CHAPTER V

CRITICAL EVALUATION OF ART. 21
CHAPTER V
CRITICAL EVALUATION BY THE EXPERTS OF THE INTERPRETATION BY SC OF ART.21

Art. 21 cannot be interpreted in an isolated way. It has to be interpreted in the fabric of the entire context. Art. 21 is studied in this topic under following heads –

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TOPIC 1
ART. 21 AND SOME INITIAL AMENDMENTS TO THE
CONSTITUTION

FALI S. NARIMAN’S comments on some judgments¹:

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 Shankri Prasad (1951), again in Sajjan Shing (1965)
and Golaknath (1967) and finally once again, in Keshvanand (1973).

In Shankari Prasad², The Constitution first Amendment Act, 1951, which
had inserted Art. 31 (b) was challenged (Before a Constitution bench of five
Judges) as ultra virus and unconstitutional.

It is said that one of the acts and regulation specified in IX Scheduled, nor
any provision, would be deem to be void on the ground that such act, regulation
or provision violated fundamental rights.

What prompted this enactment was that the Congress Party had initiated
certain agricultural reforms by enacting legislation. The High Courts of Patna
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 M.P. 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.

14 years later, Shankari Prasad’s case was revisited in Sajjan Singh³. The
Constitution 17th Amendment Act 1964 had placed a larger number of states
enactments in the IXth Schedule.

Ltd., 2010, Page No. 121-124.
² AIR 1951 SC 458
³ AIR 1965 SC 845
The 17th Amendment was upheld by a bench of five judges but not without reservations by two of the justices on the bench (Justice Hidayatullah 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 (368) in the constitution, simply because an amendment to the constitution was the “Law” under Art. 13 (2).

The author has commented that – the opinions in *Golaknath (1967)* and then in *Keshvanand (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 relating to the property rights, the basic structure doctrine has long survived.

Art.19 (1) (f) and Art.31 of the Constitution (The property clause) where deleted from the fundamental rights chapter by the 42nd Amendment Act, 1978. Art. 300 (A) inserted by the 44th 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 *Keshvanand*. 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 Art.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 illogically 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 then PM). But fortunately the Court successfully resisted the attempt – relying for the first time after the fundamental rights 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 the 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 (Art. 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 SC in Minerva Mill’s case striking down ss. 4 and 55 of the Constitution (42nd Amendment) Act -1976 replenished the faith of those who understand the SC role as the watch dog of the Constitution. To supersede the judgment in Kesavananda Bharti’s case and confer absolute and unlimited amending power on Parliament, that s. 55 of the Act inserted clause 4 and 5 in Art.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 SC had no choice but to strike down the above clause as being invalid and ultra virus. ⁴

⁴ 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:

The internal emergency was imposed on the 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 Dist. 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 SC In *ADM Jabalpur v. Shukla* -in this case the presidential order issued on 27th June, 1975 (under Art. 359) suspended the rights of all detunes to enforce any of the rights conferred by Art. 14, 19, 21 and 22 as they stood suspended under Art.368. The question was whether detunes were entitled to invoke the jurisdiction of the H.C. under Art.226 and whether the H.C. 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 H.C. in the Country, including the H.C. of Allahabad, Bombay, Delhi, Karnataka, M.P., 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 the Supreme Court and the Supreme Court held in favor of the Govt. The Loan 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, Pg. 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 challenge and controversy.”

The author comments that – “J. Khanna was superseded by justice M.H. Beg and J. Khanna resigned – but in a blaze of glory.”

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5 Supra N. 1, Page No. 168-174.
6 AIR 1976 SC 1207
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. Art.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 Art. 20 (Double Jeopardy) and Art.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 Art. 352 whenever, according to majority of members of Parliament, conditions for its invocation no longer existed.
4. An emergency declared under Art. 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 Art. 352 (5) (which had been inserted by the 38th Amendment, 1975, w.e.f. 1 Aug., 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 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.”
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 SC in *Golak-nath's case* ⁸ 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 Twenty-fourth 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 Twenty-fifth 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 rights 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 SC has held in the Bank Nationalisation case, (overruled by *Kesavananda v. State of Kerala*) ⁹ 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.

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⁷ Palikhiwala N.A., *Our Constitution defaced and defiled*, The Macmillan Co. of India Ltd., Delhi, 1974 – Page No. 50-59

⁸ A.I.R. 1967 S.C. 1646

⁹ A.I.R. 1973 S. C. 1461
The Twenty-fifth Amendment enacted that Article 19 (1) (f) would be inapplicable to acquisition or requisition laws.

Many industrial undertakings have been nationalised overnight by Ordinances which fixed, without any notice to anyone and ridiculous amounts are paid by the State.

3. The Twenty-fifth Amendment inserted Article 31C which gave precedence to Part IV over Part III.

The author states that - Due to Art. 31 (b) and (c) countless categories of law can claim the protection of Art. 31 (c).

