ON RIGHT TO PRIVACY:**

In *people Union for Civil Liberties* v. *Union of India* (AIR 1997 SC 568), popularly known as "Phone Tapping Case", the Supreme Court has held that telephone tapping is a serious invasion of an individual's right to privacy which is part of the right to "life and personal liberty" enshrined under Article 21, and it should not be resorted to by the State unless there is public emergency or interest of public safety.

Section 5 (2) of the Act permits the interception of messages in accordance with the provisions of the Act. "Occurrence of any public emergency" or "in the interest of public safety are the *sine qua non*" for the application of the provisions under Section 5 (2) of the Act.

If the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty or integrity of the country or the security of the State or friendly relations with foreign States or public order or for preventing for incitements to the commission of an offence – it cannot intercept the message or resort to telephone tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety.

The Court has laid down the following procedural safeguards for the exercise of power under Section 5 (2) of the Indian Telegraph Act –

1. An order for telephone tapping can be issued only by the Home Secretary of the Central Government or the State Governments. In an urgent case, the power may be delegated to an officer of the Home Department if the Central and State Governments not below the rank of Joint Secretary.

2. The copy of the order must be sent to the Review Committee with in one week of the passing of the order.

3. The order ceases to have effect at the end of two months from the date of issue. The authority making the order may review before that period if it considers that it is necessary to continue the order in terms of section 5 (2) of the Act.

4. The authority must maintain the records of intercepted communications, the extent the material to be disclosed, number of persons, their identity and to whom the material is disclosed.

5. The use of the intercepted material must be limited to the minimum that is necessary in terms of section 5 (2) of the Act.

6. The Review Committee to investigate whether there is or has been a relevant order under section 5 (2) of the Act.

In the case of contravention of the provisions of section 5 (2) of the Act, the Court to set aside the order. It can also direct the destruction of the copies of the intercepted material.

No contravention of the relevant provision of the Act, record the finding.

The judgment will go a long way in protecting the right of privacy enshrined under Article 21.

**ILLEGALITY RECORDED CONVERSATION:**

*Willie Isreal Aldermanet al.* v. *United States* (394 US 165, 22L Ed 2nd 176). The question before the American Court was – whether any of the Government's evidence supporting the convictions was the product of any illegal surveillance to which any of the petitioners could object? It was held that, any petitioner would be entitled to the suppression of government evidence originated in electronic surveillance. It is violation of his right.

**INSURANCE POLICY AND ARTICLE 21:**

In *LIC of India* v. *Consumer Education And research Centre* (1995 (5) SCC 482), in the case – the conditions imposed and denial to accept policies under Table 58 were challenged by the respondent as violative of right of life in Article 21. The Supreme Court held that the terms and conditions imposed by the LIC for accepting policy must be just, fair and reasonable. The policy cannot be restricted only to salaried class in Government service or quasi Government bodies or reputed commercial firms. The Court held that such a condition is unconstitutional. However, since Table 58 need not be declared unconstitutional.

**COMPULSORY BLOOD TEST TO DETERMINE PATERNITY VIOLATES ARTICLE 21:**

In *Ningammar* v. *Chikkaiah* (AIR 2000 Kar 50), the Karnataka High Court has held that, compelling a person to submit himself to medical examination of his blood test without his consent or against his will amounts to interference with his fundamental right of life or liberty particularly even where there is no provision either in the Code of Civil Procedure or in the Evidence Act or any other law which may be said to authorize to court to compel a person to undergo such a blood test and create a doubt about the chastity of a woman or create a doubt about the man's paternity. The facts of the case are that plaintiff 1)wife and 2) daughter filed a suit for maintenance against defendant respondent. The defendant denied the allegation that plaintiff no. 2 was the, daughter of the plaintiff 1 from defendant no 1. The defendant moved an application with the prayer to the effect that in the circumstances of the case, the Court may direct

plaintiff no. 1 & 2 to subject themselves for Medical Examination of their blood group test in order to determine the paternity of plaintiff no. 2. The High Court held that such an order by Trial Court was violation of Article 21 of the Constitution and the plaintiffs cannot be compelled to submit to Medical Examination of their blood group.

However, in *Veeran* v. *Veeravarualle* (AIR 2009 MAD 64), the petitioner filed Writ Petition for DNA test to prove the particularly for declaration that she is legitimate child born to her parents, i. e. father and respondent mother. It was held that, the DNA test of father will only prove that the petitioner is father without any test conducted on mother. The mother was not made a party in the case.

**BIRTH TO THE CHILD:**

In *Hindustan Times* (3rd December 1993), a two – Judge Bench of the Madras High Court held that a minor girl had the right to bear a child. In this case a 16 year old minor girl, Shahikala became pregnant and wanted to have the child against the opposition from her father. The father has filed a case in the Court seeking permission to have the pregnancy medically terminated on the ground that she was legally and otherwise also to young to take the decision to bear the child. It was argued that this would be injurious to the health of the minor mother and to the child born. On the other hand, the public prosecutor, defending the case of the girl, had argued that she had the right to bear the child under the broader 'right to privacy'. The Court accepted that Shashikala was a minor but did not agree with the petitioner's father. The Court held –

"The younger the mother, the better the birth". On the other hand, termination of the first pregnancy could lead to sterility.

**RIGHT TO MARRY AND IMMIGRATION:**

In *R.* v. *Secretary of State for Home Affairs and another, ex parte Bhajan Singh* (1975 – 2 All E. R. 1081)

It was held that, Mr. Bhajan Singh came to England in 1973 quite illegally and personal freedom cannot be claimed as above the immigration law of the land. It is available only during the free state of living.

**OBSCENE FILMS AND PRIVACY:**

*Paris Adult theatre I et al* v. *Lewis R Slaton, District Attorney, Atlanta Judicial Circuit, et all* (412 US 49, 37 L Ed 2d 446), in this case the State of Georgia demanded that – The two movies, 'Magic Mirror' and 'It All Comes Out in he end' be declared obscene and be prohibited. The American court held that, there is no fundamental privacy right in this regard.

**USE OF CONTRACEPTIVES:**

The use of contraceptives is held to be a matter of privacy which cannot be violated, *Estelle T Griswold et al* v. *State of Connecticut* (381 US 479, 14 L Ed 2d 510).

**DETENTION OF UNSOUND PERSONS:**

Indefinite detention of mentally unsound persons is held, to constitute deprivation of their personal liberty, when they are no more a danger to the society, *Terry Foucha, Louisiana* (504 US – 118 L Ed 2d 437).

**RIGHT TO PRIVACY AND DATA PROTECTION:**

Privacy is closely connected to Data Protection. An individual's data like his name, address, telephone numbers, profession, family, choices etc. are often available at various places like school, colleges, banks, directories, surveys and on various websites. Passing on such information to interested parties can lead to intrusion in privacy like incessant marketing calls.

By enactment of the Information Technology Act, 2000, the Indian Parliament provided a new legal idiom to data protection and privacy. The main principles on data protection and privacy enumerated under the Information Technology Act, 2000 are -

1. Defining data, computer database, information, electronic form, originator, addressee etc.

2. Creating Civil Liability if any person accesses or secures access to computer, computer system or computer network.

3. Creating criminal liability if any person accesses or secures access to computer, computer system or computer network.

4. Declaring any computer, computer system or computer network as a protected system.

5. Imposing penalty for breach of confidentiality and privacy.

6. Setting up of hierarchy of regulatory authorities, namely adjudicating Officers, the Cyber Regulations Tribunal etc.

The Information Technology Act, 2000 defines certain key terms with respect to data protection, like access, Computer, Computer network, Computer resource, Computer system, Computer Database, Data, Electronic Form, Electronic Record, Information, Intermediary, Secure system and Security procedure.

This Act is based on the Resolution A/RES/51/162 adopted by the General Assembly of the United Nations on 30$^{th}$ January 1997.

There were three reasons –

1. To facilitate the development of a secure regulatory environment for electronic commerce by providing a legal infrastructure governing electronic contracting, security and integrity of electronic transactions.

2. To enable the use of digital signatures in authentication of electronic records and

3. To show the role of Government in safeguarding and promoting IT sector and attracting FDI in the said sector.

## 16. NOISE POLLUTION:

In *Free Legal Aid Cell* v. *Government of NCT of Delhi* (AIR 2001 Del. 455), Public Interest Litigation was filed. Main grievance was that – as a result of display of fireworks during festivals and marriages and because of indiscriminate use of loud speakers, noise pollution has become a routine affair affecting mental as well as physical health of citizens. The Delhi High Curt observed that – noise can well be regarded as a pollutant because it contaminates environment, causes nuisance and affects the health of a person and would therefore offend Article 21, if it exceeds a reasonable limit.

Article 21 includes freedom from Noise –

In *Re Noise Pollution* (AIR 1999 Ker. 15), the Supreme Court held that under Article 21 every person has the right to live with a noise free atmosphere which cannot be defeated by exercise of right under Article 19 (1) (a).

The Court said that in the modern days noise has become one of the major sources of pollution and it has a serious effect on human health. It affects sleep, hearing and communication, mental and physical health. It may even lead to the madness of people.

The Court has issued the following directives –

1. The evaluation of fire crackers should be done on the basis of chemical composition unless and until replaced by a better system.

2. There shall be complete ban on bursting sound emitting fire crackers between 10 pm to 6 am.

3. There shall be two categories of fire crackers one for export and the other for use in own country. Both must have different colours. Fire crackers for sale in India must contain full particular of chemical compound.

4. The noise level at the boundary of public place shall not exceed to 10 db or noise standard area or 75 db whichever is lower.

5. No beating of a drum or tom-tom or blow of trumpet or use of amplifier between 10 pm to 6 am (except in emergency).

6. No horn should be allowed to be used at night (between 10 pm to 6 am) in restricted area except in exceptional circumstances.

7. Need to create general awareness towards the hazardous effects of noise pollution – to children in schools and police authorities.

8. State must play an active role in this process. The Court said that the above guidelines are issued in exercise of power conferred on this Court under Articles 141 and 142 of the Constitution and shall be binding on Governments and Municipal Authorities in every cities.

**ARTICLE 19, ARTICLE 21 AND NOISE POLLUTION:**

A citizen cannot exercise this fundamental freedom under Article 19 (1) (g) in such a manner so as to violate the fundamental right of the people under Article 21. In *Ram Lal* v. *Mustafabad OH and Cotton Ginning Factory* (AIR 1968 P & H 399), the Punjab and Haryana High Court observed –

Once a noise is considered to be a nuisance of the requisite degree it is no defense to contend that it was in consequence of a lawful business or arose from lawful amusements or from places of religious worship.

In *V. Lakshmipathy* v. *State* (AIR 1992 KAR 57), the Court held that there is no inherent or fundamental right in a citizen to manufacture, sell and deal with fireworks which will generate pollution, which would endanger the health and the public order. The Karnataka High Court directed fireworks industries to be stopped and further held that earmarked residential area should not be used for such industries. The Court directed the authorities to remove all encroachments in public lands within sixty days from the date of the receipt of the copy of the order. The petitioners were also held entitled to costs of Rs. 3000 from the respondents.

**ARTICLE 19, ARTICLE 21, ARTICLE 25 AND NOISE POLLUTION:**

In *State of Bombay* v. *Narasu Appa Mali* (AIR 1952 Bombay 82), the Bombay High Court while distinguishing religious faith from religious practice observed that –

The State protects is religious faith and belief. If religious practice run counter to public order, morality or health or a policy of social welfare then the religious practice must give way before the good of the people.

The Court observed – a particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the Directive Principles.

In *Bedi Gurcharan Singh* v. *State of Haryana* (1975 Cr. LJ 917 (SC)), the Supreme Court observed –

The right to propagate religion freely is subject to the condition that it does not violate similar fundamental rights of the followers of other religions.

The Calcutta High Court in *Masud Alam* v. *Commissioner of Police* (59 CWN 293 (1954-55)), upheld the ban on the use of loudspeakers of calling Azan five times a day. It was held that such a use, causing disturbance in the area could not be justified on the ground that it was in connection with religious purposes.

In *Om Birangana Religious Society* v. *State* (1996 100 CWN 617), the Calcutta High Court held that – noise generated from loudspeakers and microphones posed a serious threat to public health. The Court also urged the Police to be vigilant in the discharge of its duties and directed All India Radio and Doordarshan to disseminate information and create awareness on the harmful effects of noise pollution.

In *Chairman Guruvayur Devaswom Managing Committee* v. *Supdt of Police, Thrissur* (AIR 1998 Ker. 122), the Court allowed the petitioner to use horn

type loudspeakers which were used only for a limited duration every day for broadcasting devotional songs and the audibility of which was limited within the temple area only.

In *Moulana Mufti Syed Md Noorur Rehman Barkati* v. *State of West Bengal* (AIR 199 Cal. 15), the Calcutta High Court upheld the restriction on the use of microphone and loudspeaker at the time of giving Azan and held that this restriction does not violate freedom of religion under Article 25 of the Constitution.

The Supreme Court after referring to Article 19 (1) (a) and the Noise Pollution (Regulation and Control) Rules, 2000 dismissed the appeal of the appellant.

The judiciary has shown its deep concern to keep the environment free from noise pollution. The Legislature enacted the Noise Pollution (Control and Regulation) Rules, 2000. There is lack of awareness as well as implementation of these rules. The need of the hour is to create awareness among the people about the noise pollution and its effects on their health. It is also the duty of the law enforcing agencies / authorities to implement the law in letter and spirit.

**17. RIGHT TO DIE – NOT A FUNDAMENTAL RIGHT UNDER ARTICLE 21:**

The question whether the right to die is included in Article 21 came for consideration for the first time before the Bombay High Court in the case of *State of Maharashtra* v. *Maruty Sripati Dubal* (1987 Cr.LJ 549).

The Bombay High Court held that the right to life guaranteed by Article 21 includes a right to die and consequently the Court struck down Section 309 of Indian Penal Code which provides punishment for attempt to commit suicide by a person as unconstitutional.

The Andra Pradesh High Court in *Chenna Jagadeeswar* v. *State of Andra Pradesh* (AIR 1988 Cr.LJ 549), held that the right to die is not a fundamental right

within the meaning of Article 21 and hence Section 309 of Indian Penal Code is not unconstitutional.

In *P. Rathinam* v. *Union of India* (1994 (3) SCC 394), a Divisional Bench of the Supreme Court agreeing with the view of the Bombay High Court in Maruti Sripati Dubal case held that a person has a right to die and declared Section 309 of the Indian Penal Code unconstitutional which makes ‘attempt to commit suicide’ a penal offence.

Attempt to commit suicide has ceased to be legal offence in most countries.

In *Gain Kaur* v. *State of Punjab* (1996 (2) SCC 648), a fiveJudge Constitutional Bench of the Supreme Court has now overruled the P. Rathinam’s case and rightly held that “right to life” under Article 21 does not include “right to die” or “right to be killed”. The “right to die” is inherently inconsistent with “right to life” as is “death with life”.

The Court accordingly held that, Section 309 of Indian Penal Code is not violative of Article 21.

The Court upheld the judgment of the Andhra Pradesh High Court holding that Section 309 of Indian Penal Code was not violation of Article 14 and Article 21.

Law Commission of India in its report no. 2010 given to the Government in October 2008 has recommended that – “Attempt to suicide may be regarded as a manifestation of a diseased condition of mind deserving treatment and care rather than an offence to be visited with punishment”. The Commission has recommended to the Government to repeal Section 309 of Indian Penal Code.

**EUTHANASIA:**

In *Aruna Ramchandra Shanbaug* v. *Union of India and others* (AIR 2003 SC 3176), the Supreme Court rejected the concept of passive euthanasia and

rejected the application of the petitioner by differentiating between active and passive euthanasia.

**THE BASIC DEFINITIONS:**

Euthanasia is generally classified as either "active" or "passive" and as either "voluntary" or "involuntary". Similar to euthanasia is "assisted suicide".

**ACTIVE VERSUS PASSIVE:**

"Passive euthanasia" – defined as withdrawing medical treatment with the deliberate intention of causing the patient's death. For example, if a patient requires kidney dialysis to survive and the doctors disconnect the dialysis machine, the patient will presumably die fairly soon. If a patient has a heart attack or similar sudden interruption in life functions, medical staff will attempt to receive them. If they make no such effort but simply stand and watch the patient die, this is passive euthanasia.

"Active euthanasia" is taking specific steps to cause the patient's death, such as injecting the patient with poison. In practice, this is usually an overdose of pain – killers or sleeping pills.

The difference between "active" and "passive" is that in active euthanasia, something is done to end the patient's life; in passive euthanasia, something is not done that would have preserved the patient's life.

**VOLUNTARY VERSUS INVOLUNTARY:**

"Voluntary euthanasia" is when the patient requests that action be taken to end his life, or that life – saving treatment be stopped, with full knowledge that this will lead to his death.

"Involuntary euthanasia" is when a patient's life is ended without the patient's knowledge and consent.

**ASISTED SUICIDE:**

In "assisted suicide", a doctor provides a patient with the means to end his own life, but the doctor does not administer it.

**18. SOME OTHER RIGHTS:**

1. Right to water is a right to life under Article 21. Water is the basic need of survival of human being and is part of right to life and human right as enshrined in Article 21 and can be served only by providing sources of water where there is none. Pollution free drinking water was held to be paramount and the same would prevail over other needs, *Delhi Water Supply and Suvage Disposal Undertaking* v. *State of Haryana* (AIR 1986 SC 2992).

2. Economic empowerment to tribals, dalits and poor is a facet of right to life under Article 21. Government policy to allot agricultural land prior permission is necessary for alienation or sale of such land is only to effectuate the constitutional policy of economic empowerment which is protected under Article 14, 21, 38, 39 and 46 read with Preamble of the Constitution, *Murlidhar Kesekar* v. *Vishvanath Barde* (1995 SCC 549).

3. Right to agriculturist to cultivation is a part of their fundamental right to livelihood under Article 21, *Dalmiya Cement* v. *Union of India* (1996 (10) SCC 104).

Where agriculture lands were acquired by the executive action of the State in flagrant violation of Article 300A and second proviso of Article 31 A (1), there will be a violation of right to livelihood under Article 21, *K. Sai Reddi* v. *Deputy Engineer* (AIR 1995 AP 208).

Even though every acquisition of compulsory nature, the owner may be deprived of the land and means livelihood, an acquisition in accordance with the procedure is a valid exercise of power which would not amount to deprivation of right to livelihood, *Chameli Singh* v. *State of Uttar Pradesh* ( 1996 (2) SCC 569).

4. Right to dignity is not confined to the living man but also to his dead body.

5. The offence of kidnapping violates Article 21 and there must be deterrent punishment, *Tarun Bora* v. *State of Assam* (AIR 2002 SC 2926).

6. Right to road to resident of hilly areas is within the ambit of Article 21, *State of Himachal Pradesh* v. *Umed Ram Sharma* (1986 (2) SCC 68).

7. Right to Family Pension included in Article 21, *S. K. Mastan* v. *G. M. South Central Railway* (2003 (1) SCC 184).

8. The Customer can claim right to privacy from banker and the power to search and size without any material is violation of Article 21, *District Registrar and Collector* v. *Caneral Bank* (AIR 2005 SC 186).

9. Life and unborn child – Section 315 of Indian Penal Code acknowledges that the embryo is entitled to legal protection.

Section 312 to 316 of Indian Penal Code provides for punishment for abortion or for destruction of the unborn child.

Section 3 to 5 of Medical Termination of Pregnancy Act, 1997 – are more or less exception to the provision of Indian Penal Code or abortion.

Pre – conception and pre – natal Diagnostic Technique (Prohibition of Sex Selection) Act, 1994 – prohibits the determination of Sex.

10. Hindu Succession Act, 1956 – Section 21 – has conferred right to succeed to the father's estate to the child who was in the mother's womb when the father died without making any will and who is born alive after such death.

**19. PERSONAL LIBERTY:**

It comprises:

1. Autonomous control over the development and expression of one's intellect, interest, tastes and personality.

2. Freedom of choice – in the basic decision of life i. e. marriage, divorce, procreation, contraception and the education and upbringing of children.

3. Freedom of care of one's health and person, freedom to walk, stroll or loaf – freedom from bodily restraint or compulsion.

4. It thus includes :

a. the right of locomotion, except in so far as it is included in Article 19 (1) (d), *Satwant* v. *Assistant Passport Officer* (AIR 1967 SC 1836).

b. the right to travel abroad, i. e. to move out of India and to return to India, *Maneka Gandhi* v. *Union of India* (AIR 1978 SC 597).

c. the right to socialize with members of one's family and friends, *Hussaninara* v. *Home Secretary* (AIR 1979 Sc 1360).

d. the right of a prisoner to a speedy trial, *Hussaninara* v. *Home Secretary*.

e. Loss of citizenship, which would deportation, was assumed to be included in this expression, *State of Uttar Pradesh* v. *Shah M. D.* (AIR 1969 SC 1234).

f. an order made under section 144 of Criminal Procedure Code to shoot anybody violating a curfew order has been held to violate Article 21, since an order to shoot was ultra virus , *Jayantilal* v. *Eric* (1975 Cr.L.J. 661 Guj.).

g. the right of an employee in a disciplinary proceeding, *Board of Trustee* v. *Dilipkumar Nadkarni* (AIR 1983 SC 109), or of a detune before an Advisory Board, *A. K. Roy* v. *Union of India* (AIR 1982 SC 710), to take legal aid where the employer or the Government is represented by a lawyer.

h. Right of appeal from a judgment of conviction affecting liberty of a person keeping in view of the expansive definition of Article 21 as also the international covenants operating in the fields is also a fundamental right and such a right is an absolute one. Right of appeal, can neither be interfered with or impaired nor it can be subjected to any condition, *Dilip S. Dahanukar* v. *Kotak Mahendra Co. Ltd.* (2007 (6) SCC 528).

**It would not include:**

1. The right to be admitted to a college. *State* v. *Lahu* (1971 (1) SCC 601).

2. The right to own property or not to be deprived of it by laws for compulsory acquisition or imposing land ceiling, *State of Maharashtra* v. *Basanti Bai* (AIR 1986 SC 1466).

3. The right of a foreigner to reside and settle in this country, *Louis* v. *Union of India* (AIR 1991 (3) SCJ 141). The Government of India has the power to make the lawful arrest or detention of a person to prevent his affecting an unathorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition, *Hansmuner* v. *Supdt*. (1955 (1) SCR 1284).

The right of a commercial firm to remain in unauthorized occupation of a 'public premises' in contravention of the Public Premises Eviction of Unauthorised Occupation Act, 1971, *Ashoka Marketing* v. *P. N. B.* (1999 (3) SCJ 116).

4. The right to carry on any big or small business, *Sodhan* v. *N. D. M. C.* (AIR 1989 SC 1988).

5. Contesting to an elected office is not a fundamental right. Hence no grievance could be made out in the right to liberty and right to privacy of an individual are deprived, if a legislative provides for certain disqualification, *B. K. Parthasarathy* v. *State of Andhra Pradesh* (AIR 2000 AP 156).

**20. PROCEDURE ESTABLISHED BY LAW:**

'Procedure' means the manner and form of enforcing the law. Article 21 simply means that you cannot deprive a man of his personal liberty, unless you follow and act according to the law which provides for the deprivation of such liberty.

**CONCLUSION:**

How the Supreme Court evolved Article 21 (the concept of life and liberty) in creative way is discussed in detail with the help of the judgment of the Supreme Court and High Courts in this Chapter.

# CHAPTER III

## AN ACT AND A BILL FOR ARTICLE 21

# CHAPTER 3

## A. NAREGA (http://narega.nic.in)

An attempt is made in this Chapter to discuss employment guarantee scheme started by Central Government to protect right to livelihood.

**INTRODUCTION:**

The Mahatma Gandhi National Rural Employment Guarantee Act (MNAREGA) is an Indian job guarantee scheme, enacted by legislation on 25th August 2005 by the UPA Government.

**THE PLAN:**

The Central Government meets the cost towards the payment of wages, ¾ of material cost and some percentage of administrative cost.

The State Government meet the cost of unemployment allowances, ¼ of material cost and administrative cost of State Council.

The State Government to decide the amount of unemployment allowance, it should not be less than ¼ the minimum wages for the first 30 days and not less than ½ the minimum wage thereafter. 100 days of employment (or unemployment allowance) per household must be provided to able and willing workers every financial year.

Adult members of a rural household, willing to do unskilled manual work is to make registration in writing or orally to the local Gram Panchayat. The Gram Panchayat after due verification is to issue a Job Card. The Job Card to bear the photograph of all adult members of the household willing to work under NAREGA and free of cost. The Job Card is issued within 15 days of application.

MNAREGA was launched on 2nd February 2006 from Anantpur in Andhra Pradesh and initially covered 200 poorest districts of the country. The Act was implemented in phased manner – 130 districts were added in 2007-08 with its spread over 625 districts across the country.

The funding has considerably been increased –

| Sr No. | Year | Total Outlay (TO) | Wage Expendituree (Percent of TO) |
|---|---|---|---|
| 1 | 2006-2007 | $2.5 bn | 66 |
| 2 | 2007-2008 | $2.6 bn | 68 |
| 3 | 2008-2009 | $6.6 bn | 67 |
| 4 | 2009-2010 | $8.68 bn | 70 |
| 5 | 2010-2011 | $8.91 bn | 71 |

**IMPLEMENTATION:**

The Comptroller and Auditor General (CAG) of India, in its performance audit of the implementation of MNAREGA have found “significance deficiencies” in the implementation of the Act.

The MNAREGA achieves twin objectives of rural development and employment. Development activities such as water conservation and harvesting, a forestation, rural connectivity, flood control and protection such as construction and repair of embankments etc., digging of new tanks or ponds, percolation tanks and construction of small check dams are also given importance. The employers are given work such as land levelling, tree plantation etc.

