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

AN INTERDISCIPLINARY THESIS IS SUBMITTED
TO THE DEPARTMENT OF POLITICAL SCIENCE,
TILAK MAHARASHTRA VIDYAPEETH, PUNE – 37

SYNOPSIS OF THESIS

FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY
UNDER THE FACULTY OF MORAL AND
SOCIAL SCIENCES

SUBMITTED BY
MR. BHAGWAN AJIT SHRIRAM

UNDER THE GUIDENCE OF
DR. CHAVAN SHANKAR

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INTRODUCTION

1. Statement of the Problem:

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

2. Significance and objectives of the Study:

Introduction:

The Constitution has given the powers to three organs –

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

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

Independence of Judiciary –

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

Judicial Review –

Art. 13 specifically states that – Laws inconsistent with or (in derogation of) fundamental rights be void. Second Clause of the same Article prohibited
State from making any law, which took away or abridged the fundamental rights (Part III – Art. 12 to 35)

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

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

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

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

Judicial Activism –

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

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

Objectives of the research -

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

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

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

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

Following Books are reviewed -


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


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

4. **RESEARCH QUESTIONS**

1. Whether Indian Judiciary has played creative role in the interpretation of Art. 21?

2. Through Art. 21 whether Indian Judiciary has expanded the ambit of Art. 12 and whether there is any valid criticism?

3. Whether through PIL there is evolution of Art. 21?

4. Whether there is any critical evaluation regarding the implementation of the SC’s judgements?

5. Whether there is valid criticism on judicial governance?

6. Whether there is valid criticism on legal profession?

7. Whether any solution is suggested for inter-State water dispute by any expert’s?

8. Whether the Courts have created any obstacles through interim orders?

9. Whether there is ‘interpolation’ instead of ‘interpretation’ in some judgements?
5. **HYPOTHESIS**

1. Indian Judiciary has played creative role in the interpretation of the Art. 21.

2. There is an enlargement of the ambit of Art. 12.

3. Through PIL there is evolution of Art. 21.

4. There is a problem of implementation in some cases due to bureaucracy.

5. Some eminent writers have criticised on Judicial Governance.

6. Legal Profession is criticised by some authors and there is a need to improve professional and educational standard of Legal Profession.

7. Inter-state water dispute can be handled in a different way.

8. Through interim orders the Supreme Court has created some obstacles in the smooth functioning of bureaucracy and Government.

9. There is interpolation instead of interpretation in some judgements.
6. METHODOLOGY

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

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

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

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

Primary Source – Statutory Materials, Government Documents and Reports

Evaluation and Interpretation of Data:

The State  
\[\downarrow\]  
Constitution

| L | Lok Sabha  
   |      Rajya Sabha | Central Bureaucracy |
|---|------------------|---------------------|
| L | Legislative Assembly  
   | Legislative Council | State Bureaucracy |
| E | President  
   | Vice President | Secretariats |
| E | Governor | Secretariats |

Agencies of the State doing following functions  
\[\downarrow\]  
1. Quasi Federal  
2. Function of high Public Interest & Public Importance  
3. Agencies established by Statutes  
4. Public Corp. etc.

Decentralisation of Powers

1. Mahanagar Palika  
2. Nagarpalika A,B,C

Village Administration

1. Zilla Parishad  
2. Panchayat Samiti  
3. Gram Panchayat
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Judicial Review

- Constitution
  - Lok Sabha
    - Rajya Sabha
  - Central Bureaucracy

- President
  - Vice President
  - Secretariats

- Legislative Assembly
  - Legislative Council
  - State Bureaucracy

- Governor
  - Secretariats

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

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Judiciary can force L, E and agencies of the State to do mandatory duties when they omit to do so.
8. SCOPE AND LIMITATIONS OF THE STUDY:

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

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

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

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

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

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

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

Art.21 is studied under following heads –

1. Evolution of fundamental rights before 1950 (1st Chapter)
2. Creative interpretation of Art.21 by the Judiciary (IIInd Chapter)
3. Effect of an Act (MNAREGA) and a bill (On land acquisition) on Art.21 (IIIrd Chapter)
4. Some recent judgments of the SC on Art.21 (IVth Chapter)
5. Comments on Experts on various subjects (Vth Chapter)
   i) Effect of lethargic bureaucracy on the judgements
   ii) Effect of weak political class on the judgements
   iii) Effect of widening the ambit of Art.12 on Art. 14, 19, 21 and other rights and positive as well as negative side of the effect.
   iv) Effect of delay and stay orders on the rights of the people.
   v) Effect of non-implementation of the judgements of the Supreme Court and the fate of contempt of Court writ petitions.