**ART. 31 (C) SEEKS TO SUBVERT SEVEN ESSENTIAL FEATURES** –

The author states that - There is a fine but vital distinction between two cases of constitutional amendment:

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 31C 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 Part 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 31C clearly damages or destroys the supremacy of the Constitution.
2. Article 31C subordinates the fundamental rights to the directive principles of State policy.
3. The "form and manner" laid down in Article 368 is sought to be repudiated by Article 31C.
4. Article 31C completely takes away the right given under - (Article 19(1) (f), (Article 31(1)), (Article 31(2)).

Art. 14 and 19 (a) to (g) - can be violated under Article 31G 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 can be taken which may seriously undermine the position of regional, linguistic, cultural and other minorities.

As Art. 31 (1) is abrogated by Art. 31 (c) minorities can be deprived of their properties by law which is invalid.

The forth pillars of the Constitution, as shown by the Preamble, are – Justice, Liberty, Equality and Fraternity. Art. 31C takes away a very substantial part of Justice, the whole of the liberty of thought and expression, the essence of equality and the heart of fraternity.  

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 31C.

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 31C.

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10 Supra N. 4, Page No. 215
1. SAFEGUARDING THE COMMON MAN AGAINST THE
TYRANNY OF THE EXECUTIVE AND THE LEGISLATURE11:

The author (Palkhivala N.A.) has commented that:

Over the last twenty-five 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 Nationalisation case - the author comments that: there is a victory of common man. In this case the court struck down the law nationalizing banks without compensation. This decision further protected the right given by Art. 21, 22 and 91 (1) (d).

In the Privy Purse case - Palkhivala N.A. comments that:

The basic issues centered round the sanctity of the constitution, public morality and the rule of law. The 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; 12

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 criticized the decision of the Government to supersede three 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.

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11 Supra N.7, Page No. 84-89
12 Supra N.7, Page No. 93-104
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 rulings would favour the executive or not is not only irrelevant but should be dismissed as pernicious.

The principal 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 viewpoint 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 judicial system.
2. It is desirable to inject justice into politics; it is disastrous to inject politics into justice.
3. Under Art. 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 view of the ruling party then it will be against the constitution.
4. Constitution recognises no prerogative whatsoever; it recognises 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 CONSTITUTION¹³:

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 Fourth 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 a State.

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."

¹³ Supra N.7, Page No. 109-110
The Twenty-fourth Amendment made two other changes in Article 368.

1. It made it mandatory on the President to give his assent 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 Twenty-fourth 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 SC - A CRITICAL STUDY

POWER PROCLAIMING IT, EXERCISING IT: 14:

On the problem of implementation the author (Shourie Arun) 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 (Shourie Arun) says- ‘What impression is a citizen liable to form when he reads passages such as the following?’

The SC’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.

Art.142, though while exercising power under Article 142, the Supreme Court must take into consideration the statutory provision regulating the matter in dispute. (Delhi Judicial Service Association v. State of Gujarat) 15

“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 provisions 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, 16 it shall not

15 1991 (4) SCC 406 para.51
16 1991(4)SCC 584;405-06
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, 17 or SC Bar Association v. Union of India, 18

‘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 declarations 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 of the case of Indian express19 and the Bandhua Mukti Morcha20.

Critical analysis of twelve cases regarding implementation of the judgement of the SC:-

1. The Case of Indian Express –

The author has cited an example i.e. when the Indian Express was pursuing the Bofors’ Bribes 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 Asha Parekh v. State of Bihar 21 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”.

17 AIR 1995 (2) SCC 584
18 AIR 1998 (4) SCC 409.
19 Supra N. 14, Page No.5-7
20 Supra N. 14, Page No.17-57
21 1977 Cr. L.J. 21(Patna) para. 6
The author has given the principal features that bear on law and the courts, they are as under-

1. The State structure is marked by- Show of Work, not Work- much activity but little movement.
2. The entire structure is process oriented, results 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-trials a PIL was filed and 40,000 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 comment-

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 them out.
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 of compounding cynicism- about courts, about laws about the rule of law.

2. **The Bandhua 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.

   Agnivesh approached the then Chief Minister, and tried to take his help but he was threatened by the then C.M. 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 SC:**

   On 25 Feb. 1982 Agnivesh wrote to Justice P.N. Bhagwati regarding bonded labourers. The commission was sent by the court and the commissioners confirmed everything which 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 judgement on **16 Dec. 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 15,000 workers but nothing happened.

   After a year had passed, 4000 to 5000 labourers, their wives and children sat down in a dharna at the office of the District Collector in Faridabad, demanding that the Supreme Courts directions be implemented.