1. For effective monitoring of the projects 100% verification of the works at the Block level, 10% at the District level and 2% at the State level inspections need to be ensured.
2. The Ministry has set up a Task Force to look at the possibility of convergence of programmes like National Horticulture Mission, Rashtriya Krishi Vikas Yojana, Bharat Nirman and Watershed Development with NAREGA.
3. These convergence efforts add value to NAREGA works and aid in creating durable efforts and also enable planned and coordinated public investment in rural areas.

There must be provision of adequate quality work with site facilities for women and men labourers. There must be creation and maintenance of durable

assets, adequate audit and evaluation mechanisms - widespread institution of social audit and use of findings.

Award has been introduced to recognise outstanding Contribution by Civil society Organisations at State, District, Block and Gram Panchyat levels to generate awareness about provisions and entitlements and ensuring compliance with implementing processes. The Government has engaged professional institutions like IIMs, IITs and Agricultural Universities to assess the implementation of NAREGA across the country.

**CRITISISM OF NAREGA:**

1. In last 3 years on average only 50% of the households that registered under the scheme actually got employment.
2. There is a wide variation of performance across States. Maharashtra has averaged an abysmal 13% over the last three years while Rajasthan at the other end of the spectrum has averaged 73%.
3. If a BPL family were to get the full promised benefit of NAREGA they could earn the equivalent of more than 40% of their annual income from this one scheme alone.
4. If this scheme is implemented the right way, there will be no need for MP and MLAs fund.
5. The Planning Commission has said that the RBI should give directions to banks to ensure that payments to the beneficiaries of the NARGA are made only through banks of post offices.
6. There is lack of study on the working of public employment programmes.
7. There are fears that the programme will end up costing 5% of GDP.
8. The public works schemes, completed product (e. G. Water conservation, land development, a forestation, provision of irrigation systems, construction of roads or flood control) is vulnerable to being taken by over wealthier sections of society.
9. Monitoring study of NAREGA in Madhya Pradesh showed the types of activities undertaken were more or less standardised across villages, suggesting little local consultation.

10. Local Government corruption leads to the exclusion of specific sections of society.

11. Local Government have also been found to claim more people have received job cards than people who actual work in order to generate more funds than needed.

12. Bribes as high Rs. 50 are paid in order to receive the job cards.

13. A multi – corer fraud has also been suspected. In Gujarat, a scam of Rs. 10 million has taken place.

14. The productivity of labourers is lower because labourers consider it as a better alternative to working under major projects.

15. NAREGA has affected the availability of labourer as labourers prefer to work under NAREGA.

16. NAREGA ha contributed to farm labourer shortage.

The National Advisory Committee (NAC) advocated the Government to link NAREGA wages with statutory minimum wages.

17. Delay in payment and misappropriation of money and consequent underpayment is seen.

18. Fake entries ae made to divert money.

19. Vested elements associated with criminals have also penetrated in the system.

20. Continuous supervision of quality is not possible.

21. Though NAREGA has been aimed at reducing the migration to cities, it has not yet succeeded in achieving its aim.

22. The original NAREGA Act specifies stringent punishment in case the norms established for the projects are not adhered to. Due to this Gram Panchayat Officials are reluctant to initiate any project under NAREGA.

23. It is also found that often college graduates participated in the NAREGA projects. This amounts to denying the employment to genuinely unskilled people.

**REFLECTION ON NAREGA:**

The NAREGA is an ambitious programme. If properly implemented, it will have the potential of improving standards of lives of the masses in the rural India. If quality standards are strictly adhered to and corruption is stemmed,

infrastructure in the rural areas can be built, which in turn would be an engine for India's growth in the future.

**The comment of Jen Drez -** The famous economist who is a member of National advisory Council and a key person in crating the model of MNAREGA has recently commented that – MNAREGA is under deterioration and there is a need to fix the responsibility regarding corruption otherwise the scheme will deteriorate more (News Paper Lokmat, dated 11/03/2013).

**CONCLUSION:**

Except for isolation instances, a large share of intended benefits has been captured by the elite classes, including petty functionaries.

If employment guarantee schemes can be linked up with other schemes to improve skill levels among workers, the benefits can be long term, but this will require improved levels of co-ordination in the public sector.

NAREGA may be discouraging rural workers from moving to areas of higher productivity where skills for better employment can be obtained and so it may be delaying economic transformation.

**RECENT COMMENTS ON MNAREGA:**

UPA President Smt. Sonia Gandhi commented on 2nd February 2013 in Delhi on the occasion of completion of 7 years to MGNAREGA that –

1. There is a need to give attention to the total capacity of MGNAREGA.
2. Second Green Revolution is possible through this scheme.
3. It is one of the biggest welfare schemes of the world but there is a need to check corruption and mismanagement of funds.

The Prime Minister Dr, Manmohan Singh commented that through this scheme 8 Crore people are benefited and nearly 130 Lakh Crore rupees reached towards the people. Further he commented that – out of total employment nearly 47 % women took the participation in this scheme and it has contributed towards the empowerment of women.

Further he commented that, due to the scheme migration from rural area to urban area is also controlled.

The Prime Minister gave the suggestion that – to strengthen the Panchayat Raj system there is need to help Gram Panchayat in technical matter by the Rural Development Ministry (Daily Sakal, dated 3rd February 2013).

**Maharashtra State and MNAREGA** (Daily Sakal, dated 18th February 2013)**-**

Recently it has been declared by the State that – In the year 2010-2011 the total expenses were 300 Crore, in the year 2011-2012 it is increase to 600 Crore, and in the year 2012-2013 the Central Government contributed nearly 2500 Crore and the State could spent till 15th February 2013 only 1527 Crore and the State Government is forced to spend remaining amount just within 41 days. So it is clear that in the face of serious drought the Government is unable to implement the scheme in a proper way.

**THE CONCLUSION ON THE TOPIC:**

A detail discussion is made in this topic from positive and negative angles of MGNAREGA which is implemented to protect the right to livelihood.

## B] LAND ACQUISITION AND RESETTLEMENT BILL

(Economic and Political Weekly (October 8-14, 2011)

Art. 1 – Chakrawarti Sunjoy – *A Lot of Scepticism and Some Hope*

Art. 2 – Sarma E A S – *Sops For The Poor And A Bonus For Indutry*)

An attempt is made to discuss above Bill and its effect on Article 21.

**INTRODUCTION:**

The right to property guaranteed the citizen several strong safeguards against unjust land acquisition. The Parliament took the extreme step of amending the Constitution in 1977 to delete Article 31 and introduce Article 300A to dilute the citizen's right to property. This opened the floodgates to large scale acquisition of private lands for the PSUS, to enable them to set up their factories to enable them to construct residential townships for their managers. There were instances of PSUS surrendering the surplus land for use by other agencies, unmindful of the trauma caused in the first instance to the displaced families.

Post-1991, private companies joined the bandwagon of land-grabbing in a big way. The government tried to accommodate their greed by stretching the ambit of "public purpose" defined in the 1894 Act. The Apex "Court cautioned the government not to be indiscriminate in using the existing Act to dispossess the people, especially the poor, of their lands.

Though the preamble describes the process of land acquisition to be "participatory", the affected families are at no time to be consulted on the choice of the project, or its location, or on its relevance for the good of the public.

Acquisition of private lands leads directly to people's displacement, so does acquisition of the public lands that provide livelihoods to the people indirectly.

Apart from this bill, there are at least 18 other laws in operation, administered by different government agencies.

The United Progressive Alliance (UPA) Government's New Land Acquisition, Rehabilitation and Resettlement Bill (LARR) are a very significant legislation. This is the first proposed replacement (not amendment) of the

notorious Land acquisition Act of 1894, and the first ever national legislation on rehabilitation and resettlement (R&R)

The principal benefits and the two most important causes for concern are as under –

**REASONS TO BE HOPEFUL:**

There are four main positives in the LARR and they all point in the same direction – more benefits and rights for people whose land will be acquired.

First, there will be process to determine the "market price" of land compensation which will not be less than four times the price in rural areas and twice the price in urban areas.

Second, the Bill has a referendum mechanism for some situations – the approval of 80% of landowners is required when the private sector is involved in projects larger than 100 acres – it should now be possible to identify some lands that are simply not for sale.

Third, landless will be compensated with income for 20 years, plus other immediate benefits, and will have to be included in the R&R package.

Fourth, any acquisition of 100 acres or more will automatically require an R &R package (50 acres if the acquisition is by private firms in urban areas).

**REASONS TO BE SCEPTICAL:**

The two questions at the core of all land acquisition laws:

First what is the justification for taking a given piece of land?

The answer to the first question has always been: public purpose. The real question then becomes: what constitutes public purpose?

Second, how will compensation be determined?

The answer to the second question has been: by the local state authority (typically the district collector) based on market price.

There are other issues like, the question of what acts of private industry may be considered to serve a public purpose.

**PUBLIC PURPOSE:**

The origins of eminent domain (or land acquisition) law in India can be traced to the colonial state's need to create infrastructure to facilitate the movement of goods and people and enable commerce; these first "public works" were typically canals and roads; later came railways, mine, and irrigation schemes, and even later came factories and other business establishments.

Land acquisition law is essential to collate multiple properties and to own them "free and clear" of legal encumbrances. LARR gives the impression that the recent problems with land acquisition have happened because of the reckless acts of private industry. The facts are quite the opposite.

Dams and irrigation schemes, transportation, environment, power, and defence are other major categories that have caused significant displacement and are entirely or almost entirely in the domain of the State.

The private sector has been responsible for possibly less than 10% of India's total acreage taken and population displaced; the state is responsible for the remaining 90 %. One Hirakud or Bhakra Nagal or Sardar Sarovar takes more land than a 100 or even 200 Nano factories.

A majority of the land – related conflicts today are over state projects – the State Vs peasants" (especially the most vulnerable one : tribals and marginal farmers)

The definition of "Public purpose" in the Bill begins with state projects:

1. Two clauses on defence, transportation, irrigation, power, etc,
2. Three clauses on project – affected people, weaker section, displaced persons, and persons affected by natural calamities.
3. Clause (VI) brings in "Public Partnership projects".
4. Finally Clause (VII) the provision of land in the public interest for private companies for the production of goods for public or provision of public services." This could mean almost anything . Certainly the entire manufacturing sector can be included in this, possibly much of the service sector too. This is business as usual.

This rule (the inform consent ) is imposed on the clause (VI) and clause (VII), public private and private sector projects, but the entire state sector is absolved of this responsibility . Which means all new dams and irrigation

schemes, all hydro and nuclear and most thermal power projects all roads and railways and airports and ports, and most mines and all oilfields will be outside the "informed consent" rule. Nearly over 90 % of all land acquisition and displacement have taken place precisely for these projects. "The informed consent" rule, as written, turns out to be a sham.
Democracy seems to stop at the government doorstep!

**SOME LAND IS "PRICELESS":**

When the land has no substitute for its owner, when there is little market or price information for that land, when the owner gets more utility from the current use of the land than can be compensated by the new land use – land can become priceless.

One cannot imagine that a new thermal power plant could be set up where the Khajuraho temples stand today, nor can one imagine that if oil were discovered underneath Connaught Place in Delhi, excavators would move in to dig it out. These are very valuable lands and there is almost no use, certainly no industrial use that could pay for them.

These lands do exist, and they effectively are priceless this includes well to do cashew farms in Goa and the impoverished Niyamgiri Hills in Orissa. When this priceless land sits on an immovable resource – be it an existing airport that has to be expanded or a bed or iron ore that need to be extracted – the conditions exit for serious conflict.

LARR does not require the State to meet the 80% rule. The bill does not think it necessary for the State to find out which land is priceless before it blunders into conflict.

**THE PRICING PROCESS :**

The price setting process detailed in the LARR follows the same basic principles of the past: a "market price" – discovery process by the collector, followed by an augmentation of that discovered price – multiplication by four in rural areas and two in urban areas in the new Bill. But there are serious problems in this approach. It is not easy to discover the "market price" of rural land.

First, there are few land transactions at a village scale.

Second, a significant but unknown proportion of the transactions are distress sales.

Third, the transactions improperly recorded, in order to underpay stamp duties; and, where they are properly recorded, it is because the State has pre-emptively set the stamp duty.

Fourth, there is so much variation in land quality (by yield, number of crops) and size of landholding that it may be impossible to find comparable transactions.

The multiplication of “market price” to turn it into “acquisition price” has the distinct possibility of increase land prices by geometric progression in some regions. Moreover, there appears to be recognition of the fact that this pricing formula will create bizarre bound – where the price of land on one side is twice as high as on the other.

**BEST APPROACH:**

The more expensive side of this boundary will be rural, the less expensive will by urban. This is so outlandish that is it may be impossible to predict how market agents – the buyers and sellers – will respond.

The author has suggested the best approach, to set floor or minimum prices by bands/regions at the state level. These prices should be very liberal, but not legislated to be X times “market price “. Prices near urban centres should be higher than prices at locations further away. Beyond that, it is probably best to let states work out the rates alternatively.

In Haryana, where this model is in use now, set prices (declining in bands away from Delhi) have been promulgated thrice in five years. Therefore, these prices will change frequently, perhaps as often as every year. It would be wise to borrow from and improve upon the Haryana model.

**A CODE:**

If the State has created the problem (and it has) then it is the duty of the state to solve it. The LARR has a large new institutional architecture embedded in it, including an administrator; a commissioner for rehabilitation and resettlement; a rehabilitation and resettlement commit; a national monitoring

committee for rehabilitation, and resettlement; and land acquisition, rehabilitation and resettlement authority.

A new institutional architecture has to be built from different fundamental principles. The most important principle is to include all stakeholders – project affected people, civil society, and most important, political parties in the price setting process itself. Otherwise one will see-land disputes that get fanned into conflicts by political parties and state institutions that behave as expected.

Some private companies have adopted yet another way to deceive the landowners. They first buy agricultural land on the pretext of setting up, say, a sugar factory that will benefit the farmers, and later, use that land for a polluting industry that the farmers are unwilling to accept. The Bill has no answers to such situations.

Part III of the 1894 Act enabled any displaced family, not satisfied with the compensation award, to seek a reference to be made by the collector to the district court for adjudicating his/her representation. The new law has conveniently omitted this part altogether, thereby excluding judicial oversight on the decision – making process at the district level. The author questions – it's there a neo – colonial sting to the bill'?

**NEED FOR AUDITS :**

In most states, land records are in disarray. The records do not show the names of the persons actually tilling the land. Whenever land is acquired, it is the absentee landlord sitting faraway in a city that gets the compensation. The MRD should have initiated some legislative changes to protect the interest of the actual tiller of the land.

To understand the reality of forced land acquisition, the government has not tried to evaluate the pattern of use of the land already acquired and the post – acquisition plight of the displaced families. In many cases, the project developers have kept the land vacant and raised funds clandestinely from financial institutions. The displaced families on the other hand have become destitute.

Considering that the Land Ac quisition Bill will have wide ramifications, the least that MRD could have done is to generate a nationwide debate at the level of the Gram Sabhas and municipalities, such a debate along would have

helped the ministry in coming up with a law that a democratic society like ours can be proud of.

**CONCLUSION:**

As the preamble suggests, the Bill will soon become a strong drive to divert agricultural lands to industry. This has far – reaching implications for the food security of the country.

Perhaps, it will be more prudent for the government to adopt a long-term land – use policy at the national level and determine the taluk – level minimum manner. If the displaced families are given the status of lessors of the land to the private companies with indexed rentals or they become the companies' share holders, the Bill would have set a truly innovative trend.

**THE CONCLUSION ON THE TOPIC –**

The effect of the above Bill on Article 21 is discussed in detail in this Chapter.

# CHAPTER IV

## SOME RECENT JUDGMENTS

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## SOME RECENT JUDGMENTS OF THE SUPREME COURT

In this Chapter an attempt is made to discuss three recent judgments of Supreme Court on Article 21 and how the State authorities are violating Article 21.

### 1. THE CASE OF NANDINI SUNDER

*Namdini Sundar and Ors.* v. *State of Chhattisgarh* (Writ Petition (civil) No. 250 of 2007)

This case represents a yawning gap between the promise of principle exercise of power in a constitutional democracy, and the reality of the situation in Chhattisgarh.

The large tracts of the State of Chhattisgarh have been affected by Maoist activities.

The petitioners have alleged, widespread violation of human rights of people of Dantewada District and its neighbouring areas in the state of Chhattisgarh on account of the ongoing armed Maoist/naxalite insurgency and the counter – insurgency by the government through the group called "Salwa Judam" which was leading to violation of human rights.

That about 3000 SPOs, (Special Police Officers) have been appointed by the State Government to take care of the law and order situation, in addition to the regular police force.

**THREE ASPECTS WERE DEALT BY THE COURT:**

1. The issue of schools and hostels in various districts of Chhattisgarh being occupied by various security forces.
2. The issue of nature of employment of SPOs, also popularly known as Koya Commandos, the manner of their training, their status as police officers, the fact that they are provided with firearms, and the various allegations of the excessive violence perpetrated by such SPOs; and

3. Allegations made, by Swami Agnivesh (Petitioner) that some 300 houses were burnt down in some villages and women were raped and three men were killed in March, 2011.

**THE STATE GOVERNMENTS SUBMITTED TO THE COURT THAT –**

SPOs are appointed to act as guides, spotters and translators, and work as a source of intelligence, and firearms are provided to them for their self defence.

**The Court Observed that –** The Union of India and State of Chhattisgarh have acknowledged that many hundreds of civilians have been killed by Maoists/Naxalites by branding them as "police informants." This would obviously mean that SPOs would be amongst first targets of the Maoists/Naxalites.

The court observed that :

**It is also equally clear that** – as alleged by the petitioners, that the lives of thousands of tribal youth appointed as SPOs are placed in grave danger by virtue of the fact that they are employed in counter – insurgency activities against the Maoists/Naxalites in Chhattisgarh.

Strength of the SPOs till last year was only 3000 (and has now grown to 6500) the ratio of number of SPOs killed (173) to the strength of SPOs (3000 to 4000) is of a much higher order, and is unconscionable.

The State of Chhattisgarh has itself stated that in recruiting these tribal youths as SPOs "preference for those who have passed the fifth" standard has been given and it is contented by the State that –

i) Subjects such as IPC, CRPC, Evidence Act, Minors Act etc. are taught in 24 periods of instruction of one hour each.
ii) In an additional 12 periods, both the concepts of Human Rights and "other provisions of Indian Constitution" are taught.
iii) and scientific and forensic aids in 6 periods.
iv) Honorarium is paid to promote livelihoods amongst tribal youth, pursuant to Article 21 and Article 14.

The Court held that these claims are simply lacking in any credibility.

The Court commented that, 1200 SPOs appointed so far have been dismissed for indiscipline or dereliction of duties. That is an extraordinarily high number at 6500 – 20% to 40%.

The appointment of tribal youth as SPOs, who are barely literate, for temporary periods, and armed them with firearms, has endangered and will necessarily endanger the human rights of others in the society.

In light of the above the Court held that Article 21 and Article 14 of the Constitution of India have been violated, and will continue to be violated, by the appointment of tribal youth.

**CONCLUSION ON THE TOPIC –**

A detail discussion is made in this Topic of the Judgment of the Supreme Court in which the Supreme Court has given the clear directions to the State to protect Article 21 of the tribal youths of the State of Chhattisgarh.

## 2. THE CASE OF NOIDA:

In this case an attempt is made to discuss the Public Trust Doctrine which has grown from Article 21 by discussing the case decided by the Supreme Court.

NOIDA Entrepreneurs Association v. Noida and Others (Writ Petition No. (civil) 150 of 1997)

The Legislature of Uttar Pradesh enacted the Uttar Pradesh Industrial Area Development Act, 1976, for the purpose of proper planning and development of industrial units and to acquire and develop the land for the same. The New Okhala Industrial Development Authority has been constituted under the said Act.

The instant Writ Petition was originally filed seeking a large number of reliefs including the allotment of Industrial and residential plots to the members of the Petitioner Association and a large number of officials who had acted as Chief Executive Officers of the Authority, the Writ was considered as Public Interest Litigation.

The inquiry Commission was appointed which submitted the report which indicated that Mrs, Neera Yadav, IAS, Respondent No. 7 had committed serious irregularities and illegalities.

Mrs. Neera Yadav filed her affidavit as per the directions of the Court with regard to irregularities committed by other Officers, namely Mr. P. K. Mishra, Respondent No. 5, Mr. Bijendra Sahay, Respondent No. 8, Mr. Ravi Mathur, Respondent No. 4 and Mr. S. C. Tripathi.

The Central Bureau of Investigation conducted the enquiry against Mrs. Neera Yadav and filed a charge sheet against her. She was put on trial and proceeded with in accordance with law.

Mr. Ravi Mathur , IAS, Respondent No. 4 had been the CEO, NOIDA from July 1993 to 9/1/1994 and the CEO, Greater NOIDA from 10/1/1994 to 26/1/1995. Altogether, there had been 14 allegations against him which the Chairman, Board of Revenue had examined.

Mr. Ravi Mathur allotted contracts worth Rs. 10 corers to different contractors on section basis without inviting tenders.

Mr. Ravi Mathur caused financial loss to NOIDA by not paying conversation charges with respect to the plot allotted to him.

A 13 hectare City Park situated near Sector 24, 33 and 35 in NOIDA was destroyed and a new residential Sector 32 in violation of the Master Plan was carved out comprising of 200 plots.

**The Court observed that:**

- It is settled proposition of law that whatever is prohibited by law, cannot legally be affected indirectly.
- There is no provision under the Act 1976 or Regulation 1991 for conversion.
- Every holder of a public office is a trustee. State actions required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. The public Trust Doctrine is a part of the law of the land. The doctrine has grown from Article 21 of the Constitution. In essence, the action/order of the State or State instrumentality would stand vitiated if it lacks bona fides.

Thus, in view of the above, the Court directed the CBI to have preliminary enquiry and in case the allegations are found having some substance warranting further proceeding with criminal prosecution.

**CONCLUSION ON THE TOPIC –**

How the SC protected the Public Trust Doctrine which has grown from Article 21 is discussed in detail with the help of above Judgement.

**3. THE CASE OF RAM JETHMALANI:**

An attempt is made to discuss the concept of right to privacy which evolved through Art. 21 is discussed in above case.

***Ram Jethmalani and Ors.* v. *Union*** (Writ Petition (civil) No. 176 of 2009)

The Petitioners state that there have been a slew of reports, in the media, and also in scholarly publications that various individuals, mostly citizens, noncitizens, and other entities have generated, and secreted away large sums of monies, through their activities in India or relating to India, in various foreign banks, especially in tax havens, and jurisdictions that have strong secrecy laws with respect to the contents of bank accounts and the identities of individuals holding such accounts. The Petitioners allege that most of such monies are unaccounted, and in all probability have been generated through unlawful activities.

**The Petitioners Contended that:**

1. That the sheer volume of such monies points to grave weaknesses in the governance of the nation, because they indicate a significant lack of control over unlawful activities through which such monies are generated, evasion of taxes, and use of unlawful means of transfer of funds;
2. That these funds are then laundered and brought back into India, to be used in both legal and illegal activities;
3. That the use of various unlawful modes of transfer of funds across borders, gives support to such unlawful networks of international finance;
4. Such unlawful networks effectuate transfer of funds across borders in aid of various crimes committed against persons and the State. The prevailing situation also has very serious connotations for the security and integrity of India.
5. The Petitioners also further contend that a significant part of such large unaccounted monies includes in it – the monies of powerful persons in India,

including leaders of many political parties. Further, the Petitioners also contend that the efforts to prosecute the individuals, and other entities, which have secreted such monies in foreign banks, have been weak or nonexistent.

6. It was strongly argued that the efforts at identification of such monies in various bank accounts in many jurisdictions across the globe, attempts to bring back such monies, and efforts to strengthen the governance framework to prevent further outflows of such funds, have been sorely lacking.

7. The Petitioners also made allegations about certain specific incidents and patterns of dereliction of duty, wherein the Government of India, and its various agencies, even though in possession of specific knowledge have not proceeded to initiate, and carry out suitable investigations, and prosecute the individuals.

Specifically, it was alleged that Hassan Ali Khan was served with an income tax demand for Rs. 40,000 Crores (Rupees Forty Thousand Crores), and that the Tapurias were served an income tax demand notice of Rs. 20,580 Crores (Rupees Twenty Thousand and five hundred eighty Crores). The Enforcement Directorate, in 2007 disclosed that Hassan Ali Khan had “dealings amount to 1.6 billion US dollars” in the period 2001 – 2005.

In January 2007, upon raiding Hassan Ali’s residence in Pune, certain documents and evidence had been discovered regarding deposits of 8.04 billion dollars with UBS bank in Zurich. It is the contention of the Petitioners that, even though such evidence was secured nearly four and half years ago.

1. A proper investigation had not been launched.
2. The individuals concerned had not even been interrogated appropriately.
3. That the Union of India, and its various departments, had even been refusing to divulge the details and information that would reveal the actual status of the investigation.
4. The laxity of investigation indicates multiple problems of serious non-governance,
5. Investigation was being deliberately hindered because Hassan Ali Khan, and the Tapurias, had or were continuing to handle the monies of such a class.

The Petitioners further alleged that in 2007, the Reserve Bank of India had obtained some “knowledge of the dubious character” of UBS Security India Private Limited, a branch of UBS and consequently stopped this bank from

extending its business in India by refusing to approve its takeover of Standard Chartered Mutual Funds business in India.

However, it seems that the RBI reversed its decision in 2009, and no good reasons seem to be forthcoming for the reversal of the decision of 2008.

**The Court Commented that:**

What is important is that the Union of India had obtained knowledge, documents and information that indicated possible connections between Hassan Ali Khan, and his alleged co-conspirators and known international arms dealers.

In light of the above the Court gave following order:

That the high level committee be constituted by the Union of India.

That the Special Investigation Team, so constituted, shall be charged with the responsibilities and duties of investigation, initiation of proceedings and prosecution, whether in the context of appropriate criminal or civil proceedings.

The Special Investigation Team shall also be charged with the responsibility of preparing a comprehensive action plain.

That the Special Investigation Team so constituted will be responsible to this Court.