In the thesis the comments of the experts like Arun Shourie, Nani Palkhiwala and Fali S. Nariman on the judgements of SC are discussed.
SOME IMPORTANT TERMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Order** - It can come from any authority.
There are six Chapters –

**IN FIRST CHAPTER**

following things are discussed –

1. The view of Thomas Hobbes, Locke, Rousseau on Rights are discussed.


3. The Supreme Court as a guardian of a Fundamental Right, Constitutionality of a Statute, Waiver of Fundamental Rights, Fundamental Rights and Constitutional Amendments and the Concept of Judicial Review as well as the Supreme Court as an interpreter of Fundamental Rights.

**IN SECOND CHAPTER**

following things are discussed –

1. Personal liberty – Meaning and Scope Prior to the case of Maneka Gandhi and after the case of Maneka Gandhi.

2. With the help of various case laws - Right to live with human dignity, Right to livelihood, Right to Shelter, Right to health and medical assistance, Right to members of protective homes, Environmental Rights, Rights of the Prisoners – Right to free legal aid, Right against solitary confinement, Right to Speedy trial, Right against hand cuffing, Right against inhuman treatments, Right against delayed execution, Fair trial etc.

3. With the help of various case laws - Right to privacy, Right to food, Right to compensation, Prevention of sexual harassment of working women, Right to electricity, Right to education, Right to privacy and data protection, Right against noise pollution etc.

4. With the help of various case laws - Euthanasia and some other rights.
5. With the help of various case laws - The concept of personal liberty and its various aspects.

**IN THIRD CHAPTER**

following things are discussed –

**A)** MNAREGA - An attempt is made in this Chapter to discuss employment guarantee scheme started by Central Govt. to protect right to livelihood guaranteed under Art. 21.

The scheme and criticism is discussed in detail.

If properly implemented, it will have the potential of improving standards of lives of the masses in the rural India.

If employment guarantee schemes can be linked up with other schemes to improve skill levels among workers, the benefits can be long-term.

It is criticized that for isolated instances there is little evidence this scheme is implemented better than any other schemes of the Govt.

**B] LAND ACQUISITION AND RESETTLEMENT BILL**

The Bill is discussed in detail and how it will become strong drive to divert agricultural land to industry affecting the food security of country is discussed also.

**IN FOURTH CHAPTER**

In this Chapter an attempt is made to discuss the judgement of SC on Art. 21 and how the State authorities are violating Art. 21.

**1) CASE OF NANDINI SUNDER**

The Court held that - The appointment of tribal youth as SPOs, who are barely literate, for temporary periods, and armed with firearms, has endangered and will necessarily endanger the human rights of others in the society.

In light of the above the Court held that both Article 21 and Article 14 of the Constitution of India have been violated, and will continue to be violated, by the appointment of tribal youth.
2) **CASE OF NOIDA:**

In this case there is a judgment of the SC on U.P. Industrial Area Development Act, 1976.

The Court held that - Every holder of a public office is a trustee. State actions required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. The Public Trust Doctrine is a part of the law of the land. The doctrine has grown from Article 21 of the Constitution. In essence, the action/order of the State or State instrumentality would stand vitiated if it lacks bona fides.

Thus, in view of the above, the Court directed the CBI to have preliminary enquiry and in case the allegations are found having some substance warranting further proceeding with criminal prosecution.

3) **CASE OF RAM JETHMALANI:**

An attempt is made to discuss the concept of right to privacy and the concept of Black Money as well as the responsibility of the State towards Black Money through the eyes of judiciary.

**IN FIFTH CHAPTER**

Art. 21 cannot be interpreted in an isolated way. It has to be interpreted in the fabric of the entire context.

**Topic I –**

**Art. 21 and some initial amendments –**

Are Courts are empowered to invalidate legislative enactments and Executive orders if they violate any part of the Fundamental Rights guaranteed in Part III?