2. Agnivesh filed a **Contempt of Court petition in 1985** - the petition was adjourned for seventy – eight times.
After one year the Bandhua Mukti Morcha declared that on 16th March 1986 it would wrap the text of the judgement 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 judgement.

He was replaced by Justice Pathak- who said that as one of the judges who had been hearing the case had retired, the contempt petition must be filed again.

The petition was accordingly filed again.

Justice Pathak retired replaced by Justice Venkataramiah- who was replaced by Sabyasachi Mukherji- who was replaced by Justice Ranganath Mishra.

Swami Agnivesh laboured 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 labourer 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 21 Feb. **1991 a committee** was appointed which submitted the report on 30 June 1991 and stated that 1983 labourers were in bondage. The report also showed that- **Directions of the SC were not observed** by any contractor.

On 13 August 1991 the Chief Justice pronounced the judgment.

The author has commented:

*Another grandiloquent charter 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 SC. Within that Court, Chief Justice after Chief Justice has been personally involved in handling the matter and delivering the judgments.

Moreover, the SC 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 vs Union* 22. It addressed the problem in the country as a whole.

In *Peoples Union for Democratic Rights vs. union of India* 23 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 SC declared:**

‘Whenever any fundamental right which is enforceable against private individuals such as, for example, a fundamental right enacted in Art.17 or 23 24 is being violated, it is the constitutional obligation of the State to take the necessary steps.

The author comments that–the implementation of the judgment remained on paper only.


Wage Boards were 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. **Judgement on under trials:**

Due to the judgement 27,000 under trials were released in Bihar alone. The Supreme Court had ordered to take census in Bihar jails after every Two years. **This order was obeyed by the Government only once.**

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22 AIR 1997 SCC 1203
23 AIR 1997 (1) SCC 301; 157
5. The SC’s judgement on Child Labour:

The Court has ordered inter alia that:

1. The offending employed 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 who has been found working 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 judgement 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 series of judgments of the SC and the HC’s 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 found 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:

i) Look to the practicality of their decrees;

ii) Monitor the implementation of what they have decreed;

iii) 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**

In 1990 lawyers in the lower courts had brought all the courts in Delhi to a halt. Advocates who tried to attend the SC 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 lawyers 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 19 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.

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24 Supra n. Page No.399
Four years later— in Dec. 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 Nov. 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 member 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 Vs. Union of India,\(^{25}\)

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 Nov. 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.

\(^{25}\) AIR 1994(5) SCC 557.
The Delhi HC 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. Chaudhry v. State (Delhi Administration)* 26 the Supreme Court had held that it is the duty of every Advocate who accepts the brief in a criminal case to attend the trial from day-by-day, he will be 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 and Advice v. Bar Council of India* 27 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 SC 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 bring anyone to account.

8. **Torment of a witness** 28

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 proceedings 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.

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26 AIR 1984(1) SCC 722
27 AIR 1995 (1) SCC 732
28 Supra N. 14, Page No.416
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 Shri. Shivde (the first respondent) and his colleague Shri 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 and grievance of the appellant reached on 4.12.1993- Second respondent who was present in the Court sought for an adjournment again with a written application, on the following premise:

Advocate Shivde (first respondent) is unable to speak on account of the throat infection and continuous cough. The doctor has advised him to take two weeks' 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 SC :-

The SC 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 hearings?

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 strikes 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**

The gas leak tragedy occurred in the factory of UCC’s Indian subsidiary in Bhopal in Dec. 1984. Bhopal incident in which 2,500 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. 3,500 million (Rs.350 crores) as interim compensation.

Next, in the High Court of M.P. - it was reduced to Rs. 2,500 million (Rs. 250 crores) on the basis of a legal principle.

Finally, in the SC a Constitution Bench pressed the parities to a settlement, which was ultimately arrived at with the then attorney general of India on 14/15 Feb.1989. UCC agreed to pay without admitting liability, a sum of US $ 470 million - in full and final settlement of all claims, civil and criminal-which

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29 Supra N. 1, Page No. 203-250.
was accepted by the Union of India, and approved by the court. The sum of US $ 470 million. (Its equivalent then in Indian rupees was Rs. 615 crores).

The settlement was later challenged by some NGOs before another Constitution 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 crores accumulated in the Bank awaiting disbursal.

For the Bhopal Gas Tragedy not to be repeated, a series of recommendations were made by the Supreme Court of India when upholding the constitutional validity of the Bhopal Gas Leak disaster(Processing of Claims) Act, 1985.

In *Charanalal Sahu v. Union of India* 30 the Constitution 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 licences are granted for running of industries which have dangerous potentially. The Government should insist on the creation of a fund as a condition precedent for the grant of such licences 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 damage 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

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30 AIR 1990(1) SCC 613
determining compensation to victims of industrial disasters 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 minimise 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 Accidents 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 Vehicles 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 such 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 requiring industries and concerns engaged in hazardous activities to take out compulsory insurance against third-party risks.