That the Special Investigation Team also be empowered to further investigate even where charge – sheets have been previously filed; and that the Special Investigation Team may register further cases, and conduct appropriate investigations and initiate proceeding, for the purpose of bringing back unaccounted monies unlawfully kept in bank accounts abroad.

The Court accordingly directed the Union of India to issue appropriate notification and publish the same forthwith.

**ISSUE – DISCLOSURES OF VARIOUS DOCUMENTS –**

The Court commented that – Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner.

There is no presumption that every account holder in banks of Liechtenstein has acted unlawfully. In these circumstances, it would be

inappropriate for this Court to order the disclosure of such names, even in the context of proceedings under Clause (1) of Article 32.

**CONCLUSION ON THE TOPIC –**

In delivering the judgement how the Supreme Court protected the right to privacy and at the same time directed the Central Government to make responsible attempt in dealing with unaccounted monies.

# CHAPTER V

## CRITICAL EVALUATION OF ARTICLE 21

# CHAPTER V

# CRITICAL EVALUTION BY THE EXPERTS OF THE INTERPRETATION BY SC OF ARTICLE 21

Article 21 cannot be interpreted in an isolated way. It has to be interpreted in the fabric of the entire context. Article 21 is studied in this topic under following heads –

| Topic No. | Contents |
|---|---|
| **1**. | Article 21 and some initial amendments to the Constitution. |
| **2.** | Implementation of some of the judgments of the Supreme Court - Critical Study. |
| **3.** | Critical evaluation of the concept of the State as emerged from the judgments of the Supreme Court and its consequences. |
| **4.** | Comments of the Expert on Judges and their Judgments. |
| **5.** | Comments of the Experts on Legal Profession. |
| **6.** | Comments of the Experts on Judicial Governance. |
| **7.** | Comments of the Experts on Legal Education. |

## TOPIC 1

## ARTICLE 21 AND SOME INITIAL AMEENDMENTSTO THE CONSTITUTION

**FALI S. NARIMAN'S comments on some judgments** ( Nariman S. Fali, Before Memory Fades…An Autobiography, Hay House Publishers(India) Pvt. Ltd. 2010, Page 121-124) **:**

Are Courts are empowered to invalidate legislative enactments and Executive orders if they violate any part of the Fundamental Rights guaranteed in Part III?

On this great question, our constitution is silent.

The Supreme Court grappled several years with the problems that this question had posed – first in *Shankari Prasad (1951)*, again in *Sajjan Shing (1965)* and *Golakhnath (1967)* and finally once again in *Keshavanand (1973)*.

In *Shankari Prasad* (AIR 1951 SC 458), The Constitution First Amendment Act 1951, which has inserted Article 31 (b) was challenged before a Constitutional Bench of Five Judges, as ultra virus and unconstitutional.

It is said that one of the acts and regulation specified in IX$^{th}$ Scheduled, nor any provision, would be deem to be void on the ground that such act, regulation or provision violated fundamental rights.

What promoted this enactment was that the Congress Party had initiated certain agricultural reforms by enacting legislation. The High Courts of Patana held that the Act passed in Bihar was unconstitutional, whilst High Courts of Allahabad and Nagpur had upheld the validity of corresponding legislation in Uttar Pradesh and Madhya Pradesh. Appeals from those decisions were pending in Supreme Court. At this stage first amendment was enacted.

The Zamindar filed petitions challenging the amendments. A unanimous court rejected the petition of Zamindars.

Fourteen year later, *Shankari Prasad's case* was revisited in *Sajjan Singh* (AIR 1965 SC 845). The Constitution 17$^{th}$ Amendment Act 1964 had placed a larger number of states enactments in the IX$^{th}$ Schedule.

The 17$^{th}$ Amendment was upheld by a bench of five judges but not without reservations by two of the Justices on the bench (Justice Hidaytullah and Justice Mudholkar).

It was ultimately in *Golaknath (1967)* a bench of eleven judges considered the same question again.

Justice Subba Rao, who presided over the bench managed a narrow majority (6:5) for the view that none of the fundamental rights were amenable to the amendment power (Article 368) in the constitution, simply because an amendment to the constitution was the 'Law' under Article 13 (2).

The author has commented that – the opinion in *Golaknath case (1967)* and then in *Keshavanand case (1973)* were products of divided courts. They aroused much controversy and contention but the basic structure theory has come to stay. It was evolved from the great silences in our constitution. After all, although the constitution did provide that it could be amended, it surely did not say that it could be abrogated, or that its basic features could be thrown to the winds.

The author further comments that – though an innovative doctrine in disputes related to the property rights, the basic structure doctrine has long survived.

Article 19 (1) (f) and Article 31 of the Constitution (The Property Clause) where deleted from the Fundamental Rights Chapter by the 42$^{nd}$ Amendment Act, 1978. Article 300 (A) inserted by the 44$^{th}$ Amendment which provides that no person shall be deprived of his property save by authority of law.

The author has given the opinion of Durga Das Basu on the judgment of *Keshavanand.* In his commentary Durga Das Basu has written "The Court took upon itself the task of differentiating between the essential and non-essential

features of the Constitution. No such power was vested in the court by Article 368 either expressly or by implication".

**Fali S. Nariman has commented on this view that –** "Dr. Basu's view was that of the strict legal constructionist, but the Supreme Court was not bound by literal view of the Constitution. Great cases are often shaped by events; as Justice Cardozo famously said 'The hydraulic pressure of great events do not pass judges idly by'. Though of doubtful legal validity, the basic structure theory was the reaction of a court that was apprehensive of an over-enthusiastic, over powering one party majority in Parliament. But a doctrine even though illogical has come to stay.

The author further clarifies that – the 39th Amendment of the Constitution was a crude attempt to pre-empt the Supreme Court from deciding the election appeal of Indira Gandhi (the them Prime Minister). But fortunately the Court successfully resisted the attempt – relying for the first time after the fundamental right's case on the basic structure theory.

Commenting on *Minerva Mills (1980) case,* the author states that – 'a constitution bench of the court following the ratio in fundamental right case declared that the exclusion of judicial review violated the basic structure of the Constitution and struck down this part of 42nd Amendment'.

The Doctrine of Basic Structure or Basic Structure Feature had been invented by the Supreme Court in order to shield the constitution from frequent and multiple amendments by majority government.

Five years after the Basic Structure theory was first propounded in the fundamental rights case, parliament gave implicit recognition to it – in the 44th Amendment Act, 1978. It provided that the fundamental right of life and liberty (Article 21) could never be suspended (by law or constitutional amendment) even during an emergency – simply because the right to Life and Liberty were basic to the Constitutional Framework. The Basic Structure theory has now been woven into our Constitutional Fabric.

The judgment of the Supreme Court in *Minerva Mill's case* striking down Sections 4 and 55 of the Constitution (42nd Amendment) Act , 1976 replenished the faith of those who understand the Supreme Court role as the watchdog of the Constitution. To supersede the judgment in *Keshavanand Bharati's case* and confer absolute and unlimited amending power on Parliament, that Section 55 of the Act inserted clause 4 and 5 in Article 368. The effect – the Parliament will have limitless power to amend the Constitution and the Court's validity to decide Constitutional amendment was taken away. The Supreme Court had no choice but to strike down the above clause as being invalid and ultra virus. (Palkhivala N. A., *We the People* –UBS Publishers' Distributers Ltd., New Delhi, 2010, Page No. 207-209).

**COMMENTS OF FALI S. NARIMAN'S ON INTERNAL EMERGENCY** (Supra N. 1, Page No. 168-174) **:**

The internal emergency was imposed on nation on 25th June 1975. And the author resigned from his post as Solicitor General. In emergency wild powers of detention were given to the District Magistrate. The author has rightly commented that – 'Once Law are passed which enable officials to act irresponsibly, then in this country (and possibly in other countries as well) they will act – with 'hobnailed boots!'

The author has cited the decision of Supreme Court in *ADM Jabalpur* v. *Shukla* (AIR 1976 SC 1207) - in this case the presidential order issued on 27th June 1975 (under Article 359) suspended the rights of all detunes to enforce any of the rights conferred by Article 14, 19, 21 and 22 as they stood suspended under Article 368. The question was whether detunes were entitled to invoke the jurisdiction of the High Court under Article 226 and whether the High Court could issue writs of Habeas Corpus (a writ commanding a person to be brought before a judge to investigate the lawfulness of the detention).

Nine High Courts in country, including the High Court of Allahabad, Bombay, Delhi, Karnataka, Madhya Pradesh, Punjab and Rajasthan – held that – notwithstanding the imposition of the emergency and the Presidential Order, Courts were empowered to issue the writ of Habeas Corpus. The concerned State,

Government and the Union of India filed the appeals to Supreme Court and the Supreme Court held in favor of the Government. The alone dissent was from Justice H. R. Khanna who refused to rationalized tyranny. He stated that life and liberty are not conferred by any Constitution they inhere, in men and women as human being.

The author has cited – a comment of Alistair Cook in a book titled 'Six Men' (Alfried A. Knopf, New York, Page 820) that – "the ultimate measure of man is not where he stands in moments of comfort and convenience, but where he stands at times of challenged and controversy".

The author comments that – "Justice Khanna was superseded by Justice M. H. Beg and Justice Khanna resigned – but in the blaze of glory".

One of the lessons of the internal emergency (of June 1975) was not to rely on constitutional functionaries.

A Constitutional Amendment 44th was enacted in the year 1978 which provided that –

1. Article 352 (3) – declared that a President could not sign a proclamation of emergency unless the decision of the council of Minister was communicated to him in writing.

2. Parliament declared that Article 20 (Double Jeopardy) and Article 21 could never be suspended even during times of war or during a period of an emergency (external or internal).

3. Parliament was endowed with overriding power to revoke an emergency declared under Article 352 whenever, according to majority of members of Parliament, conditions for its invocation no longer existed.

4. an emergency declared under Article 352 had to be approved within a stated time by a 2/3rd majority, and if Parliament was not in session it had to be summoned and assembled for this specific purpose.

5. The finality clause and non – justifiability clause in Article 352 (5) (which had been inserted by the 38th Amendment, 1975, with effect from 1st august 1975) was expressly deleted.

**The proliferation of documentation in the area of Human Rights:-**

The author has commented – "Not only academicians and politicians but a good many intellectual around the world have harbored the sentiments about the proliferation of documentation in the area of Human Rights – declarations, conventional, resolutions, treaties, words, words, words. The United Nations is long on instruments relating to the human rights, but its member states are significantly short on performance. Universalization of Human Rights may well have been achieved, but only on paper. Effective implementation is lacking. What Governments profess and what they practice (within the State) hardly ever coincides."

**PALKHIWALA N. A. – ON INITIAL AMENDMENTS** (Palikhiwala N. A., Our Constitution Defaced and Defiled, The Macmillan Co. of India Ltd., Delhi,1974 – Page No. 50-59) **-**

The author has discussed the effect of 24th and 25th amendment on liberty.

**ARTICLE 31C – AN OUTRAGE ON THE CONSTITUTION:**

Article 13 (2) – the State shall not make any law which takes away or abridges the fundamental rights. The word "law" was construed by the Supreme Court, in *Golaknath's case* (AIR 1967 SC 1646), as including constitutional amendment and it was held that Parliament could not abridge or take away the fundamental rights in exercise of its power under Article 368.

**THE 24TH AND 25TH AMENDMENTS:**

The 24th Amendment sought to supersede that judgment. It empowered Parliament to take away or abridge all or any of the fundamental rights and it conferred generally on Parliament an unfettered power to alter the whole or any part of the Constitution.

**The 25th Amendment –** contained three significant provisions.

1. It amended Article 31 (2) and provided that anyone's property may be acquired on payment of an "amount" instead of "compensation".

The author states that – Now the property of citizen could be confiscated by the State arbitrarily. Due to this even other fundamental rights were affected, the only exception being the case of educational institutions dealt with in the proviso to Article 31 (2).

The fundamental right to freedom of speech, to form unions, and to practice any profession – guaranteed by Article 19 (1) (a), (c) and (g) can be eroded or extinguished.

2. The Supreme Court has held in *the Bank Nationalisation Case*, (overruled by *Keshavanand* v. *State of Kerala* (AIR 1973 SC 1461)), that the power of acquisition or requisition envisaged by Article 31 (2) was subject to the citizen's right to acquire, hold and dispose of property under Article 19 (1) (f) which, in its turn, was subject under article 19 (5) to reasonable restrictions in the interests of the general public.

The 25th Amendment enacted that Article 19 (1) (f) would be inapplicable to acquisition or requisition laws.

Many industrial undertakings have been nationalized overnight by Ordinances which fixed, without any notice to anyone and ridiculous amounts are paid by the State.

3. The 25th Amendment inserted Article 31 C which gave precedence to Part IV over Part III.

The author states that – due to Article 31 (b) and (c) countless categories of law can claim the protection of Article 31 (c).

**ARTICLE 31 (C) SEEKS TO SUBVERT SEVEN ESSENTIAL FEATURES:**

The author states that - there is a fine but vital distinction between two cases of constitutional amendments:

1. Where the fundamental rights are amended to permit laws to be validly passed.

2. The laws which are void as offending those rights are validated by a legal fiction.

In the first case the law which is constitutional – stands abridged.

In the second case the law which is unconstitutional – is validated and there is a repudiation of the Constitution.

If the second case is permissible the Constitution could be reduced to a scrap of paper. If Article 31 C is valid, Parliament can amend the Constitution as to declare all laws to be valid which are passed by Parliament or State Legislatures in excess of their legislative competence, or which violate any of the basic human rights in Parts III or the freedom of inter – State trade in Article 301.

No law passed by Parliament or any State Legislature shall be deemed to be void on any ground whatsoever – the insertion of only one such Article would toll the death – knell of the Constitution.

1. Thus Article 31 C clearly damages or destroys the supremacy of the Constitution.

2. Article 31 C subordinates the fundamental rights to the directive principles of the State policy.

3. The "form and manner" laid down in Article 368 is sought to be repudiated by Article 31C.

4. Article 31 C completely takes away the right given under – Article 19 (1) (f), Article 31 (1), Article 31(2).

Article 14 and 19 (a) to (g) – can be violated under Article 31 G under the cloak of improving 'the economic system'.

5. Article 32 is destroyed.

6. The power of amending or overriding the Constitution is delegated to all the State Legislatures – which is not permissible under article 368.

7. Under the guise of giving effect to the directive principles, a number of steps cam be taken which may seriously undermine the position of regional, linguistic, cultural and other minorities.

As article 31 (1) is abrogated by Article 31 (C) minorities can be deprived of their properties by law which is invalid.

The four pillars of the Constitution, as shown by the Preamble, are – Justice, Liberty, Equality and fraternity. Article 31 C takes away a very substantial part of Justice, the whole of the Liberty of though and expression, the essence of Equality and the heart of Fraternity (Supra N. 4, Page No. 215).

**Palkhivala N. A. comments that –**

In the entire history of liberty, never were so many hundreds of millions deprived of so many fundamental rights at one fell swoop as by the insertion of Article 31 C.

The author has given four features of the Totalitarian State as under –

1. Constitutional permission to the ruling party to favour its own members;
2. Denial of the right to dissent or to oppose;
3. Denial of various personal freedoms;
4. The State's right to confiscate anyone's property.

The author comments that –

All these four attributes of a Totalitarian State are implicit in Article 31 C.

**1. SAFEGUARDING THE COMMON MAN AGAINST THE TYRANNY OF THE EXECUTIVE AND THE LEGISLATURE** (Supra N. 7. Page No. 84-89) **:**

The author, Palkhivala N. A., has commented that:

Over the last 25 years the Supreme Court and the High Courts have rendered invaluable service to the republic. They have protected the fundamental rights and human rights by creating new precedents.

The Supreme Court has protected the rights of common man by enlarging the concept of State.

In *the Bank nationalization case* – the author commented that, there is a victory of common man. In this case the Supreme Court struck down the law nationalizing banks without compensation. This decision further protected the right given by Article 21, Article 22 and Article 91 (a) (d).

**In *the Privy Purse Case* – Palakhivala N. A. commented that:**

The basic issues centered round the sanctity of the Constitution, public morality and the rule of law. The Supreme Court held that – the foundation of the constitution is laid in the rule of law and there is no arbitrary power to the legislature and executive. The author lastly commented that – the independence of Judiciary is essential for the rule of law and democracy.

**2. JUDICIARY MADE TO MEASURE** (Supra N. 7, Page No. 93-104)**:**

In this chapter the author (Palkhivala N. A.) has commented on the decision of the Government regarding the appointment of Chief Justice of Supreme Court. The author has criticised the decision of the Government to supersede 3 senior most Judges who were involved in the decision of Fundamental Right's Case.

The author has stated that it was the darkest day in the history of the free institutions.

The author states that – in no other democracy there is a criticism on the Judges and there is no talk on committed judiciary.

**LAW COMMISSION'S REPORT:**

It is clearly stated in the report that – the senior most puisne having ability, experience and administrative capacity must be appointed as a Chief Justice. All these qualities were in the Judges who were superseded. Unfortunately they have to resign as they were fearless in deciding the Fundamental Right's Case.

**TRADITIONS IN OTHER COUNTRIES:**

In those countries, the tradition is firmly established that high caliber and resolute independence are the essential pre-requisites in the Chief Justice, and the consideration whether his ruling would favour the executive or not is not only irrelevant but should be dismissed as pernicious.

The principle of complete independence of judiciary from the executive is the foundation of the democracy.

The author has commented that – if Judges suitable from the Government's view point are appointed then it will have following consequences:

1. The Government of India is the single largest litigant in the whole country. If this litigant can select judges suitable to itself that would be the end of the Judiciary System.

2. It is desirable to inject justice into politics; it is disastrous to inject politics into justice.

3. Under Article 131 the Supreme Court has original and exclusive jurisdiction in disputes between Central and States and if a Chief Justice is appointed who is of the ruling party then it will be against the constitution.

4. Constitution recognizes no prerogative whatsoever; it recognizes merely rights, duties and discretions. The difference between "prerogative" and "discretion" is clear. A person who has a prerogative can act arbitrarily or irrationally and yet his decision must be treated as legal and valid.

5. The Constitution is supreme over Parliament; and not Parliament over the Constitution. The author comments that if Judges who are suitable for the Government are appointed then it will be a mockery of democracy.

**3. PROVISIONS FOR AMENDMENT OF THE CONSTITUTION** (Supra N. 7, Page No, 109-110) **:**

In this chapter the author (Palkhivala N. A.) has discussed different provisions which grant to Parliament the power to make amendments of the Constitution.

1. Article 4 – formation of a new State or alteration in the area or boundaries of an existing State, and for this purpose it authorizes amendment of the First Schedule (enumeration of the States and delimitation of their territories) and the Forth Schedule (allocation of seats to each State in the Rajya Sabha, i. e. the Council of States).

2. Article 169 – the abolition or creation of the Legislative Council in aState.

3. The Fifth Schedule – special provisions for the administration and control of Scheduled Areas and Scheduled Tribes.

4. The Sixth Schedule contains special provisions for the administration of Tribal Areas.

In all these four cases the amending power which is for special purposes or for specified areas or sections of the nation, can be exercised by a simple majority in Parliament.

5. The Fifth provision is the general amending power which under Article 368 can be exercised by a special majority.

6. The provision to Article 368 further enacts that if such amendment seeks to make any change in certain specified provisions or subjects, e. g. the Legislative Lists or the representation of States in Parliament, "the amendment shall also require to be ratified by the Legislatures of not less than one – half of the States".

**The Twenty-fourth Amendment added the following clause at the beginning of Article 368:**

"Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article".

The 24th Amendment made two other changes in Article 368.

1. It made it mandatory on the President to give his consent to an Amendment Bill passed by Parliament.

2. It superseded the decision of the Supreme Court in *Golaknath's case.*

The avowed object of the 24th Amendment was to give Parliament a limitless power of constitutional amendment, including the power to abrogate all or any of the fundamental rights.

# TOPIC 2

## IMPLEMENTATION OF SOME OF THE JUDGMENTS OF THE SUPREME COURT – A CRITICAL STUDY

**POWER PROCLAIMING IT, EXERCISING IT** (Arun Shourie, Courts and their Judgments – Rupa Co. New Delhi, 2010, Page No. 404-407)**:**

On the problem of implementation the author (Arun Shourie) has commented that –

If an authority takes on a problem, it must go to the furthest limits to ensure that a real, palpable dent is made on it. Authority must use the power it says it has to ensure that its own functioning measures up to the standards it proclaims for others.

The author (Arun Shourie) says – 'What impression is a citizens liable to form when he reads passages such as the following?'

The Supreme Court's power under article 142 (1) to do "complete justice" is entirely of different quality. What would be the need of "complete justice" in a cause or matter would depend on the facts and circumstances of each case and while exercising that power the court would take into consideration the express provisions of a substantive statute. Any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of the Supreme Court.

Article 142, though while exercising power under Article 142, the Supreme Court must take into consideration the statutory provision regulating the matter in dispute.(*Delhi Judiciary Service Association* v. *State of Gujarat,* (1991 (4) SCC 406).

"No enactment made by Central or State Legislature can limit or restrict the power of the Supreme Court under Article 142" – and all that the Court has to do is "to take into consideration" the provision that might have been

incorporated by legislatures in statutes bearing on the matter at hand. Even if a statute contains a specific prohibition or restriction, the Supreme Court has declared in *Union Carbide Corporation* v. *Union of India* (1991 (4) SCC 584) it shall not circumscribe the power of the Supreme Court to do what it thinks is necessary to ensure "complete justice".

The Court declared – in *Re. Vinay Chandra Mishra* (1995 (2) SCC 584) or *Supreme Court Bar Association* v. *Union of India* (1998 (4) SCC 409).

'But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern.

The author says – consider a citizen who has taken these declaration of the Court to heart. What is he likely to infer when he sees that the very same Court stops at merely expressing its anguish in the face of officials not filing their submissions even when they have been expressly asked to do so by the Court; even when they swear affidavits that are patently false? Here the author has given the example o the case of *Indian Express* (Supra N. 14, page No. 5-7) and the *Bandhu Mukti Morcha* (Supra N. 14, Page No. 17-57).

**Critical analysis of twelve cases regarding implementation of the judgments of the Supreme Court:**

**1. The case of *Indian Express* –**

The author has cited an example i. e. when the *Indian Express* was pursuing the *Bofors' Bribe Case* the Government proclaimed that - "the workers and Journalist are on strike". In reality they were not. But they could not start publishing their edition. Every authority sent them to other authority.

The author has given another example though the case was under exception 1 to Section 499 of Indian Penal Code, *Asha Parekh* v. *State of Bihar* (1977 Cr.L.J. 21 (Patna)), how he was dragged in to the criminal defamation case when he wrote an article on the strike of lawyers in Delhi.

The author has commented that – "the Courts are our protectors but on occasion we have to comprehend why they keep looking the other way".

The author has given the principal features that bear on law and the courts, they are as under –

1. The entire State structure is marked by – Show of work, not work – much activity but little movement.

2. The entire structure is process oriented, result count for little.

3. Merit, efficiency, performance are at a discount.

4. The consequences are fatal in all fields i. e. in public health, education, commercial, and economics activities etc.

5. The Government is the largest litigant.

6. The largest blocks of cases are cases in which the Government has arrayed against its own employees.

7. To him, the primary responsibility for this state of affairs rests with a weak and ill – informed political class and with a play – safe, non – expert bureaucracy.

The author has commented that – as other institutions have neglected their duties, courts have had to step in. This has yielded several salutary results. For example – 1) Due to series of reports in the Indian Express on under – trial a Public Interest Litigation was filed and 40000 persons who had been languishing in jails were released as a consequence. 2) The air pollution in Delhi is controlled and the water of Yamuna is cleaner etc.

After giving above examples the author has questioned – "Has the direction of the Court been complied with in full?" To answer this question the author has put the following comments –

The record shows that –

1. Several rulings are far from reality, from what lies in the realm of the practicable.

2. While the courts often give sweeping directions – they do not as often follow these up to see whether the Executive has carried out them.

3. Outside the State structure there is just about as much fear of the courts as there is of income tax among our non – salaried class.

The author has commented that – if rulings – or laws – are so far ahead of reality; or if courts, having decreed a remedy, do not follow up to ensure that it is being adhered to – they run the risk o compounding cynicism – about courts, about laws, about the rule of law.

**2. The Bandhu Mukti Morcha Case –**

Swami Agnivesh, a social worker began drawing attention on bonded labourers in the quarries around Delhi. Swami Agnivesh and his associates, accompanied by journalists, photographers, swept down on Surajkand – a place on the outskirts of Delhi and they liberated the labourers who were in bondage.

Swami Agnivesh approached the then Chief Minister, and tried to take his help but he was threatened by the then Chief Minister. When he tried to register a complaint with the police but he was dragged nearly for two years into the courts as a Naxalite.

**The case in the Supreme Court :**

On 25th February 1982 Swami Agnivesh wrote to Justice P. N. Bhagwati regarding bonded labourers. The commission was sent by the Court and the Commissioners confirmed everything which Swami Agnivesh had affirmed.

The matter was heard and the Court ordered that the labourers be released. A two man Committee was appointed to investigate. The Committee submitted a report in June 1982. Justice Bhagwati delivered the Judgment on 16 December 1983 and gave 21 directions.

1. The Court directed the Director General, Labour Welfare to report about the implementation. After three months the report was submitted stating that – **not one of the 21 directions had been implemented** because of the limited time and only 300 workers were examined and 295 workers were in bondage.

The Court gave order to Additional Commissioners to examine the cases of the remaining 15000 workers but nothing happened.

After a year had passed, 4000 to 5000 labourers, their wives and children sat down in a dharana at the office of the District Collector in Faridabad, demanding that the Supreme Courts directions be implemented.

2. Swami Agnivesh filed **a Contempt of Court petition in 1985 –** the petition was adjourned for 78 times.

After 1 year the Bandhu Mukti Morcha declared that on 16th March 1986, it would wrap the text of the Judgment in paper and cloth and send it to the Supreme Court as a stillborn child.