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 this topic initial amendment – first, 17th, 24th, 25th, 26th, 39th, 42th, 44th, etc. are discussed and the judgment of the SC on above cases as well as on the
case of Fundamental Rights, Minerava Mills and the comments of Fali S. Nariman and Nani Palkhivala are discussed in detail.

Fali S. Nariman in his book (referred in the thesis) has commented on the experience of Internal Emergency (1975) and the case of Habeas Corpus decided by the SC (in A.D.M. Jabalpur vs. Shukla (1976)) is discussed in detail in this Chapter.

Nani Palkhivala in his book (referred in the thesis) has commented on the Art. 31(c) and how it has subverted seven essential features of the Constitution, how there is a deviation from the Constitution and the importance of the case of Bank Nationalization and the case of Princely Purse for common man is discussed in detail in this Chapter.

**Topic II - On the problem of implementation of the judgment of the SC** – the Chapter is devoted to discuss the comments of Arun Souri and Fali S. Nariman in their books referred in this thesis.

1. **The Case of Indian Express** – is discussed in detail.

2. **Bonded Labour Case** - is discussed in detail and in discussion it is proved that not a single direction out of 21 directions is implementation till today after the judgement which is given in 1983.

**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. It addressed the problem in the country as a whole.

The Supreme Court declared: in above case ‘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 – all this remained on paper only.
3. The Government enacted Working Journalists Act. - 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.

5. Supreme Court’s judgement on Child Labour: The Court has ordered inter alia that:

   i) The offending employed shall pay Rs. 20,000 for every child that is found working in his establishment;
   ii) A child Labour Rehabilitation-cum-welfare Fund shall be set up for each district;
   iii) An adult member of the family of the child who has been found working shall be provided a job;
   iv) Where a job cannot be provided, the Government shall deposit Rs. 5000 for each child’

The Author 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:

   The courts decreed that contract labour stood abolished.

The author comments that:

A brave judgment, a compassionate one. But what have been the consequences? The author has discussed the ill effect of these judgment on society.

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’

The author has given two another examples regarding Activism:

The author has given two examples under this head–

7. **Strike by lawyers** - The author has discussed how the SC and BCI took the stand in this case ignoring the real issue.

8. **Torment of a witness** - The author has discussed how the SC and BCI behaved took the stand in this case ignoring the real issue.

9. **In Bhopal 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.

   Next, in the High Court of M.P.

   Finally, in the Supreme Court a Constitution Bench pressed the parities to a settlement.

   The settlement was later challenged by some NGOs.

   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.

   Not one-not a single one-of any of these recommendations of the SC (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. **In Water Dispute case** - The author has discussed Narmada Water Dispute, Kaveri Water Dispute etc. The author has compared the decisions of Tribunal with the decisions given on Water Dispute by China and America. Lastly, the
author has recommended that, the solution to water dispute should be left to the SC (Art. 131) and so Interstate Water Dispute Act – 1956 be repealed.

11. The SC on its own precedent – In Dr. B.L. Wadhera vs. Union of India the SC gave directions regarding solid waste disposal and to implement those directions a writ petition was filed and it is discussed in detail.

12. The HC of Mumbai on the precedent of the SC – In Dr. Mahesh V. Bedekar vs. State the problem of implementation of direction given by the SC in Prevention of Environmental and Sound Pollution vs. Union is discussed in detail.

Topic III – Critical Evaluation of the Concept of the State as emerged from the Judgements of the SC and Its Consequences – Arun Shorie in his book (referred in the thesis) has commented that –

The SC has interpreted statutes in a very liberal and creative way but in reality the effect of the interpretation has lead to the unintended consequences.

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.

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 ventured forth- to trade, to manufacture goods, to provide services.

In the initial judgments of the courts strict interpretation of the term State was done. But soon the Courts came to hold that the entity - vested with
constitutional or statutory powers set up by the statute as a separate legal entity even body autonomous would fall within the ambit of the word State.

If the entity had been conferred ‘State power’ and if the entity had been conducting commerce, imparting education, carrying on economic activities is a State. The Court held that the concept of the State has changed as it is no longer coercive machinery.

The Author comments that- by enlarging the ambit of 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.