It is sad to record that save and except 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 SC 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**  

Nariman Fali S. has given his experience regarding his appearance for states before interstate water disputes 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 Disputes 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. **CAUVERY WATER DISPUTE:**

The Tribunal was set up in 1990, the question was whether pre - Constitution agreements (of the years 1892 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 centred around whether the treaties continued until fresh arrangements were made and were binding on the successor

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31 Supra N. 1, Page No. 269-275.
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 5th 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 is that after nearly two decades a final ‘resolution’ of the dispute is yet not in sight.

3. THE RAVI-BEAS 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 Fali 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 Dispute proved abortive.

Inadequate rehabilitation efforts of tribal’s and others located on the banks- prompted the SC 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 square kilometres 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 or the 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 mandatory 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 US SC 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 US 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 SC must appoint a special master to hear the evidence and make recommendations both on fact and law. The US 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 SCENARIO:

In India there is no compact clause as in the US Constitution (Article 1(10)). But the IWSD Act, 1956, does envisage agreements between state concerning the use, distribution or control of waters of an interstate river.

States are thus enabled to enter into agreements regarding the sharing and allocation of water an interstate 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 out 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 or 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 neighbouring 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.  

**A 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 vs. Colorado* (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 21 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 ISWD Act, 1956)

The technicalities of the actual allocation of the waters of a river are better left to the province of the scientist, the engineer and the economist who possess necessary specialized knowledge, which the lawyer lacks. The lawyer is useful in the formulation 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 the World Bank. The neutral expert was an 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 Feb. 2007.

Lawyers representing both sides made brief legal submissions lasting not more than a couple of hours - first at the beginning and then at the end of each week. The engineers and expert 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 transcripts 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 Disputes Act, 1956, should be repealed. All disputes including water disputes be adjudicated only by the Supreme Court of India under the 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 conditioned so as to gather all necessary information with as little 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 are 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 SC on its own precedent

In Dr. B.L. Wadhera vs. Union of India, 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 difficult to breath, people are suffering from throat infection, respiratory diseases 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

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32 1996 2SCC 594 at 595
major contribution towards environmental degradation. The Municipal Corporation of Delhi (Constituted under the Act of 1975) are 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 petitioners filed the writ petition with the question of solid waste disposal [*Almitra H. Patel and another petitioners vs. Union of India*]. By order dated 16th Jan., 1998 the Court constituted a committee to look into the matter. After the final report of the committee notices were issued to all the States to file their responses. The responses of the States were positive. The Central Govt. notified Municipal 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 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 density of the population should not be allowed to increase beyond reasonable limit.

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33 [http://JUDIS.NIC.IN](http://JUDIS.NIC.IN)
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 15/02/2000.

The respondents are directed to follow following directions:

1. To prohibit accumulation of rubbish, filth, garbage or polluted obnoxious matters in any premises and to prohibit person from depositing the same in any street or public place.
2. The States, public premises be surface cleaned on daily basis including on Sunday’s 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 4 weeks.
8. To set up complaint / grievance mechanism for the Citizens.
9. Appointment of Magistrate under sec. 20 and 21 of Cr.P.C.
10. To file compliance report within 8 weeks.

Violation of directions be viewed seriously.

12. Comments of Bombay HC on the precedent of the SC
[1st Sept.,2010]

In Dr. Mahesh Bedekar vs. State of Maharashtra 34 The petitioner submitted that the Mandals who celebrate the Dahi Handi festival, Ganesh Ustav and Navratri cause noise pollution and obstruct traffic as they are celebrated on

34 PIL No. 173 of 2010
public roads. The petitioner remanded that the judgement of the SC in *Noise Pollution vs In Re with Forum, Prevention of Environmental and Sound Pollution vs. Union of India and Anr.* 35 to be implemented strictly.

The Court commented that – the above judgement 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 Sept., 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 Ganpati 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 Mohlla Committee, representatives of the prominent registered Mandals, respectable citizens of the area etc.

[10th Aug., 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 Aug., 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

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35 AIR (2005) 5 SCC 733
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 major Hospitals in Thane city.

PIL was adjourned on 29/08/2011.

[30th Aug., 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 inform 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 festivals 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
CONSEQUENCES

This topic is discussed under following heads:-

A. Enlargement of the ambit of Art. 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 ART.12:-

After the case of Maneka Gandhi - The SC 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 Art.12 covers less than four
pages. While introducing Art.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 authorities have
the constitutional sanction to make any law restricting the Fundamental rights
(Art 19.1)?’

Dr. Ambedkar said that all authorities are bound by the Fundamental
Rights provisions.

Soon, the Government following Russian model entered into economic
activities. Corporations were formed; authorities were established, departments
vented forth- to trade, to manufacture goods, to provide services.