The Chief Justice scheduled the case during the Court vacation, he retired without delivering the judgment.

He was replaced by Justice Pathak – who said that as one of the Judges who had been hearing the case had retired, the complete petition must be filed again.

The petition was accordingly filed again.

Justice Pathak retired replaced by Justice Venkataramiah – who was replaced by Justice Sabyasachi Mukherji – who was replaced by Justice Ranganath Mishra.

Swami Agnivesh labored again to collect the facts and gave a list 2800 bonded labourers. Haryana Government submitted that – there had been 544 bonded labourers, of these 250 hailed from other states and they had been sent back to those states, and 18 had been rehabilitated; the rest were not traceable. Hence there was no bonded labourers in or around the quarries.

Hearing followed hearings.

3. In the 1988 Mahabir Jain, **Commissioner of the national labour institute submitted a report and stated that – not one of the Court's 21 directions had been put into effect.**

4. on 21st February 1991 **a committee** was appointed which submitted the report on 30th June 1991 and stated that 1983 labourers were in bondage. The report also showed that - **Directions of the Supreme Court were not observed** by any contractor.

On 13th August 1991 the Chief Justice pronounced the judgment.

The author has commented:

Another grandiloquent chapter had thus far remained on paper.

The bonded labour case has been one of the most prominent initiatives of the Supreme Court in the realm of social jurisprudence. Its judgment on the matter has been in the judicial eye all along – the case is an oft-cited one; it is mandatory reading in the LL.B. course. The case concerns not some far-flung area in Mizoram. It concerns quarries on the outskirts of Delhi. The law is a law enacted by parliament, not by the Legislature of some outlying state. The tribunal involved is not some Munsif court but the Supreme Court. Within that Court, Chief Justice after Chief Justice has been personally involved in handling the matter and delivering the judgments.

Moreover, the Supreme Court has not restricted itself to enunciating general principles; it has taken great pains to give directions.

**Parallel Proceeding:**

A parallel proceeding about bonded labour was instituted – this one also was in the Supreme Court – by the *People's Union of Civil Liberties* v. *Union of India* (AIR 1997 SCC 1203). It addressed the problem in the country as a whole.

In *Peoples Union for Democratic Rights* v. *Union of India* (1997 (1) SCC 301) the Court had said – 'Time has now come when the Courts must become the courts for the poor and struggling masses of this country'.

**Furthermore, the Supreme Court declared:**

'Whenever any fundamental right which is enforceable against private individuals such as, for example, a fundamental right enacted in Article 17 or 23, 24 is being violated, it is the constitutional obligation of the State to take the necessary steps'.

The author commented that – **the implementation of the judgment remained on paper only.**

**3. The Government enacted Working Journalists Act:**

Wage Board was appointed to determine minimum salaries of journalists. **But in reality the salary was not paid and journalists were induced to work on contract basis.**

**4. Judgment on under trials:**

Due to the judgment 27,000 under trials were released in Bihar alone. The Supreme Court had ordered to take census in Bihar Jails after every 2 years. **This order was obeyed by the Government only once.**

**5. The Supreme Court's Judgment on Child Labour:**

The Court has ordered inter alia that –

1. The offending employer shall pay Rs. 20,000 for every child that is found working in his establishment.

2. A child Labour Rehabilitation – cum – welfare Fund shall be set up for each District.

3. An adult member of the family of the child shall be provided a job;

4. Where a job cannot be provided, the Government shall deposit Rs. 5000 for each child.

**Arun Shourie comments that –**

'Does the judgment suggest that the judges weighed the economic consequences that would befall the State were it to set up the fund and provide the jobs that the Court directed it to provide?'

The case points to another consequence of being too far ahead of reality.

**6. Abolition of casual labour and contract labour:**

There are serious of judgments of the Supreme Court and the High courts abolishing casual labour and contract labour in the public sector. The courts decreed that contract labour stood abolished in the tasks which were of a permanent nature – cleaning, sweeping, security etc. they could no longer be out – sourced on contract, they decreed that workers who had been working on contract or on casual employment for long periods shall be absorbed in the organization or enterprises where they had been working.

The author (Arun Shourie) comments that –

A brave judgment, a compassionate one. But what have been the consequences?

1. Those who could get employment on short – term contracts cannot now get it.

2. Unwilling employers find some way to dodge the judgment.

3. Public sector units were suddenly saddled with substantial increases in staff.

4. The age – profile of the staff of these enterprises suddenly changed.

5. Government, which desperately needs to cut down its numbers, suddenly founds its numbers increased.

6. Services all ill-performed: the one way today to ensure that toilets in Government offices are clean is to contract their cleaning and upkeep – to an organization such as Sulabh Shauchalaya.

The author comments that while giving directions the court should considered following things:

1. Look to the practicality of their decrees;
2. Monitor the implementation of what they have decreed;
3. Assess the meta-consequences of their decrees.

Arun Shourie has given two another examples regarding Activism:

The author has given two examples under this head-

**7. Strike by lawyers** (Supra N. 14 Page 399) **-**

In 1990 lawyers in the lower courts had brought all the courts in Delhi to a halt. Advocates who tried to attend the Supreme Court were physically prevented from doing so. The author has given the example of a writ filed by the author's father - urging, among other things, that strikes by lawyer assailed the Fundamental Rights of litigants and should, therefore, be declared illegal. The writ was admitted. Notices were issued to the Bar Association, to the Bar council, to the law officers of Central and State Governments.

**The matter came up on 19th April 1991-**

The court commented that – 'except four or five states (Maharashtra, Uttar Pradesh, Sikkim, West Bengal and Andhra Pradesh), other States, State Bar Council, and State bar Association are not represented'.

The Court had to reiterate in its order that the Bar Council of India, the State Bar Councils too shall take steps to appear, that the Attorney General shall file his response, that the Supreme Court Bar Association shall file their respective affidavits.

**Four years later -** in December 1994 – the Supreme Court finally gave its verdict on the question. The Court did not give its verdict on the question that was before it - namely, 'whether strikes by lawyers are illegal or not?'

Instead it incorporated in its order the "suggestions" that it said had emerged at the last hearing.

The Court said, pursuant to the discussion that took place at the last hearing on 30th November 1994, the following suggestions have emerged as interim measure, consistent with the Bar Council of India's thinking that except in the rarest of rare cases strike should be resorted to causing hardship to the litigant public.

It must be left open to any individual member/members of that Association to be free to appear without let, fear or hindrance or any other coercive steps. No such members shall be visited with any adverse or penal consequences.

The above will not preclude other forms of protest.

The matter was adjourned for six months to oversee the working of this interim order. It was hoped that it will work out satisfactorily. Liberty to be maintained in the event of any difficulty *Common cause* v. *Union of India* (1994 (5) SCC 557).

The six months passed. The Supreme Court passed no final order.

**May 1999, some lawyers brought the Courts to a halt again.** Senior Advocate, Mr. Shanti Bhushan among others - filed contempt of court cases against specific persons who had prevented them from attending the cases. Almost exactly two years later. The Court has not thought fit to schedule their plaints even for hearing.

In **November 1999,** the tow Houses of Parliament unanimously passed some amendments to the Civil Procedure Code. The President gave his assent in December. **The lawyers once again brought the courts to a standstill.** The

stoppage continued for over six weeks. The matter was again taken to the Delhi High Court: do lawyers have a right to go on strike? A Public Interest Petition asked the Court to pronounce.

**The Delhi High Court observed –**

‘Obviously the ongoing strike by the lawyers is contrary to the declared stand of the Bar Council of India and the spirit of the order of the Supreme Court’.

It recalled that in *Lt. Col. S. J. Choudhary* v. *State (Delhi Administration)* (1984 (1) SCC 722) the Supreme Court had held that it is duty of every Advocate who accepts the brief in a criminal cases to attend the trial from day-by-day, he will committing a criminal breach of his professional duty, if he fails to attend the proceedings.

It recalled what the Supreme Court had observed in *Indian Council of Legal Aid & Advice* v. *Bar Council of India* (1984 (1) SCC 722) a lawyer “must strictly and scrupulously abide by the Code of Conduct.”

The Delhi High Court held, “lawyers have no right to strike”.

Arun Shourie comments that - **But no lawyers who had participated in bringing courts to a halt suffered as a consequence.**

The Supreme Court had still not given the final verdict.

The Court has all the power it requires to do complete justice, it says. Strike amounts to gross interference in the course of justice and yet the Court does not dream anyone to account.

**8. Torment of a witness (Supra N. 14, Page No. 416)**

Two advocates succeeded in tormenting a witness by seeking numerous adjournments for cross-examining him in the Court of a Judicial Magistrate. But the Magistrate did not help him. Petitioner moved the State Bar Council for taking disciplinary proceeding against the advocates. But the State Bar Council

simply shut its doors. He met the same fate when he moved the Bar Council of India with a Revision Petition. Petitioner filed an appeal in Supreme Court.

**Facts of the Case –**

Aggrieved witness, an agriculturist scientist claims to have worked as an Adviser in the UNO until he retired. He filed a complaint before the Judicial Magistrate of First Class, Pune (Maharashtra) against some accused for the offence of theft of electricity. The accused in the said complaint case engaged Advocate Shivade (the first respondent) and his colleague Advocate Kulkarni (the second respondent) who were practicing in the courts at Pune. The two respondent advocates filed a joint Vakalatnama before the trial court and the trial began in 1993. Appellant was examined in – chief.

The agony of the appellant started when the Magistrate posted the case for cross – examination of the appellant on 30.7.1993 and adjourned it to 23.8.1993 to 13.9.1993 to 16.10.1993 to 20.11.1993 and then to 4.12.1993.

The agony and grievance of the appellant reached on 4.12.1993 – second respondent who was present in the Court sought for an adjournment agan with a written application, on the following premise:

Advocate Shivade (first respondent) is unable to speak on account of the throat infection and continuous cough. The doctor has advised him to take two week's rest.

The Judicial Magistrate granted the adjournment prayed for. The appellant went out of the Court Room and happened to come across the first respondent "forcefully and fluently arguing" a matter before another court situated in the same building. Then he lodged the complaint against both the advocates before the Maharashtra State Bar Council on 27.12.1993.

Both the respondents filed a joint reply to the above complaint. The State Bar Council obtained a report from its Advocate Member Shri. B. E. Avhad who reported that "the complaint is without any substance". The State Bar Council dropped proceedings against the respondents.

**Judgment of the Supreme Court –**

The Supreme Court held that the Judicial Magistrate is new in the services and so the Court has refrained from recommending any disciplinary action.

**The Supreme Court concluded that the Bar Council of India to consider whether what the advocates had done amounted to professional misconduct?**

Arun Shourie comments that –

An institution that proclaims again and again that it has a power, must exercise it. When it proclaims that it has all the powers that are necessary and then does not use them, it foments disbelief.

How many judgments have been pending for how long after completion of final hearing?

The Delhi High Court commented recently that it is no one's business to know even this little bit about its functioning.

Arun Shourie comments that – the institution which refuses to give such small information makes grave injury to itself.

Arun Shourie lastly commented that –

**The two instances** – the one relating to strike by lawyers, and the conduct of those two advocates in Pune and the way their matter was handled by the Bar Council of the State and Bar Council of India – are just two of the hundreds that can be recalled.

**9. BHOPAL GAS LEAK TRAGEDY** (Supra N. 1, Page No. 203- 250) –

The gas leak tragedy occurred in the factory of UCC's Indian subsidiary in Bhopal in December 1984. Bhopal incident in which 2500 people died. 200,000 were disabled.

First, in the District Court in Bhopal the suit was filed by the Union of India on behalf of all the claimants pursuant to the provisions of the Bhopal Gas Leak Disaster (processing of Claims) Act, 1985. The Bhopal District Judge (M. W. Deo) summarily ordered Union Carbide Corporation to pay to the Union of India Rs. 3500 million (Rs. 350 corers) as interim compensation.

Next, in the High Court of Madhya Pradesh – it was reduced to Rs. 2500 million (Rs. 250 cores) on the basis of a legal Principle.

Finally, in the Supreme Court a Constitutional Bench pressed the parties to a settlement, which was ultimately arrived at with the then Attorney General of India on 14/15 February 1989. Union Carbide Corporation agreed to pay without admitting liability, a sum of US $ 470 million – in full and final settlement of all claims, civil and criminal – which was accepted by the Union of India and approve by the Court. The sum of US $ 470 million. (Its equivalent then in Indian rupees was Rs. 615 cores).

The settlement was later challenged by some NGOs before another Constitutional Bench. The validity and correctness of the civil settlement was upheld by the Court, but the settlement regarding dropping of all criminal proceedings was set aside. Twenty years after the Bhopal Gas tragedy the arduous tasks of sifting the genuine from non – genuine claims is still not over. Some victims (and/or their heirs) have been paid. But more than Rs. 1,500 corers accumulated in the Bank awaiting disbursal.

For the Bhopal Gas Tragedy not to be repeated, a serious of recommendations were made by the Supreme Court of India when upholding the constitutional validity of the Bhopal Gas Leak Disaster (Proceedings of Claims) Act, 1985.

In *Charanlal Sahu* v. *Union of India* (1990 (1) SCC 613) the Constitutional Bench of the Supreme Court in the background of the bitter experience arising from the Bhopal Disaster, set out in great detail what was required to be done by legislation and executive action. The Court said, the Central Government should lay down norms and standards that must be observed

before permissions or licenses are granted for running of industries which have dangerous potentially. The Government should insist on the creation of a fund a condition precedent for the grant of such licenses or permissions: which would provide for payment of damages when an accident or a disaster occurs and ensure that the party agree to abide to pay such damages. The Court then went on to suggest five separate measures that should be enacted by law.

1. The basis for damages in case of leakages and accident should be statutorily fixed taking into consideration the nature of damages inflicted, the consequences thereof and the ability and capacity of the parties to pay. Such law should also provide for deterrent or punitive damages, the basis for which should be formulated by an expert committee or by the Government.

2. A law should be enacted to ensure immediate relief to victims – viz by providing for the constitution of tribunal regulated by special procedure for determining compensation to victims of industrial disaster or accident, appeals against which may lie to the Supreme Court on limited questions of law and only after depositing the amount determined by the Tribunal.

3. The law should also provide for interim relief to victims during the pendency of proceedings; these steps would minimize the misery and agony of victims of hazardous enterprises.

4. The law should provide for the establishment of a statutory 'Industrial Disaster Fund' contributions to which may be made by government and industries, whether they are of transnational corporations or domestic undertakings, public or private. The fund should be permanent in nature, so that the money is readily available for providing immediate effective relief to the victims. This would avoid delay in providing effective relief to the victims.

5. "The antiquated law"(sic) contained in the Fatal Accident Act, 1855, should be drastically amended, or fresh legislation should be enacted which should, inter alia, contain appropriate provisions in regard to the following matters:

a. The payment of a fixed minimum compensation on a ‘no – fault – liability’ basis (as under the Motor Vehicle Act), pending final adjudication of the claim by a prescribed forum.

b. The creation of a special forum with specific power to grant interim relief in appropriate cases.

c. The evolution of a procedure to be followed by forum which will be conducive to the expeditious determination of claims and avoid the high degree of formalism that attaches to proceeding in regular courts.

d. A provision required industries and concerns engaged in hazardous activities to take out compulsory insurance against third – party risk.

It is sad to record that save and expect for a separate statutory provision requiring industries engaged in hazardous activities to take out compulsory insurance against third party risks (Public Liability Insurance Act, 1991) –

**Not one – not a single one – of any of these recommendations** of the Supreme Court of India (made as far back in 1989) **have been implemented** so far; no steps whatever have been taken to implement any of these recommendations of the Court – and no one – not even spirited NGO seems to be interested lobbying for enactment of new laws as suggested by the Court.

**10. WATER DISPUTE** (Supra N 1, Page No. 269-275)**:**

Nariman Fali S. has given his experience regarding his appearance for States before Interstate Water Dispute Tribunals.

The Constitution provides that disputes between States can only be adjudicated in the country’s Supreme Court an exception has been made for water disputes between States. Parliament enacted the Inter – State Water Dispute Act, 1956, which provides for reference by the Government of complaint made by States to a high – powered tribunal to be set up for each and every separate dispute and complaint.

## 1. NARMADA WATER DISPUTE:

The Tribunal was set up to investigate into and adjudicate the disputes between the states of Gujarat, Maharashtra and Madhya Pradesh (and Rajasthan).

The question whether to build a high Narmada Dam or a much lower Dam occupied much time of the Ramaswami Tribunal.

Project presented by Gujarat was ultimately preferred by the tribunal.

Author (Nariman Fali S.) has commented that, over the years, **problems of implementation prevented the construction of the dam to its stipulated height.**

## 2. CUAVERY WATER DISPUTE:

The Tribunal was set up in 1990, the question was whether pre – Constitution agreements (of the years 1842 and 1924) – binding after 1947- between the Princely State of Mysore and the Province of Madras as to the flow of Cauvery Water engaged much time and attention of the Tribunal.

The treaties had lapsed after the British Parliament enacted the Indian Independence Act, 1947, and argument centered around whether the treaties continues until fresh arrangements were made and were binding on the successor states? And whether treaties could be reviewed or altered? The proceedings dragged for so long that it had to be twice reconstituted.

After nearly 20 long years, a final decision was handed down (on 5$^{th}$ Feb. 2007), it was immediately subjected to a challenge in the Supreme Court by the states of Karnataka and Kerala. The state of Tamil Nadu Challenged it by filling a special leave petition (SLP) under Article 136.

**The result of that after nearly two decades a final 'resolution' of the dispute is yet not in sight.**

## 3. THE RAVI-BEAD WATER DISPUTE:

Between the states of Punjab and Haryana arising from differences over the Longowal Accord of 24 July 1985, had been initially referred to a water dispute tribunal way back in 1986. **The end is nowhere in sight, not even in the year of grace, 2010!**

Nariman Fail S. comments that,

Water allocation by interstate water disputes tribunals is simply not acceptable to political parties or governments of contesting states. The only inevitable acceptability would be a decision of the country's highest court.

Resolution of water disputes by 'agreement' is readily forthcoming when the government at the centre has been 'strong'; not when the government at the centre has been 'weak'. It was possible for the then prime minister, Indira Gandhi, to bring around the states involved in the Narmada Water dispute to an agreement on 23 Feb., 1972.

**After the 1990s –** When Governments at the centre were 'weak' - coalition government's settlement in the Cauvery Water Disputes proved abortive.

Inadequate rehabilitation efforts of tribal's and other located on the banks- prompted the Supreme Court to intervene, and to assume a monitoring role over the construction of the Sardar Sarovar Project- a role mandated by the overriding humanitarian provisions contained in the life and liberty clause of the Constitution (Article 21).

## 4. CONTRAST THIS WITH CHINA'S THREE GORGES PROJECT –

In April 1992, the National People's Congress in Beijing approved the ambitious Three Gorges Project to tame the mighty and turbulent Yangtze River. Upon its completion, it will be the world's largest hydropower plant in terms of total installed capacity and annual power generation. It will also be the world's largest water conservation facility. But it will also inundate 653 squares

kilometers of densely populated areas of China – Inundation will affect more than 365 townships in 21 counties, cities or districts, and over one million people would have to be resettled. The Three Gorges Reservoir will also submerge 31,000 hectares of farmland and require the relocation of nearly 1,500 industrial and mining enterprises.

THREE GORGES PROJECT - beneficial as it is in the long run-can never be a possibility in India, under a democracy based on individual rights and freedoms. The Chinese believe in the Bentham's principle of the 'greatest good for the greatest number' (a worthy principle in itself). In China, they believe in a rule-by-law regime, as contrasted with India's system of governance, which is rule-of law.

Nariman Fali S. Comments that,

The Constitution give rights against a State agencies but it has not stressed duties and responsibilities of the Citizens in one State towards the Citizens in another.

Nariman Fali S. states –

'It was an error for us in India to have departed from the American Pattern to resolve interstate river water disputes.

The ISWD Act, 1956, was amended in 2002 to provide for a mandarory completion of the proceedings, but there is no monitoring of the work of these tribunals by the Supreme Court, and some of the tribunals have proceeded in a most lackadaisical manner.

## 5. AMERICAN EXPERIENCE:

The resolution has always been a difficult problem, even in the United States.

The United State Supreme Court has adjudicated disputes on many interstate rivers - the Laramie, the North Platte, the Connecticut, the Delaware and the Colorado. The federal common law principle employed by the United

State Supreme Court is known as 'equitable apportionment'. The Court goes through to render a fair, just judgment as between two co-equal quasi-sovereigns. The Supreme Court must appoint a special master to hear the evidence and make recommendations both on fact and law. The United State Supreme Court to strongly suggest the use of non-judicial forums for the resolution viz. 'negotiation and agreement pursuant to the compact clause of the constitution'.

**6. INDIAN SECNARIO:**

In India there is no compact clause as in the US Constitution (Article 1(10)). But the ISWD Act, 1956, dose envisage agreements between state concerning the use, distribution or control of eaters of an interstate river.

States ate thus enabled to enter into agreements regarding the sharing and allocation of water an intestate river, and more than 50 such agreements have been entered into between states over the years. But they have mostly been in respect of minor rivers and streams. The constitution does envisage in Entry 56 of list (of the Seventh Schedule), the exclusive competence of parliament to make laws with regard to the regulation and development of interstate rivers and river valleys. But the only enactment so far made by Parliament under this entry is the River board Act, 1956. It has limited application for rendering advice to state governments with respect to regulation and development of interstate rivers.

Many years before the 1950 constitution, the report of the Indus Commission (Rau Commission Report Volume I) had set put authoritatively the three different views on the subject of the rights of state in respect of an interstate river.

THE FIRST VIEW- was that every province of state has a right to do what it likes with the waters within its territorial jurisdiction regardless of any injury that might result to a neighboring unit. This view (the Rau Commission Said) was against the trend of international law.

THE SECOND VIEW – is of common law principle. This principle enabled a province or state at the mouth of a big river to insist that no province or state

higher up shall make any sensible diminution in the water which comes down the river. This second view was also rejected by the Rau Commission.

THE THIRD VIEW – the principle of ‘equitable apportionment’ was what was accepted and advocated by the Rau Commission viz. that every riparian state was entitled to a fair share of the waters of an interstate river.

The principle of ‘equitable apportionment’ has been reiterated by the Supreme Court of India in a presidential reference (1991). The reference was occasioned by the State of Karnataka enacting a law purportedly under Entry 17 of List II. The Court said that legislation on ‘flowing waters’ of an interstate river like the Cauvery, was not an exclusive state subject. In saying so, the Supreme Court quoted extensively from the leading American Case, *Kansas* v. *Colarado* (known as the Grandfather River Case).

The decision of a Court or Tribunal adjudicating the right of the people in one state vis-à-vis the people in another state must follow ‘a strict and complete legalism’: a phrase of Sir Owen Dixon the Chief Justice of Australia on 21st April 1952.

There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.

India is a federal or at least a quasi – federal state. It is legitimate to expect that there must be close adherence to legal reasoning but a ‘strict and complete legalism’ is best left to the country’s highest court.

The Inter – State Water Disputes Act, 1956, be repealed. The adjudication of interstate water disputes must only be by the Supreme Court of India under Article 131 without the constraints of Article 262 (read with the Inter State Water Disputes Act, 1956).

The technicalities of the actual allocation of the waters of a river are better left to the province of the scientists, the engineer and the economist who possess necessary specialized knowledge, which the lawyer lacks. The lawyer is useful in the formation of principles and their application to the case at hand.

## 7. EXAMPLE OF INDIA AND PAKISTAN:

Differences arose between India and Pakistan regarding the design of the Baglihar Plant, the quantum of pond age and the positioning of in intakes of turbines for the plant etc. and the differences between India and Pakistan were referred under the provisions of the (Indo – Pak) Indus Water Treaty, 1960 to a neutral expert appointed by World Bank. The neutral expert was a engineer, not a lawyer or a Judge. In all, five week – long meetings took place. The first two meetings covered site visits and pleadings and questions posed by the neutral expert. In a crucial third meeting, each party state made its oral and video presentations (over days, not weeks) at which questions were permitted to the representatives of the states and answers were recorded. In the fourth meeting the neutral expert presented a Final Draft Determination for consideration of the parties and in the fifth meeting, the party states offered comments on the Final Draft Determination. The neutral expert, himself a world authority on dams, made his own assessment and then gave his Final Determination on 5th February 2007.

Lawyers representing both sides made brief legal submission lasting not more than a couple of hours – first at the beginning and then at the end of each week. The engineers and experts were the main spokesmen and the principal dramatis personae. They were always at centre stage. Other important accept were that complete records of meeting were made in the form of both written transcript and video recordings. Procedural decisions were then recorded in minutes invariably by consent of parties and representatives of the party states were asked to sign agreed minutes.

**SOME SUGGESTIONS BY THE AUTHOR –**

1. IN THE LONG TERM – the Inter – State Water Dispute Act, 1956, should be repealed. All disputes including water disputes are adjudicated only by the Supreme Court of India under Article 131 under its rule – making power (Article 145 of the Constitution).

Supreme Court could then make rules for the better adjudication of such water disputes, on the American pattern.

A senior retired Justice of the Supreme Court should be appointed special master or a special Judge. The special Judge or special master, after taking on board all the documents filed by the party states and after ascertaining from the technical experts and engineers the salient features, must then call in the lawyers to discuss the legal questions that arise. A decision on the matters at issue must not resemble an adversarial proceeding but an investigative proceeding.

2. IN THE SHORT TERM – or alternatively, if Inter – State Water Dispute Act, 1956, is to remain on the statute book with prescribed outer time limits as mentioned in the 2002 amendment.

1. The mindset of tribunal members, lawyers, engineers and participants must be so formality as possible, so that the Tribunal reaches an informed decision of the points required to be decided.

2. The Chairman with members must, discuss with the engineers and technical experts on each side.

3. Adversarial form of recording of evidence must be avoided viz. the cross – examination, re – examination etc. There should be a presentation by the experts on each side with the right to any person of party to question that expert on any given point.