In the earlier cases the test was- whether the organization had been created by a statute or not. It was held that – the word other authorities comprehend every authority created under a statute. Even at this stage Justice J.C. Shaha remarked that – the authorities not sharing sovereign power do not fall under Art.12.

But soon the SC started enlarging the ambit of Art.12 and started including – agencies doing welfare social services, companies registered under the Company Act, 1956, agencies having substantial Government control – Agencies receiving Govt. aid, agencies getting extra-ordinary assistance from the Govt. fall within the ambit of Art. 12.

In Bhopal Gas, human rights jurisprudence was considered and private corporations were brought under Art. 12.

Some Govt. corporations were held to be the State and some were escaped. The Court brought, the Corporations are state but refused to give the protection available to the Govt. Servants under Art.309 to 311 to the servants of Public Sectors.

The author has discussed – its effects of Art. 14 and how administrative decisions, commercial decisions, promotion, seniority, appointment etc. came under natural justice, non-arbitrariness and non-discrimination.

The author has discussed how in the light of warning, activism became interpolation and rewriting and from creative reading to proclaiming rights to rights – mongering to grievance-mongering the activism descended.
The author has stated that weak political class and activist judiciary looks upon each issue as issue by itself and how it has creates unintended results. The author has discussed how through activism the legal confusion is created and its cumulative effect on legal system in detail in his book.

**Topic IV – Comments of the Expert on Judges and their Judgments –**

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.

(A) Fali S. Nariman :-

‘Judges are human being, and human beings, like stars in the firmament, have blemishes. Despite such blemished they shine’.

The author 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.

1. J. SUBBA RAO :-

Decisions in as many as 62 different cases were handed down by him, Sixty of the 62 judgments delivered were unanimous decisions.

Of the remaining two judgments, in the first, securing a majority (of 8:1) for his point of view the other, in the celebrated *Golaknath case* (1973), a majority. (6:5).
To him many decisions interpreting various provisions in part III 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.

*In the Kharak Singh case*- 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’, ‘they could also do same to an honest and law-abiding citizen’.

*In Gobind vs State of M.P*  The dissent in Kharak Singh had pointed the way.

‘The King can do no wrong’. This was affirmed by a bench of seven judges in 1960. *Director of Rationing vs Corporation of Calcutta,*

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)*

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 - “Howsoever high you be the law is above you.”

**2. JUSTICE KRISHNA IYER:**

The other great stellar pointer in the judicial firmament has been Justice Krishna Iyer. He was responsible for – a new thrust, for the Supreme Court. He helped to humanize the legal system –particularly in the field of criminal jurisprudence and jail reform.

Whilst Subba Rao had an obsessive concern with fundamental rights, Krishna Iyer’s concern was broader- for the poor and downtrodden.
Justice Krishna Iyer loaded into his judgments a rich mixture of law, politics and commonsense- and also compassion.

3. JUSTICE S.M. SIKRI I:
The other judge of the pre-supersession era,

Sikri J. was presiding over the largest bench of justices Kesavananda Bharati.

1. Golak Nath’s case is over-ruled;
2. Article 368 does not enable Parliament to alter the basic structure on framework of the Constitution;

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.

4. JUSTICE M. HIDAYATULLAH :
His judgments were eloquent.

His brief but precise introduction to the sixteenth edition of Mulla’s classic work on Mohammedan Law is a piece of writing unmatched in India’s legal annals.

He never wrote bad judgments-only elegant ones, eminently readable by one and all.

5. JUSTICE A.P. SEN:
The lamps of liberty, briefly lit in the high court judgement in Shivkant Shukla vs A.D.M.Jabalpur (and reiterated in nine other high court judgment in the country), were swiftly put out by the notorious judgment of our SC in April 1976.

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

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 as well as the SC-, is three-quarters problem-solvers and one-quarter crusaders”.

6. DHIRUBBAI A. DESAI -
Like his judicial mentor, Krishna Iyer, he was in the crusader class.

PALKHIWALA N.A. ON JUDGES AND THEIR JUDGMENTS :-
1. CHAGALA M.C. – A GREAT JUDGE -
   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.
   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; 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.

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.
   Judgment in the Bank Nationalization case and Privy purse Case he gave the judgement which were more important for common man.
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.