36 Supra N. 14, Page No.65-108
37 CAD Vol. VII pp 607-11
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 Art.12, 14 and 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. U.P.*, 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 J. C. Shah demurred. He said-“authorities, constitutional or statutory invested with power by law but not sharing the sovereign power do not fall under Art. 12”.

In *Rajastan Electricity Board, Jaipur v. Mohanlal*, 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*, *the Heavy Engineering Corporation and Hindustan Steel Limited*. - The SC 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.

38 AIR 1963 (1) SCR 778
39 AIR 1967 (3)SCR 377
40 AIR 1969 (3) SCR 773
41 AIR 1969 (3)SCR 995
Shourie Arun comments that:

By the mid-seventies the aperture opened in Rajasthan Electricity Board began to get enlarged.

In *Sabhajit Tewary v. Union* 42 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*) 43.

By the mid-eighties the Indian Statistical 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*) 44.

II) WELFARE AND SOCIAL SERVICES -

In *Ramana Dayaram Shetty v. International Airport Authority of Indi* 45 the SC 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 licences, 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 functions of the State shall hold for each of the new functions.

42 AIR 1975 (3) SCR 616
43 AIR 1975 (3) SCR 619
44 AIR 1984 (1) SCR 395
45 AIR 1979 (3) SCR 1014 at 1032
In *Punnan Thomas v. State of Kerala* 46 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. WB* 47 - Chief Justice Ray held that- the democratic form of Government demands equality and absence of arbitrariness.

In *Ajay Hasia v. Khalid Mujib Sebravar* 48. 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* 49 the Court held that, Art. 14 embody guaranties against arbitrariness.

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46 AIR 1969 Kerala 81  
47 AIR 1975 (2) SCR 674  
48 AIR 1981 (2) SCR 79 at 92  
49 AIR 1974 SC 555
V) **HUMAN RIGHTS JURISPRUDENCE:**

In *the Bhopal Gas Tragedy* the Court expanded the horizon of Art. 12 to bring human rights jurisprudence. The purpose was to bring compensation for the violation of Fundamental Right. (*M. C. Mehta v. Union*)

The Court rejected the judgement of the defence 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 Art.12

VI) **SOME OTHER EXAMPLES:**

Under Art.12 Corporation, Company, a mere Society or 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 Sehravardi*, the Court made these criteria more specific.

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50 AIR 1987 (a) SCR 819, at 828
51 AIR 1987 (1) SCR 819 at 842
52 AIR 1981 (2) SCR 79 at 98.
VII) CRITICISM ON ACTIVISM:

Ramaswami R. Iyer 53 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 stationery, 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 earnings 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 scores of its programmes 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?

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Because of the license-quota regulations, right up to the 1990s almost every 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 are sprinkled with acknowledgements 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,*\(^54\) 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.

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\(^{54}\) AIR 1987 SC 1086
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*)

X) ACTIVISM:

In *All India Sainik Schools Employees Association v. Defence Minister-cum-Chairman, Board of Governors, Sainik Schools Society*, the same Supreme Court, held that the 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 Defence Academy. Defence of the country is one of the legal functions of the State.

In *Mohini Jain v. State of Karnataka* 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.

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55 AIR 1975 (3) SCR 616
56 1988 SCR SUPP 3 398 at 406
57 AIR 1992 (3) SCC 666
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) CORPORATIONS 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 Articles 14 and 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 Art. 14. It “pervades the entire constitutional scheme and is a golden thread which runs through a whole fabric of the constitution” (*Ajay Hasia*) 58 that it is essence of the rule of law (*Satwant Sing Sawhney 1967*) 59.

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58 AIR 1981(2)SCR79
59 AIR 1967 SCR 1836
1. INTERPRETATION OR LEGISLATION:

The author states that sometimes the constructions are put onto provisions due to preconceptions by the Court. The author comments that, three strains in successive judgements on bonus illustrate the kinds of predispositions – first, each firm has to pay bonus whether or not it was making a profit (Jalan Traiding Company Pvt. Ltd. v. Mill Majdur Sabha) \(^{60}\). Second, the Supreme Court rejected the plea that was taken by the employees in (Sandhi Jeevaraj Ghewarchand v. Secretary, Madras Chilies, Grains Kirana Marchants Worker’s Union) \(^{61}\) that the Act was an exhaustive act.

In Mumbai Kamgar Sabha, Bombay v. Abdulbhai Faizullahbhai \(^{62}\). The Court held that the Act was not an exhaustive one. The third strain is found in judgement given in State of Tamilnadu (Housing department) v. K. Sabanayagam \(^{63}\). According to the section 36 of the Act power of exemption was given to the government. In the judgement 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 Art.12 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, \(^{64}\). 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.