4. After the presentations made, the lawyers could usefully sum up and give an analysis of the documentation on record and point to relevant conclusions.

5 This change in the modus operandi of the functioning of interstate water dispute can only be achieved by a change in the mindset of members of the tribunal – who must not sit like umpires in a cricket match. Rather, they should emulate the referee in a football match – running with the 'players', all along participating in the game though in a supervisory capacity.

**11. Comments of the Supreme Court on its own precedent –**

In *Dr. B. L. Wadhera* v. *Union of India* (1996 (2) SCC 594), in anguish the Court observed that, Delhi the capital of India is one of the most polluted cities in the world. There is no clean and healthy environment, there is difficulty to breath, people are suffering from throat infection, respiratory etc. The city has become open dustbin. The River Yamuna is free dumping place for industrial waste and for untreated sewage. Regular flow of person from rural to urban areas has made major contribution towards environmental degradation. The Municipal Corporation of Delhi (Constituted under the Act of 1975) is wholly remiss in the discharge of their duties. The Court then issued 14 directions to the authorities to prevent pollution.

*Almitra H. Patel and another* v. *Union of India* (http://JUDIS.NIC.IN) petitioners filed the writ petition with the question of solid waste disposal. By order dated 16th January 1998, the Court constituted a committee to look into the matter. After the final report of committee, notices were issued to all the States to file their responses. The responses of the States were positive. The Central Government notified Muncipal Solid Waste (Management and Handling) Rules, 1999.

The Court commented that – in this connection their attention was drawn to the 14 directions issued in the case of Wadhera. No satisfactory answer was given by the authorities of Delhi regarding non – compliance of the 14 directions, for example, sites for landfill have not been identified and handed over to the MCD nor have four additional compost plant been constructed.

The Court further commented that - Just because the work involved is difficult cannot be a reason for lack of inaction on the part of the authorities concerned. Though various authorities have employed nearly forty thousand Safai Karmacharies there is complete lack of accountability.

The Court commented that - what is required is initiative, selfless zeal and dedication and professional pride, elements which are sadly lacking. Then the

court gave the example of the Municipal Commissioner of Surat who worked with dedication which resulted in eradicating the plague and cleaning up Surat.

In Delhi no effective initiative has been taken by any authority. The local authorities are not constituted to provide only employment.

Domestic garbage and sewage is large contributor of solid waste. Unauthorized and slums are creating serious problem. The slums are multiplied and to reward encroacher on public land with free alternate site is to give a reward to a pick pocket. The destiny of the population should not be allowed to increase beyond reasonable limit.

Some difficulties in the implementation of directions given in case of Wadhera's case are shown to us and they are as under –

1. To punish the persons who litter the city sufficient numbers of Judicial Magistrate are not available.

2. Sufficient number of sites for landfills is not identified and are not handed over.

3. Construction of compost plants has not taken place.

The Court gave following directions on 15th February 2000.

1. To prohibit accumulation of rubbish, filth, garbage or polluted obnoxious matter in any premises and to prohibit person from depositing the same in any street or public place.

2. The State, public premises be surfaces cleaned on daily basis including on Sunday and public holidays.

3. Fine of Rs. 50 to a person who litters on public place.

4. To ensure proper and scientific disposal of waste.

5. Sides for landfills be indentified taking into consideration the requirement of 20 years.

6. To prohibit election of new slums.

7. To set up compost plants within 4weeks.

8. To set up complaint / grievance mechanism for the citizens.

9. Appointment of Magistrates under section 20 &21 of Criminal Procedure Code.

10. To file compliance report within 8 weeks.

Violation of directions be viewed seriously.

**12. Comments of Bombay High Court on the precedent of the Supreme Court –**

**(1st September 2010)**

In *Dr. Mahesh Bedekar* v. *State of Maharashtra* (PIL No. 173 of 2010), the petitioner submitted that the Mandals who celebrate the Dahi Handi Festival, Ganesh Utsav and Navaratri cause Noise pollution and obstruct traffic as they are celebrated on public roads.the petitioner remanded that the judgment of the Supreme Court in *Noise Pollution* v. *In Re With Forum*, *Prevention of Environmental and Sound Pollution* v. *Union of India and another* ( 2005 (5) SCC 733), to be implemented strictly.

The Court commented that – the above judgment is law of the land and everybody has to follow it. But the Court refused to give any direction because the Dahi Handi Festival was on next day. The Court directed to respondent to file affidavit.

**(9th September 2010)**

The Court expressed its anxiety over the issue raised by the Petitioner. The Court commented that Noise Pollution in the vicinity of hospitals and schools is not desirable and there is a need to do something about it.

Further the Court commented that – The Court is not aware whether various Mandals have taken necessary permissions? Whether there are any guidelines in this behalf?

The Court commented that – there is a need to strike the balance between the right to religion and Noise Pollution. As the Ganapati Festival was to start on 11/09/2010 the Court refused to give any directions. But the Court directed that the Committee be constituted having following members – (to work out strategy and to chalk out a plan to insure that celebration of religious festivals will not caused any inconvenience).

Additional chief Secretary (Home), Commissioner of Police (Thane), Commissioner, Thane Municipal Corporation, the office bearers of the Mohalla Committee, representatives of the prominent registered Mandals, respectable citizens of the area etc.

**(10th August 2011)**

The court expressed its distress when the court came to know that only one meeting has taken the place in the entire year.

The court ordered to hold the meeting.

**(24th August 2011)**

It was informed to the Court that 48 offences were registered during the festival of Dahi Handi. The Petitioner made a grievance regarding permission granted to use loudspeakers in the silence zone. The Court directed that – no permission be given for the use of loudspeakers within the distance of 100 meters from the majorHospitals in Thane city.

Public Interest Litigation was adjourned on 29/08/2011.

**(30th August 2011)**

It was brought to the notice of the Court that meeting was held the minutes of the meeting were perused by the Court. It was informed to the Court that – there were 11 silence zones in the city.

The Court gave directions to the Police –

- to ensure that there should not be violation of the rules in the said 11 silence zones.
- to ensure that the direction given by the Deputy Commissioner of Police be complied.
- Pollution Control Board to measure the level of Noise and in case of violation they should approached the police.
- Guidelines issued by the Municipal Corporation of Thane in respect of conduct of festival at public places be complied with.

## TOPIC 3
## CRITICAL EVALUATION OF THE CONCEPT OF THE STATE AS EMERGED FROM THE JUDGMENTS OF THE SC AND ITS CONSQUENCES (Supra N. 14, Page No. 65-108)

This topic is discussed under following heads:-

A. Enlargement of the ambit of Article 12

B. Effect of activism

C. Critical evaluation of activism

D. Chaotic outcome of activism

E. Cumulative effect of activism

### A. ENLARGEMENT OF THE AMBIT OF ARTICLE 12:-

After the case of *Maneka Gandhi* – The Supreme Court has interpreted statutes in a very liberal and creative way and this has become one of the hallmarks of the Supreme Court. Shourie Arun has tried to show the other side of it.

The Constituent Assembly discussion on Article 12 covers less than four pages. While introducing Article 12 Dr. Ambedkar mentioned the words at the end "or under the control of the Government of India" he said, it was possible that, in the future some territories might be placed in trusteeship with the Government of India. Persons staying there should also enjoy all the fundamental rights – hence these words.

Only three members spoke, for a few minutes each.

Mahbood Ali questioned that – 'whether all local or other authorises have the constitutional sanction to make any law restricting the Fundamental rights (Article 19(1))?

Dr. Ambedkar said that all authorities are bound by the Fundamental Rights provisions (CAD Vol. VII pp 607-11)

Soon, the Government following Russian model entered into economic activities. Corporations were formed; authorities were established, departments ventured forth – to trade, to manufacture goods, to provide services.

In the initial judgments of the courts strict interpretation of the term State was done. But soon the Courts came to hold that the entity – vested with constitutional or statutory powers set up by the statute as a separate legal entity even body autonomous would fall within the ambit of the word State.

If the entity had been conferred 'State power' and if the entity had been conducting commerce, imparting education, carrying on economic activities is a State. The Court held that the concept of the State has changed as it is no longer coercive machinery.

The Author comments that – by enlarging the ambit of Article 12, Article14 and Article 21 one can see the unintended consequences out of which some are good. The cumulative effect has been debilitating for the functioning of Governments and particularly for public Sector enterprises.

i) In the earlier cases the test was – whether the organization had been created by a statute or not.

In *Ujjam Bai* v. *Uttar Pradesh* (1963 (1) SCR 778), noting that the word other authorities are of wide amplitude, the Court said that, "They were capable of comprehending every authority created under a statute."

Even at this stage Justice Shah demurred. He said- "authorities, constitutional or statutory invested with power by law but not sharing the sovereign power do not fall under Article 12."

In *Rajastan Electricity Board, Jaipur* v. *Mohanlal* (1967 (3) SCR 377), the Court by taking the help of dictionary meaning of word authority started enlarging the scope of "other authorities."

In the year 1969 and 1970 three cases were considered by the Court i.e. *Praga Tools Corporation* (1969 (3) SCR 773), *the Heavy engineering Corporation and Hindustan steel Limited* (1969 (3) SCR 995). The Supreme Court held that these companies had been incorporated under the Companies Act and they had an existence independent of the Government and are not under Article 12. Accordingly employees of these companies do not enjoy the protection under Article 311.

Shourie Arun comments that-

By the mid – seventies the aperture opened in Rajasthan Electricity Board began to get enlarged.

In *Sabhajit Tewary* v. *Union* (1975 (3) SCR 616), the Court held that – the CSIR was a society incorporated under the societies Registration Act, 1860 and was not the State.

The Government takes only special care for the promotion, guidance and cooperation of scientific and industrial research.

The Court held that LIC, IFC and ONG were the other authorities.

The same year Justice Mathew focused on a feature which became important- Section 25 of the ONG Act. Authorizes the commission to issue binding directions to third parties and the employees are deemed to be public servants under section 21 of IPC by virtue of Section 27 of the Act. And it was the State, *Sukhdev* v *Raghuvanshi* (1975 (3) SCR 619).

By the mid-eights the Indian Stastical Institutes and Indian Council of Agricultural Research were held to be the State due to deep control of Government, *B.S. Mimbas* v *ISI, P.K. Ramachandra Iyer* v. *Union* (1984 (1) SCR 395, 1984 (2) SCR 200).

**II) WELFARE AND SOCIAL SERVICES –**

In *Ramana Dayaram Shetty* v. *International Airport Authority of India* (1979 (3) SCR 1014), the Supreme Court held that – with tremendous expansion of welfare and social service functions, increasing control of material and economic resources there is a need to restrict the power of the executive to prevent arbitrary power.

In this new spate of pronouncements all of the new functions are clubbed together: the running of an industrial unit, trading, the granting of licenses, recruitment, providing public health facilities, distributing outlays between States for drinking water – all are the same. Each became an activity of the State.

The Courts declared that what holds for the traditional function of the State shall hold for each of the new functions.

In *Punnan Thomas* v. *State of Kerala* (AIR 1969 Kerala 81), the Court held that – the Government is not and should not be as free as an individual and will be subject to restraints.

In *Erusian Equipment and Chemicals Ltd.* v. *West Bengal* (1975 (2) SCR 674), Chief Justice Ray held that the democratic form of Government demands equality and absence of arbitrariness.

In *Ajay Hasia* v. *Khalid Mujib Sebravar* (1981 (2) SCR 79), The Court held that – it is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil cannot be allowed to obliterate the true nature of the reality.

**III) A DEVICE :**

In the *Ajay Hasia* case, the court held that – Corporation were contrivance set up for the convenience of management and administration. By using corporate veil the Government cannot escape from its basic obligation.

**IV) PART III AND PART IV OF THE CONSTITUTION:**

Shourie Arun comments that:

The very judges who had insisted on giving the narrowest construction to Article 21 etc. during the emergency now unfurled the flag of activism. They became vigilantes for the citizen's Fundamental Rights. They dropped a narrow, pedantic or lexicographic approach.

It is the Fundamental Rights which along with the Directive Principles constitute the life force of the Constitution and they must be quickened into effective action by meaningful and purposive interpretation.

In *E.P. Royappa* v. *State of Tamil Nadu* (AIR 1974 SC 555), the Court held that, Article 14 embody guaranties against arbitrariness.

**V) HUMAN RIGHTS JURISPRUDENCE:**

In the Bhopal Gas Tragedy the Court expanded the horizon of Article 12 to bring human rights jurisprudence. The purpose was to bring compensation for the violation of Fundamental Right, *M.C. Mehata* v. *Union* (1987 (1) SCR 819).

The Court rejected the judgment of the defense counsel that private corporations whose activities have the potential of affecting the life and health of the people would deal a deathblow. The Court declared that similar apprehension

is voiced when In *Ramnath Shetty* case the Court brought Public Sector Corporation within the scope and ambit of Article 12.

**VI) SOME OTHER EXAMPLES :**

Under Article 12 Corporation, Company, a mere Society of Institution started falling due to judicial activism. The author comments that each succeeding judge widened the aperture that preceding activist Judge had drilled. In International Airport Authority the emphasis shifted to –

Whether entire share capital is owned by the State?

Whether Board of Directors is appointed by the State?

The Court started looking towards extra-ordinary assistance, extensive financial assistance, entire expenditure, unusual degree of control, function of public importance etc of the Institution.

Whether activities of corporations are of high public interest and fundamental to the society or whether department of Government is transferred to a Corporation.

In *Ajay Hasia* v. *Khalid Mujib Sehravari* (1981 (2) SCR 79), the Court made these criteria more specific.

**VII) CRITICISM ON ACTIVISM:**

Ramaswami R. Iyer (A Grammar of Public Enterprises, Exercises in Clarification, Rawat Publication, Jaipur, 1991, Page No. 89-109), pointed out none of these criteria could stand scrutiny. Does the exercise of economic power elevate an entity to being the State?

Shourie Arun comments that,

Would a privately owned enterprise that also had a monopolist's position be the State on the same reasoning? Because of repeated failures governmental functions are being out-sourced; today Government finds that it is able to get better stationery at a cheaper price from private suppliers; do the latter, being an instrument of Government for obtaining stationer, become the State?

The Government used to export and import items in bulk through the STC and the MMTC. Today it procures them or sells them through private parties.

Being its “agents” and “instruments” for importing and exporting those items, do these private enterprises become the State?

Substantial financial help? But on that criterion, thousands upon thousands of cottage industries, thousands upon thousands of households that have received assistance under the governmental credit schemes are these tiny units and households not instruments of the state?

When the purpose of Government in giving substantial financial assistance to an enterprise engaged in exports, or giving it permission to sell a portion of its foreign exchange earning or permitting it to set up its factory in an Export Zone, Would that make every export enterprise the “State”?

Similarly, thousands upon thousands of non-governmental organizations receive financial assistance from Government-Government seeks to implement score of its programs through them – literacy, a forestation, and family planning, the drive against polio, land and water management …. Do the units producing Khadi, or the organizations of NGOs owe their position any less to governmental policies and assistance than, say, SAIL or HMT ?

Because of the license-quota regulations, right up to the 1990s almost ever single unit operating in the country was in substantial thrall of the Government-did that mean that all of them would be the “State”?

A function of “high public interest and public importance?” every hospital, every firm producing medicines or surgical equipment, Sulabh Shauchalaya constructing public toilets, organization or helping villagers during a drought, every NGO rushing aid to those crushed by the earthquake, the parents bringing up their children – Do such considerations make each of these myriad units the “State” of India ?

Shourie Arun comments that :

Even as it was laying down these criteria, the Supreme Court was aware of their fuzziness. The judgments arte sprinkled with acknowledge of this fact in International Airport Authority Case.

Perhaps the distinction between governmental and non-governmental functions is not valid any more in a social welfare State.

But the Supreme Court had a solution in the face of fuzziness, it declared it is the aggregate or cumulative effect of all the relevant factors that is controlling.

**VIII) PRIVATE CORPORATION:**

Enterprises that were wholly private barely escaped. In *M.C. Mehta* v. *Union of India* (AIR 1987 SC 1086), the Supreme Court was confronted with claims against a private firm, Shriram Foods and Fertilizer Industries, owned by Delhi Cloth Mills. The Court observed, "If an analysis of the declarations in the (Industrial Policy) Resolution (of 1956) were vague. That if the criteria were to be used mechanically, so many institutions would get enumerated as the 'State'.

There cannot indeed be a straitjacket formula. It is not necessary that all the tests should be satisfied for reaching the conclusion.

**IX) ICPS:**

In 1998 the question was whether the Institute of constitutional and Parliamentary Studies was the State?

The Court observed the objects of the society were not government business but were expected to equip MPs and MLAs with the requisite knowledge and experience for better function.

It was held that ICPS is not a state.

The Court remarked that the observations in international authority case spill over beyond the requirement of the case and must be dismissed as obiter, *Sabhajit Tewary* v. *Union of India* (1975 (3) SCR 616).

**X) ACTIVISM:**

In *All India Sainik Schools Employees Association* v. *Defence Minister-cum-Chairman, Board of Governors, Sainik Schools Society* (1988 SCR SUPP (3) 398), the same Supreme Court, held that Sainik School Society is also the "State" of India. The overall control vests in the governmental authority. The main object of the Society is to run schools and to prepare students for the purpose of feeding the National Defense Academy. Defense of the country is one of the legal functions of the State.

In *Mohini Jain* v. *State of Karnataka* (1992 (3) SCC 666), the State Government allowed private parties to set up medical colleges, and it accorded recognition to them. These colleges received no financial assistance from the State.

The court declared that the State is under a constitutional obligation to provide education at all levels to citizens. The higher fees which were being charged to the non-Government list students were nothing but capitation fee.

The Court held that even private educational institutions can be issued directions in the form of mandamus about admissions, about employment, about service conditions of its academic staff, as they received recognition from the State.

In *Unni Krishnan*, the court on the same reasoning prescribed a detailed scheme "to eliminate discretion in the management altogether in the matter of admission."

## XI) GOVERNMENT CORPORATIONS:

The Oil and Natural Commission, the Life Insurance Corporation, the Industrial Finance Corporation, Regional Engineering Colleges came to be the "State" of India.

But Hindustan Steel and the Council of Scientific and Industrial Research – one as much a public-sector enterprise as any other, the other as close to being a department of the Government as an entity escaped.

But, in general, public sector units became for all practical purposes "other authorities" mentioned in Article 12, and thereby the "State" of India.

## XII) COORPORATIONS ARE THE "STATE", BUT ….!

As Court brought public sector units within the ambit of Article 12 but it refused to give the protections available to Government servants under Articles 309 to 311, to the servants of public sector units.

The consequences of thus swelling the ambit of Article 12 have been compounded by the parallel enlargement of the domain of Article 14 and Article 21.

## B. EFFECT OF ACTIVISM:

It was held by the Court that principle of equality is a part of basic structure of constitution, and non- arbitrariness has been proclaimed to be the "brooding omnipresence," that creates Article 14. It "pervades the entire constitutional scheme and is a golden thread which runs through a whole fabric of the constitution" (Ajay Hasia) that it is essence of the rule of law, *Satwant Sing Sawhnev* (1967 SCR 1836).

## 1. INTERPRETATION OR LEGISLATION:

The author stated that sometimes the constructions are put onto provisions due to preconceptions by the Court. The author comments that, three strains in successive judgments on bonus illustrate the kinds of predispositions – first, each firm has to pay bonus whether or not it was making a profit, *Jalan Trading Company Pvt. Ltd.* v. *Mill Madjur Sabha* (1967 SCR (1) 15). Second, the Supreme Court rejected the plea that was taken by the employees, in *Sandhi Jeevaraj Bhewarchand* v. *Secretory, Madras Chillies, Grains Kirana Marchants Worker's Union* (1969 SCR (1) 366), that the Act was an exhaustive act.

In *Mumbai Kamgar Sabha, Bombay* v. *Abdulbhai Faizullabhai* (1976 SCR (3) 591), the Court held that the Act was not an exhaustive one. The third strain is found in judgment given in, *State of Tamilnadu (Housing department)* v. *K. Sabanayagam* (1998 (1) SCC 318). According to the section 36 of the Act power of exemptions was given to the government. In the judgment Court said that when a government decides to exempt any entity it must bring to the notice of the employees who are likely to be affected by the grant of such exemptions. The author comments that - whether this is interpretation or legislation?

With the enlargement of Article 112 and with the concept of dynamic Article every action of the executive became challengeable. Even the matter which depended on subjective satisfaction of the President, like the imposition of President's rule in a state. The court devised an opening in *State of Rajasthan and others* v. *Union* (1978 SCR (1) 1). The Court held that, if the satisfaction is mala fide or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction.

**2. ADMINISTRATIVE DECISIONS:**

Courts were reluctant to examine administrative decisions and would take appeals only where the executive agency had acted in a quasi-judicial capacity. But in *A. K. Kraipak* v. *Union* (1969 (2) SCC 262), the court held that the requirement of acting judicially in essence is nothing but a requirement to act justly and fairly ant not arbitrarily. In *Delhi Transport Undertaking case* the Supreme Court held that the right to be defended rule which in essence enforces the equality clause. And in the case of *Maneka Gandhi* the rules of natural justice were made applicable to administrative decisions.

**3. COMMERCIAL DECISION:**

In *Erusion Equipment and Chemicals* v. *State of West Bengal* (1975 SCR (2) 674), it was held that, the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to part third of the constitution. Equality of opportunity should apply to matters of public contracts. The government cannot discriminate. The author comments that from quasi-judicial acts to administrative acts and now to commercial acts the activism continued.

The author comments that, now that every appointment, promotion, fixation of pay, and seniority, now that every contract must pass the taste of equality, of fairness, natural justice, non-arbitrariness, non- discrimination – every enterprise can be taken to Court for each of its myriad acts.

The author comments that, the Article 14 which prohibits the State from denying any one equality before the law ordains the state to discriminate positively in favour of those who are disadvantaged, *Indira Sawhney* v. *Union* (1992 (6) SC 273), the Article 14 manifestly talk of individuals, the Courts have decided that the State must not just discriminate in favour of individuals who are disadvantaged; it must discriminate in favour of groups that are disadvantaged.

Just as the Supreme Court legitimized ex-post changes in electoral laws to overturn an electoral judgment against the ruler, just as it was a legitimizer of cruel arbitrariness in *ADM, Jabalpur*, it became just as culpable a legitimizer of the socialist rhetoric of the tax regimes and their regulations.

Due to enlargement of Article 14 the tendency in the civil service is to play safe. They have led the administration to tie itself firmly to rules of thumb. The consequences have been to paralyse governance, to induce administrators to spend their days going through the motions of doing things rather than actually doing them.

**C. CRITICAL EVALLUATION OF ACTIVISM** (Supra N. 14, No. 143-200)**:**

What was intended to protect persons against arbitrary arrest and restraint, again physical coercion by organs of the states? Article 21 has become the device for requiring the state to provide in effect everything that would make a person's life a life with dignity and fulfillment. The point is about liability, about enforceability.

In *Re Sant Ram* the Court held that the right to life does not include the right to livelihood. Just a year later in the case of pavement dwellers of Bombay the Court held that right to livelihood is an integral component of the right to life. Therefore if an executive order removing a person from city's pavements takes away his livelihood he can challenge the order.

In *Kishori Mohanlal Bakshi* v. *Union* (AIR 1962 SC 1139), the Supreme Court held that the abstract doctrine of equal pay for equal work has nothing to do with Article 14.

But in *Randhir Sing* v. *Union* (1982 (1) SCC 618), the Supreme Court declared that the directive principals have to be read into the Fundamental Right as a matter of interpretations. Construing Article 14, Article 16, Preamble and Article 39 (B), we are of the view that equal pay for equal work is deducible from those articles.

In *P Savita* v. *Union* (AIR 1985 SC 1124), the Supreme Court declared that the above decision has enlarged the doctrine of equal pay for equal work, envisaged in Article 39(D) and exalted it to the position of a Fundamental Right by reading it along with Article 14. The author comments that Judges were accepting that what they are prescribing has not been enumerated in the article, which they are reading into the article.

## 1. IMPOSITION OF POSITIVE RIGHTS:

The author comments that Article19 is a positive right while Article 21 is a negative right but the Judges started imposing positive rights under Article 21. By such a positive interpretation they brought right to education under Article 21 as without education objectives set forth in the preamble cannot be achieved.

The author comments that on that reasoning - an ever expanding list of desirables can be added; maternity leave and facilities, nutrition, clothing, housing, well paid servants, better night-vision, devices for the Army, play grounds in neighborhoods, higher education, the study of classics.

Author comments that, to maintain that the constitution makers purposefully left life and liberty undefined so that the expressions "gather meaning through experience". It is just not true. The fact is quite the opposite; they deliberately circumscribed liberty by adding the prefix personal. They had clear idea of the limited sense in which they were using life as they were concerned with providing dyke against physical restraint and coercion by organs of the State.

The author has cited the warning given by the Chief Justice Kania in the case of *A. K. Gopalan* – "it is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition."

## 2. WARNING ON ACTIVISM:

The duty of the Judge is to expound and not to legislate is the fundamental rule. There is a marginal area in which the courts creatively interpret legislation and they are thus finishers, refiners and polishers of legislation, *Sampurna Sing* v. *State of Haryana* (1975 (2)SCC 810).

But by no stretch of imagination is a Judge entitled to add something more than what is there in the statute by way of supposed intention of the legislation. Courts are not entitled to usurp legislative functions under the disguise of interpretation. The policies that are subject to bitter public and parliamentary controversy then it is the parliament's opinion that is paramount and judiciary must be cautious in dealing with such legislations, *Duport Steels* v. *Sirs* (AIR 1980 1A II ER 529).

The author comments that – how this creative reading of Article12, Article14 and Article 21 stand on above norms?