Topic V – Comments of the Experts on Legal Profession –

Arun Shorie on legal profession :-

It is said that –

It is not for the lawyer to sit in judgment. That is the judge’s job.

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”.

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’.
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. But like most traders he used to indulge in a little sharp practice on the side. He requested 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.”

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.

**AGE OF THE PROFESSIONALS:**

The Arun Shourie 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.

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.

While a lot of power has already passed to professionals, they do no more than swell and speed the spate: socialism yesterday, consumerism today.

Professions must give up the self-serving rule, “dog doesn’t eat dog”.

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. ON LEGAL PROFESSION :-

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 given three grave shortcomings of the present system of administration of justice that – 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.

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 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 VI – Comments of the Experts on Judicial Governance -

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 [Art.142].

The author comments that, we must welcome with confidence ‘Judicial governance’.
Art. 32 and Art.226 do give primacy to the judges.

The Constitution, although it makes separate provision for the three great organs of state, does not place them in air-tight compartments.

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.

During the Internal Emergency of June 1975 up to March 1977, judicial power had contracted- almost to vanishing point.

Judicial power had contracted to its lowest level with the infamous decision in *ADM Jabalpur* (1976).

Fortunately, this concept of liberty propounded in *ADM Jabalpur* is not the rule of law. It is the rule by law.

The legitimacy of judicial governance is written into Article 21 and other articles of the Constitution.

Directive Principles are now enforceable by court through the wide and liberal interpretation of Art.21.

Dr.B.R. Ambedkar said that Art.32 is ‘the very soul of the Constitution and the very heart of it.’

‘Lord Lester said that some judges in England say that, ‘Judicial power is wonderful and absolute judicial power is absolutely wonderful’.

Some judges in India do believe and sometimes act as if ‘absolute judicial power is absolutely wonderful’. This is what gives judges a bad name; it is then that they are likened to ‘Emperors’, which they are definitely not.

In 2008 Ram Jethmalani, said in Court, “all power corrupts- and the fear of losing power corrupts absolutely!”

Ample judicial power administered with ample judicial wisdom’s is the need of the hour; not a curtailment of judicial power, but mature wisdom in its administration.
No, we don’t need judges who behave like ‘Emperors.’

1. 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- “You lawyers have nothing of your own. You borrow from the social sciences, but you have no discipline, no core, of your own”.

This theoretical emptiness at its centre makes law, particularly constitutional law, unstable, a ship with a great deal of sail but a very shallow keel, vulnerable to the winds of intellectual or moral fashion.

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 VII – Comments of the Experts on Legal Education**

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.

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.
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.

PALKHIWALA N.A. ON LEGAL EDUCATION:-
The author has commented that –

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.

The number of practicing lawyer in Japan is less than fourteen thousand. About 30,000 students appear for law examinations in Japan and only about 475 succeed i.e. less than 2%.

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.”
CHAPTER VI – CONCLUSION AND SUGGESTIONS

RESEARCH QUESTIONS & FINDINGS

1. Whether Indian Judiciary has played creative role in the interpretation of Art. 21?
Ans:- After Maneka Gandhi’s case the Supreme Court has interpreted Art. 21 in the creative way and has widened the ambit of Art. 21.
   In Chapter 2 of the Thesis this aspect is discussed in detail.

2. Whether Indian Judiciary has expanded the ambit of Art. 12 and whether there is any valid criticism?
Ans:- The Supreme Court has enlarged the ambit of Art. 12 as Fundamental Rights are against the mighty power of the State.
   There is a valid criticism by Arun Shouri in his book named – The Courts and their Judgements. The author has shown how the Supreme Court has brought many institutions and authorities under Art.12 without considering the consequences of it.
   This aspect is discussed in Thesis in detail while discussing the Concept of State in Chapter No. 5.

3. Whether through PIL there is evolution of Art. 21?
Ans:- There is an evolution of Art. 21 through PIL e.g. Bandhu Mukti Morcha, Ganga Water Pollution, Taj Mahal Case etc.
   This aspect is discussed in detail in Chapter No. 2 of the Thesis.