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\(^{60}\) AIR 1967 SCR (1) 15  
\(^{61}\) AIR 1969 (1) SCR 366  
\(^{62}\) AIR 1976 SCR (3) 591  
\(^{63}\) AIR 1998 (1) SCC 318  
\(^{64}\) AIR 1978 (1) SCR 1
But in *A. K. Kraipak v. Union* 65 The Court held that the requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily. In *Delhi Transport Undertaking* Case the SC 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 DECISIONS:

In *Erusion Equipment and Chemicals v. State of West Bengal* 66 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 Art. 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 (*Indra Sawhney v. Union JT*) 67. The Art.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 legitimised ex-post changes in electoral laws to overturn an electoral judgement 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.

65 AIR 1969 (2) SCC 262
66 AIR 1975(2) SCR674
67 AIR 1992 (6) SC 273
Due to enlargement of Art.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 EVALUATION OF ACTIVISM: 58

What was intended to protect persons against arbitrary arrest and restraint, again physical coercion by organs of the states? Art. 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 fulfilment. 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 69. The Supreme Court held that the abstract doctrine of equal pay for equal work has nothing to do with Art. 14.

But in Randhir Sing v. Union 70. The SC declared that the directive principals have to be read into the Fundamental Right as a matter of interpretations. Construing Art.14, 16, preamble and Art.39(B) we are of the view that equal pay for equal work is deducible from those articles.

In P Savita v. Union 71 the SC declared that the above decision has enlarged the doctrine of equal pay for equal work, envisaged in Art.39 (D) and exalted it to the position of a Fundamental Right by reading it along with Art.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.

68 Supra N. 14, No.143-200
69 AIR 1962 SC 1139
70 AIR 1982 (1) SCC 618
71 AIR 1985 SC 1124
1. Imposition of positive rights:-

The author comments that Art.19 is a positive right while Art.21 is a negative right but the Judges started imposing positive rights under Art. 21. By such a positive interpretation they brought right to education under Art.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 neighbourhoods, 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) 72.

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.

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72 AIR 1975(2) SCC 810
and judiciary must be cautious in dealing with such legislations. (*Duport Steels v. Sirs*) ⁷³

The author comments that - how this creative reading of Art.12, 14 and 21 stand on above norms?

3. ACTIVISM OR REWRITING:
   a) In *Samata* Judgment ⁷⁴ 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.

SCHEDULE 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 to members of the scheduled tribe in the scheduled area.
4. The business that he may regulate is that of money lending by moneylenders to tribals in the scheduled area.

The constitution makers saw clearly that the tribal’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-tribals, 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), reads, “Prohibit or restrict the transfer of land by or among members of Scheduled tribes in such area”. The Judge has inserted “and non-tribals.”

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⁷³ AIR 1980 1A II ER 529 at 541
⁷⁴ AIR 1997(6) 449 at 482, para 48
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 it 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 that 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. ART. 44, 47 AND 48 :-

The Judges are repeatedly declaring that Art. 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 Art. 21 they have incorporated these rights.

In Unni Krishnan, the Court declared, “if” really Art. 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
Art. 44, 47 and 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 Art.19 (guaranteed to citizens) and 21 (to every person). The author comments that now whether rights interpreted under Art. 21 should be provided by the States to every foreigner?

5. **PROCEDURE ESTABLISHED BY LAW:**

The judgement 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 Art.12, 14 and 21 and now ‘due process’ instead of ‘procedure established by law’.

The author comments that judgements which have brought public sector enterprises into the fold Art.12 do not mean that the employees of these organisations shall have the protections under Art.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. **CHAOTICE OUTCOME:**

Three cases are discussed by the author (Shourie Arun) 75

**FIRST CASE:**

The author comments that in *JMM bribery* case, the Supreme Court read Art. 105 (2) in *Narasingha Rao vs. State* 76 that according to which, no member of

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75 Supra N. 14, Page No.202-217.
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 had 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 or 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?

76 AIR 1988 (4) SCC 626
77 AIR 1998 (8) SCC 296
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 Vs Union78.).

THIRD CASE:

The author has discussed the case *Hawala (Vineet Narain Vs Union79)* 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 SC. 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. Sing 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 US authorities were about to begin the interrogation of Chandraswami’s disciples and associates in the forgery in the USA – the US authorities had accepted in 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 SC. The Court held that – when the career prospects remain unaffected and there is no

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78 AIR 1982 (1) SCR 947
79 AIR 1998 (1) SCC 226
detriment to government servant then there is no need for the interference from the court.

E. CUMULATIVE EFFECT:  
1. INTRODUCTION:

The author comments that, when one reads judgements 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 judgements 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 Sawhney.

The author has given another example of TADA. It was challenged. The SC 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 Oklahoma blast after which American President introduced the Omnibus Anti – Terrorism Bill of 1995

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80 Supra N. 14., Page No.240-249.
– Summary trials were authorised 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 Municipal 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 HC 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 in 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 Art.14 and 16. In Keshavanad Bharti’s Case the Court has also observed that the Courts could lift the veil and examine the position in spite of legislative declarations.
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.