**3. ACTIVISM OR REWRITING;**

a) In *Samata Judgment* (AIR 1997 (6) 449), the Court has imposed a total prohibition on the transfer of lease of land in Schedule Area to any non-tribal. The ban is to apply any person who owns the land in the area as well as to State. Even if the state has transfer any land it has to transfer only to tribal or to a co-operative society of tribal.

SCHEDULES 5, CLAUSE 5 – FEATURES;

1. The power conferred on the Governor is an enabling power; "The Governor may …." Reads the clause.
2. The transfer of land that the clause says Governor may "prohibit or restrict" is that "by or among members of the scheduled tribe in such area".\
3. The allotment of land that he may regulate is that the members of the scheduled tribe in the scheduled area.
4. The business that the may regulate is that of money lending by moneylenders to tribals in the scheduled area.

The constitution makers saw clearly that the tribals's must be brought into the general process of development and there is a need to protect them from money lender and the non-tribal encroacher.

Even the draft provision did not ban the transfer of government land to non-tribal, it was to be made in accordance with the rules by the governor in consultation with the Tribal Advisory Council of the State.

i) Clause 5 (2) (a), read, "Prohibit or restrict the transfer of land by or among members of Scheduled tribes in such area". The Judge has inserted "and non tribal."

ii) Clause 5 (2) (b), reads, "Regulate the allotment of land to members of the scheduled tribes in such area:. The Judge has entered the words "only"

The author comments that, whether this is interpretation or interpolation?

Even the words "peace and good government" which are in clause 5(2) are interpreted in the "widest possible way". Even the word "regulate" is

interpreted as "prohibition" by giving reason that is sub-serves the constitutional objective.

The sequence is patterned; first the widest possible "objective" is red into a particular provision into constitution – nothing short of an egalitarian society; next, a specific way – the complete provision of transfer – is declared to be essential for attaining the objective; and then specific interpretations of words are justified on the ground that any other interpretation would defeat the objective of the constitution provision.

b) In *Bearer Bonds and Elphinstone Mills and others* the Court commented that, where economic matters are concerned or when an issue of policy is involved, the Courts must leave the room for the executive to have sufficient "play in the joints".

The author comments that,

The sweeping ban declared in this case was brushed aside in the interpretation of schedule five.

**4. ARTICLE 44, ARTICLE 47 AND ARTICLE 48:**

The Judges are repeatedly declaring that Article 21 must be read in the light of directive principles. Accordingly, if a particular facility – say, shelter or education or health care or insurance or proper pay to imams of mosques – has not been mandated by Article 21 they have incorporated these rights.

In *Unni Krishnan*, the Court declared, "if" really Article 21 has received expanded meaning and "if" life is so interpreted has to bring within it right to education, it has to be interpreted in the light of directive principles.

The author comments that both declarations start with "if", and immediately they become settled law.

Author further comments that why the Court has neglected to implement Article 44, Article 47 and Article 48.

Further in *Mohini Jain* the Court declared that, "it is constitutional obligation of the State to provide adequate medical services and whatever is necessary for this purpose has to be done. The State cannot avoid its constitutional obligation on account of financial constrains".

The author has cited another example which regard to Article 19 (guaranteed to citizens) and Article 21 (to every person). The author comments that now whether rights interpreted under Article 21 should be provided by the States to every foreigner?

**5. PROCEDURE ESTABLISHED BY LAW:**

The judgment given in the case of *A. K. Gopalan* is overruled in the case of *Maneka Gandhi*. Now the procedure must meet the challenge of Fundamental Rights, it must be equitable, it must be fair, and it must meet the objects and reasons for the legislation.

The activism has led to the enlargement of Article 12, Article 14 and Article 21 and now 'due process' instead of 'procedure established by law.'

The author comments that judgments which have brought public sector enterprises into the fold Article 12 do not mean that the employees of these organizations shall have the protections under Articles 309 to 311?

On this the author comments that the Courts have continued to impose requirements that have compelled the enterprises to function as the bureaucratic departments they were meant not to be.

Lastly the author comments that from creative reading to proclaiming rights to rights-mongering to grievance-mongering; the descent is as steep as at is certain.

**D. COAOTICE OUTCOME:**

Three cases are discussed by the author (Shourie Arun) (Supra N. 14, Page No. 202-217) -

FIRST CASE:

The author comments that in *JMM bribery case*, the Supreme Court read Article 105 (2) in *Narasimha Rao* v. *State* (1988 (4) SCC 626), that according to which, no member of parliament shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in parliament or any of its committees. By strict interpretation it made a distinction between bribe givers and bribe takers; members who has taken bribe to vote would not be liable but those who gave the bribe would be liable. Those members who took the bribe

and voted would not be liable but those who accepted the bribe but did not vote would be liable for prosecution.

Justice Agrawal and Justice Ananda, dissenting, saw the purpose to be wider and the effect of construction that the majority was putting to be the opposite of what it intended. The author comments that, how does this premise accord with the view courts have taken in regard to the anti-defection provisions of the constitution. Clause 6 of Schedule X states that, if any question arises regarding this qualification of a member, the question shall be referred for the decision of the chairman of the Speaker of such house and his decisions shall be final. In spite of this clear bar the courts have been entertaining petitions against rulings of Speakers and giving decisions on them.

The author comments that, decisions of the Speakers in several instances were partisan but if the guiding principle applied in *JMM bribery case* is applied – then how to justify that decision?

SECOND CASE:

Mr. "X" Vs Hospital "Z", the Supreme Court declared where there is a clash of two Fundamental rights - the right which would advance the public morality or the public interest would alone be enforced for the reason that moral considerations cannot be kept at bay.

The author comments that, how does this stance can stand with the stand taken by the court in the *Bearer Bonds Ordinance Case*.

It was challenged on the ground that the ordinance and the act were discriminating in favour of those who had been cheating the national ex-chequer?

The Supreme Court said, it is necessary to remember that we are concerned here only with the constitutional validity of the Act and not with its morality, *R. K. Garg* v. *Union* (1982 SCR (1) 947).

THIRT CASE:

The Author has discussed the case Hawala, *Vineet Narain* v. *Union* (1998 (1) SCC 226), with the *St. Kitts forgery case*. The author comments that, in the case of *Hawala* a diary had been discovered in the course of raids at the premises of a terrorist. It seemed to be record of payments. Against figures, specifying

amounts appeared initials that were said to match the names of politicians and civil servants. The CBI had not investigated the contents with any diligence. The matter was taken to the Supreme Court. The Court directed the CBI to investigate the case swiftly and thoroughly. The Court directed to the CBI to regularly inform it about the progress of the case. Several of the hearings were held in camera.

The author comments that, the same Supreme Court took the different view in *St. Kitts forgery case*. N. K. Sing, a distinguished police officer had been posted as the Joint Director of the CBI as a fictitious bank account had been created in the name of Ajay Singh, the son of V. P. Singh in St. Kitts by March 1991. The investigation was nearly complete the Deputy Director of Enforcement, A.P. Nandi, had confessed the truth. Persons extremely closed to Chandraswami had confessed to the truth. The U.S. authorities were about to begin the interrogation of Chandraswami's disciples and associates in the forgery in the USA – the US authorities had accepted it toto the Letter Rogatory that the CBI had sent from India.

The greatest pressure was brought on N. K. Sing to drop the investigation. When he did not relent, the then Prime Minister transferred N. K. Sing. The officer appealed to the Central Administrative Tribunal against the order. The Tribunal held that whether the government has authority in law to transfer an officer and held that government has the authority. The officer appealed to Supreme Court. The court held that – when the career prospects remain unaffected and there is no detriment to government servant then there is no need for the interference from the court.

**E. CUMULATIVE EFFECT** (Supra N. 14, Page No. 240-249)**:**

**1. INTRODUCTION:**

The author comments that, when one reads judgments a feature that strikes is that, judges consider each issue as an issue in itself – isolated from the contexts of society, often independently of the consequences that will follow.

Different principles, different encapsulation of a principle impressed themselves on different occasions.

The judgments mandating equality, striking down disciplinary proceedings – are not delivered in vacuum.

They are delivered when public life was dominated by weak political class and when rights – mongering and grievance mongering have become the staples of public discourse. This combination has lethal consequences as can been seen in the case of *Shaha Bano* and *Indra Sawhny*.

The author has given another example of TADA. It was challenged. The Supreme Court upheld the validity of the law. The Court specifically upheld the provisions regarding the period of detention, in – camera trials, the provisions that placed the burden of proof on the accused, provisions that allowed transfer of cases from one designated court to another by the Chief Justice of India.

Yet the campaign against the act was triggered in 1993 – 1994 on the grounds that it is against Muslims, against human rights etc.

The author states that the biggest misuse of the act was between 1990 – 1992. Since its inception 77,500 persons had been booked but in Gujarat 19000 persons were booked.

In the year 1993 when the campaign began it was shown that only 535 were booked in 1994 and only 30 in 1995. But still due to weak political class the act was allowed to expire.

As against this case the author has cited the case of *Oklahama blast* after which American President introduced the Omnibus Anti – Terrorism Bill of 1995 – Summary trials were authorized and there was immediate deportation. Author states only 170 persons were killed in America while in India nearly 35000 persons were killed and yet the TADA act was buried by the weak political class.

**2. WHEN ONE SUPPLEMENTS THE OTHER:**

When weak political class and activist judiciary looks upon each issue as issue by itself then what happens is shown by the author by giving two examples.

**Example 1-**

Engineers of State Electricity Boards of Punjab demanded higher emoluments. The Committee recommended it for class I grade, in the course of time it was made applicable to all classes and when judiciary came in it was extended to non-electrical staff.

**Example 2-**

*Nimri Colony case* – In the 1960s a colony of 640 two –roomed quarters was built which was financed by a loan from the low income group housing scheme. Half of the quarters were sold to the poor and half were allotted to the staff of Muncipal Corporation of Delhi as quarters. Employee started demanding those quarters to be sold to them. The case entered in the Court. The court granted the stays; no one shall be disposed till we decide.

The same happened to a colony in North Delhi named Tripolia.

**3. SHUTTING ONE'S EYES TO FACTS:**

The textiles mills of Bombay were under takeover in 1983. Three of the mills challenged takeover. The Bombay High Court examined the actual facts and struck down the take over as illegal. The Government appealed to Supreme Court.

The court held that, it was not open for Court to have a depth examination of different facts and circumstances and record conclusion.

The author (Shourie Arun) comments that,

But the same Court held in *Indra Sawhney* that the legislative declarations of facts are not beyond judicial scrutiny in the context of Article14 and Article 16. In *Keshavanand Bharti's Case* the Court has also observed that the Courts could lift the veil and examine the position in spite of legislative declarations.

## TOPIC 4

## COMMENTS OF THE EXPERT ON JUDGES AND THEIR JUDGMENTS (Supra N. 1, Page N0. 307-364)

In this topic comments of Fali S. Nariman on six judges and comments of Palkhivala N. A. on three judges is discussed:-

Fali S. Nariman:- In jurisprudence there is a theory on legal realism from American Jurist. According to this theory the background of the judges is important when they interpret the law. The family background, educational background etc. of judges is important according to this theory. Let us study this from the angle of this theory of American jurist.

'Judges are human being, and human beings, like stars in the firmament, have blemishes. Despite such blemishes they shine'.

The author (Fali S. Nariman) comments that,

Since 1950 there have been three types of judges who have occupied places in the highest judiciary of this country.

1. Judges with a political agenda,
2. Judges with a social agenda and
3. Judges without an agenda.

There is a constellation in the northern Hemisphere whish includes seven bright stars – Saptarshi – but two of them are pointer. They show the path, i.e., they point to the Pole Star.

There have been many bright and brilliant stars. Judgments of Justice Vivian Bose, Chief Justice S. R. Das and Justice P. B. Gajendragakar adorn but the pointers – the pathfinders – Justice K. Subba Rao and Justice V.R. Krishna Iyer. Each was different. They, in the decades of the 1960, 1970 and 1980s, influenced creative judicial thinking. They lighted new, difficult (and different) paths-paths which others followed.

### 1. JUSTICE SUBBO RAO:-

The Subba Rao era began with his short but vigorous tenure as chief justice from 29 June 1966 till 11 April 1967.

Presiding over the Constitution Bench in that bried period of ten months as chief justice, decisions in as many as 62 different cases were handed down by him, almost all important constitutional cases. Sixty of the 62 judgments delivered by the Constitution Bench presided over by Subba Rao in that brief ten – month period were unanimous decisions.

Of the remaining two judgments, in the first, Subba Rao presided over a bench of nine securing a majority (of 8:1) for his point of view the other, in the celebrated *Golaknath case* (1973). He had secured a majority (6:5).

He genuinely believed that many decisions interpreting various provisions in part III of the Constitution in the first decade of the Supreme Court were retrograde. In his seven years on the bench, he did his utmost to undo them. In the early years when he couldn't he dissented. In later years, when he could muster a majority for his views, he gladly affirmed his previous dissents which then became the law of the land!

He wrote the largest number of dissents – judgments in as many as 49 different cases dissenting from the majority.

His concern for fundamental rights and his distrust of parliamentary majority led to some of his most controversial decisions. He abhorred absolute power – especially the arrogance of absolute power – whether exercised by an executive and administrative agency, or when exercised through the legislative process. He did not stop short even at questioning the validity of the exercise of constituent power.

In the *Kharak Singh case* (AIR 1963 SC 1295), He showed the way for the first time for a broader interpretation of Article 21. 'If the police could do what they did to the petitioner', said Subba Rao, 'they could also do same to an honest and law abiding citizen'. He held that the expression 'life in Article 21' could not be confirmed only to the prohibition against the taking away of life. It inhibits against its deprivation, he said, 'but it is also extended to all of those limbs and faculties by which life is enjoyed'.

How could a movement under the scrutinizing gaze of the policemen be described as a free movement? Then the whole country is his jail. The freedom of movement in clause (d) (of Article 19) therefore must be a movement in a free country.

Year later, long after Subba Rao ceased to be on the court, a bench of three judges (Justice Mathew, Justice Krishna Iyear and Justice Goswami) inspired by this dissent held in *Govind* v. *State of M.P.* (AIR 1975 SC 1379), that there could be no doubt that the makers of our constitution wanted to ensure to its citizens conditions favourable to the pursuit of happiness and that they must be deemed to have conferred upon the individual (as against Govt.) “a sphere where the individual should be left alone.”

The dissent in *Kharak Singh* had pointed the way.

Till Subba Rao became chief justice, the English rule in India was that the state was not bound by a statute unless the statute so provided. This was based on the doctrine of crown immunity. ‘The King can do no wrong’. This was affirmed by a bench of seven judges in 1960, *Director of Rationing* v. *Corporations of Culcutta* (AIR 1960 SC 1355).

Subba Rao, was not a party to this decision. Shortly after he became chief justice, he set up a bench of nine judges, *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Corporation of Calcutta* (AIR 1967 SC 997).

To consider the correctness of the prior decision in *Director of Rationing Case*. He persuaded eight of his colleagues on the bench that the English common law theory was subversive of the rule of law, and that it had been given up even in England after the enactment of the Crown Proceeding Act, 1947. The facts of that case were simple – The state of West Bengal was carrying on the business of running a market. Section 218 of the Calcutta Municipal Act required every person carrying on trade to hold a license. The government of West Bengal contended that it was not bound by the provisions of the Act, since the Act did not expressly include the state. The Supreme Court held that the state was as much bound as a private citizen to take out of license. The earlier decision (of seven judges) was overruled.

“Howsoever high you be the law is above you.”

In *Radhyeshyam Khare* v. *State of Madhya Pradesh* (AIR 1959 SC 107) - in his forceful dissent he held that – “it was obligatory –for every administrative body to comply with the rules of natural justice.”

The majority held that no opportunity needs to be given to the affected parties before action was taken, since the principles of natural justice only applied when there was duty to act judicially. Subba Rao did not agree.

The powerful dissent influenced later judgments.

In *A. K. Kraipak* (1969 (2) SCC 262), "Where it was held that principles of natural justice were not excluded where purely administrative action was involved."

Constitution Bench decision in *S. L. Kapoor* v. *Jagmohan* (1980 SCC (4) 370), where it was held that the principle of audi alteram partem applied to municipal committees.

A year before he became chief justice, Subba Rao presided over a constitution Bench decision, *State of Maharashtra* v. *Prabhkar Pandurang* (1966 (1) SCR 702).

A case concerning conditions of detention of those preventively detained. Prabhakar had been detained under the Defence of India Rules, 1962.

It was *Prabhakar's case* – Which inspired and showed the way in the spate of later cases on conditions of detention in the 1970s and early 1980s. *Hoskot case* (1978 SCC (3) 544), the two *Sunil Batra cases* (AIR 1978 SC 1675) and the decision in *Francis Coralie* (AIR 1981 SC 746) – were extensions of the principle first enunciated in *Prabhakar*.

*Golakhnath* was the culmination of the long battle between Parliament and judiciary. Over different interpretations of Article 31, on 5th Oct. 1964 – both unanimous Constitution Bench judgments – in land acquisition cases from Bombay and Madras enactments in question – one a pre – Constitutional act and the other a post – Constitutional – act void.

Meanwhile, Parliament placed all land – reform laws in the Ninth Schedule. Article 31 B of the constitution saved all laws (central or state) placed in the Ninth Schedule from challenge under Articles 13, 14, 19 or 31. This was done by the Constitution (Seventeenth Amendment) Act, 1964.

In *Metal Corporation case* (AIR 1967 SC 637), the battleground now shifted to the Ninth Schedule – and the scope and ambit of the protection under Article 31 B. This necessarily involved the validity of the Constitution (Seventeenth Amendment) Act. Justice Subba Rao was able to persuade a

majority of his colleagues (6:5) to place a judicial check on unlimited constitutional power of amendment.

In *Shankari Prasad Singh Deo* v *Union* (AIR 1951 SC 458), a constitution Bench of five Justice Presided over by the first Chief Justice of India (Sir Harilal Kania) upheld the power of Parliament to amend the Constitution. This constituent power, the court had said, was beyond the scope of judicial review. This was accepted, not unanimously, but by a majority led by the Chief Justice Gajendragadkar in the later decision i.e. in *Sajjan Singh case* (AIR 1965 SC 845).

Chief Justice Subba Rao held strong views on the subject. The incorporation device of Article 31 B was, in his view, a striking proof of the failure of the Indian Parliament to conform to the Constitution under which it was elected.

Chief Justice Subba Rao refused to accept that parliament even in its constituent functions, could impair or adversely affected the fundamental rights in Part III of the Constitution. But, this would involve invalidating all previous constitutional amendments which had declared valid a serried of land reform acts, as also the entire range of anti-zamindari legislation. So he looked around and engrafted an American doctrine. The doctrine of 'Prospective Overruling'. In exercise of this doctrine, he validated the Constitution (Seventeenth Amendment) Act, but denied power to Parliament to place any more enactment in the Ninth Schedule. In *Golaknath* case, Justice Subba Rao conceptualized his vision of fundamental rights as transcendental.'

The reasoning in *Golaknath* (bench of 11 judges) was not accepted even by the majority in *Kesavnanada Bharati* which accepted the alternative argument advanced in Golaknath and mentioned in the judgment of Chief Justice Subha Rao as having considerable force. This alternative argument was that the power to amend does not include the power to change the structure – the basic or fundamental structure of the Constitution.

The Author comments that, "I would say to the critics of *Golaknath* (1967), that if there was no Golaknath, there would have been no *Keshavnand Bharati* (1973) and unbridled power of amendment being conceded, India would have gone the ways of some of its neighbours and with a dictatorship we would have lost the freedom of the press and the independence of the judiciary – two

concepts which both chief justice Subba Rao and Advocate C. K. Daphtary greatly cherished."

**2. JUSTICE KRISHNA IYER:**

The other great pointer in the judicial firmament has been Justice Krishna Iyer. He was responsible for – and in turn inspired – a new thrust, a new direction, for the Supreme Court. He helped to humanize the legal system – particularly in the field of criminal jurisprudence and jail reform. He thus treated – and so inspired other judges to teat – binding decisions as no more than decisions applicable to the facts of that particular case.

Judge must have social philosophy and a humane approach to legal problems. Whilst Subba Rao had an obsessive concern with fundamental rights, Krishna Iyer's concern was broader – for the poor downtrodden.

He always believed that the assertion made in the United States that the Supreme Court is political institution applied as much to India as to the United States. He once said, 'law without politics is blind, politics without law is deaf". The myth is that courts of law administer Justice; the truth is they are agents of injustice. He thus widely influenced some judges to do justice according to their whim, in disregard of law.

In *Samsher Singh* v *State of Punjab* (1974 (2) SCC 831), a bench of seven judges sat to consider whether the Constitution contemplated the president and the governor as real repositories of power or whether they were like the British Crown. Justice Krishna Iyer in delivering a separate but concurring judgment, posed the question for decision as under –

In Rashtrapati Bhawan – or Raj Bhawan an Indian Buckingham Palace, or (is it) a half-way house between Buckingham Palace and the White House"? Justice Krishna Iyer loaded into his judgments a rich mixture of law, politics and commonsense – and also compassion.

In *Mohinder Singh Gill* v. *Election Commission* (1978 (1) SCC 447), Justice Krishna Iyer himself decried the lack of objective standards in judicial determination. Quoting from a book by Alan Barth (Prophet with Honour (1975), Vintage Book, New York) he accepted the standards for judicial decision mentioned there and set out the following passage (with approval)-

'Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards and rational standards are both impersonal and communicable.'

During a shorter period on the bench – a little over seven (from July 1973 to November 1980) – Justice Krishna Iyer participated in over 700 cases in which decisions were rendered, himself delivering judgments in more than half of them. His preoccupation for quick justice is apparent in his judgments. So is his helplessness at the court not being able to administer it. He starts one judgment with the words – *Qudrat Ullah* v. *Municipal Board* (1974 (1) SCC 202), - 'Instant or early justice seems impossible without radical reorientation and systematic changes in the judicial process, as these two appeals, which have survived decades, sadly illustrate.'

The author comments that,

'There was not yet been invented a cardiac machine which can read what is written on the heart of dear old Justice Krishna Iyer. If there was such an instrument, one would read the world: 'Legal Aid.' In fact, it was he who gave a new meaning to the equality clause in our Constitution. He ruled that if an indigent litigant is not afforded legal aid, he does not receive the equal protection of the law guaranteed by Article14.

It has been said the Subba Rao (and the Subba Rao court) was 'rightist', and justice Krishna Iyer (and those of his school of thought) were 'leftist'. This is a superficial characterization indulged in by those who are obsessed with 'isms'. Besides, it is not even correct. Each had many similar and abiding major concerns.

The abiding concern of the Subba Rao court were underlined (coincidentally but characteristically) by the first and the last case in which he presided as chief justice. He firmly upheld the independence of the judiciary by ensuring that the subordinate judiciary should not be selected except from the judicial service.

In *Chandra Mohan* v. *State of Uttar Pradesh* (AIR 1966 SC 1987) – What can be more deleterious for good name of the judiciary than to permit at the level of District Judge's recruitment from the executive department? He asked, and

then declared the Uttar Pradesh Higher Judicial Service Rules framed by the state government as unconstitutional.

Likewise, Justice Krishna Iyer in the celebrated Judge Transfer case, *Union of India* v. *Sankalcnad Himatlal Sheth* (1977 (4) SCC 193), - whilst accepting that the judge of the high court may be transferred from one high court to another in the public interest, read into the constitutional provision of prior consultation with the chief justice a virtual mandate – although the opinion of the chief justice of India on the proposal to transfer may not be legally binding, it would have to be accepted (he said), otherwise, without the consent of the head of the judiciary an order of transfer of a high court judge would be per se arbitrary and capricious.

So much for their common concerns – the independence of the judiciary!

In the field of human rights and freedom too, their views were not dissimilar.

In the last case over which he presided, *Satwant Sigh* v. *Assitant Passport Officer* (AIR 1967 SC 1836), Chief Justice Subba Rao speaking for a majority in bench of five judges held that the expression 'personal liberty' in Article 21 encompassed a right of locomotion, of the right to travel abroad.

Soon after the decision in *Satwant Singh* in 1966, parliament passed the passport Act, 1967, regulating conditions for the grant and refusal of a passport, and also providing for conditions on which a passport once granted could be impounded. Ten years later (in 1977) Janata Government was in power and the congress (I) in opposition. The passport of Maneka Gandhi was impounded.

In the case of *Maneka Gandhi* Justice Krishna Iyer held that – The words 'procedure according to law' in Article 21, he said, means fair, not formal procedure. The laconic order of the passport officer and his refusal to give reasons were characterized a unfair and violative of natural justice.

Contrast Satwant Singh and Maneka Gandhi – In 1967, Satwant Singh got back in passport.

In 1977, Maneka Gandhi did not get back her passport. She won the case but was denied relief.

**3. JUSTICE S. M. SIKRI:**

The other Judge of the pre – supersession era.

Prior to his retirement (on 25th April 1973), Chief justice Sikri had recommended to government (as was customary) the name of the next senior judge on the court as his successor, Justice J. M. Shelat. This was at a time when Sikri was presiding over the largest bench of justices that ever sat to determine a case – *Kesavananda Bharati*. This bench of 13 Justices was specially constituted to hear and decide the fiercely controversial question as to whether Parliament, in the exercise of its constituent power and with the requisite two – third majority, was competent to amend any and every provision of the Constitution of India. It was only a day before Chief Justice Sikri retired that the entire court assembled to announce its decision. It was discordant one. As 9 out of the 13 judges on the bench signed this final order as under :

1. *Golaknath case* in over – ruled;
2. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution;
3. The Constitution (Twenty – fourth Amendment) Act, 1971, is valid;
4. Section 2 (a) and (b) of the Constitution (Twenty – fifth Amendment) Act, 1971, is valid;
5. The first part of section 3 of the constitution (Twenty – fifth, Amendment) Act, 1971, is valid. The second part, namely and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that is does not give effect to such policy's is invalid;
6. The Constitution (Twenty – ninth amendment) Act, 19971, is valid.

The Constitution Bench will determine the validity of the Constitution.