4. Whether there is any critical evaluation regarding the implementation of the judgements of the SC?
Ans:- Arun Shouri in his book – ‘The Courts and their Judgements’ has shown that the directions given by the Supreme Court are not followed in reality in - Bandhu Mukti Morcha case, Case on Child Labour etc.
   Fali S. Nariman in his book – ‘Before Memory Fades’ AN AUTOBIOGRAPHY – has shown how the directions given by the Supreme Court in the Bhopal Case are not properly implemented.
   This aspect is discussed in Chapter No. 5 of the Thesis.
5. Whether there is valid criticism on judicial governance?
Ans: There is criticism on judicial governance by Arun Shouri and Fali S. Nariman in their above referred books and it is discussed in detail in Chapter No 5 of the Thesis.

6. Whether there is valid criticism on legal profession?
Ans:- Arun Shourie has criticised that – “Serving the interest of client” has become a slogan of the legal profession and it undermines the concepts of justice.

The principle of Adversarial Justice does not undermine justice must be considered by the legal profession.

The author (Shourie Arun) comments that – the Lawyers have nothing of their own, they borrow from social sciences and they have no discipline, no core of their own. This theoretical emptiness at its center makes law unstable, a ship with great deal of sail but very shallow keel, vulnerable to the winds of intellectual or moral fashion.

This aspect is discussed in Chapter No. 5 of the Thesis.

7. Whether any solution is suggested on inter-state water dispute by any expert?
Ans:- Nariman S. Fali has given a solution on short term and long term basis for the same in his above referred book.

This aspect is discussed in Chapter No. 5 of the Thesis.

8. Whether the Supreme Court has created any obstacles through interim orders?
Ans:- Arun Shouri has given the example of various departments in his book (referred in the thesis) and has shown that how interim orders have created many obstacles for smooth functioning of Government Departments.

This aspect is discussed in Chapter No. 5 of the Thesis.

9. Whether there is ‘interpolation’ instead of ‘interpretation’ in some judgements of the SC?
Ans:- Arun Shouri has shown in his books (referred in the thesis) that there is ‘interpolation’ instead of ‘interpretation’ in some judgements of the SC.
WHETHER HYPOTHESIS IS ACCEPTED OR REJECTED

1. Indian Judiciary has played creative role in the interpretation of the Art. 21 and has expanded the ambit of Art. 12.
Ans – Judiciary has played creative role in the interpretation of Art. 21.

2. Whether Indian judiciary has expanded the ambit of Art. 12?
Ans – There is an enlargement of the ambit of Art. 12.

3. Through PIL there is evolution of Art. 21.
Ans – There is an evolution of Art. 21 but there is abuse of PIL in some cases.

4. There is a problem of implementation in some cases due to bureaucracy.
Ans – Indian bureaucracy is dominated by delay and lethargy and has created obstacles in the implementation of the judgement of the Supreme Court.

World Justice Forum has declared the list of nations having rule of law and India ranks 78th among 97 nations. It is further declared that the corruption is one of the biggest problems in India and due to this India is on 83rd rank. Lastly in the report it is commented that incidence of crime, civil conflict, political violence are major concern in India and India ranks second from the bottom list.

5. Some eminent writers have criticised on Judicial Activism.
Ans – Fali S. Nariman, Arun Shourie has criticised on judicial activism in their books which are referred in the thesis.

6. Legal Profession is criticised by some authors and there is a need to improve professional and educational standard of Legal Profession.
Ans – Fali S. Nariman, Arun Shourie has criticised on Legal Profession and they have suggested some solutions to improve the professional Standard.

7. Inter-state water dispute can be handled in a different way.
Ans – Fali S. Nariman, has shown the different way to solve the inter-state water dispute in his book which is referred in the thesis.

8. Through interim orders the Supreme Court has created some obstacles in the smooth functioning of bureaucracy and Government.
Ans – Arun Shourie has shown that how the interim orders of the Supreme Court have created obstacles in the smooth functioning of bureaucracy and Government in his book which is referred in the thesis.
9. There is ‘interpolation’ instead of ‘interpretation’ in some judgements of the SC.
Ans :- Arun Shourie has shown in his books (referred in the thesis) that there is ‘interpolation’ instead of ‘interpretation’ in some judgements of the SC.