First, judges with a political agenda,
Second, judges with a social agenda and
Third, judges without an agenda.

There is a constellation in the Northern Hemisphere which includes seven bright stars – Saptarshi - but two of them are pointers. 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. Gajendragadkar 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.  J. SUBBA RAO :-

The Subba Rao era began with his short but vigorous tenure as chief justice from 29 June 1966 till 11 April 1967.

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81 Supra N. 1., Page No. 307-364.
Presiding over the Constitution Bench in that brief 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 82 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 Art. 21’ could not be confined 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

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82 AIR 1963 SC 1295
movement in clause (d) (of Art.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 Iyer and Justice Goswami) inspired by this dissent held in Govind vs State of M.P \(^\text{83}\) 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 vs Corporation of Calcutta*) \(^\text{84}\)

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 vs. Corporation of Calcutta*) \(^\text{85}\)

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 licence. 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 SC held that the state was as much bound as a private citizen to take out a licence. The earlier decision (of seven judges) was overruled.

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\(^{83}\) AIR 1975 SC 1379

\(^{84}\) AIR 1960 SC 1355

\(^{85}\) AIR 1967 SC 997
“Howsoever high you be the law is above you.”

In Radhyeshyam Khare vs State of M.P. 86 -

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 87 “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 vs Jagmohan 88 where it was held that he 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 vs Praghakar Pandurang) 89

A case concerning conditions of detention of those preventively detained.

Prabhakar had been detained under the Defence of India Rules, 1962.

It was held that-the liberty to write and publish a book was one such freedom that had not been taken away 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 90, the two Sunil Batra cases 91 and the decision in Francis Coralie. 92 – were extensions of the principle first enunciated in Prabhakar.

Golakthath was the culmination of the long battle between Parliament and judiciary. Over different interpretations of Art.31, on 5th Oct. 1964 - both unanimous Constitution Bench judgments- in land acquisition cases from

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86 AIR 1959 SC 107
87 AIR1969 2 SCC 262
88 AIR 1980 4 SCC 370
89 AIR 1966 1 SCR 702
90 AIR 1978 3 SCC 544
91 AIR 1978 SC 1675
92 AIR 1981 SC 746
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. Art.31 B of the Constitution saved all laws (central or state) placed in the Ninth Schedule from challenge under Art.13, 14, 19 or 31. This was done by the Constitution (Seventeenth Amendment) Act, 1964.

In *Metal Corporation case* 93 -The battleground now shifted to the Ninth Schedule - and the scope and ambit of the protection under Art.31 B. This necessarily involved the validity of the Constitution (Seventeenth Amendment) Act. J. 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 vs Union* 94 - A Constitution Bench of five justices 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 Gajendragadakr in the later decision i.e. in *Sajjan Singh* case 95.

Chief Justice Subba Rao held strong views on the subject. The incorporation device of Art.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 affect the fundamental rights in Part III of the Constitution. But, this would involve invalidating all previous constitutional amendments which had declared valid a series 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

93 AIR 1967 SC 637
94 AIR 1951 SC 458
95 AIR 1965 SC 845
Schedule! In *Golaknath*, 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 *Kesavananda Bharati* which accepted the alternative argument advanced in *Golaknath* and mentioned in the judgment of Chief Justice Subba 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 *Keshavananda 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 stellar 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 treat - 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 and 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 vs State of Punjab*, 96 - 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 vs Election Commission*, 97 - 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 fulfil 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 years (from July 1973 to Nov.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 vs Municipal Board*, 98 -‘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

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96 AIR 1974  2 SCC 831
97 AIR 1978  1 SCC 447
98 AIR 1974  1 SCC 202
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 Art.14.

It has been said that 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 vs State of U.P 99 -What can be more deleterious for the 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 vs Sankalcnad Himatlal Sheth, 100 -whilst accepting that a 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 freedoms too, their views were not dissimilar.

99 AIR 1966 S.C. 1987
100 AIR 1977 4 SCC 193
In the last case over which he presided, *Satwant Singh vs Assistant Passport Officer* 101 - 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* J. Krishna Iyer held that - The words ‘procedure according to law’ in Art.21, he said, means fair, not formal, procedure. The laconic order of the passport officer and his refusal to give reasons were characterized as unfair and violative of natural justice.

Contrast *Satwant Singh* and *Maneka Gandhi* - In 1967, *Satwant Singh* got back is 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 25 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 a discordant one. As only 9 out of the 13 judges on the bench signed this final order as under:

101 AIR 1967 SC 1836
1. *Golak Nath’s case* is 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 it does not give effect to such policy’ is invalid;

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 has 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 tilted 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 judgments were eloquent.