Twenty – sixth Amendment Act, 1971 is in accordance with law.

The cases are remitted to the Constitution Bench for disposal in accordance with law.

Justice A. N. Ray was appointed chief justice of India. Decision making in the Great Constitution case followed closely by the 'super session' had seismic effect on the entire edifice of the court. It was badly shaken and weakened. It

was never been the same since. After the supersession of April 1973, it was feared that it might happen again. And it did.

In January 1977 when Justice M. H. Beg (then No.3) was appointed Chief Justice of India on the retirement of Chief Justice Ray, ignoring the senior most Puisne Judge on the court, Justice H. R. Khanna (No.2) and his sin? - It was Khanna's judgment that had titled the balance in Keshavanand against the government. He held that the power to amend though plenary, could not be so exercised as to destroy the basic structure of the Constitution. That was not all. Khanna had the temerity (or courage – depending on one's point of view) to dissent (the lone dissenter) in the Emergency case (ADM Jabalpur).

**4. JUSTICE M. HIDAYATULLAH:**

His brief but precise introduction to the sixteenth edition of Mulla's classic work on Mohammendan Law is a piece of writing unmatched in India's legal annals.

About Parliament, his observation was that only a handful of people really took seriously to the task of law making. Others were silent spectators, which (he said) was not a bad thing, because a legislature which said nothing and did much was to be preferred to one where members talked too much and did nothing! And as for the judiciary he believed that in writing judgments, judges should not pontificate or indulge in grandiloquence. He never wrote bad judgments – only elegant ones, eminently readable by one and all.

**5. JUSTICE A. P. SEN :**

In *Shivkant Shukla* v. *ADM Jablpur*, Justices A. P. Sen and R. K. Tankha, in their celebrated judgment, rejected the plea that constitutional remedies under Article 32 and 226 were barred or could ever be barred by ordinary legislation short of amendments to the Constitution.

The lamps of liberty, briefly lit in the high bourt judgement in *Shivkant Shukla* v. *ADM Jabalpur* (and reiterated in nine other high bourt judgment in the country), were swiftly put out by the notorious judgment of our Supreme Court in April 1976.

ADM Jablapur is a blot on the judicial annals of a free country.

Justice A. P. Sen was 'punished' for his judgment and was transferred to Rajasthan in June 1976.

On freedom of the press and on personal liberties he was a real tiger and one could always rely upon him.

**INDIAN EXPRESS CASE:**

Ramnath Goenka was founder and managing editor of The Indian Express, and he had, what Napoleon called, courage of 'the – two o'clock – in – the – morning – kind' – unprepared courage that is necessary to meet an unexpected occasion! Goenka faced the Emergency of June 1975with great and determination. For the entire period that it lasted (upto March 1977), he stood erect and defiant, a towering figure – the symbol of the free press in India.

During the internal emergency, The Indian Express Group of Newspapers faced criminal prosecutions all around the country – prosecutions under the Companies Act, 1956 for not filing certain documents with the registrar and/or filing them beyond the stipulated time.

Ultimately, when the national nerve centre of the Express – the entire Head Office Building at Bahadurshah Zafar Marg – was threatened to be taken over by a seemingly vengeful government for breach of some municipal bye-laws, Goenka reacted by moving the Supreme Court of India under Article 32 to the Constitution.

In the main judgment of the court (delivered by Justice A. P. Sen) it was held that the notices of re-entry upon forfeiture of the lease of the land on which the Express Building and the press stood, and the threatened demolition of the Express Building were intended and meant only to silence the voice of the Indian Express. They thus, constituted a direct and immediate threat to the freedom of the press and were violation of Article 19 (1) (a) read with Article 14 of the Constitution. Hence, the writ petitions under Article 32 before the Supreme Court were maintainable and the notices were quashed.

The author has commended that – "It has been said that judges without a social agenda are not crusaders but only problem solvers, but they too have their uses. I believe that the ideal mix for progressive higher judiciary which includes

the High Courts as well as the Supreme Court, is three – quarters problem – solvers and one – quarter crusaders".

**6. DHIRUBBAI A. DOESAI –**

Like his judicial mentor, Krishna Iyer, he was in the crusader class.

Sitting singly (in the Gujarat High Court) he electrified the entire corporate sector in Ahmadabad and Bombay with his judgment in the *Wood Ploymer case* (109 ITR 177(1977)). It was a judgment under the companies Act, 1956. Justice Desai refused court-sanction to a scheme of amalgamation between two companies (even when the scheme had been previously approved by the necessary statutory majority of the body of shareholders of each company) because – and only because it was motivated by tax avoidance.

Justice Desai did what he thought was right and just.

**PALKHIWALA N. A. ON JUDGES AND THEIR JUDGEMENTS** (Supra N. 4, Page No. 287-300)**:**

**1. CHAGLA M.C. – A GREAT JUDGE –**

The author has commented that –

Justice Cardozo said that the work of the judge was in one sense enduring and in another sense ephemeral. What is good in it endures, what is erroneous is pretty sure to perish. The good remains the foundations on which new structures will be built. The bad will be rejected. He was at his best in dealing with cases where analogies are equivocal and precedents are silent.

The law was to him no lifeless conglomeration of sections and decisions. He illuminated justice and humanized the law. He achieved the credible and humanized even the tax laws.

His contribution to the growth of income-tax law is perhaps the most monumental contribution.

His one burning desire was to do real justice and he brushed aside the conservatism. He went state for the jugular vein of every matter which came before him – "the hub of the case." His judgments had no dark nooks or misty crannies. He wrote his judgments even as the grass grows – effortlessly, spontaneously.

His report in the Life Insurance Corporation inquiry case is a landmark in the history of public life and bears testimony to his fearless and high minded nature and his shrewd appraisal of men and human affairs.

His first impression, his tentative views, was never tenaciously held; he did not allow them to obstruct the light streaming in from even the junior most member of the Bar. The country paid him great honours and gave him historic assignments, but at all times he remained the gentle, modest, affectionate man.

Commenting on his book – “Roses in December” the author has commented that – three passions, overpowering and enduring, seem to have dominated chagla’s life : adherence to nationalism involving the integration of all communities and predicating a unity among all citizens; love of the basic human freedom, rooted in the perception that liberty is distinct and different from democracy; and devotion to justice between man and man and between man and the State. The book contains most readable vignettes of his days as vice-Chancellor, as ambassador and high commissioner, as governor, as judge of the international Court. The last high public office was surrendered in 1967 when, with is characteristic dedication to high principles, he resigned from the cabinet in protest against a parochial policy in education dictated by linguistic fanaticism.

**2. SHAH J.C. – A CHIEF JUSTICE:**

The author has commented that –

Freedom under law survives in India because of the fundamental rights and independence of our courts.

Chief Justice Shah J. C. ranks very high among the exemplars of the Supreme Court’s wisdom and sturdy independence. The major constitutional cases which Shah decided are those which helped to preserve and maintain the rights of the common man against the lawless instincts of the men in power.

Judgment in the Bank Nationalization case is very much the victory of common man. It struck down the law nationalizing banks without payments. 90% share capitals were held by the middle – class citizens and the entire body of investors benefited by the judges. That decision vindicated the ordinary citizen’s right to assert that every law must respect and conform to every fundamental right. The significance of the judgment in the *Privy Purse Case* is for Maharaja

as well as for the common man. The basic issues centered round the sanctity of the Constitution and public morality. If Privy Purses could be stopped by mere executive action, the most unsafe investment in the world would be the securities of the Indian Government in which the funds of charities and trusts for windows and orphans, and provident funds of millions of the workers are invested. What were at stake were nation's honour and its reputation for financial integrity in the eyes of the world. Instead of giving importance to the popularity he gave importance to the oath. He focused always on the basic issues and resisted the temptation to enter the scholarly side – walks and the historic by – lanes. In a string of decisions Shah brought about the growth of income-tax law and sales – tax law through the judicial process. The Supreme Court is the poorer for his retirement.

**3. KHANNA H.R. – A GREAT JUSTICE:**

The author has commented that –

In *Keshwanand Bharati's case* Justice Khanna was one of the judge out of seven who constituted majority to held that, the Constitution cannot be made to suffer a loss of identity through the amending process.

Justice H. R. Khanna resigned when he, the senior most of the Supreme Court Puisne judges, was passed over for the chief justiceships. He yielded to none in "Sturdy independence" and in his capacity to act as the "watch dog" of the independence of the judiciary. It wan seem in a judgment in the *habeas corpus case, ADM Jabalpur* v. *Shukla* (AIR 1976 SC 1207), decided by a five Judge Bench of the Supreme Court in which he was the sole dissenter. In the case he held that even in the absence of fundamental rights "the State has got no power to deprive a person of his life or his personal liberty without the authority of law. That is the essential postulate and basic assumption of the rule of law in every civilized society".

In deciding this case he has played a memorable role at the most critical juncture in our History. Generations unborn will admire his historic judgment as a shining example of judicial integrity and courage and cherish it for the abiding values it embodies.

When he pronounced his glorious dissent in the habeas corpus case, The New York times remarked that surely a statue would be erected to him some day in an Indian city.  His real monuments are his rulings upholding the basic structure of the Constitution and the citizen's rights to his life and personal liberty.

## TOPIC 5

## COMMENTS OF THE EXPERTS ON LEGAL PROFESSION (Supra N.14, Page No. 422-428)

In this topic comments of Shourie Arun and of Palkhivala N. A. are discussed –

Shourie Arun has said that –

It is not for the lawyer to sit in judgment. That is the judge's job. The lawyer's job is to present the best possible arguments to the judge in the interest of his client. The theory is – by now has become a mindset. So deeply has it been internalized – that it is from the contest of the rival lawyers that truth will emerge, and it then that the judge will be able to do justice between the two litigant.

The presumption that justice would emerge from the presentations of rival lawyers has rested on at least three assumptions –

1. The two sets of lawyers would be of more or less equal competence,
2. That while lawyers may stress some points rather than other in the interest of his client, but he would not mislead the court,
3. That the judge would have the insight to weigh the rival presentations, and to see through them when necessary. None of these premises holds in its entirety in our country today.

"Serving the interests of the client whose fee we have accepted" – that itself becomes a greasy road, securing acquittals on technicalities, 'suppressio veri suggestio falsi'. All this only "in the interest of the client".

The author says – One has just to see what lawyers have been doing on behalf of suspects in the Bofors case to gauge what "serving the interests of the client" has come to mean in practice.

The public interest suffers.

Between private parties, injustice is often done.

Attorney General and the Solicitor General on the same principle" would entail that they defend whatever the Government does.

"Serving the interest of the client" being the operating premise of the legal profession, the profession has the most distinguished exceptions. Several of

them have taken up public causes and argued them free of cost. The profession teaches immorality; it is exposed to temptation from which few are saved. The question whether the principle of adversarial justice is one that does not undermine justice and at the same time corrode the profession.

**Mahatma Gandhi and Legal Profession –**

In the twenty years that he practiced law Gandhiji operated on the exact opposite of this rule. " I warned every client at the outset," he wrote later, "that he should not expect me to take up a false case or to coach the witnesses, with the result that I built up such a reputation that no false cases used to come to me'.

The reason for this was simplicity itself. "The duty of lawyers," he wrote, "is always to place before the judges, and to help them arrive at the truth, not to prove the guality as innocent." A lawyer may be retained and remunerated by an individual in a particular case, he wrote, but he has "a prior and perpetual retainer on behalf of truth and justice."

He told his clients that he reserved the right to return their brief at any stage if he realized that the client had deceived him.

**RUSTOMJI'S CASE –**

Rustomji was close to Gandhiji and used to seek and follow his advice on even small, domestic matters. But like most traders he used to indulge in a little sharp practice on the side. He was caught in the attempt to smuggle some goods to evade duties. He was crestfallen and beseeched Gandhiji to save him. "To save or not to save you is in His hands," Gandhiji told him. "As to me you know my way. I can but try to save you by means of confenssion."

Gandhiji recalled that such scrupulous adherence to truth did not hurt him even financially. On the contrary, it made his task easier. The judges too came to look upon the cases Gandhiji urged before them in a different way, knowing that, as Gandhi had taken up the case, it must already have ben screened scrupulously for truth and law.

Unless the basic operating principle of our legal profession is reversed in the direction of Gandhiji's practice, the reforms which are so often urged in procedures of our courts and their structures will do little to ensure justice. Not

are lawyers the only ones who need to re-examine the premises on which they operate. Every profession has developed such self-serving, convenient "principles".

**AGE OF THE PROFESSIONALS:**

The author says – India is entering the Age of the Professional. Politicians have become almost illegitimate, that clears the field for the civil servant.

Similarly, enterprises that used to run at the whim of proprietors have now to rely on professionals. Software development industrial design, the formulation of new drugs, advertising; these are almost entirely dependent on professionals.

For professionals the moral is in the old proverb, what the sting shall wreak in the end is determined by the poison that inheres in the snake, not by the perfume we sprinkle on it.

When selling better becomes the standard, what is wrong with the politician he too will be seen as just marketing his office skillfully? And, will the final step not be inevitable – that the person who sells himself best is the best?

When the entire profession is swept by a particular culture, when everyone in it has internalized the rationalizations, there is no goad to reflection.

While a lot of power has already passed to professionals, they do no more than swell and speed the spate: socialism yesterday, consumerism today. The net result of their work is to add another decibel to today's chorus. And so, if for other reasons society is set on the right course, they quicken its progress. If it has taken the wrong turn, they speed it into the ditch.

The antidote is threefold. Professions must give up the self-serving rule, "dog doesn't eat dog".

1. Assessing what it is doing, monitoring the conduct of the members should be a part of work that is regarded as professional. The rule "dog doesn't eat dog" is no more observed. The members of each profession are eating each other up all the time. Just see how they try to get an advantage over their competitor; just listen what they say about others in their profession.

2. Second the antidote to professionalism is "amateurism" – the amateur, being the person who engages in an activity out of care and affection, rather than

because it will bring profit, or because that is what will advance him within the specialization. Such persons are insiders, and so they can speak with first-hand knowledge. And yet, as they have liberated themselves from the norms that will bring "success" in the profession, they are outsiders looking in a precious combination.

3. And at all times there must be person who are a profession unto themselves, those who have the sweep to ask the meta-questions that affect all the professions.

Lastly, author has commended – "As professionalism comes of age in the country, we should make a special effort to create space for such persons, we should tune our ears to better hear their voices."

**PALKHIWALA N.A.** (Palkhivala N. A. , We, The Ntion – The Lost Decades_ UBS Publishers' Distributors Ltd., New Delhi, 1994, Page No. 210-217, 219-223)–

The author has cited the answer given to him by the Advocate General of India in 1947 about the legal system of administration of justice where the advocate general answered that – "I am inclined to the view that it is better to have Kazi justice, where one wise man decides what he thinks is right and that is the end of it."

The author has commented that in the period of emergency our Parliament, to supersede the judicial decisions, passed on habeas corpus case, passed an extraordinary law to the effect that "No citizen shall be entitled to liberty on the ground of natural law, common law, natural law and rules of natural justice." This is typical when Western concepts of common law, natural law and rules of natural justice are implemented in the society like India.

The author has given three grave shortcomings of the present system of administration of justice that – first, the commercialization of legal profession. Counsel often makes statements at the Bar which are factually, incorrect and affidavits are often filed even on behalf of public authorities, which do not state the truth. Perjury is accepted as a fact of Indian life and even high public office perjure themselves.

Secondly, life has become far more complex and corruption and lowering of standards are far more pronounced, that ever before.

Thirdly, Part IIVA of the Constitution, which deals with "Fundamental Duties" has been a dead letter since the 42nd Amendment Act-1976. The gratest drawback is delay. The law may or may not be an ass, but in India it is certainly a snail. The judges who does not readily grant adjournments, becomes highly unpopular. Double standards have become shamelessly common in the legal profession.

The author further comments that the profession is looked upon, not as a learned profession but as a lucrative one. Corruption in the upper reaches of the judiciary is illustrative of the incredible debasement of our national character.

The only impeachment proceeding ever sought to be started in our parliament was that against one of our finest judge, J.C. Shah, a judge of impeccable integrity.

Character assassination is the national sport, dissatisfied litigants and lawyers scandalize the Court.

## TOPIC 6

## COMMENTS OF THE EXPERTS ON JUDICIAL OVERNANCE

Comments of Nariman Fali and of Shourie Arun are discussed –

**Nariman Fali – A Common Law Theory of Judicial Review** (Supra N.1, Page No. 365-386) –

According to the Author a written Constitution should be viewed as a 'living tree' with 'roots' in precedent and in the community's constitutional morality a tree that has 'branches' and grows over time through evolving common law jurisprudence. The protection of rights must be left to traditional institutional mechanisms, which is necessary the unelected judiciary. All judicial review – all manner of adjudication by courts – is itself an exercise in judicial accountability – accountability to the people who are affected by a judge's ruling (if the punitive contempt power is kept well in check), (Waluchow W. J., The Living Tree, Cambridge University Press London, 2007).

In 1954, Justice Vivian Bose, described, in elegant prose what the constitutional provisions meant (and should mean) to the justices –

We have upon us the whole armour of the Constitution and walk henceforth in its enlightened ways, wearing the breast plate of its protecting provisions and flashing the flaming sword of its inspiration'.

The 'flaming sword' that Justice Bose contemplated is in Article 142 of the Constitution. It empowers the Supreme Court in exercise of its jurisdiction 'to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it'.

**Initial refusal to take responsibility –**

When on some rare occasion's enacted law diverts the true courses of justice, power is vested in the Supreme Court alone, to make such orders as are necessary for doing complete justice. This is what the framers of Constitution originally intended. This is the trust that the founding fathers placed in the justices of highest court. Justice Vivian Bose regretfully commented that – The justices of the highest court over the years (except for a flash – in – the – pan decision of the year 1991 in *Delhi judicial service* v. *State of Gujarat*) (AIR 1991

SC 2176), refused to accept the onerous responsibility placed on them, and have said-taking shelter under enacted law-that nothing can be done even by the highest court where the law stands in the way-justice (they now say) must pay obeisance to enacted law.

In *Union Carbide Corporation* v. *Union* (1991 (4) SCC 584) and *Supreme Court Bar Association* v. *Union* (AIR 1998 SC 1895) the only reasons why this power reserved, only to be exercised by the justices of the highest court was because they, above all other, were to be trusted more than any other judge in the entire country they could not be expected to do wrong. This was the faith the Constitution had in the justices of the Supreme Court a faith unfortunately not shared or reciprocated by later justices of the Court in them!

The author comments that, we must welcome with confidence 'Judicial government'.

Article 32 and Article 226 do give primacy to the judges. The Constitution, as drafted and as it exists today, has placed the judges of the superior judiciary in the driving seat of Governance.

The Constitution, although it makes separate provision for the three great organs of state, does not place them in air-tight compartments. In 1955, the highest court had authoritatively said so - in *Ram Jaway's case* (AIR 1955 SC 549).

The facts of the case,

The writ-petitioners were printers and publishers of text books for different classes in schools of Punjab. The education department of the Punjab Government placed restrictions upon the fundamental rights of the petitioners. The education department said that the restrictions were reasonable and were saved under Article 19(2).

The court said that the petitioners had no fundamental rights which could be said to have been infringed by the action of the government.

The content of judicial power is not defined in our Constitution. It is assumed as having been conferred on the great chartered high courts (Bombay, Calcutta and Madras). The high court acts were passed in the year 1862, and this judicial power is now shared by the Supreme Court of India along with all the 21 high courts in the country.

All power grows by what it feeds on. All judicial power also accretes by the mere circumstance that other constitutional bodies and authority's setup to legislate and to pass administrative orders have failed to act.

If judges need to introspect, politicians need doubly to introspect and ask themselves whether they have fulfilled the aspirations of the people who elected them to make laws for the people and help alleviate their problems.

The author comments that,

In our constitutional history of 60 years, judicial power has kept vacillating – contracting at times, expanding at times – according to the exigencies of the moment.

**Contraction of Judicial Power –**

During the Internal Emergency of June 1975 up to March 1977, judicial power had contracted almost to vanishing point and one of those who fought against that Emergency was eminent parliamentarian, Somnath Chatterjee. To whom liberty was the very blood of life. In his entire political life, Somnath Chattarjee had always fought against tyranny and religious bigotry – that was why he was opposed to the Emergency. Another was the lion of the Indian press Ramnath Goyenka.

Judicial power had contracted to its lowest level with the infamous decision in *ADM Jablapur* (1976) in which it was held that –

'Liberty itself is the gift of the law, and it may by the law be forfeited or abridged'.

Justice H.R. Khanna, alone dissented from the majority view.

Rule of Law and Rule by Law –

Fortunately, this concept of liberty propounded in *ADM Jabalpur* is not the rule of law. It is the rule by law. If the rule of law is the rule by judge (as it is frequently said to be), and the rule by law is the rule of the elected representatives in parliament without any possibility of that rule being questioned by the judicial arm of the state, the author says that he would prefer to live under a rule of law.

He says that the pendulum swung away from Chief Justice Ray's grim dictum in the Post- Emergency period when both courts and Parliament said that Article 21 – life and liberty clause – can never be suspended.

**Enlargement of the ambit of Article 21 –**

Over the years, in one notable decision after another, the following rights have been declared by the Supreme Court to be encompassed within the four corners of Article 21 viz. the right to go abroad, the right to privacy; the right against solitary confinement; the right to legal aid, the right to speedy trial, the right against custodial violence; the right to medical assistance in an emergency; the right shelter; the right of workers to safe working conditions and to medical aid; the right to social justice and economic empowerment, the right to pollution free water and air, the right to a reasonable residence; the protection of the cultural heritage; the right of every child to full development; the right of residents of hilly areas to access roads; the right to education; the right to live in a clean city with noise pollution at minimum levels.

There can be almost endless list of rights can be included – in other words the right of every inhabitant to live his or her life with dignity.

Recently (11 September 2007) the court has said that the right to life includes the rights to opportunity, and therefore postulates the concept of a level playing field for all citizens – even when they are responding to soothing so prosaic and exclusively administrative – as government tenders, *Reliance Energy Ltd.* v. *State* (2007 (8) SCC 1).

The legitimacy of judicial governance is written into Article 21 and other articles of the Constitution.

In effect, a large number of Directive Principles of State Policy set out in Part IV are now enforceable by court through the wide and liberal interpretation of Article 21. The legitimacy of judicial governance is established by the provisions contained in four Articles of our Constitution – 21, 32, 226 and 227. Chief Justice Hidayatullah publicly said that the seed of this doctrine, of basic structure was embedded in Article 32.

Dr. B. R. Ambedkar said that Article 32 is 'the very soul of the Constitution and the very heart of it.' He called it 'the most important Article without which this constitution would be a nullity.'

Persons who are prejudicially affected by acts or omissions of any governmental or other authority – sometimes even 'strangers' – can approach courts for relief under Articles 32 and 226.

**Public Interest Litigation:**

In *Mody* v. *State of Maharashtra*, Piloo Mody had complained that the Bombay Government, through its three ministers, had leased out valuable plots of government land at a gross undervalue. The Bombay High Court judge rejected the state's contention that the petitioner had no locus standi. The judge upheld the petitioner's contention that the leases were granted mala fide at a gross undervalue. He then directed that the lessee to pay 33.33 per cent more rent to the government. The state of Maharashtra gained a rent increase of Rs. 1 crore per year for 99 years as a consequence of a writ field by a stranger. It was the decision in Piloo Mody's case that gave fresh impetus to the concept of Public Interest Litigation.

The Ninth Schedule to our Constitution was deliberately added in 1951. There was total denial of judicial power enacted by Article 31B only because the laws that were initially put in the Ninth Schedule were land-reform laws. But later judgments of the Supreme Court said that laws which were placed in the Ninth Schedule were not confined only to land reforms. Taking advantage of this pronouncement the government of the day during the period of the Internal Emergency in 1975:

1. First, put MISA (the dreaded security law) also in the Ninth Schedule, making its noxious provisions impervious to all judicial review:
2. And next, enacted the Prevention of Publication of Objectionable Matter Act, 1976, an act to control and muzzle the free press, also placed that act in the Ninth Schedule!

It is only when the Internal Emergency was lifted and elections were held, and the Janata government came to power that a new Parliament deleted MISA from the Ninth Schedule and repealed the Press Gagging Act, i.e. it left the 'life and liberty clause and freedom of the press'. Which is guaranteed by Article 19 (a) is virtually free of all executive and legislative constraints.

But in the year 2006 the Supreme Court considered in Coelho's case the width of the basic structure doctrine before a bench of nine judges. Arguments were solemnly advanced on behalf of the Union of India. That Article 31 B was amenable to more enacted laws being put in the 9th schedule – not necessarily land – reform laws – and so avoiding all constitutional scrutiny!

The government of the days was anxious to place in the Ninth Schedule the Delhi Laws (Special Provisions) Act 2006 – which had suspended by legislation, for a limited period of one year, the sealing of premises which had been expressly authorized by orders passed by the Supreme Court! Because of the Supreme Court's Decision in *Coleho's* case, Article 31B is no longer the black-hole of the Constitution that the GOI wanted it to be.

The author has given example of – what Swaran Singh – India's foreign minister in Indira Gandhi's government said during the dark days of the internal Emergency of June 1975. He was appointed chairman of the Constitution Committee which included three prominent practicing lawyers, and their specific mandate was to clip the wings of the High Courts by proposing amendments to Article 226.

He was the one person – a non – practicing lawyer – who set his face against abolition of Article 226.

Anthony Lester (Lord Lester), England's leading lawyer, once gave the modern-day version of Lord Action's famous phrase, 'power corrupts and absolute power corrupts absolutely'.

'Lord Lester said that some judges in England say that, 'Judicial power is wonderful and absolute judicial power is absolutely wonderful'.

Some judges in India do believe and sometimes act as if 'absolute judicial power is absolutely wonderful'. This is what gives judges a bad name; it is then that they are likened to 'Emperors', which they are definitely not.