CONCLUSION :
- Judiciary has played creative role in the interpretation of Art. 21.
- There is an enlargement of the ambit of Art. 12.
- There is an evolution of Art. 21 but there is abuse of PIL in some cases.
- Indian bureaucracy is dominated by delay and lethargy and has created obstacles in the implementation of the judgement of the Supreme Court.
- Fali S. Nariman, Arun Shourie has criticised on judicial activism in their books which are referred in the thesis.
- Fali S. Nariman, Arun Shourie has criticised on Legal Profession and they have suggested some solutions to improve the professional Standard.
- Fali S. Nariman, has shown the different way to solve the inter-state water dispute in his book which is referred in the thesis.
- Arun Shourie has shown that how the interim orders of the Supreme Court have created obstacles in the smooth functioning of bureaucracy and Government in his book which is referred in the thesis.
- Arun Shourie has shown in his books (referred in the thesis) that there is ‘interpolation’ instead of ‘interpretation’ in some judgements of the SC.

SUGGESTIONS :
1. Indian Judiciary should not take the role of legislature because ultimately the parliament is sovereign.
2. Indian Judiciary should not encroach upon the powers of the legislature. (Recently C.J. of the SC Kapadia S.H. has commented in lecture that – the SC should not run the Govt. and should not make the policies. This comment was made on the judgement of the SC in which it was declared that right to sleep is a fundamental right.)
3. Precedents are overruled by the judiciary in number of times and for the rule of law it is not good.

4. PIL has become private interest litigation and abuse of PIL must be checked.

5. I have six basic suggestions. They are as under:
   a. Regarding health problems
   b. Implementation of PNDT Act
   c. Implementation of Domestic Violence Prohibition Act
   d. Female Education
   e. Regarding free legal aid
   f. Regarding primary education which has become a fundamental right now.

A. REGARDING HEALTH PROBLEMS
   The decision given by the SC in Dr. Ashwin Patel’s case and Mukhatyar Chand’s Case lakhs of doctors are legally prohibited from getting involved in National Health Programme and Family Welfare Programme.

Looking towards the serious Indian health problems there is a need to bring ISM&H doctors in to the mainstream of National Health policy by suitable legislation.

B. IMPLEMENTATION OF PNDT ACT
   Due to ineffective implementation of the Act nearly 1Crore 20 Lakhs female foeticide has taken place. The male- female ratio is dropping in some states to a serious extent. The Rajasthan High Court has held in S. K. Gupta vs. State of Rajasthan foetus has right to live and there is a need to implement active tracker in every Sonography Machine.

There is a urgent need to take serious steps to prevent such crime.

C. IMPLEMENTATION OF DOMESTIC VIOLENCE PROHIBITION ACT -
   There is a need to implement Domestic Violence Prohibition Act very strictly because domestic violence violates Art. 21 and domestic violence is on increase.

D. FEMALE EDUCATION –
   Education has been defined as the technique of transmitting civilization. It is shocking that the country with the oldest and greatest civilization should be so
lackadaisical about the technique of transmitting it. It is now acknowledged all over the world that value based education is the only instrument for transmitting national talent into national progress.

It is only through female education at all levels and the private initiative of well-educated women, that this country will ever be transformed into what our Constitution intended it to be.

E. REGARDING FREE LEGAL AID

There is a need to frame the new rules for paper setters, moderators and examiners for LL. B. and LL. M. Examinations.

*In M. H. Hoscott v. State of Maharashtra* the SC declared that free legal aid is a fundamental right under Art. 21.

*In M.P. Vashi v. State of Maharashtra* the SC held that in order to provide free legal aid it is necessary to have well trained lawyers in the country and for the same the Govt. must provide grants – in – aid to private law colleges.

The law laid down in above cases is a welcome decision but if we look into the legal education in the State of Maharashtra then one will perceive that there is a vast scope to improve the legal education.

F. REGARDING PRIMARY EDUCATION WHICH HAS BECOME A FUNDAMENTAL RIGHT NOW

1. There is a need to control dropout rate.
2. There is a need to increase teaching days by reducing non-teaching workload and by reducing holidays. (In India every holyday is holiday.)
3. There is a need to control bogus admissions shown on musters.
4. Memory based education must include the teachings of Rabindranath Tagore, J. Krishnamurti, Yogi Aurobindo etc. They emphasised - learning in awareness, learning in consciousness.