His brief but precise introduction to the sixteenth edition of Mullá’s classic work on Mohammedan 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 vs ADM Jabalpur*. 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 court judgement in *shivkant Shukla vs ADM Jabalpur* (and reiterated in nine other high court judgment in the country), were swiftly put out by the notorious judgment of our Supreme Court in April 1976.

*ADM Jabalpur* is a blot on the judicial annals of a free country.

J. 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 1975 with 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 county - 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 of 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 Art.19 (1) (a) read with Article 14 of the Constitution. Hence, the writ petitions under Art.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 HC’s as well as the SC -, 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 HC) he electrified the entire corporate sector in Ahmadabad and Bombay with his judgment in the *Wood polymer* case. 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

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102 109 ITR 177 (1977)
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 JUDGMENTS\textsuperscript{103} :-

1. CHAGALA 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 illumined justice and humanized the law. He achieved the incredible 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 judgements had no dark nooks or misty crannies. He wrote his judgements even as the grass grows – effortlessly, spontaneously.

His report in the \textit{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.

\textsuperscript{103} Supra N. 4, Page No. 287-300.
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 predating 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. The roses will remain fragrant fro many a December.

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.

C.J. 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.

Judgement 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 judgement in the Privy Purse Case is for Maharaja as well as for the common man. The basic issues centred 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 widows 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 SC is the poorer for his retirement.

3. **KHANNA H.R. – A GREAT JUSTICE**:

The author has commented that –

In *Keshwanand Bharati’s* case J. Khanna was one of the judges 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 SC 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 was seem in a judgement in the habeas corpus case\(^\text{104}\) decided by a five Judge Bench of the SC in which he was the sole dissenter. In that 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 judgement 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 Yourk 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 citizens right to his life and personal liberty.

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\(^\text{104}\) A.D.M.Jabalpur v. Shukla, AIR 1976 S.C. 1207
TOPIC 5
COMMENTS OF THE EXPERTS ON LEGAL PROFESSION

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 internalised-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 litigants.

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 judges 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

105 Supra N. 14., Page No. 422-428
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 practised 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 guilty 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 confession.”

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 been 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 wholly 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 skilfully? 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 persons 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.\textsuperscript{106} :-

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 or 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 commented that the traditional attitude of the legal profession is that “All change is bad, specially change for the better.”

The author has given three grave shortcomings of the present system of administration of justice that – \textbf{first}, the commercialisation 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.

\textsuperscript{106} Palkhivala N.A., We, the Nation – the Lost decades-UBS Publishers’ Distributers Ltd., New Delhi,1994, Page No. 210-217, 219-223.
Secondly, life has become far more complex and corruption and lowering of standards are far more pronounced, than ever before.

Thirdly, Part IVA of the Constitution, which deals with “Fundamental Duties” has been a dead letter since the 42nd Amendment Act-1976. The greatest 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 judges, 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:– 107

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 rulings (if the punitive contempt power is kept well in check.) 108

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 vs. State of Gujarat 109) refused to

107 Supra N. 1, Page No. 365-386.
109 AIR, 1991 SC 2176
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 vs. Union*\(^{110}\) and *Supreme Court Bar Association vs. Union*,\(^{111}\) 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 governance’.

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*\(^{112}\)

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

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\(^{110}\) AIR 1991 (4) SCC 584  
\(^{111}\) AIR 1998 SC1895  
\(^{112}\) AIR 1955 SC 549
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 an 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 Jabalpur (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 judges (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 Art.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 to 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 something so prosaic and exclusively administrative-as government tenders. *(Reliance Energy Ltd. Vs State)*

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

[113] AIR 2007 (8) SCC 1
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 vs. 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 PIL.

The Ninth Schedule to our Constitution was deliberately added in 1951. There was total denial of judicial power enacted by Article 31 B 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 Art.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 Art.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 SC Decision in Coelho’s case, Art.31 B 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 practising lawyers, and their specific mandate was to clip the wings of the HC’s by proposing amendments to Article 226.

He was the one person – a non-practising 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 Lard 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!”

114 AIR 2007(2) SCC 1
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**

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

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115 Supra N. 14, Page No. 399-419
keel, vulnerable to the winds of intellectual or moral fashion, which it then validates as the commands of our most basic compact\textsuperscript{116}.

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. 117** -

   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 a practicing lawyer never ceases. The author has suggested that the BCI should adopt a three point programme—

   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.

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117 Supra N. 1, Page No. 82-83.
2. **PALKHIWALA N.A. ON LEGAL EDUCATION**

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 in 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. **SHOURIE ARUN ON LEGAL EDUCATION**

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.

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118 Supra N. 101, Page No. 217-218
119 Shourie Arun, *Courts and their Judgments*- Roopa and Co., New Delhi, 2010-Page No. 400