In 2008 Ram Jethmalani, said in Court, "all power corrupts – and the fear of losing power corrupts absolutely!"

Ample judicial power administered with ample judicial wisdom's is the need of the hour; not a curtailment of judicial power, but mature wisdom in its administration.

No, we don't need judges who behave like 'Emperors'

What we do need are those.

"Whom the lust of office does not kill;
Whom the spoils of office cannot buy;
Who possess opinions and a will?
Who have honour; and will not lie;
Who can stand before a demagogue?
And damn his treacherous flatteries without winking
Tall Men (and women), sun – crowned, who live above the fog
In public duty and in private thinking"

**ACTIVISM AND ITS PREREQUISITES** (Supra N. 14, Page No. 399-419):

The authors (Shourie Arun) comments that – What the courts have taken on, they have taken on with considerable reluctance; it is only when institutions whose duty it was to deal with the matter neglected to do so for years and years, that the courts have stepped in at the urging of citizens.

No institution, whose function is of adjudication and whose members are to function within the limit can by itself solve the myriad problems.

The author has quoted the statement made by the American Judge Bork in his essay – "why should constitutional law constantly catching colds from the intellectual fevers of the general society?" and answered –

"You lawyers have nothing of your own. You borrow from the social sciences, but you have no discipline, no core, of your own".

This theoretical emptiness at its centre makes law, particularly constitutional law , unstable, a ship with a great deal of sail but a very shallow keel, vulnerable to the winds of intellectual or moral fashion, which it then validates as the commands of our most basic compact.

The author comments that – Once the legislature declared the State as socialist the Courts cannot be blamed for advancing socialism. This activism was the work of few judges. Some judges treated them as precedents while some other expressed their reservations on these judgments.

These progressive judges had a very high opinion of what they were doing. They had convinced themselves that they were battling great odds. They were also very eager that what they were doing got known far and wide.

Author's first reservation about activism – that it was fed on, and in turn fed a superficial, rhetorical, indeed, if truth be told, exhibitionist and opportunist "Socialism".

Second reservation – the activist judgments had not been thought through: In particular, what their consequences would be?

## TOPIC 7
## COMMENTS OF THE EXPERTS ON LEGAL EDUCATION

The comments of Nariman Fali S., Palkhivala N.A. and of Shourie Arun are discussed –

**1. NARIMAN FALI S.** (Supra N. 1, Page No. 82-83)**:**

The author states that, lawyers to people ratio is 1 : 1800 in India while in England it is 1 : 300, but to him mere no. and statistics do not disclose the real malady. The quality of legal Education is more important than the numbers of lawyers. What matters a great deal in India is the quality of law teachers and professors and how they are treated.

In his first G. S. Pathak memorial lecture delivered in New Delhi, Lord Goff (then one of the senior most Law Lords in England) said that the difference between Germany and England was that in Germany 'The Professor is God : But in England the Judge is God.' In India too, the Judge is God! But we have to give much better status and recognition to our law teachers who initially move the heart and mould the minds of law students. It is law students who become practicing lawyers, and it is the bright once amongst them that become judges. One more serious aspect facing the legal profession is that the legal education system appears to have lost its ethical content.

The education of practicing lawyer never ceases. The author has suggested that the BCI Should adopt a three point program -

1. The urgent need to re – discover and reaffirm the profession's moral foundation.
2. To inculcate the ethical principle in the minds of young lawyers.
3. To promote morally responsive legal profession.

**2. PALKHIWALA N. A. ON LEGAL EDUCATION** (Supra N.101, Page No. 217-218):

Palkhivala N. A. has commented that –

1. We must educate our lawyers better. We produce ethical illiterates in our Law Colleges, who have no notion what public good is. To him India has second highest number of Lawyers in the World (nearly 3 lakhs), the first being the US

which has seven lakh legal practitioners. These large numbers result in lot of Lawyer stimulated litigation. By contrast the number of practicing Lawyers in Japan is less than fourteen thousand. About 30,000 students appear for law examinations in Japan and only about 475 succeed i. e. less than 2%. So, stiff is the examination that in Japan very few cases are filed and disputes are mostly settled out of court.

2. To him, there is need to improve the quality of public administration which is today at an all – time low. In the last 45 years India was governed very badly. The author has commented that – in the State of Bihar nothing moves except the river Ganges.

3. The quality of tax administration is poor.

4. The citizenry must be better educated to evolve the higher standard of public character. Ancient Indian culture must be taught in schools and colleges.

**3. SHOURIEARUN ON LEGAL EDUCATION** (Shourie Arun, Courts and their Judgments – Roopa and Co., New Delhi, 2010 – Page No. 400):

The author has quoted from the essay on the American Judiciary by Judge Bork that –

"You Lawyers have nothing of your own. You borrow from social sciences, but you have no discipline, no core, of your own." And a few scattered insights here and there aside. This theoretical emptiness at its center makes law, particularly constitutional law, unstable, a ship with a great deal of sail but a very shallow keel, vulnerable to the winds of intellectual or moral fashion, which it then validates as the commands of our most basic compacts.

# CHAPTER VI

## CONCLUSION AND SUGGESSIONS

# CHAPTER VI

## RESEARCH QUESTIONS AND FINDINGS

**1.** Whether Indian Judiciary has played creative role in the interpretation of Article 21?

**Answer** – After Maneka Gandhi's case the Supreme Court has interpreted Article 21 in the creative way and has widened the ambit of Article 21.

In Chapter II of the Thesis this aspect is discussed in detail.

**2.** Whether Indian Judiciary has expanded the ambit of Article 12 and whether there is any valid criticism?

**Answer** – the Supreme Court has enlarged the ambit of Article 12 as Fundamental Rights are against the mighty power of the State.

There is a valid criticism by Arun Shouri in his book named – 'The Courts and Their Judgments'. The author has shown how the Supreme Court has brought many institutions and authorities under Article 12 without fully comprehending the consequences of it.

This aspect is discussed in Thesis in detail while discussing the Concept of State in Chapter V.

**3.** Whether through Public Interest Litigation there is an evolution of Article 21?

**Answer** – There is an evolution of Article 21 through Public Interest Litigation, for example, Bandu Mukti Morcha Case, Ganga Water Pollutin Case, Taj Mahal Case etc.

This aspect is discussed in detail in Chapter II of this Thesis.

**4.** whether there is any critical evaluation regarding the implementation of the judgments of the Supreme Court?

**Answer** – Mr. Arun Shourie in his book – 'The Courts and Their Judgments' has shown the directions given by the Supreme Court are not followed in reality in Bandu Mukti Morcha Case, in Case on Child Labour etc.

Mr. Fali S. Nariman in his book – 'Before Memory Fades, An Autobiography', has shown how the directions given by the Supreme Court in the Bhopal Gas Case are not properly implementated.

This aspect is discussed in Chapter V of this Thesis with the help of 12 cases.

**5.** Whether there is valid criticism on judicial governance?

**Answer** – There is criticism on judicial governance by Mr. Arun Shourie and Mr. Fali S. Nariman in their above referred books and it is discussed in detail in Chapter V of the Thesis.

**6.** Whether there is valid criticism on legal profession?

**Answer** – Mr. Arun Shourie has criticised that – 'Serving the interest of client' has become a slogan of the legal profession and it undermine justice.

The principle of Adversarial Justice does not undermines the concepts of justice and this must be considered by the legal profession.

Mr. Arun Shourie commentes that – Principles of Gandhiji about legal profession must be incorporated by the professionals.

This aspect is discussed in Chapter V of the Thesis.

**7.** Whether any solution is suggested on inter-state water dispute by any expert?

**Answer** – Mr. Fali S. Nariman has given a solution on short term and long term basis for the same in above referred book.

This aspect is discussed in Chapter V of the Thesis.

**8.** Whether the Supreme Court has created any obstacles through interim orders?

**Answer** – Mr. Arun Shourie has given the example of various departments in his book (refered in the Thesis) and has shown that how interim orders have created many obstacles for smooth functioning of Government Departments.

This aspect is discussed in Chapter V of the Thesis.

**9.** Whether there is 'interpolation' instead of 'interpretation' in some judgments of the Supreme Court?

Answer – Mr. Arun Shourie has shown in his books (referred in the thesis) that there is 'interpolation' instead of 'interpretation' in some judgments of the Supreme Court.

**WHETHER HYPOTHESIS IS ACCEPTED OR REJECTED:**

**1.** Indian Judiciary has played creative role in the interpretation of the Article 21 and has expanded the ambit of Article 12.

**Answer** – Judiciary has played creative role in the interpretation of Article 21.

**2.** Whether Indian Judiciary has expanded the ambit of Article 12?

**Answer** – There is an enlargement of the ambit of Article 12.

**3.** Through Public Interest Litigation there is an evolution of Article 21.

**Answer –** There is an evolution of Article 21 but there is abuse of Public Interest Litigation in some cases.

4. There is problem of implementation of some cases due to bureaucracy.

**Answer** – Indian bureaucracy is dominated by delay and lethargy and has created obstacles in the implementation of the judgment of the Supreme Court.

World Justice Forum has declared the list of nations having rule of law and India ranks 78$^{th}$ among 97 nations. It is further declared that the corruption is one of the biggest problem in India and due to this India is on 83$^{rd}$ rank. Lastly in the report it is commented that incidences of crime, civil conflict, political violence are major concern in India and India ranks 2$^{nd}$ from bottom list (Daily News Paper – Lokmat dated 29 Nov.2012).

**5.** Some eminent writers have criticized on Judicial Activism.

**Answer –** Mr. Fali S. Nariman, Mr. Arun Shourie has criticized on Judicial Activism in their books which are referred in the Thesis.

**6.** Legal Profession is criticized by some authors and there is a need to improve professional and educational standard of Legal Profession.

**Answer –** Mr. Fali S. Nariman, Mr. Arun Shourie has criticized on Legal Profession and they have suggested some solutions to improve the professional Standard.

**7.** Inter – State water dispute can be handled in different way.

**Answer –** Mr. Fali S. Nariman has shown the different way to solve the inter – state water dispute in his book which is referred in the Thesis.

**8.** Through interim orders the SupremeCourt has created some obstacles in the smooth functioning of bureaucracy and Government.

**Answer –** Mr. Arun Shourie has shown that how the interim orders of the Supreme Court have created obstacles in the smooth functioning of bureaucracy and Government in his book which is referred in the Thesis.

**9.** There is ‘interpolation’ instead of ‘interpretation’ in some judgments of the Supreme Court.

**Answer –** Mr. Arun Shourie has shown in his books (referred in the Thesis) that there is ‘interpolation’ instead of ‘interpretation’ in some judgments of the Supreme Court.

**CONCLUSION:**

- Judiciary has played creative role in the interpretation of the Article 21.

- There is an enlargement of the ambit of Article 21.

- there is an evolution of Article 21 but there is abuse of Public Interest Litigation in some cases.

- Indian bureaucracy is dominated by delay and lethargy and has created obstacles in the implementation of the judgments of the Supreme Court.

- Mr. Fali S. Nariman, Mr. Arun Shourie has criticized on Judicial Activism in their books which are referred in the Thesis.

- Mr. Fali S. Nariman, Mr. Arun Shourie has criticized on Legal Profession and legal education and they have suggested some solutions to improve the professional standard.

- Mr. Fali S. Nariman has shown the different way to solve the inter – state water dispute in his book which is referred in the Thesis.

- Mr. Arun Shourie has shown that how the interim orders of the Supreme Court have created obstacles in the smooth functioning of bureaucracy and Government in his book which referred in the Thesis.

- Mr. Arun Shourie has shown in his books (referred in the Thesis) that there is ‘interpolation’ instead of ‘interpretation’ in some judgments of the Supreme Court.

**SUGGESTIONS :**

**1.** Indian Judiciary should not take the role of legislature because ultimately the Parliament is sovereign.

**2.** Indian Judiciary should not encroach upon the powers of the legislature. (Recently, Justice Kapadia S. H., Chief Justice of Supreme Court, has commented in a lecture that – the Supreme Court should not run the Government and shouls not make the policies. This comment was made on the judgment of the Supreme Court in which it was declared that right to sleep is a fundamental right.)(Daily News Paper, Sakal, dated 26/8/2012).

**3.** Precedents are overruled by the judiciary in number of times and for the rule of law it is not good.

**4.** Public Interest Litigation has become private interest litigation and abuse of Public Interest Litigation must be checked.

**5.** I have 6 basic suggestions. They are as under –

A. Regarding health problems

B. Implementation of PNDT Act

C. Implementation of Domestic Violence Prohibition Act

D. Female education

E. Regarding free legal aid

F. Regarding primary education which has become a fundamental right now.

**A. REGARDING HEALTH PROBLEMS :**

There is a need to bring ISM&H (Indian System and Homeopathic System of Medicine) doctors in the main stream of National Health Policy by suitable legislation.

Indian health problems are very serious i. e. $1/3^{rd}$ of the world's Tuberculosis cases are in India, $1/3^{rd}$ of the world's Leprosy patients are in India. Diseases like Malaria, STD, Oral Cancer, High Blood Pressure, Diabetes, Heart Diseases etc. Are on increase in India.

The number of people living with AIDS is estimated to be 2 to 3 million and the recent figure is 5.2 million to 5.7 million.

Water borne diseases and Air born diseases are affecting major population due to environmental pollution.

Infant morality rate, Child mortality rate, Delivery mortality rate is very high as compared to the developed nations.

There are over 250 medical colleges in the modern system of medicine (MBBS) and over 400 medical colleges in the Indian system of medicine (Ayurveda, Siddha, Unani) and Homeopathy.

India produces over 25000 doctors annually. In the modern system of medicine and similar number in ISM & H doctors.

India faces a huge gap in terms of availability of number of Hospital beds per 1000 population.

With a world average of 3.96 hospital beds per 1000 population, India stands just 0.7 hospital beds per 1000 population.

India faces a shortage of doctors, nurses and para medicals.

India has approximately 6,00,000 allopathic doctors including doctors emigrated to other countries as well as doctors who have died.

ISM & H doctors are more than 10,00,000.

The Indian health care industries are growing at a rapid pace and are excepted to become a US $280 billion industry by 2020.

Only 1.2% of GDP are spent on health care.

The national health policy was endorsed by the Parliament in year of 1983 and updated in 2002.

Primary health care is provided by city and district hospitals and rural primary health centers (PHCs). Primary care is focused on immunization, prevention of malnutrition, pregnancy, child birth, postnatal care and treatment of common illness.

Nearly, one million Indians die every year due to inadequate health care, 700 million people have no access to specialist care and 80% of specialists are concentrated in urban areas.

Number of medical practitioners per 10,000 individuals had fallen to 3%.

In the mid 1990s health spending amounted to 6% of GDP, which is one of the highest levels among developing nations.

The established per capita spending is around Rs. 320 per year with the major input from private households (75%). State Government contributes

15.2%, the Central Government 5.2%, third party Insurance and employer 3.3% and Municipal Government and foreign donors about 1.3%, according to a 1995 World Bank Study (Healthcare in India, From Wikipedia, the free encyclopedia).

Against this background I want to focus on following three landmark judgments of the Supreme Court –

1. *Parmanand Katara* v. *Union of India* (AIR 1989 SC 2039)

2. *Poonam Varma* v. *Dr. Asween Patel* (AIR 1996 SC 2111)

3. *Dr. Mukhyarchand and other* v. *State of Panjab* (AIR 1998 (5) SCALE 501)

In the case of *Paramanand Katara* the Supreme Court held that it is the professional obligation of all doctors (Government and Private) to extend medical aid to the injured immediately to preserve life without waiting for legal formalities. Article 21 cast the obligation on the State to preserve life.

In case of *Dr. Asween Patel* the Supreme Court held that Homeopathic Doctors using Allopathic medicines is 'negligence per se' and Court awarded compensation to the petitioner. This case clearly laid down the law that Homeopathic Doctors cannot use allopathic medicines legally. 'Negligence per se' means there is no need on the part of petitioner to prove the negligence of the doctor. If it is proved that Homeopathic Doctor has used allopathic medicine that is enough to prove the guilt of the doctor.

In *Mukhatyar Chand Case* the Supreme Court held that the practitioners of Ayurveda, Siddha and Unani can practice allopathic medicine if the State Government declares them as Registered Medical Practitioner under Section 2 (ee) (iii) of the Drug And Cosmetic Act, 1940. This means that if the the State Govrnment refuses to declare the doctors of ISM under Section 2 (ee) (iii) of the Drug and Cosmetic Act, 1940, then they cannot use Allopathic Medicines legally.

Due to the decision given by the Supreme Court in *Ashween Patel case* and *Mukhatyar Chand case* lakhs of doctor are legally prohibited from getting involved in National Health Programme and Family Welfare Programme.

Looking towards the serious Indian health problems there is need to bring ISM &H doctors in to the main stream of National Health Policy by suitable legislation. Such legislation is urgently required because it is the need of the hour and National Health Policy should not follow the age old policy of British Government.

**B. IMPLEMENTATION OF PNDT ACT:-**

Due to ineffective implementation of the Act nearly 1Crore 20 Lakhs female foeticide has taken place. The male – female ratio is dropping in some states to a serious extent. The Rajasthan High Court has held in *S. K. Gupta* v.*State of Rajasthan* (PIL No. 3270/2012), foetus has right to live and there is a need to implement active tracker in every Sonography Machine.

There is a urgent need to take serious steps to prevent such crime.

**C. IMPLEMENTATION OF DOMESTIC VIOLENCE PROHIBITION ACT:-**

There is a need to implement Domestic Violence Prohibition Act very strictly because domestic violence violates Article 21 and domestic violence is on increase.

**D. FEMALE EDUCATION** (Palkhivala N. A. ,We The Nation – The Last Decades, USB Publishers Distributers Ltd., Delhi) –

Education has been defined as the technique of transmitting civilization. It is shocking that the country with the oldest and greatest civilization should be so lackadaisical about the technique of transmitting if it is now acknowledged all over the world that value based education is the only instrument for transmitting national talent into national progress.

It is only through female education at all levels and the private initiative of well – educated women, that this country will ever be transformed into what our Constitution intended it to be.

**E. REGARDING FREE LEGAL AID:-**

There is need to frame the new rules for paper setters, moderators and examiners for LL.B. and LL.M. Examinations.

In *M. H. Hoscot* v. *Sate of Maharashtra* (AIR 1978 SC 1548), the Supreme Court declared that free legal aid is a fundamental right under Article 21.

In *M. P. Vashi* v. *State of Maharashtra* (AIR 1995 5 SCC 730), the Supreme Court held that in order to provide free legal aid it is necessary to have well trained lawyers in the country and for the same the Government must provide grants - in - aid to private law colleges.

The law laid down in above cases is a welcome decision but if we look in to the legal education in the State of Maharashtra the things are not very good.

1. There are nearly 108 Law Colleges out of which 29 Law Colleges are grantable.

2. The fee structure is different in aided and non aided law colleges. The fee ranges from Rs. 3000 to 75000 per year.

3. The rules drafted for the appointment of paper setter and examiners are age old.

4. According to BCI there must be 1 Fulltime Principal and 4 Fulltime Lectures in every law college and in reality very few colleges fulfill these criteria.

**F. REGARDING PRIMARY EDUCATION WHICH HAS BECOME A FUNDAMENTAL RIGHT NOW:-**

1. There is need to control drop out rate.

2. There is a need to increase teaching days by reducing non – teaching workload and by reducing holidays (In India every holy – day is holiday).

3. there is need to control bogus admissions shown on musters.

4. Memory based education must include the teaching of Rabindranath Tagore, J. Krishnamurti, Yogi Aurobindo etc. They emphasized learning in awareness, learning in consciousness.

In the Nobel Prize acceptance speech which was delivered on 26th May 1921 at Stockhome, Rabindranath Tagore said –

"And the one thing, the one work which came to my mind was to teach children. It was not because I was specially fitted for this work of teaching, for I have not had myself the full benefit of a regular education. For some time I hesitated to take upon myself this task, but I felt that as I had a deep love for nature I had naturally love for children also. My object in starting this institution was to give the children of men full freedom of joy, of life and of communion with nature" (Complete works of Rabindranath Tagore, Black Rose Publication).

**J. Krishnamurthy in his book '*Life Ahead*'** (J. Krishnamurthy, Life Ahead, Krishnamurthy Foundation of India, II Edition 2000. Reprint in 2007, page 25), says that –

"So, is it not the function to free from fear and not merely to prepare you pass certain examination, however necessary this may be?"

**J. Krishnamurthy in his book '*Education and Significance of Life*'** (J. Krishnamurthy, Education and Significance of Life, KFI, published in 1992, reprinted in 2008, page 14) –

"Education is not merely acquiring knowledge, gathering and correlating facts; it is to see the significance of life as a whole.

The function of education is to create human beings who are integrated and therefore intelligent.

Education should help us to discover lasting values so that we do not merely cling to formulas or repeat slogans".

**In *'Education of the Future'*** (Aurobindo, Education of The Future, Shri Aurobindo Institute of Research in Social Sciences II Edition 2006) **Shri Aurobindo comments –**

"But the question is – what is the fundamental need or aim of future education? Is it merely to creat a smarter and a more well – informed, efficient, skilful, rationalized and adaptable social being revolving in a larger circrcle in the merry – go – round of this limited and stumbling mental consciousness or to create a new Man who goes beyond mind and reson to a higher immersion of consciousness which is free from the limitations of the mental consciousness and who can lead humanity and earth towards its evolutionary fulfillment?"

**National Education of Aurobindo** (Palkhivala N. A. , We, the People, UBS Publisher's Distributers Ltd., New Delhi, 2010, Page No. 264-265) -

The core of his political philosophy is that the State exists for the individual and not the individual for the State. His philosophy regarding education may be summed up as under –

1. It is essential that Society should not give importance to success, career and money, and that it should insist on the paramount need of the full and real development of the student by contact with the Spirit and the growth and the manifestation of the truth of the being in the body, life and mind.

2. The country must give top priority to the needs of the educatin.

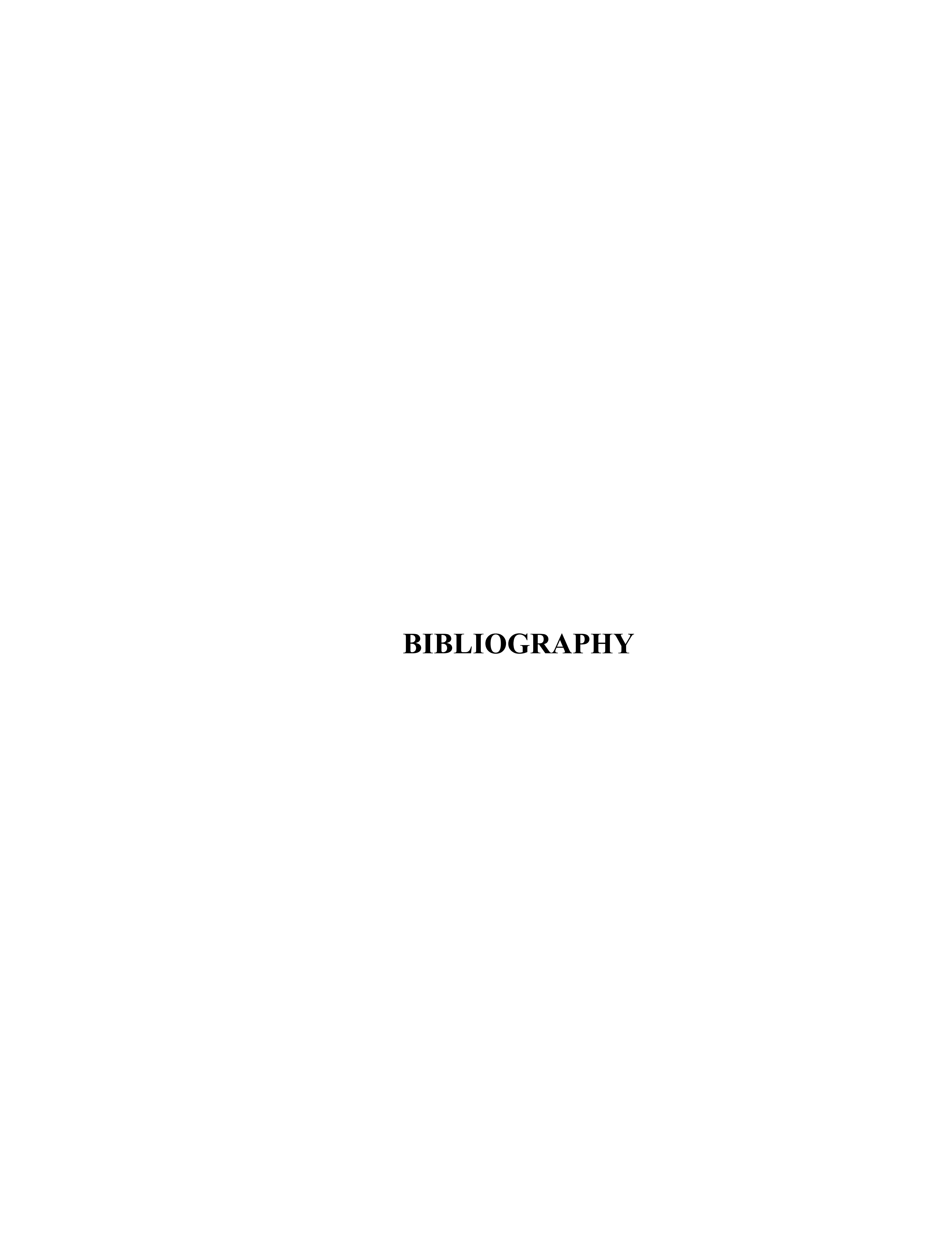
3. The country must use all the modern techniques of communication for education.

4. Permanent exhibition and museums should be planned all over the country which could be the centers of stimulating knowledge, including the inner significance and goal of evolution.

5. Teachers must grow into real examples of the perfection that is aimed at.

6. The country should engage itself in the activity of the discovery and realization of its true mission.

The basic question is – Can we ignore these ancient teachings and go astray under the impact of western education?



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